

FINAL DETERMINATION

IN THE MATTER OF :

ANTHONY MOSS AND LABORERS

LOCAL 413, Requester

v. : Docket No.: AP 2023-0967

DELAWARE COUNTY,
Respondent

On April 24, 2023, Anthony Moss on behalf of Laborers Local 413 (collectively "Requester") submitted a request ("Request") to Delaware County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking:

Certified payroll records for the Rose Tree Park Project/the new destination Playground and expansion of pedestrian mall. The new Walkways for the amphitheater. New landscaping and stormwater management. Contractor: Foresite Concepts Inc. [address omitted].

On April 28, 2023, the County denied the Request, stating that the County does not possess any responsive records because the County has not yet received the application for payment from the contractor. On May 2, 2023, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

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. While the RTKL does not define the term "good faith effort," in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court stated:

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 records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

On May 11, 2023, the County submitted a position statement reiterating its reasons for denial, along with the affidavit of Anne Coogan, Open Records Officer for the County.¹ The Coogan Affidavit provides that the Open Records Officer "inquired of ... the County Director of Public Works, whether she had any responsive records. She replied that the Contractor had not yet submitted an application for payment containing the requested certified payroll records." *See* Coogan Affidavit, ¶ 3. The Coogan Affidavit further provides that the County does "not have any

¹ Under the RTKL, an affidavit 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 County has acted in bad faith or that the requested records exist, "the averments in [the affidavit] 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)).

responsive records." Id. at ¶ 4. Therefore, based on the evidence provided, the County has met its

burden of proof that it does not possess any responsive records. See Pa. Dep't of Health v. Mahon,

283 A.3d 929 (Pa. Commw. Ct. 2022); Hodges v. Pa. Dep't of Health, 29 A.3d 1190, 1192 (Pa.

Commw. Ct. 2011).

For the foregoing reasons, the appeal is **denied**, and the County 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 or petition for review 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 according to

court rules 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.² This Final Determination shall be placed on the website at:

http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: May 26, 2023

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS

DEPUTY CHIEF COUNSEL

Sent via portal to:

Anthony Moss; Anne Coogan; Jonathan Lichtenstein, Esq.

² Padgett v. Pa. State Police, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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