



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
PETER HALL AND THE MORNING	:
CALL,	:
Requester	:
	: Docket No: AP 2022-1320
v.	:
	:
SOUTH WHITEHALL TOWNSHIP,	:
Respondent	:

On April 11, 2022, Peter Hall and The Morning Call (collectively, the “Requester”) submitted a request (“Request”) to South Whitehall Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other items, “[a] settlement and release ending litigation” in a specific federal court case. On May 18, 2022, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Township partially denied the Request, arguing that the Township does not possess a copy of the requested settlement agreement.

On June 2, 2022, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to

¹ The Township also partially denied the Request to the extent it sought “[i]nformation regarding discipline, demotion or discharge” contained in the personnel file of Officer Golden, which did not reflect the final action of the Township relating to demotion or discharge. Because the Requester does not reference or otherwise dispute the Township’s partial denial on his appeal form, any challenge of the same is waived.

supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal.² 65 P.S. § 67.1101(c).

On June 14, 2022, the Township submitted a position statement, reiterating that it does not possess a copy of the requested settlement agreement, as well as an attestation, made under the penalty of perjury, from Randy Cope, the Township's Interim Manager and Open Records Officer, who attests that a search was conducted and that no responsive records exist in the Township's possession, custody or control. Mr. Cope further attests that he contacted Marshall Dennehey, the law firm appointed by the Township's insurance carrier to defend the Township in the relevant litigation, which advised Mr. Cope that, by Order dated September 21, 2021, the Township was dismissed from the litigation. *Cope Attestation*, ¶¶3(a)(i-ii). Mr. Cope also affirms that the Township "is not and has not been involved in any settlement or release agreement due to the fact that it was dismissed with prejudice as a party to the litigation." *Cope Attestation*, ¶3(a)(iii). Thereafter, Mr. Cope attests, by Order dated October 6, 2021, the Court barred the remaining parties of the litigation, and their legal counsel, from disclosing the terms of the settlement; however, "[t]he [Township] has no knowledge of or access to any settlement or release between the remaining parties." *Cope Attestation*, ¶¶3(a)(iv-v).³

On appeal, the Requester, citing the Pennsylvania Supreme Court's decision in *Trib.-Rev. Pub. Co. v. Westmoreland Cnty. Hous. Auth.*, 833 A.2d 112 (Pa. 2003), contends that the Township has "a legal right to custody or control of" the settlement agreement and, as such, the Requester suggests the Township constructively possesses the settlement agreement and cannot "contract

² Although the Township noted, in its final response, that the records sought in the Request "may affect a legal or security interest of a third party ...[,] contain proprietary or trade secret information ... [,] or are held by a contractor of vendor[.]" see 65 P.S. § 67.1101(c)(1), no third parties contacted the OOR to participate in this appeal.

³ Under the RTKL, a statement made under the 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).

away the public’s right to access” to the agreement by means of a confidentiality clause. While we agree that the OOR has consistently held that confidentiality clauses contained in settlement agreements involving Commonwealth and local agencies are unenforceable, *see, e.g., Crossen v. Pine Grove Twp. and Roots Farm, Inc.*, OOR Dkt. AP 2020-1270, 2020 PA O.O.R.D. LEXIS 2614; *Zyla and The News-Item v. Coal Twp.*, OOR Dkt. AP 2020-0053, 2020 PA O.O.R.D. LEXIS 2021, the Township, in this case, has submitted evidence explaining that it was dismissed from the litigation prior to the settlement and, as a result, was not a participant in or party to the settlement. *Cf. Trib.-Rev. Pub. Co.*, 833 A.2d at 118-19 (concluding that the preparation of a writing, such as a settlement agreement, by an *attorney for an agency or by an attorney-in fact for the agency’s insurer* is within the possession, custody or control of the agency). Furthermore, there is no evidence in the record to suggest Marshall Dennehey, the law firm retained by the Township’s insurer to represent the Township, or any other attorney prepared the requested settlement agreement on behalf of the Township.⁴ In the absence of any evidence that the Township has acted in bad faith or that the requested records exist in the possession, custody or control of the Township, “the averments in [the attestation] 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)). Therefore, based on the evidence provided, the Township has met its burden of proof that it does not possess the records sought in the Request. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

⁴ To the extent the Requester implies the Township should possess a copy of the settlement agreement because Officer Golden was sued in both his personal and official capacity as a Township police officer, Mr. Cope attests that the Township discharged Officer Golden as of February 6, 2019, and the complaint initiating the federal lawsuit was filed on January 7, 2021. *Cope Attestation*, ¶3(a)(vii). Mr. Cope also explained that the only payments made by the Township were to Marshall Dennehey for legal fees incurred in the Township’s defense. *Cope Attestation*, ¶3(a)(vi)

For the foregoing reasons, the appeal is **denied**, and the Township 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 or petition for review to the Lehigh 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 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.⁵ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 5 July 2022

/s/ Joshua T. Young

JOSHUA T. YOUNG
DEPUTY CHIEF COUNSEL

Sent to: Paula Knudsen Burke, Esq. (via email only);
Jennifer Alderfer, Esq. (via email only);
Randy Cope, AORO (via email only)

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