



FINAL DETERMINATION

IN THE MATTER OF

**KEITH KNAUSS,
Requester**

v.

**LOWER MERION SCHOOL DISTRICT,
Respondent**

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Docket No: AP 2020-2713

INTRODUCTION

Keith Knauss (“Requester”) submitted a request (“Request”) to the Lower Merion School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking communications related to an injunction or lawsuit. The District granted the Request, providing one responsive record. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On November 16, 2020, the Request was filed, seeking:

Any and all communications, (letters, emails presentations, documents, etc.) from October 1, 2020 to the present between the Pennsylvania Department of Education or the Comptroller and the District or its agents regarding any subject matter related to Judge Smyth’s 2016 Injunction or the Wolk lawsuit.

On December 23, 2020, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the District granted the Request, providing an email from Katherine Gallagher to Acting Secretary of Education Noe Ortega and a letter attached with personal email addresses redacted. 65 P.S. § 67.708(b)(6)(i)(A).

On December 24, 2020, the Requester appealed to the OOR, challenging the sufficiency of the search and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 7, 2021, the District submitted a position statement arguing that a good faith search was performed, and the only responsive record was provided. In support of its position, the District submitted the statements made under penalty of perjury of Denise LaPera, Open Records Officer, Robert Copeland, Superintendent, and Kathy Gallagher, Executive Assistant.

On January 7, 2021, the Requester filed a response arguing that the District did not perform a good faith search because the District did not contact any of its agents. He provided a copy of a letter from a law firm representing the District in the injunction to a Montgomery County Court of Common Pleas judge referencing a letter being sent to the Department of Education (“Department”) as evidence that the firm may have contacted the Department outside of the District’s knowledge.

Upon request from the OOR, the District provided a copy of the record provided to the Requester and explained that the correspondence referenced in the letter from the firm to the Court of Common Pleas was the record provided to the Requester.

On January 14, 2021, following a request from the OOR, the District provided the statement made under penalty of perjury of Attorney Alicia Hickok. On January 15, 2021, the

Requester submitted an email he received from the Department of Health as evidence that the District did not perform a good faith search. This email was from Superintendent Copeland to a Department of Health employee. In response, the District, on January 20, 2021, submitted a position statement indicating that the District does not dispute that the email relates to the subject matter but explained that the email did not contain the search terms utilized by the District. In support of this, the District provided the statements made under penalty of perjury of Superintendent Copeland Attorney O'Donoghue and George Frazier, the District's Director of Information Systems.

On the same day, the Requester indicated that he believed the District's failure to provide this email was an honest mistake but expressed concern that the search did not include any law firm representing the District.

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, *in camera* review was requested; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter. Therefore, the request for *in camera* review is hereby denied.

The District 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)(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 District provided one responsive record to the Requester, who argues that a good faith search was not performed. 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” as used in Section 901 of the RTKL, 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 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); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted).

Additionally, the Commonwealth Court has held that an open records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open-records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody, or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by Requestor.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry of agency personnel concerning a request and to determine whether to deny access). Here, the District has submitted evidence describing its search for responsive records.

Ms. LaPera affirms that upon receipt of the Request, she identified Superintendent Copeland and Ms. Gallagher as the District employees likely to be in possession of any responsive records. In turn, they both identified an email sent by Ms. Gallagher, on Superintendent Copeland's behalf, to Acting Secretary Ortega transmitting a letter to Acting Secretary Ortega. Superintendent Copeland affirms that he did not direct any District agents or contractors to contact the Department or Comptroller and was unaware of any agents or contractors contacting them.

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 District has acted in bad faith or that the 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)).

The Requester, in turn, provided a letter from the District's law firm to the Court of Common Pleas stating "[w]e are also writing to the Department of Education," as evidence that the District did not perform a good faith search. He argues that it is possible that the law firm, or other contractors or agents, have contacted the Department outside of the District's direction or knowledge and the District should have contacted them. However, as Superintendent Copeland affirmed that the District did not direct anyone to contact the Department, there would be no reason for the District to believe any party independently contacted the Department. Further, Attorney Hickok, the author of the letter to the Court of Common Pleas, affirms that the statement regarding writing to the Department of Education refers to the letter that Superintendent Copeland sent to the Department.

Additionally, upon receipt of an email that the Requester believed was responsive to the Request, the District performed a second search for any emails between Superintendent Copeland, Denise LaPera or Kathy Gallagher and any pa.gov email address. The record provided by the Requester was located and the District acknowledges that it addressed the subject matter but that it was missed in the first search as it did not contain any of the keywords used by the District in the search. Superintendent Copeland affirms that he did send the email in question, but that he did not recall the email at the time of the initial search.

Based on the evidence provided, the District has demonstrated that it conducted a good faith search for responsive records and provided the responsive records to the Requester. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that an agency conducted a good faith search by “contact[ing] the Bureau most likely to possess responsive records, and ... explain[ing] why that Bureau is most likely to possess those records”); *Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2017-1946, 2017 PA O.O.R.D. LEXIS 1685. To the extent that the District’s initial search was flawed by virtue of the keywords chosen to conduct the search, the District affirms that it conducted a much broader second search; thus, any defect in the search was remedied by the second search.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the District 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 to the Montgomery 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. 65 P.S. § 67.1303. 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: January 22, 2021

/s/ Erin Burlew

ERIN BURLEW, ESQ.
APPEALS OFFICER

Sent to: Keith Knauss (via email only);
Justin O'Donoghue, Esq. (via email only);
Robert Copeland (via email only);
Denise LaPera (via email only)

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