



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**STEVE REINBRECHT,
Requester**

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:

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v.

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Docket No.: AP 2016-1679

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**BERKS COUNTY,
Respondent**

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INTRODUCTION

Steve Reinbrecht (“Requester”) submitted a request (“Request”) to Berks County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of a suicide note. The County denied the Request, asserting that note relates to criminal and noncriminal investigations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the County is not required to take any further action.

FACTUAL BACKGROUND

On August 16, 2016, the Request was filed, seeking: “a legible copy of the entire suicide note written by Mark Short, found by police or Berks County detectives on the dining room table in the Short residence in Sinking Spring while investigating the deaths there on August 6, 2016.” On August 23, 2016, the County invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On September 16, 2016, the County denied the Request,

asserting that the requested suicide note is a record related to both criminal and noncriminal investigations. 65 P.S. §§ 67.708(b)(16)-(17).

On October 7, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On October 7, 2016, the Requester submitted an e-mail which included a copy of an appeal to the Berks County District Attorney's Office. On October 13, 2016, the County submitted an unsworn position statement arguing that the appeal should be dismissed because the Requester did not submit true and correct copies of the Request and the County's response to the Request.¹ On October 19, 2016, the County submitted a second position statement, verified by Maryjo Gibson, Open Records Officer for the County, reiterating its reasons for denial and further asserting that no responsive records exist in the County's possession, custody or control. The County also submitted the sworn affidavit of Harold Shenk, Sergeant for the Berks County District Attorney's Office.

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,

¹ The County argues that the Requester has not submitted “true and correct” copies of the Request and the County's response because the date included on the Request submitted to the OOR is different than the date of the Request submitted to the County. Additionally, the County claims that the response submitted on appeal does not include the e-mail heading of the County's original response. However, the County does not dispute the contents of either the Request or the response; but rather, recites the language of the Request verbatim in its position statement and maintains the arguments set forth in its final response. Regardless, on November 3, 2016, the Requester submitted complete copies of the Request and the County's response, therefore, perfecting his appeal. *See* 65 P.S. § 67.1303 (requiring that the record before an appellate court include a copy of the request and agency response).

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 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, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The County 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 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). 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 burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The County argues that the requested suicide note was obtained by detectives in the District Attorney’s Office as part of an investigation, and does not exist in the County’s possession, custody or control. In support, the County submitted the sworn attestation of Maryjo Gibson, Open Records Officer for the County, who attests that a search was conducted and no records responsive to the Request exist in the County’s possession, custody or control. Ms. Gibson further attests that the Berks County District Attorney’s Office is a separately elected row office over which the County has no direct oversight or control, and to her knowledge, the requested record exists solely in the possession of the Berks County District Attorney’s Office. Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency’s burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the County acted in bad faith or that the records exist, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence provided, the County has demonstrated that the requested suicide note does not exist within its possession, custody or control. *See Stanton v. County of Montgomery*,

OOR Dkt. AP 2016-1165, 2016 PA O.O.R.D. LEXIS 1091 (holding that records of the District Attorney's Office were not in the possession, custody or control of the County).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the County 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 or petition for review to the Berks 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 website at: <http://www.openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 7, 2016

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Steve Reinbrecht (via e-mail only);
Maryjo Gibson (via e-mail only);
J. Chadwick Schnee, Esq. (via e-mail only)

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