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On February 12, 2024, the Requester and Borough exchanged correspondence because the Requester asserted that she was given a draft copy of the responsive budget records when she came to the Borough's office, and the Borough explained that the responsive records were mismarked as a "draft," but were indeed the final budget documents approved on December 30, 2023.

The Borough did not issue a formal response within five business days of the Request, and on February 12, 2024, the Request was deemed denied. *See* 65 P.S. § 67.901. That same day, the Requester appealed¹ to the Office of Open Records ("OOR"), providing reasons for disclosure, specifically arguing that she did not receive the proper copy of 2024 budget records.² The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

Between February 13, 2024, and February 23, 2024, the parties submitted correspondence reiterating their respective positions.³

On March 6, 2024, the Borough submitted an unsworn position statement from its solicitor, stating that the "draft" budget record is indeed the adopted 2024 budget provided to the Requester without amendment or correction, and naming the document a "draft" was a clerical error.

On March 10, 2024, the Requester provided what appeared to be an untimely final response from the Borough dated March 6, 2024.

¹ On appeal, the Requester does not challenge the Borough's response to Item 1 of the Request. Accordingly, the OOR need not address Item 1 of the Request on appeal. *See Dep't of Corrections v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011) (issues not raised on appeal are waived).

² The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).").

³ Additionally, on February 23, 2024, and March 6, 2024, the OOR notified the parties that no substantive submissions had been received and extended the filing deadline.

LEGAL ANALYSIS

The Borough is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Borough is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). The preponderance of the evidence standard 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).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt from disclosure. 65 P.S. § 67.708(a)(1). Here, the Borough only submitted unsworn statements from Borough personnel and its solicitor and did not submit any evidence in the form of an affidavit or attestation statement in support of the argument that the mismarking of the budget records was a clerical oversight, nor did the Borough submit any evidence that additional responsive records do not exist or are exempt from disclosure. An “unsworn position statement does not constitute evidence. Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the *evidentiary* record.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1193-94 (Pa. Commw. Ct. 2015) (*en banc*) (emphasis in original). *See, e.g., Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence).

Accordingly, the OOR is constrained to find that the Borough has not demonstrated that additional budget records do not exist in its possession, custody or control. *See Hodges*, 29 A.3d at 1192. 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 new records. *See* 65 P.S. § 67.705. In the event that no additional 2024 budget records exist, the Borough is required to provide the Requester with a detailed affidavit or attestation made under the penalty of perjury describing the search for these responsive records and affirming their non-existence.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Borough is required to provide all additional responsive 2024 budget records in the manner in which they exist within thirty days. If additional responsive 2024 budget records do not exist, the Borough is required to provide the Requester with a detailed affidavit or attestation made under the penalty of perjury describing the search for responsive records and affirming their non-existence. 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 Washington 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.⁴ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: April 26, 2024

/s/ Tope L. Quadri

TOPE L. QUADRI
APPEALS OFFICER

Sent via portal to: Lisa Scherer
Nicole Boyer, AORO