pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
EDWARD EVANS,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2024-0801**
	:	
LANSFORD BOROUGH,	:	
Respondent	:	

FACTUAL BACKGROUND

On March 11, 2024, Edward Evans ("Requester") submitted a request ("Request") to Lansford Borough ("Borough") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

> 1. All Mutual Aid Agreements currently in effect that involve or name [the Borough] Police Department as a party of the agreement.
>
> 2. All [p]ast Mutual Aid Agreements no longer in effect that involve or name [the Borough] Police Department as a party of the agreement for the last 10 years.

On March 21, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Borough denied the Request, arguing that the disclosure of records is likely to endanger an individual's personal safety, 65 P.S. § 67.708(b)(1)(ii), endanger the safety of public infrastructure, 65 P.S. § 67.708(b)(3), and jeopardize computer security, 65 P.S. § 67.708(b)(4).

On March 21, 2024, 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 Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 3 and April 16, 2024, the Borough submitted statements, unsworn, authored by its Solicitor, Robert Yurchak, Esq., asserting that responsive records do not exist in its possession, custody or control. In support of its position, on April 3 and April 17, 2024, the Borough submitted affidavits, duly sworn, authored by Maria Ahner ("Ahner Affidavit" and "Ahner Second Affidavit"), the Borough's Secretary/Treasurer and Agency Open Records Officer ("AORO").[1]

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). 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)). 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).

[1]All submissions were received after the record closed; however, to develop the record, the submissions were considered. *See* 65 P.S. § 67.1102(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").

The Borough asserts that no responsive records exist in its possession, custody or control. 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).

Here, the Request seeks all Mutual Aid Agreements in effect currently and for the past 10 years, to which the Borough was a participant. In support of the Borough's argument that it does not possess responsive records, the Ahner Affidavit indicates that, after a diligent search, Mutual Aid Agreements involving the Borough for the past 10 years could not be located. *See* Ahner Affidavit. Additionally, Attorney Yurchak indicated that an inquiry with the Chief of Police was

performed and no records responsive to the Request were located. *See* Ahner Second Affidavit; *see also* Borough Position Statement, dated April 16, 2024.[2]

Under the RTKL, a sworn affidavit 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 or that responsive records exist, "the averments in the [affidavits] 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)).

The Borough's affidavits are authored by the AORO. The Borough has demonstrated that its AORO conducted a good faith search, which included inquiries with its solicitor and Chief of Police. Based on the evidence provided, the Borough has demonstrated that it does not maintain responsive records relating to the Request. There has been no sufficient evidence provided that otherwise contradicts the statements offered by Borough in the affidavits submitted. *See Pa. Dep't of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022). Therefore, based on the evidence provided, the County has met its burden of proof that responsive records do not exist in its possession, custody or control.[3] *Hodges*, 29 A.3d at 1192.[4]

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[2] The Borough's position statement, dated April 3, 2024, explains that the Borough follows the provisions of 42 Pa. C.S. § 8593 regarding statewide municipal police jurisdiction, which precludes the need for a mutual aid provision. *See* 42 Pa. C.S. § 8593.

[3] The OOR makes no determination as to whether responsive records *should* exist, as our inquiry is limited to only whether or not records are "in existence and in possession of the … agency at the time of the right-to-know request." *Moore*, 992 A.2d at 909; *see also* 65 P.S. § 67.705.

[4] Because the Borough has demonstrated that the requested records do not exist, the OOR need not reach the Borough's alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dept.,* OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

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 Carbon 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; 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] 65 P.S. § 67.1303. 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: April 18, 2024

/s/ Bandy L. Jarosz

BANDY L. JAROSZ, ESQ.
APPEALS OFFICER

Sent to: Edward Evans (via portal only)
Robert T. Yurchak, Esq. (via portal only)
Maria Ahner(via portal only)

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