



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**ALAN DASHOFF,  
Requester**

**v.**

**PENNDEL BOROUGH,  
Respondent**

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**Docket No: AP 2024-1588**

On June 13, 2024, Alan Dashoff (“Requester”) submitted a request (“Request”) to PennDel Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

All documents sent to council members as part of the ‘meeting packet’ sent to council members prior to the meeting or added to the initial packet including but not limited to the agenda, the bill list, financial reports, Police chief[’s] report, documents related to action items to be voted on, engineer[’s] report, mayor[’s] report, code enforcement reports, fire marshal reports.

The document should be sent to [the Requester] prior to meeting the packet is referring to.

This is to be an ongoing process, for both the council and work sessions.

On June 17, 2024, the Borough denied the Request, stating that the records do not exist within the Borough’s possession, custody or control.

On the same date, the Requester filed an appeal with 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 June 28, 2024, the Borough submitted a position statement, corresponding exhibits, and an attestation made under the penalty of unsworn falsification<sup>1</sup> from Marie Serota (“Serota Attestation”), the Borough’s Secretary and Open Records Officer (“AORO”), reiterating its denial.

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).

It is presumed that agencies will act in good faith in discharging their statutory duties under the RTKL. *Smith Butz, LLC v. Pa. Dep’t of Env’tl. Prot.*, 142 A.3d 941, 945-946 (Pa. Commw. Ct. 2017); *see also Commonwealth v. Donahue*, 626 Pa. 437, 98 A.3d 1223, 1239 (Pa. 2014). Although an agency may interpret the meaning of a request for records, that interpretation must

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<sup>1</sup> 18 Pa.C.S.A. § 4904.

be reasonable and construed within the context of the request. *Vista Health Plan, Inc. v. Pa. Dep't of Human Servs.*, 2018 Pa. Commw. Unpub. LEXIS 295, \*12-13; *See 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. Additionally, the 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). Under the RTKL, an attestation may serve as sufficient evidentiary support for the nonexistence of records. *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); *see also Campbell v. Pa. Interscholastic Ath. Assoc.*, 2021 Pa. Commw. LEXIS 579 (Pa. Commw. Ct. Nov. 30, 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and which is tantamount to a “more likely than not” inquiry).

Here, the Borough submits the Serota Attestation in support of its position, which states, in part:

1. I am employed by the [Borough], whose administrative offices are located at 300 Bellevue Avenue, Penn del, Bucks County, Pennsylvania, as Secretary and AORO for the Borough.
2. I began working for the Borough in 1995 as Assistant Borough Secretary and was promoted to Borough Secretary in 2002. I am the Secretary for Borough Administration and serve as Secretary / Treasurer for Borough Council.
3. Among my duties as Borough Secretary, I am responsible for the following: finalizing, posting on the Borough's website and making publicly available the agenda, once approved by Council President, for all Council meetings held pursuant to the Sunshine Act, 65 Pa. C.S. 5706, *et seq.*; gathering documents or requesting documents from relevant sources which are pertinent to the approved and finalized agenda items for the next scheduled Council meeting, and assemble the available documents into a meeting packet for Council members to review prior to the next scheduled Council meeting; distributing the meeting packet assembled for the next scheduled Council meeting by email to each individual Council members for their individual review in preparing for deliberations on the relevant agenda items for the public meeting; attend each scheduled Council meeting and record all Council actions; and, prepare

the minutes of each meeting, and post the minutes on the Borough's website once they are approved by Council at a subsequent Council meeting.

4. Borough Council routinely holds two public meetings per month. The first is the regular monthly Council meeting, held on the first Monday of each month, and the second is Council's workshop meeting, held on the third Monday of each month. This schedule for each type of meeting is regularly maintained, unless the respective Monday falls on a holiday or circumstances otherwise result in a change to this schedule. As with Council's regular monthly meeting, the Council's workshop meeting falls under the requirements of the Sunshine Act.

5. Every meeting packet for each public Council meeting is routinely assembled and sent by email to Council members on the Friday immediately before the scheduled Monday meeting. The meeting packet is not assembled by me until the items to be placed on the agenda are identified, made final and are approved by the Council President, which also occurs on that same Friday, after which, on that same date, I prepare the written agenda for public posting and include in the meeting packet for the Council members. Individual items to be placed in the agenda may be identified for the first time throughout the day on that same Friday, wherein I would afterward compile or request any relevant documents related to that agenda item for inclusion in the meeting packet.

6. On Thursday, June 13, 2024, I received the ... [RTKL] [R]equest [...].

7. On that same date, at 1:37 PM, I emailed [the Requester], requesting that he clarify the time frame [the Requester] was seeking for his request. [The Requester] responded by email at 1:41 PM, "[flor time frame — this meeting going and going forward."

8. After [the Requester's] clarification as to the time frame for his RTK request, I interpreted [the Requester's] [R]equest as requesting the contents of the meeting packet sent to the Council members for the next scheduled Council meeting, which was a workshop meeting to be held on Monday, June 17, 2024, and each meeting packet that will be sent to Council members for every Council meeting to be held thereafter, with no end date.

9. On Wednesday, June 12, 2024, the date that [the Requester] sent his RTK Request, and Thursday, June 13, 2024, the date that I received the [R]equest, the agenda items for the June 17, 2024 Council workshop meeting were not finalized and approved by Council President and I had not yet assembled, and was unable to assemble until Friday, June 14, 2024, the meeting packet to send to Council members for the Monday Council meeting. Therefore, the meeting packet requested by [the Requester] did not yet exist.

10. Similarly, the meeting packets to be sent to Council members for each future meeting that followed had not been assembled and did not exist on June 12, 2024[,] and June 13, 2024, nor, as of those dates, could the approved agenda items, needed to assemble the meeting packets, be known.

11. On June 17, 2024, at 11:57 AM, I emailed to [the Requester] the Borough's response, denying his RTK request, advising him that the records requested did not exist under Section 705 of the RTK Statute.

12. Shortly after I sent the response, [the Requester] sent to me an email, at 12:05 PM, stating: "Just a thought, the packet for tonight's meeting exists now, Can I get it?"

13. I did not interpret the content of [the Requester's] email of June 17, 2024[,] at 12:05 PM as a new RTK request under the statute. First, [the Requester] did not submit a new request on a Standard Right to Know Form, as he did in his June 12, 2024[,] [R]equest. The Borough's public website page for access to public records states, in part, that "residents requesting public records should fill out the following form," and has attached a Standard [RTKL] Form Request Form, along with other documents. For his June 12, 2024[,] [Request], [the Requester] used the same Standard [RTKL] Form that is currently posted of the Office of Open Records website.

14. Second, based on the context and nature of the communication in [the Requester]'s 12:05 [PM] email, I interpreted this email as a question of how [the Requester] can get access to the meeting packet since, as of the date of the response, it purportedly now existed. As such, I replied to [the Requester] at 1:43 PM, "I suggest you wait until after tonight's meeting — what is actually made public at the meeting (and what was not) to help determine whether each document would be disclosable or not." While not specifically stated, my suggestion to "wait until after tonight's meeting" was for the filing of a new [RTKL] request to access the meeting packet sent to Council for the June 17<sup>th</sup> meeting. I further interpreted [the Requester]'s response at 1:44 PM to my suggestion as understanding that a new [RTKL] request would have to be filed to access that meeting packet as [the Requester] responded, "Ok but it kind of defeats the purpose when you only have half the picture. All of the data[] points are in the packet." My reply, in turn, to the [Requester]'s 1:44 PM communication was, "I'm sorry — it is according to the RTK Law."

In this matter, the Request sought responsive records that would be compiled at a future date. The Borough submitted the Serota Attestation, which shows that responsive records did not exist within the Borough's possession, custody or control at the time of the Request. *See Serota Attestation*, ¶¶ 9-11. The OOR makes no determinations 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 (emphasis added); *see also* 65 P.S. § 67.705. The Requester attempted to expand the Request by emailing

the AORO on June 17, 2024, seeking the same records.<sup>2</sup> The Borough's evidence demonstrates that an individual with knowledge of the Borough's records reasonably construed the initial Request. *See* Serota Attestation, ¶¶ 1-5, 13-14. Therefore, based on the evidence provided, the Borough has met its burden of proof that it does not possess the records sought in the Request. *Hodges*, 29 A.3d 1190 (Pa. Commw. Ct. 2011).<sup>3</sup>

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 or petition for review to the Bucks 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.<sup>4</sup> All documents or communications following the issuance of this Final Determination shall be sent to [oor-postfd@pa.gov](mailto:oor-postfd@pa.gov). This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 9, 2024**

*/s/ Damian DeStefano*

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DAMIAN DESTEFANO  
APPEALS OFFICER

Sent to: Alan Dashoff (via portal only); Marie Serota, AORO (via portal only);  
Karen Diaz, Esq. (via portal only)

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<sup>2</sup> The OOR will view the Request as written. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Michak v. Dep't of Pub. Welfare*, 56 A.3d 925 (Pa. Commw. Ct. 2012).

<sup>3</sup> The Requester is not precluded from filing another request with the Borough, and, if necessary, a new appeal with the OOR pursuant to the requirements of 65 P.S. § 67.1101(a).

<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).