



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**BEVERLY SOLOSKI,  
Requester**

**v.**

**APOLLO BOROUGH,  
Respondent**

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**Docket No.: AP 2021-1680**

### **INTRODUCTION**

Beverly Soloski (“Requester”) submitted a request (“Request”) to Apollo Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking meeting minutes, invoices to an engineering contractor, and records involving a particular type of grass. The Borough partially granted the Request but stated that it had no records related to the grass, and 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 July 6, 2021, the Request was filed, seeking:

1. The monthly minutes reflecting the lease agreement & vote of Council members between Meyer’s Shreck RV & Apollo Borough.

2. The invoices received & paid amount to Olsen Craft Engineering for the work done by Rich Craft Engineer. The invoices from January 2020 through December 2020 and January 2021 through May 2021.

3. All records & emails regarding the “special grass” (including the correct name) that [Councilman] Tarle stated in the Valley News Dispatch on June 24, 2021. Records stating that the special grass “leached radiation out of the property”.

On August 9, 2021, following a thirty-day extension, 65 P.S. § 67.901, the Borough granted Items 1 and 2 of the Request, providing meeting minutes and invoices, but denied Item 3 because no responsive records exist.

On August 13, 2021, the Requester appealed to the OOR, arguing that minutes reflecting a lease agreement responsive to Item 1 had not been provided and that records responsive to Item 3 must exist because Councilman Tarle had stated that the Borough knew that such radiation-leeching grass had been employed.<sup>1</sup> 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 October 5, 2021, in response to an inquiry by the OOR, the Borough submitted the verification of Deanna Shupe, the Borough’s Secretary, who attests that she had conducted a search for responsive records and provided all of them, and that the Borough possesses no records related to radiation-leeching grasses.

## **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,

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<sup>1</sup> The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

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)). 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 Request seeks public meeting minutes approving a lease, as well as any records relating to “special grass” which leaches radiation from the ground. The Borough argues that it has provided all responsive records. In support of this argument, the Borough submitted the affidavit of Secretary Shupe, who attests that:

3. Upon receipt of the [R]equest, I conducted a thorough examination of the files and emails in the possession, custody and control of the Borough for records responsive to the [R]equest underlying this appeal, specifically I searched the email archives and other paper records in the possession of Apollo Borough that were responsive to the [R]equest.

4. In addition, I contacted Mr. Richard Craft regarding [R]equest [Item 2] above and Mr. Mark Tarle regarding [R]equest [Item 3] above.

5. After conducting a good faith search of my email files and paper records and consulting with Mr. Craft and Mr. Tarle, I have provided the records in possession of the Borough, Mr. Tarle and/or Mr. Craft that were responsive to the [R]equest. Specifically, I have provided the following records [to] the [Requester] that were responsive to the [R]equest:

a. A copy of the minutes of the May 27, 2021 Apollo Borough Council Meeting.

b. A copy of the invoices from Olsen Craft Engineering for the periods January, 2020 through December 2020 and January 2021 through May 2021.

6. After conducting a thorough examination of the paper files and emails in the possession of the Borough, and after consulting with Councilman Tarle, I have determined that there exist[] no records and/or emails regarding the topic of “special grass” [] that “leached radiation out of the property” as requested by the [R]equester.

7. I am not in possession of any other records that are responsive to the [R]equest.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of 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 Borough 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 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)).

On appeal, the Requester argues that records responsive to Item 3 must exist because Councilman Tarle, in an interview with the Valley News Dispatch on June 24, 2021, stated that such radiation-leeching grass had been planted to help neutralize radiation at the former nuclear fuel production facility. The Requester also notes that while meeting minutes were produced, they do not actually record the Borough Council’s agreement to a lease of that property, only the receipt of funds for a short-term rental and discussion of possible sale in the future.

While a member of the Borough Council may have made statements to the contrary, the Borough has provided evidence that it possesses no records responsive to Item 3 of the Request, and unsworn statements to the media cannot be used to rebut the Borough’s testimony. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (unsworn statements cannot be used to rebut evidence). Furthermore, while the Requester has submitted legal documents suggesting that the creation of the short-term lease should have been voted on by the full Borough Council, the OOR has no jurisdiction to determine that such a vote should have happened or that minutes of it should exist.<sup>2</sup> *Gorol v. Forest Hills Borough*, OOR Dkt. AP 2019-0329, 2019 PA O.O.R.D. LEXIS 427 (“While ... evidence may establish that a [record] should

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<sup>2</sup> Notably, the Borough has posted all of its meeting minutes this year at <https://apollopa.net/meeting-minutes>. A short review of those minutes shows no prior discussion of the short-term lease in 2021.

exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record] -- the OOR may only determine whether a responsive record does, in fact, exist.”) Because the Borough has submitted evidence that it conducted a search for responsive records and did not find any other records responsive to Item 1 or any records responsive to Item 3, the instant appeal must be denied. *Hodges*, 29 A.3d at 1192.

### **CONCLUSION**

For the foregoing reasons, the Requester’s 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 Armstrong 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

*/s/ Jordan C. Davis*

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Jordan C. Davis, Esq.  
Appeals Officer

Sent to: Beverly Soloski (via email);  
Scott Andreassi, Esq. (via email)

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