



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**DAVID HUGHES,
Requester**

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:

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v.

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Docket No: AP 2020-2084

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**EXETER TOWNSHIP,
Respondent**

:

:

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INTRODUCTION

David Hughes (“Requesters”) submitted a request (“Request”) to Exeter Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking requests for proposals (“RFPs”) received for the Township Engineer and records showing when its board of supervisors reviewed these proposals. The Township denied the Request, arguing that no contract had been awarded, and that the remainder of the Request sought answers to questions. 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 Township is required to take further action as directed.

FACTUAL BACKGROUND

On October 2, 2020, the Request was filed, stating:

1. Please provide the RFP[]s received for the Township Engineer.

2. Please provide when and where and documents to support when the board reviewed these proposals. (note: they were not present or reviewed at this meeting nor presented to the public)

On October 8, 2020, the Township denied the Request, arguing that the responsive records are exempt from public disclosure as they constitute proposals where a contract had not been awarded, 65 P.S. 67.708(b)(26) and also argued that the second Item of the Request sought answers to questions, rather than records.

On October 13, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

Along with his appeal, the Requester provided an unsworn statement and a video, which documents a Township meeting on September 28, 2020, where the Township speaks about the relevant RFP information sought in this Request.

On October 22, 2020, the Township submitted a position statement and two affidavits reiterating its arguments and also stating that it performed a search for responsive records to Item 2 and found that no responsive records exist within the Township's possession, custody or control. With respect to Item 1, the Township argues that no contract has been awarded, and as a result, the proposals received are exempt from public disclosure.

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 law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* 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, the parties did not request a hearing; however, the OOR has the necessary 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 the 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)(1). 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. The Township has not proven that Item 1 is exempt from public disclosure

The Township argues that records responsive to Item 1 of the Request are proposals submitted in response to the Township’s engineering services RFP, and therefore, exempt from disclosure. Section 708(b)(26) of the RTKL exempts from disclosure:

A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of an agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. § 67.708(b)(26).

In support of its argument, the Township submitted the affidavit of David Speece, Jr., Chairman of the Township’s Board of Supervisors, who attests, as follows:

On February 20, 2020, the Township issued [a] Request for Proposals for Engineering Services for the [Township].

The Request for Proposals required responses to the Request for Proposals to be submitted on or before March 20, 2020.

The Township received several timely Proposals in response to the Request for Proposals.

The Proposal responses were circulated via email to member[s] of the Township Supervisors, including myself, for review on May 6, 2020.

The Township's current Engineering firm, Great Valley Consultants, Inc., timely submitted a Proposal in response to the Request for Proposals.

Due to COVID-19, there was no discussion on action on the Proposals in response to Request for Proposals for Engineering Services by the Township Supervisors until September 28, 2020.

The Proposals were never opened at or during a public meeting.

At the September 28, 2020 meeting, the Board of Supervisors voted not to change Engineering firms and to retain Great Valley Consultants as the Township's Engineering firm.

The Board of Supervisors never awarded a contract on the Request for Proposals for Engineering Services for the Township.

The Board of Supervisors never rejected the Proposals received in response to the Request for Proposals for Engineering Services.

Under the RTKL, a sworn affidavit or statement made under 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Township 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)).

The pertinent section of 708(b)(26) exempts "[a] proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids." As part of the record, the OOR reviewed the Township meeting video from September 28, 2020, where the Board of Supervisors officially voted to take no action regarding the RFPs. During this meeting, a member of the Board states "I

think we [should] put another RFP out next year ... and then tell the others that there may be another RFP coming in the future.” Another Board member states “I am a firm believer though that we continue to look at all of our services options on a yearly basis.” The motion is then made to make no change on the Engineering Services for the Township and to authorize the administration to contact the other vendors that put in bids during the RFP process.

The Township argues that since no contract was awarded or proposal rejected by the Board, that the responses to the RFP are exempt. However, the action taken by the Township here effectively awards the contract to its current vendor and rejects all of the responses to the RFP. During the September 28, 2020, Board meeting, the members of the Board indicate that the responses to the RFP were a useful tool to make sure that the Township is effectively spending taxpayer money. Furthermore, each member of the Board who voted to remain with the current vendor indicated they had reviewed the responses to the RFP and believed that voting to not make a change of vendor was the prudent choice. Additionally, the Township did not indicate that there was any future date to consider the current proposals. The fact that the Board of Supervisors did not explicitly “reject” any proposals does not mean that the proposals were not rejected.

Accordingly, for the foregoing reasons, the Township has failed to meet its burden of proving that the requested RFPs are exempt under Section 708(b)(26) of the RTKL.¹

2. The Township has proven that no responsive records exist, responsive to Item 2

The Township argues that records responsive to Item 2 of the Request do not exist. Item 2 of the Request sought records related to showing when the Township’s Board reviewed the

¹ Section 708(b)(26) also exempts the “financial information of a bidder or offeror” that is used to demonstrate the financial capability of the applicant. However, there has been no assertion that this part of the exemption applies here. The Township does not offer any evidence that suggests Section 708(b)(26) might otherwise apply to responsive records requested in Item 1.

proposals in response to the RFP. In support of this argument, the Township provides the affidavit of Tina Stephens, Open Records Officer for the Township, who attests, as follows:

Through discussion with the Solicitor, it was determined that the [R]equest numbered 2 in the October 2, 2020, [R]equest, were questions and not for a document and in accord with established law, the Township did not have to respond to questions.

Notwithstanding, I researched and confirmed that there were no potentially responsive records in the custody, control [or] possession of the Township to the Number 2 of the October 2, 2020, [R]equest.

Under the RTKL, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry* at 520-521. The Township, in its affidavit responding to Item 1 of the Request, details that an email was sent between members of the Board of Supervisors on May 6, 2020, which contained the responses to the relevant RFP. However, based on the evidence provided, the Township has met its burden of proof that it does not possess records that are responsive to Item 2. *See Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Township is required to provide records responsive to Item 1 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 Berks 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 11, 2020

/s/ Ryan W. Liggitt

RYAN W. LIGGITT, ESQ.
APPEALS OFFICER

Sent to: David Hughes (via email only);
Tina Stephens, AORO (via email only);
Michelle Mayfield, Esq. (via email only)

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