



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
TRICIA MEZZACAPPA,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2020-1482
	:	
WEST EASTON BOROUGH,	:	
Respondent	:	

On July 10, 2020, Tricia Mezzacappa (“Requester”) submitted a request (“Request”) to West Easton Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, in part, the “internet browsing history, all computers, July 1 through July 9.” After extending its time to respond by thirty days, the Borough did not timely respond, and the Request was deemed denied.¹ 65 P.S. § 67.902(b)(2).

On August 19, 2020, the Requester appealed to the Office of Open Records (“OOR”), challenging the partial denial and stating grounds for disclosure.² Specifically, the Requester

¹ The Borough responded to the Request on August 18, 2020, partially denying the Request and asserting that certain records do not exist. However, because the Borough’s response was not issued within the allotted thirty days, the Request was deemed denied on August 17, 2020. *See* 65 P.S. § 67.901.

² The Request consisted of forty items. On appeal, the Requester only challenges the sufficiency of the Borough’s response regarding Item 24. As a result, the Requester has waived any objections regarding the sufficiency of the Borough’s response regarding the remainder of the Request. *See Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011). Also, in the appeal, the Requester granted the OOR an additional thirty days to issue a final determination. *See* 65 P.S. § 67.1101(b)(1).

asserts that the Borough “has furnished these records before.” On August 31, 2020, the Borough submitted the attestation of Joan Heebner (“Ms. Heebner”), the Borough’s Open Records Officer, who attest, in part, as follows:

3. Upon receipt of the [R]equest, I conducted a thorough examination of files in the possession, custody and control of the [Borough] for records responsive to the [R]equest..., specifically I checked the browsing history on all 3 Borough computers, one of which is rarely used. There was no browsing history available in the requested date range.
4. Based on the advice of our previous IT consultant, EZ Micro, and confirmed verbally with our current IT consultant, Curtis Scott, ‘Due to the age of your computers, running CCleaner can improve performance as it finds out-dated or files not in use that can be deleted. If not cleaned, the pile up of these files can cause the computer to run slower.’ Mr. Scott has informed us that this is even more important than even before as since the pandemic there are more cases of ransomware, hijacking of computers, etc.
5. While EZ Micro/Mr. Scott provided/provide back up of our ‘work files’ on the computers, they did not/do not provide ‘internet’ records/items that were removed while running CCleaner which, according to an online statement ‘gets rid of temporary files that eat up disk space and invalid Windows registry keys’.
6. As mentioned in my reply to [the Requester], our computers were shipped in 2012 and 2014 making them rather old, thus the need to run CCleaner....
7. [The Requester] is correct in her statement that the Borough has furnished browsing history records to her before; obviously, we had them then but we did not have this record for this specific date span. I cannot provide records I do not have.
8. Based upon the above-described search of the [Borough’s] files and inquiries with relevant [Borough] personnel, I have made the determination that the records requested are not within the [Borough’s] possession, custody or control.

The Requester did not submit any evidence challenging Ms. Heebner’s attestation.

Under the RTKL, an attestation may serve as sufficient evidentiary support for the nonexistence of records. *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 competent evidence that the Borough acted in bad faith or that responsive records exist, “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)). Based on the evidence submitted, the Borough has met its burden of proving that no records exist in the Borough’s possession, custody or control that are responsive to the Request. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

For the foregoing reasons, the appeal is **denied**, and the Borough 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 Northampton 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. This Final Determination shall be placed on the OOR’s website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 16, 2020

/s/ Magdalene C. Zeppos
MAGDALENE C. ZEPPOS, ESQ.
APPEALS OFFICER

Sent to: Tricia Mezzacappa (via email only); and
Joan Heebner, AORO (via email only)