



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JOHN DEBARTOLA,
Requester**

v.

**CAMBRIA COUNTY,
Respondent**

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Docket No: AP 2024-0921

FACTUAL BACKGROUND

On March 26, 2024, John DeBartola (“Requester”) submitted a request (“Request”) to Cambria County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. Any documents that show how the hotel tax was spent from January 1, 2022 to present. This includes invoices, check registries, outgoing and ingoing bills[,] and salaries.
2. [A]ll expenditures, income and money given from the destination marketing program of the visitors['] bureau funded through the hotel tax of the County.

On March 27, 2024, the Requester verified that he is seeking “how the hotel tax money is being spent by Visit Johnstown.”¹

¹ See <https://www.visitjohnstownpa.com/> (last accessed May 30, 2024).

On April 2, 2024, the County denied the Request, arguing that no records responsive to the Request exist within its possession, custody or control.

On April 4, 2024, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 14, 2024, the Requester submitted a position statement and documentation in support of the appeal.

On April 15, 2024, the County submitted a position statement reiterating its grounds for denial. In support of its position, the County submitted the attestation, made subject to the penalties of 18 Pa.C.S. § 4904, of its Open Records Officer, Melissa Kestermont (“Kestermont Attestation”).

On that same day, the Requester provided an additional submission in support of the appeal.

On May 21, 2024, in response to the OOR’s request for additional information, the County provided the supplemental attestation, made subject to the penalties of 18 Pa.C.S. § 4904, of Melissa Kestermont (“Kestermont Supplemental Attestation”).

LEGAL ANALYSIS

The County 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

² 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).”). During the appeal, the Requester granted the OOR an additional extension of time to issue this final determination. *Id.*

subject to the RTKL, the County 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).

On appeal, the County argues that no records responsive to the Request exist within its possession, custody or control because “Visit Johnstown is not an entity of...[the] County and is a non-profit entity that does not exist as an arm of County government or any other Commonwealth agency.”³

The Requester argues that “the [C]ounty has an obligation under [the RTKL]...to ask [Visit Johnstown] for the records” as part of its search.

1. The County demonstrated that it does not possess records responsive to the Request

The County argues that no records responsive to the Request exist within its possession, custody or control. *See* Kestermont Attestation, ¶ 4.

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:

³ In its position statement, the County stated that the Requester “has asked Visit Johnstown directly for...[the] information sought, and...[it] denied said request.” As the instant Request was submitted to the County, the OOR need not address whether Visit Johnstown is an agency independently subject to the requirements of the RTKL.

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 County's position, the Kestermont Attestation states:

Upon receipt of the [R]equest, I conducted a thorough examination of files in the possession, custody, and control of the [County] for records responsive to the [R]equest...and found that no such records exist.

See Kestermont Attestation, ¶ 4.

Under the RTKL, a sworn affidavit or 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 County acted in bad faith or that responsive records exist, "the averments in [the statement] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. 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)).

Here, the Kestermont Attestation is authored by the County's Open Records Officer who is familiar with the County and who affirms that that the County does not possess responsive

records. *See* Kestermont Attestation, ¶¶ 1, 3-4. Moreover, no evidence was presented to show that the County is in actual possession of records responsive to the Request. Rather, the Requester’s argument centers on whether the County is required to contact Visit Johnstown as part of a complete search for responsive records. Accordingly, based on the evidence provided, the County has met its burden of proof that it does not possess the records sought in the Request. *Hodges*, 29 A.3d at 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”).

2. The County is not required to contact Visit Johnstown to obtain the records responsive to the Request

As stated above, the Requester argues that County’s search is incomplete, and that, under the RTKL, the County is required to contact Visit Johnstown as part of a complete search for records responsive to the Request.

The County argues that “Visit Johnstown is not an entity of...[the] County and is a non-profit entity that does not exist as an arm of County government or any other Commonwealth agency.” The County further argues that, although it distributes a portion of the County’s hotel tax to Visit Johnstown in accordance with County Ordinance No. 2016-3 (“Ordinance”),⁴ the “County, nor its Commissioners, have any control nor elicit any direction to the Visitors Center, (Visit Johnstown),” and that “there is a separate board that runs Visit[] Johnstown, of which...the County does not appoint individuals to nor has any control over.” Finally, the County argues that the Pennsylvania County Code (“Code”) explicitly delineates the expenditures for which the hotel

⁴ *See* Agency Submission, pp 6-10.

tax distribution can be used and that it is Visit Johnstown's responsibility to ensure the funds are utilized in accordance with the law. *See* 16 P.S.A. § 1770.10(d).

The RTKL makes two groups of records accessible—those records in an agency's actual⁵ or constructive possession and those records in the possession of third parties. Records in an agency's actual or constructive possession are accessible under Section 901 of the RTKL. *See* 65 P.S. § 67.901. Records in the possession of third parties are indirectly accessible through Section 506(d) of the RTKL, which states “[a] public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this action, shall be considered a public record of the agency for purposes of this act.” *See* 65 P.S. § 67.506(d)(1); *Pa. Dep't of Pub. Welf. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014), *aff'd* 124 A.3d 1214 (Pa. 2015). Further, for Section 506(d) to apply, a contract between the agency and the third party from whom records are sought must exist, the records must relate to the performance of the agency's governmental function, and the records must not be exempt from access under the RTKL. *See Allegheny Cnty. Dep't of Admin. Serv. v. A Second Chance, Inc.*, 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011); *see also* 65 P.S. § 67.305(a), *Eiseman*, 124 A.3d at 1223.⁶

In support of the County's position, the Kestermont Attestation states:

By way of providing background, the Agency collects hotel tax from relevant establishments in...[the] County and then disburses said monies to...County Tourist Council, Inc., d/b/a Visit Johnstown, per the...Ordinance. Visit Johnstown is a non-profit entity⁷ and does not exist as an arm of County government, or any

⁵ As determined above, the County is not in actual possession of the records responsive to the Request.

⁶ In *A Second Chance*, the Commonwealth Court explained that records “in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency” are presumptively public records subject to public access, “so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL.” 13 A.3d at 1039.

⁷ Visit Johnstown's website states that “Visit Johnstown is a 501(c)4 non-profit corporation that is governed by a board of directors representing tourism industry partners and area businesses who have a vested interest in furthering

other “Commonwealth agency” as described in the...[RTKL]. The purpose of Visit Johnstown is to promote travel and tourism to the area.”

See Kestermont Attestation, ¶ 5. In further support of the County’s position, the Kestermont Supplemental Attestation states:

4. ...[L]odging facilities submit the hotel tax⁸ to the...County Treasurer’s Office, either monthly or quarterly, depending on the number of rooms in the establishment. The County keeps a four percent (4%) administrative fee and then distributes the remainder to Visit Johnstown on a monthly basis.
5. No other entity receives any portion of the tax. The County is merely the collection vehicle for the hotel tax that, by law, must be collected and disbursed to a designated tourist promotion agency, in this case Visit Johnstown. ...[The Ordinance], defines how the funds are to be used by the tourist promotion agency. It is the tourist promotion agency’s responsibility to ensure the funds are utilized in accordance with the law. The legislation is enabling legislation, meaning the County can choose whether to enact it, but that is all....
6. In preparing the Attestation, neither Cambria County nor its Commissioners have any control nor elicit any direction to Visit Johnstown regarding expenditure of funds in compliance with.... Section 1770.10 [of the Code].

See Kestermont Supplemental Attestation, ¶¶ 4-6.

As previously stated, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. See *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. In the absence of any competent evidence that the County acted in bad faith, “the averments in [the statements] should be accepted as true.” *McGowan*, 103 A.3d at 382-83.

Here, the Kestermont Attestations show that the relationship between the County and Visit Johnstown is statutory, not contractual. Accordingly, based on the evidence presented, Section 506(d) of the RTKL is not applicable in this instance. See 65 P.S. § 67.506(d)(1); *A Second Chance*, 13 A.3d at 1039; see also *Cochran Holdings Group v. Lycoming Cnty.*, OOR Dkt. AP

tourism development and promotion in Cambria County.” See <https://www.visitjohnstownpa.com/about> (last accessed May 30, 2024).

⁸ The Code enables the collection of a hotel tax. See 16 P.S.A. § 1770.10.

2015-0544, 2015 PA O.O.R.D. LEXIS 568 (determining bank account records of a tourist promotion agency were not accessible from the county under Section 506(d) of the RTKL.”

Because Section 506(d) of the RTKL is inapplicable and the County has demonstrated that it is not in actual possession of the records responsive to the Request, the final question is whether the County is in constructive possession of the responsive records and, thus, the records are accessible under Section 901 of the RTKL. *See* 65 P.S. § 67.901; *see also Palochko v. Exec. Educ. Academy Charter Sch. and Exec. Educ. Academy Charter Sch. Found.*, OOR Dkt. AP 2019-0524, 2019 PA O.O.R.D. LEXIS 530 (under Section 901 of the RTKL, an agency may exercise constructive possession over another entity’s records).

In *Eiseman*, the Commonwealth Court explained the concept of constructive possession under the RTKL. The Court stated:

Constructive possession focuses on an agency’s access to a record. The analysis emphasizes the statutory language in Section 901 of the RTKL that mandates an agency “determine whether [it] has possession, custody or control of the identified record.” 65 P.S. § 67.901. We recognize constructive possession under Section 901 as a means of access so agencies cannot frustrate the purposes of the RTKL by placing their records in the hands of third parties to avoid disclosure.

However, this Court does not infer constructive possession from the mere availability of the records to an agency upon request. The litmus test under Section 901 remains whether the records document a transaction of the agency to which the request was directed, not whether they document a transaction of a private contractor.

86 A.3d at 938-39 (internal citations omitted); *see also Off. of the Budget v. Off. of Open Records*, 11 A.3d 618, 631 (Pa. Commw. Ct. 2011).

As noted above, the Code authorizes the collection of a hotel tax. Specifically, Section 1770.10 applies to third through eighth class counties.⁹ *See* 16 P.S. § 1770.10. The Code

⁹ The County is a fourth class county. *See* <https://www.pacounties.org/who-we-are/pennsylvania-county-by-class> (last accessed June 5, 2024).

authorizes counties to enact ordinances governing the collection and enforcement of the hotel tax. *See* 16 P.S. § 1770.10(b). The Code also authorizes county treasurer’s offices to collect the hotel tax and to distribute the applicable revenue to the tourist promotion agency named in a county’s ordinance as the recipient of the funds. *See* 16 P.S. § 1770.10(c). Further, the Code delineates how the funds shall be used by the recognized tourist promotion agency. *See* 16 P.S. § 1770.10(d). Finally, the Code requires the tourist promotion agency to submit an audited report of income and expenditures to the county.¹⁰ *See* 16 P.S. § 1770.10(e).

Here, applying the *Eiseman* “litmus test” of “whether the records document a transaction of the agency to which the request was directed,” there is nothing in the record to show that the requested records document a transaction of the County. *See Eiseman, supra*. As affirmed by the Kestermont Attestations, Visit Johnstown is the tourist promotion agency to which the County distributes hotel tax funds, and in its position statement, the County explains that “Visit Johnstown is funded by various sources, of which a very limited amount comes from the hotel tax.” *See* Kestermont Attestation, ¶ 5; Kestermont Supplemental Attestation, ¶ 4. Additionally, the Kestermont Attestation affirms that “Visit Johnstown is a non-profit entity and does not exist as an arm of County government, or any other ‘Commonwealth agency’ as described in the [RTKL].” *See* Kestermont Attestation, ¶ 5. Further, the Kestermont Supplemental Attestation affirms that “neither Cambria County nor its Commissioners have any control nor elicit any direction to Visit Johnstown regarding expenditure of funds.” *See* Kestermont Supplemental Attestation, ¶ 6. Rather, it is the Code that directs the expenditure of hotel tax funds. *See* 16 P.S. § 1770.10(d). Finally, there is nothing in the Code that requires counties to provide oversight of the designated tourist promotion agencies nor does the Code require the tourist promotion agencies to submit

¹⁰ The Kestermont Attestation affirms that “[t]hrough a previous...[RTKL] request, the Requester has also been provided copies of audits of Visit Johnstown that the [County] had in its possession. *See* Kestermont Attestation, ¶ 7.

“invoices, check registries, ...bills” or salary information to the counties. *See* 16 P.S. § 1770.10. The Code only requires the tourist promotion agency to submit an audited report of income and expenditures to the county. *See* 16 P.S. § 1770.10(e). Moreover, Visit Johnstown’s website¹¹ describes the function of Visit Johnstown as, in sum, promoting and advocating for travel and tourism within the County, which is accomplished “by employing a variety of destination marketing tactics.” *See* <https://www.visitjohnstownpa.com/about> (last accessed May 30, 2024). Thus, based on the publicly available information, Visit Johnstown is, ostensibly, a non-profit tourism marketing corporation, the function of which is distinct from the functions of the County.

Based on the available evidence and statutory authority, the OOR cannot find that the requested records document a transaction of the County or that the County is in constructive possession of the requested records. Accordingly, the County is not obligated to contact Visit Johnstown as part of a complete search for responsive records. *See* 65 P.S. § 67.901; *Eiseman, supra.*; *see also, e.g., Campbell v. City of Phila. Parks and Recreation Dep’t*, OOR Dkt. AP 2023-1018, 2023 PA O.O.R.D. LEXIS 1580.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the County 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 or petition for review to the Cambria 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 this matter, the OOR is not a proper party to any appeal and should not be named

¹¹ In his April 14, 2024 position statement, the Requester directs the OOR to Visit Johnstown’s Articles of Incorporation. However, the Articles of Incorporation were not submitted into the appeal record.

as a party.¹² 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: June 10, 2024

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO

Sent via OOR portal to: John DeBartola
 Ronald N. Repak, Esq.
 Melissa Kestermont

¹² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).