



FINAL DETERMINATION

IN THE MATTER OF

JOHN YAKIM,
Requester

v.

MUNICIPALITY OF MONROEVILLE,
Respondent

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: Docket No: AP 2017-1354
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INTRODUCTION

John Yakim (“Requester”) submitted a request (“Request”) to the Municipality of Monroeville (“Municipality”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of payments made to a councilperson by the Municipality’s insurance carrier. The Municipality partially denied the Request, stating that certain records do not exist and redacting personal information. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Municipality is required to take further action as directed.

FACTUAL BACKGROUND

On July 3, 2017, the Request was filed seeking:

All invoices, remittances or copies of checks for payments made to Councilman Gresock or Dr. Nicholas Gresock by the municipality or any municipal insurance carrier. This should include payments made to Dr. Gresock for either health insurance claims or workmen’s comp claims. Date range, 2011 to date.

On July 11, 2017, the Municipality partially granted the Request, providing certain payment records. The Municipality also provided an e-mail¹ dated July 6, 2017 from Highmark Inc. in response to the Request, stating that the responsive records are not public because they would identify possible workmen's compensation information and individually identifiable health information, citing 65 P.S. § 67.708(b)(5) and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. § 164.502(a). Highmark Inc.'s e-mail also states that it is no longer contracted with the Municipality, so that it would not be required to provide records pursuant to 65 P.S. § 67.506(d)(1).

On July 11, 2017, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Municipality to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On July 13, 2017, the Requester submitted a statement that he is not requesting personally identifiable information, rather only the payments made to a provider on behalf of the Municipality through the insurance carrier.

On July 13, 2017, the Municipality submitted a position statement reiterating its grounds for denial, along with a sworn affidavit from Joseph Sedlack, the Municipality's Open Records Officer, attesting that no worker's compensation claims exist for employees since 2011.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets,

¹ The Municipality redacted personal e-mail addresses from the Highmark Inc. e-mail, citing 65 P.S. § 67.708(b)(6).

scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; and the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Municipality is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the

Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 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)). “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).

1. There are no payments of worker’s compensation from 2011 to present responsive to the Request

Mr. Sedlack attests that “no worker’s compensation claims have been directed to Dr. Nicolas Gresock and therefore no payments for worker’s compensation claims have been made to Dr. Gresock since 2011.” The Requester did not submit any evidence to challenge the Municipality’s affidavit.

Under the RTKL, a sworn affidavit 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). In the absence of any competent evidence that the Municipality acted in bad faith or that the records exist, “the averments in [the affidavit] 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)). Based on the evidence provided, the Municipality has met its burden of proving that no payments for worker’s compensation claims to Dr. Gresock during the timeframe set forth in the Request exist in the Municipality’s possession, custody or control. *See Hodges*, 29 A.3d at 1192.

2. The Municipality failed to prove that no other records exist responsive to the Request

The Municipality's denial of the Request included a letter from Highmark Inc. stating that records are exempt from access as containing an individual's identifiable health information citing both 65 P.S. § 67.708(b)(5)² of the RTKL and HIPAA. However, the Request states that is seeking "payments" made to Councilman Gresock by the Municipality or any insurance carrier, not the health information of Dr. Gresock.

Other than an unsworn statement by Highmark, Inc. in an e-mail, the Municipality has not provided any evidence to withhold records of payments. Section 708 of the RTKL places the burden of proof on the Municipality to demonstrate that a record is exempt. *See* 65 P.S. § 67.708(a)(1); *see Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (holding that unsworn and unverified statements cannot constitute competent evidence to sustain an agency's burden of proof). Further, the exemptions found in the RTKL apply in a very limited manner to financial records. Section 708(c) of the RTKL states that "[t]he exemptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) OR (17)." 65 P.S. § 67.708(c). Because the Request is seeking only payments in the form of –"invoices, remittances or copies of checks"— the record(s) at issue are financial records. The Municipality has not provided any evidence supporting the application of Section 708(b)(5) or HIPAA to the responsive records, nor has it raised any other reason for denying access to the records. Therefore, the Municipality

² Section 708(b)(5) exempts from public access, "[a] record of an individual's medical, psychiatric or psychological history or disability status ... or related information that would disclose individually identifiable health information." 65 P.S. § 67.708(b)(5).

has not met its burden of proof under the RTKL. *See* 65 P.S. § 67.305.³

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Municipality is required to provide records of payments made by the Municipality or its insurance carrier to the identified Councilman since 2011 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 Allegheny 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. 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 8, 2017

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: John Yakim (via e-mail only);
Joseph Sedlak (via e-mail only)

³ Highmark Inc.'s e-mail also states that it is "no longer directly contracted with Monroeville, but is contracted with Municipal Benefit Services, which is not a local agency defined by the RTKL." However, there is no evidence that Highmark Inc. does not have records responsive to the Request dating back to 2011.

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