



## **AMENDED FINAL DETERMINATION**

**IN THE MATTER OF**

**MICHELLE GROVE,  
Requester**

**v.**

**GREGG TOWNSHIP,  
Respondent**

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**Docket No.: AP 2018-0883**

### **INTRODUCTION**

Michelle Grove (“Requester”) submitted a request (“Request”) to Gregg Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking meeting minutes. The Township allegedly did not respond to the Request, and 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 Township is required to take further action as directed.

### **FACTUAL BACKGROUND**

On April 30, 2018, the Request was filed, seeking “2018 Minutes for all meetings that were closed to the public” and “2018 Recordings of all meetings that were closed to the public.”

On May 16, 2018, the Requester filed an appeal with the OOR, claiming that the Township did not respond to the Request. *See* 65 P.S. § 67.901 (stating that a request is deemed denied if the agency fails to respond within five business days of receipt of the request). 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. 65 P.S. § 67.1101(c).

On May 29, 2018, the Township submitted an undated statement made under penalty of perjury by Jennifer Snyder, the Township's Open Records Officer, who attests that she did in fact respond to the Request on May 1, 2018. On June 7, 2018, the Requester submitted a statement made under penalty of perjury arguing that the Township did not respond to the Request. In response to a request by the OOR for clarification and additional evidence, on June 11, 2018, the Township submitted the response it sent to the Requester on May 1, 2018 but did not submit additional evidence.

### **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 local agencies. 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 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 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. 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) 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)). Likewise, “[t]he 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).

Ms. Snyder attests that the Township granted access to all responsive records but alternately claims that no records exist. Ms. Snyder also attests that she is “aware of no further documentation that is responsive to [the Request].” As a result, it appears that the Township argues that no records exist, other than records that were provided to the Requester. While an affidavit 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), a conclusory affidavit is not sufficient to sustain an agency’s burden of proof. *See Moore v. Dep’t of Corr.*, 177 A.3d 1073 (Pa. Commw. Ct. 2016) (requiring more details about a search for responsive records, “including, at a minimum, a description of the records ... reviewed.”). Here, Ms. Snyder provides no details about the search she performed, and therefore, has not demonstrated that she performed a good faith search for responsive records. Due to this lack of competent evidence, the Township has not met its burden of proving that no additional responsive records exist and must provide any additional records that may exist in its possession, custody or control.<sup>1</sup>

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. Absent an agency providing a sufficient evidentiary basis that additional responsive records do not exist, the OOR will order disclosure of responsive public records. *See Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

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<sup>1</sup> The Requester also asks the OOR to make a finding of bad faith. Section 1305(a) of the RTKL states that “[a] court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.” 65 P.S. § 67.1305(a); *Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017) (“An example of bad faith is a local agency’s failure to comply with the mandate of Section 901 of the RTKL, which requires that a local agency make a good faith search for information responsive to a request and determination of whether that information is public.”). However, the facts of this case do not support such a finding.

## CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township must provide any additional records that may exist to the Requester 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 or petition for review to the Centre 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. 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.<sup>2</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**AMENDED FINAL DETERMINATION ISSUED AND MAILED: June 22, 2018**

/s/ Blake Eilers  
Blake Eilers, Esq.  
Appeals Officer

Sent to: Michelle Grove (via email only);  
Jennifer Snyder (via email only);  
David Gaines, Esq. (via email only)

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