



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>JOHN YAKIM,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2016-1170</b>
	:	
<b>MUNICIPALITY OF MONROEVILLE,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

John Yakim (“Requester”) submitted a request (“Request”) to the Municipality of Monroeville (“Municipality”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking audio and video recordings of specific committee meetings. The Municipality partially granted the Request by inviting the Requester to listen to the audio records and offering to make copies of the audio records for a fee comprised of duplication and labor costs. 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 Municipality is required to take further action as directed.

**FACTUAL BACKGROUND**

On June 2, 2016, the Request was filed, seeking “[a]ll audio and video recordings of Home Rule Charter meetings since the creation of the committee through May 31, 2016.” On

June 9, 2016, the Municipality invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On July 8, 2016, the Municipality partially granted the Request, offering to permit the Requester to listen to the audio recordings. Additionally, the Municipality explained that if the Requester was seeking copies of the audio records, it would charge the Requester for duplication and labor costs. Lastly, the Municipality claimed that there are no video recordings of the Home Rule Charter meetings.

On July 8, 2016, the Requester appealed to the OOR, challenging the denial of the video records as well as the duplication fee. With respect to the fee challenge, the Requester argues that the Municipality is prohibited from charging labor costs. The OOR invited both parties to supplement the record and directed the Municipality to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 11, 2016, the Requester made a submission in support of his appeal, again challenging the Municipality's assertion that no video records exist. The Municipality did not submit any evidence or argument.

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

The Municipality 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. 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) 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. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

**1. The Municipality is allowed to charge the Requester actual costs for the duplication of audio records, but not labor expenses.**

In its response, the Municipality stated that the cost of duplicating the audio records would include both material and labor costs. Section 1307(b) of the RTKL states that “[f]ees for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication shall be established ... by the Office of Open Records, for Commonwealth agencies and local agencies.” 65 P.S. § 67.1307(b)(i). Pursuant to Section 1307(b)(i), the OOR established a fee structure, which is available on the OOR’s website at <http://openrecords.pa.gov/RTKL/FeeStructure.cfm>.<sup>1</sup> The records at issue are audio records, which the fee structure categorizes as “specialized documents” for which an agency is permitted to charge the actual costs of materials used. However, an agency is not permitted to charge labor costs for duplicating records. *State Employees' Retirement System v. Office of Open Records*, 10 A.3d 358, 363 (Pa. Commw. Ct. 2010) (“[T]he RTKL does not expressly authorize the charging of labor costs”). Consequently, the Municipality is limited to charging the actual cost of materials used in providing copies of the audio records and is not entitled to recover labor expenses incurred while duplicating the audio records.

**2. The Municipality did not meet its burden of proof that the video records do not exist.**

In the present case, the Municipality denied access to the video records, stating that it does not record the Home Rule Charter meetings. On appeal, however, the Municipality did not

---

<sup>1</sup> Retrieved on August 5, 2016.

make a submission in support of its denial. Under the RTKL, the Municipality has the burden of proving that the records do not exist. See *Hodges v. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). Based on the Municipality's failure to provide any evidence supporting its claim, the Municipality did not meet its burden of proof. See 65 P.S. § 67.305.

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records sought in the Request. Absent an agency providing a sufficient evidentiary basis that no records exist, the OOR will order disclosure of responsive public records. See generally *Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the Municipality is required to provide, within thirty days, copies of responsive audio records and video records, if any, upon payment of actual costs as outlined above. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Allegheny 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 according to court rules 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>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: August 5, 2016**

---

<sup>2</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

/s/ Bina Singh

---

APPEALS OFFICER  
BINA SINGH

Sent to: John Yakim (via email only);  
Joe Sedlak (via e-mail only)