



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAMES VLAHOS AND SUNNYVILLE PARTNERS II, LLP,	:	
Requester	:	
	:	Docket No: AP 2016-1539
v.	:	
	:	
LOWER POTTS GROVE TOWNSHIP,	:	
Respondent	:	

INTRODUCTION

James Vlahos, on behalf of Sunnyville Partners II, LLP (collectively, the “Requester”), submitted a request (“Request”) to Lower Pottsgrove Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records concerning the recusal of the Township solicitor in a particular legal matter. The Township denied the Request, claiming that it asks questions rather than seeking records, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **dismissed**, and the Township is not required to take any further action.

FACTUAL BACKGROUND

On August 16, 2016, the Request was filed and stated as follows:

As per my conversation on May 27, 2016 with Stephen H. Kalis, Esquire[,] I was informed that he is the attorney representing the Lower Pottsgrove Board of Commissioners with regard to the David W. Fisher “Right to Know” with regard to Sunnyville Partners II LLP. It is also my understanding from the conversation

that Charles D. Garner, Jr. Esquire[,] has a conflict. I am requesting in writing on what is the “Conflict[.]” I would appreciate an answer in writing.

On August 23, 2016, the Township denied the Request claiming, among other things, that the Request seeks answers to questions rather than records.

On September 12, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 21, 2016, the Township submitted a position statement reiterating its grounds for denial. In support of its position, the Township submitted the affidavit of Edward C. Wagner (“Mr. Wagner”), the Township’s Manager. The Requester did not submit any additional information.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and

relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Township claims that the Request asks a question and does not identify or seek records. The RTKL defines a “record” as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

65 P.S. § 67.102. Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013) (internal citations omitted). The Commonwealth Court has specifically held that requests “set forth as a question complete with question mark” seek answers to questions, rather than records. *Gingrich v. Pa. Game Comm’n*, No. 1254 CD 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012). The presence or absence of a question mark is not determinative as to whether a request asks a question. *See Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766.

Here, the Request states, in relevant part, that “I am requesting in writing on *what is the ‘Conflict’...*” (Emphasis added). The Request clearly asks a question and does not seek a record. In his appeal notice, the Requester again couches his Request as a question by stating “the... Township Open Records Officer...has denied my request for *why the appointed township solicitor...recused himself from representing*” the Township in regards to a potential litigation and “I requested in writing on *what* was [the solicitor’s] reason for recusing himself and *what* was his conflict.” (Emphasis added).¹ As the Request posed a question, the Township was not

¹ In his appeal documents, the Requester also asserts that, as special counsel was hired due to Mr. Garner’s recusal, meeting minutes should exist to document the motion and vote necessary to hire special counsel. He further asserts that the Township should have a written statement on file from Attorney Garner addressing the recusal. However, a requester may not modify or expand upon the wording of his request on appeal. *See Pa. State Police v. OOR*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010

required to respond to that item as a request for records under the RTKL. Accordingly, the appeal must be dismissed.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **dismissed**, and the Township is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Montgomery County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.²

This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 5, 2016

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: James Vlahos, Jr. (via U.S. Mail);
Stephen Kalis, Esq. (via e-mail only);
Edward Wagner (via e-mail only)

PA O.O.R.D. LEXIS 256 ("A requester may not modify the original request as the denial, if any, is premised upon the original request as written"). As such, the OOR's review on appeal is confined to the Request as written and submitted to the Township. Nothing prevents the Requester from submitting a new request seeking records.

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).