

**IN THE SUPREME COURT OF PENNSYLVANIA**

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No. \_\_\_\_\_

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JANET AND SCOTT BRUNERMER, Appellant/Petitioner

v.

APOLLO BOROUGH, Appellee/Respondent

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**PETITION FOR ALLOWANCE OF AN APPEAL**

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*Petition for Allowance of Appeal from the July 28, 2022, Order Affirming the order of the Armstrong County Court of Common Pleas docket denying an award of fees, sanctions and penalties claimed relative to the Complaint in Mandamus of an Open Records Office Decision.*

at the Commonwealth Court, No. 661 CD 2021, to the Armstrong County Court of Common Pleas, 2020-0779-Civil, to the Office of Open Records at No. AP-2020-0642 dated 6-5-2020.

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Dated: August 26, 2022

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## **REFERENCES TO THE OPINION IN THE MATTER**

The Commonwealth Court issued its' Panel Opinion of July 28, 2022, affirming the Armstrong County Court of Common Pleas decision denying the Appellants request for attorneys' fees and sanctions. It is attached hereto at Appendix A.

The Armstrong County Court of Common Pleas Adjudication and Order of May 12, 2021, reversing the Final Determination of the Office Records is attached hereto at Appendix B.

The Office of Open Records issued its Final Determination in the matter of Janet and Scott Brunermer v. Apollo Borough, granting in part and denying in part the appeal and requiring the Borough to provide responsive records to their Right-to-Know-Law Request. It is attached hereto at Appendix C.

## **TEXT OF THE ORDER IN QUESTION**

On July 18, 2018, the Commonwealth Court issued an unreported opinion concluding with this paragraph and order. It is attached as Appendix A.

AND NOW, this 28<sup>th</sup> day of July 2022, the May 21, 2021, order of the Armstrong County Court of Common Pleas is AFFIRMED.

## **QUESTIONS PRESENTED**

1. Did the Commonwealth Court err in holding that Apollo Borough did a “good enough” job in their search for records to warrant The Court not finding the Borough acted in bad faith, thus denying the Appellants fees, penalties, and sanctions?
2. Did the Commonwealth Court err in holding that Apollo Borough should not be found in bad faith after refusing to comply with an Office of Open Records Final Determination until after a Complaint in Mandamus was filed?

## **STATEMENT OF THE CASE**

### **a. Background of Initial Right-to-Know Request**

The underlying matter in this appeal stems from a February 28, 2020, Right-to-Know Law Request (“RTKL”) made by the Appellants to Apollo Borough (“Borough”) seeking “Borough related e-mails to and from Brenda Troup, Zoning

Officer, from personal and business e-mail accounts, contact@thefishbowltoo.com and rechhaben@gmail.com from April 2017 – February 2020.” (R. R. 25a)

On February 28, 2020, Appellants filed a RTKL request to Apollo Borough (R. R. at 25a). The RTKL request sought the following records:

- 1) Borough related e-mails to and from Brenda Troup, zoning officer, from personal and business e-mail accounts, contact@thefishbowltoo.com and rechhaben@gmail.com from April 2017 to February 2020.
- 2) Borough related e-mails to and from boroughmanager@yahoo.com for April 2017 to February 2020.

The Borough invoked a 30-day extension to respond (R. R. at 26a).

Before the extension expired, the Borough responded to the request by providing a handwritten response on the request along with 5 pages of emails responsive to category 1 of the Request. (R. R. 27a – 33a). As for category 2, the Borough did not provide any records and maintained that address was not a Borough e-mail address.

On April 1, 2020, the Appellants appealed the response to the Office of Open Records (“OOR”) (R. R. at 22a).

While the appeal was pending, the Borough provided its’ first affidavit from Borough Secretary, Ms. Deana Shupe, dated April 20, 2020, verifying under penalty of perjury that the records provided with the Borough’s initial response

included all responsive records (R. R. at 35a). The Borough would later provide additional responsive records.

In consideration of the Borough verifying that the email address in category 2 was not a Borough email account, the Appellants withdrew the appeal as to that part of the request.

The Appellant's provided the OOR with records, solicitor invoices, and e-mails from other Borough contractors' accounts, obtained from four consolidated mandamus cases involving the Appellants and the Borough. In the exhibits provided, the Appellant's cited examples of Ms. Troup, Apollo Borough Zoning Officer, using both [contact@thefishbowltoo.com](mailto:contact@thefishbowltoo.com) ("the fish bowl account") and [rechhaben@gmail.com](mailto:rechhaben@gmail.com) ("Gmail account") for Borough business (R. R. at 37a-167a).

The OOR granted the Borough permission to respond to the Appellants submission.

By letter dated May 13, 2020, the Borough enclosed its second affidavit dated May 11, 2020, executed by Ms. Troup, Zoning Officer (R. R. @ 169a). The letter also provided 17 pages of additional records.

On May 20, 2020, the Appellant's made a supplemental submission providing the Borough's invoices from its solicitor, which further indicated that the



Borough Solicitor billed the Borough for emailing Ms. Troup on dates when the Borough had not provided e-mails in response to the request, nor from Ms. Troup's accounts. (R. R. at 188a).

On June 5, 2020, the OOR issued a Final Determination. The OOR then found the appeal was moot for records the Borough had provided in initially responding to the request and during the appeal process. The OOR also granted the appeal in part and required the Borough to provide the remainder of the requested emails for the two requested email accounts in category 1 of the Request within 30 days or appeal the final determination to the Armstrong County Court of Common Pleas within 30 days.

The Borough did not file a Petition for Review with the Court of Common Pleas (R.R. at 240a). The Borough did not provide any documents to the Appellants by the July 6, 2020, deadline.

The Borough responded by issuing a third affidavit, this time signed by the Borough solicitor alleging no records existed in his possession. (R. R. at 249a). This affidavit was made under penalty of perjury. The Borough solicitor's affidavit does not describe how he searched his files for additional records responsive to the request.

On July 9, 2020, the Borough provided its' fourth affidavit dated July 7, 2020, signed by Brenda Troup, zoning officer, (R. R. at 252a) which was substantially the same as the affidavit Ms. Troup provided previously (R. R. at 169a). The affidavit was conclusory. This affidavit does not describe how Ms. Troup searched her files for additional records responsive to the request.

**b. The Complaint in Mandamus**

On July 13, 2020, the Appellant's filed a "Complaint in Mandamus" at the Armstrong County Court of Common Pleas. An evidentiary hearing was scheduled for October 20, 2020.

The thrust of the complaint was that the Borough did not provide additional emails from and to Borough Official's and third-party contractors to Ms. Troup's email accounts, as well as describe how Ms. Troup searched her files for additional records responsive to the request.

The Appellant's averred that the Borough's response to the OOR's final determination is insufficient:

a. The Borough failed to conduct a good faith search to locate records responsive to the Request;

b. The Borough failed to conduct a good faith search of records in the possession of its contractors and third-party vendors; and

c. The Borough and/or its contractors and third-party vendors are in possession of additional responsive records which have not been provided. The Borough did not appeal the OOR's decision.

d. The time to appeal the OOR's final determination has elapsed.

e. The Appellants have not appealed the OOR's final determination to the lower court.

f. The Borough has not appealed the OOR's final determination to the lower court.

g. The OOR's final determination is not subject to modification

h. The Borough has a legal duty to comply with the RTKL and provide records consistent with the OOR's non-appealed final decision. *Capinski v. Upper Pottsgrove Twp.*, 164 A.3d at 609.

i. The Borough has the burden of proof to establish it has complied with the OOR's final determination. *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 185 A.3d 1161, 1173 (Pa. Cmwlth. Ct. 2018, single judge opinion), appeal granted in part, 218 A.3d 375 (Pa. 2019) ("As to noncompliance with OOR's Disclosure Order, DOC [the agency] bore the burden to prove it provided 'all responsive records.'")

On August 19, 2020, a month after litigation was filed, the Borough filed an Answer in response to the Complaint that added an additional 300 pages worth of e-mails. Again, all these e-mails were “from” accounts other than Ms. Troup’s, and the Appellee’s Answer to the Complaint admits this. The most egregious part of the Borough’s answer was that it filed a different answer with the Court, than it gave to the Appellants. (R. R. at 633a)

On September 21, 2020, “Notice to Attend” were given to Brenda Troup, Zoning Officer; Jamie Johnson, Assistant Borough Secretary, Deanne Shupe, Borough Secretary, and Scott Andreassi, Esq., Borough Solicitor. (See Dkt. 9/21/2020) Subpoenas were issued to Grant Kanish, Building Code Officer, and Richard Craft, Borough Engineer. There was no objection to the “Notice to Attend” to Ms. Troup.

The Borough would request a continuance on October 13, 2020, and the hearing was rescheduled for December 22, 2020 (See Dkt. 10/13/2020).

On November 17, 2020, the Appellant’s would ask their counsel to withdraw from the case due to a lack of finances (See Dkt. 11/17/2020).

On November 19, 2020, the Borough would file it’s fifth series of affidavits, signed by multiple Borough employees and third-party contractors, with the Armstrong County Court of Common Pleas. (R. R. at 603a – 617a).

After multiple requests to the Borough Solicitor, the Appellants had to take the extraordinary measure of travelling to the Armstrong County Courthouse to obtain the missing documents as the Borough Solicitor refused to give these documents to the Appellants on March 25, 2021 (R. R. at 849a – 852a).

The hearing scheduled for December 22, 2020, would again be continued at the request of the Borough, with the new date being February 24, 2021.

### **c. The Hearing**

On the first day of the hearing, Zachary Gordon, Esq., Plaintiff's Counsel, was reinstated. Plaintiff's Counsel clearly outlined factual information that the Borough knew the courtesy copied e-mails were included in Plaintiff's request, and where Ms. Troup was courtesy copied as part of their response to the Office of Open Records (R. R. at 661a).

Two Borough employees, Ms. Shupe and Ms. Jamie Johnson, and two third-party contractors, Mr. Craft, Borough Engineer, and Mr. Kanish, Borough Building Code Officer, testified on behalf of the e-mails they provided in the Right-to-Know Request responses.

Mr. Craft testified that he was not asked to look for e-mail records until "early August", a month after the Plaintiffs filed their Mandamus Complaint (R. R. at 698). Mr. Craft testified that his firm consisted of three individuals, two of

which, were never contacted by the Borough, but were tagged in various e-mails between Mr. Craft and Ms. Troup (R. R. at 699a). No one else from Mr. Craft's firm was contacted until Mr. Craft personally did Mr. Grant Kanish, Apollo Borough Building Codes Official, also was not contacted by the Borough until after litigation had begun (R. R. at 684a).

Ms. Jamie Johnston, Assistant Borough Secretary, was not asked to search her records until after July 13, 2020, after the Complaint in Mandamus was filed (R. R. at 709a). In fact, it was Ms. Johnston who provided the bulk of the e-mails related to this request (See R. R. at 712a). Again, Ms. Johnston found the e-mails on her computer, not Ms. Troup's. For all the e-mails the Appellant's received none came directly from Ms. Troup's computer.

Ms. Shupe, Agency Open Records Officer and Borough Secretary, testified that she provided the initial five pages of e-mails from her account (R. R. at 722a). She testified as well that she did not ask anyone else from the Borough, including the Apollo Borough Police Department for e-mail records (R. R. at 732a). After performing a third search of her e-mail account, Ms. Shupe would provide over fifty more e-mails (R. R. at 730a). Again, these e-mails would come from Ms. Shupe's computer, not Ms. Troup.

At the February 24, 2021, evidentiary hearing, Ms. Troup, Zoning Officer, chose not to appear in the lower court to testify. After nearly one and a half years of litigation, the Borough then claimed that she was not a Borough employee and that she would have to be subpoenaed. (R. R. at 636a) The Appellants would file a subpoena to Ms. Troup. Prior to this hearing, whether or not Ms. Troup was a Borough employee was never in question. When the Appellants had counsel, Ms. Troup had always been served with a notice to attend. Suddenly, when faced with testifying on the witness stand, Ms. Troup fails to appear. Because of Ms. Troup's refusal to appear, the hearing would be forced to be extended to a date of March 16, 2021, adding even more to the expense of the Appellants and Borough taxpayers.

At the March 16, 2021, hearing, Ms. Troup, the main subject of the RTK request, provided her testimony. Ms. Troup admitted she deleted her e-mails. This is the only reason the Appellants received five pages of e-mails from Ms. Troup's account. "My practice, up until creating a specific e-mail for the Borough's business, I don't save this stuff. I had maybe seven e-mails because I had no reason to save things." (R. R. at 774a-775a) Even though, Ms. Troup was completely aware of on ongoing litigation between the Borough and the Appellants she chose to delete records pertaining to the litigation (R. R. at 96).

Ms. Troup admits in her role as Zoning Officer that she contacts various Borough employees and contractors. These contracted employees include the Solicitor, the Building Code Officer and the Borough Engineer. Her documentation as a Zoning Officer requires that she follow certain record retention standards.

The Borough's attorney, Scott Andreassi, oddly enough, had Ms. Troup testify to an affidavit dated October 19, 2020. This affidavit is not in the file (R. R. 787a). The Borough's attorney lied to the lower court by having Ms. Troup testify to an affidavit that does not exist.

After hearing testimony, on March 16, 2021, the lower court issued an order for the Borough to file a brief on April 5, 2021, and the Appellant's to file an answer on April 12, 2021.

On May 12, 2021, the Lower Court Adjudicated that Appellant's were not entitled to any relief, that the Borough did not act in bad faith, and the Borough will produce documents and signed affidavits responsive to the RTK within 30 days of its' order. As of the time of this writing, the Borough has not done so.

#### **d. Post Hearing**

On June 30, 2021, after being ordered to do so, the Appellants filed a "Concise Statement of Errors" citing 13 issues for appeal:



1) The case involved the enforcement of a final determination issued by the Office of Open Records (“OOR”), which found that the defendant Apollo Borough failed to prove it provided all Borough related emails related to two email accounts. The Borough failed to provide additional records within thirty days.

2) The Borough failed to provide the Appellants with copies of the e-mails within thirty days;

3) The Borough’s initial search was insufficient, and the Borough failed to even attempt to perform a proper search until after the Complaint was filed;

4) The Borough’s position is that the court cannot expect small agencies to comply with the Right-to-Know Law;

5) The Borough’s Zoning Officer testified that she “deleted” e-mails routinely;

6) The Borough’s lone defense to non-compliance with its duties under the RTKL is that the Borough lacks the resources to comply with the law;

7) The Borough in its’ Answer admits that the Borough failed to search many accounts for responsive records until after the Complaint was filed;

8) The Borough routinely files answers late, which is also a delay in providing overdue public records;

9) The Borough served a copy of its Answer on Appellants' counsel which did not match the filing with the lower court;

10) The Borough filed affidavits in support of its Answer on November 19, 2020 and failed to give them to the Appellants. At the March 2021 hearing, the Appellants offered testimony that they had never received the affidavits. The Borough's counsel agreed to provide a copy of the affidavits to the Appellants' counsel, but the Borough never did so. The Appellant's went to retrieve the filed affidavits from the Prothonotary's public case file at their own expense and Troup's affidavit did not exist.

11) If the Borough's initial failure to send the affidavits was a clerical mistake or result of a post office error, the Borough counsel's failure to remedy that mistake once it was brought to the Borough counsel's attention is further justification for awarding counsel fees in this case.

12) At the Hearing on Mandamus/Evidentiary Hearing Judgment scheduled for February 24, 2021, the Borough chose to not have Brenda Troup present at the hearing, claiming she was a contractor. (R. R. 755a-756a). The Petitioner's sent Ms. Troup a Notice to attend, which had been the standard procedure for asking Ms. Troup to appear in court since one of the Petitioner's criminal hearings on June 24, 2019. (R. R. 579a). At the last minute, instead of following the procedures

that have taken place in all prior hearings that involves Ms. Troup, the Borough decides she is no longer an employee, but is a third-party contractor. Knowing the expense involved in litigation, the Borough caused this case [to] be dragged to a second hearing on March 16, 2021. This is evidence of bad faith.

13) As of the time of this writing, the Petitioners have received nothing from the Borough, and the Borough is in contempt of the lower court's order.

The lower court in its' Rule 1925(a) Memorandum writes, "The statement does not contain discrete allegations of error. The only discernable assertion of error is the argument that the [lower] Court should have concluded that the Borough acted in bad faith and imposed penalties and awarded attorneys' fees." (R. R. at 871a)

The Appellants argued that the lower court's order and Rule 1925(a) Memorandum are factually incorrect in its interpretation of the Right-to-Know Law. The lower court believes there should be a limitation on the number of Right-to-Know requests (R. R. at 882a) and imposes a restriction on the number to RTKL requests, by his opinion. The Judge has willfully and wantonly disregarded the state legislatures interpretation of the RTKL is incorrect.

The lower court does not address items 10-13 in the Appellants concise statement.

#### **e. The Appeal to the Commonwealth Court**

On June 11, 2021, the Appellants, *pro se*, timely filed an appeal to the Commonwealth Court.

The Appellants argued in their brief that the Armstrong County Court of Common Pleas erred in not finding Apollo Borough in bad faith and in failing to award attorneys' fees, sanctions, and penalties.

The Commonwealth, in its 18-page opinion authored by Judge Christine Fizzano Cannon, decided that Apollo Borough could not be found in bad faith because the Appellant had filed multiple RTKL requests and filed multiple lawsuits against Apollo Borough; therefore, the Borough could not have acted willfully, with wanton disregard of its responsibilities, or otherwise in bad faith.

## **REASONS FOR ALLOWANCE OF APPEAL**

The Pennsylvania State legislature enacted the Right-to-Know Law to evince a deep and abiding commitment to the principles of transparency and accountability in all branches of government. For the past 14 years, Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101-67.3104, has “promote[d] 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. Cmwlth. 2010) (*en banc*), *aff'd* 75 A.3d 453 (Pa. 2013).

The Commonwealth Court's Opinion, if allowed to stand, would substantially remove the ability of Pennsylvanians to hold their government accountable through the enforcement of orders of the Pennsylvania Office of Open Record in granting an appeal, and before a lawsuit is filed in the Court of Common Pleas.

The Commonwealth Court's opinion also suffers from fundamental doctrinal problems. An appeal to the OOR or a court from the denial of a RTKL request is not a typical adversarial dispute, in which the reviewer serves as an umpire between the two sides, each armed with relevant facts and applicable law. In a RTKL appeal, the requester has never seen the text of the documents at issue and is

at a severe disadvantage in its ability to argue that all documents sent agency comply with the OOR final determination.

The RTKL process includes two key structural features to level this playing field. First, the RTKL makes agency records presumptively public and puts the burden of the agency to prove. 65 P.S. §§ 67.305. **Second, the RTKL provides that upon receipt of a RTKL request, it is the responsibility of the Open Records Officer, to reach out to third-party contactors for public records not in the possession of the agency. 65 P.S. §§ 67.506(d).**

The RTKL tasks the Office of Open Records (“OOR”) with determining whether an agency has met its burden of proof. *Center Twp.*, 95 A.3d 354, 358 (Pa. Cmwlth. 2014). In this instant matter, the OOR *granted* the Appellants’ appeal. Decisions of OOR appeals officers are reviewable upon petitions for review to the court of common pleas when the matter arises from a determination of a local agency. 65 P.S. §§ 67.1302. “The RTKL requires **both** the Commonwealth Court and the court of common pleas to render decisions that “contain findings of facts and conclusions of law based upon the evidence as a whole.” [Such] decision[s] shall clearly and concisely explain the rationale for the decision.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010) (*en banc*), *aff’d* 75 A.3d 453 (Pa. 2013). The Appellee’s did not appeal the final determination to the court of common pleas.

Under the Commonwealth Court’s opinion in the instant case, if a Requestor makes multiple RTKL requests or have other legal actions against an agency, then it is “good enough” for an agency to at least try, or “do their best” and fail to obey an order from the OOR requiring the production of additional records. The Opinion also jeopardizes the rights of Pennsylvanians in that it makes it acceptable for a government agency to not reach out to third party contractors until after litigation has been filed in the court of common pleas, or as is the case in the instant matter, nearly six months after the initial request. This is an affront to the Right-to-Know Law, transparency in government, and due process. The Commonwealth Court in its’ decision has effectively written a blank check for agencies not to comply with an order from the OOR.

**1. Review Is Warranted Under PA R.A.P. 1114(b)(2), Because the Commonwealth Court Opinion Conflicts with a holding of the Pennsylvania Supreme Court on the Same Legal Question: Attorney Fees, Sanctions and Penalties are not applicable when a Pennsylvania Agency tries to comply with a RTKL request.**

The Commonwealth Court references *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 197 A.3d 825, 834-35 (pa. Cmwlth. 2018) (*Uniontown Newspapers III*) (Simpson, J. single judge op.) and Supreme Court affirmation, *Uniontown Newspapers, Inc. v. Dep’t of Corr.*, 243 A.3d 19, 24, 34 (Pa. 2020) (*Uniontown Newspapers IV*). This case sets the standard for awarding attorney fees, sanctions, and penalties. The Appellants also cite this case in their brief multiple times.

In the Uniontown case, the Commonwealth Court found that the DOC's records custodian had not independently addressed the request but had forwarded it to the DOC's health bureau and the relied on the health bureau's position that all requested records were exempt from disclosure. *Uniontown Newspapers II*, 185 A.3d at 1168. The Appellants will concede that the Appellee's did remit several responsive records in their initial search; however, unlike the DOC, which, at the very least asked the health bureau to search their records the Appellee did nothing and only searched her own records. In the instant matter, the Appellee's did not contact their third-party contractors and various borough employees until after litigation was filed with the court of common pleas. In both cases, the government agencies forced the Requesters to expend time and resources to discern what responsive records remained undisclosed. The Appellants still have not received attachments related to Troup's e-mails and her responses given to the Appellants by the Borough. They cannot be certain that they have received all her e-mails. The Appellants still have not received all the affidavits from the Appellant. Nor have they received any additional responsive records, even though the court of common pleas ordered the Appellant to provide them.

The Appellee's were ordered by the OOR to remit Borough related e-mails to and from Zoning Officer Brenda Troup's e-mail account to the Appellants. The



Borough chose not to respond until litigation began, then the Borough decided to produce false affidavits.

The RTKL does not require a showing that the agency willfully intended to hide records from the public. Instead, Appellants continue to argue that an agency's failure to comply with its statutory duties is sufficient to find bad faith. The Supreme Court of Pennsylvania affirmed the Commonwealth Court's holding that failing to perform mandatory duties under the RTKL supports a finding of bad faith. *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corrections.*, 243 A.3d 19, 25 (Pa. 2020). ("As such, the court observed that, under the RTKL, proof of bad faith does not require establishing fraud or corruption. *Id.* Rather, an abnegation of mandatory duties by an agency, including performance of a detailed search and review of records to ascertain if the requested material exists, or if any exclusion may apply, prior to denial of access will support a finding of bad faith. *Id.* (citing *Chambersburg Area Sch. Dist. V. Dorsey*, 97 A.3d 1281 (Pa. Cmwlth. 2014))."

The Appellant's will also concede the Commonwealth Court's understanding that the Appellee's do admit that many employees and contractors were not contacted until after the original Complaint was filed. The Commonwealth Court erred in it's Opinion because the Appellee's initial

production and search was statutorily and wholly inadequate. There is no dispute. The Commonwealth Court misinterpreted the law or is biased.

The Commonwealth Court Opinion affirmed by the Supreme Court in Uniontown Newspapers made clear that locating additional records after the administrative appeal after the case was in litigation before a court constitutes bad faith under the RTKL. (*Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 185 A.3d 1161, 1172 (Pa. Cmwlth. Ct, 2018), *aff'd* 243 A.3d 19 (Pa. 2020).

**2. Review Is Warranted Under Pa. R.A.P. 1114(b)(4), Because These Questions Are of Such Substantial Public Importance as to Require Prompt Resolution by the Supreme Court: The Commonwealth Court's Opinion Relieves Agencies of Their Burden of Proof Regarding the Compliance with an Order from the Office of Open Records granting an RTKL Appeal.**

The Commonwealth Court in its' review related to civil penalties also errs. The Commonwealth agrees with the lower court's opinion that Section 1305(a) does not apply because the Appellants' have remitted "dozens of RTKL requests and [filed] multiple lawsuits against the Borough within the past year, the Borough had not acted in the bad faith so as to warrant penalties, even though its response in this matter was incomplete and it should have conducted a more thorough search at the outset."

Section 1308 of the Right-to-Know Law states:

A policy or regulation adopted under this act may not include any of the following:

- (1) A limitation on the number of records which may be requested or made available for inspection or duplication.
- (2) A requirement to disclose the purpose or motive in requesting access to records.

Admittedly, the Borough does not have a policy limiting the number of records which may be requested; however, the lower court and the Commonwealth Court are imposing limits. An agency should not be foreclosed from carrying out its statutory duty to determine whether exemptions apply when it is incapable of reviewing the requested documents within the time given. *State System of Higher Educ. V. APSCUF*, 142 A.3d 1023 (Pa. 2016).<sup>1</sup>

The Appellants do not live in a vacuum. The appellants filed four mandamus complaints against the Borough because the Appellants received NO responsive records from the Borough before having to seek litigation.<sup>2</sup> The Borough's paltry response to the request for the zoning officer's email demanded that the Appellants file a fifth mandamus complaint based on their experience with the Borough. The

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<sup>1</sup> Although this case refers to an agency's duties when a request for a large number of records is requested, it relates to the current matter since the Appellants have requested a large number of records over the course of one year. This wasn't simply one large request; this was a request for one Borough third-party contractors' emails. The Borough never maintained or asserted that the request was too large, only that the Brunermers' had made too many requests over an 8-month period.

<sup>2</sup> *Pa. OOR Dkts.* AP 2019-1551, AP 2019-1242, AP 2019-1103, AP 2019-1021. Appealed to *Arms. Co. Ct. of Common Pleas*, 2019-1790-CIVIL, 2019-1518-CIVIL, 2019-1402-CIVIL, 2019-1343 reversing the OOR final determination. On Appeal *Pa. Cmwlth Ct.* 746 CD 2022, 747 CD 2022, 748 CD 2022, 749 CD 2022.

Appellants had to file multiple lawsuits against the Borough for their inability to give the Appellants something as simple as local ordinances.

The Commonwealth Court could not have read the entire record. In its' brief to the lower court, the Borough referred to a criminal docket and references to other RTKL requests submitted by the Requesters. (R. R. 823a). The Borough had the opportunity to try and establish these allegations through testimony or exhibits; the Borough elected to do neither. The Borough did not introduce into evidence any of those allegations. None of these non-record allegations justify denying the Appellants' requested relief. Nothing in the RTKL limits a requester's ability to seek different records from the same agency. Further, the purpose of the request does not matter, and the RTKL prohibits the disclosure of the purpose or motive of the request. While the Borough, the lower court, and the Commonwealth Court may wish the General Assembly wrote the RTKL differently, that is not an excuse for non-compliance with the RTKL as currently enacted.

The Borough had the chance to comply, swore on at least three occasions that they had nothing and then provided 300 more pages after being sued. That is what This Court should find is bad faith.

## **CONCLUSION**

This Court's ruling in *Uniontown Newspapers* (Pa. 2020) clearly defines an agency's duty to comply with an Open Records Office Final Determination. The similarities between the Appellant's case and the Uniontown Newspaper case are strikingly similar, the most obvious being both parties seeking outside counsel and prompting litigation when an agency denied them access to public documents after the OOR ordered them to do so.

Apollo Borough filed two affidavits, signed under penalty of perjury, while was matter was being litigated with the OOR. After those affidavits were signed, the Borough produced more documents. Apollo Borough remitted a two more affidavits after the 30-day response time was set by the OOR. The Appellants brought a Mandamus complaint against the Borough on July 13, 2020, and the Borough filed over 300 pages of responsive records, but only after litigation began. Apollo Borough was given a third chance to file attestations, and on November 19, 2020, they filed six more from borough employees and third-party contractors. In total, ten (10) affidavits have been filed in this matter. That is not a typo. Ten affidavits have been filed in this matter.

The Borough, having been given multiple chances to provide signed affidavits still have chosen not to abide by their statutory duties after being ordered

to do so. The Appellants still have not been given the October 2020 affidavit the Borough claims Brenda Troup, the subject of the original request, to have signed.

The lower court while reversing the final determination of the OOR (5/12/2021), has Ordered the Borough to “conduct a reasonable and good faith search for such documents, which includes a reasonable and good faith effort to retrieve documents from the Borough’s third-party contractors. Along with any additional responsive documents, the Borough shall also submit the Brunermers an affidavit prepared by an appropriate Borough representative detailing the efforts made by the Borough, from the date of this order forward, to comply with this paragraph.” The lower court, not “liv[ing] in a vacuum” can’t justify finding the Borough in bad faith even though the court doesn’t believe the Borough has given the Appellants all the responsive documents and properly signed affidavits.

After spending over \$13,000 in legal fees, the lower Court and the Commonwealth Court believe the Borough has performed its statutory duty under the RTKL when they have not. The Borough was given three bites at the apple. One at the time of initial request, two, before the OOR, and three, in the Court of Common Pleas. Not finding the Borough in bad faith is, in effect, giving them an unconstitutional right to deny access to public records even after litigation has begun.

The most formidable second issue under the Commonwealth Court's decision is not so much a burden of proof, but that agencies under the Commonwealth Court's decision can refuse to comply until they get sued instead of complying with the un-appealed final determination. This is where the affidavit certifying the production of the vetted public documentation and responsive records are provided after the OOR's decision is paramount to transparency that leads to fair government. Time and time again, the Borough had a chance to comply, falsely sworn it had nothing, and then provided 300 more pages after being sued. As of the writing of this petition, the Appellants are still waiting on responsive records to this request. The Borough has provided no exemptions, exclusions or defenses before the OOR, in fact they willingly admit they did nothing until litigation began. That is what this Court should find is bad faith.

Accordingly, this Court should grant the petition for allowance of appeal.

## **CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY**

We certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Record of the Appellate and Trial Courts that requires filing confidential information and documents differently than non-confidential information and documents.

Dated: August 26, 2022

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## **CERTIFICATE OF SERVICE**

We certify that a true and correct copy of the foregoing Application for a Petition for an Allowance of an Appeal was served on the following party via the Court's electronic filing system and via electronic mail:

Scott J. Andreassi, Esq.  
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Dated: August 26, 2022

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## **CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATION**

We certify that this Petition complies with the applicable word count limitation, 9,000 words, set for in the Pennsylvania Rule of Appellate Procedure Rule 1115(f) based upon a word count performed by the word processing system used to prepare this Petition.

Dated: August 26, 2022

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Janet and Scott Brunermer,	:	
Appellants	:	
	:	
v.	:	
	:	No. 661 C.D. 2021
Apollo Borough	:	Submitted: February 11, 2022

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE CHRISTINE FIZZANO CANNON, Judge  
HONORABLE LORI A. DUMAS, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE FIZZANO CANNON

FILED: July 28, 2022

Janet and Scott Brunermer (Brunermers) appeal *pro se* from the May 12, 2021, order of the Court of Common Pleas of Armstrong County (trial court), which granted relief in the Brunermers’ mandamus action arising from a request pursuant to Pennsylvania’s “Right-to-Know” Law (RTKL)<sup>1</sup> but declined to assess attorneys’ fees or civil penalties against Apollo Borough (Borough). Upon review, we affirm.

**I. Factual & Procedural Background**

In February 2020, the Brunermers submitted a RTKL request to the Borough asking for “Borough-related e-mails to and from Brenda Troup [Troup], Zoning Officer, from personal and business e-mail accounts,

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<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

Appendix A

contact@thefishbowltoo.com [Fishbowl account] and rechhaben@gmail.com [Gmail account] from April 2017 – February 2020.”<sup>2</sup> Office of Open Records (OOR) Final Determination, 6/5/20, at 1; Reproduced Record (R.R.) at 240a-47a. In March 2020, after taking a standard 30-day extension, the Borough produced documentation responsive to the Brunermers’ request.<sup>3</sup> R.R. at 28a-33a. The Brunermers appealed to the OOR, which invited the parties to supplement the record and accepted additional submissions from both sides. *Id.* at 242a.

The OOR concluded in a June 2020 final determination that the Borough had not conducted a sufficient search for records when it received the Brunermers’ initial request and since then had not shown that there were no further responsive records in its possession or the possession of any possible third parties. R.R. at 246a. The OOR ordered the Borough to search for and provide any additional records within 30 days. *Id.* In July 2020, the Brunermers filed a mandamus action in the trial court alleging that the Borough failed to conduct a good faith search for responsive documentation, which warranted imposition of attorneys’ fees, costs, and civil penalties. *Id.* at 1a-15a.

Hearings were held in February and March 2021, during which counsel for the Borough acknowledged that some individuals were not asked to produce documents responsive to the February 2020 request until after the Brunermers filed their mandamus action in July 2020. R.R. at 710a. Scott Brunermer testified that in an unrelated mandamus action the Brunermers brought against the Borough, the

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<sup>2</sup> The Brunermers also requested documentation from boroughmanager@yahoo.com, but ultimately withdrew their claims regarding that address based on the Borough’s verification that the address was not associated with the Borough. Trial Ct. Rule 1925(a) Op. at 2 n.1; Reproduced Record (R.R.) at 872a.

<sup>3</sup> The subject matter pertains to a dispute between the Brunermers and the Borough as to permissible uses of a property owned by the Brunermers.

Brunermers received an email between Grant Kanish (Kanish), the Borough's building code official, and Troup at the Fishbowl account that was responsive to the Brunermers' RTKL request here but was not provided to the Brunermers as part of the Borough's RTKL response. R.R. at 674a. Kanish testified that Borough Solicitor Scott Andreassi (Andreassi) asked him for emails among himself, Troup, Andreassi, and other Borough personnel, but Kanish did not remember the date of the request. *Id.* at 683a-84a. Kanish recalled providing Andreassi with printouts of every email he could find after doing a search for the names of Troup, Andreassi, the Borough, and the Fishbowl and Gmail accounts, but did not remember when he did that. *Id.* at 684a-87a & 693a. After providing Andreassi with what he had, Kanish had no further involvement in this matter. *Id.* at 687a-89a. Kanish stated that the August 2020 affidavit he completed indicating he had no other responsive documents was true and accurate to the best of his knowledge when he signed it. *Id.* at 693a.

Richard Craft (Craft), the Borough's engineer, testified that Andreassi contacted him in August 2020, after the Brunermers filed their complaint, and asked him to gather any emails relevant to the Brunermers' initial RTKL request, which Craft stated he did by searching his project email folders and his inbox generally. R.R. at 697a & 701a. Craft was not asked to seek emails from other people at his engineering firm and he did not ask anyone else on his own. *Id.* at 698a-99a. He acknowledged that David Hill (Hill), an architect with his firm, was copied on many of the emails he produced, but Craft stated that he was the primary contact between his firm and the Borough and that Hill was not directly involved in any matters concerning property owned by the Brunermers. *Id.* at 700a & 702a-03a. Craft stated that the August 2020 affidavit he signed indicating he had no other responsive

documents was true and accurate to the best of his knowledge when he signed it. *Id.* at 703a.

Jamie Johnston (Johnston), an assistant secretary for the Borough, testified she was asked by Andreassi in June or July 2020 to look for emails between herself and Troup's Fishbowl and Gmail accounts. R.R. at 708a & 712a. She provided everything that came up when she searched her email account for those addresses. *Id.* at 712a-13a. She had no intent to withhold information or documents, and the August 2020 affidavit she signed indicating she had no other responsive documents was true and accurate to the best of her knowledge when she signed it. *Id.* at 714a-15a.

Deanna Shupe (Shupe), the Borough secretary and treasurer, stated that one of her duties is to handle RTKL requests and that she received the Brunermers' request in February 2020. R.R. at 717a. She searched her own emails for Troup's Fishbowl and Gmail addresses. *Id.* at 720a. She also asked Troup to search her emails and included Troup's responses with her own when she responded to the request in March 2020. *Id.* at 721a & 723a. She did not double-check with Troup about what Troup provided to her, and because she did not have access to Troup's email accounts, she was unable to review whether Troup's responses were complete. *Id.* at 744a-46a. She turned over everything she found and received from Troup and did her best to be thorough but acknowledged that additional emails were later found when she learned of other ways to search. *Id.* at 720a-31a, 744a & 750a. The affidavit she completed for the March 2020 response was accurate based on what she had done at that time. *Id.* at 722a. She could not recall whether she asked anyone else for information responsive to the Brunermers' request. *Id.* at 725a. She did not personally redact any information from the materials she provided. *Id.* at 739a-40a.

She did not know why some people were not asked for information until after the Brunermers filed their mandamus action in July 2020, but Andreassi told her that he would be asking some people, so she did not duplicate his efforts. *Id.* at 723a, 733a-34a & 748a. She did not intentionally withhold any documents or information. *Id.* at 749a.

Troup testified that she has been the Borough's appointed zoning officer on an independent contractor basis since 2012; she does not have a formal contract with the Borough. R.R. at 785a. Andreassi asked her to respond to the Brunermers' request when it was first received. *Id.* at 767a. She looked through her emails and found six or seven that she gave to Andreassi. *Id.* at 768a. She was later asked several times to check and make sure she had provided a complete response. *Id.* She did not recall Shupe asking her for the names of people she had emailed. *Id.* at 769a. She primarily used her Gmail account for Borough matters but acknowledged that some emails may have been through the Fishbowl account, which is for her personal business. *Id.* at 770a. She acknowledged deleting emails because she did not believe they needed to be kept and was not aware of a Borough policy on record retention. *Id.* at 773a-74a. She acknowledged several emails she either sent or received regarding the Brunermers' property. *Id.* at 779a-83a. She maintained that she provided everything she had and did not intentionally withhold any documents or information. *Id.* at 788a.

Andreassi, the Borough solicitor, testified that prior to the events at issue here, he began helping Shupe with RTKL requests. R.R. at 791a. Generally, when Shupe received a request, he would review it and advise her. *Id.* When she compiled a response, he would review it before it was sent to the requester. *Id.* at 791a-92a. He contacted many of the individuals in this matter, advised them to

produce any information they had, and produced it as it was provided to him. *Id.* at 797a-98a. He did not redact any information and did not withhold any attachments to responsive emails. *Id.* at 796a-97a. He acknowledged that after the Brunermers filed their complaint, he used the information in it to conduct another round of searches. *Id.* at 800a.

The trial court found the Borough had a duty to comply with the OOR's final determination and ordered the Borough to conduct a reasonable and good faith search for any additional records. Trial Ct. Adjudication & Order, 5/12/21; R.R. at 854a-57a. However, the trial court declined to find that the Borough had acted in bad faith. R.R. at 855a. The trial court noted that the Borough had not refused or failed to conduct a search for records, did not object or claim exemptions to the Brunermers' request, and had continued to search throughout the litigation in an effort to comply. *Id.* The trial court therefore denied the Brunermers' requests to assess attorneys' fees and civil penalties against the Borough. *Id.* at 857a.

The Brunermers filed a statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) (Rule 1925 Statement) and the trial court issued an opinion pursuant to Rule 1925(a). *See* Pa.R.A.P. 1925(a) & (b); R.R. at 860a-64a & 871a-83a. The trial court concluded that the Brunermers' Rule 1925 Statement failed to raise "discrete allegations of error"; the only discernible assertion was that the trial court should have found that the Borough acted in bad faith and was subject to attorneys' fees and penalties. R.R. at 871a & 880a-83a. The matter is now before this Court.<sup>4</sup>

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<sup>4</sup> Under the RTKL, when the request for records is directed to a local agency, the trial court reviews the OOR's determination with a *de novo* standard and a plenary scope; in this context, our appellate review is limited to determining whether the trial court has committed an error of law and whether the findings of fact are supported by substantial evidence. *Off. of Dist. Att'y of Phila. v. Bagwell*, 155 A.3d 1119, 1123 n.3 (Pa. Cmwlth. 2017) (*Bagwell*).



## II. Discussion

Agencies have a mandatory duty to conduct a good faith search for records sought pursuant to a RTKL request. Section 901 of the RTKL states:

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.

65 P.S. § 67.901. In the RTKL context, bad faith does not require a showing of fraud or corruption by the agency; a lack of good faith compliance and failure to meet the mandatory duty of disclosure may rise to the level of bad faith without a showing of intent to withhold information. *Uniontown Newspapers, Inc. v. Dep't of Corr.*, 185 A.3d 1161, 1170 (Pa. Cmwlth. 2018) (*Uniontown Newspapers II*) (Simpson, J., single judge op.).<sup>5</sup> Failing to perform a search until a matter is in litigation, which may be shown by the existence of responsive records that later come to light, may also constitute bad faith. *Id.*

### A. Attorneys' Fees

The purpose of attorneys' fees under the RTKL is to “remedy the damage to the requester where an agency has denied access to records in bad faith and to the agency where a requester has launched a frivolous challenge to a denial of access by restoring the requester or the agency to the place where each would have been prior to petitioning the court for review.” *Off. of the Dist. Att’y of Phila.*

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<sup>5</sup> Pursuant to Section 414(b) of this Court’s Internal Operating Procedures, single-judge opinions, even if reported, may be cited only for their persuasive value and are not binding precedent. 210 Pa. Code. § 69.414(b).

*v. Bagwell*, 155 A.3d 1119, 1140 (Pa. Cmwlth. 2017) (*Bagwell*). A trial court may order payment of attorneys’ fees to a requester pursuant to Section 1304(a) of the RTKL, which provides:

(a) Reversal of agency determination.—If a court reverses the final determination of the appeals officer<sup>[6]</sup> or grants access to a record after a request for access was deemed denied,<sup>[7]</sup> the court may award reasonable attorney[s]’ fees and costs of litigation or an appropriate portion thereof to a requester if the court finds either of the following:

(1) the agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or

(2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.

65 P.S. § 67.1304(a).

The leading cases on bad faith attorneys’ fees in RTKL matters arise out of recent litigation between Uniontown Newspapers, Inc., and the Department of Corrections (DOC). The dispute arose in 2014 when a reporter requested information from the DOC concerning potential exposure of inmates to toxic coal waste at the State Correctional Institution-Fayette. *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 151 A.3d 1196, 1200 (Pa. Cmwlth. 2016) (*Uniontown Newspapers I*). The DOC denied the request in its entirety, asserting the records

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<sup>6</sup> In *Uniontown Newspapers, Inc. v. Department of Corrections*, 243 A.3d 19, 33-34 (Pa. 2020) (*Uniontown Newspapers IV*), our Supreme Court held that the “appeals officer” in this section is the records officer of the agency subject to the RTKL request.

<sup>7</sup> Attorneys’ fees are recoverable when an access request is deemed denied. Under the RTKL, a request is “deemed denied” where there is a failure to respond to the request within a statutory deadline. *Uniontown Newspapers v. Dep’t of Corr.*, 197 A.3d 825, 832 n.4 (Pa. Cmwlth. 2018) (*Uniontown Newspapers III*) (Simpson, J., single judge op.) (citing *McClintock v. Coatesville Area Sch. Dist.*, 74 A.3d 378 (Pa. Cmwlth. 2013)).

were part of an internal investigation and therefore not subject to disclosure. *Id.* The OOR disagreed and ordered disclosure, after which the DOC released some documentation, but the requester filed a petition for review asking this Court to enforce the OOR's order and compel further disclosure. *Id.* at 1201. This Court largely denied the parties' cross-motions for summary relief and ordered further fact-finding as to the extent of the DOC's noncompliance and whether the DOC acted in bad faith.<sup>8</sup> *Id.* at 1209.

Subsequently, this Court found that the DOC's records custodian had not independently addressed the request, but had forwarded it to the DOC's health bureau and then relied on the health bureau's position that all requested records were exempt from disclosure. *Uniontown Newspapers II*, 185 A.3d at 1168. This Court found bad faith based on the DOC's denial of the request without having conducted a good faith search, its decision to contest the requester's appeal to the OOR while still failing to obtain and assess all potentially responsive records, and its failure to comply with the OOR's disclosure order. *Id.* at 1172-73. This Court also found that the DOC acted in bad faith when it failed to locate and disclose responsive records after the order and instructions set forth in *Uniontown Newspapers I*. *Id.* at 1173-74. We noted: "Critically, [DOC] did not perform any search for records in response to the Request. . . . Without obtaining or reviewing any records, DOC denied access to responsive public records. DOC's failure to [conduct a good faith search] prior to issuing its 'denial' . . . constitute[d] bad faith." *Id.* at 1172. We also explained that

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<sup>8</sup> When a state agency is the subject of a RTKL enforcement action, a single judge of the Commonwealth Court serves as the arbiter of disputes over attorneys' fees and civil penalties. When, as in this case, a local agency is the subject, the common pleas court serves that role. *See Uniontown Newspapers III*, 197 A.3d at 835 n.8.

DOC's delay in complying with the Disclosure Order was unreasonable. Once this Court issued the Summary Relief Opinion, there was no excuse for further delay. Yet, DOC forced Requester to expend time and resources to discern what responsive records remained undisclosed. Under these circumstances, DOC's persistent denial of access constitute[d] bad faith.

*Id.* at 1174.

After a hearing, this Court awarded the requester attorneys' fees because the DOC had acted in bad faith and denied disclosure willfully and with knowing disregard of the requester's rights to access. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 197 A.3d 825, 834-35 (Pa. Cmwlth. 2018) (*Uniontown Newspapers III*) (Simpson, J., single judge op.). Our Supreme Court affirmed. *Uniontown Newspapers, Inc. v. Dep't of Corr.*, 243 A.3d 19, 24, 34 (Pa. 2020) (*Uniontown Newspapers IV*).

Here, the Brunermers argue that the Borough's initial search and response was insufficient and that the Borough failed to comply with its statutory duties under the RTKL, including its production of additional records after the Brunermers began litigation; the Brunermers claim this amounted to bad faith sufficient to warrant an award of attorneys' fees. Brunermers' Br. at 20-32; Brunermers' Reply Br. at 3-6. The Borough responds that its actions did not constitute a bad faith denial or refusal to search for records. Borough's Br. at 7. Rather, the Borough asserts that it made good faith efforts to respond to the Brunermers' multiple RTKL requests (other legal actions between these parties are pending). *Id.* at 7-10.

The trial court found that the Borough had not denied the Brunermers' request or claimed exemptions from disclosure and had engaged in a valid search for responsive documentation. Trial Ct. Rule 1925(a) Op. at 11; R.R. at 881a. The trial

court added that although the Borough had not provided a complete response to the Brunermers' request, the evidence and circumstances, including the Brunermers having filed several lawsuits and dozens of requests within the preceding calendar year, indicated that the Borough had not acted in bad faith. *Id.* at 11-12; R.R. at 881a-82a (“[T]he Borough acted slowly and without adequate staff or open records training, but not in bad faith.”).

We note that Section 1304(a) applies where a reviewing court reverses the agency's denial of disclosure or grants access after a deemed denial, which occurs when an agency fails to timely respond to a request. 65 P.S. § 67.1304(a). Assuming, without deciding, that the initial requirement for applicability of Section 1304(a) was met, the trial court's finding that the Borough did not act in bad faith is supported by substantial evidence of record. It is true that in the context of the RTKL, intent to wrongfully withhold disclosure is not required for a finding of bad faith and that an agency's failure to provide an adequate response to a request *may* be the basis for such a finding. *Uniontown Newspapers II*, 185 A.3d at 1170. However, a trial court, as the reviewing court, is the finder of fact, and its conclusion regarding a party's bad faith will be upheld unless the opponent establishes that it is legally erroneous or unsupported by substantial evidence of record. *Bagwell*, 155 A.3d at 1123 n.3.

The Borough's witnesses testified that when they learned of the Brunermers' request, they searched their emails and provided what they found. R.R. at 684a-87a, 697a, 701a, 712a-13a, 720a-31a & 768a. The witnesses also confirmed that their affidavits accompanying their submissions were true and accurate to the best of their knowledge when they completed them. *Id.* at 693a, 703a, 714a-15a & 722a. Shupe, the Borough's *de facto* RTKL officer, candidly acknowledged that

after she sent her first submission, she found other documents when she learned different ways to search her email accounts, but that she did her best to be thorough. *Id.* at 720a-31a, 744a & 750a. She asked Troup, the Borough's appointed zoning officer, for documentation and passed along what she received from Troup, but had no way to confirm whether Troup's submission was complete because she did not have access to Troup's accounts. *Id.* at 744a-746a.

Troup also candidly acknowledged that she had deleted Borough-related emails in the past because she did not believe they needed to be kept and that she was not aware of a Borough policy on record retention. R.R. at 773a-74a. She nevertheless averred that she had turned over everything she found. *Id.* at 788a. Andreassi, the Borough solicitor, acknowledged that after the Borough's initial response in March 2020, when he read the Brunermers' complaint commencing their action, he made further inquiries based on the information in that filing that apparently had not been known to him beforehand. *Id.* at 800a.

Here, the trial court did not expressly credit the Borough's witnesses, but it did so by necessary implication in concluding the Borough's actions did not amount to bad faith so as to warrant attorneys' fees. The trial court particularly noted that while the Borough's failure to initially provide all responsive information *could* result in a finding of bad faith, the totality of circumstances and evidence here did not warrant such a finding. Trial Ct. Rule 1925(a) Op. at 11-12; R.R. at 881a-82a. Although the Brunermers attempted to portray the Borough's conduct as obstructive, the trial court found no support in the record for that characterization. *Id.* at 11; R.R. at 881a.

We agree. The circumstances here are distinguishable from the facts in the *Uniontown Newspapers* cases, where the DOC denied the initial request without

conducting a search, then repeatedly failed to locate and disclose documents after orders by both the OOR and this Court to do so. Here, the Borough did not deny the Brunermers' request or claim exemptions to disclosure. The Borough witnesses testified that they did their best to comply with the initial request, then voluntarily and independently searched for more records when they learned better methods to do so or, in the instance of Andreassi, when he learned from the Brunermers' complaint of additional potential information subject to disclosure. Although a lack of resources does not justify nondisclosure, the Borough did not assert its lack of resources as an excuse, and the trial court found as fact that in the context of the Brunermers' multiple requests and lawsuits, the Borough had essentially done its best. *But see Pa. State Sys. of Higher Educ. v. Ass'n of State Coll. & Univ. Faculties*, 142 A.3d 1023, 1032 (Pa. Cmwlth. 2016) (stating that "just because an agency claims it neither has the time nor resources to conduct a document-by-document review within the time-period required by the RTKL does not make it so"). Unlike in the *Uniontown Newspapers* cases, the record here does not indicate the Borough acted willfully, with wanton disregard of its responsibilities, or otherwise in bad faith.<sup>9</sup> As the record supports the trial court's conclusion, the court did not err in declining to impose attorneys' fees on the Borough.

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<sup>9</sup> In a March 18, 2022, post-submission filing, the Brunermers asked this Court to consider *California University of Pennsylvania v. Bradshaw* (Pa. Cmwlth., No. 1491 C.D. 2018, filed Oct. 13, 2021) (Brobson, P.J., single judge op.) (unreported), where a single judge of this Court, acting as the reviewing court, imposed attorneys' fees and civil penalties on the university after finding that it acted in bad faith when it denied a RTKL request based on a clearly unreasonable interpretation of the law and admittedly failed to conduct any search before issuing the denial. *Id.*, slip op. at 13-16. The university had pursued its legally insufficient denial as far as our Supreme Court, which denied allocatur, before conducting a search and determining that no responsive records existed. *Id.*, slip op. at 14-15. Had the university conducted a search prior to denying and litigating the request, several years of litigation could have been "short-circuited." *Id.* This case is distinguishable from *Bradshaw* because the Borough did not deny, claim exemptions to, or litigate the Brunermers' request, and the record here contains no indication of bad faith conduct on the part of the Borough.

## **B. Civil Penalties**

A trial court may impose civil penalties against an agency pursuant to Section 1305 of the RTKL, which states:

(a) Denial of access.--A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.

(b) Failure to comply with court order.--An agency or public official who does not promptly comply with a court order under this act is subject to a civil penalty of not more than \$500 per day until the public records are provided.

65 P.S. § 67.1305.

Whereas attorneys' fees pursuant to Section 1304(a) seek to remedy damage to a requester when an agency denies disclosure in bad faith, civil penalties under Section 1305 "penalize conduct of a local agency and . . . provide a deterrent in the form of a monetary penalty in order to prevent acts taken in bad faith in the future." *Bagwell*, 155 A.3d at 1141. "[B]ad faith is a matter of degree, implicating the extent of noncompliance," and the reviewing court (either the trial court or this Court) has the exclusive authority to find facts and impose sanctions in this regard. *Uniontown Newspapers I*, 151 A.3d at 1203, 1208.

In *Bagwell*, the Philadelphia District Attorney's office initially denied the RTKL request as a whole, claiming numerous exemptions. 155 A.3d at 1123. The OOR ordered disclosure and the trial court agreed, ultimately imposing a Section 1305 civil penalty of \$500. *Id.* at 1124. We affirmed upon concluding that the record was "replete with evidence" that the District Attorney's office wrongly denied access based on the identity of the requester and the presumed intended use of the records, failed to cite sufficient legal authority in support of its reasons for



denial, and did not make a good faith search for the requested records. *Id.* at 1141-42. In the *Uniontown Newspapers* cases, this Court found that the DOC's referral of the matter to its health bureau and reliance on the bureau's reasons for denying disclosure did not constitute a good faith search. *Uniontown Newspapers II*, 185 A.3d at 1172, 1174. In imposing Section 1305 penalties on the DOC, we emphasized the agency's "noncompliance throughout the RTKL process" for more than three years. *Id.* at 1175-76.

Where this Court has awarded or upheld penalties under Section 1305(a), there generally has been an initial denial by the agency (as required by the provision) followed by ongoing nondisclosure or explanations not credited by the reviewing court. *See, e.g., Uniontown Newspapers II*, 185 A.3d at 1175-76; *Bagwell*, 155 A.3d at 1141-42. By contrast, when an agency has shown some diligence to respond to a request and nondisclosure is due to a genuine and nonfrivolous belief that documents have been provided, are unavailable, or are not subject to disclosure, we have declined to impose or uphold penalties. *See, e.g., Campbell v. Pa. Interscholastic Athletic Ass'n (Off. of Open Recs.)*, 268 A.3d 502, 519 (Pa. Cmwlth. 2021); *Capinski v. Upper Pottsgrove Twp.*, 164 A.3d 601, 610 n.14 (Pa. Cmwlth. 2017); *Drack v. Ms. Stacy Hamilton Open Recs. Officer Borough of Carlisle* (Pa. Cmwlth., No. 2128 C.D. 2014, filed Jan. 13, 2016), slip op. at 8, 2016 WL 182499, at \*3 (unreported).<sup>10</sup>

As discussed above, in the context of the RTKL, intent to wrongfully withhold disclosure is not required to sustain a finding of bad faith, while an agency's failure to provide an adequate response to a request may, but need not, be

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<sup>10</sup> Section 414(a) of this Court's Internal Operating Procedures provides that an unreported panel decision issued after January 15, 2008, may be cited for its persuasive value, but not as binding precedent. 210 Pa. Code § 69.414(a).

the basis for such a finding. *Uniontown Newspapers II*, 185 A.3d at 1170. However, the reviewing court (in this case the trial court) is the finder of fact, and its conclusion regarding a party's bad faith will be upheld unless the opponent establishes that it is legally erroneous or unsupported by substantial evidence of record. *Bagwell*, 155 A.3d at 1123 n.3.

Here, the Brunermers sought a \$1,500 civil penalty against the Borough under Section 1305(a) of the RTKL and asked the trial court to impose penalties upon the Borough of \$500 per day under Section 1305(b) if the court ordered further disclosure and the Borough did not comply. Brunermers' Complaint ¶¶ 81-82; R.R. at 13a-14a. The trial court did not address subsections (a) and (b) distinctly, but generally concluded that under the circumstances, including the Brunermers' dozens of RTKL requests and multiple lawsuits against the Borough within the past year, the Borough had not acted in bad faith so as to warrant penalties, even though its response in this matter was incomplete and it should have conducted a more thorough search at the outset. Trial Ct. Rule 1925(a) Op. at 11-12; R.R. at 881a-82a. Before this Court, the Brunermers reiterate their arguments that the Borough's incomplete response amounted to bad faith such that penalties are warranted. Brunermers' Br. at 19-36. The Borough responds that the trial court correctly concluded that no bad faith had occurred. Borough's Br. at 4-12.

As detailed above, the Borough's witnesses testified that when they learned of the Brunermers' request, they searched their emails and provided what they found. R.R. at 684a-87a, 697a, 701a, 712a-13a, 720a-31a & 768a. The witnesses also confirmed that their affidavits accompanying their submissions were true and accurate to the best of their knowledge when they completed them. *Id.* at 693a, 703a, 714a-15a & 722a. The Borough's witnesses did not deny or challenge

the request, candidly acknowledged when their efforts had fallen short, and explained their efforts to remediate the issue. R.R. at 773a-74a & 800a.

The trial court did not expressly credit the Borough's witnesses, but it did so by necessary implication in concluding the Borough's actions did not amount to bad faith so as to warrant penalties. The court particularly noted that while the Borough's failure to initially provide all responsive information *could* result in a finding of bad faith, the totality of circumstances and evidence here did not warrant doing so. Trial Ct. Rule 1925(a) Op. at 11-12; R.R. at 881a-82a. Although the Brunermers attempted to portray the Borough as obstructive, the trial court found no support in the record for that characterization. R.R. at 881a. We agree. As the record supports the trial court's conclusion, the court did not err in declining to impose a Section 1305(a) penalty on the Borough. Because this matter was appealed by the Brunermers upon the trial court's May 12, 2021, order that the Borough obtain and provide all previously undisclosed documentation, there is no evidence that the Borough failed to promptly comply with that order. Therefore, we likewise discern no error in the trial court's refusal to impose a penalty under Section 1305(b).<sup>11</sup>

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<sup>11</sup> The Brunermers also argue that they should not have had to issue a subpoena to Troup for her attendance at the first hearing before the trial court in February 2021. Brunermers' Br. at 33-34. The Brunermers assert that they issued Troup a notice to attend the hearing, which should have been sufficient pursuant to Pennsylvania Rule of Civil Procedure 234.3, Pa.R.Civ.P. 234.3, and that they were wrongfully subjected to additional counsel costs associated with an additional hearing. The trial court did not independently rule upon this issue upon finding that all points raised in the Brunermers' Rule 1925(b) Statement were related to their position that the Borough acted in bad faith, which the court ultimately found meritless. Trial Ct. Rule 1925(a) Op. at 1; R.R. at 871a. We agree. In their Statement, the Brunermers raised the issue of Troup's non-appearance at the first hearing, but characterized it as additional evidence of the Borough's bad faith and not as a discrete instance of trial court error. R.R. at 863a.

We also note that at the hearing, Borough Solicitor Andreassi argued that although Troup was the Borough's zoning officer, she held the position in an independent contractor capacity and was therefore only subject to compelled attendance and testimony via subpoena. R.R. at 754a-

### III. Conclusion

The trial court did not err in declining to impose attorneys' fees and penalties on the Borough pursuant to Sections 1304 and 1305 of the RTKL. We therefore affirm the trial court's order.

s/Christine Fizzano Cannon

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CHRISTINE FIZZANO CANNON, Judge

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57a. The trial court agreed over Brunermers' counsel's assertion that Troup had appeared for depositions in previous proceedings without requiring a subpoena; therefore, requiring her to be subpoenaed for the hearing was disingenuous. *Id.* Ultimately, Troup did appear and testify at the March 2021 hearing after the Brunermers issued a subpoena for her to do so. R.R. at 770a-91a. Thus, any error on the part of the trial court was harmless and to the extent the Brunermers seek attorneys' fees for the March 2021 hearing, that claim is meritless in light of the Brunermers' failure to establish entitlement to attorneys' fees pursuant to Section 1304(a) of the RTKL, as discussed in Section "A" above.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Janet and Scott Brunermer,	:	
Appellants	:	
	:	
v.	:	
	:	No. 661 C.D. 2021
Apollo Borough	:	

ORDER

AND NOW, this 28th day of July, 2022, the May 12, 2021, order of the  
Armstrong County Court of Common Pleas is AFFIRMED.

s/Christine Fizzano Cannon

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CHRISTINE FIZZANO CANNON, Judge

IN THE COURT OF COMMON PLEAS OF ARMSTRONG COUNTY, PENNSYLVANIA

JANET and SCOTT BRUNERMER, )  
Plaintiffs/ )  
Petitioners, )  
) No. 2020-0779-Civil  
vs. )  
APOLLO BOROUGH, )  
Defendant/ )  
Respondent. )

ADJUDICATION

In this mandamus action, Plaintiffs/Petitioners Janet and Scott Brunermer (the "Brunermers") seek a writ of mandamus compelling Defendant/Respondent Apollo Borough (the "Borough") to comply with a Final Determination issued by the Pennsylvania Office of Open Records ("OOR") on June 5, 2020. That determination and this action concern a request for documents submitted by the Brunermers to the Borough on or about February 28, 2020, pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. § 67.101 *et seq.* ("RTKL") (the "Request"). In addition to an order compelling compliance, the Brunermers also seek 1) a finding that the Borough acted in bad faith, 2) the imposition of a civil penalty, and 3) an award of attorneys' fees.

FINDINGS AND CONCLUSIONS

1. With regard to the Borough's compliance with the OOR's Final Determination issued June 5, 2020, the Court finds and concludes that the Borough has a mandatory duty to comply with the directives in the determination. Thus, the Court will order that the Borough provide to the Brunermers all responsive documents as identified in the Brunermers' initial RTKL request. The Borough has the

Appendix B

duty to conduct a reasonable and good faith search for responsive documents. The Court does not find evidence in the record indicating that specific documents have been withheld.

2. The Court finds and concludes that the Borough did not act in bad faith in its initial search for responsive documents, in its initial response to the Brunermers' request, or in the subsequent months, including before the OOR and during the pendency of this litigation. The Borough did not fail to perform a search, did not lodge any objections to what was a very broad and generic document request spanning a period of almost three years, did not deny the request or cite any exceptions under the RTKL, and continued to search for documents up to and through the litigation of this action. Further, this request was only one of dozens of RTKL requests submitted by the Brunermers to the Borough over a period of less than a year.

3. The Court finds and concludes that the Borough did not deny the Brunermers access to any public records in bad faith.

4. The RTKL does not authorize an award of attorneys' fees in this action.

An appropriate order follows.

IN THE COURT OF COMMON PLEAS OF ARMSTRONG COUNTY, PENNSYLVANIA

JANET and SCOTT BRUNERMER, )  
Plaintiffs/ )  
Petitioners, ) No. 2020-0779-Civil  
vs. )  
APOLLO BOROUGH, )  
Defendant/ )  
Respondent. )

**ORDER**

AND NOW, this 12<sup>th</sup> day of May, 2021, upon consideration of Plaintiffs/Petitioners' Complaint in Mandamus, and after hearing and briefing on the matter, the Court is

ORDERED as follows:

1. Defendant/Respondent Apollo Borough (the "Borough") shall, within 30 days of the date of this Order, provide to Plaintiffs/Petitioners Janet and Scott Brunermer (the "Brunermers") all documents responsive to the Brunermers' Right to Know Law request dated February 28, 2020, that have not been produced to date. The Borough shall conduct a reasonable and good faith search for such documents, which includes a reasonable and good faith effort to retrieve documents from the Borough's third-party contractors. Along with any additional responsive documents, the Borough also shall submit to the Brunermers an affidavit prepared by an appropriate Borough representative detailing the efforts made by the Borough, from the date of this order forward, to comply with this paragraph. The affidavit shall include, but not necessarily be limited to, the sources or parties contacted to locate responsive documents. If no additional documents are located, the affidavit shall so state.

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2021 MAY 12 AM 0:45  
BRENDA C. GEORGE  
PROthonotary AND  
CLERK OF COURTS  
ARMSTRONG CO. PA



2. The Brunermers' requests for civil penalties, attorneys' fees, and any other sanctions are DENIED.

By the Court:

Chase G. McClister, J.  
Chase G. McClister

this 12 Certified from the Record 21  
 day of May 2021 A.D.  
Brenda C. George  
 Brenda C. George,  
 Prothonotary and Clerk of Courts  
 Armstrong County, Pennsylvania

MY COMM. EXPIRES 1ST  
 MON. JAN. 2024



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**SCOTT AND JANET BRUNERMER,**  
**Requesters**

**v.**

**APOLLO BOROUGH,**  
**Respondent**

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**Docket No: AP 2020-0642**

### **INTRODUCTION**

Scott and Janet Brunermer (collectively, “Requesters”) submitted a request (“Request”) to Apollo Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking emails to and from specific email addresses for a specific time period. The Borough partially denied the Request, arguing some records do not exist. The Requesters appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **dismissed as moot in part**, and the Borough is required to take additional action as directed.

### **FACTUAL BACKGROUND**

On February 28, 2020, the Request was filed, seeking:

1. Borough related e-mails to and from Brenda Troup, Zoning Officer, from personal and business e-mail accounts, [contact@thefishbowltoo.com](mailto:contact@thefishbowltoo.com) and [rechhaben@gmail.com](mailto:rechhaben@gmail.com) from April 2017 – February 2020.

2. Borough related e-mails to and from [boroughmanager@yahoo.com](mailto:boroughmanager@yahoo.com), for April 2017 – February 2020.

On March 17, 2020, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the Borough partially denied the Request, arguing that [boroughmanager@yahoo.com](mailto:boroughmanager@yahoo.com) is not a Borough email address and therefore no records exist responsive to Item 2 of the Request and providing emails responsive to Item 1 of the Request.

On April 1, 2020, the Requesters appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal.<sup>1</sup> 65 P.S. § 67.1101(c).

On April 21, 2020, the Borough submitted a position statement reiterating its grounds for denial. The Borough claims that all emails responsive to Item 1 of the Request were provided and no responsive emails exist as to Item 2 of the Request because the email address is not a Borough email address. In support of its position, the Borough submitted the affidavit of Deanna Shupe, the Borough's Open Records Officer.

On May 1, 2020, the Requesters responded, withdrawing the appeal as to Item 2 of the Request and arguing that the Borough has significant credibility issues as illustrated by prior RTKL cases. The Requesters argue that the only emails provided post-date the Request and challenge the sufficiency of the records provided.<sup>2</sup> They argue that the Borough failed meet its burden of proof because it failed to address the "fishbowltoo" account in its response. Further, the

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<sup>1</sup> Due to the COVID-19 pandemic, the appeal was stayed indefinitely by the OOR. On April 7, 2020, the OOR established a submission deadline of May 1, 2020 for the Borough's response, thus lifting the stay.

<sup>2</sup> The Requesters argue that the Request was submitted February 17 and received February 18, 2020, however, the Request itself is dated February 28, 2020, and the Borough at all times refers to February 28, 2020 as the date the Request was received. Further, the appeal indicates that Request was submitted February 28, 2020. Therefore, the emails provided all predate the Request.

Requesters provide examples of responsive emails for both email accounts in their possession that were not provided in response to the Request. The Requesters argue that in Ms. Troup's deposition from RTKL mandamus litigation between the parties, she acknowledges storing Borough records at her home office and the Borough's affidavit does not indicate that she was asked to search her home office.

On May 4, 2020, the Borough Solicitor requested the opportunity to respond to the Requesters' submission. The OOR granted the opportunity to respond and indicated that acceptance of the submission would be determined upon review. *See* 65 P.S. § 67.1102(b)(3) ("In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute"). On May 8, 2020, the Borough Solicitor concurred that an affidavit from Ms. Troup was necessary and indicated that she was instructed to do another search of the gmail and the fishbowltoo accounts and provide an affidavit.

On May 19, 2020, Attorney Zachary Gordon, on behalf of the Requesters, provided the OOR with the affidavit of Ms. Troup and "the emails provided to the Requesters, a copy of which is attached hereto as Exhibit A...." Attorney Gordon requested that no additional evidence be admitted and argued that the affidavit is contradicted in many other instances, as previously argued. He further argues that the response provided no emails sent by Ms. Troup and therefore, the documents provided are insufficient.

On May 20, 2020, the Requesters submitted the affidavit of Scott Brunermer and invoices provided to them in other matters that they argue prove there is additional email correspondence.

The OOR accepts all of the above-referenced submissions in the interest of fairness. *See* 65 P.S. § 67.1102(b)(3).

## 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 necessary information and evidence before it to properly adjudicate the matter.

The Borough 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 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)(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)). 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).

### **1. The Borough provided responsive records during the appeal**

During the appeal, the Borough provided additional records that are responsive to the Request. As such, the appeal as to the records provided on appeal is dismissed as moot.

### **2. The Borough did not demonstrate that no responsive records exist**

The Borough submitted the affidavit made under the penalty of perjury of Ms. Troup, the Zoning Officer, who attests that she searched her files for records responsive to the request, specifically the identified email accounts for all “Borough related emails,” and that there were no responsive emails in the fishbowl account and all the responsive records in the gmail account were provided. She also attached a copy of what she describes as “the emails provided to the Requesters....” A review of the emails provided to the Requesters in the Borough’s final response

and the emails provided on May 13, 2020, shows that the emails provided on May 13th are additional responsive records.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *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 evidence that the Borough has acted in bad faith or that the records exist, “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)). Here, the Requesters challenge the credibility of the Borough’s evidence by providing a Motion for Sanctions and Other Relief submitted on March 11, 2020 in appeals before the Armstrong County Court of Common Pleas, a consent order regarding the same, and an April 14, 2020 email from the Borough’s counsel regarding another appeal. The Requesters explain that these documents show that the gmail and fishbowl accounts were used to conduct Borough business and show that the Borough’s affidavits have been incorrect in the past.

The Requesters also provided invoices showing that the Borough was billed for emails from the Borough Solicitor to Ms. Troup. The Requesters attest that many of the emails referenced on the invoices were not provided in response to the Request.

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. While the RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court recently stated:

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 records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted); *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, 138-139 (D.D.C. 2012)) (citations omitted).

Here, the Requesters have shown that Ms. Troup utilizes the gmail and the fishbowl accounts for Borough related business. The Borough has not demonstrated that a sufficient search took place. Ms. Troup does not attest as to whether she has any physical records at her home office and whether they have been searched. There is no evidence regarding a search of records in the possession of the Borough Solicitor. The OOR does not assess whether an agency *should* have responsive records, only whether those records currently exist in the agency's possession, custody, or control. *See, e.g., Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731 ("While...evidence may establish that a [record] *should* exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such a [record] – the OOR may only determine whether a responsive record does, in fact, exist."). Here, the Borough has not provided sufficient evidence to demonstrate that no additional records exist and therefore has not carried its burden of proof.

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **dismissed as moot in part**, and the Borough is required to search for additional responsive emails and provide those records, to the extent any exist, within thirty days. 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

Armstrong 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. 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: June 5, 2020**

*/s/ Erin Burlew*

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ERIN BURLEW, ESQ.  
APPEALS OFFICER

Sent to: Scott and Janet Brunermer (via email only);  
Zachary Gordon, Esq. (via email only);  
Scott Andreassi, Esq. (via email only);  
Deanna Shupe (via email only)

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