



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**DEREE NORMAN,
Requester**

v.

**CITY OF PHILADELPHIA,
Respondent**

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Docket No.: AP 2022-1629

INTRODUCTION

Deree Norman (“Requester”) submitted a request (“Request”) to the City of Philadelphia (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq*, seeking a copy of specific 911 calls. The City denied the Request, indicating it does not possess responsive records and 911 records are exempt under the RTKL regardless of the Requester’s identity. The Requester filed an appeal with the Office of Open Records (“OOR”). Upon review of the file, the appeal is **denied**, and the City is not required to take any further action.

FACTUAL BACKGROUND

The Request was filed on July 1, 2022, stating:

[o]n April 8, 2022 I arrived at the Ryan Vet Hospital for a scheduled appointment. I was immediately approached by a Univ of Penn law enforcement officer, in respon[s]e to a complaint of trespassing. I subsequently called 911 from my cell phone to report the violation of Title 18 of the Pennsylvania Crimes code [p]ursuant to § 4906(a) and § 4906(b)(1)(2). I am requesting a copy (recording) of the 911 call I made and the call made by the Ryan Hospital relating to Univ of Penn Div of Public Safety case no. 22-1701”.

See Request. On July 6, 2022, the City denied the Request, stating that records pertaining to 911 recordings are expressly exempt under the RTKL, 65 P.S. § 67.708(b)(18), and the City cannot consider the Requester’s identity in responding to the Request. *See Response.*

On July 11, 2022, the Requester filed an appeal with the OOR, challenging the denial and stating grounds for disclosure. The OOR notified the Requester the appeal was insufficient because it did not include a copy of the City’s Response. The Requester provided a copy of the Response, and the OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 3, 2022, the City submitted a position statement, arguing the records in question cannot be released pursuant to 65 P.S. § 67.708(b)(18)(i), and the City conducted a search and determined there are no responsive records in the City’s possession, custody, or control. On August 3, 2022, the Requester filed a submission challenging the City’s search, response, and submission.

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). 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 reasonable 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.* Here, neither party requested a hearing.

The City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemption(s). *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.” 65 P.S. § 67.708(a); *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)). Likewise, “[t]he 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 City argues it conducted a good faith search and determined no responsive records exist in this case.¹ In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901.

¹ The requested records, even if they did exist, could not be released under the RTKL pursuant to 65 P.S. § 67.708(b)(18) that specifically exempts “[r]ecords ... by emergency dispatch personnel, including 911 recordings.”

While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under...the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal citations omitted), *aff’d* 243 A.3d 19 (2020); *see also* *Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open records officers have

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. Of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also* *In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access.

In support of the City’s argument that it conducted a good faith search and no responsive records exist, the City provided the affidavit of Lieutenant Barry Jacobs (“Lt. Jacobs”), the Open Records Officer for the Philadelphia Police Department (“PPD”). Under penalty of perjury, Lt. Jacobs affirms as follows:

1. I am familiar with the [R]equest underlying the above-captioned appeal, which was received on July 1, 2022 and addressed to the Department of Records....
2. 911 call records, to the extent that they exist, are generally under the custody and control of the PPD, not the Department of Records to which this [R]equest was addressed.
3. As the [R]equester was informed in the ... [R]esponse, 911 audio call recordings are not public records under the RTKL, regardless of a [R]equester's relationship to those records.
4. Nevertheless, I searched (or caused to be searched) PPD records for audio recordings responsive to this [R]equest using the identifying information provided in the [R]equest regarding location, date, and name underlying the 911 calls. This search was conducted in files where such records are routinely kept.
5. To the best of my knowledge, information, and belief, PPD does not possess any responsive records for this [R]equest.

Under the RTKL, a sworn affidavit is generally competent evidence 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 City acted in bad faith, "the averments in [the affidavit] 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)).

In this instance, the City has demonstrated its Open Records Officer conducted a good faith search by searching PPD records for recordings responsive to the Request in the files where such records are routinely kept. Jacobs Affidavit ¶ 4. The City also demonstrated that the good faith search resulted in no responsive records. Jacobs Affidavit ¶ 5. *See Campbell v. Pa. Interscholastic Ath. Ass'n*, 268 A.3d 502, (Pa. Commw. Ct. 2021) (the affidavit of the association's executive director stating that after a thorough search, the association did not have possession, custody or control of certain records was sufficient); *Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015

PA O.O.R.D. LEXIS 294 (finding that an agency conducted a good faith search by “contact[ing] the Bureau most likely to possess responsive records, and ... explain[ing] why that Bureau is most likely to possess those records”). Therefore, the City has met its burden of proving the requested records do not exist.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the City 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 Philadelphia 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 according to court rules as per Section 1303 of the RTKL. 65 P.S. § 67.1303. 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: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 5, 2022

/s/ Lois Lara

APPEALS OFFICER
LOIS LARA, ESQ.

Sent to: Deree Norman, (via email only)
Feige Grundman, Esq., Counsel for the City (via email only)
Lt. Barry Jacobs, AORO (via email only)

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