



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOSHUA PRINCE, ESQ.	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2015-0350
	:	
CITY OF HARRISBURG,	:	
Respondent	:	

INTRODUCTION

Joshua Prince, Esq. ("Requester") submitted a request ("Request") to the City of Harrisburg ("City") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking records regarding the "Protect Harrisburg Legal Defense Fund" ("Fund"). The City partially denied the Request, providing redacted donor records. 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 **denied in part** and the City is required to take further action as directed.

FACTUAL BACKGROUND

On February 25, 2015, the Request was filed, stating:

This is a request for all records, including, but not limited to, financial records pursuant to Section 102, since January of 2015, relating to the US Law Shield, et al. v. City of Harrisburg, et al. and Firearm Owners Against Crime, et al. v. City of Harrisburg, et al., including, but not limited to, the following: (1) All records, including, but not limited to, City of Harrisburg's "Protect Harrisburg" Legal

Defense Fund, information of which can be found at <http://harrisburgpa.gov/protectharrisburg> and <http://harrisburgpa.gov/mayor-papenfuse-announces-protect-harrisburg-legal-defense-fund>. As provided for by Section 102, this specifically includes, but is not limited to, the names, addresses, and amounts of any donations to/receipts by the City of Harrisburg; (2) All records, including, but not limited to, all financial accounts and financial institutions utilized by the City of Harrisburg, in relation to request (1); (3) all records, including, but not limited to, contracts, communications, and billings, from or to Lavery, Faherty, Patterson or any other law firm or attorney hired to review the legal issues relating to request (1); and (4) Any other record in any way relating to the current litigation specified above.

On February 26, 2015, the City partially granted the Request and provided records regarding previous RTKL requests related to the Fund. The City also provided donor lists with the check number, donors' name, donors' address and donors' phone numbers redacted, citing 65 P.S. § 67.708(b)(13), which exempts from disclosure the identity of an individual who makes a donation to an agency. The City denied the remainder of the Request.

On March 12, 2015, the Requester appealed to the OOR, challenging the denial and redactions and asserting grounds for disclosure. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal pursuant to 65 P.S. § 67.1101(c). On March 18, 2015, the City submitted a position statement, reiterating the reason for redacting donor information. Additionally, the City provided the name of the bank institution that it utilizes for the Fund. On March 23, 2015, the Requester filed a position statement, arguing that the City has not met its burden of proving that requested records are exempt from disclosure, and that donor information is considered a financial record under the RTKL and is not subject to redaction. The Requester also argues that redactions are not permissible because the donations are intended for the personal tangible benefit to a named public official or employee of the agency. *See* 65 P.S. § 67.708(b)(13).

On April 9, 2015, the OOR sought evidence in the form of an affidavit from the City regarding the structure of the Fund, leaving the record open until the close of business, April 17, 2015. However, the City did not respond the OOR's inquiry until April 25, 2015,¹ at which time it submitted a position statement, as well as the attestation of Neil Grover, Esq., who attests that, other than what has already been provided to the Requester, no other responsive records exist in the City's possession, custody or control. Although the City's submission was late, because it is relevant and probative, the submission has been accepted into the record. *See* 65 P.S. § 67.1102(b)(3) (stating that "appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

On April 9, 2015 and April 17, 2015, the Requester submitted further support of his appeal, arguing that Section 708(b)(13) does not support redactions because, here, the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency. *See* 65 P.S. § 67.708(b)(13). In support, the Requester asserts that the City, including the City's Mayor, Police Chief, and Council Members have been named as defendants in a lawsuit, which prompted the establishment of the Fund in order to raise legal defense funds. Additionally, the Requester cites to *US Law Shield of Pennsylvania, LLC, et al. v. City of Harrisburg, et al.*, No. 2015 CV 00255 EQ (Dauph. Com. Pl. Feb. 25, 2015), and argues that any donations made to the Fund are unlawful due to a preliminary injunction recently being granted regarding certain gun-related City ordinances.

¹ April 25, 2015 fell on a Saturday.

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. 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 City 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 City has not met its burden of demonstrating that responsive donor information may be redacted under Section 708(b)(13) of the RTKL

The City cites to Section 708(b)(13) of the RTKL in support of its redactions of the check numbers, names, addresses and telephone numbers of donors. Section 708(b)(13) provides that:

[r]ecords that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

65 P.S. § 67.708(b)(13).

Here, the City asserts in its unsworn position statement that the Fund is a subaccount/line item of the Police Protection Special Revenue Fund of the City (“Special Revenue Fund”), and that all revenues of this Special Revenue Funds are donated directly to the City and has its own bank account, and all expenditures from this Special Revenue Fund are line item appropriated by

City Council during the normal budget process. The City further submits that donors on the redacted list provided to the Requester are individuals and that there are no corporations or like entities on the donor list. However, the City presented no affidavit supporting this assertion.

While an affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof, *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), unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL. *See Housing Authority 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); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all”). As a result, there is no competent evidence establishing that the list consists of donors who have made a donation to the City, and that the donations do not fall under any of the exceptions to the exemption. Therefore, the City has failed to meet its burden of proof to withhold the requested donor information under Section 708(b)(13) of the RTKL.

Because the City did not meet its burden of proving that donor information is exempt from disclosure, the OOR is constrained to grant access to the redacted portions of the donor list. To the extent that access is granted to individual's home addresses, any release is subject to the Court's holding in *Pennsylvania State Education Association v. Office of Open Records*, No. 396 M.D. 2009, 2015 Pa. Commw. LEXIS 72 (Pa. Commw. Ct. Feb. 17, 2015).²

² On February 26, 2015, the Court stayed its February 17, 2015 Order and reinstated the preliminary injunction enjoining the release of the home addresses of public school employees in the possession of school districts.

2. The City has demonstrated that no other records exist.

On appeal, the City asserts that other than the redacted records provided (which it has failed to show are exempt), no other responsive records exist in its possession, custody or control. In support, Neil Grover, Esq. attests the following:

3. In my capacity as the City Solicitor, I am familiar with the records of the Agency and have knowledge of the matters at issue in this proceeding.
4. Upon receipt of the [R]equest, I have direct knowledge that [the City's Open Records Officer] Mr. Brownsweiger, in consultation with me, caused a thorough examination of files in the possession, custody and control of the Agency for records responsive to the [R]equest underlying this appeal.
5. Additionally, inquires with relevant Agency personnel and, if applicable, relevant third party contractors, were made as to whether the requested records exist in their possession.
6. After conducting a good faith search of the Agency's files and inquiring with relevant Agency personnel, I understand that all public records within the Agency's possession, custody or control that are responsive to the [R]equest, along with the supplemental information requested, were obtained and provided to the [R]equester.

Based on the evidence submitted, the City has established that other than the redacted records that were provided to the Requester, no other responsive records exist in its possession, custody or control. *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). While the Requester alleges that additional records exist, however in the absence of any evidence that the City has acted in bad faith, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pennsylvania 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)).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and the City is directed to provide an unredacted donor list to the Requester 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 to the Dauphin 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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: April 27, 2015



APPEALS OFFICER
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Sent to: Joshua Prince, Esq. (via e-mail only);
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