



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**ERIN BECKES,  
Requester**

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**v.**

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**Docket No: AP 2022-2826**

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**NORTH EAST SCHOOL DISTRICT,  
Respondent**

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### **FACTUAL BACKGROUND**

On October 31, 2022, Erin Beckes (“Requester”) submitted a request (“Request”) to the North East School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 et seq., stating,

Date range for public documents - May 2022 - Present date of this request

Request Public documents identifying - all public Board meeting minutes approving all legal fees/invoices or statements submitted by Knox Law, correspondence(s) to/from Knox Law - all court correspondences and documents of both Knox Law & NESD respective personnel, canceled checks, approved by the NESD Board of Directors, submitted by Superintendent, Dr. Hartzell and/or Board President Mobilia to/by the Knox Law Firm relative to the initiating court proceedings against Constable John Wilson which the Board of School Directors approved.

On November 7, 2022, the District invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On December 7, 2022, the District granted the Request in part, informing the

Requester of where the board meeting minutes are publicly available online. The District also provided access to copies of the requested canceled checks and court correspondence, including a copy of the complaint filed against Constable John Wilson. The District denied access to two emails which the District argued were protected from disclosure by the attorney-client privilege and the RTKL exemption for internal, predecisional deliberations of the District. *See* 65 P.S. §67.708(b)(10). The District further asserted that no other responsive records existed in its possession, custody, or control.

On December 20, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> Specifically, the Requester asserted that the District did not provide legal invoices identifying the legal fees in the complaint against Constable John Wilson and that all checks were illegible to identify the payees. The Requester also included eight points listing why the District's final response did not adequately address the Request. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 22, 2022, the District submitted a position statement reiterating its grounds for denial.<sup>2</sup> It argued that the Requester did not challenge the denial of the records containing privileged emails and predecisional deliberations, asserting that the appeal was waived as to these issues. The District further argued that the Requester attempted to modify the original Request on appeal, noting that seven of the eight enumerated items listed in the Requester's appeal documents

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<sup>1</sup> 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).").

<sup>2</sup> The factual assertions in all the position statements submitted by the District during the course of this appeal were affirmed by Jeff Fox, Agency Open Records Officer, subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

were not part of the original Request. The District stated that the checks were provided to the Requester in the condition that they had been received from the bank.

On December 31, 2022, the Requester submitted a position statement and argued that there was a Sunshine Act violation because there was no verification or validation of the complaint against Constable John Wilson.<sup>3</sup> The Requester also claimed that the District did not provide all court documents pertaining to John Wilson, such as written court transcripts and the court's final ruling. In addition, the Requester argued that the invoices provided did not correspond with each canceled check.

On January 6, 2023, the District responded and claimed, as well as reiterating prior arguments, that the Requester did not offer her December 31, 2022, submission under penalty of perjury. As such, it was not admissible in the instant proceeding.

On January 12, 2023, The Requester made an additional submission and argued that the District was interpreting the Request inaccurately.

On February 17, 2023, the OOR provided the District with additional time to supplement the record until February 21, 2023, and particularly requested more information regarding the responsive communications. The OOR also specifically asked for an attestation or an affidavit addressing the existence of additional responsive records.

On February 20, 2023, the Requester demanded a forensic audit of the District's and Knox Law Firm's servers in case an affidavit indicated no additional responsive records. The Requester reiterated that the District had not obtained responsive documents from the Court Administrative Office and was obligated to do so.

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<sup>3</sup> None of the Requester's submissions during the course of this appeal were made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

On February 21, 2023, the District made additional submissions and reiterated that the Requester did not preserve the denial of emails as an issue on appeal. Alternatively, the District argued that the two responsive emails were not subject to disclosure because they contained internal predecisional and privileged attorney-client communications. The District disclosed the body of the emails in question while maintaining that the attachments, specifically drafts of litigation documents, were privileged and not subject to public access. In support of its position, the District submitted the attestations of Attorney Tim Sennett and Jeff Fox, the Agency Open Records Officer for the District (“AORO”).<sup>4</sup> Although the District’s submissions indicated no additional responsive correspondence, they did not address the existence of other records that may be responsive to the rest of the Request.

### LEGAL ANALYSIS

The District 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 District 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 non-existence.” *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

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<sup>4</sup> The Sennett and Fox Attestations were made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities. Under the RTKL, a sworn attestation may serve as sufficient evidentiary support for the non-existence 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 District 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))

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 Requester cannot modify or expand the Request on appeal and the District’s interpretation of the Request is reasonable**

On appeal, the Requester attempts to elaborate and modify her original Request.

Specifically, the Requester provides the following list on appeal,

1. [The AORO] did not provide invoices identifying the legal fees in the complaint against Constable John Wilson.
2. All checks were illegible as to identification of the payees. Additionally, there is no correlation between checks and missing (requested) invoices submitted to [the District] by Solicitor Tim Sennett, Knox Law Firm.
3. There were no identifying Board meeting minutes listing or approving the complaint against Constable John Wilson.
4. There was violation of the Sun Shine Law since there was no verification or validation of the complaint approved by the North East School Board Directors.
5. There was no validation or verification of the approval of payments submitted by Tim Sennett (Knox Law Firm) monthly approved by the School Board Directors.
6. There was not written document or correspondence relative to his appearance at the hearing (for Constable John Wilson 8/2, 2022) in front of Judge Mead.
7. There was no identification of individuals asking questions during the hearing on August 2, 2022, which Mr. Sennett was in attendance. (I was a witness and provided testimony during the hearing).
8. There were no submitted written transcripts from the Constable John Wilson hearing on August 2, 2022, which is public record.

*See* Appeal Documents.

The Requester may not modify or expand upon the Request on appeal. *See Michak v. Pa. Dep’t of Pub. Welfare*, 56 A.3d 925, 930 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal argue that an agency must instead disclose a different record in response to the request”). The Request did not seek information pertaining to a violation of the Sunshine Act,<sup>5</sup> any verification or a validation of the

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<sup>5</sup> The Requester’s alleged violation of the Sunshine Act, 65 Pa. C.S. §§ 701-716; does not fall within the OOR’s jurisdiction. See 65 Pa. C.S. § 715 (providing for the jurisdiction and venue of judicial proceedings). The OOR is only responsible for providing trainings courses about the Sunshine Act and does not have the authority to adjudicate

payments submitted by Knox Law Firm, legal invoices themselves, correspondence, or transcripts relative to appearance and testimony of certain individuals at a hearing which was only mentioned on appeal; instead, it sought all public “*Board meeting minutes approving all legal fees/invoices or statements submitted by Knox Law, correspondence(s) to/from Knox Law; all court correspondences and documents of both Knox Law & NESD respective personnel, canceled checks, approved by the NESD Board of Directors, submitted by Superintendent Dr. Hartzell and/or Board President Mobilia to/by the Knox Law Firm relative to the initiating court proceedings against Constable John Wilson which the Board of School Directors approved.*” (emphasis added). Therefore, the OOR’s review on appeal is confined to the Request as written. *See, e.g., Brown v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998.

Furthermore, the District interprets certain portions of the Request, which the Requester challenges.<sup>6</sup> Specifically, upon receipt of the Request, the District interpreted the Request to be seeking: (1) Board meeting minutes evidencing approval of legal fees associated with the initiation of proceedings against Constable John Wilson; (2) correspondence from or with Knox Law regarding the initiation of proceedings against Constable John Wilson; (3) canceled checks relating to the payment of legal fees associated with the initiation of proceedings against Constable John Wilson; and (4) court correspondence and documents of both Knox Law and [District] personnel

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or prosecute claims that the Sunshine Act has been violated. 65 P.S. § 67.1310(a)(3) (requiring the OOR to provide annual trainings on the RTKL and Sunshine Act).

<sup>6</sup> Specifically, the Requester asserts that Attorney Wachter and the AORO have interpreted the Request in a way that suits the District’s interest but fails to explain why this is the case. Instead, the Requester again asserts the Request sought certain items, such as validation of invoices, invoices themselves, etc., even though it is evident from the face of the Request that such items were not Requested as discussed in earlier sections of the instant Final Determination. The Requester is not prohibited from filing another RTKL request to seek items which were not included in the Request. *See Hollinger v. Adams County*, OOR Dkt. AP 2013-0238, 2013 PA O.O.R.D. LEXIS 180.

relating to the initiation of proceedings against Constable John Wilson. *See* District Supplemental Statement January 5, 2023, at 1.<sup>7</sup>

When responding to an RTKL request, an agency is permitted to make a reasonable interpretation of the meaning of a request for records. *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. However, a requester may challenge an agency's or an appeals officer's construction of his request on appeal. *See, e.g., UnitedHealthcare of Pa., Inc. v. Dep't of Human Servs.* (Pa. Commw. Ct. 2018), 189 A.3d 41, 2018 Pa. Commw. Unpub. LEXIS 296, 2018 WL 2436334 (assessing an agency's interpretation of the request).<sup>8</sup> When evaluating such a challenge, the Commonwealth Court considers the plain language of a request as compared to an agency's interpretation. *Madison v. Pa. Bd. of Prob. & Parole*, 212 A.3d 560, 563 (Pa. Commw. Ct. 2019); *see also UnitedHealthcare of Pa.*; *see also Uniontown Newspapers, Inc. v. Dep't of Corr.*, 151 A.3d 1196 (Pa. Commw. Ct. 2016) (construing plain language of request in enforcement context).

When a request is subject to multiple reasonable interpretations, the OOR must determine whether the agency's actual interpretation of a request is reasonable. *See Spatz*, 2013 PA O.O.R.D. LEXIS 513. The OOR determines this from the text and context of the request alone, as neither the OOR nor the Requester are permitted to alter the request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water & Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (stating that "a requester

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<sup>7</sup> On February 21, 2023, the District attempted to reinterpret the Request, which was an improper narrowing of the District's initial interpretation of the Request. *See* District Position Statement February 21, 2023 ("the Request was interpreted to be a request for communications between the District and representatives of Knox Law pertaining to the 'initiating court proceedings.'")

<sup>8</sup> An unpublished opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414.

may not modify the original request as the denial, if any, is premised upon the original request as written”).

Here the plain language of the Request almost exactly corresponds to the District’s initial interpretation. Further, the direct meaning of the Request is clear. In this instance, the Requester is attempting to broadly construe the plain meaning of the Request by attempting to expand on what was requested, as discussed above.<sup>9</sup>

## **2. The Requester did not waive the issue of the withheld communications**

The District argues that the Requester waived the issue regarding the denial of access to the two email communications responsive to the Request because she did not specifically preserve these issues.

Pursuant to Section 1101 of the RTKL, a requester “must state the grounds upon which the requester asserts that the record is a public record . . . and . . . address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1); *see also Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request”); *Saunders v. Pa. Dep’t of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012) (holding that a requester must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access”).

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<sup>9</sup> To the extent that the Request asked for judicial records apart from the complaint provided as part of the District’s final response the OOR lacks the jurisdiction to grant access. A record created by the judicial system is a “judicial record” and, therefore, is not a record of the District. See 65 P.S. § 67.102 (defining “record”). “judicial records” not subject to disclosure under the RTKL. *Philadelphia Dist. Attorney’s Office v. Stover*, 176 A.3d 1024, 1028 (Pa. Commw. Ct. 2017). Further, the District is not required to search the records of entities outside of its control unlike what the Requester suggests in her submissions. *See Uniontown Newspapers, Inc.* at 1171-72.



The Requester used the standard OOR form to initiate her appeal and, in so doing, subscribed to the following,

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

The Commonwealth Court has held that a general statement that records are public and not subject to an exemption is sufficient to meet the requirements of 1101(a)(1). *See Barnett v. Pa. Dep't of Pub. Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Further, the Requester expressly stated that she is not an attorney and that by appealing the partial denial of the Request, she is asking for all of the requested information/documentation to be provided. *See Requester Position Statement*, January 12, 2023.<sup>10</sup> A requester's appeal need only be "minimally sufficient" to warrant review by the OOR. *Padgett v. Pennsylvania State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Based on the foregoing, the Requester has sufficiently challenged the City's grounds for denying access to the two responsive emails.

### **3. The appeal is moot as to the responsive emails disclosed on appeal**

On appeal, the District provided access to the body of the two emails previously withheld but maintained that the attachments are protected from disclosure. The emails are responsive to the correspondences sought in the Request. As such, the appeal as to the records provided on appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521 (holding that an appeal is properly dismissed as moot where no controversy remains).

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<sup>10</sup> The Requester's position statement is admissible as argument despite the District's assertion that an unsworn submission should not be considered. *See* 65 P.S. § 67.1102(a)(2) (stating that "[t]he appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute").

**4. The attachments of the two responsive emails are not subject to public access because they are protected under the attorney-client privilege and the work product doctrine**

The District argues that the two responsive email communications contain attachments protected from public disclosure under the attorney-client privilege and the attorney work product doctrine. 65 P.S. §67.305(a)(2).

For the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *Bousamra v. Excelsa Health*, 210 A.3d 967, 982-83 (Pa. 2019) (citing *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007), *aff'd* 992 A.2d 65 (2010)).

“[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014). An agency may not, however, rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent

the privilege, and where the client's goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001).

The attorney work-product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. “The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation.” *Bousamra v. Excelsa Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep’t of Env’t Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted).

The District asserts that the attachments were draft complaint forms, draft complaints, supplemental information to be included within the complaints, and draft correspondence related to a trespass and ban action that was suggested to be filed against Constable Wilson. *See* District Submission, February 21, 2023, at 2. Ms. Shannon Trippi, a paralegal and assistant to the District’s Solicitor, sent both emails to the District’s representatives. Both emails invited the District, as the client, to review, comment, or ask questions regarding the draft documents. *Id.* The District disclosed the final product of the emails to the Requester. *Id.* Furthermore, the District’s Solicitor, Attorney Sennett, who prepared the documents at issue, attested that the attachments were prepared

at the request of the District to offer legal options and that these documents differed from the final complaint document that was filed. *See* Sennett Attestation ¶¶ 7, 8.

The Requester does not contradict the District’s arguments regarding the protections of the attorney client and attorney work product privileges. Instead, the Requester argues that the District is circumventing the Request by not providing her several requested items, such as an approval of payments to the District’s Solicitor, identification of individuals asking questions during a hearing, and court transcripts.<sup>11</sup> Accordingly, the Requester does not address the District’s relevant arguments or assert a waiver of the attorney-client privilege. It is also evident from the record that the attachments to the two emails likely involved mental impressions, suggestions, and strategic alterations made by the Solicitor. *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions). As a result, the attachments to the email communications are protected by the attorney-client privilege and the attorney work product doctrine.

##### **5. The District is not obligated to enhance the legibility of the records**

The Requester argues that the checks provided in response to the Request are not legible. In response, the District asserts that checks provided to the Requester were copies and magnifications of what was received from the bank. *See* District’s Position Statement December 21, 2022; *see also* Fox Attestation, December 21, 2022, ¶2. Accordingly, the District provided a copy of responsive records in the condition in which they exist, fulfilling its obligations under the RTKL and is not required to provide a more legible copy of the checks. *See Hoyer v. Middlesex Township*, OOR Dkt. AP 2011-0628, 2011 PA O.O.R.D. LEXIS 716 (“The Township provided

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<sup>11</sup> Although the Requester indicated that she was responding to the arguments pertaining to the privileges, these assertions are irrelevant to the instant appeal as none of these items appear in the Request. It is essential to note that the Requester is not precluded from submitting a new request to the District, which clarifies the records being sought. *See Hollinger v. Adams County*, OOR Dkt. AP 2013-0238, 2013 PA O.O.R.D. LEXIS 180.

the requested records and is permitted to charge for them as the readability was not a result of the Township's manner of photocopying, but rather a reflection of the nature of the original records").<sup>12</sup>

**6. The District did not prove that there are no other responsive records in its possession, custody, or control**

The Requester argues that the District final response as well as District's submissions on appeal does not explain the absence of certain records. Specifically, the Requester suggests that board meeting minutes are absent of certain discussions that should have taken place before legal action was taken against Constable Wilson.<sup>13</sup>

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).

The OOR recognizes that the District cannot provide access to a record that does not exist in its possession. However, the District failed to provide an attestation or an affidavit to factually

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<sup>12</sup> Nevertheless, the District provided enhanced copies of the responsive checks on appeal, which the Requester again objected to, claiming that they are still not sufficiently legible.

<sup>13</sup> The OOR does not make determinations as to whether records should exist, only whether they exist. *See, e.g., Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731 ("While ... evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record] -- the OOR may only determine whether a responsive record does, in fact, exist").

prove that no other responsive records exist in this instance.<sup>14</sup> The District instead only provided attested assertions regarding the non-existence of any additional *correspondences*, which is only a portion of what the Request sought. *See* District Position Statement February 21, 2023; *see also* Fox Attestation February 21, 2023, ¶ 2.

The agencies have the burden of proving that a record does not exist, *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011), and the District has not met its burden of proof, specifically regarding the board meeting minutes. The District is therefore directed to conduct a good faith search for records as set forth in 65 P.S. § 67.901 and provide any records discovered as a result of that search. If no records are located as a result of this search, the District shall inform the Requester of such in writing.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, and dismissed as moot in part**, and the District is required to provide the Requester with a statement describing the search and that no responsive records exist or to provide all responsive records discovered as part of that search within thirty days. 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 Erie 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.<sup>15</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>14</sup> It is important to note here that the OOR explicitly asked the District to provide such an attestation if there were no other responsive records on February 17, 2023. *See* OOR Correspondence February 17, 2023.

<sup>15</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: March 1, 2023**

*/s/ Berk V. Demiral*

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BERK V. DEMIRAL  
APPEALS OFFICER

Sent via email to: Erin Beckes  
Jeff Fox  
Timothy S. Wachter, Esquire