



### **FINAL DETERMINATION**

|                  |   |                          |
|------------------|---|--------------------------|
| IN THE MATTER OF | : |                          |
|                  | : |                          |
| MICHELLE GROVE,  | : |                          |
| Requester        | : |                          |
|                  | : |                          |
| v.               | : | Docket No.: AP 2018-1652 |
|                  | : |                          |
| GREGG TOWNSHIP,  | : |                          |
| Respondent       | : |                          |

### **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 emails. The Township granted the Request, and the Requester appealed to the Office of Open Records (“OOR”), challenging the search for responsive records. For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Township is required to take further action as directed.

### **FACTUAL BACKGROUND**

On August 21, 2018, the Request was filed, seeking:

\* August 3-21, 2018: All email correspondence regarding ignoring the Office of Open Records. Search all email addresses used by Jennifer Snyder, Keri Miller, Doug Bierly. SEARCH TERM: “exemption log” INCLUDE ALL REPLIES

On August 23, 2018, the Township granted the request, providing responsive records.

On September 13, 2018, the Requester filed an appeal with the OOR, arguing that the Township did not conduct a good faith search. 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 September 25, 2018, the Township submitted a position statement, which was accompanied by affidavits executed by Jennifer Snyder, the Township's Open Records Officer, Keri Miller, the Chair of the Township's Board of Supervisors, and Douglas Bierly, a member of the Board. On September 25, 2018, the Requester submitted a position statement attesting that the identified employees use multiple email accounts to conduct Township business and arguing that the Township presented no evidence indicating that it had checked the host server. On October 3, 2018, the OOR requested additional evidence addressing the Requester's allegations, and on October 11, 2018, Ms. Snyder explained that, while she does not know how to search the Township's server, she had requested that Mr. Bierly and Ms. Miller search all email accounts they use to conduct Township business.

### **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).

Here, the Requester argues that the Township did not conduct a good faith search. Section 901 of the RTKL requires that an agency “make a good faith effort” to determine “whether the agency has possession, custody or control of the identified record.” 65 P.S. § 67.901. The RTKL does not define the term “good faith effort” as used in Section 901. However, the Commonwealth Court has explained 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, 1171-72 (Pa. Commw. Ct. 2018) (citing *Breslin v. Dickinson Twp.*, 68 A.3d 49, 54 (Pa. Commw. Ct. 2013)).

The Township argues that it has provided all responsive records. Specifically, Ms. Snyder attests that she:

4. ... [C]onducted a thorough examination of files in the possession, custody, and control of the Township for records responsive to the [R]equest underlying this appeal, including a keyword search of the requested emails for the keyword “exemption log.”

5. Additionally, I have inquired with relevant Township personnel, namely Keri Miller and Doug Bierly, as to whether the requested records exist in their possession and in particular, I asked Ms. Miller and Mr. Bierly to perform a search of their email accounts for any responsive records.

6. Ms. Miller and Mr. Bierly have provided the records that I requested from them.

7. After conducting a good-faith search of the Township’s files and inquiring with relevant Township personnel, I identified all records within the Township’s

possession, custody, or control that are responsive to this [R]equest and provided them to [the Requester].

Both Ms. Miller and Mr. Bierly attest that they provided all responsive records to Ms. Snyder. While the Requester argues that the Township uses other email addresses to conduct Township business, there is no evidence establishing that the Township did not check these addresses or the server. *See Dep't of Labor & Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015) (holding that affidavits by individuals identified in the request attesting that they were not in possession of the requested records was sufficient to meet the agency's burden of proof); *see also Chirico v. Cheltenham Twp. Sch. Dist.*, OOR Dkt. AP 2018-0484, 2018 PA O.O.R.D. LEXIS 697 (concluding that an agency's search for emails was made in good faith where it conducted an email archive search and inquired of its Board members, who provided affidavits attesting that they searched their email accounts).

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 Township acted in bad faith, "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)). Accordingly, the Township has proven that it conducted a good faith search in response to the Request.

However, the Township has not met its burden of proving that it provided all responsive records identified in its searches to the Requester. In its unsworn position statement, the Township explains that "all responsive *non-privileged* emails" (emphasis added) have been provided to the Requester, implying that emails that the Township deems privileged were withheld. The Township

has not explained what records were withheld, nor has it elaborated on the basis for invoking a privilege.<sup>1</sup> Accordingly, because the Township has not met its burden of proving that records may be withheld, these records must be provided to the Requester.

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.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, 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>.

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<sup>1</sup> Section 903 of the RTKL requires that an agency’s denial of a request “shall include,” among other things, “[a] description of the record requested” and “[t]he specific reasons for the denial, including a citation of supporting legal authority.” In the case of any potentially privileged emails, the Township provided neither.

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

**FINAL DETERMINATION ISSUED AND MAILED: October 12, 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)