



FINAL DETERMINATION

IN THE MATTER OF

**TIMOTHY LESTER,
Requester**

v.

**GALLAGHER TOWNSHIP,
Respondent**

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Docket No: AP 2022-2022

INTRODUCTION

Timothy Lester (“Requester”) submitted a request (“Request”) to Gallagher Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking cellphone records for two identified Township Supervisors. The Request was deemed denied 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 Township is required to take additional action as directed.

FACTUAL BACKGROUND

On July 12, 2022, the Request was filed, seeking “Jan[uary] 1[,] 2022 to July 10, 2022[,] all cellphone incoming and outgoing calls as well as all text messenger [sic] incoming and outgoing[.] This would be for Kenneth Porter – Brian Hoy[.]” On July 19, 2022, the Township invoked a thirty-day extension to respond to the Request. 65 P.S. § 67.902(b). The Township failed to respond to the Request by August 18, 2022, and, therefore, the Request was deemed

denied. *See* 65 P.S. § 67.902(b). On August 23, 2022, the Township issued a letter explaining that the records requested are in possession of a third party and that the Township’s request for the third party to provide the records had not yet been satisfied. The Township sought an additional extension of time to reply until September 21, 2022. In the letter, the Township acknowledged that the response letter would “ordinarily serve as a ‘deemed denial,’” and apprised the Requester of his appeal rights under the RTKL.

On September 1, 2022, the Requester appealed to the Office of Open Records (“OOR”), stating grounds for disclosure. *See* 65 P.S. § 67.902(b). The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 14, 2022, the Township submitted a position statement asserting that, in an August 28, 2022 letter from the Requester he stated that he would not back off of this matter, that he would be filing an appeal and that he would not pay for any records. The Township argues that, pursuant to Section 901 of the RTKL, “all applicable fees shall be paid in order to receive access to the record requested.” 65 P.S. § 67.901. The Township indicates, in a footnote, it understands “that the responsive records, which are in the process of production by the third parties at issue, run into the hundreds of pages.” The Township argues, “[b]ecause [the] Requester has indicated in writing that he is unwilling to pay the fee required by Section 901 ... and set forth in the regulation adopted pursuant to Section 1307 [of the RTKL],¹ the [R]equest does not comply with the provisions of the [RTKL] and the ... appeal must be denied.”²

¹ Official RTKL Fee Schedule, <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm> (last accessed September 21, 2022).

² In a footnote, the Township also notes that the Requester did not seek mediation in this matter, whereby the issues could have been more amicably resolved. However, the Township did not seek mediation, either. Nevertheless, the OOR encourages the parties to work together outside of the OOR appeal process to achieve the exchange of records, whenever possible.

On September 13, 2022, the Requester submitted a statement in support of the appeal, asserting several reasons why he should be granted access to the requested records including, among other things, that the individuals identified in the Request have been using the cellphones to conduct Township business and to hold meetings without a quorum. The Requester also asserts that the Township's attorney has mishandled the Request pursuant to state and federal law.

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" 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)).

In the position statement, the Township explains that it has still not received the cellphone records from the third parties, presumably the cellphone service providers, and asserts that the Requester would not agree to an additional thirty day extension of time to respond to the Request. The Township argues that, following the deemed denial of the Request, the Requester stated in a letter to the Township that he will not pay for the records requested; therefore, the Township argues that the Request does not comply with Section 901 of the RTKL that requires the payment of duplication fees to obtain responsive records. The Township relies on *Coppola v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2022-0993, 2022 PA O.O.R.D. LEXIS 1142, in support of its position.

In this matter, the Requester sought printed copies of the requested records. Initially, we note the Township is correct that to receive access to records “all applicable fees shall be paid” in accordance with the OOR’s Standard Fee Schedule. 65 P.S. § 67.901. In addition, under the

RTKL, upon receipt of a request, the agency open records officer *shall* determine whether one of the seven factors provided for in Section 902(a) applies to a request including, whether “the requester refuses to pay applicable fees authorized by [the RTKL].” 65 P.S. § 67.902(a)(6). Further, following the open record’s officer’s review of a request to determine whether any of the factors in Section 902(a) apply, the RTKL provides the following:

(1) Upon a determination that one of the factors listed in subsection

(a) applies, the open-records officer shall send written notice to the requester within five business days of receipt of the request for access under subsection (a).

(2) The notice shall include a statement notifying the requester that the request for access is being reviewed, the reason for the review, a reasonable date that a response is expected to be provided and *an estimate of applicable fees owed when the record becomes available*. If the date that a response is expected to be provided is in excess of 30 days, following the five business days allowed for in section 901, the request for access shall be deemed denied unless the requester has agreed in writing to an extension to the date specified in the notice.

65 P.S. § 67.902(b)(emphasis added).

Based on a review of the Township’s extension notice, it does not explicitly state what factors apply to require the invocation of a thirty-day extension, but it implies that Section 902(a)(7), “the extent or nature of the request precludes a response withing the required time period,” may apply, in that the notice the Township states that “due to the nature of the request” it is requesting thirty days to respond. 65 P.S. § 67.902(a)(7); (b)(2). However, absent from the notice is any indication the Township determined that the Requester had, at that point in time, refused to pay any applicable fees, pursuant to Section 902(a)(6). Furthermore, the July 19, 2022, extension notice does not provide “*an estimate of applicable fees owed when the record becomes available*.” 65 P.S. §67.902(b). Based on a review of the appeal, including the attachments provided by the Requester, the first indication that the Requester may not be willing to pay any

applicable fees for the duplication of the records occurred following the issuance of the Township's August 23, 2022 letter, in which it sought an additional thirty days to obtain the cellphone records. Accordingly, the Township's August 23, 2022 letter was deficient.

Notably, the August 23, 2022, letter was issued after the Request had already been deemed denied on August 18, 2022. *See* 65 P.S. § 67.902(b) ("If the date that a response is expected to be provided is in excess of 30 days, following the five business days allowed for in section 901, the request for access shall be deemed denied unless the requester has agreed in writing to an extension to the date specified in the notice.") Here, the Township acknowledges receiving the Request on July 12, 2022. The initial thirty-day extension notice was timely issued on July 18, 2022; however, thirty calendar days from July 19, 2022, is August 18, 2022. The Township did not seek a further extension or receive an agreement from the Requester in writing by August 18, 2022. Therefore, the Request was deemed denied on that date.

In order to file an appeal before the OOR, Section 1101(a)(1) of the RTKL requires that "a written request for access to a record is denied or *deemed denied*...[and to] state the grounds upon which the requester asserts that the record is a public record ... and address any grounds stated by the agency for delaying or denying the request." 65 P.S. § 67.1101(a)(1); *see also Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) ("[I]t is appropriate and, indeed, statutorily required that a requester specific in its appeal to Open Records the particular defects in an agency's stated reasons for denying a RTKL request"). The Township asserts that the appeal was improper because the Requester has expressed an unwillingness to pay any applicable fees associated with providing the cellphone records and, as set forth above, it cites *Coppola* in support of its position. However, a review of *Coppola* shows that it is wholly inapplicable to the instant matter. In *Coppola*, the OOR concluded that the agency properly denied

a RTKL request because the evidence demonstrated that the requester had been notified of fees associated with two previous RTKL requests and copies had been prepared, but the requester failed to pay the fees or retrieve the records. The OOR determined that the agency properly denied a request under Section 901, due to the outstanding fee balance. *See Coppola*, 2022 PA O.O.R.D. LEXIS 1142, *2.

In the instant matter, the Township has not yet obtained the records and has not granted access to the records, as the Request was deemed denied. In addition, the Township has not presented any evidence that the Requester owes outstanding fee balances related to prior requests. Further, the Township did not provide notice of a reasonable fee estimate or seek prepayment under Section 1307(h) of the RTKL. Put simply, the Request was deemed denied and no fee related basis has been established that would have any bearing on whether the appeal was actually denied, rather than deemed denied, or whether the appeal is sufficient. Accordingly, the Requester's appeal from the deemed denial was properly filed under Section 1101(a)(1) of the RTKL.

As the Township has not proven any basis for withholding the records, they must be provided to the Requester. Once access is granted, the Township may charge appropriate reasonable duplication fees. 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). However, the fee estimate must be reasonable. *See Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 653 (Pa. Commw. Ct. 2016) (citations omitted).³ In addition, upon receiving the records, the Requester

³ See <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm> (last accessed September 15, 2022).

may file another appeal challenging the merits of any records that were withheld or 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 Twersky v. Concord Twp.*, OOR Dkt. AP 2022-1626, 2022 PA O.O.R.D. LEXIS ____; *Cuccias and FOIA Professional Services v. Tredyffrin-Easttown Sch. Dist.*, 2021-1284, 2021 PA O.O.R.D. LEXIS 1439.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide all responsive records within thirty days. 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 Clinton 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 3, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG ESQ.

Sent to: Timothy Lester (via First Class U.S. Mail);
Justin Houser, Esq. (via email only);
Mary Myers (via email only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).