



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**DAWN PERLMUTTER,
Requester**

v.

**YARDLEY BOROUGH,
Respondent**

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Docket No: AP 2022-2347

FACTUAL BACKGROUND

On September 29, 2022, Dawn Perlmutter (“Requester”) submitted a request (“Request”) to Yardley Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking to “[i]nspect files for the following properties: [1] 70 South Main Street[, 2] 121 South Main Street[, and 3] 20 West College Avenue.”

On October 4, 2022, the Borough issued a response indicating that the Requester inspected the records on October 3, 2022 and that “[n]o records were withheld or exempted from ... inspection.” The Borough’s response also indicated that the Requester sought copies. The Borough granted that Request in part and denied in part, arguing that certain records contain exempt personal identification information, 65 P.S. §67.708(b)(6), and that some of the records contain copyrighted plans, 65 P.S. §§ 67.707(a)-(b). The Borough also notified the Requester that it was charging \$10.00 for approximately 40 pages of records that needed to be redacted and copied.

On October 7, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. Specifically, the Requester argues that the Borough “refused to let [her] photograph records during [her] in person inspection[,]” and challenging the \$10.00 fee amount. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 14, 2022, the Borough asked the Requester whether she would withdraw the above-captioned appeal if the Borough would be “amenable to waiving the \$10.00 in copying fees.” That same day, the Requester responded “propos[ing] the Borough concede that it improperly charged copy fees as well as erroneously claimed copyright exempts records from disclosure under the RTKL, allow [her] to photograph records it did not provide copies of by COB Monday, and stipulate to the disposition of this appeal as ‘Granted: Moot.’” The Borough did not agree to the Requester’s proposed stipulations.

On October 17, 2022, both parties contacted the OOR raising concerns on what issues remain outstanding for the OOR to adjudicate. On October 18, 2022, the OOR responded raising several concerns on the issues remaining before the OOR and extended the submission deadline.

On October 18, 2022, Earl Markey filed a Request to participate in the instant matter. That same day, the OOR denied the Request, noting that there is an adequate remedy at law for Mr. Markey.¹

On October 26, 2022, the Borough submitted a position statement raising the following arguments: 1) The Borough acted within its legal authority when coordinating and supervising the

¹ This denial does not preclude Mr. Markey from filing a similar request with the Borough and, if necessary, filing an appeal with the OOR pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

file inspection appointment and did not improperly prevent the Requester from taking photos; 2) The Borough properly redacted records; 3) The Borough properly withheld responsive records protected by the Copyright Act; and 4) The Borough properly assessed copying fees in accord with the RTKL Fee Schedule. In support of its position, the Borough submitted the affidavits of Paula Johnson, Borough Manager and Open Records Officer, Mary McLean, Right to Know Assistant for the Borough, Patty Sargent, Financial Assistant for the Borough, and Attorney Sarah Steers, Associate Attorney at Curtin & Heefner LLP and Solicitor for the Borough.

On October 26, 2022, the Requester submitted a position statement arguing that the Borough “has no interest in the copyright” and that the Borough is “not the copyright police.” The Requester also submitted an additional position statement contesting a statement of fact submitted by the Borough. In support, on October 27, 2022, the Requester submitted an affidavit by herself describing the events that took place on October 3, 2022.

On October 27, 2022, the OOR contacted the parties. The OOR noted that attached to the Borough’s final response were 40 pages of records responsive to the Request representing the records for which the Borough is charging the \$10.00 fees. On October 28, 2022, the Requester responded that the “records attached to the Borough’s October 4, 2022, response are the same records that the Borough charged \$10 fees for.” The Requester further specifies that she is seeking “any zoning or building permits or records of any building inspections for the demolition that occurred in August – September 2022 of two balconies (described as porches on the architectural drawings) from the first and second floors of the front of Mayor Harding’s historic home at 121 South Main Street, Bucks County, Yardley, PA 19067.”

LEGAL ANALYSIS

The Borough is a local agency subject to the RTKL. 65 P.S. § 67.302 Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Borough is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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)).

1. The Borough provided records responsive to the Request and the Borough may charge fees for the copying of responsive records that require redaction.

The Request sought to “[i]nspect files” of three properties. The Requester also marked that she wanted “in-person inspection of records preferred (may request copies later).” The Requester inspected the records on October 3, 2022 and, the Borough indicated in its final response that “[d]uring the inspection, [the Requester] requested that the Borough make copies of specific records maintained in those files.” Also in its final response, the Borough charged the Requester \$10.00 in fees and provided records responsive to the Request that are not subject to the Copyright Act.

The Requester argues, however, that she “asked to photograph records during the in-person inspection but was not permitted to do so.” The OOR notes that the Borough has not denied the Requester access to the records and has provided the Requester an opportunity to inspect the records, but merely asks the Requester to pay copying fees necessary for secure redaction.

Section 701(a) of the RTKL requires that public records be accessible for inspection and duplication, 65 P.S. § 67.701(a), and the law contemplates a requester’s ability to photograph records. *See, e.g., DeBartola v. Cambria Cnty. Dist. Attorney’s Off.*, OOR Dkt. AP 2017-0050, 2017 PA O.O.R.D. LEXIS 1019. The OOR has held that agencies can require a requester to schedule an appointment to inspect records and that agency staff can supervise inspection. *See, e.g., Murphy v. Northern Lebanon Sch. Dist.*, OOR Dkt. AP 2019-0564, 2019 PA O.O.R.D. LEXIS 461. Further, Section 1307 of the RTKL provides that the OOR has the authority to establish duplication fees for local agencies. 65 P.S. § 67.1307(b)(1)(i). Pursuant to this authority, the OOR has promulgated a Fee Schedule, which notes that no additional fee may be imposed for photographing a record. Official RTKL Fee Schedule, available at [OOR - Official RTKL Fee Schedule \(pa.gov\)](#). However, the Fee Schedule further states:

If a requester wishes to inspect, rather than receive copies of, records which contain both public and non-public information, the agency may redact the non-public information. An agency may not charge the requester for the redaction itself. However, if an agency is unable to securely redact the records by electronic means, the agency may charge (in accordance with the OOR’s Official Fee Schedule) for any copies it must make in order to securely redact the material before allowing the requester to view the records.

Id.; *see, e.g., DeBartola*, 2017 PA O.O.R.D. LEXIS 1019. The OOR has interpreted the language in Section 901 of the RTKL requiring that “all applicable fees shall be paid [i]n order to receive access to the record requested,” to mean that a requester shall pay fees before actually receiving the records, whether for inspection or duplication. *See, e.g., Frame v. Menallen Twp.*, OOR Dkt. AP 2009-1072, 2010 PA O.O.R.D. LEXIS 155 (quoting 65. P.S. § 67.901).

Here, Ms. McLean attests that she “redacted any personal phone numbers identified on the pages [the Requester] selected for duplication.” 65 P.S. § 67.708(b)(6)(i)(A). Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidentiary support. *Sherry v.*

Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Borough acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

As noted above, the Requester seeks to take a photograph of the record which is a permissible form of duplication. However, as discussed below, the OOR cannot order the Borough to duplicate copyrighted material. The Borough has identified 40 pages of records responsive to the Request that it has already provided to the Requester and is not subject to the Copyright Act.² Further, a review of those records indicates that seven pages required redaction for personal identification information. 65 P.S. §67.708(b)(6). Therefore, the Borough was permitted to provide access to the forty pages of responsive records via inspection, and the Borough may imposition a duplication fee for those records that required redaction of personal identification information. A review of those records indicates that seven pages required redaction. As such, the Borough may charge the Requester \$1.75 in copying fees. However, an additional fee cannot be imposed in the event the Requester takes a photograph of those records not protected by the Copyright Act. [OOR - Official RTKL Fee Schedule \(pa.gov\)](#)

² The OOR recognizes that the responsive records have also been provided to the Requester in an electronic format because the records were attached to the instant appeal. However, an agency may deny access to public records where a requester has an outstanding balance due from previous RTKL requests. *Compare* 65 P.S. § 67.901 (stating that “[a]ll applicable fees shall be paid in order to receive access to the record requested”); *Pa. Dep’t. of Transp. v. Drack*, 42 A.3d 355, 363 (Pa. Commw. 2012); *Brown v. Pa. Dep’t of Corr.*, A.3d 1118 (Pa. Commw. 2017) with *Lynch v. Indiana Township*, OOR Dkt. AP 2018-0876, 2018 PA O.O.R.D. LEXIS 852 (holding that an agency may not seek past due fees when the underlying copies were made without the requester’s knowledge); *Carr v. Penn Hills Township*, OOR Dkt. AP 2018-1399, 2018 PA O.O.R.D. LEXIS 1280.

2. Engineering and architectural drawings are protected by the Federal Copyright Act

The Borough argues that it “properly withheld responsive records protected by the Copyright Act.”³ In support, the Borough explains that the “file for 121 South Main Street contains, in part, plans, surveys, and engineering drawings.” Ms. McLean attests that “[a]s it pertains to copyright-protected documents, the pages selected by Dr. Perlmutter for duplication included blueprints or architectural drawings; more specifically, four (4) pages labeled ‘front elevation showing existing and New Work’” and that “[t]hese drawings indicated that they were prepared by Brooks D. Kaufman, RA, and are sealed by an architect’s seal with a handwritten signature over the seal.” McLean Affidavit ¶¶ 30-31. Attorney Steers also attests that the Requester “can view the drawings in-person, as well as other documents protected by Federal copyright statute.” Steers Affidavit ¶ 9.

The Copyright Act precludes the reproduction of any copyrighted works without the consent of the copyright holder. *See* 17 U.S.C. §§ 106, 501. In *Ali v. Philadelphia City Planning Commission*, the Commonwealth Court held the Copyright Act does not “exempt[] materials from disclosure under the RTKL”; instead, it “limits the level of access to a public record only with respect to duplication, not inspection.” 125 A.3d 92, 101-05 (Pa. Commw. Ct. 2015). In *Ali*, the Commonwealth Court further explained:

Because we lack jurisdiction under federal law to resolve the question of whether a local agency’s disclosure of copyrighted material pursuant to the RTKL without the owner’s consent constitutes infringement under the Copyright Act, where a local agency has refused to duplicate a public record in response to a RTKL request by invoking the Copyright Act, our review must be confined to determining whether the local agency has met its burden of proving facts sufficient to show that forced duplication of copyrighted material under the RTKL implicates rights and potential

³ The Borough did make these records available for inspection.

liabilities arising under the Copyright Act that can only be resolved by the federal courts.

...a conflict between the Copyright Act and the RTKL with respect to access (i.e., duplication) where (1) the public record in question is protected under a copyright held by a third party and (2) the local agency does not have the consent of the copyright owner to the duplication of the public record in response to a RTKL request. With respect to the second element, we do not hold that the local agency is under any obligation to seek out the copyright owner and endeavor to secure its consent. ... we hold that where a local agency invokes the Copyright Act as a basis to limit access to a public record to inspection only, the absence of consent by the copyright owner to duplication in response to a RTKL request should be presumed.

125 A.3d at 104-05.

The Borough has identified records that are subject to the Copyright Act (i.e. four pages labeled “font elevation showing existing and New Work” and “pages of drawings protected by Federal copyright statute”). While the Borough acknowledges their public nature, the Borough has already made the records subject to the Copyright Act available for inspection. Therefore, the Borough properly found that those records are subject to the Copyright Act and need only provide access to inspect those records. *See Smith v. West Chester Area Sch. Dist.* OOR Dkt. AP 2022-1674 (consolidated), 2022 PA O.O.R.D. LEXIS 2123 (finding that “to the extent that any attachments or other records are subject to the Copyright Act, the District must provide access to inspect the records”). The OOR cannot order the Borough to allow the photographing of copyrighted material.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Borough is not required to take any further action.⁴ This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to Bucks County Court of Common

⁴ This Order does not preclude the Requester from, as she has previously done, inspecting the records. The Requester may also photograph those records not subject to the Copyright Act and that do not require redaction, and the Borough is entitled to charge the Requester \$1.75 for those records that require redaction.

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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 4, 2022

/s/ Lyle Hartranft

APPEALS OFFICER
LYLE HARTRANFT, ESQ.

Sent via email to: Dawn Perlmutter; Paula Johnson, AORO; Sarah Steers, Esq.

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