



FINAL DETERMINATION

IN THE MATTER OF

**KELLY POTTEIGER,
Requester**

v.

**CUMBERLAND COUNTY SCHOOL
DISTRICT,
Respondent**

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Docket No: AP 2022-2096

INTRODUCTION

Kelly Potteiger (“Requester”) submitted a request (“Request”) to the Cumberland Valley School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking contract records and communications related to the agreement between the District and BLOCKSI. The Request was deemed denied and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On August 31, 2022, the Request was filed, seeking:

All records of contracts with [the District] and Blocks i showing cost, detailed agreement, and training materials for teachers and administrators for the years 2019, 2020, 2021, and 2022. Any communication between B[locks i] and [the District] administration from Jan[.] 1, 2021 and Aug[.] 23, 2022 regarding the software application and available use options.

The District did not reply within five business days, and the Request was deemed denied on September 8, 2022. 65 P.S. § 67.701.¹

On September 9, 2022, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 20, 2022, the District submitted a position statement that attached responsive records including, approximately 400 emails, the Blocks Education Agreement, Teacher Dashboard quote, the Blocks purchasing order and the User Training materials. The District claims that there are no additional responsive records in the District's possession, custody or control. In support of its position, the District submitted the affidavit of Tracy Panzer, the District Open Records Officer.

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).

¹ The District submitted a copy of a September 9, 2022, letter with the appeal submission, in which it attempted to invoke a thirty-day extension to respond based on Section 902(b) of the RTKL, 65 P.S. §67.902(b). However, in the position statement and Ms. Panzer's affidavit, the District acknowledges that the Request was received on August 31, 2022, and five business day from that date is September 8, 2022, due to the District being closed in observance of the Labor Day holiday on September 5, 2022. Pursuant to Section 902(b)(1), a thirty-day extension notice must be issued within five business days of the receipt of the Request. In this instance, the extension notice was untimely.

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 District 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 District provided records on appeal

During the course of the appeal, the District provided copies of responsive records. The District included approximately 400 emails, the Blocks i Education Agreement, Teacher Dashboard quote, the Blocks i purchasing order, the User Training materials and Cumberland Valley 1 Year Teacher Dashboard. In addition, Ms. Panzer affirms that teacher tutorials were provided to the District teachers through the following internet links: <https://blocks i.teachable.com> and <https://blocks i.net/teacherhub/>.² The Requester has not stated that she did not receive the records. Accordingly, the appeal as to the records provided with the District’s appeal submission is moot.

2. The District has demonstrated that no additional records exist

The District argues that, other than the records provided to the Requester during the course of the appeal, no additional responsive records exist within the District’s possession, custody or control. In support of the District’s argument, Ms. Panzer attests, the following:

3. In my capacity as the Open Records Officer, I am familiar with the records of the ... District....

5. Upon receipt of [the Request], I conducted a diligent review of Cumberland Valley School District’s records, including hard copy records and computer databases, for records responsive to [the Request].

6. In addition to searching hard copy and computer database records, I inquired with [the] District’s Director of Technology and Innovation, Chris Smith, as to whether [the] District’s Technology and Innovation Department had any records responsive to [the Request].

7. My search for electronic records yielded approximately 400 e-mail records.

² Section 704 of the RTKL provides that “an agency may make its records available through any publicly accessible electronic means,” 65 P.S. § 67.704(a).

8. In addition to the e-mail records, my search for responsive documents also yielded copies of the Blocks Education Agreement, Blocks User Agreement and Training Materials, Cumberland Valley 1 Year Teacher Dashboard, and Purchase Order between Blocks and CVSD.

9. Additionally, teacher tutorials were provided to CVSD teachers through the following internet links: <https://blocks.teachable.com> and <https://blocks.net/teacherhub/>.

Under the RTKL, a statement made under made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

In 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," in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court concluded that:

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

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018), *aff'd*, 243 A.3d 19 (Pa. 2020). Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open records officers have:

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

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access). The District’s evidence demonstrates that Ms. Panzer is familiar with the District’s records and that she also contacted the Director of the Technology and Innovation Department to identify and obtain responsive records. *See Mollick*, 32 A.3d at 875; *see also Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search has been conducted by an agency when it “contact[ed] the Bureau most likely to possess responsive records,... explain[ing] why that Bureau is most likely to possess those records.”) Further, the Requester has not presented evidence that other records do, in fact, exist. In the absence of any evidence that the District has acted in bad faith or that additional responsive 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)). The District does not claim RTKL exemptions related to the records and, based on a review of the records, it does not appeal that any were redacted. Therefore, based on the evidence provided, the District has met its burden of proving that the requested records were provided to the Requester in their entirety and that no additional responsive records exist within the District’s possession, custody or control. *See Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the District 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 Cumberland 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 6, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG ESQ.

Sent to: Kelly Potteiger (via email only);
Jason Statler, Esq. (via email only);
Tracy Panzer (via email only)

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