



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**TAMMI IAMS,  
Requester**

**v.**

**DONEGAL TOWNSHIP,  
Respondent**

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**Docket No: AP 2022-2169**

### **FACTUAL BACKGROUND**

On July 29, 2022, Tammi Iams (“Requester”) submitted a request (“Request”) to Donegal Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. [T]o inspect and make [her] own copies of any and all versions of any and all quote(s)/bid(s) received for the deliberation, discussion and public vote made during the June 9, 2022, Board of Supervisor Public Monthly Meeting for having a Surveillance Cameras [sic] purchased from David Davis Communications not to exceed \$21,000.00 to be paid out of Act 13 and to use the wifi not the one for us to dig conduit. (So, you understand the all versions is because it was stated that Mr. Bauer received several different version of quotes from David Davis Communications so [the Requester] would like to inspect all as these were needed for the decision, deliberation and purpose of spending public tax money.
2. [T]o inspect and make [her] own copies of any and all invoice(s)/bill(s) from David Davis communications that was granted (decided on) for having Surveillance Cameras purchased from the public vote made during the June 9, 2022, Board of Supervisor Public Monthly Meeting.

3. [T]o inspect and make [her] own copies of any and all invoices(s), bill(s), reimbursement(s) and receipt(s) from any all companies, vendors, individuals and/or stores for the purchase of any and all equipment needed for the Surveillance Cameras to be put in and operational by David Davis Communications from the Public vote during the June 9, 2022, Board of Supervisors Public Monthly Meeting. This would include any and all monitors, wiring, network boxes, wifi extenders, wifi boosters, wireless receivers, switches, ethernet cable, junction boxes, new statis ip addresses & modems. The time frame would be from June 9, 2022 up to and including the present day July 29, 2022.

On September 6, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Township granted the Request, providing the Requester with records responsive to the Request.<sup>1</sup>

On September 19, 2022, the Requester appealed to the Office of Open Records (“OOR”), arguing that she “did receive several responsive records, however [she] asked to inspect the records [herself] as quote(s)/bid(s) are required to be kept by the [T]ownship according to the Second-Class Township Code Section....”.<sup>2</sup> 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 October 19, 2022, the OOR contacted the parties and extended the submission deadline until October 26, 2022. After receiving no submissions, on November 14, 2022, the OOR again contacted the parties providing an additional opportunity to submit evidence. On the same date, the Township sought additional time to submit evidence. The OOR granted the extension and

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<sup>1</sup> The Township redacted part of the responsive records pursuant to Sections 708(b)(16) and (17) of the RTKL. The Requester does not challenge those redacted records on appeal.

<sup>2</sup> The Requester granted the OOR additional time to issue a 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).”).

extended the submission deadline to November 18, 2022. Also on November 14, 2022, the Requester contacted the OOR asking for additional time to respond to the Township's submission.<sup>3</sup>

On November 18, 2022, the Township submitted a position statement arguing that the instant appeal should be denied. The Township claims that "the [R]equester's [R]equest was fully responded to in good faith." In support of its position, the Township submitted the attestations of Edward Shingle, Township Supervisor and Open Records Officer, and Paul Toigo, Esq., an attorney at the law firm that is the Solicitor for the Township.

On December 5, 2022, the OOR contacted the parties asking the Requester to identify what issues remain outstanding for the OOR to adjudicate. On December 6, 2022, the Requester responded arguing that she was "not provided or given the opportunity to inspect all the records." The Requester also argues that not all responsive records were provided. In support, she provided an unverified statement from Heather Hubbs, the former Secretary/Treasurer of the Township, along with an attached email showing correspondence with David Davis Communications.

### **LEGAL ANALYSIS**

The Township 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 Township 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*,

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<sup>3</sup> The OOR granted the request and extended the submission deadline to November 18, 2022.

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. Township provided records in the manner in which they currently exist**

Section 701 of the RTKL states 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). The RTKL does not define “medium”; however, the OOR has defined it “as the substance through which something is transmitted or carried, a ‘means,’ such as on paper or on a hard-drive or on a database or over the Internet.” *Acton v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2009-0926, 2009 PA O.O.R.D. LEXIS 786, *aff'd*, No. 2010-719 (Wash. Com. Pl. July 26, 2011), *aff'd*, 38 A.3d 1092 (Pa. Commw. Ct. 2012), *petition for allowance of appeal denied*, 57 A.3d 72 (Pa. 2012).

The OOR has previously differentiated “medium” from “format.” In *Bowling v. Pennsylvania Emergency Management Agency*, the requester sought copies of “electronic spreadsheets” and PEMA provided the documents in PDF format rather than in Excel format. *See* OOR Dkt. AP 2009-0128, 2009 PA O.O.R.D. LEXIS 607, *rev'd on other grounds*, *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Commw. Ct. 2010), *aff'd*, 75 A.3d 453 (Pa. 2013).

The OOR held:

The RTKL provides requesters with the right to inspect and duplicate. Duplication is a snapshot, a static record that cannot be altered or modified, in other words, a “copy.” [Section 701(b) of the RTKL] specifically prevents access to an agency’s computer, evidencing intent to protect government records and files from any interference. By providing a .pdf file, PEMA complied with the RTKL by duplicating its spreadsheet and [the requester] received the “information” requested. It was provided in an electronic medium and there is no requirement to provide records in a manner that would subject them to alteration or manipulation. [The requester] received the record, as defined by the RTKL, which he requested.

OOR Dkt. AP 2009-0128, 2009 PA O.O.R.D. LEXIS 607. Therefore, “under the RTKL, ‘medium’ is a broad term, and ‘electronic medium’ encompasses all electronic formats.” *Cap v. Lehigh and Northampton Transp. Auth.*, OOR Dkt. AP 2013-0168, 2013 PA O.O.R.D. LEXIS 112. Pursuant to Section 701 and *Bowling*, an agency is not required to convert electronic records into a different file format. *Id.*

Here, the Township argues that it “does not retain any paper invoices received, but instead relies on digital storage methods such as emails containing records, hard drives, etc., to retain its records.” Specifically, the Toigo Attestation verifies that the “although [the] Township might occasionally print various records for use in public meetings or other environments, such records are disposed of [... and] further indicated that [the] Township generally retains records in digital format when possible.” Toiga Attestation, ¶10. The Township further explained that “photocopies were made by the Township solicitor for the purpose of compiling records responsive to [the] [R]equest into a single document, and thereafter were promptly destroyed. *Id.* at ¶¶ 18-19. Here, the Township submitted evidence that it provided records “in the manner in which it currently exists,” i.e. in electronic format, and therefore, met its burden in providing records responsive to the Request.<sup>4</sup>

## **2. The Township has demonstrated that no additional records exist**

The Township argues that the Requester has “received the records the Township concluded [the Requester] had requested after a good faith effort to decipher the contents of an indisputably convoluted [R]equest.” In support of this argument, the Shingle Attestation states the following:

- [Shingle] notified Township staff and fellow Supervisors of the contents of the [R]equester’s [R]equest, and instructed them to review their physical and digital records to determine whether they possessed any responsive records.

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<sup>4</sup> If the Requester seeks to visually inspect the records in paper form, at the Township offices, the Township would be required to convert the electronic records into paper and under those circumstances the Township can impose a fee of \$0.25 per page. *See* 65 P.S. § 67.701(b) (agencies are not required to permit access to an agency computer).

- On August 29, 2022, Donegal Township Supervisor Mr. James Bauer [“Bauer”] informed [Shingle] that he possessed records responsive to the [R]equester’s [R]equest in the form of emailed quotes, bids, invoices and the like in relation to the surveillance camera project.
- On August 31, 2022, [Shingle] forwarded emails with documents provided to him by Mr. Bauer to the Township solicitor, and requested that they review the documents in question

Under the RTKL, a sworn attestation is generally competent evidence to sustain an agency’s burden of proof. *See 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 Township acted in bad faith or that the responsive records exists in the format requested (i.e. in paper format only), “the averments in [the attestation] 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 *Office of the Governor v. Scolforo*, 65 A. 3d 1095, 1103 (Pa. Commw. Ct. 2013)). However, the Requester argues that not all responsive records have been provided. As indicated above, the Requester submitted an unverified statement from the former Secretary/Treasurer of the Township along with an “email from David Davis Communications.”<sup>5</sup>

In *Pennsylvania Department of Health v. Mahon*, the Commonwealth Court discussed the evidence required to establish the absence of records, quoting its previous decision in *Hodges v. Pennsylvania Department of Health*, which held that an agency “may satisfy its burden of proof ... with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.” *Mahon*, No. 1066 C.D. 2021, 2022 Pa. Commw. LEXIS 136, \*29, *publication ordered*, Oct. 18, 2022 (quoting *Hodges*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011));

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<sup>5</sup> The OOR notes that the Request seeks “quote(s)/bids(s)[,] invoice(s)/bill(s), reimbursement(s) and receipt(s)” regarding David Davis Communications. To the extent the Requester seeks additional records (i.e. email or other forms of communication or quotes from other contractors), the Requester is not precluded from filing a new RTKL Request with the Township.

*see also Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry), *appeal granted on other grounds*, 2022 Pa. LEXIS 889 (June 22, 2022). The *Mahon* Court found that the OOR erred in rejecting the agency’s affidavit solely on the basis that it was conclusory, reasoning that where there is no evidence of bad faith or that records exist, “[i]t is questionable to what degree additional detail and explanation are necessary to establish the nonexistence of a record rather than its exemption from disclosure.” 2022 Pa. Commw. LEXIS at \*29.

Here, the Requester argues that additional records should exist and submits an unverified attestation along with an email correspondence. However, the Shingle Attestation explains that Township staff and Township Supervisors were contacted regarding the nature of the Request. Township Supervisor Bauer possessed records responsive to the Request “in the form of emailed quotes, bids, invoices and the like in relation to the surveillance camera project.” Additionally, the Township identified and provided numerous pages of records responsive to the Request showing numerous invoices from David Davis Communications. Finally, the Requester’s unsworn argument that records should exist along with an email communication without more does not overcome the evidence provided by the Township, which the OOR finds to be credible. Accordingly, the OOR concludes that the Township has met its burden of proving that it is more likely than not, that no additional records exist as outlined in the Request in the Township’s possession, custody or control. *See Hodges*, 29 A.3d at 1192.

## CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Township is not required to take any further action. 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 Washington 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.<sup>6</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 14, 2022**

*/s/ Lyle Hartranft*

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APPEALS OFFICER  
LYLE HARTRANFT, ESQ.

Sent via email to: Tammi Iams; Edward Shingle, Jr.; Paul Toigo, Esq.

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