



FINAL DETERMINATION

IN THE MATTER OF

**JOSH MONIGHAN,
Requester**

v.

**MIDDLESEX TOWNSHIP,
Respondent**

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Docket No: AP 2021-1951

INTRODUCTION

Josh Monighan (“Requester”) submitted a request (“Request”) to Middlesex Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a police incident report and a corresponding audio and video recording. The Township denied the Request, arguing the incident report was previously provided to the Requester on June 15, 2021, in response to another RTKL request, no other responsive records exist, and the RTKL does not apply to audio or video recordings made by a law enforcement agency. 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 for lack of jurisdiction in part**, and the Township is required to take additional action as directed.

FACTUAL BACKGROUND

On August 16, 2021, the Request was filed, seeking:

1. Public record of cause for ingress on 197 Sunnyside Drive [and] 3989 Spring Rd[.,] May 5[,] 1:30 a.m.
2. Public record of audio video created on ingress on 197 Sunnyside Drive [and] 3989 Spring Rd[.,] May 5[,] 1:30 a.m.

On August 19, 2021, the Township invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On September 14, 2021, the Township denied the Request, arguing that the record responsive to Item 1 was provided to the Requester in response to a previous RTKL request and that no other responsive records exist.¹ The Township denied the Request pertaining to Item 2, arguing that the RTKL does not apply to audio or video recordings made by a law enforcement agency.² 42 Pa.C.S. § 67A02(a).

On September 15, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.³ The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 22, 2021, the Township submitted a position statement reiterating its grounds for denial. In support of its position, the Township submitted the attestations, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of Eileen Gault, the Township's Open Records Officer, and Steven D. Kingsborough, Chief of Police for the Middlesex Township Police Department.⁴ On September 28, 2021 and October 4, 2021,

¹ An appeal of an identical RTKL request was addressed by the OOR at *Monighan v. Middlesex Township*, OOR Dkt. 2021-1166, 2021 PA O.O.R.D. LEXIS 1176 (finding that, despite subsequently providing the redacted incident report, the Township was permitted to deny the request because the Requester failed to comply with the Township's posted RTKL policy requiring the use of the Township's request form or the standard statewide RTKL request form).

² The Township also argued that the Request was not made in compliance with the procedure set forth in 42 Pa.C.S. §§ 67A03-67A05.

³ The Request attached to the appeal form listed the Middlesex Township Municipal Authority as the Agency but also listed the Township's Open Records Officer, Eileen Gault. In its submission, the Township acknowledged it received an identical request from the Requester on August 16, 2021, that listed the Township as the Agency.

⁴ The Township also submitted the attestation, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of Rory Morrison, the Manager and Right-to-Know Officer of the Middlesex Township Municipal Authority ("Authority"). Mr. Morrison attests that the Authority did not receive the Request.

the Requester submitted information in support of the appeal.⁵ On October 6, 2021, in response to the OOR's request for additional evidence, the Township submitted an attestation, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of Chief Kingsborough, addressing the redactions made in the responsive record previously provided to the Requester. On that same day, the Requester submitted a response to the additional evidence provided by the Township.

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.

⁵ The Requester's second submission was received by the OOR after the record closed; however, in order to develop the record, the submission was considered. *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”).

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)(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 Township proved additional records responsive to Item 1 do not exist

The Township denied Item 1, arguing that it does not possess any additional 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), *aff’d* 243 A.3d 19 (Pa. 2020); *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, Chief Kingsborough attests:

2. ...[he is] familiar with the documents and records pertaining to matters involving the Middlesex Township Police Department as well as documents and records prepared by officers of the Middlesex Township Police Department and [he is] responsible for searching criminal records requested through [RTKL] requests filed with the Middlesex Township Police Department and those pertaining to Police Department records requested through [the Township].

3. Based upon [his] responsibilities...[he is] familiar with the records of the Middlesex Township Police Department.
4. Upon receipt of the [R]equest, [he] conducted a thorough examination of files in the possession, custody and control of the Middlesex Township Police Department for records responsive to the requests underlying this appeal.
5. Additionally, [he]...inquired with relevant personnel and, if applicable, relevant third[-]party contractors as to whether the requested records exist in their possession.
6. After conducting a good faith search of the records and files and inquiring with relevant personnel, [he]...made the determination that the only records responsive to the records requested...was the Incident Report Form MT-21- 01647, a redacted version of which was provided to [the Requester] on June 15, 2021, and that there are no other records that exist within the possession, custody or control of the Middlesex Township Police Department responsive to [the R]equest. The record was previously provided to the [OOR] with respect to the appeal docketed [at] AP...2021-1166....

Ms. Gault also attests that the statements made by Chief Kingsborough are “are true and correct based upon [her] personal knowledge[,] information and belief.”

Under the RTKL, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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, “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)). The Requester did not submit evidence challenging the affidavits submitted by the Township. Based on the evidence submitted, the Township demonstrated that it conducted a good faith search for responsive records, that a redacted copy of the only existing responsive record was previously provided to the Requester, and that no additional records exist in the Township’s possession, custody or control. *Hodges*, 29 A.3d at 1192.

However, the Township is arguing that because it has provided the record responsive to Item 1 in a prior RTKL request, separate and apart from the instant RTKL proceeding, it is not required to produce it to the Requester again. Even when an agency has provided records in response to prior RTKL requests, “nothing in the RTKL excuses an agency from responding to a request for records because the records were previously provided in response to a prior request for records.” *Tomasic v. Forest Hills Volunteer Fire Dep’t*, OOR Dkt. AP 2015-1436, 2015 PA O.O.R.D. LEXIS 1214 (finding that providing responsive records to other Borough Council member in response to prior RTKL requests does not excuse agency from responding to a new request by the Borough Council’s Vice President) (*citing Cwiek v. Phila. Dist. Attorney’s Office*, OOR Dkt. AP 2014-1236, 2014 PA O.O.R.D. LEXIS 1036)). Accordingly, the Township is required to provide the redacted record, as discussed below, responsive to Item 1 of the Request to the Requester within thirty days.

2. The Township justified redactions of information identifying a minor

In the responsive record identified by the Township, Incident Report Form MT- 21-01647, the Township redacted certain information, asserting that it is exempt from disclosure under Section 708(b)(30) of the RTKL. 65 P.S. § 67.708(b)(30). Chief Kingsborough attests that “[t]he information redacted from Incident Report Form MT-21-01647 pertained to the name, home address, age, phone number and other information relating to two children 17 years of age or younger pursuant to 65 P.S. § 67.708(b)(30).”

Section 708(b)(30) of the RTKL expressly exempts from public disclosure “[a] record identifying the name, home address or date of birth of a child 17 years of age or younger.” *Id.* Further, Section 708(b)(6) of the RTKL exempts certain specifically listed “personal identification information[,]” such as “all of part of a person’s Social Security number, driver’s license number,

personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.” 65 P.S. § 67.708(b)(6)(i).

As previously discussed, under the RTKL, an attestation or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Accordingly, because the Township’s evidence demonstrated that the responsive record contains information protected under the RTKL, the redacted information is exempt from public access and can remain redacted from the responsive record required to be provided to the Requester.

3. The OOR does not have jurisdiction concerning Item 2

The Township denied Item 2 of the Request, arguing that the RTKL does not apply to audio or video recordings made by a law enforcement agency, and the Request was not made in compliance with 42 Pa.C.S. §§ 67A03-67A05.

Act 22 of 2017, 42 Pa.C.S. §§ 67A02-67A03, removed audio and video recordings made by law enforcement agencies from access under the RTKL and created a separate, exclusive means of access. To obtain such recordings, a requester must follow the procedures set forth in Act 22 and submit a written request to the open records officer for the law enforcement agency that possesses the record. 42 Pa.C.S. § 67A02. A “[l]aw enforcement agency” includes “an agency that employs a law enforcement officer.” 42 Pa.C.S. § 67A01. Further, appeals concerning such requests are to be filed “in the court of common pleas with jurisdiction.” 42 Pa.C.S. § 67A06.

Here, Chief Kingsborough attests:

Any audio or video records are only available pursuant to Act 22 of 2017. [The Requester] fails to submit a request for audio and video recordings in accordance with the requirements of that Act in that, among other things, [the Requester] has not complied with the requirement that the request be made within 60 days of the

event, failing to describe his relationship to the event, if the recorded incident took place inside a residence, that he identify each person present at the time of recording. In addition, [the Requester] is aware, having been advised more than one time, that the OOR does not have jurisdiction over the Act 22 process, and that his appeal is to be made to the Court of Common Pleas of Cumberland County.

Based on the evidenced presented, the Request pertaining to Item 2 should have been filed with the Middlesex Township Police Department pursuant to Act 22, and any applicable appeal should have been filed with the Cumberland County Court of Common Pleas; therefore, the OOR lacks jurisdiction to consider the appeal as to this matter and the appeal regarding Item 2 is dismissed.⁶ *See Monighan v. Pa. State Police*, OOR Dkt. 2021-1279, PA O.O.R.D. LEXIS 1287; *Maxwell v. Collier Township*, OOR Dkt. AP 2020-0878, 2020 PA O.O.R.D. LEXIS 1822.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part and dismissed for lack of jurisdiction in part**, and the Township is required to provide the responsive report, subject to the redactions identified 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 Cumberland 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.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁶ Act 22 of 2017 has very different appeal procedures from the RTKL, with strict time constraints. The OOR has created a summary of the requirements and procedures to appeal under Act 22, which can be found at: <https://www.openrecords.pa.gov/RTKL/PoliceRecordings.cfm>.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: October 13, 2021

/s/ Erika Similo

APPEALS OFFICER
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Sent to: Josh Monighan (via email only);
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