



FINAL DETERMINATION

IN THE MATTER OF

**GEORGE YUHAS,
Requester**

v.

**TUNKHANNOCK BOROUGH,
Respondent**

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Docket No.: AP 2021-1295

INTRODUCTION

George Yuhas (“Requester”) submitted a request (“Request”) to the Tunkahhnock Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, asking the Borough to preserve a recording device. The Borough denied the Request, noting that it did not seek any records, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **dismissed**, and the Borough is not required to take any further action.

FACTUAL BACKGROUND

On June 23, 2021, the Request was filed, seeking:

Secure for future review & inspection [due] to the possible use as evidence regarding sunshine violation, the electronic device Olympus Digital Voice Recorder DS-2400 and its content very specific to Drug Dog meeting midmonth in June 2021.¹

¹ The Requester also checked the boxes indicating that he wanted copies and inspection of the records.

On June 29, 2021, the Borough notified the Requester that the identified electronic device is not a record under the meaning of the RTKL and that the Requester did not seek files from the device. On July 1, 2021, the Requester appealed to the OOR, arguing that the records should be provided. The OOR invited the parties to supplement the record and directed the Borough to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 14, 2021, the Borough submitted a position statement explaining that it had provided the Requester with the electronic files in a separate appeal, *Yuhas v. Tunkhannock Borough*, OOR Dkt. AP 2021-1300, and that the files had been transferred from the audio recorder to a computer and no longer existed on the device in question. The Borough reiterated its argument that the identified device is not a “record” under the RTKL. In support of this argument, the Borough submitted the verification of Dawn Welch, the Borough’s Open Records Officer, who attests that she uses the digital recorder to help her produce meeting minutes and that the files had been provided to the Requester in response to a separate request.

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 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 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)).

In this case, the Request does not seek any identified records from the Borough. Under the RTKL, a request must seek records. For example, questions posed within a request do not require a response under the RTKL. *See Walker v. Pa. Ins. Dep’t*, No. 1485 C.D. 2011, 2012 Pa. Commw.

Unpub. LEXIS 425 at *16 (Pa. Commw. Ct. 2012); *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at * 14 (Pa. Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”); *see also Stidmon v. Blackhawk Sch. Dist.*, No. 11605-2009 at 5 (Beav. Com. Pl. Dec. 14, 2009) (“The [RTKL] did not provide citizens the opportunity to propound interrogatories upon local agencies, rather it simply provides citizens access to existing public records”). The RTKL defines a “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.

Here, the Requester does not seek information, but instead seeks to require the Borough to secure a recording device for possible future review and inspection.² There is no provision of the RTKL which requires an agency to maintain a record in any form prior to the filing of a request for information, and the OOR has no power to require the Borough to keep its digital files in any specific location. Therefore, the appeal must be dismissed. *Cerrie v. North East Borough Police*, OOR Dkt. AP 2020-1724, 2020 PA O.O.R.D. LEXIS 2890.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **dismissed**, 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 Wyoming 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

² This is made especially clear because the Requester did later file a RTKL request for the information on the recording device, which he received.

this matter, the OOR is not a proper party to any appeal and should not be named as a party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 2, 2021

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: George Yuhas (via email only);
Anthony Litwin, Esq. (via email only)

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