

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
Pennsylvania Historical and Museum	:	
Commission,	:	Docket No. 190 CD 2023
	:	RECEIVED
Petitioner,	:	
	:	
v.	:	JUL 1 / 2023
	:	
Alec Ferretti,	:	
	:	OFFICE OF OPEN RECORDS
Respondent.	:	

UNOPPOSED APPLICATION OF ANCESTRY.COM OPERATIONS INC.
FOR INTERVENTION PURSUANT TO PA R.A.P. 1531 (a)

AND NOW comes Ancestry.com Operations Inc. (“Ancestry”), by its attorneys Nauman, Smith, Shissler & Hall, LLP, and files this application for permission to intervene in the instant proceeding pursuant to Pa. R.A.P. 1531(a), representing in support thereof the following:

1. Ancestry is a Virginia corporation with its principal office located at 1300 West Traverse Parkway, Lehi, Utah 84043. Ancestry is a for-profit genealogy company and provides access to genealogical and historical records including birth and death records, marriage licenses, and military service records.

2. Ancestry entered into a license agreement in 2008 with the Pennsylvania Historical and Museum Commission (“PHMC”) to scan, index, and publish certain historical and genealogical records maintained by PHMC. Under the terms of the agreement, PHMC would provide Ancestry access to various categories of such records for the purpose of allowing Ancestry to digitize them for Ancestry’s use and at no cost to PHMC. In addition, Ancestry, through proprietary processes would index and otherwise catalogue the records for access through

Ancestry's various web presences. Although Ancestry agreed to license a "digital copy" of the records and index to PHMC, ownership of the digital copies and indexes created by Ancestry remained with Ancestry. Ownership of the physical records remained, and remains, with PHMC. Furthermore, Pennsylvania residents maintain free electronic access to the individual records through Ancestry. (C.R. OOR Exhibit 1, Pages 8-21)¹

3. The license agreement provided a confidentiality clause for both PHMC and Ancestry to "protect the confidentiality of ... confidential information with the same diligence with which it guards its own proprietary information." (C.R. OOR Exhibit 1, Pages 11-12)

4. On September 1, 2022, Alec Ferretti² ("Ferretti") filed a request with the PHMC pursuant to Pennsylvania's Right-to-Know Law, 65 P.S. § 67.101 et seq. His request sought "all documents scanned (and subsequent indexes and metadata created) pursuant to the contract signed in 2008 between PHMC and [Ancestry] along with all documents scanned (and subsequent indexes metadata created) pursuant to any addenda to that contract, including but not limited to, all birth and death records and metadata for birth and death records." In essence, Ferretti sought not only the records held by a government agency, PHMC, but the work product and digital compilation created by Ancestry at significant expense³ and using its proprietary processes, including all metadata. (C.R. OOR Exhibit 1, Page 8)

¹ References designated in this manner are to the Certified Record filed by the Office of Open Records with the Court on May 23, 2023.

² Mr. Ferretti is on the board of directors of Reclaim the Records, a self-described activist group.

³ Ancestry spent over \$3 million to digitize and index the records.

5. On September 9, 2022, PHMC denied the request asserting only that it did not ‘possess’ the records requested. (C.R. OOR Exhibit 1, Pages 5-6)

6. Ancestry was not made aware of the initial request by Ferretti or the PHMC’s denial including the basis for it.

7. On September 9, 2022, Ferretti filed an Appeal to the Office of Open Records (“OOR”). (C.R. OOR Exhibit 1)

8. As part of the appeal process, the OOR directed that any third parties which may have an interest in the appeal must be notified pursuant 65 Pa C.S. § 67. 1101(c). (C. R. OOR Exhibit 2, Page 4)

9. Despite this direction, Ancestry was not notified at the time of the filing of the appeal on September 9, 2022.

10. On December 19, 2022, over three months after the filing of the appeal, counsel for the PHMC emailed Jared Akenhead, an employee in Ancestry’s Content Acquisition team, advising for the first time of the filing of the OOR appeal. Between the filing of the appeal on September 9, 2022, and PHMC’s counsel’s email, PHMC and Ferretti had filed numerous position statements and responses in the matter, including those filed on September 30, 2022, October 25, 2022, November 14, 2022, December 6, 2022, December 8, 2022 and December 19, 2022. None of these filings had been served upon or provided to Ancestry.

11. On December 20, 2022, Mr. Akenhead emailed Kelly Isenberg, the Senior Appeals Officer assigned to the case, indicating the first notice received by

Ancestry of the appeal. Mr. Akenhead requested a meeting with Ms. Isenberg to discuss how to proceed. (C.R. OOR Exhibit 16, Pages 4-5)

12. Ms. Isenberg responded on December 20, 2022, and attached the initial notice packet given to the parties when the initial appeal was filed on September 9, 2022, and a link to the procedural guidelines of the OOR. She concluded by directing that any other information would have to be obtained from counsel for PHMC. (C.R. OOR Exhibit 17, Pages 2-3)

13. On December 21, 2022, Mr. Akenhead, Ms. Bosen of Ancestry's legal department and Greg Leone, Chief Counsel of PHMC had a telephone call. During that call Mr. Leone assured Ancestry it would handle the appeal before OOR and, if there was an adverse decision by OOR, PHMC would handle the appeal.

14. Ancestry received no other contact from the parties or the OOR regarding the progress of the proceeding for over 5 months.

15. The Final Determination by the OOR was entered on January 26, 2023, and was not provided to Ancestry. (C.R. OOR Exhibit 20, Pages 2-22)

16. The first indication Ancestry had of the adverse decision or any further proceedings was on June 1, 2023, when Mr. Leone emailed Ancestry indicating PHMC had filed a Petition for Review on February 27, 2023.

17. A copy of PHMC's Petition for Review was not served upon Ancestry when filed.

18. The issues presented for review in the Petition were: 1) whether the request was ‘sufficiently specific’; 2) whether the records requested were archival records and exempt under 65 P.S. §67.708(b)(24); 3) whether the license agreement prohibits the release of the records requested; and 4) whether the request is for an ‘extensive dataset for which ‘market value may be charged’. The Petition did not include challenges based upon copyright, the confidential proprietary information exemption or lack of applicability of the Right-to-Know law under 65 P.S. §67.506(d)(1) as to whether the license agreement involved the performance of a ‘governmental function’ and thus whether the request sought ‘records’ as defined under 65 P.S. §67.102.

19. When Ancestry became aware of the appeal and the issues raised and, more importantly, not raised as set forth above, it immediately sought counsel to file this Application.

20. Ancestry seeks to intervene in this proceeding, now that it is fully aware of the nature and extent of the proceeding, as any decision by the Court in this matter will directly affect records involved in this proceeding and, more importantly, could infringe upon Ancestry’s interests and result in the release of Ancestry’s commercially valuable work product created using confidential and proprietary processes it has developed and applied to the records PHMC allowed Ancestry access to digitize under the aforementioned license agreement.

21. In addition, Ancestry contends that the records at issue in their digitized form under the license agreement, despite the finding of the OOR to the contrary, are not “records” as defined under the RTKL, Section 102, nor are they

records of a private, third-party subject to public disclosure under the RTKL § 67.506(d)(1).

22. Ancestry contends its confidential, proprietary, intellectual property and commercial interests with regard to its work product have not been and are not being adequately protected by the current parties to this proceeding.

23. Although not binding, as set forth in an analogous rule under the general Pennsylvania Rules of Civil Procedure 2328, intervention may be sought if the party seeking intervention will be adversely affected by a ruling or that ruling may affect a legally enforceable interest of such party.

24. If the digital records and indexes sought by Ferretti are ordered released as requested and as ordered by the OOR, Ancestry will suffer the direct loss of its valuable work product which would result in substantial competitive harm to Ancestry, including due to the likelihood that Mr. Ferretti will cause the entire record set to be published on the internet by Reclaim the Records which would allow any of Ancestry's competitors to simply download and use the entire data set at no cost (despite Ancestry's substantial investment in creating the digital record compilation), as well as the competitive harm caused by access to its confidential and proprietary indexing processes. Once lost, they cannot be recovered.

25. Ancestry seeks to intervene for the purpose of asserting the aforesaid exemptions and defenses to protect the interests set forth above or, alternatively, will seek a remand to the OOR for the purposes of developing a full, adequate record on these exemptions and defenses. "The right to intervene should be

accorded to anyone having an interest of his own which no other party on the record is interested in pursuing.” Keener v. Zoning Hearing Bd. Of Millcreek Twp., 714 A.2d 1120, 1123 (Pa. Cmwlth. 1998)(analysis under the Pennsylvania Civil Rules of Procedure 2327 and 2329).

26. As this Court has previously held, since the RTKL provides no avenue for a direct appeal by an entity that is neither a requester nor an agency under 65 P.S. §67.1101 (a) or (c), intervention in any subsequent appeal is permitted. Allegheny County Dept. of Admin. Services v. ASCI, 13 A.3d 1025, 1031-33 (Pa. Cmwlth. 2011)

27. This Court has also announced in a case where a third party asserted trade secret and confidential, proprietary claims that, although Section 1101(c)(1) does not permit said party to directly appeal, it allows participation in an appeal when either the requester or the agency has filed a petition for review as provided in Section 1301(a) and the assertion of such claims implicates a property interest and an independent basis under due process, outside the provisions of the RTKL, to preserve its property interest in protecting the disclosure of its trade secrets or confidential proprietary information. West Chester University of Penna. v. Schackner, 124 A.3d 382, 390-91 (Pa. Cmwlth. 2015)

28. Ancestry’s intervention at this point will not unduly delay the proceeding nor waste the resources of the current parties or the Court. To the contrary, Ancestry’s intervention will allow it to protect the rather substantial interests it has in both its confidential proprietary processes and the commercially valuable work product it created at substantial cost and licensed to PHMC and which Ferretti now seeks to obtain. Requester here is not merely seeking records

but the very work product of Ancestry including its proprietary indexing processes and metadata which the Right-to-Know Law does not compel the release of for the reasons set forth above.

29. Counsel for Ancestry has contacted counsel for PHMC who does not oppose its Application for Intervention. Counsel for Ancestry has also contacted counsel for Ferretti who does not oppose the within Application for Intervention.

WHEREFORE, Ancestry.com Operations Inc., Applicant, respectfully moves this court for the entry of an Order permitting it to intervene in this proceeding and to assert the exemptions and defenses set forth above including, but not limited to, if the Court deems it appropriate, to seek remand to the Office of Open Records for the purpose of providing evidence in support of said exemptions and defenses.

NAUMAN, SMITH, SHISSLER & HALL, LLP

By: /s/Craig J. Staudenmaier

Craig J. Staudenmaier, Esquire

Supreme Court ID No. 34996

Joshua D. Bonn, Esquire

Supreme Court ID No. 93967

200 North Third Street, 18th Floor

Harrisburg, PA 17101

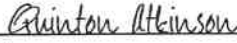
Telephone: (717) 236-3010

Counsel for Ancestry.com Operations Inc.

Date: July 11, 2023

VERIFICATION

I, Quinton Atkinson, Sr. Director Global Content Acquisition, Ancestry.com Operations Inc., do state that I am authorized to make this statement on behalf of Ancestry.com Operations Inc. and verify that I have read the attached document and that the within information is true and correct to the best of my knowledge, information and belief. To the extent that the contents of the pleading are that of counsel, I have relied upon counsel in making this verification. This verification is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

DocuSigned by:

Quinton Atkinson

Date: July 11, 2023

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Craig J. Staudenmaier, Esquire

Signature: /s/Craig J. Staudenmaier

Craig J. Staudenmaier, Esquire
Supreme Court ID No. 34996
200 North Third Street, 18th Floor
Harrisburg, PA 17101
Telephone: (717) 236-3010

CERTIFICATE OF SERVICE

AND NOW, on the date stated below, I, Karen L. Gagne an employee of the firm of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I this day in conformance with Pa.R.A.P. 121, served the foregoing *“Unopposed Application of Ancestry.Com Operations Inc. for Intervention Pursuant to Pa R.A.P. 1531 (a)”* as indicated below addressed to the following:

Via First Class U.S. Mail & Electronic Mail:

Terry Lee Mutchler, Esquire
Evan Kramer, Esquire
Obermayer, Rebmann, Maxwell & Hippel
LLP
1500 Market St Ste 3400
Philadelphia, PA 19102
terry.mutchler@obermayer.com
evan.kramer@obermayer.com
Counsel for Alec Ferretti, Respondent

Amber Sizemore, Esquire
Governor’s Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
ambsizemore@pa.gov
*Counsel for Pennsylvania Historical
and Museum Commission, Petitioner*

Gerard Leone, Esquire
Pennsylvania Historical and Museum
Commission
401 North Street
Harrisburg, PA 17120
Leone.gerard@gmail.com
*Counsel for Pennsylvania Historical and
Museum Commission, Petitioner*

Kelly C. Isenberg, Attorney
Senior Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101- 2234
kisenberg@pa.gov

Date: July 11, 2023

/sKaren L. Gagne

Karen L. Gagne, Legal Assistant

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
Pennsylvania Historical and Museum	:	
Commission,	:	Docket No. 190 CD 2023
Petitioner,	:	
	:	
v.	:	
Alec Ferretti,	:	
Respondent.	:	

ORDER

AND NOW, this ____ day of July, 2023, upon consideration of the foregoing Uncontested Application for Intervention filed by Ancestry.com Operations Inc., it is hereby ORDERED that said Application is GRANTED, and Ancestry.com Operations Inc. is granted permission to intervene in this proceeding as a party petitioner.

BY THE COURT:

RECEIVED

JUL 17 2023

OFFICE OF OPEN RECORDS

J.