



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF:	:	
	:	
SEAN DONOHUE,	:	
Complainant	:	
v.	:	Docket No.: AP 2009-0077
	:	
LUZERNE COUNTY,	:	
Respondent	:	

INTRODUCTION

Mr. Sean Donohue filed two right-to-know requests with Luzerne County (“the County”), pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.* He sought copies of emails involving the Luzerne/Schuylkill Workforce Investment Board Inc. (“LSWIB”), records of county funding or assistance and the building occupied by LSWIB, internal telephone and email directories for the County, names and telephone number of all County personnel and email addresses. The County provided some of the information requested, but denied requests for emails between the County and LSWIB as exempt and stated that it does not possess email addresses for LSWIB as it is a separate entity not subject to County control. Mr. Donohue timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth below in this Final Determination, the appeal is **granted in part and denied in part** and the County is directed to provide documents and information as set forth below.

FACTUAL BACKGROUND

On January 15, 2009, Mr. Donohue sent a RTK request to the County seeking the following:

1. All emails sent or received by the County that end with @lswib.org
2. All emails to and from County Commissioners that mention LSWIB for 2008 and 2009;
3. All emails between the County and LSWIB for 2008 and 2009;
4. Records that disclose County funding or assistance to LSWIB; and
5. Records that disclose County payment or ownership of the building LSWIB occupies.

Sandra Zurek, Right-to-Know Officer for the County responded on January 26, 2009. Request numbers 1, 2 and 3 (see above) were denied as exempt pursuant to the RTKL, section 67.708(b)(10)(i)(a) “in that the information relates to internal predecisional deliberations and the information requested in items 1 and 3 is also denied to the extent it is subject to Attorney-Client privilege. Items 4 and 5 cannot be provided due to the non-existence of the requested information.”

On January 16, Mr. Donohue sent a RTK request to the County seeking the following (numbers have been changed for purposes of this appeal)

6. A complete copy of the internal telephone and email directory for Luzerne County including names and telephone numbers of all County personnel and all email addresses that end in “@luzernecounty.org.”
7. If all email accounts ending in “@lswib.org” are maintained on a server owned by Luzerne County, all addresses ending that way.

Ms. Zurek responded to this request on January 26, 2009. All of the information in number 6 was granted and provided at no charge. With respect to number 7, she stated that those records “are not under the control of Luzerne County. Luzerne Schuylkill Workforce Investment Board is a non-profit entity over which Luzerne County has no direct control.”

Mr. Donohue timely appealed both the denial of January 26, 2009 and the partial denial of the same date. He argues that LSWIB is government-funded, that its employees use email addresses that end in “@luzernecounty.org” and that “the claim by Luzerne County that it does not have control over the email communications of the L/SWIB are false.”

On March 9, 2009, the Office of Open Records called Ms. Zurek to see if the County intended to supplement the record regarding the facts alleged by Mr. Donohue in his appeal and the exemptions claimed by the County. On March 10, Vito DeLuca, Esquire, Solicitor for the County, left a message at the Office of Open Records stating that the County did not plan to provide any additional information and that the reasons for denial were included in the County’s responses to Mr. Donohue’s requests.

LEGAL ANALYSIS

Pursuant to section 67.503(a), the OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). Luzerne County is a local agency subject to the RTKL, 65 P.S. §67.302.

The RTKL defines a “record” as follows: “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,” 65 P.S. §67.102.

The RTKL defines a “public record” as follows: “A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege,” 65 P.S. §67.102.

Section 67.708 of the RTKL clearly states that the burden of proof rests with the public body to demonstrate that the record is exempt. In pertinent part, section 67.708 states:

(a) Burden of proof. —

(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.

Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8th ed.). *See also* Commonwealth v. Williams, 615 A.2d 716 (PA. 1992).

The County did not meet its burden of proving that items 1-3 (see above) are exempt pursuant to the RTKL or subject to attorney/client privilege. Mr. Donohue did not contest the County's assertion that numbers 4 and 5 do not exist, which leaves number 7, Mr. Donohue's request for all emails that end in @lswib.org. According to its website, LSWIB is "a private non-profit corporation" serving Luzerne and Schuylkill Counties. The Pennsylvania Corporation Bureau website lists LSWIB as a non-profit corporation. As such, the County's statement that it does not have the requested information due to the independence of LSWIB is credible. As a separate entity, the County would not have control over the LSWIB's records in order to release them. Mr. Donahue has a separate appeal pending with the Office of Open Records related to a RTK request submitted to LSWIB for its records.

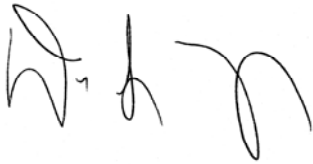
CONCLUSION

For the foregoing reasons, this appeal is **granted in part and denied in part** as follows. Luzerne County is directed to provide the information denied as exempt in numbers 1-3 above. Numbers 4 and 5 were not appealed and number 6 was granted. The County is not required to provide the information requested in number 7 (see factual background above).

The parties are advised that this is a final determination. Within thirty (30) days of the mailing date of this determination, it may be appealed to the Luzerne County Court of Common Pleas. In the event of an appeal for judicial review, all parties must be served with notice of the appeal. The Office of Open Records shall be served notice in accordance with Section 1301 and have an opportunity to respond to any appeal for judicial review.

The parties are advised that this Final Determination will be posted on the Office of Open Records website at: <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED March 13, 2009

A handwritten signature in black ink, appearing to read 'Dena Lefkowitz', written in a cursive style.

APPEALS OFFICER
DENA LEFKOWITZ, Esq.