



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF:**

**JOSEPH CAP,  
Complainant**

**v.**

**LEHIGH COUNTY,  
Respondent**

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**Docket No.: AP 2010-0701**

### **INTRODUCTION**

Mr. Joseph Cap (the “Requester”) filed a right-to-know request with Lehigh County (the “County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §67.101, *et. seq*, seeking a Windows Media Player playable DVD. The County denied the request stating the record does not exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied** and the County is not required to take further action.

### **FACTUAL BACKGROUND**

On July 16, 2010, the Requester submitted a right-to-know request with the County stating as follows: “The request is for Thursday, July 15, 2010, from 9:30 a.m. to 12:00 p.m. of a video clip on a DVD, playable on a Windows Medial Player application, recorded by the interior reception area camera of individuals entering and existing [sic] the premises at Magistrate District Court 31-1-04...” (“Request”). On July 23, 2010 the

County denied the Request stating the record does not exist. On July 3, 2010 the Requester appealed to the OOR challenging the County's assertion that the record does not exist. On August 6, 2010 the County provided the Affidavit signed under penalty of perjury by Denise M. Halal, Executive Aide for the Magisterial District Judge Administrator of Lehigh County, stating as follows:

1. "I was unable to record the events that took place on July 15, 2010 or any other time period between May 3, 2010 and July 21, 2010."
2. "I determined that the security system at District Court 31-1-04 had not been recording at all since May 3, 2010."
3. "It did not record because there may have been a disc problem, a power surge or some similar event that changed the 'storage setting' on the system at that location from ENABLED to DISABLED. According to Bosch, the 'storage setting' was set to 'no', which disabled the recording function."
4. "There is no way to obtain any events between May 3, 2010 and July 21, 2010 at 8:32 a.m. when I changed the 'storage setting' to 'yes' because the recording function was not operating."

On August 10, 2010 the Requester responded that the County failed to provide sufficient evidence that the video was never created.

### **LEGAL ANALYSIS**

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." *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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." 65 P.S. §67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §§67.102 and 301. Records in possession of a Commonwealth or 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. 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 clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a)(1) states: “[t]he 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 “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*, 567 Pa. 272, 786 A.2d 961 (2001).

The County does not contend that the Request does not seek a record of the County. It asserts that the requested record does not exist. An agency cannot provide a record that does not exist. Through the Affidavit of Denise Halal the County has provided sufficient evidence to find that the requested video footage does not exist because it was never created.

### CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Court of

Common Pleas in Lehigh 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 §67.1302. 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 AND MAILED:** August 26, 2010

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

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AUDREY BUGLIONE, ESQ.  
Appeals Officer

Sent to: Joseph Cap, John Ashcraft, III