



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**KARL KLOEPFER,**  
**Requester**

**v.**

**RUTLEDGE BOROUGH,**  
**Respondent**

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**Docket No.: AP 2017-1600**

### **INTRODUCTION**

Karl Kloepfer (“Requester”) submitted a request (“Request”) to Rutledge Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the Borough’s final and draft meeting minutes. The Borough partially denied the Request for draft meeting minutes and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Borough is required to take further action.

### **FACTUAL BACKGROUND**

On August 16, 2017, the Request was filed, seeking “...Borough Council meeting minutes or draft meeting minutes for the following dates: March 5, March 27, April 3, April 24, June 5, July 3, July 24. Right to know law section 708(b)(21).” On August 22, 2017, the Borough partially granted the Request, providing the finalized meeting minutes, but withholding draft meeting minutes.

On August 24, 2017, the Requester appealed to the OOR, challenging the Borough's denial of the Request for draft meeting minutes.<sup>1</sup> The OOR invited the parties to supplement the record, and directed the Borough to notify third parties of their ability to participate in the appeal. 65 P.S. § 67.1101(c). Neither party supplemented the record.

On September 18, 2017, the OOR sent correspondence to the Borough to determine the dates of the Borough's next regularly scheduled meeting after the July 24, 2017 (the last meeting noted in the Request). The Borough never responded.

### LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law 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. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

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 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

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<sup>1</sup> On appeal, the Requester limits his challenge to the denial of the draft meeting minutes. Thus, the Requester has waived any objections regarding the sufficiency of the Borough's response for the final version of the meeting minutes. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Borough is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901.

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(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(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The Requester’s appeal challenges the Borough’s denial of the draft meeting minutes. Section 708(b)(21) of the RTKL states, “[d]raft meeting minutes of any meeting of an agency until the next regularly scheduled meeting of the agency.” 65 P.S. § 67.708(b)(21)(i). Pursuant to Section 708(b)(21), draft meeting minutes may be withheld from public access until the next

regularly scheduled meeting of the agency. *Id.*; *Moss v. Londonderry Twp.*, OOR Dkt. AP 2009-1088, 2010 PA O.O.R.D. LEXIS 50. Regardless of whether or not the Borough takes action on the minutes at its next regularly scheduled meeting, they will cease to be draft minutes at that time pursuant to Section 708(b)(21). In some cases, both draft and adopted versions of the meeting minutes may exist even after an agency has adopted the final version of the minutes. If the agency retains both the draft and final meeting minutes, both versions would be subject to access, as the RTKL does not expressly exclude draft meeting minutes from public access following the next regularly scheduled meeting of an agency is held. The RTKL does contain a section that excludes certain types of draft records, such as “the draft of a bill, resolution, stated of policy, management directive, ordinance or amendment thereto prepared by or for an agency.” 65 P.S. § 67.708(b)(9). As draft meeting minutes are not listed, they are not expressly excluded under the RTKL.

In this matter, the Request sought the draft minutes of the following meetings: March 5, March 27, April 3, April 24, June 5, July 3 and July 24. Although the Borough has not submitted any evidence of the regularly scheduled meeting held after July 24, to the extent that the draft minutes exist for the March 5, March 27, April 3, April 24, June 5, July 3 meetings they are public records subject to access since regularly scheduled meetings have occurred, even if final adopted minutes also exist. As for July 24<sup>th</sup> meeting, those draft minutes would also be subject to access as long as the next regularly scheduled meeting was held prior to the date of the Request, August 16, 2017.<sup>2</sup>

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<sup>2</sup> A request can only seek records that are in existence as of the date of the request; agencies are not required to provide records that do not exist at the time of the Request. *See Terensky v. City of Monessen*, OOR Dkt. AP 2013-0772, 2013 PA O.O.R.D. LEXIS 349.

## CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the Borough is required to provide draft meeting minutes sought in the Request. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Delaware County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>3</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 22, 2017**

/s/ Jill S. Wolfe

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent to: Karl Kloepfer (via e-mail only);  
Dawn Bascelli (via e-mail only)

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<sup>3</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).