



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**CHESTER DUDZINSKI,
Requester**

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:

:

v.

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Docket No.: AP 2021-0479

:

**CITY OF PITTSBURGH,
Respondent**

:

:

INTRODUCTION

Chester Dudzinski, Esq. (“Requester”) submitted a request (“Request”) to the City of Pittsburgh (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to the North Shore of the Ohio Trail. The City granted the Request, providing responsive records and stating that no other records exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the City is not required to take any further action.

FACTUAL BACKGROUND

On January 26, 2021, the Request was filed, seeking:

Any and all records related to the trail dedications, ownership, maintenance, upkeep, easements, care, custody and control or any related documents to the North Shore [of] the Ohio Trail bike trail, specifically the area denoted in the[] attached pictures.... Additionally, requested are any and all documents related to the

ownership, maintenance, care, custody and control of the round hole or depression depicted in Picture 4.¹

On March 4, 2021, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the City granted the Request and provided responsive records.

On March 9, 2021, the Requester appealed to the OOR, stating grounds for disclosure. Specifically, the Requester asserts that additional responsive records exist. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 15, 2021, the City provided additional responsive records. On March 18, 2021, the City submitted a position statement, arguing that it had conducted a good faith search and all responsive records in its possession have been provided to the Requester. In support of the City's position, the City provided the sworn affidavit of Marcelle Newman ("Ms. Newman"), the City's Assistant Director of Public Works. The Requester did not submit additional evidence 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).

¹ The Request included four pictures.

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 City 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)). 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 City provided responsive records during the appeal

During the appeal, the City provided records that are responsive to the Request. As such, the appeal as to the records provided on appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The City has demonstrated that no additional responsive records exist

The City argues that, other than the records already provided to the Requester, there are no additional responsive records in the City’s possession, custody or control. The Requester maintains that the City failed to provide all 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).

Here, Ms. Newman affirms, in part, as follows:

3. ... [W]hen I received the [R]equest, I forwarded it to the [Department of Public Works (“DPW”)] division in which the park is located.
4. I forwarded it to the division so the clerk in the office ... could manually search for paper records.
- ...
8. Cartegraph is DPW’s digital data base, that among other things, tracks maintenance on the City’s public property.
9. I also made sure that Matthew Jacob, the staff member from the City Department of Innovation and Performance, who maintains and services Cartegraph, was notified of this [R]equest and was asked to respond.
- ...
11. Matthew Jacob prepared the Cartegraph reports that were sent to the Requester....
12. Besides notifying the two key staff members whose work is described above, I conferred with my Director and William Crean, who is the City Superintendent of Streets and Operations in the DPW in my search for responsive records.
13. Following my search, the responsive records that were turned over to the Requester ... are the only records that exist from the DPW.

The Requester did not submit any evidence challenging Ms. Newman'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 evidence that the City has acted in bad faith or that additional responsive records do 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)). Accordingly, based on the evidence submitted, the City has demonstrated that it conducted a good faith search for responsive records, which included a search of paper files and the City's digital database, as well as reaching out to identified City personnel, and that no additional responsive records exist in the City's possession, custody or control. *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"); *Leese v. East Hanover Twp.*, OOR Dkt. AP 2020-1611, 2020 PA O.O.R.D. LEXIS ____; *Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2017-1946, 2017 PA O.O.R.D. LEXIS 1685; *Hodges*, 29 A.3d at 1190.

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot in part**, and the City 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 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.² This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 7, 2021

/s/ Magdalene C. Zeppos-Brown

MAGDALENE C. ZEPPOS-BROWN, ESQ.
ASSISTANT CHIEF COUNSEL

Sent to: Chester Dudzinski, Esq. (via email only); and
Celia Liss, Esq., AORO (via email only)

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).