



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**IVAN VOLKOV,
Requester**

v.

**MONTGOMERY COUNTY,
Respondent**

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Docket No: AP 2019-2542

INTRODUCTION

Ivan Volkov (“Requester”) submitted a request (“Request”) to Montgomery County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the 2019 County budget and the proposed or final 2020 County budget. The County denied the Request, arguing the Requester has an outstanding balance of fees owed from a prior RTKL request. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the County is directed to take further action.

FACTUAL BACKGROUND

On November 7, 2019, the Request was filed, stating:

My name is Ivan Volkov. I reside in Pennsylvania, Montgomery County.

Please provide me with the final 2019 budget for the County as well as draft or proposed or final 2020 budget, for the County.

On November 15, 2019, the County invoked a thirty-day extension to respond. 65 P.S. § 67.902(b). On December 16, 2019, the County denied the Request, arguing that the Requester has an outstanding balance from a previous RTKL request.

On December 16, 2019, the Requester appealed the Requests to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 17, 2019, the County submitted a position statement reiterating its grounds for denial. The County claims that the Requester is attempting to obtain records for an individual who has an outstanding balance with the County. In support of its position, the County submitted the affidavit of Joshua Stein, Esq., County Solicitor.

Over the course of the appeal, the Requester submitted a statement arguing that he is not a ‘straw person,’ and that he does not owe the County outstanding fees related to prior RTKL requests. Additionally, the Requester argues that the County is acting in bad faith in denying the Request.

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). 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, the County requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter. Accordingly, the request for a hearing is denied.

The County 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)(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)).

Attorney Stein further attests that:

In the past two months Mr. Burda, either as himself or posing as his wife, has filed more than ninety (90) appeals.

It is the County’s belief that the [R]equest at issue is an attempt by Steven Burda to circumvent the fees he owes to the County by impersonating his nephew.

The address provided by [the Requester] is even the same as that of Steven Burda.

In furtherance of this belief the County has appealed this matter to the Montgomery County Court of Common Pleas, docket number 2019-18886, to determine whether a requester may so easily circumvent settled law through the use of an obvious straw agent.

Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *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, the Requester refuted this argument with statements indicating he was not a straw person for Steven Burda. In addition, the Requester submitted a copy of a student identification badge, with the name of the Requester.

Although the RTKL must be construed without regard to the identity of the requester, *see Slaby v. Northumberland County*, OOR Dkt. AP 2011-0331, 2011 PA O.O.R.D. LEXIS 257, an agency may deny access to public records where a requester has an outstanding balance due from previous RTKL requests. *Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, 363 (Pa. Commw. Ct. 2012). Here, it is undisputed that prior requests were submitted by Steven Burda. Further, the

County has not presented any evidence, other than a belief, refuting that the Requester exists separate and apart from Mr. Burda. Additionally, the Request in this matter is signed by the Requester. Because the prior requests for which fees were owed were not submitted by the Requester, the County cannot deny the Requests based on an outstanding balance.¹

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County is required to provide the requested 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 Montgomery 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 14, 2020

/s/ Ryan W. Liggitt

RYAN W. LIGGITT, ESQ.
APPEALS OFFICER

Sent to: Ivan Volkov (via email only);
Joshua Stein, Esq., AORO (via email only)

¹ The Requester asks the OOR to make a finding that the County denied the Request in bad faith. See 65 P.S. §§ 67.1304-1305 (permitting a court to impose attorney fees or other sanctions). However, the County provided evidence that showed the reasons for their denial, such as previous requests being submitted by Steven Burda with the same mailing address as the Requester. Therefore, the County's actions have not risen to the level of bad faith in this instance.

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).