

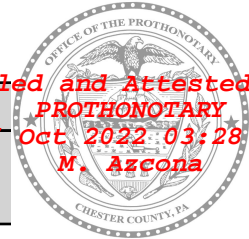
Supreme Court of Pennsylvania
Court of Common Pleas
Civil Cover Sheet
CHESTER County

For Prothonotary Use Only:

Docket No:

2022-08180-CS

Filed and Attested by
PROTHONOTARY
17 Oct 2022 03:28 PM
M. Azcona



The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

S E C T I O N A	Commencement of Action	
	<input type="checkbox"/> Complaint	<input type="checkbox"/> Writ of Summons
	<input checked="" type="checkbox"/> Petition	<input type="checkbox"/> Declaration of Taking
	<input type="checkbox"/> Transfer from Another Jurisdiction	
	Lead Plaintiff's Name: RICHARD A BREUER	Lead Defendant's Name: BOROUGH OF MALVERN
	Are money damages requested? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Dollar Amount Requested: <input type="checkbox"/> Within arbitration limits (check one) <input type="checkbox"/> outside arbitration limits
	Is this a Class Action Suit? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Is this an MDJ Appeal? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Name of Plaintiff/Appellant's Attorney: Richard A Breuer		
<input type="checkbox"/> Check here if you have no attorney(are a Self-Represented [Pro Se] Litigant)		

S E C T I O N B	Nature of the Case: Place "X" to the left of the <u>ONE</u> case category that most accurately describes your PRIMARY CASE . If you are making more than one type of claim, check the one that you consider most important.		
	TORT (do not include Mass Tort) <input type="checkbox"/> Intentional <input type="checkbox"/> Malicious Prosecution <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Nuisance <input type="checkbox"/> Premises Liability <input type="checkbox"/> Product Liability(does not include mass tort) <input type="checkbox"/> Slander/Label/Defamation <input type="checkbox"/> Other:	CONTRACT (do not include Judgments) <input type="checkbox"/> Buyer Plaintiff <input type="checkbox"/> Debt Collection: Credit Card <input type="checkbox"/> Debt Collection: Other <input type="checkbox"/> Employment Dispute: Discrimination <input type="checkbox"/> Employment Dispute: Other <input type="checkbox"/> Other	CIVIL APPEALS Administrative Agencies <input type="checkbox"/> Board of Assessment <input type="checkbox"/> Board of Elections <input type="checkbox"/> Dept. of Transportation <input checked="" type="checkbox"/> Statutory Appeal: Other <input type="checkbox"/> Zoning Board <input type="checkbox"/> Other:
	MASS TORT <input type="checkbox"/> Asbestos <input type="checkbox"/> Tobacco <input type="checkbox"/> Toxic Tort - DES <input type="checkbox"/> Toxic Tort - Implant <input type="checkbox"/> Toxic Waste <input type="checkbox"/> Other:	REAL PROPERTY <input type="checkbox"/> Ejectment <input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Ground Rent <input type="checkbox"/> Landlord/Tenant Dispute <input type="checkbox"/> Mortgage Foreclosure: Residential <input type="checkbox"/> Mortgage Foreclosure: Commercial <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Other:	MISCELLANEOUS <input type="checkbox"/> Common Law/Statutory Arbitration <input type="checkbox"/> Declaratory Judgement <input type="checkbox"/> Mandamus <input type="checkbox"/> Non-Domestic Relations <input type="checkbox"/> Restraining Order <input type="checkbox"/> Quo Warranto <input type="checkbox"/> Replevin <input type="checkbox"/> Other:
	PROFESSIONAL LIABILITY <input type="checkbox"/> Dental <input type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional		

2022-08180-CS

**Chester County
Court of Common Pleas
Cover Sheet**

Docket No:
2022-08180-CS

Plaintiff(s): (Name, Address) <p align="center">RICHARD A BREUER</p> 81 LANCASTER AVE STE 201 MALVERN, PA 19355	Plaintiff's/Appellant's Attorney(circle one) (Name, firm, address, telephone and attorney ID#) <p align="center">Richard A Breuer</p> (610) 647-4680 Richard A. Breuer, Attorney attorney ID#: 030065 81 Lancaster Ave, Ste 201, Malvern, PA 19355, US
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Defendant(s): (Name, Address) <p align="center">BOROUGH OF MALVERN</p> 1 E FIRST AVE, STE 3 MALVERN, PA 19355	Are there any related cases? Please provide case nos.
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Defendants who are proceeding without counsel are strongly urged to file with the Prothonotary a written statement of an address AND a telephone number at which they can be reached

Commencement of Action (if applicable): Agreement for an Amicable Action Motion to Confirm Arbitration Award
 Notice of Appeal

If this is an appeal from a Magisterial District Judgement, was appellant Plaintiff or Defendant in the original action?

Jury Trial Demanded Yes No

Nature of case if not on previous cover sheet - Please choose the most applicable

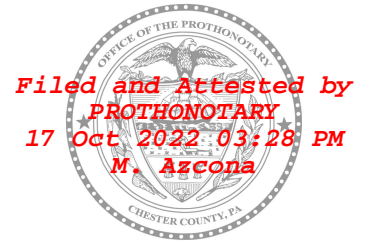
<input type="checkbox"/> Annulment <input type="checkbox"/> Custody - Conciliation Required <input type="checkbox"/> Custody - Foreign Order <input type="checkbox"/> Custody - No Conciliation Required <input type="checkbox"/> Divorce - Ancillary Relief Request <input type="checkbox"/> Divorce - No Ancillary Relief Requested <input type="checkbox"/> Foreign Divorce <input type="checkbox"/> Foreign Protection from Abuse <input type="checkbox"/> Paternity <input type="checkbox"/> Protection from Abuse <input type="checkbox"/> Standby Guardianship	<input type="checkbox"/> Writ of Certiorari <input type="checkbox"/> Injunctive Relief <input type="checkbox"/> Mechanics Lien Claim <input type="checkbox"/> Issuance of Foreign Subpoena <input type="checkbox"/> Name Change <input type="checkbox"/> Petition for Structured Settlement
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<p>Arbitration Cases Only</p> Arbitration Date <input style="width:150px;" type="text" value="mm/dd/yyyy"/> Arbitration Time <input style="width:150px;" type="text" value="hh:mm:ss"/> Defendants are cautioned that the scheduling of an arbitration date does not alter the duty of the defendant to respond to the complaint and does not prevent summary disposition form occurring prior to the arbitration date. This matter will be heard by a Board of Arbitrators at the time and date specified but, if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial <i>de novo</i> on appeal from a decision entered by a judge.	<p>Notice of Trial Listing Date</p> Pursuant to C.C.R.C.P. 249.3, if this case is not subject to compulsory arbitration it will be presumed ready for trial twelve (12) months from the date of the initiation of the suit and will be placed on the trial list one (1) year from the date the suit was filled unless otherwise ordered by the Court. To obtain relief from automatic trial listing a party must proceed pursuant to C.C.R.C.P. 249.3(b), request an administrative conference and obtain a court order deferring the placement of the case on the trial list until a later date.
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File with: Chester County Justice Center, Prothonotary Office, 201 W. Market St., Ste. 1425, PO Box 2746, West Chester, PA 19380-0989

These cover sheets must be served upon all other parties to the action immediately after filing.

Submit enough copies for service.



Richard A. Breuer, Esquire
81 Lancaster Avenue, Suite 201
Malvern, PA 19355-2157
610-647-4680
ID #30065

Petitioner, *pro se*

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

RICHARD A. BREUER, ESQ.	:	STATUTORY APPEAL
81 Lancaster Ave, Ste 201	:	
Malvern PA 19355	:	
Petitioner	:	
	:	
v.	:	NO.
	:	
BOROUGH OF MALVERN	:	
1 E First Ave	:	
Malvern PA 19355	:	
Respondent	:	

**PETITION FOR REVIEW OF DECISION
UNDER THE RIGHT-TO-KNOW LAW**

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Richard A. Breuer, Esq., hereby petitions this Honorable Court pursuant to the Right-to-Know Law (“RTKL”) 65 P.S. §67101 *et seq.* to review a Final Determination of the Pennsylvania Office of Open Records (“OOR”) at OOR Dkt. No. AP 2022-1959 regarding a request by petitioner to the Borough of Malvern for access to records.

This case presents what petitioner believes are questions of first impression under RTKL §902, which provides for an extension of time for an agency’s response to a request.

1. Petitioner Richard A. Breuer, Esq., is a citizen of the United States having an office at 81 Lancaster Ave, Ste 201, Malvern, PA 19355.

2. Respondent Borough of Malvern is a borough having its principal business address at 1 E First Ave, Malvern, PA 19355.

3. On June 29, 2022, petitioner emailed and RTKL request to the Borough for “[d]ocuments regarding the initiative [*sic*] process set forth in Section 1103 of the Malvern Home Rule Charter, including petition forms, instructions, policies, and procedures, other than the Charter itself.”

4. The Borough’s Open Records Officer, Borough Manager Tiffany M. Loomis, responded to the request by email on July 1, 2022. In that email, Ms. Loomis invoked an extension under RTKL §902 because, in her words,

1. Legal Review is required
2. The extent or nature of the request precludes a response within the required time period.

The email stated an expected response date of August 5, 2022.

5. Petitioner appealed to the OOR on July 1, 2022, challenging as pretextual the Borough's invocation of the §902 extension. That appeal was docketed by the OOR at Dkt. AP 2022-1561.

6. The OOR on July 6, 2022 dismissed the appeal at Dkt. 2022-1561 as premature. The OOR declined to review what it termed the Borough's "discretion to invoke such an extension." The OOR noted that "[t]he Requester is not prohibited from filing a new appeal to the OOR of any denial or deemed denial stemming from the request, pursuant to the requirements of 65 P.S. §67.1101(a)(1)."

7. The Borough provided its substantive response to the request on August 3, 2022, stating that "[a]fter a good faith search, no responsive records could be located."

8. Petitioner timely filed another appeal with the OOR, challenging the delay in the Borough's response. That appeal, dated August 24, 2022, was docketed by the OOR as Dkt. AP 2022-1959.

9. The OOR issued a Final Determination in Dkt. No. AP 2022-1959 on September 15, 2022, in which it held that the Borough had satisfactorily established that no responsive records existed and denied the appeal. (See Exhibit 1.) The OOR did not rule on the propriety of the Borough's delay in responding. This is the Final Determination being appealed in this action.

10. Petitioner does not challenge the Borough's assertion that no responsive records exist. What petitioner does challenge is the §902 extension invoked by the Borough. Petitioner avers that there is no factual support for the §902 extension. Petitioner further avers that the Borough's invocation of the extension is for improper purposes and as retaliation against petitioner and a client of petitioner's.

11. The Borough's September 6, 2022 position statement to the OOR seeks to shift responsibility for its delay to petitioner and an unnamed client of his: "[o]ne reason why it took so long is that Mr. Breuer and one of his clients have filed twenty-six (26) Right-to-Know requests with the Borough since January 1, 2022."

12. The client to whom the Borough Solicitor presumably refers is Danny S. Fruchter. The petitioner represents Mr. Fruchter in two consolidated appeals in Commonwealth Court of RTKL matters involving the Borough and in a case in this court against the Borough and its council members involving the Sunshine Act.

Petitioner has also represented Mr. Fruchter in several OOR appeals involving the Borough.

13. The Borough's reference to these past RTKL requests is nothing more than an *ad hominem* attack. The only previously-filed RTKL requests that could have delayed a response to the instant request were those which were still unprocessed at the time the instant request was filed. The Borough has provided no facts as to what requests, filed by petitioner, Mr. Fruchter, or anyone else were ahead in the queue on July 1, 2022. Based on information obtained from the Borough by a later request, petitioner believes that only a single request (filed by Mr. Fruchter) was pending on July 1, 2022.

14. The Borough also refers to staff shortages as affected by Covid-19. There is no question that Covid-19 has had a pervasive effect throughout the world. The Borough does not explain however, how Covid-19 affected its response to the instant request. The effect of prior staff absences due to Covid-19 would already be reflected in the response backlog as it existed on July 1, 2022. The Borough did not cite staff unavailability in its July 1, 2022 invocation of the §902 extension.

15. The Borough has expressly stated in its submissions to the OOR in a different matter that a delayed response for legal is justified because of other pending litigation between the Borough and Mr. Fruchter. See letter by Michael G.

Crotty, Esq., to Jordan Davis, Esq., of the OOR dated May 25, 2022, in OOR Dkt. AP. 2022-1178, p. 3, last paragraph. (See Exhibit 2.) The RTKL forbids consideration of the purpose of a request; §902(a)(4) does not include a delay for legal review because of other pending litigation.

16. The supposed determination that delay for “legal review” is required made by Ms. Loomis on July 1, 2022 is unfathomable. Since the Borough never located any responsive documents, Ms. Loomis could not have had any documents in hand on July 1, 2022 which would have evinced a need for legal review. And, the time required to for legal review of nonexistent documents, irrespective of the complexity of the review criteria, cannot be more than zero.

The Borough did not assert or support the “legal review” basis for an extension in its OOR submissions.

17. The initiative process set forth in Section 1103 of the Borough’s Home Rule Charter is part of the bedrock of the Borough’s governmental structure. It creates a fundamental right of the Borough’s citizenry. The Charter assigns to the Borough Manager specific responsibilities in the initiative process. Petitioner suggests that if documents (other than the Charter itself) relating to that process exist, they would be in the Manager’s files. The Borough’s files in fact contain documents regarding the previous Manger’s review of a petition on July 5, 2016. (The existence

of the previous petition was discovered by the petitioner by a review of the council meeting minutes after the instant request was filed. The memorandum referred to in the minutes was requested in a separate RTKL request, dated August 9, 2022, and produced by the Borough on August 15, 2022.)

18. Petitioner believes that the present Borough Solicitor has been the Solicitor since the passage of the Home Rule Charter in 2009 and more certainly since the presentation of the 2016 petition. Petitioner suggests that the Solicitor would have knowledge of whether responsive documents existed and would have been able to inform the staff's search.

19. RTKL §902 provides for extension of an agency's response time upon a determination by the agency's open records officer that one or more of seven circumstances exists. Petitioner suggests that the use of the word "determination" and the listing of seven specific criteria in §902 imply that the officer must have a factual basis on which to conclude that one or more of the criteria are met. A reading that the extension is based merely on the agency's 'discretion,' a word that appears nowhere in §902, untethered to any facts, would eradicate "determination" and the list of criteria. The result would be to permit an extension to be invoked arbitrarily.

20. Petitioner accepts the Borough's response that it has no responsive documents. Petitioner also accepts that since the extension period has now passed,

the question is technically moot. Petitioner suggests that this case should nevertheless be decided, since presents a question that is likely to reoccur and because of the timing issues would otherwise evade review. A decision construing the operation of §902 will be valuable to guide the parties in their future conduct.

21. RTKL §§1304 and 1305 provide for an award of counsel fees and costs and the imposition of a civil penalty for willful, wanton, of bad faith conduct by the Borough.

WHEREFORE, petitioner respectfully requests that the Court review the decision of the OOR, decide that RTKL §902 requires a factual basis for an extension, find that the Borough lacked a factual basis for the extension in this case, and award appropriate relief under RTKL §§1304 and 1305 as may be warranted by the facts.

Respectfully submitted,



Richard A. Breuer, Esquire

VERIFICATION

I, Richard A. Breuer, Esquire, hereby state that the facts set forth in the foregoing petition are true and correct to the best of my knowledge, information, and belief.

I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

October 17, 2022



Richard A. Breuer, Esquire



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
RICHARD BREUER,	:
Requester	:
	:
v.	: Docket No: AP 2022-1959
	:
MALVERN BOROUGH,	:
Respondent	:

On June 29, 2022, Richard Breuer (“Requester”) submitted a request (“Request”) to Malvern Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “[d]ocuments regarding the initiative [sic] process set forth in Section 1103 of the Malvern Home Rule Charter, including petition forms, instructions, policies, and procedures, other than the Charter itself.”

On July 1, 2022, the Borough invoked a thirty-day extension during which to respond to the Request. 65 P.S. § 67.902(b). On August 3, 2022, the Borough denied the Request, stating that no responsive records exist.

On August 17, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the 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. 65 P.S. § 67.1101(c).

On September 6, 2022, the Borough submitted a position statement arguing that it has no records responsive to the Request. In support of its argument, the Borough submitted the attestation of Corinne Badman, Assistant Borough Manager and Assistant Open Records Officer for the Borough.

On September 7, 2022, the Requester submitted a position statement addressing the following: “1) Claimed reasons for delay; 2) Other request for petition-related information; and 3) Evidence of pretext for delay.” *See* Requester’s September 7, 2022 position statement.

On September 6, 2022, the OOR contacted the parties asking the Borough to provide additional evidence on the search that was conducted. The OOR provided both parties the opportunity to present additional evidence/argument. On September 9, 2022, the Borough submitted the supplemental attestation of Ms. Badman, who attests as follows:

3. Upon receipt of the subject request in this appeal, I conducted a thorough examination of files in the possession, custody, and control of the Agency for records responsive to the request. Specifically, I undertook the following:
 - a. Consulted with the current Borough Manager, who was previously the Assistant Borough Manager;
 - b. Searched the emails sent or received by the prior Borough Manager, since the current Borough Manager and I knew that no such records had been created since we were hired to our current positions in 2021 and 2022, respectively;
 - c. Consulted with the Borough Treasurer, who has been in that position for twenty-five (25) years and worked closely with the prior Borough Managers;
 - d. Consulted with the Codes Enforcement Officer, even though it was unlikely that he had been involved in any such matters; and
 - e. Consulted with the Borough Solicitor, whose office has served in that capacity since 1999, and who advised that she was not aware of the existence of any such responsive records having been created by her or anyone else in her office.
4. I did not expect to find any records responsive to the subject request because “forms and instructions” for other matters, such as building permits and zoning applications, are kept in a “forms file” near the front desk for easy access. The

Home Rule Charter does not state that forms or instructions for the process(es) set forth in section 1103 thereof are provided or available.

5. As I continued through my other duties for the Borough, I “kept an eye out” for a file or any mention of any such records, as did the Borough Manager, in the event something had been created before our respective tenures and placed in some unlikely location. During that time, I was engaged in many assorted tasks and projects that required me to handle many files, both electronic and paper, regarding many different matters. Nonetheless, no records responsive to the subject request ever surfaced and/or were located.
6. Based upon the above-described search of the Agency’s files and inquiries with relevant Agency personnel, I have made the determination that the records requested are not within the Agency’s possession, custody, or control.

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, the Commonwealth Court outlined the elements of a good faith search in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), *aff’d* 243 A. 3d 19 (Pa. 2020). The Court noted that an Agency Open Records Officer (AORO) has a duty to:

1. Advise all custodians of potentially responsive records about the request;
2. Obtain all potentially responsive records from those in possession of the potentially responsive records;
3. Contact agents within its control, including third party contractors; and
4. Review the records and assess their public nature.

Id. In sum, an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents; an agency may do so by providing relatively detailed and non-conclusory affidavits submitted in good faith by officials or employees with knowledge of the records and the search for the records. *See Burr v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-0747; 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct.

2011); *In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the openrecords officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Here, the evidence before the OOR substantiates that Ms. Badman is an individual who is familiar with the Borough’s records. Ms. Badman specifically indicated who she contacted in search of the records responsive to the Request and that “[t]he Home Rule Charter does not state that forms or instructions for the process(es) set forth in section 1103 thereof are provided or available.” Badman attestation, ¶¶3-4. Under the RTKL, an attestation or statement made under penalty of perjury may serve as sufficient evidentiary support of the nonexistence of a record. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. 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 requested exist, “the averments in the [attestations] 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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Therefore, based on the evidence provided as outlined above, the Borough has met its burden of proving that it is not in the possession, custody or control of records responsive to the Request. *Hodges*, 29 A.3d 1190, 1192; *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 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).

For the foregoing reasons, the Requester’s appeal is **denied**, and the Borough 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 Chester County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 15 September 2022

/s/ Lyle Hartranft
Lyle Hartranft, Esq.
Appeals Officer

Sent via email to: Richard Breuer (via email only);
Corinne Badman, AORO (via email only);
Wendy McLean, Esq. (via email only)

¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

SIANA LAW

EXPERIENCE - SERVICE - RESULTS

MICHAEL G. CROTTY

mgcrotty@sianalaw.com

May 25, 2022

Via Email Only

jorddavis@pa.gov

Jordan Davis, Esquire

Commonwealth of Pennsylvania

Office of Open Records

333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

**Re: Danny Fruchter (Requestor) v. Malvern Borough (Respondent)
OOR Dkt. AP 2022-1178**

Dear Mr. Davis:

Our office represents Malvern Borough with regard to the above-captioned matter. Please allow this correspondence to serve as the response of the Borough and Borough's Open Records Officer to the above-referenced appeal filed by Requestor Danny Fruchter.

On March 21, 2022, Mr. Fruchter submitted three (3) Right to Know requests to the Borough, requesting:

1. The agendas, minutes, and published schedules for the meetings of the Finance and Administration Committee/Sub-Committee, the Public Safety Committee (and the Public Works Committee/Sub-Committee listed in the attachment). The agendas, minutes, and published schedules for all other meetings of the Finance & Administration Committee/Sub-Committee, the Public Safety Committee/Sub-Committee, and the Public Works Committee/Sub-Committee occurring after January 1, 2020.
2. Reports of the Finance & Administration Committee/Sub-Committee, the Public Safety Committee/Sub-Committee, and the Public Works Committee/Sub-Committee as approved by Borough Council on the dates in the attached list.

All other reports of the Finance & Administration Committee/Sub-Committee, the Public Safety Committee/Sub-Committee, and the Public Works Committee/Sub-Committee submitted to Borough Council since January 1, 2020.

3. All documents comprising the emails referred to in your report of the Finance & Administration Committee stated in the Borough Council's Minutes of April 21, 2020 under agenda items 4.c, including all attachments to the emails. Also, all documents referred to in the Committee's report as stated in the minutes.

On April 27, 2022, the requests were granted with respect to the documents that the Borough's Open Records Officer was able to locate, but redacted for information concerning an individual's family/medical status, with respect to matters of public safety that, if disclosed, would be reasonably likely to jeopardize or threaten public safety, and information that, if disclosed, would violate an individual's constitutional right of privacy per Sections 708(b)(2) and 708(b)(5) of the Right to Know Law ("RTKL") (specifically the redaction of a family/medical issue in one document). Records constituting or revealing confidential proprietary information were also withheld pursuant to Section 708(b)(11) of the act. *See also Pa. State Educ. Ass'n (PSEA) v. Office of Open Records*, 148 A.3d 142 (Pa. 2016); *Adams v. Pa. State Police*, 51 A.3d 322 (Pa. Cmwlth. 2012). A supplemental response to Request 2 was submitted on May 19, 2022. The Borough's responses to Mr. Fruchter's requests were as follows:

1. Your request for agendas, minutes, and published schedules for the meetings of the Committees/Sub-Committees listed in the attachment and for all other meetings of the Committees/Sub-Committees after January 1, 2020 is granted with respect to the enclosed documents that could be located by the Borough, but redacted for information concerning an individual's medical status, public safety that, if disclosed, would be reasonably likely to jeopardize or threaten public safety, and information that, if disclosed, would violate an individual's constitutional right of privacy per Sections 708(b)(2) and 708(b)(5) of the Right to Know Act. See also Pa. State Educ. Ass'n (PSEA) v. Office of Open Records, 148 A.3d 142 (Pa. 2016); Adams v. Pa. State Police, 51 A.3d 322 (Pa. Cmwlth. 2012).
2. Your request for reports of the Committees/Sub-Committees and all other reports of the Committees/Sub-Committees after January 1, 2020 is granted with respect to the enclosed documents that could be located by the Borough, but redacted for information concerning public safety that, if disclosed, would be reasonably likely to jeopardize or threaten public safety per Section 708(b)(2) of the Right to Know Act. Records constituting or revealing confidential proprietary information were also withheld pursuant to Section 708(b)(11) of the Right to Know Act.

3. Your request for all documents comprising the emails referred to in the report of the Finance and Administration Committee stated in the Borough Council Minutes of April 21, 2020, under agenda items 4.c, including all attachments to the emails and all documents referred to in the committee's report as stated in the minutes is granted with respect to the enclosed documents that could be located by the Borough. After a good faith search, the emails could not be located.

Mr. Fruchter asserts in his appeal the Borough's response to Request 1 does not include minutes or published meeting schedules. His sole remaining issue with the Borough's response to Request 2 is that the Borough provided no identification of documents that were withheld under Section 708(b)(11) of the RTKL. He further claims that the Borough should be required to produce the "requested emails and other documents referred to in Request 3 or satisfactorily explain why it cannot do so." Finally, Mr. Fruchter takes issue with the Borough's invocation of the thirty (30) day extension for legal review to respond to his requests.

Extension for Legal Review

The Borough's invocation of the extension for legal review was warranted. Mr. Fruchter's challenge to the extension is disingenuous. Mr. Fruchter filed a lawsuit against the Borough and individual Borough Council members on March 20, 2022 on the premise that the Borough violated the Pennsylvania Sunshine Act. This lawsuit is still pending. He has filed two (2) other lawsuits against the Borough within the past nine (9) months petitioning for judicial review under the RTKL, both of which were dismissed. As with his prior suits, he is using the RTKL process as an alternative to litigation discovery. By doing so, each of these requests necessarily requires a legal review of assigned counsel. Subsequent to his first three (3) requests, he submitted two (2) more requests; one (1) on April 21, 2022 and another on May 23, 2022. Therefore, his complaints and insinuations about the permitted extension period are ill-founded. Even so, under Section 1101 of the RTKL, the invocation of the thirty (30) day extension is not subject to the OOR's jurisdiction (as it is neither a denial or deemed denial under 65 P.S. § 67.1101(a)).

Appeal of Response to Request 1

The minutes and published meeting schedules in Request 1 do not exist. An Affidavit of Nonexistence of Records executed by the Borough Open Records Officer is enclosed. Under Section 705 of the RTKL, an agency is not required to create a record which does not currently exist in its custody, possession or control. *Moore v. Office of Open Records*, 992 A.2d 907 (Pa. Cmwlth. 2010). An agency's submission of an affidavit that no records exist may serve as sufficient evidentiary support. *Id.* In *Moore*, the requestor sought copies of documents that "[did] not currently exist" in the agency's possession. *Id.* at 908. The agency provided the OOR with an Affidavit of Nonexistence of Record swearing to the nonexistence of the record within the agency's possession. *Id.* at 908-909. The OOR determined that through submission of these documents, the Department demonstrated that the requested record did not currently exist and that the Department had satisfied its responsibilities under the RTKL. *Id.* at 909. The OOR denied the requestor's appeal, which was affirmed by the Commonwealth Court. *Id.* The Court added that it was obvious the agency could not grant access to a record that did not exist. *Id.* Similarly here, the Borough cannot grant access to documents that do not exist.

Appeal of Response to Request 2

Upon receipt of this appeal, it came to the Borough's attention that certain documents were inadvertently omitted from its April 27, 2022 response due to a technical error. On May 19, 2022, a supplemental response enclosing an additional one-hundred and ninety (190) pages of responsive documents was provided. These additional documents satisfy a portion of Mr. Fruchter's appeal regarding Request 2, as confirmed in his May 22, 2022 letter. Regarding his remaining issue with the Borough's response to Request 2, the Borough appropriately withheld documents constituting or revealing confidential proprietary information. Section 102 of the RTKL defines "confidential proprietary information" as:

Commercial or financial information received by an agency:

- (1) which is privileged or confidential; and
- (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

The withheld documents are renovation concepts for a Borough building that were prepared by a private third-party corporation, Arcus Design Group – Architects, Inc. (“Arcus”). These plans, architectural drawings, renderings, photographs and schematics are subject to copyright protection. Under the Copyright Act, the owner of copyrighted materials has the exclusive right to duplicate and authorize duplication of the copyrighted materials. 17 U.S.C. § 106; *Ali v. Phila. City Planning Comm’n*, 125 A.3d 92, 102 (Pa. Cmwlth. 2015). Therefore, the Borough cannot duplicate the copyrighted materials to produce them to Mr. Fruchter without exposing itself to liability under the Copyright Act. *See Ali*, 125 A.3d at 102-05.

Where a local agency refuses to duplicate a public record in response to a RTKL request by invoking the Copyright Act, review must be limited to determining whether the local agency has met its burden of proving facts sufficient to show that forced duplication of copyrighted material under the RTKL implicates rights and potential liabilities arising under the Copyright Act that can only be resolved by federal courts. *Id.* There is a conflict between the Copyright Act and the RTKL with respect to duplication where (1) the public record is protected under a copyright held by a third party and (2) the local agency does not have the consent of the copyright owner to the duplication of the public record in response to a RTKL request. *Id.* A local agency is under no obligation to seek out the copyright owner and endeavor to secure consent. *Id.* Here, the plans, architectural drawings, renderings, photographs and schematics are copyrighted materials and the Borough does not have the consent of Arcus to duplicate them. *See Ali*, 125 A.3d at 92 (approving redaction of architectural drawings of floor plans, maps, architectural schematics and artists’ renderings). See the attached Affidavit of Borough Manager Tiffany Loomis.

Appeal of Response to Request 3

The emails and documents in Request 3 could not be located. As stated above, under Section 705 of the RTKL, an agency is not required to create a record which does not currently exist in its custody, possession or control. *See* Section 705 of the RTKL; *Moore*, 992 A.2d at 907. The Open Records Officer began her tenure as Borough Manager in October of 2021. The request seeks an email that dates back to April 21, 2020, which is during a former employee’s tenure. She searched the physical and electronic records of the Borough (including the former employee’s email system). The email could not be located. The Affidavit of Borough Manager Tiffany Loomis confirms the same.

For the foregoing reasons, Mr. Fruchter's appeal should be denied. Please do not hesitate to contact our office if you require further information. We look forward to hearing from you as to this matter.

Very truly yours,

/s/ Michael G. Crotty

Michael G. Crotty

MGC/RTS/dml

Enclosure

cc: Tiffany M. Loomis, Borough Manager (via email only) (w/ encl.)
Wendy W. McLean, Esquire/Scott E. Yaw, Esquire (via email only) (w/ encl.)
Richard A. Breuer, Esquire (via email only) (w/ encl.)
Danny Fruchter (via email only) (w/ encl.)