



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SCOTT AND JANET BRUNERMER,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2023-0290
	:	
APOLLO BOROUGH,	:	
Respondent	:	

FACTUAL BACKGROUND

On January 31, 2023, Scott and Janet Brunermer (collectively the “Requesters”) submitted a request (“Request”) to Apollo Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”),¹ 65 P.S. §§ 67.101 *et seq.*, seeking a copy of the Borough’s Comprehensive Plan and the meeting minutes for December of 2022. As the Requesters did not receive the Borough’s response within five business days of the Request, on February 8, 2023, the Requesters filed an appeal with the Office of Open Records (“OOR”) claiming that the Request was deemed denied. *See* 65 P.S. § 67.901.

On February 23, 2023, the Requesters informed the OOR that the contact information in the Notice of Appeal for the Borough’s representative was incorrect and provided the correct

¹ Janet Brunermer was added as a Requester to the instant appeal on February 14, 2023. *See* 65 P.S. § 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”).

contact information. On the same day, the OOR contacted the Borough to confirm it received notice of the instant appeal. On February 24, 2023, the Borough responded and informed the OOR that it had not.

On February 27, 2023, the OOR asked for an extension of ten days to issue the Final Determination in order to allow the Borough to make submissions. On the same day, the Requesters agreed to the extension request, making the Final Determination due date March 20, 2023. *See* 65 P.S. § 67.1101(b)(1). The OOR allowed both parties to make submissions until March 7, 2023. *See* 65 P.S. § 67.1102(b)(3).

On February 27, 2023, the Borough provided access to the meeting minutes for December 2022. The Requesters confirmed receiving the December meeting minutes on the same day. The Borough also submitted the attestation of Deanna Shupe, Secretary/Treasurer and Open Records Officer for the Borough (“AORO”), in support of its argument that a good faith search for responsive records had been conducted and that no additional responsive records exist within its possession, custody, or control.²

On February 28, 2023, the Requesters challenged the Shupe attestation by asserting that the good faith search described by Deanna Shupe did not include contacting relevant third parties who might possess responsive records, such as the Borough’s former Engineer and Zoning Officer. In response, the Borough stated on March 1, 2023, that it would reach out to the relevant third parties to determine the existence of any additional responsive records.

² The Shupe Attestation was made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities. The Requester challenged the admissibility of this attestation because it did not have any metadata attached to it; however, the OOR has no such requirement and accepted it into the record. *See* 65 P.S. § 67.1102(b)(3) (“In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

On March 7, 2023, the Requesters submitted the Borough's Zoning Map and asserted that the contents suggested the existence of additional responsive records.

On March 8, 2023, the Borough communicated to the OOR that it was in the process of gathering additional submissions. The OOR allowed submissions until the end of day March 9, 2023. *See* 65 P.S. § 67.1102(b)(3).

On March 9, 2023, the Borough made additional submissions, including three attestations by the Engineer for the Borough, Dominic Garofola, the former Engineer for the Borough, Richard W. Craft, and the Zoning Officer for the Borough, Brenda Troup.³

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).

³ The Garofola, Craft, and Troup Attestations were made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities. Again, the Requesters challenged the admissibility of the Troup attestation because it did not have any metadata attached to it without explaining how this makes the attestation inadmissible. The OOR accepted these attestations into the record. *See* 65 P.S. § 67.1102(b)(3)

1. The Borough provided some responsive records on appeal

During the appeal, the Borough granted access to the December 2022 meeting minutes responsive to the Request. The Requesters confirmed that they had received these responsive records. As such, the appeal as to the records provided on appeal is dismissed as moot. *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 proved that it conducted a good faith search and 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. *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 Envtl. 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 Shupe Attestation states that Secretary Shupe is the Secretary, Treasurer, and AORO of the Borough. Shupe Attestation ¶¶ 1, 2. Upon receipt of the Request, Secretary Shupe thoroughly examined files in her possession, custody, and control for responsive records. *Id.* ¶ 4. The search yielded no results for the Borough’s Comprehensive Plan, but the December 2022 meeting minutes were found and publicly available online. *Id.* ¶¶ 5, 6. Secretary Shupe did not have any other responsive documents in her possession. *Id.* ¶ 7.

The Requesters argued that Secretary Shupe did not conduct a good faith search because she did not contact third parties within the Borough’s control who may have responsive records, such as the Zoning Officer and the former Borough Engineers. *See* Requesters Correspondence February 28, 2023, 4:26 P.M. The Borough did not directly challenge this argument and instead agreed to provide additional evidence from the listed individuals. *See* Borough Correspondence March 1, 2023, 10:17 A.M. The Requesters also relied on the Zoning Map of the Borough and argued that the contents of the map suggested that additional responsive records existed. *See* Requesters Correspondence March 3, 2023.

In the Borough’s supplemental submissions, both the Borough’s Zoning Officer and the Borough’s current Engineer attested that they searched the documents in their possession, custody, or control, which did not produce responsive records. *See* Garofola and Troup Attestations. However, the former Engineer of the Borough located additional responsive records in his search: a Comprehensive Plan dated 1996/97 and a document titled “Industrial Redevelopment Plan and Development Strategy.” *See* Craft Attestation. The Borough indicated that it would provide access to these responsive records on appeal. *See* Borough Correspondence March 8, 2023.

On March 8, 2023, the OOR requested that the additional attestations submitted on March 9, 2023, include information that the Borough sent the responsive records to the Requesters. However, the attestations did not include this information despite the Borough's indicated intention of doing so. Therefore, absent confirmation of receipt by the Requesters, the OOR is obligated to instruct the Borough to send the responsive records found on appeal to the Requesters.

3. The Borough did not act in bad faith

The Requesters claim that the Borough acted in bad faith by failing to contact third parties as part of a good faith search, failing to respond in a timely manner or provide final response, and the lack of metadata on the attestations provided.⁴ Section 1305(a) of the RTKL states that “[a] court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.” 65 P.S. § 67.1305(a); *Office of the Dist. Atty. Phila. v. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017) (“An example of bad faith is a local agency’s failure to comply with the mandate of Section 901 of the RTKL, which requires that a local agency make a good faith search for information responsive to a request and determination of whether that information is public.”).

The Requesters offer the lack of response as a demonstration of the Borough's bad faith. Section 901 of the RTKL states that “[u]pon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record...and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible...” 65 P.S. § 67.901. As such, the agencies are urged to respond as promptly as possible. Further, Section 902 provides that an agency may invoke an extension of time to respond to an RTKL request when certain factors are present, thereby providing the agencies with

⁴ The OOR notes again that there is no requirement that an attestation include metadata.

a means to have enough time to conduct an adequate search if five business days are insufficient. 65 P.S. § 67.902(b). In this instance, the Requesters did not receive a response or a notice of extension within five business days. Although the Borough is encouraged to consider and utilize Sections 901 and 902 of the RTKL in the future, the Borough ultimately participated diligently in the appeal and acted in a manner demonstrating good faith involvement in the instant matter.

The Requesters also contend that the Borough did not conduct a good faith search. This allegation is in contrast to the Borough's participation and multiple searches for responsive records on appeal, which eventually produced the responsive records sought. Finding an agency in bad faith when it conducted good faith searches during the appeal would contradict the RTKL's remedial goal to encourage maximum public access to government records. In this instance, the Borough disclosed additional records due to a good faith search conducted during the appeal.

As such, based on the evidence presented, the record does not support a finding of bad faith.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **dismissed as moot in part**, and the Borough is required to provide the responsive Comprehensive Plan and the Industrial Redevelopment Plan and Development Strategy to the Requesters 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 Armstrong 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: March 17, 2023

/s/ Berk V. Demiral

BERK V. DEMIRAL
APPEALS OFFICER

Sent via email and Portal to: Scott Brunermer
Janet Brunermer
Deanna Shupe
Scott Andreassi, Esquire

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