

On January 3, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 13, 2023, the City submitted a position statement reiterating its grounds for denial. In support of its position, the City submitted the attestation, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of its Open Records Officer, Candice Newsome (“Newsome Attestation”).

LEGAL ANALYSIS

The City 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 City 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)).

In this instance, the City argues that the requested records are exempt from disclosure pursuant to the Uniform Construction Code (“UCC”). *See* 34 Pa. Code § 403.85(e). Section 403.85 of the UCC provides, in pertinent part, as follows:

² The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

The Department [of Labor and Industry], a municipality and a third-party agency acting on behalf of a municipality may prohibit release of applications received, building plans and specifications, inspection reports and similar documents to the public under the act of June 21, 1957 (P. L. 390, No. 212) known as the Right-to-Know Law (65 P.S. §§ 66.1 - 66.9)....

34 Pa. Code § 403.85(e). The UCC expressly states that the City may prohibit the release of “building plans.” *Id.*; see also *Walkauskas v. Town of McCandless*, OOR Dkt. AP 2013-1195, 2013 PA O.O.R.D. LEXIS 681 (finding that the UCC exempts building plans and specifications from disclosure).

In support of the City’s position, the Newsome Attestation states:

1. I am the open records officer for the City....
2. In Docket# AP 2023-00006[][,] [t]he Request[e]r seeks building plans for [the specified property].
3. The [R]equest stated: “Request for Building Plan for [the specified property].”
4. Section 403.85(e) of the UCC specifically exempts building plans from disclosure under the R[TKL].
5. Herein, the [R]equest is for “building plans[.]”[]
6. Section 403.85(e) exempts “building plans” from disclosure. Accordingly, the [R]equest was denied.

See Newsome Attestation.

Under the RTKL, a sworn affidavit or statement made under the 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 City acted in bad faith, “the averments in [the statement] 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)). However, an agency cannot rely on conclusory statements to sustain its

burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *see also Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency’s conclusory affidavit was insufficient); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d at 659 (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*). Nonetheless, in *Office of the Governor v. Davis*, the Commonwealth Court held that an affidavit may be unnecessary when an exemption is clear from the face of the record. 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (*en banc*).

Here, although the Request appears to seek records that are explicitly protected from disclosure under the UCC, the UCC’s implementing regulations specifically provide that the UCC applies “to every building or structure...on or after April 9, 2004, and all existing structures that are not legally occupied.” 34 Pa. Code § 403.1(1). The sales listing for the property specified in the instant Request, which was submitted by the Requester as part of the appeal, indicates that the building was constructed in 1955.³ However, the City’s evidence does not address Section 403.1(1) of the UCC, nor does the City provide evidence refuting the sales listing provided by the Requester. Further, there is no evidence in the record suggesting that improvements occurring after April 9, 2004 were made to the building.⁴ As such, based on the evidence provided, the City did not demonstrate that the responsive building plans are exempt from disclosure pursuant to the UCC, and thus, also did not demonstrate that the responsive building plans are not public records under the RTKL. *See* 65 P.S. § 67.102 (any record that is “exempt from being disclosed under

³ *See* <https://www.foxroach.com/ListingDetails/500-W-9TH-ST-CHESTER-PA-19013/PADE2036754>.

⁴ It is not incumbent upon the OOR to request additional evidence when developing the record. *See Highmark, Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017).

any Federal or State law or regulation or judicial order or decree” is not a public record). Accordingly, insofar as the responsive building plans predate April 9, 2004, the responsive records must be provided to the Requester. Nevertheless, insofar as any building plans do not predate April 9, 2004, those records are not required to be disclosed by the City because the records are expressly exempt from disclosure pursuant to the UCC, and thus, are not public records under the RTKL. *See* 34 Pa. Code § 403.85(e), 65 P.S. § 67.102; *see also* *Davis*, 122 A.3d at 1194.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and, within thirty days, the City is required to provide all responsive records as described 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 Delaware 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 24, 2023

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO

Sent via email and OOR E-file portal to: Laura Blenman
 Carl W. Ewald, Esq.
 Candice Thompson-Newsome

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