



FINAL DETERMINATION

IN THE MATTER OF

**ROBERT SCRIPP,
Requester**

v.

**WHITAKER BOROUGH,
Respondent**

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Docket No: AP 2022-2614

FACTUAL BACKGROUND

On October 25, 2022,¹ Robert Scripp (“Requester”) submitted a request (“Request”) to Whitaker Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking,

- 1) Report on sidewalk located at 118 Whitaker Way by Whitaker Code Enforcer. Inspection was performed on October 13, 2022.
- 2) Ordinance on sidewalk condition
- 3) A written record on how many times I called on this matter.

On October 27, 2022, the Borough invoked a thirty-day extension during which to respond to the Request. 65 P.S. § 67.902(b). On November 7, 2022, the Borough issued a response granting the Request and provided access to the Inspection Record from October 13, 2022, the ordinance on sidewalk conditions, and a written record of how many times the Requester called regarding

¹ The Requester states that he submitted the Request on October 20, 2022, but the Borough acknowledges that it received the Request on October 25, 2022.

the condition of the sidewalk at 118 Whitaker Way. On November 10, 2022, the Borough provided an amended final response, correcting the inspection date listed in the prior response to October 12, 2022. The final response also provided that the Building Inspector/Code Enforcement and Zoning Officer who performed the inspection to be Edward M. Crates.

On November 17, 2022, the Requester appealed to the OOR, challenging the responsiveness of the disclosures.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. 65 P.S. § 67.1101(c).

On December 12, 2022, the Borough submitted a position statement asserting that in response to the Request, it conducted a good faith search, granted access to all responsive records, and had no additional records. In support of its position, the Borough submitted the attestation of Jean Warren, Agency Open Record Officer for the Borough (“AORO”).³

On December 12, 2022, the Requester submitted a position statement and asserted that he had called the AORO regarding how bad the sidewalk pad had gotten.⁴

² With his appeal form, the Requester also included a second RTKL request submitted to the Borough on November 17, 2022 for correspondence regarding the sidewalk; however, the appeal form only references the Request submitted in October and the “Records Requested” section of the form states that inspection records are those at issue in the appeal, not correspondence. Regardless, the records demonstrates that the Borough invoked a timely extension to the November request and, if it were at issue, the appeal of the same would be premature. Finally, in its attestation, the Borough established that it does not possess records responsive to the November request.

³ The Warren Attestation was made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

⁴ The Requester’s submissions were not made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities. Further, the Requester stated that he had been bound to a wheelchair for more than 20 years and never been in such a position, asserting that the sidewalk in question was sunk, cracked, and falling apart.

LEGAL ANALYSIS

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). The preponderance of the evidence standard 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 Borough proved that no additional responsive records exist

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. The RTKL does not define the term “good faith effort.” However, 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.

Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr., 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal citations omitted).

Under the RTKL, a sworn attestation may serve as sufficient evidentiary support for the nonexistence of records. *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 or that the records exist, “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 *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the Warren Attestation states:

1. I am employed by the [Borough] as the Borough Secretary, and I am the only office personnel which the Borough employs.
2. As part of my duties as a Borough Secretary, I serve as the [AORO], and I am responsible for responding to the Right-to-Know Requests filed with the Agency.
3. In my capacity as the AORO, I am familiar with the records of the Agency.
4. On or about October 20, 2022, [Requester] submitted [the Request] [...]
5. On behalf of the Agency, on October 27, 2022, I invoked a thirty (30) day extension to respond to the request due to bona fide staffing limitations and the necessity of a legal review by the Borough’s Solicitor.
6. Thereafter, I began my good faith search for documents, by reviewing the file associated with 118 Whitaker Way and the sidewalk located in front of the property, subject to the [Request].
7. Additionally, I contacted Edward Crates of Martone Engineering that serves as the Agency’s code enforcement officer and Richard Lassiage who serves as the Agency’s Deputy Code Enforcement Officer.
8. Outside of the Agency’s records, which I maintain, and those in possession of Mr. Crates and Mr. Lassiage, there are no other locations or third parties which would be in possession of documents responsive to the [Request].
9. Once I completed a thorough search of the records, I compiled the responsive records and provided them to the Requester, which included:
 - a. A report on the sidewalk located at 118 Whitaker Way that was performed on October 12, 2022.
 - b. An ordinance, namely the International Property Maintenance Code regarding sidewalks, and written record on how many times the Requester called my office regarding the Sidewalk located at 118 Whitaker Way.
10. After the results of my good faith and thorough search of the Agency’s records and by contacting appropriate third parties who may be in possession of documents, I can verify that there are no additional documents responsive to the [Request] and that the Requester received all documents that were responsive to [the Request].

The AORO attests that she is the sole employee of the Borough, is familiar with the Agency records, and that she conducted a search for all responsive records. The AORO also shows that she searched the Borough's records and contacted third parties who might know of or possess the requested records. As a result, the AORO conducted a good faith search. *See Pa. Dep't of Health v. Mahon*, 2022 Pa. Commw. LEXIS 136 (Pa. Commw. Ct. 2022); *see also Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294. After the search, the AORO attests that she provided all the responsive records to the Requester and that the Borough, or the relevant third parties, have no additional records responsive to the Request.

The Requester submitted that he has communicated with the AORO regarding the condition of the sidewalk. This submission is not sufficient to create a showing of a search done in bad faith or that additional records exist within the Borough's custody, possession, or control responsive to the Request. As a result, the Borough has proven that it conducted a good-faith search and that no additional responsive records exist.

CONCLUSION

For the foregoing reasons, the 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 Allegheny 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>.

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

FINAL DETERMINATION ISSUED AND MAILED: January 25, 2023

/s/ Berk V. Demiral

BERK V. DEMIRAL
APPEALS OFFICER

Sent via email to: Robert Scripp
Jean Warren
Joseph Dalfonso, Esquire