



pennsylvania
OFFICE OF OPEN RECORDS

December 10, 2013

Ted Tomlinson
Open Records Officer
LeRoy Township
7854 Southside Rd
Canton, PA 17724

RE: Jelsma v. Leroy Township, OOR Dkt. AP 2013-1520

Dear Mr. Tomlinson,

The Office of Open Records received the attached letter from Requester Wiebe Jelsma on December 6, 2013 stating that the Township has not complied with the Final Determination issued on September 23, 2013 granting Mr. Jelsma access to records of Leroy Township. For your convenience, we enclosed a copy of the Final Determination.

Please inform me within two weeks of this letter as to whether or not the Township has provided the information ordered to be released and copy Mr. Jelsma on your response.

If you have any questions, please contact me.

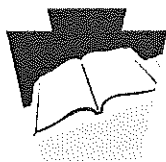
Sincerely,

A handwritten signature in black ink, appearing to read 'Dena Lefkowitz', with a stylized flourish at the end.

Dena Lefkowitz
Chief Counsel

Cc: Wiebe Jelsma
Terry Mutchler, Executive Director

Enclosure



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

WIEBE JELSMA,
Complainant

v.

LEROY TOWNSHIP,
Respondent

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Docket No. AP 2013-1520

INTRODUCTION

Wiebe Jelsma (“Requester”) submitted a request (“Request”) to LeRoy Township (“Township”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), seeking copies of various records including Township meeting minutes, and expenses concerning the Innes Hose Fire Company (“Fire Company”), an entity with which the Township contracted for fire protection and rescue services. The Township partially granted the Request, and the Requester subsequently appealed to the Office of Open Records (“OOR”). 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 8, 2013, the Requester filed the Request¹ seeking:

¹ In his appeal, the Requester discusses other RTKL requests, including those dated June 28, 2013 and July 11, 2013. However, because the appeal period for these other requests has expired, any arguments raised by the Requester concerning those requests will not be addressed. This Determination focuses specifically on the Request of August 8, 2013.

- [1.] documentation of allowable gaps in the pages of the minutes of the Supervisors of [Township].
- [2.] copy of page 235 of minute book of the Supervisors of [the Township].
- [3.] copy of the minutes of the meeting of the Supervisors of [Township] of [November 5, 2008].
- [4.] copy of the list of expenses by the [Fire Company] for the years 2008 and 2009.
- [5.] copy of the ordinance of the [Fire Company] that enables the [Fire Company] to tax the supervisors in the total assessment of the Township and why it has to be done by contract.

On August 9, 2013, the Township's Open Records Officer ("ORO") responded to the Request, stating:

- [1.] As far as the missing pages, I'm sure you are correct that this is a violation of the [T]ownship [C]ode. I have no further information other than what I offered in the previous letter. Sorry.
- [2.] Copy of page 235 is included in this mailing. (\$0.25)
- [3.] Copy of the 11/5/2008 minutes is included. (\$0.25)
- [4.] I didn't find anything related to the expenses of the fire company for 2008 [and] 2009.
- [5.] I'm not aware of any ordinance by the fire company whereby they establish the rates they charge the covered municipalities. Note – LeRoy [T]ownship does not charge a special fire coverage tax.

On August 23, 2013, the Requester filed an appeal with the OOR, challenging the response of the Township and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On August 26, 2013, the Township submitted an attestation of nonexistence of records from its ORO in support of its position. In his attestation, the ORO identified the records requested as "copies of minutes (that do not exist), copies of fire contracts (could not find) and

² The Requester, as part of his appeal and supplemental submission, appears to seek records that were not part of the Request, e.g. a "ledger of revenue." However, a requester may not modify, explain or expand a request on appeal. *See Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010). To the extent that the Requester seeks different records beyond those enumerated in his underlying Request, the new requests will not be addressed by this Determination. Instead, the Requester may, if he chooses, file a new RTKL request with the Township.

copies of missing blank pages from LeRoy [Township] minute books.” No verification was submitted by the Township to confirm whether or not it notified the Innes Hose Fire Company of the Request or the appeal. On September 3, 2013, the Requester submitted argument and copies of documentation received previously from the Township.

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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* No. 20 MAP 2011, 2013 Pa. LEXIS 1800 (Pa. Aug. 20, 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 decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, 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 clearly 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). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The appeal as to Item 1 is granted

Item 1 of the Request seeks “documentation of allowable gaps in the pages of the [Township’s] minutes.” Under the RTKL, an attestation presented 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. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Here, the attestation provided by the Township during the course of the appeal does not address whether the requested documentation exists. As such, the appeal concerning this Item of the Request is granted.³

³ An agency is not required to create a record that does not exist, or maintain a record it does not currently maintain. 65 P.S. § 67.705.

2. The appeal as to Items 2 and 3 of Request is denied

To the extent that the Requester contests the Township's responses to Items 2 and 3 of the Request, the appeal is denied. Although the Requester appears to take issue with the content of the November 5, 2008 minutes and the gap in the Township's minute books, he does not articulate any error by the Township in granting access to the records provided.

3. The appeal as to Item 4 of the Request is granted

In Item 4 of the Request, the Requester seeks "a list of expenses" by the Fire Company for 2008 and 2009. The attestation submitted by the Township, however, does not sufficiently address whether the Township possesses such records. The attestation merely states that copies of fire contracts could not be found. Moreover, the Requester's appeal submission includes a copy of a contract between the Township and the Fire Company that substantiates that the Township engaged the Fire Company for fire protection services during the 2008-2009 time period.

Section 506(d)(1) of the RTKL provides that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency[.]

65 P.S. § 67.506(d)(1). In *Allegheny County Dep't. of Admin. Servs. v. A Second Chance, Inc.*, the Commonwealth Court explained that records "in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency" are presumptively public records subject to public access, "so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL." 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011); *see also* 65 P.S. § 67.305(a). Section 506(d), however, does not reach all

records in possession of a private contractor that relate to the governmental function; rather, the records reached are only those that relate to performance of that function. *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. Ct. 2011). In *Wintermantel*, the Pennsylvania Supreme Court specifically addressed the term governmental function and adopted the “non-ancillary test” to determine whether a third party contractor was performing a governmental function, explaining that a governmental function under the RTKL “connote[s] an act of delegation of some substantial facet of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors.” 45 A.3d at 1043. The OOR finds that the Township’s contract for “fire protection and rescue service[s] to its residents” is a governmental function within the meaning of Section 506(d) of the RTKL. Further, the OOR holds that a record of expenditures necessary for the performance of this contract clearly is directly related to this governmental function.

The Township fails to provide any evidence to substantiate whether it has actual possession of the records sought, or whether the Fire Company possesses records responsive to the Request. Accordingly, the Township failed to meet its burden of proof that records responsive to Item 4 of the Request do not exist.

4. The appeal as to Item 5 is denied


The Requester seeks a copy of an ordinance “that enables the [F]ire [C]ompany to tax the supervisors in the total assessment of the Township.” The OOR has repeatedly held that an agency cannot be required to perform legal research for a requester. *See Poindexter v. Pennsylvania Board of Probation and Parole*, OOR Dkt. AP 2011-0672, 2011 PA O.O.R.D. LEXIS 461; *Reaves v. Pennsylvania Board of Probation and Parole*, OOR Dkt. AP 2010-1224, 2011 PA O.O.R.D. LEXIS 60; *Leiberton v. Allegheny Valley School District*, OOR Dkt. AP

2009-357, 2009 PA O.O.R.D. LEXIS 647, *rev'd on other grounds SA-09-760* (Allegheny Com. Pl. May 5, 2010) (“[A]n agency has no obligation to compile laws and regulations on a stated topic merely because it may have applied such laws as part of its agency transactions or activities”). Accordingly, the Township in the instant matter had no obligation under the RTKL to copy and compile the legal authority sought by the Requester.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Township is required to provide records responsive to Items 1 and 4 of the Request to the Requester within thirty (30) days. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal or petition for review to the Bradford 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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: September 23, 2013



**ANGELA EVELER, ESQ.
APPEALS OFFICER**

Sent to: Wiebe Jelsma;
Ted Tomlinson (via e-mail only)