

April 29, 2021

Sent First Class Mail

Kelly Ferrari, Prothonotary
First Floor Government Center
124 W. Diamond Street
Butler, PA 16001

RE: Submission of Record in:
Lancaster Township v. Alex Weidenhoff and the Cranberry Eagle,
No. 2021-40053

Dear Ms. Ferrari:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, (“RTKL”), defines the Record on Appeal as “the record before a court shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all “evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2).” The record in this matter consists of the following:

Office of Open Records Docket No. 2020-2509:

1. The appeal filed by Alex Weidenhof and the Cranberry Eagle (“Requester”) to the Office of Open Records (“OOR”), received November 25, 2020.
2. Official Notice of Appeal dated November 30, 2020 sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Requester’s submission dated November 30, 2020.
4. Email dated November 30, 2020, wherein Appeals Officer confirms receipt of Requester’s submission.
5. Lancaster Township’s (“Township”) submission dated December 9, 2020.
6. Email chain dated December 9, 2020 wherein Appeals Officer confirms receipt of Township’s submission.

7. Email chain dated December 9, 2020, wherein Appeals Officer grants a two-day extension for submissions deadline.
8. Requester's submission dated December 11, 2020.
9. Email dated December 11, 2020 from Appeals Officer confirming receipt of Requester's submission.
10. Email chain dated December 17, 2020, wherein both parties agree to an extension for the OOR to issue the Final Determination.
11. The Final Determination issued by the OOR on January 26, 2021.

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kyle Applegate".

Kyle Applegate
Chief Counsel

Attachments

cc: Alex Weidenhof (Requester)
Christopher Reese, Esq. (County)

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

LANCASTER TOWNSHIP)	CIVIL DIVISION – STATUTORY APPEAL
Appellant,)	
)	No. 21-40053
v.)	
)	
ALEX WEIDENHOF AND THE)	
CRANBERRY EAGLE)	
Appellees,)	

CERTIFICATION OF RECORD

I hereby certify the contents of the record transmitted with this Certification of Record pursuant to Pa.R.A.P. 1952 in *Alex Weidenhof and the Cranberry Eagle v. Lancaster Township*, OOR Dkt. AP 2020-2509, which is the subject of this appeal.

The record transmitted with this certification is generated entirely from the Office of Open Records database. It is our practice to scan in each and every document submitted in an appeal. Thus, no originals are being transmitted to this Court.

I certify that this filing complies with the provisions of the ‘Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts’ that require filing confidential information and documents differently than non-confidential information and documents.

Also, my signature on this Certification of Record and on all other correspondence directed to the Court in connection with this matter may be electronic and not original. I hereby certified that this is my true and correct signature and that I have approved the use thereof for these purposes.



Liz Wagenseller, Executive Director
Office of Open Records
333 Market St. 16th floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
E-mail: OpenRecords@pa.gov

Dated: April 29, 2021

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA


LANCASTER TOWNSHIP)	CIVIL DIVISION – STATUTORY APPEAL
Appellant,)	
)	No. 21-40053
v.)	
)	
ALEX WEIDENHOF AND THE)	
CRANBERRY EAGLE)	
Appellees,)	

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following by Email at the email listed below:

Christopher Reese, Esquire
Lope Casker & Casker
207 E. Grandview Avenue
Zelienople, PA 16063
creese@lopecasker.com

Alex Weidenhof
The Cranberry Eagle
850 Rowan Road
Suite 504
Cranberry Township, PA 16066
aweidenhof@butlereagle.com



Michele Kusery-Grant, Administrative Officer
Office of Open Records
333 Market St. 16th floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
E-mail: mkuser@pa.gov

Dated: April 29, 2021

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

LANCASTER TOWNSHIP)	CIVIL DIVISION – STATUTORY APPEAL
Appellant,)	
)	No. 21-40053
v.)	
)	
ALEX WEIDENHOF AND THE)	
CRANBERRY EAGLE)	
Appellees,)	

CERTIFIED RECORD

Kyle Applegate
Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
333 Market St. 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
E-mail: kyapplegat@pa.gov

April 29, 2021

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

LANCASTER TOWNSHIP)	CIVIL DIVISION – STATUTORY APPEAL
Appellant,)	
)	No. 21-40053
v.)	
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CRANBERRY EAGLE)	
Appellees,)	

**TABLE OF CONTENTS
RECORD**

Alex Weidenhof and The Cranberry Eagle v. Lancaster Township, OOR Dkt. AP 2020-2509

Office of Open Records Docket No. 2020-2509:

1. The appeal filed by Alex Weidenhof and the Cranberry Eagle (“Requester”) to the Office of Open Records (“OOR”), received November 25, 2020.
2. Official Notice of Appeal dated November 30, 2020 sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Requester’s submission dated November 30, 2020.
4. Email dated November 30, 2020, wherein Appeals Officer confirms receipt of Requester’s submission.
5. Lancaster Township’s (“Township”) submission dated December 9, 2020.
6. Email chain dated December 9, 2020 wherein Appeals Officer confirms receipt of Township’s submission.
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8. Requester’s submission dated December 11, 2020.
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10. Email chain dated December 17, 2020, wherein both parties agree to an extension for the OOR to issue the Final Determination.
11. The Final Determination issued by the OOR on January 26, 2021.

OOR EXHIBIT 1

Devenyi, Dylan

From: no-reply@openrecordspennsylvania.com
Sent: Wednesday, November 25, 2020 12:58 PM
To: aweidenhof@butlereagle.com
Subject: [External] PA Office of Open Records - Appeal Confirmation

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.



You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Alex Weidenhof
Company:	The Cranberry Eagle
Address 1:	8050 Rowan Rd
Address 2:	Suite 504
City:	Cranberry Township
State:	Pennsylvania
Zip:	16066
Phone:	724-776-4270
Email:	aweidenhof@butlereagle.com
Agency (list):	Lancaster Township
Agency Address 1:	113 Kings Alley
Agency Address 2:	
Agency City:	Harmony
Agency State:	Pennsylvania
Agency Zip:	16037
Agency Phone:	724-452-7213
Agency Email:	office@lancaster-township.com

Records at Issue in this Appeal:	Correspondence related to breaches of a collective bargaining agreement; correspondence related to employees (see attached Request for more details)
Request Submitted to Agency Via:	e-mail
Request Date:	10/20/2020
Response Date:	11/25/2020
Deemed Denied:	No
Agency Open Records Officer:	Christina Senft, Secretary-Treasurer
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	Yes
Agree to permit the OOR additional time to issue a final determination:	No
Interested in resolving this issue through OOR mediation:	No
Attachments:	<ul style="list-style-type: none"> • Lancaster 20201020.pdf • 20201026-Interim response.pdf • 20201125-Final response.pdf

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

Subject: October 20, 2020 RTK Response
From: Chrissy Senft <cseft@lancaster-township.com>
Date: 25/11/20, 11:29
To: Alex Weidenhof <aweidenhof@butlereagle.com>
CC: Chris Reese <creese@lopecasker.com>

Alex:

These are the township's responses to your Right to Know requests dated October 20, 2020 in the order you made them:

1. We have provided you the CBA for the Lancaster Township Police Department.
2. We do not know of any alleged breaches of the Police Department CBA.
3. There is no CBA for the public works employees.
4. You have asked for correspondence related to alleged impropriety and/or wrongdoing by Township employees. Such public records are exceptions to the Sunshine Law and are not open to public access.

See Section 708(a)(7) for public records relating to an agency employee that are not available for public access, such as subsections:

- (ii) a performance rating or review,
- (vi) written criticism of an employee
- (vii) grievance material, including documents related to discrimination or sexual harassment.
- (viii) Information related to discipline, demotion or discharge contained in a personnel file. This subparagraph does not apply to the final action of an agency that results in demotion or discharge.

See also 708(a)(17), subsections:

- (i) complaints submitted to an agency
- (ii) investigative materials, notes, correspondence, and reports.

By listing these subsections, we are not admitting or denying that any such records exist. Instead, we are stating that even if we had such records, they would not be available for public access. To the extent that your request falls outside of these categories and would be available for public access, we do not have such records.

5. Same answer as the one for number 4 above.
6. From January 1 through October 20, 2020, the Board of Supervisors held a number of executive sessions to discuss personnel matters. Most of them on Wednesdays for a period of time starting in February and ending recently. On many of those occasions, the executive session was continued to another date. We have attached the two sets of minutes where the executive sessions were mentioned.

Thank you,
Chrissy Senft

— Attachments: —

February 17, 2020 - Board of Supervisors Regular Meeting Minutes.pdf	252 KB
November 16, 2020 - Regular Supervisors Meeting.pdf	482 KB

Subject: Right To Know Request - 10/20/20
From: "Chrissy Senft" <cseft@lancaster-township.com>
Date: 26/10/20, 14:38
To: "Alex Weidenhof" <aweidenhof@butlereagle.com>
CC: "Chris Reese" <creese@lopecasker.com>

Good Afternoon Alex,

Per your request I have attached the Collective Bargaining Agreement with the Lancaster Township Police Department. Presently, the Public Works Department does not operate under a Collective Bargaining Agreement.

Lancaster Township is requesting an extension until November 25, 2020 (29 days from original due date) due to:

- 1) staffing limitations – no Township Manager
- 2) COVID – Currently operating remotely
- 3) a legal review is necessary, and
- 4) the records, if any, will likely require redactions.

Thank you,
Chrissy Senft

—Attachments: —

CBA 2019-2023.pdf

611 KB



pennsylvania
OFFICE OF OPEN RECORDS

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Lancaster Township (Attn: AORO)

Date of Request: 20 October 2020 Submitted via: ☒ **Email** ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Alex Weidenhof Company (if applicable): The Cranberry Eagle

Mailing Address: 8050 Rowan Rd., Ste. 504

City: Cranberry Township State: PA Zip: 16066 Email: aweidenhof@butlereagle.com

Telephone: 724-776-4270 ext. 113 Fax: 724-776-0211

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☒ **Email** ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.*

- i. A copy of the collective bargaining agreement with the Lancaster Township Police Department
- ii. Any and all correspondence dated between Jan. 1, 2019, and Oct. 20, 2020, among Township officials, including the Secretary, Manager, and/or Supervisors, related to alleged breaches of the Police CBA
- iii. A copy of the collective bargaining agreement with Township's public works employees
- iv. 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.
- v. 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. This item should be interpreted to request all items that otherwise would be public under the Sunshine Act, 65 Pa.C.S. Ch. 7, in addition to all records covered by the Right to Know Law. (i.e., all documents presented to a quorum of Supervisors for deliberation in a format not designated as an executive session.)
- vi. 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. This information is required to be public by 65 Pa. C.S. § 708(b).

DO YOU WANT COPIES? ☒ **Yes, electronic copies preferred if available**

☐ Yes, printed copies preferred

☐ No, in-person inspection of records preferred (*may request copies later*)

Do you want certified copies? ☐ Yes (*may be subject to additional costs*) ☒ **No**

NOTE: *In most cases, a completed RTKL request form is a public record.*
More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Nov. 27, 2018



pennsylvania

OFFICE OF OPEN RECORDS

RTKL requests may require payment or prepayment of fees. See the [Official RTKL Fee Schedule](#) for more details.

Please notify me if fees associated with this request will be more than ☒ \$ 20_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$_____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

00R EXHIBIT 2

NOTICE RELATED TO THE CORONAVIRUS (COVID-19) EMERGENCY

Pennsylvania is currently under a declared state of emergency related to the coronavirus (COVID-19). Some agencies and requesters may face challenges in regard to their ability to meaningfully participate in Right-to-Know Law (RTKL) appeals. Accordingly, and to ensure due process, the Office of Open Records (OOR) is taking the following temporary steps.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **December 28, 2020**.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **December 9, 2020**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Every staff member of the OOR is working remotely, and we are only able to receive postal mail on a limited basis at this time. Accordingly, we urge agencies and requesters to use email for all communication with the OOR at this time.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters during this time to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.



November 30, 2020

Via Email Only:

Mr. Alex Weidenhof
The Cranberry Eagle
8050 Rowan Rd
Suite 504
Cranberry Township, PA 16066
aweidenhof@butlereagle.com

Via Email Only:

Christina Senft
Agency Open Records Officer
Lancaster Township
113 Kings Alley
Harmony, PA 16037
office@lancaster-township.com
csenft@lancaster-township.com

RE: OFFICIAL NOTICE OF APPEAL - Weidenhof and The Cranberry Eagle v. Lancaster Township OOR Dkt. AP 2020-2509

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. on November 25, 2020. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **subject to the enclosed information regarding the coronavirus (COVID-19).**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik Arneson", written over a horizontal line.

Erik Arneson
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records (“OOR”) has received the enclosed appeal, which was filed under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the enclosed information regarding the coronavirus (COVID-19). If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR “other than *in camera* records” will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. Â§ 67.1101(c)).

The Commonwealth Court has held that “the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party’s failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact **must** be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process.”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

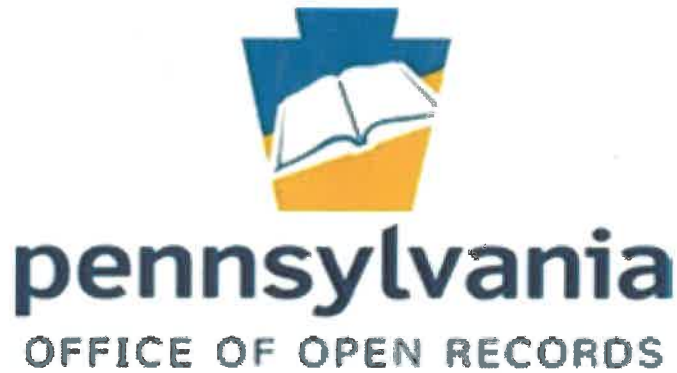
The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court – saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



APPEALS OFFICER:

Magdalene C. Zeppos-Brown, Esq.

CONTACT INFORMATION:

**Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234**

FACSIMILE:

(717) 425-5343

EMAIL:

mazepposbr@pa.gov

**Preferred method of contact and
submission of information:**

EMAIL

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot
speak to parties individually without the participation of the other party.**

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review
prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff
are also available to provide general information about the appeals process by calling (717) 346-9903.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

00R EXHIBIT 3

Zeppos-Brown, Magdalene

From: Alex Weidenhof <aweidenhof@butlereagle.com>
Sent: Monday, November 30, 2020 12:18 PM
To: Zeppos-Brown, Magdalene
Cc: Chrissy Senft; office@lanaster-township.com
Subject: [External] Statement in AP 2020-2509
Attachments: Lancaster_Appeal.pdf

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.*

Appeals Officer Zeppos-Brown,

Please find attached my position statement in *Weidenhof v. Lancaster Township*, AP 2020-2509.

I would appreciate if you could confirm your receipt of the email and attachment.

Thank you,

Alex Weidenhof
Reporter, *The Cranberry Eagle*
724-776-4270 x. 113

Via Email

Magdalene C. Zeppos-Brown, Esq.
Office of Open Records
333 Market St., 6th Floor
Harrisburg, PA 17101-2234
mazepposbr@pa.gov

30 November 2020

Re: Position Statement in *Weidenhof v. Lancaster Township*, AP 2020-2509

Dear Appeals Officer Zeppos-Brown,

The Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, requires requesters, upon appeal, to “state the grounds upon which the requester asserts that the record is a public record . . . [and] address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1). This position statement fulfills both requirements, outlines the way in which the Respondent erred in denying a request under the RTKL, and argues for the release of the requested records.

I. BACKGROUND

On October 20, 2020, Alex Weidenhof, a reporter for *The Cranberry Eagle*, (“Requester”) submitted a request (“Request”) to Lancaster Township, Butler County, (“Township”) pursuant to the RTKL seeking:

- [1]. A copy of the collective bargaining agreement with the Lancaster Township Police Department[;]
- [2]. Any and all correspondence dated between Jan. 1, 2019, and Oct. 20, 2020, among Township officials, including the Secretary, Manager, and/or Supervisors, related to alleged breaches of the Police CBA[;]
- [3]. A copy of the collective bargaining agreement with Township’s public works employees[;]
- [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. This item

should be interpreted to request all items that otherwise would be public under the Sunshine Act, 65 Pa. C.S. Ch. 7, in addition to all records covered by the Right to Know Law. (i.e., all documents presented to a quorum of Supervisors for deliberation in a format not designated as an executive session.)[; and]

[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. This information is required to be public by 65 Pa. C.S. § 708(b).

On October 26, the Township's Open Records Officer, Christina Senft, granted Item 1, stated no responsive records exist for Item 3, and invoked a 30-day extension for Items 2 and 4-6.

On November 25, Ms. Senft sent a timely response to the Requester, granting in part and denying in part the Request. Specifically, Ms. Senft reiterated the Township's responses to Items 1 and 3, stated no responsive records existed for Item 2, denying Items 4 and 5, and provided insufficient records for Item 6.

This appeal challenges the Township's response to Items 2, 4, 5, and 6. The Township's response to Items 1 and 3 were sufficient.

II. ARGUMENT

In a multitude of ways, the Township's response to the Request was deficient and failed to comply with the RTKL.

A. The response does not comply with Section 901.

Section 901 requires the Township, upon receipt of a RTKL request, to "make a good faith effort to determine if [a] record requested is a public record, legislative record or financial record and whether the [Township] has possession, custody or control of [an] identified record." 65 P.S. § 67.901. A good faith search for records, while not defined in the RTKL, includes advising "all custodians of potentially responsive records about the request, and . . . obtain[ing] all potentially responsive records from those in possession." *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*,

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018). After obtaining these records, the open records officer then “has the duty to review the records and assess their public nature under ... the RTKL.” *Id.*

Additionally, the Commonwealth Court has held that such inquiries can constitute good faith efforts, stating 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). The court has also determined it is “the open-records officer’s duty and responsibility” to inquire of responsive records and then review them for access under the RTKL. *In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011).

In the instant Request, the Township plainly failed to comply with Section 901. Ms. Senft, in her November 25 response, stated the Township is

not admitting or denying that any such records [responsive to Items 4 and 5 of the Request] exist. Instead, we are stating that even if [the Township has] such records, they would not be available for public access. To the extent that your request falls outside of these categories and would be available for public access, [the Township does] not have such records.

The Township has failed to produce any evidence that it conducted a good faith search for responsive records, and in its response made it clear no such search was conducted, running afoul of Section 901.

B. The Township cannot meet its burden under Section 708(a).

Records in the possession of the Township are presumed to be public, unless they are exempt from the RTKL or otherwise prohibited from release. *See* 65 P.S. § 67.305. The Township is required to, upon receipt of a request, “determine if the record requested is a public record.” 65

P.S. § 67.901. In claiming any records are not public or that exemptions from the RTKL apply, the Township clearly holds the burden of proof. 65 P.S. § 67.708.

The RTKL makes plain the Township's burden of proof in claiming exemptions from the law: "[t]he burden of proving that a record of a . . . local agency is exempt from public access shall be on the . . . local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1).

In its denial of records pursuant to Items 4 and 5 of the Request, the Township claimed a number of exemptions, namely multiple subsections under the (b)(7) agency employee records exemption and the (b)(17) noncriminal investigative records exemption.

Because the Township has failed to so much as identify records responsive to the Request, it cannot meet the burden of proof required of it by Section 708. Mere speculation about what records will be responsive and conjecture about what those documents will contain is not enough to establish a basis for exemptions. *See Mission Pa., LLC v. McKelvey*, 212 A.3d 119 (Pa. Commw. Ct. 2019); *see also California Borough v. Rothery*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018).

C. Section 708(b)(17) exemption does not apply

Moreover, the Township's assertion that the "noncriminal investigative" record exemption applies to documents relevant to this request falls flat.

The Township specifically asserted two subsections apply to responsive records, namely the "complaints submitted to an agency" and "investigative materials, notes, correspondence and reports" exemptions. 65 P.S. § 67.708(b)(17)(i),(ii). However, as with all other denials pertaining to this request, the Township has not provided any evidence to satisfy its burden.

The Commonwealth Court has held that for the noncriminal investigative record exemption to be applied, the "investigation" must be "a systematic or searching inquiry, a detailed

examination, or an official probe.” *Department of Health v. Office of Open Records*, 4 A.3d 811 (Pa. Commw. Ct. 2010). On top of that, the investigation must be “conducted by an agency acting within its legislatively granted fact-finding and investigative powers.” *Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920, 925 (Pa. Commw. Ct. 2012). Further, for the Township to assert responsive records are exempt under subsection (ii)—that is, the record is exempt because it is a complaint in a noncriminal investigation—the Township must prove there was an investigation. *Brown v. Pa. Office of Inspector General* 178 A.3d 975 (Pa. Commw. Ct. 2017).

As stated before, the Township must prove that an exemption applies before it claims that exemption. *See* 65 P.S. § 67.708. Because it has not conducted a search for records, and has not identified responsive records, the Township cannot meet its burden.

D. The Township has not provided all records responsive to Item 6.

All documents in the “possession . . . of a local agency shall be presumed to be a public record.” 65 P.S. § 67.305. Upon receipt of a request, the agency, in this case the Township,

shall make a good faith effort to determine if the record requested is a public record, . . . and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.

65 P.S. § 67.901. In other words, the Township has the responsibility to identify all records responsive to the request.

In its November 25 response, the Township provided Requester with draft copies of two Board of Supervisors meeting minutes, from February 17 and November 16, showing reference to executive sessions held by board members. The Township failed to include, however, meeting minutes from its April 20 Board of Supervisors meeting, which also includes reference to these executive sessions.¹

¹ This document is attached to this position statement.

Furthermore, the Request also sought “[a]ny documents . . . 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.” The RTKL defines “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. As the Sunshine Act requires “members of the agency [to] be notified 24 hours in advance of the time of the convening of the meeting specifying the date, time, location and purpose of the executive session” if the session is not announced for the future at an open meeting, 65 Pa. C.S. § 708(b), it is unreasonable to believe the supervisors were not notified at any point in writing of the existence of an executive session. Given the Township’s clear refusals to conduct good faith searches for records responsive to other items in the Request, it is more than likely it did not conduct a good faith search for records other than meeting minutes, and the Township has produced no evidence to the contrary.

E. The Township has not evidenced a search for Item 2 records.

In its November 25 response, the Township stated it was unaware “of any alleged breaches of the Police Department C[ollective] B[argaining] A[greement].” The Request, however, did not pose a question asking if the Township were aware of such breaches; instead, it specifically sought “[a]ny and all correspondence dated between Jan. 1, 2019, and Oct. 20, 2020, among Township officials . . . related to alleged breaches of the Police CBA.”

As with the Township’s responses to Items 4, 5, and 6 of the Request, it has failed to produce any evidence that a good faith search was conducted to find records responsive to this item.

III. CONCLUSION

For the foregoing reasons, the Township's partial denial of this request should be overturned, this appeal granted, and the Township be ordered to take further action to fulfill the Request.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be 'Alex Weidenhof', with a long horizontal line extending to the right.

Alex Weidenhof

cc: Christina Senft (via e-mail only)

**LANCASTER TOWNSHIP BOARD OF SUPERVISORS
APRIL 20, 2020 MEETING MINUTES**

The Lancaster Township Board of Supervisors meeting was called to order by Chairman Plesniak at 6:00 pm. Those in attendance were Supervisor Kris Kniess, Supervisor Tim Zinkham, Township Manager Benjamin Kramer, Secretary-Treasurer, Chrissy Senft, Township Solicitor Chris Reese, Township Engineer Tom Thompson, Bob Brennan, Scott Forman, Connie Domhoff, Debbie Scott, Tim Greenlund, and Alan Osan. The April 2020 meeting was duly advertised in the Butler Eagle, a newspaper of general circulation on April 15, 2020 indicating the meeting would be held through the Zoom Video-Audio conferencing program.

The meeting began with the Pledge of Allegiance and Chairman Plesniak addressed the circumstances of the COVID 19 crisis and how it effects Lancaster Township residents and employees as well as safety measures being taken. Supervisor Zinkham thanked local companies, Insight Pipe and Centerline Boring as well as their owners Mike Marburger and Christopher Zoelle for donations of PPE for staff.

MEETING MINUTES & TREASURER'S REPORT

A motion was made by Supervisor Zinkham to approve the February 17, 2020 Board of Supervisors Meeting minutes, motion was seconded by Supervisor Kniess and passed by a majority vote. VOTE: Zinkham, Kniess, Plesniak – YES

A motion was made by Supervisor Kniess to approve the March 27, 2020 Disaster Declaration through April 20, 2020 and extend until May 18, 2020. Motion was seconded by Supervisor Zinkham and passed by a majority vote. VOTE: Kniess, Zinkham, Plesniak – YES

A motion was made by Supervisor Kniess to approve the Treasurer's Report dated February 14 – April 14, 2020, motion was seconded by Supervisor Zinkham and passed by a majority vote. VOTE: Kniess, Zinkham, Plesniak – YES

COMMITTEE REPORTS

Zoning & Planning Use:

1. Plantations 1, Revision 3 – Subdivision - After discussion amongst the Board of Supervisors, Bob Brennan and Scott Foreman, a motion was made by Supervisor Zinkham to approve Revision #3 including a modification of sidewalks on only 1 side of the development, and allowing the subdivision of Lots 15-31 to create 3 additional lots. Motion was seconded by Supervisor Kniess and passed by a majority vote. VOTE – Zinkham, Kniess, Plesniak – YES
2. Celia Way – Party wall subdivision – A motion was made by Supervisor Kniess to approve the first party wall subdivision of Phase 7 at Arden Woods. This allows the division of the property upon completion of the foundations of the duplexes. Township Engineer, Tom Thompson agreed that all requirements have been met. Motion was seconded by Supervisor Zinkham and passed by a majority vote. VOTE: Kniess, Zinkham, Plesniak – YES
3. Arden Wood – Letter of Credit Release Request #9 – A motion was made by Supervisor Zinkham for approval of the Release Request #9 in the amount of \$173,223.61 as reviewed by Gannett Fleming and dated March 23, 2020. Motion was seconded by Supervisor Kniess and passed by a majority vote. VOTE: Zinkham, Kniess, Plesniak – Yes
4. Zoning Hearing Board (Zoelle – Dimensional Variance)
The ZHB convened on February 20, 2020 to review the application submitted for dimensional relief at 126 Nine Hill Road. The ZHB approved the requested relief and the decision has been executed by their Solicitor & Chairman.

Road Department: Weekly Reports have been emailed to all Supervisors.

2020 Road Improvements – Bids to be received and opened May 18, 2020 at 3PM and reviewed by the Board of Supervisors at their regularly scheduled 6PM Board meeting the same day.

Police Department: Sergeant Cornell addressed the Board of Supervisors regarding the location for officers to qualify and discussed some of the effects COVID 19 is having for residents. Officers are taking online courses and have applied for several grants.

Historical Society: No report.

ORDINANCES & RESOLUTIONS

Seneca Area EMA - A motion was made by Supervisor Zinkham to ratify Ordinance 112 approving the Intergovernmental Cooperative Agreement for the participation in the Seneca Area EMA, motion was seconded by Supervisor Kniess and passed by a majority vote. VOTE: Zinkham, Kniess, Plesniak, - YES

NEW BUSINESS

PUBLIC COMMENT

Township Resident Connie Domhoff expressed concerns about the parking at the Log Cabin Restaurant and work being completed, as well as requested additional information regarding Arden Woods be placed on the township website. Township Engineer Tom Thompson explained the process of what is currently being completed. Township Manager Ben Kramer will work to update the website with additional information regarding Arden Woods.

EXECUTIVE SESSION

Executive sessions to discuss Personnel matters were held on:

2/25/2020
3/3/2020
3/12/2020
3/25/2020
3/27/2020
3/30/2020
4/1/2020
4/8/2020
4/15/2020

Chairman Plesniak closed the meeting with encouragement to the community and thanks to the staff during the COVID 19 crisis. Chairman Plesniak made a motion to adjourn the regular meeting of the Lancaster Township Board of Supervisors at 6:52 PM. Seconded by Supervisors Kniess and passed by a majority vote.

Respectfully submitted:

Christina M. Senft
Secretary/Treasurer

00R EXHIBIT 4

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Monday, November 30, 2020 12:26 PM
To: Alex Weidenhof
Cc: Chrissy Senft; office@lancaster-township.com
Subject: RE: [External] Statement in AP 2020-2509

Dear Parties:

I am confirming receipt of the below email and attachment. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
[\(717\) 346-9903](tel:7173469903) | mazepposbr@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Alex Weidenhof <aweidenhof@butlereagle.com>
Sent: Monday, November 30, 2020 12:18 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Cc: Chrissy Senft <cсенft@lancaster-township.com>; office@lancaster-township.com
Subject: [External] Statement in AP 2020-2509

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Appeals Officer Zeppos-Brown,

Please find attached my position statement in *Weidenhof v. Lancaster Township*, AP 2020-2509.

I would appreciate if you could confirm your receipt of the email and attachment.

Thank you,

Alex Weidenhof
Reporter, *The Cranberry Eagle*
724-776-4270 x. 113

00R EXHIBIT 5

Zeppos-Brown, Magdalene

From: Chris Reese <creese@lopecasker.com>
Sent: Wednesday, December 9, 2020 3:03 PM
To: Zeppos-Brown, Magdalene
Cc: Alex Weidenhof; Chrissy Senft
Subject: [External] Lancaster Township response to RTK appeal by Alex Weidenhof -- OOR Dkt. AP 2020-2509
Attachments: Response from Lancaster Township to Alex Weidenhof appeal -- OOR Dkt AP 2020-2509.pdf
Follow Up Flag: Follow up
Flag Status: Flagged

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Dear Ms. Zeppos-Brown:

Please find attached Lancaster Township's response to the appeal in the matter of Weidenhof and the Cranberry Eagle v. Lancaster Township – OOR Dkt. AP 2020-2509.

If you could please confirm your receipt of this e-mail and the attached response, I would appreciate it.

Thank you.

Christopher J. Reese
Solicitor for Lancaster Township

cc: Alex Weidenhof, Cranberry Eagle (via e-mail)
Christina Senft, Lancaster Township (via e-mail)

Christopher J. Reese, Esq.
Lope, Casker & Casker
207 E. Grandview Avenue
Zelienople, PA 16063
Tel: 724-452-5020
Fax: 724-452-7866

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VIA E-MAIL (mazepposbr@pa.gov)

December 9, 2020

Macdalene C. Zeppos-Brown, Esq.
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Lancaster Township's RTK response to appeal by Alex Weidenhof

This letter is in response to the Right to Know appeal filed by Alex Weidenhof of the Cranberry Eagle. We have organized our response based on the numbered requests as initially made by appellant (i-vi) with supplemental responses and arguments where appropriate.

i) We have provided the collective bargaining agreement with the Lancaster Township Police Department.

ii) There are no records related to alleged breaches of the CBA.

iii) A collective bargaining agreement with the public works employees does not exist.

iv) We have reviewed the Township records regarding claims alleging impropriety and wrongdoing by Township employees 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 due to the following exceptions:

Section 708(7) exemptions:

(vi) written criticism of an employee

(viii) information related to discipline, demotion or discharge contained in a personnel file. (No such records exist related to a final action that resulted in demotion or discharge).

Section 708(a)(17) exemptions:

i) complaints submitted to an agency

ii) investigative materials, notes, correspondence and reports.

An additional reason to withhold several documents related to claims of impropriety and/or wrongdoing and the subsequent investigations is that the documents contain legal advice and work product and are protected by attorney/client privilege.

In the Township's initial response, we included the following statement in an effort to provide further protection of employees' confidentiality:

By listing these subsections, we are not admitting or denying that any such records exist. Instead, we are stating that even if we had such records they would not be available for public access. To the extent that your request falls outside of these categories and would be available for public access, we do not have such records.

Trying to protect employee confidentiality in this way was a mistake. The statement gave the incorrect impression that the Township had not reviewed responsive records before stating that they were exempt. Therefore, we want to be clear that the Township has concluded a search of its records as required, has reviewed those records, and states that they fall within the exemptions listed above. We apologize for the confusion and for not following the more precise wording that is required under the Right to Know Law.

v) We have reviewed the Township records related to alleged impropriety and/or wrongdoing by Benjamin Kramer and are not providing the records, because the records need not be provided due to the following exemptions:

Section 708(a)(17) subsections:

i) complaints submitted to an agency

ii) investigative materials, notes, correspondence and reports.

vi) From January 1 through October 20, 2020, the Board of Supervisors held executive sessions to discuss multi-faceted personnel matters, sometimes including COVID-related issues as it related to personnel. On many occasions, an executive session would be continued to a future date.

We initially attached two sets of minutes to our RTK response where the executive sessions were mentioned. Specifically, at the February 17 public meeting, it was announced that an executive session was held on February 4, 2020 and the minutes for November 16, 2020 state that "Solicitor Chris Reese discussed several executive sessions that had been held over the past few months to discuss personnel matters such as the negotiations with former Township Manager Ben Kramer and the intended hiring of Danielle Rich." Attached to his letter to this appeal, Mr. Weidenhof includes minutes from April 20, 2020 where the Township listed nine dates where such executive sessions were held: February 25, March 3, 12, 25, and 27, and April 1, 8, and 15.

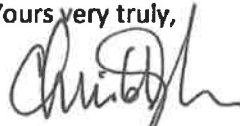
We have attached to this appeal response an e-mail that was discovered mentioning the executive session on March 3. We have also attached redacted billing records to show the dates when executive sessions were referred to in bills from the Township solicitor. After a good faith search of Township records, we do not have any other records with respect to executive sessions.

Going forward we will make every effort to announce upcoming executive sessions at public meetings or, where that is not possible, provide information regarding previously-held executive session that took place after the last public meeting.

In providing these clarifications and supplementations above, including the efforts related to our initial response, the Township can affirm that it has conducted a good faith search of its records, including notifying the custodians who could potentially have such records, obtaining all such records and reviewing them, and making an assessment of their public nature under the Right to Know Law. We have attached an attestation in this regard signed by Christina Senft, Agency Open Records Officer.

Taking these clarifications and supplementations into account, we ask that Mr. Weidenhof's appeal be denied.

Yours very truly,

A handwritten signature in black ink, appearing to read "Chris Reese", written over a horizontal line.

Christopher J. Reese

Cc: Alex Weidenhof (via e-mail)

LANCASTER TOWNSHIP

113 Kings Alley
Harmony, Pennsylvania 16037

Phone: (724) 452-7213 • Fax: (724) 453-0129

ATTESTATION THAT AGENCY PROVIDED ALL RESPONSIVE RECORDS

Name of Requester: Alex Weidenhof

Records Requested: See October 20, 2020 Right to Know request included in the appeal package.

Appeal Caption: Weidenhof and The Cranberry Eagle v. Lancaster Township
OOR Dkt. AP 2020-2509

I, Christina Senft, hereby declare under the penalty of perjury, pursuant to 18 Pa.C.S. § 4904, that the following statements are true and correct based upon my personal knowledge information and belief:

1. I serve as the Open Records Officer for Lancaster Township ("Agency") and am responsible for responding to Right-to-Know requests filed with the Agency.
2. In my capacity as the Open Records Officer, I am familiar with the records of the Agency.
3. Upon receipt of the request and supplemented upon receipt of the appeal, I conducted a thorough examination of files in the possession, custody and control of the Agency for records responsive to the request underlying this appeal, specifically I searched the relevant files, including electronic files and e-mails associated with the Lancaster 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, including Lancaster Township's electronic files and e-mails. In doing this, we compiled the relevant documents for review prior to responding to the appeal.
4. Additionally, I have inquired with relevant Agency personnel and, if applicable, relevant third-party contractors as to whether the requested records exist in their possession, 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.

LANCASTER TOWNSHIP

113 Kings Alley
Harmony, Pennsylvania 16037

Phone: (724) 452-7213 • Fax: (724) 453-0129

5. After conducting a good faith search of the Agency's files and inquiring with relevant Agency personnel, I identified all records within the Agency's possession, custody or control that are responsive to the request and available for public access and provided them to the requester. Those items that were not provided at the time of the initial response, on or about November 25, 2020, have been attached to our response to the appeal on this date, December 9, 2020.

Date: December 9, 2020

Signature: Christina M Senft
Christina Senft
Open Records Officer
Lancaster Township

From: jdplesniak <jdplesniak@gmail.com>
Sent: Saturday, February 22, 2020 1:31 PM
To: Tim Zinkham <tzinkham@lanaster-township.com>
Subject: RE: Questions

Hi Tim, I am looking forward to resolving these issues in the march 3rd 4:15 executive session meeting. Thank you for being engaged.

Sent from my Verizon, Samsung Galaxy smartphone

Lope Casker & Casker
207 E. Grandview Avenue
Zelienople, PA 16063
724-452-5020

Invoice submitted to:
Lancaster Township
113 Kings Alley
Harmony, PA 16037

March 28, 2020
In Reference To: GENERAL
Invoice #25389

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
--	-----------------	---------------

1/6/2020 Preparation and participation in monthly meeting executive session. CJR	-	
---	---	--

1/8/2020 Meeting with Board in our office to discuss matter. CJR	personnel	
---	-----------	--

2/4/2020 Meeting with Board		
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Lope Casker & Casker

207 E. Grandview Avenue

Zelienople, PA 16063

724-452-5020

Invoice submitted to:
Lancaster Township
113 Kings Alley
Harmony, PA 16037

June 18, 2020

In Reference To: GENERAL

Invoice #25476

Professional Services

Hrs/Rate

Amount

5/18/2020 Monthly meeting plus executive session afterward.

CJR

5/20/2020 Preparation and participation in executive session with BOS.

<u>Hrs/Rate</u>	<u>Amount</u>
-----------------	---------------

6/3/2020 Participation in executive session with BOS

6/10/2020 Executive session with BOS

6/17/2020 Executive session with BOS

6/27/2020 Participation in executive session meeting with BOS.

Lope Casker & Casker

207 E. Grandview Avenue
Zelienople, PA 16063
724-452-5020

Invoice submitted to:
Lancaster Township
113 Kings Alley
Harmony, PA 16037

August 12, 2020

In Reference To: GENERAL

Invoice #25520

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
6/25/2020 _ Conference call with BOS over		
personnel issues.		

8/5/2020
with BOS to discuss personnel issues.

Meeting

Lope Casker & Casker
207 E. Grandview Avenue
Zelienople, PA 16063
724-452-5020

Invoice submitted to:
Lancaster Township
113 Kings Alley
Harmony, PA 16037

October 30, 2020

In Reference To: GENERAL

Invoice #25605

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
8/12/2020 Executive session meeting with BOS, matters. CJR		regarding ongoing personnel

9/2/2020 Executive session meeting with BOS re same. CJR

	<u>Hrs/Rate</u>	<u>Amount</u>
9/21/2020		
Preparation and participation in monthly meeting. Executive session afterward. CJR		

9/30/2020	Met with BOS in executive session	
-----------	--------------------------------------	--

<u>Hrs/Rate</u>	<u>Amount</u>
-----------------	---------------

10/19/2020

session before meeting begins.

Executive

·||

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OOR EXHIBIT 6

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Wednesday, December 9, 2020 3:43 PM
To: Chris Reese
Cc: Alex Weidenhof; Chrissy Senft
Subject: RE: [External] Lancaster Township response to RTK appeal by Alex Weidenhof -- OOR Dkt. AP 2020-2509

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Attorney Reese:

Pursuant to your request, I am confirming receipt of the Township's submission in the above matter. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
[\(717\) 346-9903](tel:7173469903) | mazepposbr@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Chris Reese <creese@lopecasker.com>
Sent: Wednesday, December 9, 2020 3:03 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Cc: Alex Weidenhof <aweidenhof@butlereagle.com>; Chrissy Senft <cseft@lancaster-township.com>
Subject: [External] Lancaster Township response to RTK appeal by Alex Weidenhof -- OOR Dkt. AP 2020-2509

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Dear Ms. Zeppos-Brown:

Please find attached Lancaster Township's response to the appeal in the matter of Weidenhof and the Cranberry Eagle v. Lancaster Township – OOR Dkt. AP 2020-2509.

If you could please confirm your receipt of this e-mail and the attached response, I would appreciate it.

Thank you.

Christopher J. Reese
Solicitor for Lancaster Township

cc: Alex Weidenhof, Cranberry Eagle (via e-mail)
Christina Senft, Lancaster Township (via e-mail)

Christopher J. Reese, Esq.
Lope, Casker & Casker
207 E. Grandview Avenue
Zelienople, PA 16063
Tel: 724-452-5020
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00R EXHIBIT 7

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Wednesday, December 9, 2020 3:49 PM
To: Alex Weidenhof; Chris Reese; Chrissy Senft
Subject: RE: [External] Request for extension — Weidenhof v. Lancaster Township OOR Dkt. No. AP 2020-2509

Follow Up Flag: Follow up
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Dear Parties:

The Requester's request for an extension is granted. Both parties will have through December 11, 2020 to make any additional submissions in the above matter.

Mr. Weidenhof, once I have the opportunity to review all submissions, I will advise if the OOR requires additional time to issue the Final Determination.

Please let me know if you have any questions. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
(717) 346-9903 | mazepposbr@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](#)

From: Alex Weidenhof <aweidenhof@butlereagle.com>
Sent: Wednesday, December 9, 2020 3:21 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>; Chris Reese <creese@lopecasker.com>; Chrissy Senft <csenft@lancaster-township.com>
Subject: [External] Request for extension — Weidenhof v. Lancaster Township OOR Dkt. No. AP 2020-2509

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Dear Appeals Officer Zeppos-Brown:

I ask that the OOR grant a two-day extension to its current submission deadline. In its response, the Township has included new information and arguments which require my review. I would appreciate if you could move the deadline to 5:00 p.m. on December 11. I am in turn more than willing to agree to an extension to the Final Determination due date, as well.

Thank you,

--

Alex Weidenhof
Reporter, *The Cranberry Eagle*
724-776-4270 ext. 113

00R EXHIBIT 8

Zeppos-Brown, Magdalene

From: Alex Weidenhof <aweidenhof@butlereagle.com>
Sent: Friday, December 11, 2020 3:42 PM
To: Zeppos-Brown, Magdalene; Chrissy Senft; Chris Reese
Subject: [External] Reply in Weidenhof v. Lancaster Township, AP 2020-2509
Attachments: Lancaster Reply.pdf

Follow Up Flag: Follow up
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Dear Appeals Officer Zeppos-Brown,

Please see the attached reply in *Weidenhof v. Lancaster Township*, AP 2020-2509.

I would appreciate if you could confirm your receipt of this e-mail and attachment.

Thank you,

--

Alex Weidenhof
Reporter, *The Cranberry Eagle*
724-776-4270 ext. 113

Via e-mail

Magdalene C. Zeppos-Brown, Esq.
Office of Open Records
333 Market St., 6th Floor
Harrisburg, PA 17101-2234
mazepposbr@pa.gov

11 December 2020

Re: Reply in *Weidenhof v. Lancaster Township*, AP 2020-2509

Dear Appeals Officer Zeppos-Brown,

In its response in the above-captioned matter, Lancaster Township has once more failed to meet its burden under the Right-to-Know Law in several instances, and its provision of new documents pertaining to Item 6 similarly do not comply with the RTKL.

In Attorney Reese's response, he reiterated the Township's denial of access to records responsive to Items 4 and 5. And while a sworn attestation was attached to the response pertaining to Item 6, the Township made no such sworn statement related to its cited exemptions.

I. THE TOWNSHIP HAS NOT MET ITS BURDEN

Section 708(a) of the RTKL makes very clear that the burden of proof with response to exemptions is laid squarely on the Township:

The burden of proving that a record of a . . . local agency is exempt from public access shall be on the . . . local agency receiving a response by a preponderance of the evidence. Despite this clear and unambiguous burden, the Township has provided no evidence of the cited exemptions being applicable.

A. Records responsive to Item 4 should not be withheld under Section 708(b)(7).

While the Township has cited the Section 708(b)(7)(vi) exemption, related to written criticism of an employee, it has not demonstrated that records responsive to that request do not contain non-exempt information, such as the factual background leading to written criticism of an employee. *See, e.g., Bhaya v. Central Bucks School Dist.*, OOR Dkt. AP 2014- 0319, 2014 PA

O.O.R.D. LEXIS 372 (an affidavit stating withheld records included records “received from parents of students...which were critical of [a coach] and constituted complaints” did not include a statement that the records were “written criticisms” to substantiate the application of Section 708(b)(7)(vi)); *see also* 65 P.S. § 67.706 (“The agency may not deny access to the record if the information which is not subject to access is able to be redacted”).

While the OOR has found the redaction of “written criticisms” to be permissible within a record, the wholesale withholding of a record merely containing these criticisms is not. In *Krug v. Bloomsburg University of Pennsylvania*, for example, the OOR held that Bloomsburg permissibly redacted emails containing such criticisms, stating “the University has proven that the . . . emails contain criticisms of identified management employees, and therefore they *may be redacted* under Section 708(b)(7) of the RTKL.” PA O.O.R.D. LEXIS 1419, *12 (emphasis added). What the Township is doing in the instant case is materially different from *Krug*. Rather than redacting any information that is a written criticism, the Township is wholesale withholding records without proof they contain criticisms, let alone are comprised solely of such grievances.

B. The Township has not met its burden to assert the Section 708(b)(17) exemption.

The Township has again failed to meet its burden to apply the Section 708(b)(17) exemption as well, but still asserts that records responsive to Items 4 and 5 should be withheld on that basis.

As noted in the position statement sent to the OOR on 30 November, the Township must prove there was a noncriminal investigation to apply this exemption. Moreover, the Township has to demonstrate there was “a systematic or searching inquiry, detailed examination, or an official probe” that is not criminal in nature. *Department of Health v. Office of Open Records*, 4 A.3d 803, 810-811 (Pa. Cmwlth. 2010). The “official probe” further has to be conducted by “an agency acting

within its legislatively granted fact-finding and investigative powers.” *Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920, 925 (Pa. Cmwlth. 2012).

Despite its re-assertion of this exemption, the Township has once more not provided any evidence that would support its position.

C. There is no evidence for the work product doctrine or attorney/client privilege.

While the Township, for the first time on appeal, raised the issue that some documents “contain legal advice and work product and are protected by attorney/client privilege,” it, like in the arguments it posed in its denial of the Request, again failed to provide any evidence of such.

The burden of proof still rests with the Township, even when the exemption is related to a privilege rather than an RTKL-delineated exemption. *Bagwell v. Pa. Dep’t of Education*, 103 A.3d 409 (Pa. Cmwlth. 2014). Because it has not met this burden, its assertion of the work product doctrine and attorney/client privilege fall flat.

Furthermore, the Township claims “several documents” should be withheld because they “contain” privileged information. This again fails to comply with the presumption that records “in the possession of . . . a local agency shall be presumed to be a public record.” 65 P.S. § 67.305. When information contained within a record is exempt from disclosure, it is, once more, not proper to withhold the full document. Instead,

if an agency determines that a public record . . . contains information which is subject to access as well as information which is not subject to access, the agency’s response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record . . . and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. *The agency may not deny access to the record if the information which is not subject to access is able to be redacted.*

65 P.S. § 67.706 (emphasis added). In this instance—and in the other two exemptions the Township asserts—it has denied access to responsive records, regardless of whether the supposedly exempted information can be redacted and without proof the exemptions apply.

II. THE TOWNSHIP'S RESPONSE TO ITEM 6 IS INCOMPLETE

Attached to the Township's response in the instant appeal is the sworn attestation of its Open Records Officer that all responsive records available for public access have been provided. Although Ms. Senft's statement is sufficient evidence that all such records have been provided, the records sent with respect to Item 6 are redacted incompatibly with the RTKL.

In his letter, Attorney Reese indicated the supplemental evidence provided in regard to Item 6 of the Request, *i.e.*, one e-mail and four invoices submitted by his law firm to the Township, included "*redacted* billing records" (emphasis added). Upon review of the billing records, it appears the Township has redacted all information not specifically pertaining to the executive sessions, as well as the billing hours, rate, and subtotal amounts in those line-items in which such sessions are referred.

While the provision of these records is welcome, and although there is no reason to believe the Township has not provided all responsive records, the redactions in the invoices are unsubstantiated. Although the redacted information may not be responsive to the request, the Township may not redact it solely because it is non-responsive. *Kerr v. N. Huntingdon Twp.*, OOR Dkt. AP 2014-1080, 2014 PA O.O.R.D. LEXIS 1031 ("Nor is there an exemption under the RTKL which permits an agency to redact content in a responsive record that is presumptively public because that content is non-responsive"). Note, too, that the Township has not claimed any exemptions for the redacted information in these records, and that information as "mundane and

uninforming” as that included in billing records is largely not protected by privilege or the work-product doctrine. *Levy v. Senate of Pa.*, 94 A.3d 436 (Pa. Cmwlth. 2014).

III. CONCLUSION

For the foregoing reasons, and those iterated in the original position statement, this appeal should be **granted** and the Township directed to take further action to provide responsive records.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Alex Weidenhof', with a long horizontal flourish extending to the right.

Alex Weidenhof

cc: Christina Senft (via e-mail only)
Christopher J. Reese, Esq. (via e-mail only)

OOR EXHIBIT 9

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Friday, December 11, 2020 3:47 PM
To: Alex Weidenhof; Chrissy Senft; Chris Reese
Subject: RE: [External] Reply in Weidenhof v. Lancaster Township, AP 2020-2509

Dear Mr. Weidenhof:

Pursuant to your request, I am confirming receipt of your submission in the above matter. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
[\(717\) 346-9903](tel:7173469903) | mazepposbr@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Alex Weidenhof <aweidenhof@butlereagle.com>
Sent: Friday, December 11, 2020 3:42 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>; Chrissy Senft <csenft@lancaster-township.com>; Chris Reese <creese@lopecasker.com>
Subject: [External] Reply in Weidenhof v. Lancaster Township, AP 2020-2509

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Dear Appeals Officer Zeppos-Brown,

Please see the attached reply in *Weidenhof v. Lancaster Township*, AP 2020-2509.

I would appreciate if you could confirm your receipt of this e-mail and attachment.

Thank you,

--

Alex Weidenhof
Reporter, *The Cranberry Eagle*
724-776-4270 ext. 113

OOR EXHIBIT 10

Zeppos-Brown, Magdalene

From: Chris Reese <creese@lopecasker.com>
Sent: Thursday, December 17, 2020 5:15 PM
To: Zeppos-Brown, Magdalene; Alex Weidenhof; Chrissy Senft
Subject: RE: [External] Reply in Weidenhof v. Lancaster Township, AP 2020-2509

Follow Up Flag: Follow up
Flag Status: Flagged

That is fine with us.

Thank you.

Chris

Christopher J. Reese, Esq.
Lope, Casker & Casker
207 E. Grandview Avenue
Zelienople, PA 16063
Tel: 724-452-5020
Fax: 724-452-7866

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From: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Sent: Thursday, December 17, 2020 4:15 PM
To: Alex Weidenhof <aweidenhof@butlereagle.com>; Chrissy Senft <cseft@lancaster-township.com>; Chris Reese <creese@lopecasker.com>
Subject: RE: [External] Reply in Weidenhof v. Lancaster Township, AP 2020-2509

Dear Parties:

This will confirm that Mr. Weidenhof has agreed to an extension for the OOR to issue its Final Determination, such that the Final Determination will now be issued on or before January 27, 2021. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
[\(717\) 346-9903](tel:(717)346-9903) | mazepposbr@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Alex Weidenhof <aweidenhof@butlereagle.com>

Sent: Thursday, December 17, 2020 3:26 PM

To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>; Chrissy Senft <cseft@lancaster-township.com>; Chris Reese <creese@lopecasker.com>

Subject: Re: [External] Reply in Weidenhof v. Lancaster Township, AP 2020-2509

Appeals Officer Zeppos-Brown,

Yes, an extension until January 27, 2021, is okay.

Thanks,

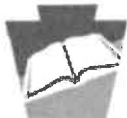
Alex Weidenhof
Reporter, *The Cranberry Eagle*
724-776-4270 ext. 113

On 17/12/20 13:45, Zeppos-Brown, Magdalene wrote:

Dear Mr. Weidenhof:

I write in regard to the above appeal. Specifically, the OOR is experiencing a high volume of appeals at this time. In order to ensure that the OOR has sufficient time to review the submissions and deliberate and discuss the appeal, we request an extension to issue the Final Determination, such that the Final Determination in the above matter would be issued on or before January 27, 2021. Kindly advise on or before December 18, 2020 if you agree to the extension.

Thank you for your cooperation in this process.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

OOR EXHIBIT 11



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

ALEX WEIDENHOF AND THE
CRANBERRY EAGLE,
Requester

v.

LANCASTER TOWNSHIP,
Respondent

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: Docket No.: AP 2020-2509

INTRODUCTION

Alex Weidenhof, a staff writer with The Cranberry Eagle (collectively, the “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 regarding collective bargaining agreements and Township employees. The Township partially denied the Request, stating, in part, that certain records do not exist. 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 Township is required to take further action as directed.

FACTUAL BACKGROUND

On October 20, 2020, the Request was filed, seeking, in part:

2. Any and all correspondence dated between Jan. 1, 2019, and Oct. 20, 2020, among Township officials, including the Secretary, Manager, and/or Supervisors, related to alleged breaches of the Police [Collective Bargaining Agreement (“CBA”)].

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.¹ 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

¹ 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.² 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

MAGDALENE C. ZEPPOS-BROWN, ESQ.
APPEALS OFFICER

Sent to: Alex Weidenhof (via email only);
Christopher Reese, Esq. (via email only); and
Chrissy Senft, AORO (via email only)

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