



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**MICHELLE GROVE,  
Requester**

**v.**

**GREGG TOWNSHIP,  
Respondent**

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**Docket No: AP 2018-2157**

### **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 and attachments related to the Old Gregg School Advisory Board (“Board”). The Township granted 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 **denied in part** and **dismissed as moot in part**, and the Township is not required to take additional action.

### **FACTUAL BACKGROUND**

On October 24, 2018, the Request was filed, seeking:

1. 2017 All emails to/from [ogsrobin@gmail.com](mailto:ogsrobin@gmail.com), sent or received by the [T]ownship. Search all email addresses used by the secretary and 2017 supervisors. Include all attachments.
2. All emails to/from OGS Advisory Board members with the keyword “minutes” including all attachments. Search all email addresses used by advisory board members from 2007-2017.

On November 30, 2018, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Township granted the Request and provided responsive records.

On December 13, 2018, the Requester appealed to the OOR, challenging the sufficiency of the provided records and stating grounds for disclosure. Specifically, she argued that all requested records have not been provided as there is evidence that emails were purposefully deleted. The Requester contends that deleting emails is done to conceal the contents from taxpayers and equates this to a bad faith denial. 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 27, 2018, the Township submitted the affidavit of Keri Miller, the Alternate Open Records Officer, who attests to the search performed by the Open Records Officer at the time of the Request and provided meeting minutes that were not provided with the original response. Ms. Miller also provided email correspondence between the Township's prior Open Records Officer and Board members, as well as documents provided to the Requester. Ms. Miller further attests that no other responsive records exist in the possession, custody or control of the Township. The Requester submitted arguments that the Township acted in bad faith; however, she did not specifically seek a finding of bad faith from the OOR. *See* 65 P.S. § 67.1305(a).

Upon the OOR's request for clarification, on January 14, 2019, Ms. Miller provided a supplemental affidavit concerning the search and her time on the Board.

### **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, the parties did not request a hearing; however, the OOR has the 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 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)). 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).

**1. The Township has provided a responsive record on appeal**

During the course of the appeal, the Township provided the Requester with an additional set of meeting minutes. As such, the appeal as to these meeting minutes is dismissed as moot.

**2. The Township has demonstrated that all responsive records in its possession, custody or control have been provided to the Requester**

The Township states that it provided the Requester with all responsive records in the Township’s possession, custody or control. On appeal, the Requester claims that not all responsive records were provided and that the Township did not perform a good faith search for records. In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As 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... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining

potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted).

Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody, or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by Requestor.

*Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is "the open-records officer's duty and responsibility" to both send an inquiry of agency personnel concerning a request and to determine whether to deny access).

Ms. Miller, the Alternate Open Records Officer, attests that she worked with Ms. Snyder, the Open Records Officer at the time of the Request. She explains that on October 25, 2018, Ms. Snyder emailed the current Board members who were also Board members for the years requested telling them to search their email accounts for any Board related email or attachment with the keyword "minutes." She also emailed the two current Board of Supervisors members who were also supervisors in 2017 telling them to search their emails from all emails to/from ogsrobin@gmail.com.<sup>1</sup> No prior Board member who is not currently a Board member was asked to search their emails because "previous board members who are no longer serving the agency are

---

<sup>1</sup> Based upon the documents provided, this email account belongs to Robin Bastress, a former Board member who kept the Board minutes.

not members of the agency.”<sup>2</sup> Ms. Miller attests that Ms. Snyder had multiple conversations with the current Board members, instructed them on how to search their email accounts, how to save emails, and reminded Board members to submit their responsive records. Ms. Miller attests that Ms. Snyder compiled all the responsive records, including what she thought was all the attachments and sent the response on November 30, 2018.

Ms. Miller provided a supplemental affidavit clarifying that she volunteered on the Board until 2017 when she was elected a Supervisor of Gregg Township and removed from the Board. Upon receipt of the request, she did search her email addresses and found no responsive records, further, her Board email address was removed upon completion of her time with the Board. She again attested that no other responsive records exist.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury 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). Here, Ms. Miller attested to the efforts undertaken by Ms. Snyder. She also provided the email Ms. Snyder sent to supervisors seeking emails to/from the ogsrobin@gmail.com account with attachments and the email Ms. Snyder sent to Board members seeking emails with the keyword “minutes.” Ms. Miller’s attestation indicates that Charles Stover, Douglas Bierly, Jim Smith, Don Grenoble, Colleen Begley, Carol Gingrich, Carol Myers and Andrew Miller were all contacted to search their emails. The Township has provided adequate evidence to demonstrate that it conducted a good faith search. *See Pa. Dep’t of Labor and Indust. v. Earley*, 126 A.3d 355,

---

<sup>2</sup> The Commonwealth Court has determined that the RTKL does not require an agency to ask for or obtain records of former officials or employees of the agency. *Breslin v. Dickinson Twp.*, 68 A.3d 49, 55 (Pa. Commw. Ct. 2013) (holding that the former employee’s records were not subject to the RTKL because they were not in the agency’s possession or in the possession of a third party with whom the agency had contracted to perform a government function).

358 (Pa. Commw. Ct. 2015); *St. Hilaire v. Camp Hill Borough*, OOR Dkt. AP 2017-0416, 2017 PA O.O.R.D. LEXIS 465 (requiring an affiant to explain the search conducted). Ms. Miller also provided a link to the records provided to the Requester.

Ms. Miller also attests that no other responsive records exist in the Township's possession. Under the RTKL, a sworn affidavit or statement made under the penalty of perjury 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 the records exist, "the averments in [the statement] 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 proof that it does not possess the records sought in the Request. *See Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied in part** and **dismissed as moot in part**, and the Township is not required to take any additional 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 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 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>3</sup> This Final Determination shall be placed on the OOR website at:  
<https://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: January 16, 2019**

/s/ Erin Burlew

---

Erin Burlew, Esq.  
APPEALS OFFICER

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

---

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