



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**JEFFREY KRUG,
Requester**

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:

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v.

Docket No.: AP 2018-1599

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**BLOOMSBURG UNIVERSITY OF
PENNSYLVANIA,
Respondent**

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INTRODUCTION

Jeffrey Krug (“Requester”) submitted a request (“Request”) to Bloomsburg University of Pennsylvania (“University”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking copies of certain RTKL requests submitted to the University. The University granted the Request and the Requester appealed to the Office of Open Records (“OOR”) challenging the sufficiency of the records provided. For the reasons set forth in this Final Determination, the appeal is **granted**, and the University is required to take further action as directed.

FACTUAL BACKGROUND

On July 24, 2018, the Request was filed, seeking “[c]opies of [R]ight-to-[K]now Requests submitted to [the] ... University from January 1, 2017 through June 30, 2018.” On August 30, 2018, after invoking a thirty day extension to respond to the Request, 65 P.S. § 67.902, the University granted the Request and provided the requested records.

On September 7, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester acknowledged that he received records responsive to the Request but explained that he could not determine whether he received all of the requested records.¹ The OOR invited both parties to supplement the record and directed the University to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 27, 2018,² the University submitted a position statement explaining that the University provided all records responsive to the Request. In support of its position, the University submitted the affidavit of Mary Vezendy, the University's Open Records Officer. On November 13, 2018, in response to an OOR request for clarification, the University submitted the supplemental attestation of Ms. Vezendy.

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 LLC 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,

¹ The Requester did not contest any redactions made to the records provided. The University explains that personal email addresses and phone numbers of private individuals were redacted as exempt personal identification information, 65 P.S. § 67.708(b). However, as the Requester does not contest these redactions in this appeal, the OOR will not address those redactions for the purpose of this final determination. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

² The Requester filed ten appeals challenging the University's responses to requests under the RTKL, including the instant appeal. On September 17, 2018, the University requested to extend the submission period for each of the appeals for thirty days under *Pa. State Sys. of Higher Educ. v. Ass'n of State Coll. & Univ. Faculties ("APSCUF")*, 142 A.3d 1023 (Pa. Commw. Ct. 2016), because of the voluminous number of responsive records that it was required to review to make submissions in these appeals. On September 20, 2018, the Requester argued that the University had already identified responsive records for many of the requests and, therefore, a further extension was not warranted. On September 25, 2018, the OOR requested that the University submit evidence demonstrating that the instant appeal met the requirements of *APSCUF* related to requests involving voluminous records: namely, (1) a valid estimate of the number of documents being requested; (2) the length of time the personnel charged with reviewing the request require to conduct the review; and, (3) any difficulties the University anticipates in fulfilling the Requester's requests in electronic format, to the extent he requested such. On September 27, 2018, the University submitted a position statement in this appeal arguing that it provided all records responsive to the Request. As a result, the University abandoned its request to extend the final determination deadline to conduct a search for responsive records, and the OOR will not address its request to extend the submission period in this appeal under *APSCUF*.

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 law also provides that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The University is a Commonwealth agency subject to the RTKL and is required to disclose public records. *See* 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order, or decree. 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. 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) provides: “(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 University argues that it provided all records responsive to the Request. In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. The RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL; however, the Commonwealth Court has held that “[a]s part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.” *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1172 (Pa. Commw. Ct. 2018) (citing *Breslin v. Dickinson Twp.*, 68 A.3d 49 (Pa. Commw. Ct. 2013)).

Here, Ms. Vezendy attests that “the University identified responsive records” and provided them to the Requester. In a supplemental affidavit, Ms. Vezendy explained that:

4. Upon receipt of the [R]equest ... I conducted a thorough examination of files in the possession, custody and control of the Agency for records responsive to the [R]equest....
5. After conducting a good faith search of the Agency’s files and inquiring with relevant Agency personnel, I identified all records that are responsive to the [R]equest and provided them to [the Requester] ... pursuant to a letter sent on August 30, 2018.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support under the RTKL. *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). However, under the RTKL, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)). Here, the University’s affidavit fails to provide sufficient factual basis for the OOR to conclude that it conducted a good faith search to identify all records responsive to the Request and provided those records to the Requester. Merely stating that all records provided to the Requester without providing non-conclusive explanations of the search conducted is insufficient to meet its burden of proof under the RTKL.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the University is required to conduct a good faith search for records and provide all responsive records within thirty days. 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 Commonwealth Court. 65 P.S. § 67.1301(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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 21, 2018

/s/Benjamin A. Lorah

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Jeffrey Krug (via email only);
Wesley M. Weymers, Esq. (via email only);
Mary Vezendy (via email only)

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