



FINAL DETERMINATION

IN THE MATTER OF

**PAUL EDLING,
Requester**

v.

**SCHUYLKILL HAVEN BOROUGH,
Respondent**

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Docket No: AP 2022-2230

FACTUAL BACKGROUND

On September 8, 2022, Paul Edling (“Requester”) filed a request (“Request”) with Schuylkill Haven Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking certified electronic copies of:

1. [A]ny and all [records, including,] but not limited to[,] maps[,] documents, easements[,] right[s]-of-way[and] deed changes pertaining to Eaton Street behind N. Garfield Ave.
2. [A]ll highway department committee reports and meeting minutes, all Borough Council meeting minutes and any special meeting minutes and planning committee meeting minutes [and] reports from 6/1/2000 to 6/3/2003.
3. [A]ll [records, including,] but not limited to[,] meeting minutes, engineer notes, recommendations e[tc.] from the planning commission, highway division and Borough council [related to] the approval of the subdivision.

On September 12, 2022, the Borough acknowledged receipt of the Request and noted that a response would be forthcoming. However, the Borough did not invoke a thirty-day extension of

time to respond; accordingly, when the Borough did not issue a final response by September 15, 2022, the Request was deemed denied. *See* 65 P.S. § 67.901.¹

On September 23, 2022, the Requester filed an appeal with the Office of Open Records (“OOR”), arguing that the Request was deemed denied and stating grounds for disclosure.² 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. *See* 65 P.S. § 67.1101(c).

On October 4, 2022, the Borough submitted a position statement, arguing that the appeal was premature. *See* 65 P.S. § 67.1101(a)(1) (stating that an appeal may be filed within 15 business days of an agency’s denial or the deemed denial of a request). The next day, the Borough noted that the general Borough map from 2001, the Borough’s FEMA map and the map of the relevant subdivision exist only as hard copies and are available for inspection. However, the Borough provided copies of the applicable ordinance, the Pennsylvania Liquid Fuels Map, the Borough’s Zoning Map and Borough Council meeting minutes. The Borough argues that no other meeting minutes exist. In support, the Borough submitted a statement made under the penalty of unsworn falsification to authorities by Kaitlyn Tinari, Secretary of the Borough Council and the Borough’s Open Records Officer. The Borough also submitted an unsworn certificate verifying that the meeting minutes are true and correct.

On October 14, 2022, in response to the OOR’s inquiry, the Requester indicated that he is not satisfied with the records produced by the Borough. Because the Requester’s submission included a picture of the subdivision map dated October 29, 2021, as referenced by the Borough,

¹ Section 902(b)(2) of the RTKL governs an agency’s ability to invoke an extension to respond, stating a notice invoking an extension “shall include a statement notifying the requester that the request for access is being reviewed, the reason for the review, a reasonable date that a response is expected to be provided and an estimate of applicable fees owed when the record becomes available.” 65 P.S. § 67.902(b)(2).

² The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

the OOR inquired whether he had inspected the records that the Borough had made available. On November 18, 2022, the Requester noted that he had inspected the map at the Schuylkill County Courthouse and had not inspected records at the Borough's office.

LEGAL ANALYSIS

1. The Borough must provide certified copies

The Borough notes that the general Borough map from 2001, the Borough's FEMA map and the relevant subdivision map exist only as hard copies and are available for inspection.

Section 705 of the RTKL frees agencies from the obligation "to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. § 67.705; *see also Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that an agency cannot be made to create a record that does not exist). Meanwhile, Section 701 of the RTKL provides that "[a] record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists." 65 P.S. § 67.701. The RTKL does not define "medium;" however, the OOR has defined it "as the substance through which something is transmitted or carried, a 'means,' such as on paper or on the hard-drive or on a database or over the internet." *Acton v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2009-0926, 2009 PA O.O.R.D. LEXIS 786, *aff'd*, No. 2010-719 (Wash. Com. Pl. July 26, 2011), *aff'd*, 38 A.3d 1092 (Pa. Commw. Ct. 2012), *petition for allowance of appeal denied*, 57 A.3d 72 (Pa. 2012).

Here, the Request sought electronic copies, meaning that he seeks records in an electronic medium. Per Section 705 of the RTKL, the Borough is not required to convert these records into an electronic medium. 65 P.S. § 67.705; *see also Ayoob v. Glenfield Borough*, OOR Dkt. AP

2021-1513, 2021 PA O.O.R.D. LEXIS 1560 (acknowledging that the agency was not required to create electronic copies of records that existed only as hard copies); *Ayoob v. Haysville Borough*, OOR Dkt. AP 2021-1565, 2021 PA O.O.R.D. LEXIS 1651 (same). However, the Request seeks copies, the Requester indicated on the Request form that he does not want to inspect the records, and the Borough has presented no evidence that these records cannot be copied.

Further, the Requester seeks certified copies. Under the RTKL, “[i]f an agency’s response grants a request for access, the agency shall, upon request, provide the requester with a certified copy of the record if the requester pays the applicable fees....” 65 P.S. § 67.904. In *Philadelphia District Attorney’s Office v. Cwiek*, the Commonwealth Court concluded that:

[A] “certified copy” of a responsive record under the RTKL is more than simply the agency’s records officer’s attestation that he or she has made a true and correct copy of a document in an agency’s possession. Instead, it verifies the authenticity of the document for purposes of admitting the record as evidence during pending or future litigation.

196 A.3d 711, 715 (Pa. Commw. Ct. 2017) (citing *Butler v. Dauphin Cnty. Dist. Attorney’s Off.*, 163 A.3d 1139, 1145 (Pa. Commw. 2017) (“This RTKL certification is equivalent to certifying copies for admission into evidence; stated differently, the agency is certifying as to the authenticity of the copies being provided.”).

The Borough has submitted an unsworn certificate verifying that the meeting minutes are true and correct. Aside from the fact that it is neither sworn nor made pursuant to the penalty of unsworn falsification to authorities,³ this statement is insufficient because it does not verify the

³ The OOR notes that either a sworn affidavit or an attestation made pursuant to the penalty of unsworn falsification to authorities is sufficient under the RTKL. See *Cwiek*, 196 A.3d at 715; *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).

authenticity of the records. *See id.* Accordingly, the Borough must provide the Requester with certified copies of the redacted records upon the payment of applicable fees.⁴

2. No other records exist

The Borough argues that no other records exist, and the Tinari attestation establishes that the Borough searched for responsive records and provided them to the Borough's solicitor. Tinari attestation at ¶¶ 3-5. The solicitor then provided the records to the Requester.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. In the absence of any evidence that the Borough has acted in bad faith, "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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). However, the Requester challenges the absence of any records related to the approval of the referenced subdivision, which was approved by the Borough's Planning Commission. He argues that records should exist.

In *Pennsylvania Department of Health v. Mahon*, the Commonwealth Court discussed the evidence required to establish the absence of records, quoting its previous decision in *Hodges v. Pennsylvania Department of Health*, which held that an agency "may satisfy its burden of proof ... with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." *Mahon*, No. 1066 C.D. 2021, 2022 Pa. Commw. LEXIS 136, *29,

⁴ The RTKL provides that the OOR shall establish fees to be charged by agencies. 65 P.S. § 67.1307(b)(1)(i). The OOR has established a fee schedule which permits agencies to charge up to \$0.25 per copy plus the actual cost of postage. *See* Official RTKL Fee Schedule, <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm>. Additionally, Section 1307(c) of the RTKL permits agencies to "impose reasonable fees for official certification of copies if the certification is at the behest of the requester and for the purpose of legally verifying the public record." 65 P.S. § 67.1307(c); *see also* Official Fee Structure, *supra* (recommending no more than \$5.00 per record for certification fees). Additionally, the RTKL favors a contemporaneous exchange of fees for records. However, under no circumstances is an agency required to provide records to a requester without first receiving the applicable fees. *See Ayoob, supra*; *Bowen v. Pa. Dep't of Corr.*, OOR Dkt. AP 2021-0709, 2021 PA O.O.R.D. LEXIS 732.

publication ordered, Oct. 18, 2022 (quoting *Hodges*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011)); *see also Campbell v. Pa. Interscholastic Athletic Ass’n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry), *appeal granted on other grounds*, 2022 Pa. LEXIS 889 (June 22, 2022). The *Mahon* Court found that the OOR erred in rejecting the agency’s affidavit solely on the basis that it was conclusory, reasoning that where there is no evidence of bad faith or that records exist, “[i]t is questionable to what degree additional detail and explanation are necessary to establish the nonexistence of a record rather than its exemption from disclosure.” 2022 Pa. Commw. LEXIS at *29.

Here, the Requester argues that additional records should exist, because the subdivision was approved by the Borough’s Planning Commission. While the Tinari attestation does not describe the search in detail, the OOR notes that the Borough has obviously searched for records and provided a number of these records to the Requester. Furthermore, the Request seeks records from approximately 20 years ago. *See* 65 P.S. § 67.507 (“Nothing in this act shall be construed to modify, rescind or supersede any record retention policy or disposition schedule of an agency....”). Finally, the Requester’s unsworn argument that records should exist without more does not overcome the evidence provided by the Borough, which the OOR finds to be credible. Accordingly, the OOR concludes that the Borough has met its burden of proving that it is more likely than not that no additional records exist in the Borough’s possession, custody or control. *See Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the Borough is required to provide certified copies of the records as set forth above. 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 Schuylkill 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 29, 2022

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent via email to: Paul Edling, Mark Semanchik, Esq., and Kaitlyn Tinari

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