

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Germantown Cab Company, :
Petitioner :
 :
v. : No. 160 C.D. 2012
 : Submitted: October 12, 2012
Philadelphia Parking Authority, :
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: June 27, 2013

Germantown Cab Company (Germantown Cab) petitions for review of a final decision of the Office of Open Records (Open Records) dismissing its appeal of the Philadelphia Parking Authority's response to its request for public records. Open Records dismissed the appeal on grounds of mootness because it found that the Parking Authority had provided the requested records. Germantown Cab contends that the records provided were inadequate, but it was denied the opportunity to prove this point because Open Records did not give Germantown Cab an evidentiary hearing. We affirm.

Germantown Cab submitted three requests for records to the Parking Authority on October 14, 2011, pursuant to the Right-to-Know Law.¹ In each case, Open Records denied Germantown Cab's appeal of the Parking Authority's

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

response, prompting Germantown Cab to petition for our review. In addition to the instant appeal, Germantown Cab has petitioned for review of Open Records' final decision on the other two requests. *See Germantown Cab Company v. Philadelphia Parking Authority* (Pa. Cmwlth. 159 C.D. 2012, filed June 27, 2013), and *Germantown Cab Company v. Philadelphia Parking Authority* (Pa. Cmwlth. 161 C.D. 2012, filed June 27, 2013).

At issue in this appeal is Germantown Cab's October 14, 2011, request for public records that stated as follows:

1. Any records pertaining to issues or questions that have been submitted to the City of the First Class Taxicab and Limousine Advisory Committee by the Philadelphia Parking Authority.
2. Any records responding or commenting to those issues or questions by the City of the First Class Taxicab and Limousine Advisory Committee.
3. Any records of suggestions, proposals or comments made by the Philadelphia Parking Authority to the City of the First Class Taxicab and Limousine Advisory Committee.
4. Any records of suggestions, proposals or comments made by the City of the First Class Taxicab and Limousine Advisory Committee to the Philadelphia Parking Authority.

Reproduced Record at 143 (R.R. ____). The Parking Authority responded to this request by providing a summary of its 2008 proposed regulations; the comments on those proposed regulations offered by individual members of the First Class Taxicab and Limousine Advisory Committee; and a summary of those individual comments. R.R. 145-164.

Germantown Cab appealed to Open Records, asserting that the records provided by the Parking Authority were "either fabricated, incorrect,

incomplete and/or inconsistent” with other statements made by the Parking Authority. R.R. 10. Germantown Cab noted that the Parking Authority’s proposed 2011 regulations and comments had not been included in the records provided to Germantown Cab under the above-quoted request.

Open Records invited the parties to supplement the record, and neither party requested a hearing. Germantown Cab supplemented the record with a copy of a brief the Parking Authority had filed in *Bucks County Services, Inc. v. Philadelphia Parking Authority*, __ A.3d __ (Pa. Cmwlth., No. 584 M.D. 2011, filed June 10, 2013), a matter then pending before this Court. Germantown Cab contended that statements in that brief showed that the Parking Authority’s response to the instant request was incomplete or fabricated. The Parking Authority supplemented the record with a letter brief; a notarized sworn affidavit from Linda J. Miller, Open Records Officer for the Parking Authority; and copies of emails sent to Advisory Committee members about the Parking Authority’s 2011 proposed regulations. The letter brief explained that the Parking Authority’s staff did not understand Germantown Cab’s October 14, 2011, request to include the 2011 proposed regulations to be “issues or questions submitted to the [Advisory] Committee.” R.R. 23-24. However, because Germantown Cab’s appeal to Open Records disclosed this broader scope of its request, the Parking Authority provided these additional communications about the proposed 2011 regulations “to avoid the delay that would be associated with filing a new request for [these records which] are clearly public records.” R.R. 24. The Parking Authority did not include the text of the proposed 2011 regulations because they were available through the *Pennsylvania Bulletin*. Miller’s affidavit confirmed that all responsive records had been provided.

Open Records dismissed Germantown Cab’s appeal as moot. Based on Miller’s affidavit and the supplemental responsive records, Open Records found the Parking Authority had responded to Germantown Cab’s record request. Germantown Cab then petitioned for this Court’s review.

On appeal,² Germantown Cab presents two issues for our review. First, it contends that Open Records erred because it issued a final determination that did not resolve whether the Parking Authority’s first response was valid under the Right-to-Know Law or allow Germantown Cab to comment on the Parking Authority’s supplemental responses. Second, it contends that Open Records erred in relying on the affidavit of the Parking Authority’s Open Records Officer in light of the fact that statements in the affidavit are belied by other records given to Germantown Cab by the Parking Authority.

The Right-to-Know Law promotes “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*, 990 A.2d at 824. To advance this goal, the Right-to-Know Law requires agencies to disclose public records. 65 P.S. §67.305(a). Section 305(a) of the Right-to-Know Law provides that “[a] record in the possession of a Commonwealth agency . . . shall be presumed to be a public record.” 65 P.S. §67.305(a). The statute then provides that upon “receipt of a written request for access to a record, an agency shall make

² This Court’s scope of review in appeals from the Office of Open Records is *de novo*. *Bowling v. Office of Open Records*, 990 A.2d 813, 819-20 (Pa. Cmwlth. 2010), *petition for allowance of appeal granted*, 609 Pa. 265, 15 A.3d 427 (2011); Section 1301(a) of the Right-to-Know Law, 65 P.S. §67.1301(a) (“The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision.”). Additionally, this Court may substitute its own findings of fact for that of the agency. *Bowling*, 990 A.2d at 818.

a good faith effort to determine if the record requested is a public record . . . and whether the agency has possession . . . of the identified record” Section 901 of the Right-to-Know Law, 65 P.S. §67.901. The burden of proving that an agency does not have a record is on the agency. *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011). A notarized affidavit is sufficient evidence that a record does not exist. *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010). With these principles in mind, we turn to Germantown Cab’s arguments.

In its first issue, Germantown Cab contends that the records it received from the Parking Authority in this case cannot be reconciled with records that it received from the Parking Authority in other requests. Accordingly, the Parking Authority’s response was not valid under the Right-to-Know Law.

The instant record request has its genesis in an earlier request made by Germantown Cab in July of 2011 for information about the identity of the First Class Taxicab and Limousine Advisory Committee members, their terms and meeting dates.³ The Parking Authority provided Germantown Cab two lists of

³ On July 22, 2011, Germantown Cab made the following request:

1. List of members appointed to the “City of the First Class Taxicab and Limousine Advisory Committee” from date established to present.

Please include:

2. Each [appointee’s] terms
3. Date member was appointed and if no longer on the committee please indicate when term had ended
4. By whom the member was appointed. If member was appointed by Chairman’s designee please indicate who that designee was.
5. Which position within the committee the member statutorily fulfilled.
6. Whether the member had/has been designated an officer and if so what type.
7. Dates any meetings were held
8. Dates of any known future meetings

Advisory Committee members but did not provide documents on future meetings. Germantown Cab appealed to Open Records, which concluded that the Parking Authority could not be required to create a document about future meetings in response to a request. Open Records noted that Germantown Cab could seek meeting information in additional requests, and that led to the instant request.

With respect to the instant request under appeal here, Germantown Cab contends that the Parking Authority did not provide documents relating to the proposed 2011 regulations. It was not until after Germantown Cab filed an appeal to Open Records in this case that the Parking Authority provided the records related to the 2011 proposed regulations. According to Germantown Cab, this raises a significant issue regarding the Parking Authority's good faith, which Open Records did not address.

The Parking Authority responds that the record supports Open Records' finding that all responsive records were provided to Germantown Cab. There is no discrepancy between the Parking Authority's responses to Germantown Cab, which has submitted four different requests and received four different sets of records. Each response is consistent with what was requested and with the records provided under the other requests. Even if there were discrepancies, Open Records does not have a statutory mandate to resolve what are, in effect, discovery disputes. Much of Germantown Cab's brief is spent attempting to litigate the *Bucks County* case, not its Right-to-Know appeal at issue here.

Germantown Cab's argument that the Parking Authority acted in bad faith by not disclosing the communications and correspondence regarding the proposed 2011 regulations lacks merit. Section 901 of the Right-to-Know Law

requires an agency to make a “good faith effort” at determining whether a record is public, whether it has the record, and respond promptly to the request. 65 P.S. §67.901. Section 901 states:

Upon receipt of a written request for access to a record, an agency shall make a *good faith effort* to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.

65 P.S. §67.901 (emphasis added). Here, in response to Germantown Cab’s appeal to Open Records, the Parking Authority provided the very records that Germantown Cab complained had been missing from the initial response. Additionally, Germantown Cab argues it did not have an opportunity to respond to the Parking Authority’s submissions to Open Records, which required an evidentiary hearing. However, Germantown Cab supplemented the record with its submission of the Parking Authority’s brief from the *Bucks County* case. Under the Right-to-Know Law, the Open Records hearing officer decides whether to hold an evidentiary hearing, and that decision is not appealable. 65 P.S. §67.1102(a)(2).⁴ Accordingly, there is no error to correct.

In its second issue, Germantown Cab argues that Open Records erred in relying on the affidavit of Miller when other records received by Germantown Cab call into question Miller’s assertions. The Parking Authority responds that it is well-settled that an affidavit of an open records officer is sufficient evidence to

⁴ Section 1102(a)(2) of the Right-to-Know Law states, in relevant part, that “The appeals officer may hold a hearing. A decision to hold or not hold a hearing is not appealable.” 65 P.S. §67.1102(a)(2).

support a finding by Open Records that all responsive public records have been provided. We agree.

The Parking Authority provided the notarized affidavit of Miller to establish the Parking Authority's understanding of the October 14, 2011, record request, and to explain that, based on the more specific description of requested records in Germantown Cab's appeal, the Parking Authority had provided all responsive records. The notarized affidavit of an agency's open records officer is sufficient evidence to show that all responsive records have been provided. *Moore*, 992 A.2d at 909. As such, Open Records properly dismissed Germantown Cab's appeal as moot.

For the above-stated reasons, we affirm.

MARY HANNAH LEAVITT, Judge

