



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:	
	:	
<b>LORRAINE HARMER,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No: AP 2022-1032</b>
	:	
<b>CHESTER COUNTY INTERMEDIATE</b>	:	
<b>UNIT 24,</b>	:	
<b>Respondent</b>	:	

### INTRODUCTION

Lorraine Harmer (“Requester”) submitted a request (“Request”) to Chester County Intermediate Unit 24 (“Unit”) pursuant to the Pennsylvania Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking an unredacted version of a specific email. The Unit denied the Request, arguing the record was related to the character or qualifications of an individual and contains internal predecisional deliberations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **dismissed as moot**, and the Unit is not required to take any further action.

### FACTUAL BACKGROUND

On March 3, 2022, the Request was filed, seeking the “[u]nredacted version of email sent from Sue Kerr to Maureen Linahan and Danielle Schoening on July 21, 2021 at 12:28 pm with the subject of, 'Lorraine Harmer- Employment Reference.'”

On March 10, 2022, the Unit invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On April 8, 2022, the Unit denied the Request, arguing that record was related to the character or qualifications of an individual, exempt under 65 P.S. § 67.708(b)(7), and contains internal predecisional deliberations, exempt under 65 P.S. § 67.708(b)(10)(i)(a).

On April 28, 2022, 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 Unit to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On May 10, 2022, the Unit submitted a position statement reiterating its grounds for denial. However, on May 16, 2022, the Unit notified the OOR via email correspondence that the requested record had been provided to the Requester on the previous Friday, May 13, 2022. On the same Monday, the Requester affirmed that the requested record had been provided and provided an electronic copy of said record to the OOR.

On May 16, 2022, and again on the following day, the Requester made it known that she sought a finding of bad faith on the Unit.

### **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 Unit 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. *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 appeal is moot because the requested record was provided to the Requester, thus satisfying the underlying RTKL request. As stated, the Unit communicated that the record was sent to the Requester, and the Requester affirmed this as well as provided said record to the OOR via email correspondence.

The Requester seeks a finding of bad faith against the Unit. While the OOR, in its discretion, may make findings of bad faith, those findings are reserved for egregious situations. Further, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith...”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$ 1,500 if an agency denied access to a public record in bad faith”). Under the RTKL, a finding of bad faith may be appropriate where an agency refuses to comply with its statutory duties under the RTKL. *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 243 A.3d 19, 28-29 (Pa. 2020); *California Univ. of Pa. v. Bradshaw*, No. 1491 C.D. 2018, 2021 Pa. Commw. Unpub. LEXIS (Oct. 13, 2021) (awarding attorney's fees, costs and statutory damages for bad faith when the University failed to contact third-party contractor in search for records prior to asserting that no responsive records exist and subsequently litigating the frivolous basis for denial); *Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Commw. Ct. 2017) (a finding of bad faith was warranted where the agency based a denial on the identity of the requester, refused to provide a legal rationale for denial and did not perform a good faith search).

The Requester sought a finding of bad faith due to the Unit’s denial of the record before it was granted, and the Requester argues that there was an unreasonable interpretation of the law in

the denial. The Unit provided the responsive record on appeal to the Requester. An agency generally has the discretion to release otherwise nonpublic records. *See* 65 P.S. § 67.506(c). That decision is solely within the discretion of the agency and is not subject to the OOR's legal review. Further, based on the record, the OOR cannot conclude that the Unit unreasonably withheld the record. For these reasons, the OOR declines to make a finding of bad faith.

### CONCLUSION

For the foregoing reasons, the appeal is **dismissed as moot**, and the Unit 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 Chester 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.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: MAY 27, 2022**

*/s/ Matthew Eisenberg*

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APPEALS OFFICER  
MATTHEW EISENBERG, ESQ.

Sent to: Lorraine Harmer (via email only);  
Janice Heagy (via email only);  
Justin Barbetta, Esq. (via email only)

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<sup>1</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).