



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
NICOLE RABENA AND LA LA LOBSTER,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2022-2124
	:	
YARDLEY BOROUGH,	:	
Respondent	:	

INTRODUCTION

On August 1, 2022, Nicole Rabena and La La Lobster (collectively “Requester”) submitted a request (“Request”) to Yardley Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking copies of zoning applications between January 1, 2020 and August 1, 2022 (“Item 1”), copies of outdoor dining applications and permits granted, denied and zoning violations between January 1, 2020 and August 1, 2022 (“Item 2”), and records referencing La La Lobster, Mil Lee’s Diner, Nicole Rabena, Frederick Rabena between January 1, 2020 and August 1, 2022 (“Item 3”). The Borough issued a response partially granting the Request and redacting certain information within the records under the attorney-client privilege. The Requester appealed the Borough’s response regarding Item 1 to the Office of Open Records (“OOR”). For the reasons set forth in this final determination, the appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the Borough is required to take further action as described below.

FACTUAL BACKGROUND

On August 1, 2022, the Request was filed, seeking:

1. Copies of zoning applications, zoning permits granted, Use and Occupancy permits/approvals granted, zoning permits denied and zoning notices between January 1, 2020 through August 1, 2022.
2. Copies of outdoor dining applications, outdoor dining permits granted, outdoor dining permits denied, outdoor dining notices and outdoor dining zoning violations issued between January 1, 2020 through August 1, 2022.
3. Records including emails, texts, invoices, applications, notices and correspondence referencing LaLa Lobster, Mil Lee's Diner, Nicole Rabena, Frederick Rabena between January 1, 2020 through August 1, 2022.

On August 30, 2022, following a thirty-day extension, 65 P.S. 67.902(b), the Borough issued a response ("Response") partially granting the Request, redacting certain information within the records under the attorney client privilege pursuant to 65 P.S. §§ 67.102 and 67.67.305(a)(2).

On September 12, 2022, the Requester appealed to the OOR, challenging the Borough's Response regarding Item 1 of the Request. The Requester did not appeal the County's application of the attorney-client privilege, but rather argues the Borough's Response to Item 1 was incomplete. Specifically, the Requester contends the Borough "did not provide copies of all zoning applications between January 1, 2020 through August 1, 2022." On September 13, 2022, the OOR sent a notice of appeal that invited the parties to supplement the record and directed the Borough to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On September 22, 2022, the Borough submitted a position statement arguing that all records responsive to Item 1 of the Request were provided following a thorough and good faith search. In support of its argument, the Borough submitted the notarized affidavits of Paula Johnson

("Ms. Johnson"), the Borough Manager and Agency Open Records Officer ("AORO"), Wes Foraker ("Mr. Foraker"), the Borough's Code Enforcement Officer and Emergency Management Coordinator, and Mark Sarson ("Mr. Sarson"), the Borough's former Zoning Officer/Planner. On September 22, 2022, the Requester responded to the Borough's submission, alleging that the Borough did not provide all records responsive to Item 1. The Requester explains there must be more zoning applications because there were several zoning hearings during the time period in question and the hearings require applications. The Requester points out that Item 1 of the Request is not limited to applications related only to the Requester, and reiterates that the Request seeks all zoning applications, not just the applications related to the Requester from January 2020 through August 1, 2022.

After reviewing the Borough's submission and affidavits, the OOR sought clarification from the Borough, asking whether all records relevant to Item 1 of the Request were provided. The Borough agreed to conduct a secondary search and the OOR sought an extension from the Requester to issue its Final Determination in order to ensure the record was fully developed. The Requester granted the OOR's request to extend the Final Determination due date to November 2, 2022, and the OOR extended the due date to file additional supplemental submissions to October 27, 2022.

The Borough's secondary search uncovered four additional records that were provided to the OOR and the Requester on October 10, 2022. On October 10, 2022, upon receipt of the additional records, the Requester again responded, alleging all applications were not provided in this case. The Requester reemphasized that the Request was not limited to the Requester's application, but all applications filed from January 2020 through August 1, 2022, explaining there

must be more applications based on the number of zoning hearing board hearings that occurred during the period in question.

On October 27, 2022, the Borough submitted its supplemental submission, along with the affidavits of Ms. Johnson, Mary Ann McLean (“Ms. McLean”), the Borough’s Right-to-Know Assistant and Recording Secretary for the Borough, Planning Commission, and Zoning Hearing Board. The Requester did not file any supplemental information in this case but reiterated that she is requesting all applications and maintains that the Borough incorrectly limited its search to the Requester’s applications.¹

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). This important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonable, probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing

¹ The OOR received several email messages after the record closed; however, to develop the record, the messages were considered. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

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

The Borough is a local agency subject to the RTKL. 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. As an agency subject to the RTKL, the Borough is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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. Additional responsive records were provided to the Requester during the appeal

The Requester alleges the Borough failed to provide all zoning applications between January 2020 and August 2022 in response to Item 1 of the Request. During the course of the appeal, the Borough conducted an additional search that located four previously unreleased records, including two “Request for Hearing Before Hearing Board” forms completed by the Requester, through counsel, and two partial zoning applications also associated with the Requester. These four responsive records were provided to the Requester and the OOR during the pendency of this appeal. Accordingly, insofar as the appeal pertains to the four records provided by the Borough in response to Item 1, it is dismissed as moot because the Borough provided these records during the pendency of this appeal and there is nothing further for the OOR to adjudicate relative

to the additional records. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Borough demonstrated that it conducted a good faith search and that no additional records exist as to the Requester, but the Borough did not demonstrate that all zoning applications were provided to the Requester in response to Item 1 of the Request

The Borough argues it conducted a good faith search and determined no additional responsive records exist. The Requester contends the Borough failed to provide all zoning applications from January 2020 through August 1, 2022. 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. 2013) (internal citations omitted), *aff’d* 243 A.3d 19 (2020); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open records officers have

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be

deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

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

Here, the Borough maintains it conducted a good faith search in determining that no additional responsive records exist. The September 20, 2022 affidavit of Ms. Johnson indicates:

1. I am the Borough Manager and Open Records officer for Yardley Borough, Bucks County, Pennsylvania.
2. Yardley Borough received a Right-to-Know [R]equest on August 1, 2022 from [the Requester], on behalf of LaLa Lobster.
- ...
4. I have made a good faith effort to determine whether the Borough has possession, custody or control of the records requested [in the Requester’s]...[R]equest, pursuant to 65 P.S. § 67.901.
5. Upon receipt of the ...[R]equest, I conducted a thorough search for and of Borough records kept at the Borough Office or hosted on the Borough server.
6. I also inquired with relevant Borough staff as to whether any records responsive to this [R]equest exist in their possession.
7. Specifically, I asked the Borough’s Code Enforcement Officer and the Zoning Officer and Planner to search for records responsive to this [R]equest.
8. On August 18, 2022, the Borough’s Code Enforcement Officer sent records identified as responsive to me for review.
9. On August 21, 2022, the Borough’s Zoning Officer and Planner sent records identified as responsive to me for review.

The Borough also provided the affidavit of Mr. Foraker, who states:

3. ...Ms. Johnson asked me to search my records, including emails, texts, invoices, applications, notices and correspondence, for anything referencing La La Lobster, Mil Lee's Diner, Nicole Rabena, and Frederick Rabena.
4. Ms. Johnson asked me to search during the timeframe January 1, 2020 through August 1, 2022.
- ...
6. I conducted a thorough search for and of my records, emails, texts, and other correspondence using the search terms provided within the timeframe specified.
7. On August 18, 2022, I provided Ms. Johnson with all of the records I identified as responsive to this [R]equest.

The Borough also provided the affidavit of Mr. Sarson, who states:

1. I am the former Zoning Officer/Planner for Yardley Borough, Bucks County, Pennsylvania.
2. I served as the Zoning Officer/Planner for Yardley Borough... .
3. Specifically, I served as the Zoning Officer/Planner for Yardley Borough from January 25, 2021 through August 26, 2022.
4. Paula Johnson, the Yardley Borough Manager and Open Records Officer, contacted me by email on August 18, 2022.
5. In her August 18, 2022 email, Ms. Johnson asked me to search my records, including emails, texts, invoices, applications, notices and correspondence, for anything referencing La La Lobster, Mil Lee's Diner, Nicole Rabena, and Frederick Rabena.
6. Ms. Johnson asked me to search during the timeframe January 1, 2020 through August 1, 2022.
- ...
8. I conducted a thorough search for and of my records, emails, texts, and other correspondence using the search terms provided within the timeframe specified.

Based on the Requester's contention that the Borough did not provide all zoning applications from January 2020 to August 1, 2022, and to ensure the Borough conducted a thorough search for all zoning applications and not just applications related to the Requester, the

Borough conducted another search for responsive records during the appeal, which revealed four additional responsive records related to the Requester, as discussed above. However, the additional search did not produce any additional applications. The Requester still maintains that the Borough is not providing all records because several zoning hearing board hearings occurred during the time period in question which, according to the Requester, necessarily indicates additional records exist because each hearing requires an application in order to trigger that hearing. The Requester points out that Item 1 of the Request is not limited to applications filed by the Requester, Nicole Rabena, or Frederick Rabena. Based on a review of the Borough's affidavits, it appears the Borough limited its search for applications under Item 1 of the Request to the Requester, Nicole Rabena, or Frederick Rabena. Ms. Johnson's supplemental affidavit, dated October 27, 2022, describes in detail the records provided to the Requester in this case. Johnson Affidavit ¶¶ 16-22. Ms. Johnson further states: "I attest, to the best of my understanding and belief, no zoning applications or zoning-related documents received or generated by the Borough and identified as a responsive record using the parameters of [the Requester's] August 1, 2022...[R]equest were withheld from [the Requester] in the Borough's August 31, 2022 [R]esponse." Johnson Affidavit ¶ 25.

The Borough also provided the affidavit of Ms. McLean, who says:

1. I am the Right-to-Know Assistant for Yardley Borough, Bucks County, Pennsylvania.
2. I also serve as the Recording Secretary for Yardley Borough (which includes mandatory attendance at Council meetings and at Planning Commission and Zoning Hearing Board meetings as needed).
3. I am familiar with the records maintained by the Borough.

...

12. I am aware of a September 29, 2022 email exchange between [the Requester], [the undersigned Appeals Officer], and the Borough's Solicitor suggesting that I locate Zoning Hearing Board records, including zoning hearing applications, as Ms. Johnson was out of the country at this time and thus unable to perform any additional searches.

...

14. In my capacity as the Borough's Right-to-Know Assistant, I contacted Mr. Joseph Caracappa, the Solicitor for the Borough's Zoning Hearing Board ("ZHB").

15. I asked Mr. Caracappa whether the ZHB was in possession of any ZHB applications filed by Ms. Rabena or La La Lobster in 2020, 2021, or 2022.

16. Mr. Caracappa provided me with two full zoning applications submitted by [the Requester] and/or La La Lobster during that timeframe.

...

18. I also made a good faith effort to determine whether the Borough has possession, custody or control of the subsequent or additional records requested, pursuant to 65 P.S. § 67.901.

19. I conducted my own thorough search for responsive records kept or maintained at the Borough office.

20. My search was conducted independent of Ms. Johnson's or Mr. Caracappa's searches.

21. I specifically searched for zoning records, including zoning applications, zoning hearing applications, and ZHB applications.

22. I identified two partial zoning application documents in the Borough's possession.

23. I did not identify any other records responsive to [the Requester's] original ... Request or subsequent document clarifications suggested by [the Requester] or [the undersigned Appeals Officer].

...

25. I attest, to the best of my understanding and belief, that I provided all additional responsive records to the Borough Solicitor, either by including the Borough Solicitor on emails with Mr. Caracappa or by sending the documents to the Solicitor directly.

Under the RTKL, a sworn affidavit is generally competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Borough acted in bad faith, "the averments in [the sworn affidavits] 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 Borough demonstrated that all applications related to the Requester and the remaining records sought in Item 1, during the time period in question have been provided. Thus, as to applications filed by the Requester and the remaining records sought in Item 1 from January 2020 through August 1, 2022, the appeal is **denied in part** because the Borough met its burden in describing a good faith search and demonstrated no additional records exist within its possession, custody or control.

However, the Borough's evidence falls short of demonstrating that there are no other zoning applications that were filed by other individuals between January 2020 through August 1, 2022. It seems the Borough's initial search and supplemental search focused on applications filed by the Requester, and the Borough did not prove that it conducted a sufficient search for all zoning applications from January 2020 through August 1, 2022. A plain reading of Item 1 of the Request does not contain any such limitation. An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013- 0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling v. Office of*

Open Records, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). To the extent that the Request seeks *all* zoning applications during the timeframe specified in Item 1 of the Request, the appeal is **granted in part**. The OOR is mindful that an agency “shall not be required to create a record which does not currently exist...” 65 P.S. § 67.705. The Borough is therefore directed to conduct a good faith search for all zoning applications filed during the time period in question and provide such records to the extent they exist. If no records are located as a result of this search, the Borough shall inform the Requester of such in an affidavit or attestation and explain the search that was conducted. *See, e.g., Campbell v. Galetton Area Sch. Dist.*, OOR Dkt. AP 2018-2175, 2019 PA O.O.R.D. LEXIS 45; *Kowalchick v. Norwegian Twp.*, OOR Dkt. AP 2018-22127, 2019 PA O.O.R.D. LEXIS 48.

Based on the Borough’s affidavits provided in both the original September submission and its October supplemental submission, the OOR finds that the Borough has met its burden of proof to show it conducted a good faith search, and provided responsive records as it relates to zoning applications regarding Requester, along with the other records sought in Item 1, but not as it relates to all zoning applications filed from January 2020 to August 1, 2022 and the appeal is therefore **granted in part and denied in part**. *Hodges*, 29 A.3d at 1192; *Pa. Dep’t of Health v. Mahon*, 2022 Pa. Commw. LEXIS 136, at *11 (Commw. Ct. Aug. 19, 2022).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part and dismissed as moot in part**, and the Borough is required to search for all zoning applications between January 1, 2020 through August 1, 2022 and if any responsive records exist, provide them to the Requester within thirty days of the date of this Final Determination and if no additional records are found to be responsive to Item 1 of the Request, the Borough shall inform the Requester and explain the

search that was conducted.. 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 as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 1, 2022

/s/ Lois Lara

APPEALS OFFICER
LOIS LARA

Sent to: Nicole Rabena, (via email only);
Sarah Steers, Esq. (via email only); and
Paula Johnson, AORO (via email only)

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