



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**GERARD GREGA,
Requester**

v.

**WEATHERLY BOROUGH,
Respondent**

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Docket No: AP 2026-1929

FACTUAL BACKGROUND

On April 29, 2026, Gerard Grega (“Requester”) submitted a request (“Request”) to Weatherly Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, in relevant part:¹

3. Documented reason for T. Mengle “ABSTENTION” on this 5Y, 1N and 1 Abstain roll call vote made to accept the Northpoint parcel donation.
4. COPIES of all communications (emails, etc.) to/from/between Weatherly Borough (Manager/Solicitor/ and/or Council members) and the WASD between August 2025 and present regarding the Blakeslee Avenue “vacating” action just approved on 4/27/26.
5. All communications (emails, texts, etc.) between WB Manager, Council members, Solicitor, and Northpoint discussing the Northpoint land parcel transaction between January 1, 2024 and present culminating in the approved Resolution on 4/27/26.

¹ In the appeal, the Requester only challenged Parts 3-5 of the five-part Request. Therefore, any challenge to the Borough’s response to Parts 1 and 2 have been waived and will not be addressed on appeal.

The Borough responded on May 6, 2026. The Borough denied Part 3 of the Request, arguing that responsive records do not exist within the possession, custody or control of the agency. The Borough partially granted and partially denied Part 4 of the Request, arguing that certain records are protected by the attorney-client privilege. The Borough denied Part 5 of the Request, arguing that the records are protected by the attorney-client privilege, the records reflect internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), and the records are exempt contents of a real estate evaluation, 65 P.S. § 67.708(b)(22).

On May 14, 2026, 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 the OOR if any third parties have a direct interest in the appeal. 65 P.S. § 67.1101(c).

On June 1, 2026, the Borough submitted a position statement reiterating its grounds for denial and providing a responsive email to Part 4 of the Request. The Borough claims that no records exist for Part 3 of the Request, that it has now provided all responsive records to Part 4 of the Request, and that the records responsive to Part 5 of the Request reflect internal, predecisional deliberations (65 P.S. § 67.708(b)(10)(i)(A), relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17), and are exempt contents of a real estate evaluation, 65 P.S. § 67.708(b)(22). At the direction of the OOR, on June 5, 2026 the Borough submitted an attestation, made subject to the penalties set forth in 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) from Terry Glover, the Borough’s Open Records Officer (“Glover Attestation”).

On June 10, 2026, the OOR asked the Requester to provide a legal citation to support his argument that abstentions require a councilmember to provide a written reason for abstaining from a vote. On June 12, 2026 the Requester provided a citation to subsection (j) of the public official

conflict of interest statute, 65 Pa.C.S. § 1103, as well as what appear to be general internet search results for rules in other states.²

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)).

1. The Borough established that records responsive to Part 3 of the Request do not exist in the Borough’s possession, custody, or control

Part 3 of the Request seeks a “[d]ocumented reason for T Mengle ‘ABSTENTION’” on a roll call vote. The Borough claims that while Councilperson T. Mengle did abstain from the vote, “there was no documentation presented by T. Mengle as to why she abstained.”

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

² On June 16, 2026, the OOR requested an extension to conduct *in camera* review but withdrew the request the next day prior to receiving a response.

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).

Here, Open Records Officer Glover attests that a search was conducted and that no responsive records exist in the Borough's possession, custody or control.³ *See* Glover Attestation, ¶¶ 3-5. The Requester argues that, based on 65 Pa.C.S. § 1103(j) a responsive written record explaining any abstention *should* exist for Part 3 of the Request. However, that statutory provision only applies where there is a conflict of interest, and in this case, there is no evidence that the abstention was based on a conflict of interest.⁴ Further, the OOR does not determine whether records should exist, only whether an agency actually possesses them. *Gorol v. Forest Hills Borough*, OOR Dkt. AP 2019-0329, 2019 PA O.O.R.D. LEXIS 427 (“While...evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record] - the OOR may only determine whether a responsive record does, in fact, exist.”).

³ 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 Borough has acted in bad faith or that the requested records exist, “the averments in [the Glover Attestation] 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)).

⁴ The Requester provided other statutes and internet search results in support of his claim that a written record should exist, but they are not applicable to Borough officials in Pennsylvania.

Therefore, based on the evidence provided, the Borough has met its burden of proof that it does not possess the records sought in Part 3 of the Request and this portion of the appeal is denied.

Hodges v. Pa. Dep't of Health, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

2. The Borough established that no additional records responsive to Part 4 of the Request exist in the Borough's possession, custody, or control

Although the Borough initially argued that certain records responsive to Part 4 of the Request are privileged, on appeal it provided what it claims is the only remaining responsive record. Here, Open Records Officer Glover attests that all remaining responsive records were provided on June 1, 2026 and no additional records exist. *See Glover Attestation*, ¶ 5. This is corroborated by the Borough's position statement and the email attached thereto. Therefore, based on the evidence provided, the Borough has met its burden of proof that it does not possess additional records for Part 4 of the Request. Concerning the email provided by the Borough, the appeal is dismissed as moot. *See Kutztown Univ. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (holding that an appeal is properly dismissed as moot where no controversy remains). Because the Borough provided the record, there is no need to address the attorney-client privilege claim.

3. The Borough failed to prove that records responsive to Part 5 of the Request are exempt

Part 5 of the Request seeks communications between the Borough Manager, council members, solicitor, and Northpoint discussing a land parcel transaction. The Borough responded as follows:

Denied. You are requesting confidential information protected by attorney-client privilege between Borough Solicitor/Borough Manager/Borough Council and Northpoint. Secondly, this pertains to pre-decisional deliberations of an agency under section 708(b)(10)(i). Further, this pertains to contents of a real estate evaluation involved in a potential acquisition of real estate under Section 708(b)(22).

One method an agency may use in meeting the burden of proof that a record is exempt is testimonial affidavits, which if “found to be relevant and credible may provide sufficient evidence in support of a claimed exemption.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 381 (Pa. Commw. Ct. 2014) (quoting *Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1073 (Pa. Commw. Ct. 2013)). Such “affidavits must be detailed, nonconclusory, and submitted in good faith.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*) (citation omitted). Attestations and affidavits that are “conclusory or merely parrot [an] exemption do not suffice” to satisfy an agency’s burden of proof. *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016). “In other words, a generic determination or conclusory statement are not sufficient[.]” *Scolforo*, 65 A.3d at 1103.

As noted above, the OOR directed the Borough to support its claims on appeal with a sworn affidavit or attestation. The only attestation provided by the Borough, the Glover Attestation, makes no mention of privilege or Sections 708(b)(10) and/or 708(b)(22) of the RTKL, and the statements in both the denial and position statement are conclusory. Further, the claims made in the Borough’s position statement are not competent evidence, as “[p]osition 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 (Pa. Commw. Ct. 2015) (citations omitted); *see also Hous. Auth. of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (noting that “assertions in briefs” are “not evidence of record”). Accordingly, the Borough failed to meet its burden of proof that the records are exempt and shall provide to the Requester all records responsive to Part 5 of the Request. *See* 65 P.S. § 708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, and dismissed as moot in part**, and the Borough is required to provide all responsive records for Part 5 of the Request within thirty days. 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 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.⁵ 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: June 17, 2026

/s/ Josh Macel

APPEALS OFFICER
JOSH MACEL

Sent *via* Appeals Portal to: Gerard Grega; Tracy Glover (AORO); James Nanovic, Esq.

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