



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
CLAUDE CARTER,	:	
Complainant	:	
	:	
v.	:	Docket No.: AP 2009-0175
	:	
PHILADELPHIA SHERIFF’S OFFICE	:	
Respondent	:	

INTRODUCTION

Claude Carter (“Mr. Carter”) filed a right-to-know request pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101 *et. seq.* with the Philadelphia Sheriff’s Office (“the Sheriff’s Office”), seeking records containing excess proceeds resulting from mortgage and tax foreclosure sales conducted by the Sheriff’s Office. The Sheriff’s Office denied the request. Mr. Carter timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted** and the Sheriff’s Office is required to release the records requested.

FACTUAL BACKGROUND

On January 21, 2009, Mr. Carter filed a right-to know request with the Sheriff’s Office requesting records and information concerning excess proceeds resulting from mortgage and tax foreclosure sales conducted by the Sheriff’s Office. Specifically, he

stated that the information should include, but not necessarily only include, the amount of excess proceeds, street address of the foreclosed property, book-writ number and property owners. Mr. Carter also indicated that the Sheriff's Office could supply records and data fields not specifically requested if it made the task easier.

In a letter dated January 28, 2009, the Sheriff's Office stated that it would respond within the statutory period. On February 25, 2009, the Sheriff's Office denied Carter's request. In its February 25, 2009 denial, Edward D. Chew ("Mr. Chew") Open Records Officer for the Sheriff's Office, stated that the Sheriff's Sales do not always generate excess proceeds. Real estate parcels sold at Sheriff sale are identified by Book and Writ numbers. Book and Writ Numbers do not distinguish sales that did nor did not generate excess proceeds.

On any sale involving competitive bidding, the Sheriff orders a Distribution/Title Insurance Policy for each real estate. Distribution Policies are identified by the Book and Writ number. Distribution Policies do not distinguish sales that did or did not generate excess proceeds. Each Distribution Policy must be examined to determine whether the sale generated excess proceeds. The Sheriff does not separate Distribution Policies for sales that generate excess proceeds nor is a list of sales that generate excess proceeds maintained.

In disposing of any excess proceeds, the excess is mailed to the person entitled to the proceeds. If no information is available for the entitled person, a voucher is generated, the excess proceeds are deposited in an unclaimed monies account, and the transfer is noted in the individual file for the Book and Writ. Vouchers are also used to generate the preparation of checks to transfer funds for reasons other than to deposit

funds into an unclaimed funds account. The vouchers are stored in chronological order by date. Checks are not separated based on what account they are deposited in and a list of checks used to transfer funds to unclaimed funds account is not maintained. Where there is a request for payment of excess sale proceeds, the Sheriff's Office examines the individual file for the Book and Writ to determine whether there are such funds and their location.

At appropriate times, all five year old Distribution Policies are manually examined to determine if a Policy itemizes excess sale proceeds. Where a Distribution Policy items excess sales, the file for the Book and Writ is examined to determine whether there are such funds. If the individual file shows that the funds remained unclaimed, a voucher is generated and the funds are transferred to the State. The transfer is then noted in the individual file for the Book and Writ.

In defense of the denial, Mr. Chew stated that the Sheriff's Office does not maintain centralized records for Books and Writs containing excess sale proceeds and/or unclaimed funds and associated vouchers and checks. Mr. Chew argued that to satisfy Mr. Carter's request the Office would be required to create a compilation and that it is not required to do so under the RTKL.

The Sheriff's Office did not inform Mr. Carter of his right to appeal its decision. Under the RTKL, if the agency denies or partially denies a request for records, § 903 of the RTKL provides in relevant part:

- . . . the denial shall be issued in writing and shall include:
- (1) A description of the record requested.
- (2) The specific reasons for the denial, including a citation of supporting legal authority.

(3) The typed or printed name, title, business address, business telephone number and signature of the open-records officer on whose authority the denial is issued.

(4) Date of the response.

(5) **The procedure to appeal the denial of access under this act.**

65 P.S. §67.903 (emphasis added).

Regardless, on March 12, 2009, Mr. Carter filed a timely appeal with the OOR.

Mr. Carter subsequently granted the OOR additional time to issue a Final Determination.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies.

See 65 P.S. §67.503(a). The Office is a local agency subject to the RTKL. See 65 P.S. § 67.302.

Section 102 of the RTKL, defines the term “record” as:

“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.”

The RTKL provides further clarity in defining a “public record” as:

“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 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 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. West 2004). See also Commonwealth v. Williams, 615 A.2d 716 (PA. 1992).

The Sheriff's Office cites § 705 of the RTKL as support for its denial of access to the records. Regarding creation and compilation of records, the RTKL provides as follows: "When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." See 65 P.S. §67.705.

The Sheriff's Office contends that the records requested cannot be provided because it does not maintain centralized records and would need to manually sort through the records and create a compilation. However, the Sheriff's Office concedes that the information regarding the excess proceeds is maintained in the individual's files of the Book and Writ and Distribution Policies. The Sheriff's Office is correct that the RTKL does not require the creation of a compilation of records, but it does provide for access to information which the Sheriff's Office concedes is available among a large number of records. This requires record retrieval and extraction, **not** the compilation of information and creation of a new record. Retrieval while difficult and potentially burdensome is possible and required under the RTKL. See §706.

While the Sheriff's Office is not required to create or compile a unique list or spreadsheet of the sales including excess proceeds, the Sheriff's Office is required to produce copies of any records that contain the information relating to excess proceeds

that Mr. Carter requested, even if this means manually reviewing a large number of files to copy and/or print those records. An agency may not deny access to records merely because retrieval requires searching for or extracting those records from a large or voluminous source.

The OOR recognizes the potential burden, and sometimes significant burden, these types of voluminous requests may place upon an agency already struggling with heavy workloads. However, under this law, because a request is voluminous does not relieve the agency of its requirements to presume the records are open and available and respond in accordance with the Act. Moreover, the Legislature considered this balancing of a requestor's rights under the RTKL with an agency's ability to comply with the RTKL and determined that the law had a presumption of openness.

As a practical matter, in cases involving voluminous records, the OOR encourages both parties to discuss and arrange mutually acceptable options that will allow the requestor to obtain the documents to which they are entitled while avoiding placing an undue burden on the agency, which, particularly in these difficult economic times, have to perform more functions with less resources.

Here, the Sheriff's Office concedes that it has records responsive to Mr. Carter's request in its possession. The Sheriff's Office does not claim that Mr. Carter's original request lacks specificity or that the Sheriff's Office is unclear as to the records or information requested. The Sheriff's Office has not demonstrated or even claimed that the records are subject to any other exemptions under the RTKL. Further, the Sheriff's Office manually reviews the files from time to time to extract the information to determine what funds need to be sent to the state. It follows that such a review can be

conducted here to obtain the information that Mr. Carter has requested. As noted above, while retrieval and reproduction of these records may prove time consuming, costly, and/or difficult, the current RTKL does not create any exception for such a circumstance. As such, the Sheriff's Office has failed to meet its burden under the RTKL.

Therefore, the appeal is **granted** and the Sheriff's Office is required to provide Mr. Carter with copies of the requested records relating to the excess proceeds from Sheriff's sales.

CONCLUSION

For the foregoing reasons, Mr. Carter's appeal is **granted**. The Sheriff's Office is directed to provide Mr. Carter with copies of the requested records containing excess proceeds resulting from mortgage and tax foreclosure sales conducted by the Sheriff's Office. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Court of Common Pleas, Philadelphia County. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED April 23, 2009



A handwritten signature in cursive script, appearing to read "Nath J. Byerly".

APPEALS OFFICER
NATHANAEL J. BYERLY, Esq.