



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
STACEY ERDELY and FRAZIER SCHOOL	:	
DISTRICT SCHOOL BOARD,	:	
Requester	:	
	:	Docket No: AP 2023-2568
v.	:	
	:	
PERRYOPOLIS BOROUGH,	:	
Respondent	:	

FACTUAL BACKGROUND

On August 31, 2023, Stacey Erdely and the Frazier School District School Board (collectively “Requester”) submitted a request (“Request”)¹ to Perryopolis Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[B]ank records/financial reports showing the funds below were distributed as noted in Mary Fuller Frazier’s Trust Fund, Last Will and Testament, and the Perry Township School District Resolution(s):

The documents states three (3) funds were to be established:

- 1) A School Community Library Fund - \$4000/per year
- 2) A Scholarship Fund - \$3,200/per year
- 3) A Lyceum-Cultural Fund - \$1,000/per year to be used by school administrators

Attached to the Request was a resolution of the Perry Township School District from 1959

¹ The OOR notes that the Requester sought paper copies of responsive records and not electronic copies.

regarding the Trust of Mary Fuller Frazier (“Frazier Trust”) and a resolution from October 1959 of the Borough regarding the Frazier Trust.²

On October 6, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Borough denied the Request in part, arguing that records responsive to the Request relating to a Scholarship Fund or Lyceum-Cultural Fund do not exist in the possession, custody, or control of the Borough. The Borough provided a copy of a check from July 2023 from the Borough to the Mary Fuller Frazier Community Library (“Library”) for \$6,000 as responsive to the portion of the Request relating to the “School Community Library Fund[.]”

On October 24, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.³ The Requester specifically states that she seeks “the history of the [Frazier Trust] funds distributed and what accounts received the funds.” 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 November 21, 2023, the Borough submitted a position statement reiterating its grounds for denial that responsive records do not exist in the Borough’s possession, custody, or control. The Borough clarifies that it receives monies from the Frazier Trust for the Library and distributes that money to the Library as evidenced by the \$6,000 check from July 2023. The Borough further states, after consultation with current and prior Borough Council Members and the trustees of the Frazier Trust, that there is no actual Library Fund, Scholarship Fund, or Lyceum-Cultural Fund and thus no records specifically responsive to the Request exist in the Borough’s possession,

² These resolutions reference that the Last Will and Testament of Mary Fuller Frazier bequeathed her residuary estate for improvements in the community of Perryopolis. Referencing Paragraph 21 of the Last Will and Testament of Mary Fuller Frazier, the Borough Resolution creates a school-community library funds in the amount of \$4,000 per year, a scholarship fund in the amount of \$3,200 per year, and a lyceum-cultural funds in the amount of \$1,000 per year.

³ 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).”).

custody, or control. In support of its position, the Borough submitted the attestation of Colleen Pontoriero, the Open Records Officer for the Borough (“Pontoriero Attestation”), who explains the process by which the Borough obtains funds from the Frazier Trust.

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 or do not exist. 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)).

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 identified 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 all 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). Regarding the non-existence of records, an agency has the burden of proving that a record does not exist and "it may satisfy its burden of proof . . . with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192; *Moore*, 992 A.2d at 909 (search of records and sworn and unsworn affidavits that documents were not in agency's possession are enough to satisfy burden of demonstrating nonexistence).

Here, the Request seeks bank records and financial reports which demonstrate the monetary distributions from the Frazier Trust to: (1) A School Community Library Fund - \$4000/per year; (2) A Scholarship Fund - \$3,200/per year; and (3) A Lyceum-Cultural Fund. The Borough maintains that no responsive records exist in its possession custody or control because despite the language of the Frazier Trust, Borough Resolution, and School District Resolution, the trust funds are not distributed in the specified amounts to the specified fund accounts. The Borough clarifies that the Frazier Trust "provides the [Borough] with funds that the [Borough] shall distribute within their discretion." *See Pontoriero Attestation* ¶ 12.⁴ The Borough further asserts that the Frazier Trust is maintained by Wells Fargo and that trust distributions made by Wells Fargo to the Borough occur after the trustees consult with Borough officials as to the Borough's proposed budget. *Id.* at

⁴ Under the RTKL, a 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 Borough has acted in bad faith, "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)).

¶¶ 12-13. The trustee reviews the proposed budget and then distributes trust funds to the Borough for specific use for purposes that align with the provisions of the Trust. *Id.* The Frazier Trust as it is currently managed by Wells Fargo does not have a School Community Library Fund, Scholarship Fund, or Lyceum-Cultural Fund. *Id.* at ¶ 10. Similarly, while the Borough has and continues to distribute funds to the Library, the Borough does not maintain any specific School Community Library Fund, Scholarship Fund, or Lyceum-Cultural Fund related to the Frazier Trust. *Id.* at ¶¶ 7-9, 11, 14-15. The Borough also states that it provided the Requester with a 2023 financial record demonstrating the Borough's distribution of funds to the Library and states that should the Requester wish to receive additional financial documentation from the Borough which reflect the distribution of funds to the Library, the Borough will make copies of those records available subject to copying fees.

The Request specifically seeks records related to the three funds specified in the resolutions attached to the Request. Despite the language of the Borough Resolution and the Perry Township School District Resolution from 1959, the Borough has presented credible evidence that the three specified funds do not exist and thus records of those distributions to and from funds do not exist. The OOR makes no determination as to whether records should exist, only whether the Borough possesses them. *Gorol v. Forest Hills Borough*, OOR Dkt. AP 2019-0329, 2019 PA O.O.R.D. LEXIS 427 (“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.”). Accordingly, the Borough has met its burden proving that no additional responsive records exist in its possession, custody or control. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

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 Fayette 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 65 P.S. § 67.1303, but 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 OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 20, 2023

/s/ Catherine R. Hecker

APPEALS OFFICER
CATHERINE R. HECKER

Sent via OOR Portal to: Stacy Erderly
Colleen Pontoriero, AORO
Michael Mays, Esq.

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