



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

WILLIAM TOWNE,
Requester

v.

PITTSBURGH WATER AND SEWER
AUTHORITY,
Respondent

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Docket No: AP 2021-0292

INTRODUCTION

William Towne (“Requester”) submitted a request (“Request”) to the Pittsburgh Water and Sewer Authority (“Authority”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other items, legal bills and invoices. The Authority partially denied the Request, arguing that it interpreted the entire Request to only seek legal bills and invoices relating to legal services for RTKL requests and providing records with redactions. 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, denied in part, and dismissed as moot in part**, and the Authority is required to take additional action as directed.

FACTUAL BACKGROUND

On December 30, 2020, the Request was filed, seeking:

1. All e-mails, letters, and messages alleged to have been sent in any other format from or on behalf of the [Authority] to the above-named requester relating to provision of records or coordination around provision of records requested under

the Right-to-Know Law after June 1, 2019. Responsive messages that are (a) not providing or seeking to coordinate provision of access to requested records AND (b) also sent to the Office of Open Records and/or filed in the Court of Common Pleas of Allegheny County at dockets SA-20-000475 or SA-20-000478 may be omitted. For the avoidance of doubt, this request includes at least every message alleged or referred to in the [Authority's] Response and New Matter filed in the case consolidated under the above docket numbers, especially paragraphs 9, 24, 29, 33, 37, 43-45, 51, 61, 67-69, 78, 80, 83-86, 88, 90, 91, 93-101, 108, 109, and 111.

2. All logs or records of phone calls from or on behalf of the [Authority] to the above-named [R]equester at the above-listed telephone number after March 1, 2019.
3. All invoices or bills for legal services provided to [the Authority] from the law firm Clark Hill PLC for legal services performed after June 1, 2019, redacting words or phrases that would reveal the mental impressions of [the Authority's] counsel or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.

On January 7, 2021, the Authority invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On February 8, 2021, the Authority partially denied the Request, providing some records in redacted form and arguing that redactions were necessary to protect personal information and banking information, as well as stating that the Authority interpreted the Request as only seeking legal bills and invoices. 65 P.S. § 67.708(b)(6).

On February 9, 2021, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Authority to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 22, 2021, the Requester provided the OOR a submission asking the OOR to find that the Authority is acting in bad faith. The Requester's submission also provides a brief background regarding prior RTKL requests between the Requester and the Authority.

Also on February 22, 2021, the Authority provided a position statement stating that the Authority continues to search for records and will provide non-exempt records as they are located.

The Authority also states that it plans to withhold records that have been previously provided to the Requester.

The OOR sought an additional submission from the Authority in the form of an attestation or affidavit attesting to the factual assertions made in the unsworn position statement. On March 1, 2021, the Authority submitted the attestation of Tracy Smith, the Authority's Open Records Officer, who attests to the Authority's interpretation of the Request, states that the search is ongoing and that the Authority has not withheld any records responsive to Item 3 of the Request.

The OOR asked the Authority for additional clarification regarding whether or not the Authority was withholding records as it previously stated it would do in the unsworn statement, but did not address in the attestation, as well as sought clarification as to a reason for the search for records taking an extended period of time.

On March 8, 2021, the Authority provided the OOR another supplemental submission in the form of responsive records it previously provided, redacting only financial account information, as well as responsive records related to Item 3 of the Request.

The OOR granted multiple continuances to the Authority in an attempt to allow it to provide evidence in the form of an attestation or affidavit to attest to the redactions made, search for records, and other facts not in the record; however, the Authority has failed to provide any such supplement to date.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Authority 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). 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, “[t]he 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 Authority has provided evidence that some records were provided and properly redacted

The Authority first argues that it has now provided some records on appeal with redactions to names of private individuals and financial account information. The Authority provided the attestation of Ms. Smith, the Open Records Officer, who attests, as follows:

On February 8, 2021, after invoking a 30-day extension, the PWSA timely produced certain documents responsive to the Request in the form of, among other documents, redacted legal bills, which are responsive to Part 3 of the Request. In connection with this production, counsel for the PWSA stated that “[b]ased upon the context of your Request, when read as a whole, the PWSA has interpreted your request as seeking legal bills and invoices relating to the provision of legal services relating to Right to Know Law Requests. If the actual scope of your request is broader, please let me know.”

To date, the PWSA has not received any clarifying response from the Requester.

The redactions made to the documents produced by the [Authority] were only to the names of other private citizens and/or [Authority] rate payers who submitted [r]equests to the PWSA pursuant to the Right to Know Law. The last page of the production includes the redaction of financial account numbers.

The [Authority] continues to undertake a diligent search of its records for any and all documents and records potentially responsive to Parts 1 and 2 of the Request and, to date, has not withheld any documents responsive to the Request.

Under the RTKL, an attestation or sworn statement 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 competent evidence that the Authority acted in bad faith, “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 a review of the redacted records, the Authority has properly redacted financial account information, as the account information is for the law firm the Authority contracts with, Clark Hill, PLC. 65 P.S. § 67.708(b)(6); *See Berney v. Sch. Dist. of Phila.*, OOR Dkt. AP 2016-1390, 2016 PA O.O.R.D. LEXIS 1426 (finding the bank account number of a law firm that the district contracts with to be exempt from disclosure pursuant to Section 708(b)(6)). Therefore, this portion of the appeal is denied.

Over the course of the appeal, the Authority provided responsive records without redactions to the names of private citizens who filed RTKL requests. Therefore, that portion of the appeal is dismissed as moot.

2. The Authority has failed to provide sufficient evidence that it has conducted a good faith search

Throughout the present appeal, the OOR has specifically asked the Authority to provide evidence regarding a search for records, results of that search and a reason for why the search for records has not been completed. The OOR initially did not receive a sworn statement regarding factual assertions by the date submissions were to due and instead received a conclusory unsworn email from the Authority’s attorney. The OOR provided the Authority additional time to submit evidence. The Authority did provide the above attestation; however, when asked for a supplement regarding an explanation for why the search for records had not been completed, the Authority did not respond by the date set by the OOR. The next business day after the extended deadline for submissions, the Authority indicated that another submission would be forthcoming; however, the Authority only produced records that it already had previously provided, but without redactions to individual names, as previously mentioned in this Final Determination. The Authority has yet to

provide any evidence regarding a good faith search for records, as to whether or not a comprehensive search took place or not, the results of that search, or whether or not additional records are being withheld for one reason or another. The Authority, in an unsworn statement provided to the OOR, indicates that they are refusing to provide responsive records that have been provided to the Requester in the past, but the Authority did not provide evidence establishing a legal reason for withholding these records. The Authority, in the same unsworn statement, indicates that it is preserving the right to redact or withhold any exempt records that are exempt under the “Attorney-Client Privilege or Attorney Work Product Doctrine or any other recognized legal privilege.”

In order to meet its burden of proof to withhold information, the Authority 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 District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (“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 at 659 (“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”). This evidentiary requirement applies to direct interest participants, as well as agencies. *See Voltz*, 163 A.3d at 491 (“Highmark did not distinguish between assertions in briefs and sworn statements in affidavits... OOR properly recognized unsworn statements are not evidence...”). “[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.*

While the RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL, the Commonwealth Court outlined the elements of a good faith search in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018). The Court noted that an Agency Open Records Officer (AORO) has a duty to:

1. Advise all custodians of potentially responsive records about the request;
2. Obtain all potentially responsive records from those in possession of the potentially responsive records;
3. Contact agents within its control, including third party contractors; and
4. Review the records and assess their public nature.

In sum, an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents; an agency may do so by providing relatively detailed and non-conclusory affidavits submitted in good faith by officials or employees with knowledge of the records and the

search for the records. The Court also noted that failure to search for records in an agency's possession during the request stage constitutes bad faith.

The OOR is mindful that an agency's employees and officers are entitled to a presumption of good faith and has no reason to doubt the Authority's description of the search conducted for responsive records. Nonetheless, the OOR is required to base its findings on detailed recitations of the facts. The problem with the evidence provided in this matter is that it does not provide the OOR with enough information about the search conducted to judge whether the search meets the test for a good-faith search; in fact, the Authority seems to indicate, without justification, that it has not completed a search for records after over two months from the date of the Request

Here, the Authority provides an attestation which states it "continues to undertake a diligent search of its records" without providing any justification for the delay. As a result, the Authority has not provided sufficient evidence regarding good faith search for records or the results of its search. The Authority has merely stated that some responsive records were provided to Item 3 of the Request, omitting the other Items completely.

The OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records sought in the Request. Absent the Authority providing a sufficient evidentiary basis that no records exist, the OOR will order disclosure of responsive public records. *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.

3. The Authority has acted in bad faith

The Requester has insisted throughout the appeal that the Authority has acted in bad faith as they have not provided adequate evidence regarding whether or not records exist or proof they

searched for records. Additionally, the Requester points out that the Authority is unjustly withholding records previously provided.

Although the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record... or otherwise acted in bad faith...”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$ 1,500 if an agency denied access to a public record in bad faith”). Here, the evidence demonstrates a lack of good faith by the Authority. Under the RTKL, a finding of bad faith is appropriate where an agency refuses to comply with its statutory duties under the RTKL. *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 2020 Pa. LEXIS 6488, at *20-21 (2020). Bad faith involves failing to perform a detailed search and review of records to ascertain if the requested material exists or if any exclusion may apply prior to denial of access. *Id.*

”There is simply nothing in the RTKL that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so. “Such concerns must give way to the important goal of government transparency, which is the hallmark of the RTKL. *Id.* at *21, quoting *Com., Dep’t of Envtl. Prot. v. Legere*, 50 A.3d 260, 266 (Pa. Cmwlth. 2012). Here, the Authority has failed to even claim the Request is burdensome choosing instead to repeatedly ignore the deadlines imposed by the OOR and the RTKL and has seemingly refused to address the OOR’s requests for clarification on basic issues that are not overly burdensome. The Authority, over the course of this appeal, has not been cooperative or forthcoming to provide evidence that it has even conducted a good faith search for records in this matter. As a result, it has failed to establish whether it has the records responsive to the Request

or whether any exceptions apply. Based on the Authority's failure to comply with its statutorily mandated duties under the RTKL, the OOR finds that the Authority has acted in bad faith in the present matter. *See Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1142 (Pa. Commw. Ct. 2017) (finding that a trial court did not err in finding that an agency acted in bad faith when it "failed to conform to the duties imposed by the RTKL in several respects," including the failure to make a good faith search for responsive records).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part and dismissed as moot in part**, and the Authority is required to provide all responsive records 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. 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: March 11, 2021

/s/ Ryan W. Liggitt

RYAN W. LIGGITT, ESQ.
APPEALS OFFICER

Sent to: William Towne (via email only);
Tracy Smith, AORO (via email only);
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¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).