



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ED DEMSKI,	:	
Complainant	:	
	:	Docket No.: AP 2009-1065
v.	:	
	:	
	:	
PETERS CREEK SANITARY	:	
AUTHORITY,	:	
Respondent	:	

INTRODUCTION

Mr. Ed Demski (the “Requester”) filed a right-to-know request with the Peters Creek Sanitary Authority (the “Authority”) pursuant to the Right-to-Know Law, 65 P.S. § 67.101, *et. seq.* (“the RTKL”), seeking a copy of an audio cassette tape of the Authority’s November 2009 meeting. The Authority denied the request stating that the Authority did not consider the tapes an official public record. The Requester filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, Requester’s appeal is **granted** and the Authority is required to take further action.

FACTUAL BACKGROUND

On November 20, 2009, Requester filed a right to know request with the Authority seeking a copy of the audio cassette recording of the November 2009 Authority meeting. Richard Kovach, Authority Manager, denied the request pursuant to Section 12(B)(14) of the Authority's Resolution 2008-03 which he states establishes the Authority's open records policy. The Authority asserted that "Draft minutes of any meeting of Peters Creek Sanitary Authority; minutes of an executive session and any record of discussions held in executive sessions" are not public records. On December 2, 2009, the Requester filed a timely appeal to the OOR.

In support of his appeal, Requester argues that he is a prior Board member and that it was his understanding that the current Board disapproved of the prior Board practice of destroying the tapes and considered the recordings public. The Authority responded to the appeal by advising the Requester that the November minutes had been approved during the December 14, 2009 regular meeting. It enclosed a copy of the minutes and requested payment of \$1.00.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). The Authority is a local agency subject to the RTKL. See 65 P.S. § 67.302. There is no dispute that the recording is a record of the Authority. The RTKL defines 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.

Agencies bear the burden of proving the applicability of exceptions. Specifically, § 708 in pertinent part 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.

65. P.S. § 67.708.

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). Merely citing the regulation of a local agency within the law does not meet its burden. Further there is no evidence in the record that the regulation would even apply as the agency does not advise as to whether the November meeting was an executive session. By the agencies response it appears that the meeting was not an executive session as it did provide the minutes of the meeting. Therefore, the agency is required to provide a copy of the audio tape of the meeting or an affidavit as to its nonexistence.

CONCLUSION

For the foregoing reasons, this appeal is **granted**, and the Authority is directed to release the record requested. The parties are advised that this is a Final Determination and is binding on the parties. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Washington County Court of Common Pleas. 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.
§67.1302.

| FINAL DETERMINATION ISSUED and mailed: January 4, 2010

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

APPEALS OFFICER
AUDREY BUGLIONE, Esq.