



FINAL DETERMINATION

IN THE MATTER OF

**ANDREW CAIRNS,
Requester**

v.

**BUCKS COUNTY,
Respondent**

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Docket No.: AP 2022-1815

INTRODUCTION

Andrew Cairns (“Requester”), an inmate at SCI-Coal Township, submitted a request (“Request”) to Bucks County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking 911 transcripts and a postmortem examination report. The County denied the Request, arguing that “these records do not exist in the possession, custody, and control of the County Commissioners and Administration.” The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the County is not required to take further action at this time.

FACTUAL BACKGROUND

On June 6, 2022, the Request was filed,¹ seeking:

1. Full and complete copies of the 911 Transcripts from Ms. Silva’s call,....
2. Full and complete Post Mortem Examination report performed

¹ The Request was dated May 18, 2022 but the County did not receive the Request until June 6, 2022.

On July 13, 2022, following a thirty-day extension, 65 P.S. § 67.902(b), the County denied the Request, arguing that the “records do not exist in the possession, custody, and control of the County Commissioners and Administration.”²

On August 4, 2022, the Requester appealed to the OOR, challenging the denial and providing reasons for disclosure.³ The appeal indicated that it was filed against the Bucks County Law Department, a division within the County and not against the Bucks County Coroner’s Office, a separate agency. The OOR invited the parties to supplement the record and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 10, 2022, the OOR was contacted by Debra Silva, wife of the Requester. Ms. Silva indicated that the Requester, who is incarcerated, gave permission to include Ms. Silva on any correspondence involving the above-captioned matter. As the Requester was effectively able to communicate through Ms. Silva, the OOR included Ms. Silva on correspondence regarding the instant matter.⁴

On August 15, 2022, the County submitted the attestation of Ashley Dayoub, Open Records Officer for the County of Bucks Board of Commissioners and Administration (Agency), attesting that the records to the Request are not within the possession of the Agency and that the Request was forwarded to the County Coroner’s Office.⁵ Ms. Dayoub explains that the Requester mailed his two RTKL requests to the Bucks County District Attorney’s Office Open Record Officer, Timothy Lutes. Mr. Lutes forwarded the Requests to the County’s prior Open Records

² The OOR notes that attached to the Requester’s appeal packet was a denial from the County of Bucks, Law Department, and a denial from the Bucks County District Attorney’s Office.

³ Although the OOR did not receive the appeal until August 4, 2022, it was postmarked August 1, 2022, and pursuant to the “prisoner mailbox rule,” it is considered filed on that date. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

⁴ Any correspondence sent by Ms. Silva will hereinafter be referred to as sent by the Requester.

⁵ Ms. Dayoub explains that “the County of Bucks Board of Commissioners and Administration’s structure does not include the elected County ROW officers, like the Coroner or the District Attorney. The instant appeal was filed against the Bucks County Board of Commissioners and Administration (i.e. Bucks County).

Officer, Robbie Cain. Ms. Dayoub further explained that “[s]ince the Coroner’s office does not fall under the Commissioners and Administration, Ms. Cain forwarded the request asking for ‘Post Mortem Examination Report’ to the Office of the Coroner.” It was Ms. Dayoub’s understanding that “the Coroner’s office also responded to the request submitted to their office; however, [she does] not have a copy of their response.”

On August 16, 2022, the County Coroner’s Office submitted the attestation of Attorney Christopher Serpico, Open Records Officer for the County Coroner’s Office, arguing that the records are exempt under Section 708(b)(20) of the RTKL. On August 19, 2022, the County submitted a second attestation.

The OOR has received numerous correspondence by the Requester.⁶ On August 12, 2022, the OOR received the Requester’s position statement. On August 21, 2022, the Requester’s correspondence explains that he “did not send any requests for documents to this agency” and “can almost guarantee the [County] has never possessed, or intends to ever possess, an autopsy report, or copy of 911 transcripts from a criminal proceeding.” The Requester also made additional submissions on August 22, 2022 and August 24, 2022.

On August 29, 2022, the OOR asked the parties for additional argument and evidence and extended the final determination deadline to October 4, 2022. On September 12, 2022, the County submitted additional argument, and, on September 19, 2022, the Requester submitted additional argument.

⁶ Emails dated August 11, 16, 17, 18, 21, 24, 27 and 29, 2022. Many of the emails argue the facts of the case.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The County 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. 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.” *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 County argues that it does not possess the requested 911 transcripts or the Post-Mortem Examination report. In support of the County’s position, Ms. Dayoub attests as follows:

9. After thorough investigation within the County Commissioners and Administration Department including 911 communications, it was determined that responsive documents do not exist within the [County].
10. While the 911 communications center does keep 911 call audio recordings according to its policy, it does not create transcripts from those audio recordings.
11. On July 13, 2022, I sent a letter denying the Request and advised that 911 transcripts did not exist within the Agency’s possession.

In the County’s second attestation, Ms. Dayoub attests that “[t]he Post-Mortem Examination Report that is sought by the Requester is not in the possession of the Board of Commissioners and Administration.” *See* Dayoub Second Attestation at ¶ 6.

Under the RTKL, a statement made under 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 County acted in bad faith or that the County possess the 911

transcripts, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

In this matter, the County has presented evidence that it does not possess the 911 transcripts and that “[w]hile the “911 communications center does keep 911 call audio recordings according to its policy, it does not create transcripts from those audio recordings.” Ms. Dayoub attests that through her search with the County Commissioners and Administration Department, including 911 communications, she “determined that responsive documents do not exist within the [County].”⁷ In regard to the Post-Mortem Report, Ms. Dayoub attests that the report “is not in the possession of the Board of Commissioners and Administration.” Moreover, the OOR has not been presented with any evidence that contradicts Ms. Dayoub’s statements.

Based on the evidence provided, including Ms. Dayoub’s attestations and the Requester’s acknowledgement that the County does not have records responsive to the Request, the County has demonstrated that it is “more likely than not” that the records responsive to the Request do not exist within its possession. Hence, the County has shown by a preponderance of the evidence that it does not possess the records sought.⁸ *Hodges, supra.*; see also *Campbell v. Pa. Interscholastic Athletic Assoc.*, 268 A.3d 502 (Pa. Commw. Ct. 2021), *petition for allowance of appeal granted upon other grounds*, Nos. 677 and 678 MAL 2021, 2022 Pa. LEXIS 889 (Pa. June 22, 2022) (an

⁷ The OOR notes that Section 708(b)(18) of the RTKL protects from disclosure “[r]ecords or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.” 65 P.S. § 67.708(b)(18). See *Frantz v. West Chester Bor. Police Dep’t*, OOR Dkt. AP 2022-1440, 2022 PA O.O.R.D. LEXIS 1864 (finding that 911 transcripts are facially exempt records pertaining to audio recordings by emergency dispatch personnel).

⁸ As noted in the Requester’s August 21, 2022, it appears that the Requester filed the instant appeal against the wrong agency and meant to file an appeal against the Bucks County District Attorney’s Office and the Bucks County Coroner’s Office, two separate agencies from the Bucks County Commissioners and Administration. The County explained that the Coroner’s Office has a separate Open Records Officer, Chris Serpico, who responded to the Request regarding the post-mortem examination. See County’s August 15, 2022 correspondence. The response of the Coroner’s Office is not at issue in this appeal.

agency meets its burden of proof under the preponderance of evidence standard when it demonstrates that it is “more likely than not” that no responsive records exist”).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the County is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks 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 according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁹ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 30, 2022

/s/ Lyle Hartranft

Lyle Hartranft, Esq.
Appeals Officer

Sent to: Andrew Cairns (via US Mail);
 Debbie Silva (via email);
 Christopher Serpico, Esq. (via email);
 Ashley Dayoub, AORO (via email)

⁹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).