



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**ADAM WILCOX,  
Requester**

**v.**

**WESTMORELAND COUNTY,  
Respondent**

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**Docket No: AP 2021-1736**

### **INTRODUCTION**

Adam Wilcox (“Requester”) submitted a request (“Request”) to Westmoreland County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking certain 911 audio recordings and other communications. The County partially denied the Request, arguing that 911 records are not subject to public disclosure<sup>1</sup> and the County does not possess certain records. 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 County is not required to take any further action.

### **FACTUAL BACKGROUND**

On August 2, 2021, the Request was filed, seeking the following records in relation to events between February 2021 and August 2, 2021:

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<sup>1</sup> The County did, however, provide the Requester with a time response log concerning the relevant 911 call.

1. An audio file (mp3) of each emergency phone call I made on July 30<sup>th</sup> at the following times: 3:56 PM -11 minutes, 4:08pm – 36 minutes, 4:47 PM – 23 minutes, 5:11 PM – 2 minutes.
2. AND any calls or communication made on by behalf (using my name as an identifying tag) in response to a severely distressing mental state I was in after being victim of a verbal assault on me and my psychiatric service dog at [sic] by a neighbor (name is unknown by be [sic]). Including but not limited to official police reports, or live audio transmissions in response to the July 30th incidents.
3. Any formal communication about my behalf, made from February, 2021 – August 2, 2021 by the local (Trafford Police). That would include any phone calls responded to, reports written, or consultation sought on my behalf, to resolve on-going mental health and domestic struggles within my residential neighborhood.

On August 9, 2021, the County partially denied Item 1 of the Request, asserting that the responsive records are exempt 911 recordings, 65 P.S. 67.708(b)(18)(i). The County denied Items 2 and 3 of the Request asserting that the requested records are not in the possession, custody or control of the County.

On August 23, 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 County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 2, 2021, the County submitted a position statement reiterating its grounds for denial. Accompanying the submission were the sworn affidavits of Jason Greenwald, Open Records Officer for Westmoreland County, and Eugene Good, Chief of Operations/911 Coordinator for the Westmoreland County Department of Public Safety. The Requester submitted additional responses on August 27, 2021 and on September 2, 2021.

### **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 LLC 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 County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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. 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. 65 P.S. § 67.708(b).

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

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

### **1. The County may withhold the responsive 911 recordings**

In the instant matter, the County contends that the responsive 911 records are exempt pursuant to Section 708(b)(18) of the RTKL, which protects from disclosure “[r]ecords or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.” 65 P.S. § 67.708(b)(18)(i). However, “[t]his paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.” 65 P.S. § 67.708(b)(18)(ii).

Here, the Request seeks 911 call records that are expressly exempt under Section 708(b)(18) of the RTKL. *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101, 104 (Pa. Commw. Ct. 2016) (holding that evidence may be unnecessary when an exemption is clear from the face of the record). While the RTKL does not preclude the County from releasing the records, the County has not indicated that the public interest in disclosure of the records outweighs nondisclosure, and that determination is within the County’s discretion. 65 P.S. § 67.708(b)(18)(ii); *see also Irwin v. Wayne Cnty. Dist. Atty’s Office*, OOR Dkt. AP 2016-0893, 2016 PA O.O.R.D. LEXIS 943; *Hammond v. Lancaster Cnty. Dist. Atty’s Office*, OOR Dkt. AP 2016-0494, 2016 PA O.O. R.D. LEXIS 600. While the Requester states that he is seeking the records for an upcoming

landlord/tenant dispute, the OOR is without authority to compel the County to exercise its discretion in favor of disclosing the records. *Pa. Dep't of Pub. Welf. v. Froelich*, 29 A.3d 863 (Pa. Commw. Ct. 2011); *Brady v. Franklin Cnty.*, OOR Dkt. AP 2020-0219, 2020 PA O.O.R.D. LEXIS 439; *Loro v. Delaware Cnty.*, OOR Dkt. AP 2019-0779, 2019 PA O.O.R.D. LEXIS 590. Therefore, the responsive 911 recordings may be withheld.

**2. The County has demonstrated that it does not possess records responsive to Items 2 and 3 of the Request**

The County asserts that it does not have any records responsive to Items 2 and 3 and in support, Mr. Good attests:

The County denied the request when the County does not have any records in its possession regarding police reports, communications or written reports created internally to the Trafford Police Department ... I conducted a thorough examination of files and records in the possession, custody and control of the County for records possibly responsive to the requests underlying this appeal concerning police reports, communications or written reports.

In further support of its position that no records exist, the County provided the affidavit, dated September 2, 2021, of Jason Greenwald, Open Records Officer for the County. Mr. Greenwald attests:

The County denied the request when the county does not have any records in its possession regarding police reports, communications or written reports created internally to the Trafford Police Department ... I conducted a thorough examination of files and records in the possession, custody and control of the County for records possibly responsive to the requests underlying this appeal concerning police reports, communications or written reports. Additionally, inquiry was made to relevant personnel at the County, including the Department of Public Safety, as to whether the requested records exist in the possession of the County concerning police reports, communications or written reports. The County denied the request when the County does not have any records in its possession regarding police reports, communications or written reports which would be created internally and maintained by the Trafford Police Department.

Under the RTKL, a sworn statement made under the penalty of perjury may serve as sufficient support 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 competent evidence that the County acted in bad faith or that additional responsive records exist “the averments in the affidavit should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. 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)). Therefore, based upon the evidence provided, the County has met its burden of proving that no responsive record exists in its possession for Items 2 and 3. *See Hodges*, 29 A.3d at 1192.

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **denied**, and the County 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 Westmoreland 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 13, 2021**

/s/ Lyle Hartranft  
Lyle Hartranft, Esq.  
Appeals Officer

Sent via email to: Adam Wilcox (via email only);  
Melissa A. Guidy, Esquire. (via email only);  
Jason Greenwald, AORO (via email only)

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