



FINAL DETERMINATION

IN THE MATTER OF

**GENE GOEBEL,
Requester**

v.

**GARNET VALLEY
SCHOOL DISTRICT,
Respondent**

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Docket No.: AP 2021-0762

INTRODUCTION

Gene Goebel (“Requester”) submitted a request (“Request”) to the Garnet Valley School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records provided to the District by the County government and the property addresses that the District appealed reassessment values on. The District did not respond, and the Request was deemed denied. 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** and **dismissed as moot in part**, and the District is required to take further action as directed.

FACTUAL BACKGROUND

On March 1, 2021, the Request was filed, stating:

Please provide the 123 property addresses that the ... District appealed the County reassessment values on[.] Please provide all the data the County sent the [District] regarding all before/after assessment values for properties in the [District] (before and after the reassessment)[.]

On April 7, 2021, following a 30-day extension, 65 P.S. § 67.902, the Request was deemed denied. 65 P.S. § 67.901.

On April 12, 2021, the Requester appealed to the OOR, providing reasons for disclosure. The OOR invited the parties to supplement the record and directed the District to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On April 13, 2021, the District provided a response to the Request, granting a number of property records, but stating that no responsive list of properties being appealed exists. The same day, in response to the Requester, the District provided a variety of CSV files received from the County. The same day, the Requester also provided a copy of a series of emails he had exchanged with a representative of the District, discussing the property reassessment.

On April 30, 2021, in response to an inquiry by the OOR, the District provided the verification of Patricia Sharp, the District's Agency Open Records Officer, who attests that she conducted a search and that no responsive list exists.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the

request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Request is dismissed as moot in part

On April 13, 2021, the District provided the Requester with the CSV files provided to them by the County. Because these files are fully responsive to the section of the Request seeking files, and the Requester has not objected to the District's production of these records, the Request is dismissed as moot as to these files. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The District has failed to demonstrate that no other responsive records exist

The District argues that no responsive list of properties being appealed exists. In support of this argument, the District submitted the verification of Ms. Sharp, who attests that:

3. Upon receipt of the request, I conducted a good faith and thorough examination of files in the possession, custody and control of the [District] for records responsive to the [R]equest underlying this appeal.

4. The District produced documents to the [Requester] which the District had in its possession, custody, and control and which it believed would satisfy the request, and further which are not protected by the attorney-client privilege pursuant to section 305 of the Pennsylvania Right-to-Know Law or otherwise exempt from disclosure by law.

Under the RTKL, an affidavit may serve as sufficient evidentiary support to withhold requested 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 District acted in bad faith, "the averments in [the verification] 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)). However, an agency cannot rely on conclusory statements to sustain its burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct.

2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *see also Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency’s conclusory affidavit was insufficient); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d at 659 (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (*citing Scolforo*).

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. The RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL. While the RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court recently stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *appeal granted in part by*, 218 A.3d 375, 2019 Pa. LEXIS 5410 (Pa. 2019); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (*citing Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted). Furthermore, a good faith search may require an Agency Open Records Officer to consult with other agency officials to determine if they possess responsive records. *Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer's duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Here, the District's Agency Open Records Officer attests that she conducted a search of the District's administrative files and did not locate any responsive list of properties to be appealed. *See Bush v. New Britain Twp. Police Dep't*, OOR Dkt. AP 2019-2633, 2020 PA O.O.R.D. LEXIS 2094 (where the request is seeking a specific administrative record, an agency's open records officer may conduct a good-faith search without showing that other employees were consulted); *cf Bush v. Borough of Mt. Pleasant*, OOR Dkt. AP 2019-2410, 2020 PA O.O.R.D. LEXIS 1304 (explaining that where a request sought information which could be contained outside of a single responsive administrative document, proving that a responsive list does not exist is insufficient). However, in this case, the materials submitted by the Requester show that several other employees or contractors of the District were involved with the appeals in question- specifically, the District's Director of Business and Support Services, the District Solicitor, and an expert appraiser. The District has not submitted any statements or evidence to show that these parties were contacted to determine if they had the responsive information in their possession.

The OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records sought in the Request. Absent providing a sufficient evidentiary basis that the requested list does not exist, the District must release any responsive public lists. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **dismissed as moot in part**, and the District is directed to contact individuals within the agency who may possess responsive records and determine if any responsive records exist. If no responsive list exists, the

District should provide the Requester with an attestation to that effect, or otherwise provide the responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Delaware 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 according to court rules 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 12, 2021

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Gene Goebel (via US mail only);
 Patricia Sharp (via email only)

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