



FINAL DETERMINATION

IN THE MATTER OF

**JOSHUA TWERSKY,
Requester**

v.

**CONCORD TOWNSHIP,
Respondent**

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Docket No: AP 2022-1626

INTRODUCTION

Joshua Twersky (“Requester”) submitted a request (“Request”) to Concord Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various Township financial records for specific years. The Township partially denied the Request by granting in-person inspection of records for the purpose of conserving Township resources and arguing that because certain records may exempt under the RTKL, several restrictions will be placed on what devices may be brought to the inspection by the Requester. 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 Township is required to take additional action as directed.

FACTUAL BACKGROUND

On June 7, 2022, the Request was filed, seeking electronic copies of:

2) Sewer Dept. Financial Statements (bank statements, bank reconciliations, general ledgers, and check registers) – Fiscal years 2011-2014 and whatever else is slated to be destroyed under resolution 28-2022.¹

3) Sewer Dept. Accounts Payable record – 2012, 2013, & 2014 and whatever else is slated to be destroyed under resolution 28-2022.

4) Sewer Dept. Billing and receipt registers – Fiscal Years 2012, 2013, & 2014 and whatever else is slated to be destroyed under resolution 28-2022.

5) Financial & Insurance documents from the Sewer Authority Prior to 2012 and whatever else is slated to be destroyed under resolution 28-2022.²

On June 14, 2022, the Township invoked a thirty-day extension to respond to the Request. 65 P.S.

§ 67.902(b). On June 30, 2022, the Township partially denied the Request. More specifically, the

Township stated, the following:

The records you have requested have been set aside for your in-person review. In an effort to preserve Township resources (i.e., the costs of legal review, copying and redaction), the records requested include certain documents which you may not be entitled to under the RTK[L]. As such, during your review of these documents, you will not be allowed to have a phone, any recording devices or writing supplies on your person. Additionally, you will be accompanied by a representative by the Township during your review. Any records you wish to have duplicated will be copied and redacted if necessary and provided to you upon receipt of customary fees. Please let us know when you would like to schedule time to review the documents.

On July 11, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. Also, on July 11, 2022, the OOR issued an Order notifying the Requester that the appeal was deficient because it failed to include a complete copy of the Request and the Township's final response.

¹ Resolution No. 28-2022 "Disposition of Township Records Per The Municipal Records Manual." See https://cms9files.revize.com/concordpa/document_center/Government/Resolutions/2022/Resolution%20No%2028-2022%20Disposition%20of%20Records.pdf (last accessed September 13, 2022).

² By email dated September 15, 2022, the Requester confirmed that he received records in response to Item 1 of the Request, and he is not challenging Item 1 on appeal.

On July 14, 2022, the Requester provided a copy of the Request and the Township's final response. That same day, the OOR notified the parties that the deficiency was cured and invited both parties to supplement the record.³ 65 P.S. § 67.1101(c). The OOR also directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On July 29, 2022, the Township submitted the affidavit of Lisa Waldron, the Township's Open Records Officer, in support of the Township's position on appeal. The Township reiterates its final response to the Request and asserts that the Requester has not contacted the Township to schedule a time to inspect the records.

Also, on July 29, 2022, the Requester submitted an affidavit, made under penalty of perjury, in support of the appeal. The Requester asserts that nothing in the RTKL requires a requester to sort and review documents in order to permit the Township to make necessary redactions. The Requester also expresses his concern regarding whether he would be placed "in legal jeopardy if [he] were to view and[/]or read documents that should be excluded," which is why he has not scheduled a time for inspections. The Requester also expresses his concern that all of the records are slated for destruction, based on his understanding that the records will not be digitized.

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,

³ The Requester granted the OOR additional time to issue the Final Determination. See 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).")

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” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 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.* Here, neither party requested a hearing.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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 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)(1). 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)).

Section 502(b) of the RTKL sets forth the duties of an agency open records officer, upon the receipt of a request:

(b) FUNCTIONS.—

(1) The open-records officer shall receive requests submitted to the agency under this act, direct requests to other appropriate persons within the agency or to appropriate persons in another agency, track the agency's progress in responding to requests and issue interim and final responses under this act.

(2) Upon receiving a request for a public record, legislative record or financial record, the open-records officer shall do all of the following:

(i) Note the date of receipt on the written request.

(ii) Compute the day on which the five-day period under section 901 will expire and make a notation of that date on the written request.

(iii) Maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been fulfilled. If the request is denied, the written request shall be maintained for 30 days or, if an appeal is filed, until a final determination is issued under section 1101(b) or the appeal is deemed denied.

(iv) Create a file for the retention of the original request, a copy of the response, a record of written communications with the requester and a copy of other communications. This subparagraph shall only apply to Commonwealth agencies.

65 P.S. § 67.502(b). In addition, Section 903 provides, with respect to the issuance of a response, the following:

If an agency's response is a denial of a written request for access, whether in whole or in part, the denial shall be issued in writing and shall include:

(1) *A description of the record requested.*

(2) *The specific reasons for the denial, including a citation of supporting legal authority.*

- (3) The typed or printed name, title, business address, business telephone number and signature of the open-records officer on whose authority the denial is issued.
- (4) Date of the response.
- (5) The procedure to appeal the denial of access under this act.

65 P.S. § 67.903 (emphasis added).

In this matter, the Township’s evidence demonstrates that Ms. Waldron took steps to comply with Section 502(b), in that she affirms that the records were gathered and they comprise “approximately fifty (50) double size banker’s boxes.” However, based on a review of the Township’s final response, the Township has not fully complied with Section 903, because the response letter does not describe what responsive records have been identified and, more importantly, the denial does not list the grounds for denial. Rather, the Township admitted that the records “include certain documents which [the Requester] may not be entitled under the RTKL,” but invited the Requester to inspect the records and, upon determining what records the Requester chose for duplication, the Township would then determine if any records chosen needed to be redacted under the RTKL.

In *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, *an agency has the duty to review the record and assess their public nature under ... the RTKL.*

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020) (emphasis added).

Furthermore, “the RTKL does not allow an agency to delegate its disclosure duty or burden of proof to third parties.” *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 401 (Pa. 2021). In

McKelvey, the Supreme Court concluded that the Pennsylvania Department of Health did not fulfill its statutory duty to “independently evaluate and discern the validity of claimed exemptions to disclosure ... including those made by third parties” when the Department failed to review redactions made by third party applicants on the applications for medical marijuana licenses. *McKelvey*, 255 A.3d at 403-04. It is apparent from the record in this matter that the Township is improperly delegating its review and response duties to a third party, specifically the Requester. Therefore, the Township, not the Requester, must review the identified responsive records to determine whether all records described as comprising more 50 bankers boxes, are public records and, if so, whether the records are in whole or in part subject to a RTKL exemption. *See* 65 P.S. § 67.102; 65 P.S. § 67.708(b); *see also McKelvey, id.*

Here, the Requester sought electronic copies of the records. Section 701 of the RTKL provides that “[a] record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists.” 65 P.S. § 67.701(a). However, based on Ms. Waldron’s affidavit, it appears that all of the responsive records may exist in hardcopy format. Therefore, the Township may charge the appropriate duplication fee for any pages that must be copied, but not any records that exist in an electronic format. 65 P.S. § 67.1307(b)(1). In addition, Section 1307(h) of the RTKL states that “[p]rior to granting a request for access in accordance with this act, an agency may require a requester to prepay an estimate of the fees authorized under this section if the fees required to fulfill the request are expected to exceed \$100.” 65 P.S. § 67.1307(h). Further, the Commonwealth Court in *Pa. Dep’t of Educ. v. Bagwell*, the Court noted:

[A]n agency’s fee estimate must be reasonable. For such an estimate to comprise more than a guess, and closely correspond to the fees a requester will owe when an agency undertakes the final step of duplication and physical redaction, an agency must review the records at issue. At a minimum, a fee estimate should represent the

cost of duplicating and sending public records, not potentially responsive records, to a requester.

131 A.3d 638, 653 (Pa. Commw. Ct. 2016) (citations omitted).⁴ Here, if appropriate, the Township may demand prepayment for records in hard copy if the cost exceeds \$100, but may not withhold records in electronic format on that basis. *See Pedro v. City of Philadelphia*, OOR Dkt. AP 2020-2236, 2020 PA O.O.R.D. LEXIS 3102 (the City provided electronic records but demanded prepayment for records in hardcopy). To the extent that the parties ultimately agree that records will be accessed by inspection, the Township may have a staff member present for the inspection, but may not prohibit the Requester from taking photographs of the records at no cost. *See Lynch v. Indiana Twp.* OOR Dkt. AP 2018-0876, 2018 PA O.O.R.D. LEXIS 852.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide all responsive records, as described above, within thirty days.⁵ 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 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. 65 P.S. § 67.1303. 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁴ See <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm> (last accessed September 15, 2022).

⁵ Upon receiving the records, the Requester may file another appeal challenging the merits of any redaction made by the Township. *See Buehl v. Pa. Dep't of Corr.*, No. 198 C.D. 2015, 2015 Pa. Commw. Unpub. LEXIS 552 (holding that that a requester could timely file an appeal both from the date of an agency's response and the date when an agency mailed responsive records); *see also Cuccias and FOIA Professional Services v. Tredyfrin-Easttown Sch. Dist.*, 2021-1284, 2021 PA O.O.R.D. LEXIS 1439.

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: September 21, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Joshua Twersky (via email only);
Lisa Waldron (via email only);