



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**TERRY SMITH,
Requester**

v.

**GREATER JOHNSTOWN SCHOOL
DISTRICT,
Respondent**

:
:
:
:
:
:
:
:
:
:
:

Docket No. AP 2016-1549

INTRODUCTION

Terry Smith (“Requester”) submitted two requests (“Requests”) to the Greater Johnstown School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking to inspect legal fees for civil actions in Cambria County and for appeals before the OOR. The District partially denied the Requests, arguing, among other things, that information protected by the attorney-client privilege and attorney-work product doctrine must be redacted from the requested records. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On July 21, 2016, the first Request was filed, seeking to inspect:

[1]. Access to [District] records as to the costs incurred, invoices received, amounts paid and any all amounts encumbered for payment of legal representation, administrative costs incurred in the filing of Appeal Responses to the [OOR], and the handling of all lawsuits from 2009-present, including the lawsuits filed by John DeBartola and Joseph Taranto decided in March of 2016 and John DeBartola and Dan Stonerook that is ongoing, and the followed

prosecution of Johanna Boratko in district court and her appeal to the Cambria County Court of Common Pleas, for the beginning on January 1, 2009 thru present;

[2]. [A]ccess to the total amounts billed by Jared Handelman, School Attorney and/or the law firm of Elliot Greenleaf for representation of the [District], including the Respondents in and before Cambria County Court of Common Pleas, District Magistrates and the [OOR] and including billable hours, court filing fees, and any other related administrative fees incurred by the law firms of Elliot Greenleaf or their attorney Jared Handelman or the attorney John Kuzmiak;

[3.] [T]otal amounts debited to any and all [District] adopted budgetary expenditure appropriation line items and/or encumbered for the period beginning on/or about January 1, 2009 thru present including dates paid or encumbrances recorded as debits to applicable line items accounts;

[4]. [T]otal amounts submitted to the [District] Third Party Insurance carrier(s) as a claim for the aforementioned legal representation, administrative cost incurred in the civil actions filed in Cambria County Court of Common Pleas, District Magistrates Court and [OOR] appeals.

Also, on July 21, 2016, a second Request was filed, seeking to inspect:

[5.] [C]osts incurred, invoices received, amounts paid and any all amounts encumbered for payment of legal representation, administrative cost incurred in the civil actions filed in and before the Cambria County Court of Common Pleas for the period beginning January 1, 2006 thru present.

On July 28, 2016, the District invoked a thirty-day extension of time to respond to the Requests. *See* 65 P.S. § 67.902. On August 29, 2016, the District partially denied the Requests, indicating that the records would be available for inspection, subject to redaction of information protected by the attorney-client privilege and attorney-work product doctrine. The District also stated that certain records do not exist.

On September 14, 2016, the Requester filed two appeals with the OOR, challenging the denials and stating grounds for disclosure.¹ The OOR invited both parties to supplement the

¹ The appeals were docketed at OOR Dkts. AP 2016-1549 and AP 2016-1550. Because the appeals involve the same parties and similar issues, the appeals are hereby consolidated into the above-referenced docket number.

record and directed the District to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On September 26, 2016, the District submitted two position statements, asserting that the Requester appealed to the OOR before inspecting the redacted records. The District granted access to all responsive records in its possession, subject to the redaction of privileged information. The District states that it granted access to its vendor invoice report documenting all payments and invoices submitted by legal counsel, as well as the District's budget showing the District's expenses. The District further states that records relating to Mr. Handelman's representation of the District before the Cambria County Court of Common Pleas or District Magistrates, as well as claims to third party insurance carriers do not exist. The District also submitted a statement made under the penalty of perjury from Michael Vuckovich, Open Records Officer for the District, in support of its denial.

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 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 District 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). 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. Records responsive to Item 4 and a portion of Item 2 do not exist

The District states that records relating to the representation of the District by Mr. Handelman before the Cambria County Court of Common Pleas and District Magistrates (portion of Item 2),² as well as total amounts submitted to the District's third party insurance carrier as a claim for legal representation (Item 4), do not exist. Mr. Vuckovich confirms in his affidavit that:

Mr. Handelman does not represent the Board or the District before the Cambria County Court of Common Pleas or any District Magistrate... the District has no records responsive to this portion of the Request. Moreover the District has not been billed by Mr. Handelman for any court filing fees or administrative fees....

...I have determined that the District has made no claim to any third party insurance carrier for costs and fees incurred in legal representations referenced in [the Request].

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *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 competent evidence that the District acted in bad faith or that the records exist, "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)). Based on the evidence provided, the District has met its burden of proving that no responsive records exist in the District's possession, custody or control with respect to Item 4 and a portion of Item 2.

² The District has granted access to records responsive to the remainder of Item 2, subject to the redaction of privileged information.

2. The Requester may not challenge the District's redactions to the records

The District argues that because the Requester has not inspected the redacted records responsive to Items 1, 3, 5 and the remaining portion of Item 2, she has no basis for appeal. Mr. Vuckovich attests that, “[t]o date, the Requester has failed to schedule any time to conduct the inspections granted to her, or otherwise made any effort to review the records responsive to her request in possession of the District.” In *Indiana Univ. of Pa. v. Loomis*, a requester was granted access to redacted records; however, the requester did not pay the duplication fees assessed by the agency or retrieve the records, and appealed to the OOR challenging the redactions. 23 A.3d 1126 (Pa. Commw. Ct. 2011). The Commonwealth Court held that because the RTKL allows an agency to withhold access to records until all fees are paid, *see* 65 P.S. § 67.901, and the requester did not pay the copy fees for the redacted records, “the OOR should have denied his appeal.” 23 A.3d at 1128. Therefore, the Requester’s failure to pay for or inspect the redacted records precludes her from challenging the District’s redactions at this time. *See Kunkle v. Pa. Dep’t of Env’tl. Prot.*, OOR Dkt. AP 2013-1359, 2013 PA O.O.R.D. LEXIS 812; *Parker v. Pa. Dep’t of Agriculture*, OOR Dkt. AP 2011-1238, 2011 PA O.O.R.D. LEXIS 843; *but see Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, n.8 (Pa. Commw. Ct. 2012) (distinguishing *Loomis* because it “arose in the context of records in the possession of third parties).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the District is not required to take any further 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 Cambria 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.³ This Final Determination shall be placed on the OOR website: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 14, 2016

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Terry Smith (via e-mail only);
Michael Vuckovich (via e-mail only);
Jarad Handelman, Esq. (via e-mail only)

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