



FINAL DETERMINATION

IN THE MATTER OF

**TOM FORD AND THE BORO AND
TOWNE NEWS,
Requester**

v.

**MOUNT POCONO BOROUGH,
Respondent**

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Docket No: AP 2021-1222

INTRODUCTION

Tom Ford, Editor for the Boro and Towne News, (collectively the “Requester”) submitted a request (“Request”) to Mount Pocono Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a recording of a conversation. The Borough denied the Request, arguing that it did not have possession of the recording. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Borough is not required to take any further action.

FACTUAL BACKGROUND

On May 3, 2021, the Request was filed, seeking “[e]lectronic copies of recording of conversation between the mayor and the [B]orough Secretary referred to during the [B]orough council meeting of May 3, 2021.” After invoking an extension of time to respond, 65 P.S. § 67.902(b), the Borough, on June 8, 2021, denied the Request, contending that the requested record was not in the possession of the Borough. The Borough explained that its Solicitor, James Fareri,

Esq., was advised by the Borough Mayor, Michael Penn, that the recording was not preserved on the recording device that was used and that the recording could not be located on the Mayor's computer where it was downloaded.

On June 22, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On July 2, 2021, the Requester submitted a position statement, and verified, under the penalty of perjury, the factual statements therein. The Requester contends that the denial of his Request is based on unsworn statements, that the Borough failed to conduct a good faith search for the recording, that the Borough was required to preserve the recording, and that the Borough should have made an effort to recover any previously deleted files from the computer(s) where the recording was downloaded.

Although the Borough failed to file a response to the appeal by the record closing date, it subsequently requested that the OOR reopen the appeal record to allow it to submit evidence. On July 7, 2021, the OOR granted the Borough's request and reopened the record.¹ On July 9, 2021, the Borough submitted a position statement and two sworn affidavits, one from Mayor Penn and the other from Attorney Fareri. The Borough asserts that the recording was lost and that it does not exist in the Borough's possession.

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.*

¹ See 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

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 Borough is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. See 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. See 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof

as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The Borough claims that the recording sought does not exist. In support of the Borough’s position, Attorney Fareri, the Borough’s Solicitor, attests in relevant part, as follows:

2. On or shortly after May 3, 2021, I became aware of the [Request]... for a recording allegedly made by Michael Penn, Mayor of the [Borough] of a conversation with Joshua Walker, the Borough Secretary.

3. Upon receipt of such information I requested that the Mayor provide me with a copy of the recording so I could review the same to determine whether it was a “public record” as defined in the [RTKL].

4. The Mayor indicated to me that his conversation with Mr. Walker was short and that he discussed with Mr. Walker his relationships with members of Council. The Mayor viewed this as a personnel issue. The recording was on the Mayor’s personal digital recorder.

5. The Mayor attempted to download the recording on his personal computer after the [R]equest was received. The Mayor then attempted to locate the recording on his personal computer to discover that it had never been downloaded, or otherwise was not located on the computer.

6. The Mayor advised that after the download he erased and recorded over the conversation on his digital recorder. The Mayor never listened to the recording on the digital recorder and is not certain that the conversation was ever recorded.
...

8. As the record did not exist, I could never review the record personally.

In addition, Mayor Penn attests as follows in his affidavit:

3. On April 6, 2021, I visited the Borough offices and requested to speak with Mr. Walker. I had with me my own personal digital recorder. I asked Mr. Walker if he would consent to recording our conversation. Mr. Walker indicated that he did

consent but wished to have a witness. The witness was Alexis Wilkinson, the Borough Zoning Officer.

4. I had a very brief conversation with Mr. Walker. The subject of the conversation was Mr. Walker's working relationship with Councilpersons as a personnel matter.

5. The recording was made on my digital recorder to the best of my knowledge. I attempted to download this and other recordings on my digital recorder to my personal laptop. This was done after a Right to Know Request had been received.

6. Upon downloading the information on the digital recorder, I erased contents of the recorder. Thereafter, I ascertained that the conversation with Mr. Walker had not downloaded on to the computer. I erased the digital recorder because I thought the conversation had been downloaded on to my personal computer.

7. I believed that the conversation was either never recorded on the digital recorder due to some malfunction or was lost when downloading on to my personal computer.

8. I reviewed the contents of my personal computer to see if the conversation was on the computer. It was not.

9. The record requested based upon the above does not exist and is unable to be produced.

10. It was my intention to provide the record to the Borough Solicitor for review to see if indeed the same was a public record. I was unable to do this because as above referenced, the record does not exist.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Borough has acted in bad faith or that the requested information exists, "the averments in the [affidavits] 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)).

Here, the Mayor, as the individual who made the recording and attempted to download it, attests that the recording no longer exists on his recording device and was not saved on his

computer. *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. There is no evidence before the OOR that refutes the Borough’s evidence, or which would cause us to doubt the credibility of the Borough’s affiants. Nor can we conclude that the Borough intentionally failed to preserve the recording once the Request was filed. *Cf. Cap v. Lehigh and Northampton Transp. Auth.*, OOR Dkt. AP 2018-1337, 2018 PA O.O.R.D. LEXIS 1071 (finding that the agency failed to institute a litigation hold on responsive records within a reasonable period of time throughout the RTKL process). The Requester also contends that the Borough is required to retrieve files deleted from the Mayor’s computer hard drive. However, the evidence here shows that the recording was not saved, or therefore deleted, from the Mayor’s personal computer. Moreover, an agency is not required to conduct a forensic analysis to locate potentially deleted information, *see, e.g., Paint Twp. v. Clark*, 109 A.3d 796 (Pa. Commw. Ct. 2015).

Accordingly, based on the foregoing, the Borough has met its burden of proving, by a preponderance of the evidence, that the recording does not exist in the Borough’s possession, custody or control. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Borough is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Monroe County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The

OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 20, 2021

/s/ Angela Edris

APPEALS OFFICER
ANGELA EDRIS, ESQ.

Sent via email to: Tom Ford;
James Fareri, Esq.;
Joshua Walker, AORO

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