



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**LORI YACABITIS,
Requester**

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:

:

v.

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Docket No: AP 2022-2774

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**CLIFTON TOWNSHIP,
Respondent**

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FACTUAL BACKGROUND

On November 10, 2022, Lori Yacabitis (“Requester”) filed a request (“Request”) with Clifton Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. ... [C]opies of the [] Township monthly financial reports showing a list of each and every individual and/or company paid on the Township [p]ayroll. I am requesting copies [of] the monthly financial reports depicting payroll, for the months of September, October, and November, of the year 2022. Each of the three (3) monthly reports should include: #1) [] [T]ownship, General Fund, Lackawanna ‘Account Quick Report’ as of November 10, 2022, showing all individual net wage amounts paid during the months of September, October, and November of 2022. Or whatever report from General Funds the individuals and/or companies receiving paid payroll, shows up on.
2. ... [C]opies of the Hourly Time Sheets and/or Payroll Sheets submitted by June Ejek, Denise Rinaldi, and Ms. McCracken, from January 1, 2022 - November 10, 2022, reported and billed to [the] Township.

On November 17, 2022, the Township granted the Request, requiring a payment of \$19.50 prior to mailing responsive records. On November 23, 2022, the Requester asked for an itemized bill,

and on December 1, 2022, the Township mailed the records to the Requester via regular U.S. mail as well as via certified mail, along with an invoice in the amount of \$32.60.¹ On December 6, 2022, the Township emailed the Requester, noting that she should have received the records. The email attached a signed invoice that differed slightly from the unsigned one included with the records, although the total was the same.

On December 12, 2022, the Requester filed an appeal with the Office of Open Records (“OOR”), arguing that the appeal had been deemed denied as she had not received any records.² The Requester also challenges the fees assessed by the Township, noting that she has received different invoices. 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. *See* 65 P.S. § 67.1101(c).

On December 16, 2022, the Requester submitted a position statement, acknowledging that she had received records, but that the seven pages of records responsive to Item 1 were not the records she had requested and that the requested monthly financial reports were not included. With her submission, the Requester included Account Quick Reports for a different month that she had previously obtained from the Township, noting that this was the type of record she was requesting and that she is unable to verify that the Township has provided all of the official time sheets. Additionally, the Requester notes that it is not evident why the Township charged \$6.55 for postage when the records were also sent via certified mail; in any case, she argues, it was not necessary for

¹ In the email, the Township states that the records would be sent via certified mail that day.

² The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1). The Requester’s position statement accompanying her appeal is dated December 9, 2022; she argues that she had received no records as of that date, but she had not been able to get to the post office to check if the records were being held there. However, the Requester also submitted a pink slip from the United States Postal Service (“USPS”), stating that it had attempted to deliver a large envelope from the Township on December 5, 2022, but was unable to leave it at the address because a signature was required.

the records to be sent via certified mail with signature confirmation. Finally, she notes that the Township charged her \$0.50 per page for color copies when she never requested color copies.

On December 20, 2022, the Township submitted a copy of an unsigned letter addressed to the Requester, dated December 5, 2022, which itemized responsive records. Accompanying the letter was an unsigned invoice that appears to have been included along with the records, assessing fees for seven color pages of financial records for a total of \$3.50, 18 color pages of time sheets for a total of \$9.00, a charge of \$6.55 for postage and a \$13.55 charge for sending the records via certified mail with signature confirmation required, for a final total of \$32.60.³ The Township also included a signed invoice also pertaining to the Request but dated December 6, 2022, noting that the Requester owed a total of \$32.60 in fees; a certified mail receipt dated December 1, 2022;⁴ and a text message from the USPS, confirming that the records had been delivered on December 9, 2022.

On December 22, 2022, the Requester submitted a position statement, reiterating her objections and enclosing documentation of delivery of the records.⁵ Additionally, she argues that the Township's letter of December 5, 2022 could not have accompanied the records, since it is dated after the records were sent. On December 29, 2022, the Township sent the Requester a "redefined invoice," noting that it was assessing \$8.25 for 33 copies at \$.25 per copy,⁶ \$6.55 for

³ The original invoice received by the Requester noted that the Certified Mail Fee was "TBD;" "13.55" was handwritten next to "TBD."

⁴ Though the date on the receipt submitted by the Township is not visible, a copy of the same receipt had previously been submitted by the Requester, and the date is visible on that copy.

⁵ The Requester also claims that there were only 17 pages of time sheets but she was billed for 18. The Township's letter dated December 5, 2022 reflects that 17 time sheets were enclosed, but the Township's initial invoice lists 18 pages. Regardless, the Requester's response of December 16, 2022 reflects that she received 18 pages of time sheets.

⁶ In light of the Requester's protest about the cost of color copies, it appears that the Township now only seeks to charge her the acceptable rate for black and white copies. See Official RTKL Fee Schedule, *available at* <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm>.

“Postage weight,” \$2.40 for four stamps at \$0.60 each,⁷ and \$13.55 for certified mail delivery, for a total of \$30.75. On January 18, 2023, the Requester contacted the OOR, noting that on January 10, 2023, she had received a copy of the invoice that was dated December 29, 2022.

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*, 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 Township has not proven that no other records exist

The Requester argues that monthly financial reports were not provided. Her Request specifically mentions “Account Quick Reports,” and she provides reports from prior months that she has procured from the Township as examples of what she is looking for. Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt from disclosure. 65 P.S. § 67.708(a)(1). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). In the present case, the Township has not complied with the RTKL by failing to provide any factual or legal support for the nonexistence of additional

⁷ The cost of a forever stamp is \$0.63, according to USPS.com. *See* USPS.COM Postal Explorer, <https://pe.usps.com/> (last accessed February 1, 2023).

responsive records. Accordingly, the Township has not met its burden of proof under the RTKL. *See* 65 P.S. § 67.305; *Hodges*, 29 A.3d at 1192.

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. *See* 65 P.S. § 67.705. However, absent the Township providing a sufficient evidentiary basis that no responsive records exist, the OOR will order disclosure of responsive public records. *See, e.g., Kuznik v. W. Newton Borough*, OOR Dkt. AP 2022-0925, 2022 PA O.O.R.D. LEXIS 1482; *Popko v. S. Londonderry Twp.*, OOR Dkt. AP 2022-0377, 2022 PA O.O.R.D. LEXIS 1101.

2. The Township has not justified all of the fees it has assessed

The Requester challenges the Township’s assessment of fees for certain copies and mailing costs. The permissibility of fees is properly before the OOR on appeal. *See* 65 P.S. § 67.1307(b); *Prison Legal News v. Off. of Open Records*, 992 A.2d 942 (Pa. Commw. Ct. 2010). 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 approved fees of up to \$0.25 per page for black and white copies and the actual cost of USPS first-class postage. Official RTKL Fee Schedule, available at <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm>. Section 1307(g) of the RTKL provides that “no other fees may be imposed unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable.” 65 P.S. § 67.1307(g); *see also SERS v. Off. of Open Records*, 10 A.3d 358, 363 (Pa. Commw. Ct. 2010); *Remling v. Fountain Hill Borough*, OOR Dkt. AP 2021-1332, 2021 PA O.O.R.D. LEXIS 1616 (rejecting an agency’s attempt to charge the requester for IT services used to comply with the request); *Envtl. Integrity Project v. Robinson Twp.*, OOR Dkt. AP 2018-0364, 2018 PA O.O.R.D. LEXIS 445 (rejecting an

attempt to charge a requester for the electricity used in scanning records with the requester's own portable scanning device.). Neither the RTKL nor the OOR's fee schedule authorize any additional fees.

Here, the Township mailed the records via regular mail for an apparent cost of \$6.55;⁸ however, it also mailed the records via certified mail with signature confirmation for a cost of \$13.55. The RTKL provides that an agency may charge postage, provided that the fee does "not exceed the actual cost of mailing." 65 P.S. § 67.1307(a). As stated above, all fees are subject to the "necessarily incurred" and "reasonableness" test. The OOR has held that the cost for postage must be the cost for sending the records via USPS first-class mail, and not the more expensive certified mail, absent a specific request or demonstrated need that the records be sent via the more expensive method. *See Peckham v. Pa. Dep't of Environ. Prot.* OOR Dkt. AP 2014-1489, 2014 O.O.R.D. LEXIS 1406 (noting parenthetically that, subject to "necessarily incurred" and "reasonableness" test, an agency may not charge for certified mail); *Kovarick v. PENNVEST*, OOR Dkt. AP 2013-1671, 2013 PA O.O.R.D. LEXIS 1002 (holding that where there is no evidence that the requester demanded that records be sent via UPS, the agency cannot demand payment for mailing via UPS and must provide the records at the cost of mailing them via regular mail). The Township provides no evidence that it was necessary or reasonable to send the records via certified mail with signature confirmation.

Further, the latest invoice submitted by the Township includes an additional charge for four stamps at the cost of \$0.60 each, for a total of \$2.40, and lists copying fees for 33 records, whereas the original invoice only identified 25 records.⁹ The Township provides no explanation for or

⁸ The first invoice lists this charge as "Postage;" the most recent invoice lists "Postage Weight."

⁹ The Township makes no assertion that it mailed any additional records, and the Requester asserts that she only received the Priority Mail envelope that the Township mailed on December 1, 2022.

justification of these charges. As the Township has not met its burden of proving that the totality of charges it seeks to recover from the Requester are authorized under the RTKL, fees must be limited to the actual cost of mailing 25 records via first class mail plus the cost of duplicating those records multiplied by \$.25 per page. The Township may not charge the Requester for certified mailing, the additional fee for stamps, nor for copying fees regarding the unexplained eight-page difference in the latter invoice.

The Requester argues that she should not have to pay for the seven pages of records that were provided by the Township but that she argues were not responsive to her Request. An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Garland v. Pa. Dep't of Environ. Prot.*, OOR Dkt. AP 2017-1490, 2017 PA O.O.R.D. LEXIS 1310; *Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513. The OOR determines this from the text and context of the request alone, as neither the OOR nor the requester is permitted to alter a request on appeal. *See Pa. State Police v. Off. of Open Records*, 995 A.2d 515 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water & Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (stating that “a requester may not modify the original request as the denial, if any, is premised upon the original request as written”). The Township describes these records as the Township’s Balance Sheet, General Fund Profit and Loss budgets and statement, a list of bill payments to companies and a Treasurer’s report. As the Request seeks financial reports, including payroll and payments to companies, the Township’s provision of these documents resulted from a reasonable interpretation of the Request.¹⁰

¹⁰ As set forth above, the Township has not met its burden of proving that no other records exist.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the Township is only permitted to assess fees as set forth above. Additionally, within thirty days, the Township is required to conduct a good faith search for additional records and provide either (1) any responsive records that are discovered, or (2) if no other records are discovered, an attestation or sworn affidavit describing the search and affirming the nonexistence of additional responsive records. 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 Lackawanna 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. 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.¹¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 15, 2023

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent via email to: Lori Yacabitis, June Ejik, Moriah McCracken and Robert Sayers, Esq.

¹¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).