



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**EUGENE GOEBEL,
Requester**

v.

**CONCORD TOWNSHIP,
Respondent,**

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**: Docket No: AP 2019-2599
: (Consolidated)**

INTRODUCTION

Eugene Goebel (“Requester”) submitted various requests (collectively the “Requests”) to Concord Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to a specific address. The Township partially denied the Request, stating that records do not exist but making the Township’s file available for inspection. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the Township is not required to take any further action.

FACTUAL BACKGROUND

On November 11, 2019, the Requests were filed stating:

[1.] Provide the number of employees per each business & bldg. (through Local Service Tax).¹

¹ This Request contained two additional parts; however, on December 30, 2019, the Requester limited his appeal to only this item within the Request.

[2.] Please provide the rationale and authority to close the following 3 Code Violations from Concord Township to Premier Landscaping c/o Mr. David Thompson. Include details on if fines were paid and if so how much for each violation, was there a court case if so when and how resolved. If fines were not paid provide rationale.

July 15, 2019

July 18, 2019

July 26, 2019

[3.] Provide all Land Development applications for 711 Concord Road since 1981.

On December 11, 2019, after extending the response period for thirty days pursuant to 65 P.S. § 67.902, the Township responded by making its file for the address cited in the Requests available for inspection.

On December 18, 2019, the Requester appealed to the OOR, challenging the denials and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On December 23, 2019, the Township submitted a sworn affidavit in support from Amanda Serock, Open Records Officer for the Township, that no records exist responsive to the Requests. The Township also submitted a letter from Attorney Tyler Therriault stating that it is providing local services tax records regarding the two businesses located at the address. On December 23, 2019, the Requester submitted statements in response that the Township provided records even though it stated that it does not have records responsive to the Requests. On January 2, 2020, the Township supplemented the record with two additional sworn affidavits from Ms. Serock and Attorney Therriault.

² The OOR received three appeals docketed as OOR Dkt. AP 2019-2599, OOR Dkt. AP2019-2600 and OOR Dkt. AP 2019-2601 which are hereby consolidated into one appeal, docketed as OOR Dkt. AP 2019-2599.

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 law also states 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, requisite information and evidence before it to properly adjudicate the matter.

The Township 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). 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. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

Here, the Township submitted affidavits attesting that there are no records responsive to the Requests in its possession, custody or control. Ms. Serock attests that:

I confirmed with the entire ...Township staff and Township Professionals that no responsive documents existed. I conducted a good faith search for responsive documents ...and I have provided [the Requester] with the opportunity to review the entire township file for 711 Concord Road. No other files, documents, and/or records responsive to the request exist, and the law office of Donaghue & Labrum, LLP communicated that no responsive documents existed in the letter ...dated December 11, 2019. I hereby reaffirm that no responsive records exist within the care, custody or control of Concord Township for his original request.

With respect to the Request seeking the” number of employees per each business & bldg. (through Local Service Tax)”, Ms. Serock attests that she conducted a good faith search and “did not locate any responsive records. She further attests that “other than the local services tax records

provided by the law office of Donaghue & Labrum, LLP, via letter dated December 23, 2019, I hereby affirm that no additional responsive records exist within the care, custody and control of the Concord Township...”

Under the RTKL, an affidavit 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). In the absence of any evidence that the Township has acted in bad faith or that additional responsive records exist, “the averments in [the affidavit] 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)). Based on the evidence provided, the Township has met its burden of proving that, other than the local services tax record, it does not possess any other the records sought in the Requests. The Township has offered the Requester the opportunity to inspect the Township’s file for the property referenced in the Request.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **denied in part** and **dismissed as moot in part**, 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 to the Delaware 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.³ This Final Determination shall be placed on the OOR website at:
<http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 14, 2020

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent via email to: Eugene Goebel;
Hugh Donaghue, Esq.;
Tyler Therriault, Esq.;
Amanda Serock

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