



4. Any and all correspondence dated between Jan. 1, 2018, and Oct. 20, 2020, among Township officials, including the Secretary, Manager, and/or Supervisors, related to alleged impropriety and/or wrongdoing by Township employees.
5. Any and all correspondence dated between Jan. 1, 2020, and Sept. 30, 2020, among Township officials, including the Secretary, Manager, and/or Supervisors, related specifically to allegations of wrongdoing by former Manager Ben Kramer....
6. Any documents dated Jan. 1, 2020 to Oct. 20, 2020, purporting the existence of an executive session(s) held by the Supervisors, including the date, time and place the session was held, as well as the topics discussed at the session....

On November 25, 2020, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the Township partially denied the Request, asserting, in part, that records responsive to Items 4 and 5 of the Request are exempt employee records, 65 P.S. § 67.708(b)(7), and relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17). Additionally, the Township provided meeting minutes in response to Item 6 of the Request and stated that no records exist that are responsive to Item 2 of the Request.

On November 25, 2020, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.<sup>1</sup> 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 November 30, 2020, the Requester submitted his position statement, arguing that the Township has not conducted a good faith search to identify responsive records and has not met its burden of proof under the RTKL. On December 9, 2020, the Township submitted a position

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<sup>1</sup> The Request consisted of six items. On appeal, the Requester only challenges the sufficiency of the Township's response regarding Items 2, 4, 5 and 6 of the Request. As a result, the Requester has waived any objections regarding the sufficiency of the Township's response regarding Items 1 and 3 of the Request. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011). Also, during the course of the appeal, the Requester provided the OOR with additional time to issue this Final Determination. 65 P.S. § 67.1101(b)(1).

statement, reiterating its grounds for denial. The Township further contends that certain responsive records are subject to the attorney-client privilege and the attorney-work product doctrine and that the Township conducted a good faith search for records. In support of its argument, the Township submitted the attestation of Christina Senft (“Ms. Senft”), the Township’s Open Records Officer. The Township also provided additional records that are responsive to the Request.

On December 11, 2020, after the OOR afforded both parties additional time to submit supplemental position statements, the Requester submitted a reply to the Township’s position statement, again arguing that the Township did not meet its burden of proof under the RTKL. The Requester further maintains that the Township’s response to Item 6 of the Request is “incomplete” and that the Township improperly redacted information from the records provided on appeal. The Township did not make a supplemental submission.

### **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). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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)). Likewise, 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 provided responsive records during the appeal**

During the appeal, the Township provided additional records, including one email and four redacted billing records, that are responsive to Item 6 of the Request. As such, the appeal as to the unredacted portions of the records provided is dismissed as moot.

With respect to the redacted portions, the Requester argues that “the redactions in the invoices are unsubstantiated” because the Township “has not claimed any exemptions for the redacted information in these records.” The Requester further contends that the redacted information may not be withheld “solely because it is non-responsive.”

Based on a review of the billing records, it appears that the Township redacted items such as the description of work, the date the work was performed, the number of billable hours for each entry and the amount charged. As noted by the Requester, the Township has not provided any basis for the redactions made, despite the opportunity to make a supplemental submission. As the Township has failed to provide any evidence in support of the redactions, the redacted information on the billing records is subject to public access. *See* 65 P.S. § 67.708(a)(1); 65 P.S. § 67.305.

**2. The Township has demonstrated that no records responsive to Item 2 of the Request exist and that no additional records exist that are responsive to Item 6 of the Request**

The Township contends that records responsive to Item 2 of the Request do not exist and that other than the records provided on appeal, no other records exist that are responsive to Item 6 of the Request. The Requester, in turn, asserts that the Township did not conduct a good faith search for responsive records. 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,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court concluded that:

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 record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal 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, 138-39 (D.D.C. 2012)).

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 [r]equest[e]r.

*Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also 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 to agency personnel concerning a request and to determine whether to deny access).

In this instance, Ms. Senft attests, in part, as follows:

3. Upon receipt of the [R]equest ..., I conducted a thorough examination of files in the possession, custody and control of the [Township] for records responsive to the [R]equest ..., specifically I searched the relevant files, including electronic files and e-mails associated with the ... Township e-mails and servers. As assisted by our solicitor, I also requested that each member of the Board of Supervisors conduct the same search of their files.... In doing this,

we compiled the relevant documents for review prior to responding to the appeal.

4. Additionally, I have inquired with relevant [Township] personnel and, if applicable, relevant third-party contractors ..., specifically, as mentioned above, each member of the Board of Supervisors and also our solicitor. The solicitor was able to provide billing records that helped determine the executive sessions that were held from May through October 20, 2020.
5. After conducting a good faith search ..., I identified all records ... that are responsive to the [R]equest and available for public access and provided them to the [R]equester. Those items that were not provided [that are responsive to Item 6] have been attached to our response to the appeal....

Based on the above-described search, the Township thus states that “there are no records related to alleged breaches of the CBA” and that the Township “does not have any other records with respect to executive sessions.”

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). In the absence of any competent evidence that the Township acted in bad faith or that responsive records exist, “the averments in [the 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)). Based on the evidence provided, the Township has met its burden of proof that it does not possess records responsive to Item 2 of the Request. *See Hodges*, 29 A.3d at 1192. The Township has likewise shown that other than the records providing during the appeal, it does not possess any additional records that are responsive to Item 6 of the Request. *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.

**3. The Township has not provided sufficient evidence to withhold any records that are responsive to Items 4 and 5 of the Request**

Items 4 and 5 of the Request seek communications “related to alleged impropriety and/or wrongdoing by Township employees,” as well as communications “related specifically to allegations of wrongdoing by former Manager Ben Kramer.” The Township states that it withheld records because they constitute exempt employee records, 65 P.S. § 67.708(b)(7), and they relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17). Specifically, the Township states in its unsworn submission that it “reviewed the Township records regarding claims alleging impropriety and wrongdoing ... and the documents related to the investigation of such matters. The Township is denying the request for such records because the records need not be provided....” The Township also asserts the attorney-client privilege and the attorney-work product doctrine as a basis for withholding records, stating that “[a]n additional reason to withhold several documents ... is that the documents contain legal advice and work product and are protected by attorney/client privilege.”

In order to meet its burden of proof to withhold information, the agency must provide sufficient evidence. *But see Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements when construing exemptions). Under the RTKL, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the Dist. Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing



alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)).

Moreover, unsworn statements of counsel do not constitute evidence. *Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015) (“Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the *evidentiary* record”) (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”). “[I]t is not incumbent upon OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts.” *Id.* Accordingly, the Township’s unsworn and conclusory statements are insufficient to withhold the records that are responsive to Items 4 and 5 of the Request. *See* 65 P.S. § 67.708(a)(1); *see Luning v. Chester Water Auth.*, OOR Dkt. AP 2020-0923, 2020 PA O.O.R.D. LEXIS 0923.

## CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part, denied in part and dismissed as moot in part**, and the Township is required to provide the Requester with responsive records, as directed above, 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: January 26, 2021**

*/s/ Magdalene C. Zeppos-Brown*

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Sent to: Alex Weidenhof (via email only);  
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<sup>2</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).