pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
KEVIN BRAND AND PROPLOGIX,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2024-0578**
	:	
FOLCROFT BOROUGH,	:	
Respondent	:	

FACTUAL BACKGROUND

On February 20, 2024, Kevin Brand and Proplogix (collectively "Requester") submitted a request ("Request") to Folcroft Borough ("Borough") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

> For…[a specified] property[,]
>
> 1. [A]ny open or outstanding nuisance code violations (tall grass, junk in the yard, etc.) and any associated invoices.
>
> 2. [A]ny open or outstanding building permits and building code violations, along with a permit history.

Because the Requester did not receive the Borough's response within five business days of the Request, on February 28, 2024, the Requester filed an appeal with the Office of Open Records

("OOR") claiming that the Request was deemed denied and stating grounds for disclosure.[1] *See* 65 P.S. § 67.901. 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 2, 2024, the Borough submitted a position statement arguing that no responsive records exist within its possession, custody or control.

On April 3, 2024, the OOR asked the Borough to provide an attestation or sworn affidavit explaining what steps the Borough took to search for records responsive to the Request and affirming that, after the search, no responsive records were found. To date, no response has been received.

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] The Requester granted the OOR a thirty-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).").

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 Borough did not comply with the RTKL by timely responding to the Request, nor, on appeal, did it provide any evidentiary basis in support of its position that no records responsive to the Request exist within its possession, custody or control because an "unsworn position statement does not constitute evidence. Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the *evidentiary* record." *Office of the Governor v. Davis*, 122 A.3d 1185, 1193-94 (Pa. Commw. 2015) (*en banc*) (emphasis in original). *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. CCP June 28,

2011) ("Because the letter written by City's counsel is a legal brief, it cannot be...evidence at all"). Accordingly, the Borough did not meet its burden of proof that no responsive records exist within its possession, custody or control;[2] and, after a good-faith search, the Borough must provide the Requester with all records responsive to the Request. *See* 65 P.S. § 67.305; *see also Hodges*, 29 A.3d at 1192 (Pa. Commw. Ct. 2011).

Nevertheless, the OOR is mindful that an agency cannot be required to produce records that do not exist. 65 P.S. § 67.705. If the agency completes its search by contacting all third-party contractors for records responsive to the Request and determines that no records exist, it must provide the Requester with an attestation explaining the second supplemental search and affirming that no additional responsive records exist within its possession, custody or control.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and, within thirty days, the Borough must conduct a good-faith search for records responsive to the Request and provide all responsive records to the Requester. If no responsive records are located, the Borough must provide the Requester with an attestation explaining its search and affirming that no responsive records exist. 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, but as the quasi-judicial tribunal that adjudicated

[2] In *Mission Pa., LLC v. McKelvey*, the Commonwealth Court stated that "[a] preponderance of the evidence may be the lowest burden of proof, but it still requires evidence unless the facts are uncontested or clear from the face of the RTKL request or the exemption. 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), appeal denied by 223 A.3d 675 (Pa. 2020).

this matter, the OOR is not a proper party to any appeal and should not be named as a party.[3] 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.

FINAL DETERMINATION ISSUED AND MAILED: April 19, 2024

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO

Sent via OOR portal to: Kevin Brand
Andrew Hayman

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