



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**ALEX WEIDENHOF,
Requester**

v.

**LANCASTER TOWNSHIP,
Respondent**

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: Docket No: AP 2020-2087

INTRODUCTION

Alex Weidenhof (“Requester”) submitted a request (“Request”) to Lancaster Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of the Township Manager. The Township partially denied the Request, stating the Request does not seek records under the RTKL. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

On October 8, 2020, the Request were filed seeking:

1. Any and all agreements between the Township and Benjamin Kramer pertaining to the end of his employment at the Township.

2. Any and all correspondence between Benjamin Kramer, including those made by and through an attorney, and other officials in the Township, including but not limited to communications with members of the Board of Supervisors, communications with the Township secretary, and non-privileged communications with its solicitor, between 1 January 2018 and 30 September 2020 pertaining to his

role as a real estate agent. In this instance, correspondence includes emails, memoranda, and letters, as well records and minutes of, or notes from, in-person meetings and phone calls.

On October 13, 2020, the Township responded, granting access to a separation agreement that would be ratified at the next monthly meeting on October 19, 2020. The Township denied Item 2, stating that the Request seeks records of Mr. Kramer’s work as a real estate agent and not records that document a transaction or activity of the Township.

On October 13, 2020, 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 Township to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On October 15, 2020, the Requester submitted his position statement arguing that the Township has not conducted a good faith search to identify the records and has not proven that the records do not document a transaction or activity of the Township. The Township did not make a submission on appeal.

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, 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, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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). 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. The Township must provide records responsive to Item 1 of the Request

In response to the Request, the Township granted access to the separation agreement. However, the Township submitted no evidence demonstrating that it provided all responsive records to the Requester. While the Township states that it would provide access to the separation agreement, and the OOR has no reason to doubt the Township’s intention to do so, the Township has not submitted evidence, *e.g.*, a statement made under the penalty of perjury, demonstrating that it has provided the record or that it has searched for and located any additional records responsive to Item 1 of the Request. Absent the Township providing a sufficient evidentiary basis that records have been provided, the OOR will order disclosure. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

2. The Township failed to prove the records do not document a transaction or activity of the Township

The Request seeks records of Township Manager, Benjamin Kramer, and other Township officials, supervisors and solicitor regarding Mr. Kramer’s work as a real estate agent. The Township argues that these records do not document the transaction or activity of the Township.

The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.”

65 P.S. § 67.102. To determine if certain material is a record, the RTKL imposes a two-part inquiry: (1) does the material document a “transaction or activity of the agency”; and (2) if so, was the material “created, received or retained . . . in connection with a transaction, business or activity of [an] agency.” See 65 P.S. § 67.102; *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of a record must be liberally construed. *Id.*; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012).

Records are not considered records of an agency merely because they are capable of being accessed by Township officials, Board of Supervisors and Solicitor or by their location on an agency computer. *Pa. Office of Attorney General v. Bumsted*, 134 A.3d 1204 (Pa. Commw. Ct. 2016); *Meguerian v. Office of the Attorney General*, 86 A.3d 924, 930 (Pa. Commw. Ct. 2013); *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012). For records to qualify as records of an agency, the OOR must look to the subject matter of the records and must document a transaction or activity of the agency. *Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011).

Here, the Township’s response states that Mr. Kramer’s work as a real estate agent does not document a transaction or activity of the Township; however, the Township does not identify the responsive records or provide any additional information describing the nature of the records. Without additional information, it is unclear if the records, although pertaining to the Township Manager’s outside employment, also pertain to a transaction or activity of the Township. See generally *Muckrock News v. Philadelphia Gas Works*, OOR Dkt. AP 2018-1918, 2018 PA O.O.R.D. LEXIS 1450 (determining that emails received by the agency from its paid membership

to access an information exchange program document transactions and activities of the agency because the emails reflect benefits the agency receives—information—in exchange for its membership dues).

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the Township is required to provide all responsive records to the Requester 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 Butler 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 8, 2020

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent via email to: Alex Weidenhof;
Chrissy Senft

¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).