



FINAL DETERMINATION

IN THE MATTER OF

**MIN XIAN AND SPOTLIGHT PA,
Requester**

v.

**CITY OF DUBOIS,
Respondent**

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Docket No.: AP 2023-2178

On August 2, 2023,¹ Min Xian and Spotlight PA (collectively “Requester”) submitted a request (“Request”) to the City of DuBois (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, in pertinent part:

1. Itemized invoices, bills, vouchers, or other financial statements reflecting City of DuBois’ payment for legal work pertaining to the representation of Herm Suplizio and any other individuals in relation to the state Attorney General’s investigation of Herm Suplizio. Please include description or explanation for each payment.
2. Engagement or retainer letters signed by any [C]ity employee for legal services (provided by an individual attorney or a law firm) pertaining to the state Attorney General’s investigation of Herm Suplizio. Requester seeks these engagement or retainer letters for the following time period: 1/1/2020 to the present.
3. Any additional spreadsheets, lists, logs or other documents kept by the [C]ity for financial record-keeping purposes that identify the legal engagements or law firms pertaining to the state Attorney General's investigation of Herm Suplizio.

¹ The Requester submitted an amended request, which is the Request at issue in this appeal, on August 1, 2023 at 4:26 p.m. Receipt of the Request was confirmed by the City’s Open Records Officer on August 2, 2023. Further, the City’s normal business hours are Monday through Friday from 8:00 a.m. to 4:00 p.m. See <https://duboispa.gov/> (last accessed November 9, 2023). Therefore, the Request is considered filed on August 2, 2023.

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5. Public or private gifts, donations, or endowments the City of DuBois received from 2010 and the present. Please include amount, source, and purpose for each item.

On August 9, 2023, the City invoked a thirty-day extension of time to respond to the Request; however, as the City did not respond within the extension period, the Request was deemed denied on September 8, 2023. *See* 65 P.S. § 67.902. On September 11, 2023, the City partially denied the Request,² arguing that records responsive to Item 1 are exempt from disclosure as records relating to a criminal investigation, 65 P.S. § 67.708(b)(16), and as records related to a Grand Jury proceeding. The City denied Items 2 and 3 of the Request, asserting that the requested records do not exist, and to the extent they did, the records are exempt from disclosure as records relating to a criminal investigation and Grand Jury proceeding. And finally, the City denied Item 5 of the Request, stating that the City does not maintain a list of gifts, donations or endowments, and to the extent they did, the records would be exempt from public access as records identifying donors. *See* 65 P.S. § 67.708(b)(13).

On September 12, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.³ 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). The Requester submitted a position statement on September 28, 2023, arguing that the requested records are financial records and are therefore subject to disclosure. The record in this matter closed on October 3, 2023; because the OOR did not receive

² The City partially granted the Request, providing records responsive to Item 4 of the Request, which is not at issue in this appeal.

³ The Requester granted the OOR an extension of time 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).”).

a submission from the City, the record closing date was extended to November 3, 2023. However, to date, the City has not submitted legal argument or evidence in support of its position.

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)).

Here, the City did not participate on appeal by submitting legal argument or evidence in support of withholding records. Although the OOR lacks jurisdiction over the criminal investigative records of a local agency, there is nothing in the record to suggest that requested records of payments, invoices, an engagement letter, and logs kept for financial record keeping purposes, would contain investigative information. *See* 65 P.S. § 67.503(d)(2). The fact that these records may pertain to funds used in connection with the representation of individuals who are subject to a criminal investigation being conducted by another agency, does not, in itself, make the records related to a criminal investigation. *See Haverstick v. Delaware Cnty. Dist. Atty. Office*, OOR Dkt. AP 2022-2082, 2022 PA O.O.R.D. LEXIS 2682 (the OOR retains jurisdiction over portions of appeals where “the requested records are incapable of being exempt under Section 708(b)(16)”) *citing Silver v. City of Pittsburgh*, OOR Dkt. AP 2013-1395, 2013 PA O.O.R.D. LEXIS 886; *see also Simoni v. Brentwood Borough*, OOR Dkt. AP 2017-2261, 2018 PA O.O.R.D.

LEXIS 180 (a record possessed by an agency for administrative purposes and incidentally related to an investigation is not necessarily exempt as a record relating to a criminal investigation).

Additionally, we note that Item 5 of the Request does not seek a “list” of donors as referenced in the City’s denial, and to the extent certain records responsive to Items 2, 3 and 5 of the Request do not exist, the City has not submitted evidence to meet its burden of proof regarding the nonexistence of such records.⁴ *See Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). Accordingly, as the City did not submit evidence on appeal to support the withholding of the requested records, the City failed to meet its burden of proof under the RTKL. 65 P.S. § 67.305.

For the foregoing reasons, the appeal is **granted**, and the City is required to conduct a search and provide all responsive records to the Requester within thirty days or, in the alternative, if certain records do not exist, a detailed attestation describing its search for those records. 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 Clearfield 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.⁵ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

⁴ Further, as the City has not participated in this appeal, the OOR has no information before it that would suggest that any constitutional right to privacy concerns exist with regard to the records requested in Item 5.

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

FINAL DETERMINATION ISSUED AND MAILED: November 14, 2023

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS
DEPUTY CHIEF COUNSEL

Sent via portal to: Min Xiang;
 Chris Nasuti