



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
STEVEN BURDA AND ALINA BURDA,	:
Requester	:
	:
v.	: Docket No.: AP 2021-2334
	:
MONTGOMERY COUNTY,	:
Respondent	:

INTRODUCTION

Steven Burda and Alina Burda (collectively “Requester”) submitted a request (“Request”) to Montgomery County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking budget information and records relating to County employees. The County denied the Request, asserting that the Requester owed outstanding fees, 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 County is not required to take any further action.

FACTUAL BACKGROUND

On October 26, 2021, the Request was filed, seeking:

- 1) ...[C]urrent RTK Officer’s name, work email, phone and fax numbers in the ... District Attorney’s Office....
- 2) ...ALL the current employees of [the] County..., with their name, title, work email, office phone and fax number, as well as for full year 2018 and 2019 and 2020 and 2021 ... salary and bonus. Also provide the budget for 2022 employees, by line item.

On November 3, 2021, the County denied the Request, asserting that the Requester owed outstanding fees for records provided in response to a prior RTKL request.

On November 3, 2021, the Requester appealed to the OOR, stating that Requester Alina Burda is Requester Steven Burda's wife and that she "do[es] not owe any fees." 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 November 3, 2021, the Requester made a submission, asking that the OOR change the caption to only list Requester Alina Burda's name as the Requester.¹ On November 16, 2021, after being afforded additional time to do so, the County submitted the affidavit, made subject to the penalty of perjury, of County Solicitor, Joshua Stein, Esq., in support of its denial.²

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

¹ As the Request lists both Steven Burda and Alina Burda, the OOR declines to change the caption.

² On November 16 and 18, 2021, the Requester objected to the OOR affording the County additional time to make a submission after the record closed; however, the County's submission was entered into the record. *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").

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, but the Requester asked for oral argument; however, the OOR declines to do so, as it has the necessary information and evidence before it to properly adjudicate the matter.

The County 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)).

The County argues that it is permitted to deny access to public records because the Requester has an outstanding fee balance for a prior RTKL request. The County asserts that, in accordance with a prior OOR Final Determination issued in the matter of AP 2017-2181, in which the OOR granted the Requester's appeal and ordered access to the requested records, it copied the records per the Requester's directive, and the Requester has not paid the outstanding duplication fees.

An agency may deny access to public records where a requester has an outstanding balance due from previous RTKL requests. *See* 65 P.S. § 67.901 (“[a]ll applicable fees shall be paid in order to receive access to the record requested”); *Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, 363 (Pa. Commw. Ct. 2012). On appeal, the agency must provide a sufficiently detailed affidavit explaining the alleged past-due balance, whether the requester was notified of the balance, the records that were prepared, the date on which they were prepared, and whether they were actually made available to the requester. *See Brown v. Pa. Dep’t of Corr.*, 178 A.3d 977 (Pa. Commw. Ct. 2017) (unpublished).

In this instance, Attorney Stein attests, in part, as follows:

5. On January 10, 2018, the [OOR] issued a Final Determination at [OOR Dkt.] AP 2017-2181 granting [the Requester's] RTKL appeal. In that case, Voters Services gathered the responsive records and prepared copies.³ On January 23, 2018, the County sent notice that the copies were ready as a cost of \$19.75. The County reached that amount based on 79 absentee ballots at \$0.25 per page. As of today's date, the County has not been paid for the outstanding balance.

Under the RTKL, a statement made under the penalty of perjury is 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).

³ In OOR Dkt. AP 2017-2181, the Request sought, among other things, “[c]opies of the received absentee ballots (records) from Lower Providence Township...for 2017 General Election.” The OOR concluded that the requested records were not exempt from disclosure, and the OOR ordered the County to provide access to them.

The Requester argues that only Requester Alina Burda filed the instant appeal and that she “do[es] not owe any fees.” However, it is undisputed that both Steven Burda’s and Alina Burda’s names are listed as the Requester on the Request. Moreover, Steven Burda’s email address was provided as the Requester’s email address on the Request. Because the prior requests for which fees were owed were submitted by Requester Steven Burda, the County is permitted to deny the Request based on an outstanding balance. *See Burda v. Montgomery Cnty.*, OOR Dkt. AP 2019-2029, 2019 PA O.O.R.D. LEXIS 1711; *Burda v. Montgomery Cnty.*, OOR Dkt. AP 2019-2629, 2020 PA O.O.R.D. LEXIS 1735; *but see Burda v. Montgomery Cnty.*, OOR Dkt. AP 2019-2603, 2020 PA O.O.R.D. LEXIS 1645 (concluding that the County could not deny access to public records for past-due duplication fees for a prior RTKL request submitted solely by Requester Steven Burda when the request at issue was submitted solely by Requester Alina Burda).

CONCLUSION

For the foregoing reasons, the 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 Montgomery 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.⁴ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 23, 2021

/s/ Magdalene C. Zeppos-Brown
MAGDALENE C. ZEPPOS-BROWN, ESQ.
DEPUTY CHIEF COUNSEL

⁴ *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Sent to: Steven Burda (via email only);
Alina Burda (via email only); and
Joshua Stein, Esq. (via email only)