



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**SEAN DONAHUE,
Complainant**

v.

**CITY OF HAZLETON,
Respondent**

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Docket No.: AP 2013-1284

INTRODUCTION

Sean Donahue (“Requester”) submitted a request (“Request”) to the City of Hazleton (“City”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), seeking records pertaining to himself. The City denied the Request, arguing that the Requester must use a form to submit requests for records. The Requester then appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **dismissed for lack of jurisdiction in part** and the City is required to take further action as directed.

FACTUAL BACKGROUND

On July 22, 2013, the Request was filed, seeking incident reports and “intelligence analysis” pertaining to the Requester. On that same day, the City responded, stating “[p]lease fill out one of the attached RTK request forms and return [it to the City].”

On July 23, 2013, the Requester appealed to the OOR, arguing that he is unable to use the forms the City provided to him. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal pursuant to 65 P.S. § 67.1101(c). On July 24, 2013, the City made a submission, explaining that the City “only ask[s] for these forms to be filled out to streamline the process and make it more efficient.”

On July 30, 2013, the City provided a position statement, which was verified by the affidavit of Lisa Shema, Open Records Officer for the City, arguing that the requested records are exempt from disclosure pursuant to Section 708(b)(16) (criminal investigative records) and Section 708(b)(17) (non-criminal investigative records) of the RTKL.¹ The City’s submission included an e-mail from the City’s Chief of Police, which states that “[t]he only way that the Hazleton Police Department would be in possession of [these records] would be through criminal and or non-criminal investigation[s]” and that “[t]his denial is not to be construed as an admission, confirmation, or denial that these [records] either do or do not exist.” On August 5, 2013, the City provided a copy of its policy governing Right-to-Know requests made to the City.

The Requester also made submissions on July 24, 2013; July 25, 2013; July 31, 2013; August 1, 2013; August 2, 2013; and August 5, 2013, respectively.

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

¹ The Requester filed another appeal, arguing that the City’s submission was a denial of the Request. This appeal was docketed at OOR Dkt. AP 2013-1343. In order to avoid confusion, that appeal was consolidated into the present docket number.

actions.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *appeal granted* 15 A.3d 427 (Pa. 2011).

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 or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The City 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 clearly 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The City violated Section 504 of the RTKL

The RTKL provides that a requester may submit a request in person, by mail, by e-mail, or by facsimile. 65 P.S. § 67.703. The RTKL does not require the use of any specific form, but an agency may promulgate regulations and policies to govern its administration of the RTKL. 65 P.S. § 67.504(a). However, any regulations or policies promulgated by the agency “shall be posted at each agency and, if the agency maintains an Internet website, on the agency’s Internet website.” 65 P.S. § 67.504(b)(4). The OOR has held that “[a]n agency that has a posted policy requiring use of a form may deny access to the requested records where the request fails to use the required form, provided the agency timely responds to the Request notifying the Requester of the policy.” *See Mezzacappa v. West Easton Borough*, OOR Dkt. AP 2012-1605, 2012 PA O.O.R.D. LEXIS 1284.

On appeal, the City has provided a copy of its policy governing Right-to-Know requests, which states that “[r]equests to view and receive copies of public records should be made on the standardized request form available from the ... Office of Open Records or available for the City’s Open-Records Officer during normal City office hours.” However, this policy is not posted on the City’s website, in violation of Section 504 of the RTKL. As a result, the City cannot cite this policy as a valid basis to deny or refuse to process the Request for failure to use a

form, as it was not properly posted leaving requesters without notice or knowledge of the existence of the policy.

2. The City did not meet the burden of proving that responsive records do not exist

In its response, the City never confirms or denies whether it possesses records responsive to the Request. Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidence of the nonexistence of records. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Here, the City, in an unsworn statement, states that the requested records may not exist. This unsworn statement is not competent evidence of the nonexistence of the requested records. *See Housing Authority of the City of Pittsburgh v. Van Osdol*, 40 A.3d. 209 (Pa. Commw. Ct. 2012); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. P1. June 28, 2011) (holding that unsworn and unverified statements cannot constitute competent evidence to sustain an agency's burden of proof). Therefore, the OOR finds that the City did not meet its burden of proving that any of the requested records do not exist. *See Hodges, supra*.

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records listed in the Request. Absent an agency’s provision of a sufficient evidentiary basis as to whether any responsive records exist, however, the OOR will order the disclosure of responsive public records. *See Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755.

3. The appeal is dismissed to the extent that it seeks criminal investigative records

The City cites the criminal investigative records exemption, 65 P.S. § 67.708(b)(16), to support its withholding of the requested records. Pursuant to 65 P.S. § 67.503(d)(2), only the

Luzerne County District Attorney's Office is authorized "determine if the record requested is a criminal investigative record" of a local agency within Luzerne County. Accordingly, the OOR lacks jurisdiction to assess the merits of this aspect of the appeal, and, to the extent that the City claims that the requested records are properly withheld records pursuant to the criminal investigative records exemption, the appeal is dismissed for lack of jurisdiction. This dismissal is without prejudice to the Requester's ability to file an appeal of with the Luzerne County District Attorney's Office within the timeframe provided for within 65 P.S. § 67.1101(a)(1).

4. The requested records are not protected by Section 708(b)(17) of the RTKL

Finally, the City argues that certain responsive records are exempt pursuant to Section 708(b)(17) of the RTKL, if they exist. Section 708(b)(17) exempts from disclosure records of an agency "relating to a noncriminal investigation," including "[c]omplaints submitted to an agency" and "[i]nvestigative materials, notes, correspondence and reports." 65 P.S. § 67.708(b)(17)(i)-(ii). In order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *See Department of Health v. OOR*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties." *Id.* at 814; *see also Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

The City's submission states that certain records, if they exist, are exempt pursuant to Section 708(b)(17). These conclusory statements are not sufficient evidence of the existence of an exemption under the RTKL. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records."). Based on the lack of sufficient evidence supporting

the City's claim, the OOR is constrained to hold that the City has not met its burden of proving that the records are exempt pursuant to Section 708(b)(17) of the RTKL.

The OOR recognizes that the Requester has been arrested and charged with threatening a public official, but is constrained to order release of information when the City fails to meet the burden imposed by the RTKL to demonstrate why the requested records are exempt from disclosure. *See* 65 P.S. 67.708(a)(1).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **dismissed for lack of jurisdiction in part** and the City is required to provide all responsive records, with the exception of all records subject to 65 P.S. § 67.708(b)(16), to the Requester within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Luzerne 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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 22, 2013



APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Sean Donahue (via e-mail only);
Lisa Shema (via e-mail only)