



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**MATT MURRAY,
Requester**

:

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:

:

v.

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Docket No: AP 2024-0953

:

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**UPPER POTTS GROVE TOWNSHIP,
Respondent**

:

FACTUAL BACKGROUND

On February 21, 2024,¹ Matt Murray (“Requester”) submitted a request (Request) to Upper Pottsgrove Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq*, seeking a “[c]opy of any and all plans preliminary and final submitted to Upper Pottsgrove Township by CMC Engineering or CVE Engineers from 1/1/2023 to 2/16/2024.”

On March 28 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Township denied the Request, arguing that “no responsive records exist.”

On April 9, 2024, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² Specifically, the Requester argues that “[t]he project manager Aloysius

¹ The record indicates that the Request is dated February 16, 2024, and that the Township received the Request on February 21, 2024. *See* Township’s February 28, 2024 thirty-day extension.

² The Requester granted the OOR an 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).”).

Gryga (formerly CMC employee and current CVE employee) testified under oath before [the Honorable] Steven Tolliver during an emergency injunction hearing on 2-15-2024 at Montgomery County Court House that plans were provided to the [T]ownship during that period.” The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 17, 2024, the Township submitted a verified position statement,³ reiterating its argument that responsive records do not exist. In support of its position, the Township submitted the affidavit of Eric Frey, Esq. (“Frey Affidavit”), Solicitor for the Township.

On April 18, 2024, the Requester submitted a position statement arguing, in essence, that responsive records must exist.⁴ The Requester also attached Exhibits A (a copy of the Township calendar), B (the Request), C (a ‘plan’ “turned over to [the Requester] by the [T]ownship”), D (a ‘plan’ “from the PA DCED that received the plan from [the] Township as part of an application for a grant”), E (a “stage description plan”), and F (“photographs of the actual work being done and a parking lot being built”).

On April 19, 2024, the Requester submitted a supplemental position statement, arguing that the Township’s submission “should [] be discounted.”⁵ The Requester argues that “[i]t was only after the subsequent submission of RTK#75 that asked for a specific plan did the [Township] respond with the document.”

On April 19, 2024, the Township submitted an “Addendum to Township’s Verified

³ All of the Township’s position statements, addendums, and affidavits are subject to penalties under 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

⁴ See Requester’s position statement, pages 1-3.

⁵ The Requester argues that the Township’s submission was made after the April 18, 2024 deadline; however, the OOR Portal reflects that the Township’s position statement was submitted on April 17, 2024. Nonetheless, to the extent the submission was submitted late, the OOR will accept the late submission in order to resolve the dispute. 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”).

Position Statement,” providing additional background to the instant matter. The Township explains that the Requester submitted an additional request to the Township on February 21, 2024, seeking “the same plans as being sought in the subject appeal to the OOR.” In response to the additional request that contained more specific language, the Township provided copies of plans to the Requester. Thus, the Township argues that “[a]s this is the only plan that has been provided to the Township and Requester has already received this plan from the Township, the Township position remains unchanged – there are no plans responsive [to] the Request.”

On April 23, 2024, noting that a copy of the plans responsive to the Request have now been provided to the Requester, the OOR asked the Requester to identify the remaining issue(s) for the OOR to adjudicate. On April 25, 2024, in response to the OOR’s inquiry, the Requester argues that “[w]hile [the Township] did provide a solitary plan for a parking lot via RTK#75, [the Township] did not provide me with anything more stating [that additional] plans do not exist.” The Requester argues that “[t]he [T]ownship has a duty to look for documents outside the four walls of their building by asking their agents like Mr. Gryga who were paid tens of thousands of taxpayer dollars to produce any documents they have in their possession whether they be preliminary[] drafts or final.”

On April 25, 2024, the Township submitted a “Second Addendum to Township’s Verified Position Statement” clarifying “that there are no plans in possession of the Township which are responsive to the subject Request.”

On May 9, 2024, in response to an additional inquiry by the OOR,⁶ the Requester submitted two supplemental position statements. The Township also submitted a supplemental position

⁶ The OOR provided both parties the opportunity to address the Requester’s argument “that these records are [in] the possession of a Mr. Gryga and the Township’s duty under the RTKL to reach out to Mr. Gryga.”

statement⁷ arguing, in essence, that it reasonably interpreted the Request and provided plans that were “submitted” to the Township and that “[n]o other plans (preliminary or final) have been submitted to the Township for review or approval.” The Township further argues that “Mr. Gryga is an outside third-party contractor who has not submitted any plans to the Township other than the plans which have been previously provided to the Requester.”⁸ In support of the Township’s argument that there are no additional responsive records in its possession, custody or control, the Township submitted the supplemental affidavit of Eric Frey, Esq. (“Supplemental Frey Affidavit”).⁹

On May 10, 2024, the Requester submitted two photographs appearing to represent that the Township “broke ground actually building a parking lot and installation of a water garden following the one final plan that they have provided.”

LEGAL ANALYSIS

The Township 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 Township 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*

⁷ The Township’s supplemental position statement is subject to penalties under 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

⁸ The Township also argues that “[e]ven if the OOR determines that Mr. Gryga, as an outside third-party contractor, and the plans that he is preparing are subject to RTK disclosure, the plans are exempt from disclosure under both Section[s] 708(b)(10) and 708(b)(22) of the [RTKL].”

⁹ The Supplemental Frey Affidavit is subject to penalties under 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

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 appeal as it relates to the records provided is moot

During the appeal, the Township provided additional records responsive to the Request.¹⁰ As such, the appeal as it relates to the records provided is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Township reasonably interpreted the Request to seek those records “submitted” to the Township

The Township emphasizes the word “submitted” in the Request and argues that “[n]o other plans (preliminary or final) have been submitted to the Township for review or approval.” An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012- 0433, 2012 PA O.O.R.D. LEXIS 557. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010)). The OOR determines the reasonableness of the agency’s interpretation from the text and context of the request alone, as neither the OOR nor the Requester are permitted to expand the request on appeal. *See Pa. State Police v. Office of Open Records*, 995

¹⁰ *See* Township’s April 19, 2024 “Addendum to Township Verified Position Statement”, page 2 (“[t]he only plans which have been finalized and submitted to the Township are the plan sheets previously provided to Requester”). As noted above, these “plans” were provided to the Requester in response to a second request submitted to the Township. To the extent these “plans” were provided to the Requester during the instant appeal and are responsive to the Requester, the appeal as to the records provided is dismissed as moot.

A.2d 515 (Pa. Commw. Ct. 2010); *McKelvey v. Office of Attorney General*, 172 A.3d 122 (Pa. Commw. Ct. 2017) (“Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal.”).

In this instance, the Request specifically seeks a “[c]opy of any and all plans preliminary and final *submitted* to [the Township] by CMC Engineering or CVE Engineers from 1/1/2023 to 2/16/2024.” (Emphasis added). The Township’s interpretation of the Request was reasonable, and the Township explains that “once the plans are at a point that they will be ready for submission to the Township for consideration, the version of the plans will then be for the purpose of internal, predecisional deliberation of the Township to choose which version of the Construction Project the Township desires to pursue. At this point, the plans are not to a point that they have even been presented to the Township for its review and consideration.” Township’s supplemental position statement, page 3. See *Vista Health Plan, Inc. v. Dep’t of Human Servs.*, 2018 Pa. Commw. Unpub. LEXIS 295, *12-13; see also *Pa. Dep’t of Conservation & Natural Res. v. Vitali* (Pa. Cmwlth., No. 1013 C.D. 2014, filed July 9, 2015), 2015 Pa. Commw. Unpub. LEXIS 479, at *9; *Bethke v. City of Phila. Law Dep’t*, OOR Dkt. 2022-0148, 2022 PA O.O.R.D. LEXIS 929.

3. The Township demonstrated that no additional records responsive to the Request exist in its possession, custody or control

The Township asserts that it does have any additional responsive plans other than those previously provided to the Requester that have been submitted to the Township. 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).

In support of the Township's assertions, the Frey Affidavit¹¹ states, in relevant part, the following:

4. I was personally involved in the Township's Right-to-Know Officer search for records that could be responsive to the Request.

□

7. While the consulting engineer identified by Requester is working on plans for a municipal complex (which is the subject of litigation brought by the Requester against the Township), the plans remain in draft form and, as such, have not been provided to the Township or any of the Township staff or other consultants.

8. As no plans (either preliminary or final) have been submitted to the Township, there are no records responsive to the Request.

9. To the best of my knowledge, the documents identified in the Request do not exist; and therefore, the documents cannot be provided.

¹¹ Under the RTKL, an attestation is generally competent evidence to sustain an agency's burden of proof. *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 competent evidence that the Township acted in bad faith, "the averments in [the Township's evidence] 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 Supplemental Frey Affidavit states, in relevant part, the following:

3. Upon receipt of the [R]equest, I worked with the AORO to conduct a thorough examination of files in the possession, custody and control of the [Township] ... for records responsive to the [R]equest underlying this appeal, specifically we communicated (by telephone and email) with Township Commissioners, staff, consultants and with Al Gryga who is an outside third-party contractor working for the companies hired by the Township to complete the plans which are the subject of the Records Request.
4. Additionally, since the filing of this appeal, I have further inquired with Mr. Gryga to confirm that no other plans (preliminary or final) have been submitted to the Township for review of consideration. I have confirmed that draft plans exist but that neither the final design, nor the final layout of the Township project has been determined. As such, there are no plans (preliminary or final) which are ready for Township review or consideration at this point. All plan sheets or portions of plans that have been submitted to the Township have been previously provided to the Requester by the Township pursuant to prior RTK requests for the same.
5. Further, Mr. Gryga confirmed this week that draft plans do exist showing multiple designs of the Township project – none of which have been submitted to, reviewed by, or approved by the Township. As such, the plans are simply drafts or potential versions of the proposed Township project.
6. The Township has not made any decision to proceed with the Construction project – especially since the Requester has filed a lawsuit against the Township to stop the same. Once plans (preliminary or final) are ready for review by the Township, the plans will be reviewed and approved by the Township at a public meeting. At this time, the plans will be available for public view and comment.
7. Based upon the above-described search of the [Township's] files and inquiries with relevant [Township] personnel and outside third-party contractors, I have made the determination that the records requested are not within the [Township's] possession, custody, or control.

It is important to note that the OOR makes no determinations as to whether additional responsive records should exist, and its inquiry is limited only to whether 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. As such, allegations that records could exist or should exist are insufficient to establish that the records do, in fact, exist.

The Township’s affidavits are authored by its Solicitor, who attests that “the plans remain in draft form and, as such, have not been provided to the Township or any of the Township staff or other consultants.” Frey Affidavit, ¶ 7. Attorney Frey further attests that “[a]s no plans (either preliminary or final) have been submitted to the Township, there are no records responsive to the Request.” Additionally, Attorney Frey confirmed with Mr. Gryga “that draft plans do exist showing multiple designs of the Township project [but] none of which have been submitted to, reviewed by, or approved by the Township.” Supplemental Frey Affidavit, ¶ 5. As such, the Township “made the determination that the requested records are not within the [Township’s] possession, custody, or control.” *Id.* at ¶ 7.

Thus, based on the evidence provided, the Township has met its burden of proof that a good faith search was performed and that no additional records responsive to the Request (i.e. plans that have been submitted to the Township) exist in its possession, custody or control.¹² *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011); *see also Pa. Dep’t of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022) (concluding that, in the absence of countervailing evidence, an agency may satisfy its burden of proving a record does not exist by submitting “either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record”).

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot in part**, and the Township 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

¹² Because the Township demonstrated that there are no additional records responsive to the Request (i.e. “plans preliminary and final submitted [to the Township]”), the OOR need not reach the Township’s alternative grounds for denying access to those records held by a third-party.

appeal to the Montgomery 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. 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.¹³ 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: May 15, 2024

/s/ Lyle Hartranft

APPEALS OFFICER
LYLE HARTRANFT, ESQ.

Sent via e-file Portal to: Matt Murray; Linda Coleman, AORO; Eric Frey, Esq.

¹³ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).