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Attorney for Respondent

COUNTY OF BUCKS, 55 East Court Street Doylestown, PA 18901 Petitioner,	:	IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
vs.	:	CIVIL ACTION – LAW
MEGAN BROCK, Respondent.	:	No. 2022-03083

ANSWER AND NEW MATTER TO PETITION FOR REVIEW OF THE JUNE 3, 2022 FINAL DETERMINATION OF THE PENNSYLVANIA OFFICE OF OPEN RECORDS

AND NOW COMES, Megan Brock, Respondent, by and through attorney J. Chadwick Schnee and files this Answer and New Matter to Petition for Review of the June 3, 2022 Final Determination of the Pennsylvania Office of Open Records, averring as follows:

INTRODUCTION

This matter arises under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*. a statute designed to provide members of the public with speedy access to records of their government. "[T]he RTKL is remedial in nature and '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.'" *Off. of the Dist. Att'y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. 2017) (quoting *Pennsylvania State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commw. 2014)). Under the RTKL, all records in the possession of an agency are presumptively public from public access, and agencies bear the burden of

proving otherwise. As remedial legislation, agencies' reasons for denying access to records must be "narrowly construed." *See Pa. State Police v. Grove*, 161 A.3d 877, 992 (Pa. 2017); *McKelvey v. Pa. Dep't of Health*, 255 A.3d 385, 400 (Pa. 2021) (As remedial legislation, "the [RTKL] must be construed to **maximize access** to public records that are in an agency's possession") (emphasis added).

JURISDICTION

1. Admitted.

PARTIES

2. Denied in part and admitted in part. As set forth in the Petition for Review, Petitioner is identified only as "County of Bucks," rather than "County of Bucks Administration." Similarly, the final order of the Office of Open Records ("OOR") under review refers to Petitioner as "Bucks County." It is admitted that the County of Bucks has principal offices located at 55 East Court Street, Doylestown, PA 18901.

3. Admitted.

4. Admitted.

PROCEDURAL HISTORY AND RELEVANT BACKGROUND

5. Admitted in part and denied in part. By of further answer, the RTKL request ("Request") submitted by Respondent Megan Brock ("Respondent") is a written document that speaks for itself, and any characterization thereof is specifically denied.

6. Admitted in part and denied in part. It is admitted that the County partially denied the Request for the reasons set forth in this paragraph. However, the County's denials are written documents that speak for itself, and any characterization thereof is specifically denied.

7. Admitted in part and denied in part. It is admitted that the Respondent filed an appeal to the Office of Open Records ("OOR"). However, Respondent's appeal is a written document that speaks for itself, and any characterization thereof is specifically denied.

8. Denied. The OOR docketed the appeal as *Brock v. Bucks County*, OOR Dkt. AP 2022-0846.

9. Admitted in part and denied in part. It is admitted that the County made a submission to the OOR on April 15, 2022. The County's submission is a written document that speaks for itself, and any characterization thereof is specifically denied.

10. Admitted in part and denied in part. It is admitted that the OOR issued a binding, final order directing the County to provide all responsive records with the permissible redaction of personal identification information. The OOR's final order in OOR Dkt. AP 2022-0846 is a written document that speaks for itself, and any characterization thereof is specifically denied. Further, the Appeals Officer's name is Magdalene C. Zeppos-Brown, rather than Magdalene C. Zeppos-Bros.

THE COUNTY'S APPEAL SHOULD BE DENIED

11. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, courts may adopt "the appeals officer's factual findings and legal conclusions when appropriate," *see Bowling v. Office of Open Records*, 75 A.3d 453, 472 (Pa. 2013) and are not required to accept any new evidence on appeal. *See Highmark, Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. 2017) ("[I]t is the parties' burden to submit sufficient evidence to establish material facts" before the OOR); *Mission Pennsylvania, LLC v. McKelvey*, 212 A.3d 119, 129 (Pa. Commw. 2019) ("Lack of evidence, when the parties and participants had a full opportunity to submit evidence to the fact-finder, is not a valid reason for supplementing the record"); *see also Township of Worcester v. Office of Open Records*, 129 A.3d 44, 59 (Pa. Commw. 2016) (noting that "An appeals officer functions as the initial fact-finder" and that OOR "appeals officers are empowered to develop the record to ensure

Chapter 13 courts may perform appellate review without the necessity of performing their own fact-finding").

12. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, in the RTKL context, appellate courts may "independently review" a decision of an appeals officer, but nothing precludes a court from simply adopting "the appeals officer's … legal conclusions when appropriate." *Bowling*, 75 A.3d at 472.

13. Denied as conclusion of law to which no responsive pleading is required. By way of further answer, nothing precludes a reviewing court from simply adopting an appeals officer's "factual findings … when appropriate." *Id.* Parties are not entitled to supplement the evidentiary record before reviewing courts under the RTKL. *See Voltz*, 163 A.3d at 491 ("[I]t is the parties' burden to submit sufficient evidence to establish material facts" before the OOR); *Mission Pennsylvania, LLC*, 212 A.3d at 129 ("Lack of evidence, when the parties and participants had a full opportunity to submit evidence to the fact-finder, is not a valid reason for supplementing the record"); *see also Township of Worcester*, 129 A.3d at 59 (noting that "An appeals officer functions as the initial fact-finder and that OOR "appeals officers are empowered to develop the record to ensure Chapter 13 courts may perform appellate review without the necessity of performing their own fact-finding"). Respondent opposes further supplementation of the evidentiary record where Petitioner had a full and fair opportunity to provide evidence and legal argument to the OOR and actually did so.

14. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, agencies "must raise all its challenges before the fact-finder closes the record… In the ordinary course of RTKL proceedings, this will occur at the appeals officer stage, and a reviewing court will defer to the findings of the appeals officer." *Levy v. Senate of Pa.*, 94 A.3d 436, 441-42 (Pa. Commw. 2014), *petition for allowance of appeal denied* 630 Pa. 738 (Pa. 2014).

THE COUNTY FAILED TO MEET ITS BURDEN OF PROVING THAT ITS ASSERTED REASONS FOR DENYING ACCESS TO THE REQUESTED PUBLIC RECORDS APPLY

15. It is admitted that the County seeks relief; however, it is denied that the County is entitled to any of the relief sought. By way of further response, the County did not seek a hearing before the OOR and should not be granted a hearing on appeal. *See*, *e.g.*, *Thomas v. Pennsylvania Board of Probation and Parole*, No. 1558 C.D. 2018, 2019 WL 3540069 at *4 (rejecting an argument to hold a hearing in a RTKL matter where a requester did not "at any point prior to his present appeal request an evidentiary hearing").[1] The County had an opportunity to present evidence before the OOR as the factfinder and should not be given another opportunity to meet its burden of proof for the first time on appeal.

16. Denied. The County did not raise this argument before the OOR, and, accordingly, has waived this argument. *See Levy*, 94 A.3d at 441–42. To the extent that the County now argues that no responsive records exist after arguing substantive reasons for denying access, an award of attorney's fees and court costs is warranted. *See*, *e.g.*, *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 185 A.3d 1161 (Pa. Commw. 2018) (finding that an agency acted in bad faith by arguing that records are exempt before discovering, on appeal, that no responsive records exist), *aff'd*, 243 A.3d 19 (Pa. 2020). The County should not be permitted to litigate arguments on appeal that it did not raise before the OOR.

17. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, the County did not raise any argument concerning the specificity of the Request on appeal before the OOR, and, accordingly, has waived this argument. To the extent that the County now argues that the Request is insufficiently specific after arguing substantive reasons for denying access, an award of attorney's fees and court costs is warranted. *See*, *e.g.*, *Uniontown Newspapers, Inc.*,

[1] This unreported decision is cited for its persuasive value only.

185 A.3d 1161 (Pa. Commw. 2018) (finding that an agency acted in bad faith by arguing that records are exempt before discovering, on appeal, that no responsive records exist), *aff'd*, 243 A.3d 19 (Pa. 2020). The County should not be permitted to litigate arguments on appeal that it did not raise before the OOR.

18. Admitted as an accurate excerpt from *Madison v. Pa. Board of Probation and Parole*, 212 A.3d 560 (Pa. Commw. 2019). By way of further answer, the averments of paragraph 17 are incorporated herein by reference.

19. Denied. By way of further answer, the County did not raise these arguments on appeal before the OOR, and, accordingly, has waived this argument. To the extent that the County now argues that the Request is insufficiently specific after arguing substantive reasons for denying access, an award of attorney's fees and court costs is warranted. *See*, *e.g.*, *Uniontown Newspapers, Inc.*, 185 A.3d 1161 (Pa. Commw. 2018) (finding that an agency acted in bad faith by arguing that records are exempt before discovering, on appeal, that no responsive records exist), *aff'd*, 243 A.3d 19 (Pa. 2020). The County should not be permitted to litigate arguments on appeal that it did not raise before the OOR.

20. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, the County has waived any argument that the Request is "unreasonable" based on failing to preserve or raise this issue before the OOR. Additionally, the OOR properly concluded that, based on the threadbare evidence and argument provided by the County to the OOR that merely "outlined the rationale and exemptions the County relied on in denying the appeal," the County did not meet its burden of proof under the RTKL.

21. Admitted in part and denied in part. It is admitted that Petitioner quotes excerpts from the County's submission to the OOR; however, the County's submission is a written document that speaks for itself. Any characterization thereof is specifically denied.

22. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, while a sufficiently-detailed affidavit may serve as sufficient evidence in RTKL matters, the threadbare and conclusory assertions set forth in the County's submission were properly rejected by the OOR.

WHEREFORE, Respondent respectfully request this Honorable Court to deny the County's appeal and issue an order (1) affirming the final order of the OOR the OOR; (2) awarding attorney's fees and court costs to Respondent; and (3) granting whatever additional relief to Respondent that this Court deemed appropriate.

NEW MATTER

23. The averments of the preceding paragraphs are incorporated herein by reference.

24. Section 1303(a) of the RTKL requires appellants to serve "notice of actions commenced in accordance with section … 1302…" 65 P.S. § 67.1303(a).

25. To the extent that the Pennsylvania Rules of Appellate Procedure apply to this statutory appeal before this Honorable Court, Respondent believes that Petitioner has failed to serve the Attorney General's Office in accordance with Pa. R.A.P. 1514(c) and that, as a result, this appeal should be dismissed.

26. The RTKL authorizes an award of "attorney fees and costs of litigation" where an "the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law" or if an agency "otherwise acted in bad faith…" 65 P.S. §§ 67.1304(a)-(b); *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 243 A.3d 19, 34 (Pa. 2020) ("Section 1304(a)(1) 'permit[s] recovery of attorney fees when the receiving agency determination is reversed, and it deprived a requester of access to records in bad faith'").

27. By offering conclusory evidence in support of its legal arguments, the County's defenses "were not based on a reasonable interpretation of law" for purposes of awarding court costs and attorney fees under 65 P.S. § 67.1304(a)(2).

28. By arguing for the first time on appeal that no responsive records exist in Paragraphs 16-20 of its Petition for Review or that the Request is "unreasonable," the County has acted in bad faith for purposes of awarding court costs and attorney fees under 65 P.S. § 67.1304(a)(1). *See Office of the District Attorney of Philadelphia v. Bagwell*, 155 A.3d 1119, 1140–41 (Pa. Commw. 2017) ("An example of bad faith is a local agency's failure to comply with the mandate of Section 901 of the RTKL, which requires that a local agency make a good faith search for information responsive to a request and determination of whether that information is public"); *see*, *e.g.*, *Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections*, 243 A.3d 19 (Pa. 2020) (affirming an award of $118,458.37, in addition to a civil penalty of $1,500, where an agency did not conduct a good faith search for records).

29. By willfully failing to comply with the OOR's final order, Petitioner has deprived the Requester of access to public records determined by the OOR to be subject to public access, justifying the imposition of attorney fees and litigation costs.

30. The RTKL also permits a court to "impose a civil penalty of $1,500 if an agency denied access to a public record in bad faith," as well as a $500 per day penalty for not complying with a court order. 65 P.S. § 67.1305; *see Bagwell*, 155 A.3d at 1141 ("[T]he purpose of Section 1305 of the RTKL is not to remedy harm to a party but to penalize conduct of a local agency and to provide a deterrent in the form of a monetary penalty in order to prevent acts taken in bad faith in the future").

31. Here, by asserting an unreasonable interpretation of law, by failing to conduct a good faith search and review records, and by not producing records in as directed by the OOR's final

order, Petitioner has acted in bad faith, justifying the imposition of a penalty of $1,500 and a $500 per day, per record penalty until all records are produced.

WHEREFORE, Respondent respectfully asks this Honorable Court to:

(1) Deny or dismiss the Petition for Review with a direction to immediately require the County to produce all responsive records to Respondent as ordered by the OOR;

(2) Award attorney fees and costs to Respondent;

(3) Impose a civil penalty of $1,500.00 against the County;

(4) Impose a $500 per day, per record penalty against the County for each day that records are not produced; and

(5) Grant Respondent such other relief as is just and appropriate.

Dated: July 18, 2022

Respectfully Submitted,

/s/ J. Chadwick Schnee

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VERIFICATION

I, Megan Brock, hereby verify that the facts contained in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: _____ _____

Megan Brock

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COUNTY OF BUCKS, 55 East Court Street Doylestown, PA 18901 Petitioner,	:	IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
vs.	:	CIVIL ACTION – LAW
JAMIE WALKER, Respondent.	:	No. 2022-02630

CERTIFICATE OF SERVICE

I hereby certify that this 18th day of July, 2022, I have served the attached Answer and New Matter to the persons listed below via First Class U.S. Mail:

Daniel D. Grieser, Esq.
Bucks County
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Doylestown, PA 18901
Attorney for Petitioner

/s/ J. Chadwick Schnee
J. Chadwick Schnee (PA 306907)