

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA
CIVIL DIVISION

ALEX WEIDENHOF and the BUTLER
EAGLE,
Plaintiffs,

v.

LANCASTER TOWNSHIP,
Defendant.

Case No. 21-10207

2021 DEC 30 AM 9:41

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BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs are a local newspaper and one of its reporters, Alex Weidenhof. Mr. Weidenhof reports on local government, business and other topics for the *Butler Eagle*. The *Butler Eagle* is a newspaper of general circulation with its principal places of business located at 514 West Wayne Street in Butler. The Defendant (“Township”) is a township of the Second Class in Butler County, with a municipal office located at 113 Kings Alley in Harmony.

The Township is among the municipalities that the *Butler Eagle* covers, providing citizens with information about their local government’s operations. The newspaper and its staff report on these municipalities by attending meetings, conducting interviews, and filing public records requests, among other newsgathering methods.

The instant case stems from an October 2020 Right to Know Law (“RTKL”) request Plaintiffs submitted to the Township. After a partial denial of the request, Plaintiffs appealed to the Office of Open Records (“OOR”), which in turn issued a Final Determination directing the Township to provide the requested documents.

Plaintiffs seek the intervention of this Honorable Court to enforce the December 8, 2020 OOR Final Determination. See Exhibit A, OOR Final Determination.

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II. FACTUAL BACKGROUND

Plaintiffs submitted a RTKL request to the Township on October 8, 2020. The request sought two categories of information about a former Township employee named Benjamin Kramer:

- (1) Any and all agreements made between the Township and Benjamin Kramer pertaining to the end of his employment at the Township and
- (2) Any and all correspondence between Benjamin Kramer, including those made by and through an attorney, and other officials in the Township, including but not limited to communications with members of the Board of Supervisors, communications with the Township secretary, and non-privileged communications with its solicitor, between 1 January 2018 and 30 September 2020 pertaining to his role as a real estate agent. In this instance, correspondence includes emails, memoranda, and letters, as well as records and minutes of, or notes from, in-person meetings and phone calls.

See Exhibit B, RTKL request.

The Township responded to the request on October 13, 2020, granting access to a separation agreement related to Mr. Kramer that would be ratified at the next monthly meeting on October 19, 2020. The Township denied the second part of the request, reasoning that the requested records about Mr. Kramer's work as a real estate agent did not document a transaction or activity of the Township. *See Exhibit C, RTKL denial.*

Plaintiffs timely filed an appeal of the partial denial to the OOR on October 13, 2020. On October 15, 2020, Mr. Weidenhof submitted a position statement arguing that the Township had not conducted a good faith search to identify the records and had not proven that the records were not documenting a transaction or activity of the Township. *See Exhibit D, OOR position statement.* The Township did not make a submission to the OOR. *See Exhibit A, OOR Final Determination, page 2.*

The OOR granted the Plaintiffs' appeal in its entirety, determining that "the Township is required to provide all responsive records to the Requester within thirty days" and informing the parties that within thirty days of the mailing date of the Final Determination, "any party may appeal to the Butler County Court of Common Pleas. 65 P.S. § 67.1302(a)."

Despite the OOR's clear instructions about when and how to appeal to the Butler County Court of Common Pleas, the Township did not do so. Nor did the Township produce the responsive records. Instead of producing the documents, or appealing to this court, the Township instead had a former employee sign an attestation thirty days after the OOR issued its Final Determination. *See Exhibit E, cover letter and attestation* (although the attestation is dated January 7, 2020, the cover email is dated January 7, 2021, 17:04 [5:04 p.m.]

The former employee who signed the attestation, Christina Senft, was deposed on September 9, 2021. She held the role of secretary/treasurer at the Township from 2015 until she resigned in March 2021. Ms. Senft testified that she was concerned about signing the attestation:

Q. Looking at paragraph 5¹, did you feel satisfied for yourself that that was an accurate summation of what you did with regard to this Right-to-Know request?

A. Prior to me signing this at 4:30 on the afternoon that it was due, I had lengthy conversations with Chris Reese [former Township solicitor] about why am I signing this when I did not – when I was not the one who conducted this and why wasn't he. And I was told that because I was appointed as the official Right-to-Know officer that I needed to sign this document.

Q. Where were you at 4:30 p.m. when you signed this?

A. That, I can't answer. I was either at my home working from home or I was in the township office. I want to say that I was actually in the township office, because I also had contacted my personal attorney regarding this – and it wasn't John at the time. It was a different attorney – because I was very unsure about signing this.

Q. What made you feel unsure about it?

¹ Paragraph 5 of the attestation: "After conducting a good faith search of the Agency's files and inquiring with relevant Agency personnel, I identified all records within the Agency's possession, custody or control that are responsive to the request and available for public access and provided them to the requester." *See Exhibit E*

A. Because I don't like the terms "I" that are listed in this, because I had forwarded everything to Chris Reese. I had done the best that I could to my ability. I don't believe it was the best of the ability of the township....

Q. When you said you had reservations about the "I" pronoun, was it the entirety of this that you felt uncomfortable about the "I" part?

A. I would say that it was especially about item 3.

Q. Let's talk about item 3. What part?

A. I questioned to what degree the supervisors truly searched their emails.

See Exhibit F, p. 29-30.

Ms. Senft provided further detail about the nature of the "search" referenced in the attestation.

Q. So, you never contracted with CMIT [Information Technology company] yourself to say I want you to run a search through our email files to look for search terms such as Ben Kramer, real estate?

A. I did not.

Q. Do you know if Mr. Reese [former Township solicitor] did that?

A. I do not.

Q. Did you ever have any direct communication with the supervisors about their emails?

A. You know, when the request came in, I said I need you three to go through your emails, and if there is something, you need to get it to myself or to Chris Reese. At that point, nothing was turned over to me. I believe there was one email from Tim Zinkham that was turned over to Chris Reese.

See Exhibit F, p. 26-27.

Paragraph 7 of the attestation said "I can also confirm that one email was found, which involved Benjamin Kramer's job as a real estate agent and that the e-mail does no [sic] constitute a record of the Township because it does not document a transaction or activity of the Township." Ms. Senft testified about that paragraph of the attestation:

Q. And on paragraph 7, did you pull that email yourself?

A. I did not.

Q. Do you know who pulled it or found it?

A. I believe Tim Zinkham sent it to Chris Reese.

Q. So, you had no direct response from any of the supervisors for them saying to you, Chrissy, I went back through my email in-box and performed a search looking for Ben Kramer real estate. I came up with nothing. Nobody ever responded to you in that way?

A. Kris Kniess and Joe Plesniak responded to Chris Reese in an email I was copied to, again at the last possible second, because Chris had called everyone and said I need this in writing from you and literally hung up the phone, reply all, I don't have anything, Kris; I don't have anything, Joe.

Q. Was it your understanding that that search was done within minutes, seconds? How long are we talking about from the time that the "I need these records" email was sent out to the time that –

A. I mean, maybe an hour.

See Exhibit F, p. 33.

Ms. Senft testified that she felt pressured to sign the attestation.

Q. When you signed this attestation – and I don't want to put words in your mouth, but can you describe whether you felt pressured at all?

A. Yes.

Q. What did you think would happen if you didn't sign it?

A. At that point, I wasn't certain. Again, it was not really a great time in my personal life for me to jeopardize my job with the township, and, again, I had expressed my reservations about the situation there over and over and over again, and basically Joe looked at me and told me not to cry and it's all going to be fine, Chrissy. And I'm sitting here, you know, a year later and it's not fine.

Q. Did you feel under duress to sign this?

A. Yes, yes.

See Exhibit F, p. 34.

III. STANDARD OF REVIEW

“Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Monger v. Upper Leacock Twp.*, 132 A.3d 585, 589 n. 3 (Pa. Commw. Ct. 2016). See also Pa.R.Civ.P. 1035.2. The Court “reviews[s] the record in the light most favorable to the nonmoving party, and any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party.” *Id.*

IV. LEGAL ARGUMENT

The central tenet of the Right to Know Law is that it “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.” *Pa. State Educ. Ass’n v. Commonwealth*, 148 A.3d 142, 155 (Pa. 2016).

In 2009, the Pennsylvania General Assembly enacted the Right to Know Law, replacing its predecessor, the Right to Know Act, “with an alternative paradigm that more strongly tilted in favor of maximizing transparency.” *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 656 (Pa. 2020). “Under the [RTKL], agency records are *presumed* to be public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific, enumerated exceptions[.]” *Bowling v. Office of Open Records*, 75 A.3d 453, 457 (Pa. 2013) (emphasis added). The RTKL “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.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015) (en banc) (quoting *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commw. Ct. 2014) (en banc)).

As a local agency, the Township is subject to the disclosure requirements of the RTKL. See *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173, 1179 (Pa. Commw. Ct. 2017). As an agency subject to the RTKL, it had a duty to make a “good faith,” reasonable inquiry in response to a RTKL request. See 65 P.S. §67.901. See also *In re Silberstein*, 11 A.3d 629, 633 (Pa. Cmmw. Ct. 2011) (“burden upon a local agency, through its designated open-records officer, to first make a good faith determination as to whether any requested record is in fact a ‘public record’ and, if so, then determine whether the identified public record is within its possession, custody or control.”). “[U]nder the RTKL, an agency bears the burden of

demonstrating that it has reasonably searched its records to establish that a record does not exist.”
Dep’t of Labor & Industry v. Earley, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015)

However, in response to Plaintiffs’ RTKL request, the record is clear that after the October 8, 2020 request, the Township performed at most, a cursory search, providing only a separation agreement related to Mr. Kramer. Ms. Senft’s testimony establishes that the first time an earnest and good faith search was undertaken was months after the October 8, 2020 RTKL request. It was only at the conclusion of the time frame for the Township to appeal to the Butler County Court of Common Pleas that there was a search “at the last possible second” for responsive emails. *See Exhibit F*, page 33, lines 16-17. In addition, Ms. Senft testified that although she had access to the former Township employee’s emails from the time frame beginning October 1, 2020, she did not have access to anything prior. According to Ms. Senft, “Mr. Kramer apparently deleted his mailbox prior to that.” *See Exhibit F*, pages 25-26, lines 25, 1-4. Given that the request related to Mr. Kramer and that a “good faith” search certainly should have entailed scrutiny of his emails, it defies logic as to how a search could have been conducted without a collection and review of the relevant records.

When an agency, such as the Township, willfully or with wanton disregard deprives a requester of access to public records, the requester is entitled to reimbursement of its costs and attorneys’ fees. *See* 65 P.S. § 67.1304(a)(1). Moreover, an agency’s bad faith refusal to grant access to public records permits the imposition of civil penalties against the entity. *See* 65 P.S. § 67.1305(a). Because the Township failed to perform an initial search for records and subsequently refused to comply with the Final Determination, this Court should award Plaintiffs their reasonable costs and attorney’s fees and impose civil penalties against the agency.

As our Supreme Court recently recognized, in affirming the Commonwealth Court's imposition of attorneys' fees and a finding of bad faith at the request stage, an open records officer must "act with diligence" in responding to a request. See *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 243 A.3d 19, 28 (Pa. 2020). There is nothing in the record demonstrating that the Township acted with diligence in processing the request in the time period from the submission of the request on October 8, 2020 through the Township's response on October 13, 2020. The Township's October 18, 2020 points to a lack of search: "[W]e are not providing those documents, **if there are any**..." See Exhibit C (emphasis added). Indeed, it was not until months later that a search of any type was actually performed.

The Supreme Court acknowledged an argument made in the *Uniontown* case by amicus curiae Pennsylvania NewsMedia Association: "'[a] good faith response - either to produce records or assert an exemption - cannot occur absent a good faith search, followed by collection and review of responsive records, so an agency has actual knowledge about the contents of the relevant documents.' Brief of Amicus Curiae, at 15. In light of DOC's failure to take any reasonable steps to respond to Appellee's request, its argument with respect to burdensomeness rings hollow."


The record in the instant case does not show any good faith search, followed by collection and review of responsive documents in the time period of October 8, 2020 through October 13, 2020. Instead, the "search" comes months later, when the thirty day timeframe following the OOR's final determination is about to expire. Only then does the Township perform the search, at the end of the day, in what is described as a hurried manner. See Exhibit F, page 33, line 25, describing the search as taking "maybe an hour." There is no information in the record

confirming that there was any kind of keyword search for relevant records performed by the Township's information technology. *See* Exhibit F, page 26, lines 13-22.

V. CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant their Motion for Summary Judgment; grant the full scope of relief requested in Plaintiffs' Complaint in Mandamus, including production of responsive documents, shifting attorneys' fees, related sanctions, and all available relief under the RTKL; and provide any further such relief that this Court deems appropriate under the circumstances.

Dated: December 29, 2021



Paula Knudsen Burke

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

PA ID 87607

PO Box 1328

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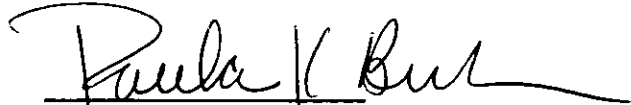
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Paula Knudsen Burke, hereby certify, that on this date I sent the foregoing via UPS to the following counsel of record:

Neva Stotler, Esq.
N. Stotler Law
109 S. High St., Unit B Zelienople,
PA 16063 neva@nstotlerlaw.com
Counsel for Defendant

Date: December 29, 2021



Paula Knudsen Burke

REPORTERS COMMITTEE FOR
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Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

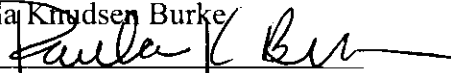
Submitted by: Paula Knudsen Burke
Signature: 
Attorney No.: 87607

EXHIBIT A



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**ALEX WEIDENHOF,
Requester**

:

:

:

:

v.

:

Docket No: AP 2020-2087

:

**LANCASTER TOWNSHIP,
Respondent**

:

:

INTRODUCTION

Alex Weidenhof (“Requester”) submitted a request (“Request”) to Lancaster Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of the Township Manager. The Township partially denied the Request, stating the Request does not seek records under the RTKL. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

On October 8, 2020, the Request were filed seeking:

1. Any and all agreements between the Township and Benjamin Kramer pertaining to the end of his employment at the Township.
2. Any and all correspondence between Benjamin Kramer, including those made by and through an attorney, and other officials in the Township, including but not limited to communications with members of the Board of Supervisors, communications with the Township secretary, and non-privileged communications with its solicitor, between 1 January 2018 and 30 September 2020 pertaining to his

role as a real estate agent. In this instance, correspondence includes emails, memoranda, and letters, as well records and minutes of, or notes from, in-person meetings and phone calls.

On October 13, 2020, the Township responded, granting access to a separation agreement that would be ratified at the next monthly meeting on October 19, 2020. The Township denied Item 2, stating that the Request seeks records of Mr. Kramer's work as a real estate agent and not records that document a transaction or activity of the Township.

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 the appeal pursuant to 65 P.S. § 67.1101(c).

On October 15, 2020, the Requester submitted his position statement arguing that the Township has not conducted a good faith search to identify the records and has not proven that the records do not document a transaction or activity of the Township. The Township did not make a submission on appeal.

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, neither party requested 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). 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)). The 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 must provide records responsive to Item 1 of the Request

In response to the Request, the Township granted access to the separation agreement. However, the Township submitted no evidence demonstrating that it provided all responsive records to the Requester. While the Township states that it would provide access to the separation agreement, and the OOR has no reason to doubt the Township’s intention to do so, the Township has not submitted evidence, *e.g.*, a statement made under the penalty of perjury, demonstrating that it has provided the record or that it has searched for and located any additional records responsive to Item 1 of the Request. Absent the Township providing a sufficient evidentiary basis that records have been provided, the OOR will order disclosure. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

2. The Township failed to prove the records do not document a transaction or activity of the Township

The Request seeks records of Township Manager, Benjamin Kramer, and other Township officials, supervisors and solicitor regarding Mr. Kramer’s work as a real estate agent. The Township argues that these records do not document the transaction or activity of the Township.

The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.”

65 P.S. § 67.102. To determine if certain material is a record, the RTKL imposes a two-part inquiry: (1) does the material document a “transaction or activity of the agency”; and (2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency.” See 65 P.S. § 67.102; *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of a record must be liberally construed. *Id.*; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012).

Records are not considered records of an agency merely because they are capable of being accessed by Township officials, Board of Supervisors and Solicitor or by their location on an agency computer. *Pa. Office of Attorney General v. Bumsted*, 134 A.3d 1204 (Pa. Commw. Ct. 2016); *Meguerian v. Office of the Attorney General*, 86 A.3d 924, 930 (Pa. Commw. Ct. 2013); *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012). For records to qualify as records of an agency, the OOR must look to the subject matter of the records and must document a transaction or activity of the agency. *Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011).

Here, the Township’s response states that Mr. Kramer’s work as a real estate agent does not document a transaction or activity of the Township; however, the Township does not identify the responsive records or provide any additional information describing the nature of the records. Without additional information, it is unclear if the records, although pertaining to the Township Manager’s outside employment, also pertain to a transaction or activity of the Township. See generally *Muckrock News v. Philadelphia Gas Works*, OOR Dkt. AP 2018-1918, 2018 PA O.O.R.D. LEXIS 1450 (determining that emails received by the agency from its paid membership

to access an information exchange program document transactions and activities of the agency because the emails reflect benefits the agency receives—information—in exchange for its membership dues).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Township is required to provide all responsive records 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 Butler 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 8, 2020

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent via email to: Alex Weidenhof;
Chrissy Senft

¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

EXHIBIT B



pennsylvania
OFFICE OF OPEN RECORDS

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Lancaster Township (Attn: AORC)

Date of Request: 8 October 2020 Submitted via: Email U.S. Mail Fax In Person

PERSON MAKING REQUEST:

Name: Alex Weidenhof Company (if applicable): The Cranberry Eagle

Mailing Address: 8050 Rowan Rd., Ste. 504

City: Cranberry Township State: PA Zip: 16066 Email: aweidenhof@butlereagle.com

Telephone: 724-776-4270 ext. 113 Fax: 724-776-0211

How do you prefer to be contacted if the agency has questions? Telephone Email U.S. Mail

RECORDS REQUESTED: Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.

1. Any and all agreements made between the Township and Benjamin Kramer pertaining to the end of his employment at the Township.
2. Any and all correspondence between Benjamin Kramer, including those made by and through an attorney, and other officials in the Township, including but not limited to communications with members of the Board of Supervisors, communications with the Township secretary, and non-privileged communications with its solicitor, between 1 January 2018 and 30 September 2020 pertaining to his role as a real estate agent. In this instance, correspondence includes emails, memoranda, and letters, as well as records and minutes of, or notes from, in-person meetings and phone calls.

DO YOU WANT COPIES? Yes, electronic copies preferred if available
 Yes, printed copies preferred
 No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? Yes (may be subject to additional costs) No
 RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than \$ 20.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? Yes No (If Yes, Final Due Date: _____) Actual Response Date: _____

NOTE: In most cases, a completed RTKL request form is a public record. More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Nov. 27, 2018

EXHIBIT C

Subject: RE: Right-to-Know Request
From: Chrissy Senft <cseft@lanaster-township.com>
Date: 10/13/2020, 13:44
To: Alex Weidenhof <aweidenhof@butlereagle.com>

Alex,

1. In response to your first request, we will be able to provide you a copy of a separation agreement with Mr. Kramer once it is ratified after the next monthly meeting on October 19.
2. In response to your request for all correspondence regarding Mr. Kramer's role as a real estate agent, we are not providing those documents, if there are any, because they do not constitute "records" under the Right to Know Law.

The definition is:

"Record." Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document.

Since correspondence regarding Mr. Kramer's work as a real estate agent do not document a transaction or activity of an agency, any such correspondence would not constitute a "record" and therefore does not need to be provided in response to a Right to Know request. Our solicitor, Christopher Reese, contacted the Open Records hotline and confirmed that this is an appropriate rejection of that part of your Right to Know request.

Thank you,
Chrissy Senft
Secretary-Treasurer

EXHIBIT D

October 15, 2020

Via E-Mail

Jill Wolfe, Esq.
Office of Open Records
333 Market St, 16th Floor
Harrisburg, PA 17101-2234
jiwolfe@pa.gov

Re: Position statement in *Weidenhof v. Lancaster Township*, AP 2020-2087

Dear Attorney Wolfe,

The Right-to-Know Law requires requesters upon appeal to “state the grounds upon which the requester asserts that the record is a public record . . . and . . . address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101. This position statement addresses both grounds, demonstrates the errors made by Lancaster Township in denying the request, and argues for the release of the requested records.

1. The information sought constitute “records.”

On October 8, 2020, I submitted a request (“Request”) to Lancaster Township, Butler County (“Township”), under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking copies of a separation agreement between the Township and its former Manager, Benjamin Kramer. The Request additionally sought records of correspondence between Mr. Kramer and various other Township officials with respect to Mr. Kramer’s outside role as a real estate agent.

On October 13, 2020, Christina Senft, the Township's Open Records Officer, sent a timely response, granting the Request in part and denying it in part. Ms. Senft stated the Township does not consider the second item within the request, which sought copies of correspondence, "records" under the RTKL, averring such correspondence does not "document[] a transaction or activity of" the Township. § 67.102.

The Township erred in coming to this conclusion and, for the following reasons, its denial of the Request should be reversed and this appeal be granted.

A. The Township failed to act in good faith by not conducting a search for records.

Ms. Senft, in her October 13 response to the Request, stated that the Township would not provide the correspondence "documents, if there are any." In turn, she indicated the Township did not conduct a good faith search for responsive records as required under Section 901 of the RTKL.

In *In re Silverstein*, the Commonwealth Court held that

[A] right-to-know request directed to a local agency . . . requires that the local agency's open-records officer inquire of its public officials . . . as to whether the public official is in possession, custody or control of a requested record that could be deemed public. It is then the open-records officer's duty and responsibility to determine whether the record is

public, whether the record is subject to disclosure, or whether the public record is exempt from disclosure. 11 A.3d 629 (Pa. Cmwlth. 2011).

The Township in this case failed to conduct a search for potentially responsive records prior to determining in error that such documents are not considered "records" under the RTKL. It is impossible to determine that such a response is appropriate without first conducting a good faith search as required by the RTKL.

Even a cursory review of responsive records would have given the Township the ability to make a determination of whether such documents were "records" based on the facts, rather than, as it did in this case, declaring carte blanche that any responsive records that would have been found after a good faith search would not fall under the RTKL.

The Office of Open Records should grant this appeal and require that the Township conduct a good faith search for responsive records.

B. Mr. Kramer's outside role is inextricable from Township activity.

The Commonwealth Court has consistently held that, because the RTKL is remedial legislation designed "to promote access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions," the statute must be liberally construed. Allegheny County Department of Administrative Services

v. A Second Chance, Inc., 13 A.3d 1025 (Pa. Cmwlth. 2011) (quoting Bowling v. Office of Open Records, 990 A.2d 813, 824 (Pa. Cmwlth. 2010) (en banc)).

As a Second Class Township, the Township has broad powers to enact and enforce codes of regulation as to the "construction, alteration, repair, occupation, maintenance, sanitation, lighting, ventilation, water supply, toilet facilities, drainage, use and inspection of all buildings and housing constructed, erected, altered, designed or used for any use or occupancy" within the Township. 53 P.S. § 66517. It also has the ability to establish codes to which housing, commercial, and industrial developments must conform, to approve such developments that meet these requirements, and to reject those that do not. 53 P.S. § 10501 et seq.

The Township further established the office of Township Manager, pursuant to the Second Class Township Code, to be the its "Chief Administrative Officer," with all administrative offices under the Manager's control, and to make recommendations to the Board of Supervisors "as may be necessary or expedient for the health, safety and welfare" of Township residents. Lancaster Township Ordinance 107 § 4. Mr. Kramer, in that office, therefore had the ability to preside over the enforcement of ordinances established by the Township, and to make recommendations to the Board of Supervisors.

It is unlikely that correspondence between various Township officials and Mr. Kramer regarding that role are confined only to him being a real estate agent, instead broaching the topic that this may, in some way, have influenced his decision-making as Township Manager.

As such, the correspondence sought in the Request documents Township activity, thus constituting a "record" under the RTKL, and must be released. The Township's denial should be reversed.

C. This correspondence necessarily documents Township activity.

Unless, in the most unlikely possibility, the correspondence pertains to Township officials asking Mr. Kramer about home prices, it seems extraordinarily probable the officials sought information about whether Mr. Kramer's outside role as a real estate agent influenced his decision-making.

This is the very definition of a Township activity.

The Township, like any agency in the Commonwealth, has the obligation to ensure its decisions are not influenced by conflicts of interest. By asking Mr. Kramer if his outside role has impacted his job as Township Manager, should such records exist, other Township officials have documented an activity of the Township.

This office has previously held that a single e-mail sent from one agency member asking that an investigation be launched into another member of the

same agency is a transaction or activity of that agency. *Aliota v. Millcreek Township School District*, OOR Dkt. AP 2018-0169. While the Township has not launched a good-faith search of its records to determine what responsive records exist, such a responsive e-mail, in its likely existence, would be a record, contrary to the Township's arguments.

Because the correspondence necessarily documents an activity of the Township, I ask the Office grant this appeal.

D. An in camera review may be required.

Because the Township did not conduct itself in good faith by failing to conduct any semblance of a search for records, it may be necessary for the Office of Open Records to conduct an *in camera* review of responsive documents to determine what records are public under the RTKL.

Under the RTKL, it is the "subject-matter" of an email or other correspondence that determines whether it is a record under the RTKL. *Meguerian v. Pa. Office of the Attorney General* 86 A.3d 924 (Pa. Cmwlth. 2013). But, to determine the subject matter of the correspondence, it is first necessary to review responsive records.

The Township's previous actions, in violation of Section 901 of the RTKL, do not inspire confidence that it will act in good faith in the future in

conducting a search of records responsive to the Request and determining whether those records are distributable under the RTKL.

Therefore, while I stop short of requesting an *in camera* review, I ask that the Office of Open Records remain open to ordering such a review *sua sponte* if the Township continues to fail to act in good faith.

E. Jurisprudence supports the instant Request.

Previous cases, before the Office of Open Records, various county Courts of Common Pleas, and the Commonwealth Court, have held that documents responsive in cases similar to the current matter are, in fact, “records” as defined under the RTKL.

In one case similar to the instant Request, this office held that an email sent to a school board seeking “an investigation into another School Board director as a result of comments made pertaining to the behavior of the Requester” was a record of that school district. *Aliota v. Millcreek Township School District*, OOR Dkt. AP 2018-0169.

Similarly, the Centre County Court of Common Pleas affirmed this Office’s holding in *Grove v. Gregg Township* that, without providing any factual evidence to support its position, Gregg Township failed to meet its burden to prove Internet browsing histories on local government-owned computers were not “records” under the RTKL. OOR Dkt. AP 2018-1289; *Gregg Township v. Grove*.