



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**RICHARD STEWART,
Requester**

v.

**MUNICIPALITY OF KINGSTON,
Respondent**

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

Docket No. AP 2016-1632

INTRODUCTION

Richard Stewart (“Requester”) submitted a request (“Request”) to the Municipality of Kingston (“Municipality”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking applications and building permits for a specific location. The Municipality denied the Request as a repeated request and further asserted that disclosure of the requested records would threaten the physical security of a building. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **dismissed as moot in part**, and the Municipality is required to take further action as directed

FACTUAL BACKGROUND

On September 1, 2016, the Request was filed, seeking: “all building permits issued to 239 Schuyler Avenue [and] all applications for any permits/license [for] 239 Schuyler Avenue.” On September 2, 2016, the Municipality denied the Request as a disruptive, repeated request.

See 65 P.S. § 67.506(a)(1). The Municipality also denied the Request under the building and infrastructure security exemption. *See* 65 P.S. § 67.708(b)(3)(iii).¹

On September 26, 2016, the Requester filed an appeal with the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Municipality to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On October 6, 2016, the Municipality submitted a position statement verified under the penalty of perjury by Julie Norton, Open Records Officer for the Municipality, reiterating its reasons for denial. Additionally, with its position statement, the Municipality provided the Requester with a record of a maintenance violation for 239 Schuyler Avenue.

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

¹ The Municipality references Section 708(b)(iii) in its final response and position statement rather than Section 708(b)(3)(iii) of the RTKL; however, because the Municipality argues that “critical systems” are involved, the OOR interprets the Municipality’s argument to have been made under Section 708(b)(3)(iii) of the RTKL.

hearing to resolve an appeal. 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 requisite information and evidence before it to properly adjudicate the matter.

The Municipality 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 *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Municipality provided the Requester with records on appeal

On appeal, the Municipality provided a record of a maintenance violation. As a result, the appeal is dismissed as moot for this record.

2. The Municipality has not demonstrated that the Request is duplicative and burdensome

The Municipality denied the Request as a repeated request for the same records. Section 506(a) of the RTKL provides that “[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.” 65 P.S. § 67.506(a). “Under this section ... an agency must demonstrate that (1) ‘the requester has made repeated requests for th[e] same record[(s)]’ and (2) ‘the repeated requests have placed an unreasonable burden on the agency.’” *Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011); *see also Slate v. Pa. Dep’t of Env’tl. Prot.*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 (“A repeated request alone is not enough to satisfy § 506(a)(1)”). Repeated requests for the same records, although phrased differently, may be denied as disruptive. *See Cohen v. Pa. Dep’t of Labor & Indus.*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton Sch. Dist.*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 (“Slight differences in phraseology do not preclude application of [Section 506(a)]”).

Here, Ms. Norton attests that the instant Request is the third request for records concerning 239 Schuyler Avenue filed by the Requester. Ms. Norton cites to two appeals previously filed with the OOR (*Stewart v. Municipality of Kingston*, OOR Dkt. AP 2016-0962, 2016 PA O.O.R.D. LEXIS 917; *Stewart v. Municipality of Kingston*, OOR Dkt. AP 2016-0974, 2016 PA O.O.R.D. LEXIS 922). While the two previous requests referenced by Ms. Norton pertain to 239 Schuyler Avenue, one request sought a zoning file and the other request sought

residential rental licenses. The Request that is the subject of the instant appeal seeks building permits and applications for permits. Additionally, on appeal the Municipality provided a responsive record that has not previously been provided to the Requester, indicating that this Request is different from prior requests. Furthermore, the Municipality has not provided evidence demonstrating that the Request has placed an unreasonable burden on the Municipality. Therefore, the Request in this matter is not duplicative.

3. The Municipality has not demonstrated that disclosure of the requested records would be reasonably likely to threaten the physical security of a building

The Municipality states that one responsive record relating to a building permit exists and is exempt from access under Section 708(b)(3)(iii) of the RTKL, which exempts from disclosure, a record that:

the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include ... building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

65 P.S. § 67.708(b)(3)(iii); *see Crockett v. SEPTA*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under this exemption); *but see Moss v. Londonderry Twp.*, OOR Dkt. AP 2009-0995, 2009 PA O.O.R.D. LEXIS 724 (holding that records related to the Three Mile Island nuclear power plant were not subject to public access). In order for this exemption to apply, “the disclosure of” the records — rather than the records themselves — must create a reasonable likelihood of endangerment to the

safety or physical security of certain structures or other entities, including buildings and infrastructure. *See* 65 P.S. § 67.708(b)(3).

In support of its argument, the Municipality submitted a position statement, verified by Ms. Norton, attesting that a “record in the file relates to a building permit taken out for electrical. This would appear to involve critical systems of the building and should not be provided.” While a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof 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), conclusory statements are not sufficient to meet an agency’s burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Here, Ms. Norton generally concludes that the withheld record “would appear to involve critical systems of the building[,]” but the Municipality has not demonstrated how disclosure of the record would create “a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system.” 65 P.S. § 67.708(b)(3)(iii). Therefore, the Municipality has not proven that disclosure of the record would threaten the security of a building. *See* 65 P.S. § 67.708(a)(1). As the Municipality has not raised any other grounds for denial, the withheld record is subject to public access.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **dismissed as moot in part**, and the Municipality is required to provide the withheld responsive record 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 Luzerne 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.² This Final Determination shall be placed on the website at: <http://www.openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 26, 2016

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Richard Stewart (via e-mail only);
Julie Norton (via e-mail only)

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