

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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|-----------------------------|---|-------------------|
| Pennsylvania Historical and | : | |
| Museum Commission, | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 190 C.D. 2023 |
| | : | |
| Alec Ferretti | : | |
| (Office of Open Records), | : | |
| Respondent | : | |

PER CURIAM

MEMORANDUM AND ORDER

Before this Court is Ancestry.com’s (Intervenor) “Application of [Intervenor] Pursuant to Pa.R.A.P. 123 to Supplement the Record or, Alternatively, to Remand to the Office of Open Records” (Application) and “Application of [Intervenor], for an Extension of Time to File a Brief – Second Request” (Second Extension Request).

Briefly, the underlying matter involves the Pennsylvania Historical and Museum Commission’s (Petitioner) appeal from the Office of Open Records’ (OOR) decision directing Petitioner to comply with Alec Ferretti’s (Requester) Right-to-Know Law (RTKL)¹ request seeking digital copies of certain analog records that were digitized by Intervenor. By July 26, 2023 memorandum and order (Memorandum and Order), this Court exercised its discretion to grant Intervenor’s “Unopposed Application ... for Intervention....” In this Memorandum and Order, the Court underlined that Intervenor was not made timely aware of the RTKL request

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-.3104.

or subsequent proceedings, and thus, was denied the opportunity to contest disclosure of purported confidential and proprietary information.

Now, Intervenor seeks permission to supplement the record within 20 days of issuance of this Order, or alternatively, asks this Court to remand proceedings to the OOR, with instruction to permit Intervenor sufficient time to submit evidence in defense of its position opposing the RTKL request. *See* Application, Wherefore Clause. Neither Petitioner nor Requester have filed an Answer to the instant Application. However, Intervenor represents their respective positions as follows: Petitioner opposes the Application; Requester opposes a request to remand proceedings but concurs with a request for supplementation. Application ¶26.

During the interim between the date of filing its Application and this Court's disposition of such, Intervenor filed Second Extension Request for an additional 10 days from the date of the Court's issuance of this Order to file the appellate brief, which neither Petitioner nor Respondent oppose. Most recently, Intervenor submitted a substantive appellate brief on the merits and a supplemental record (Supplemental Record), thereby effectively rendering its request for an extension to file its appellate brief moot. Nevertheless, it is still within the Court's discretion to determine whether to grant its Application and accept its Supplemental Record.

Concerning the instant Application before us, Intervenor represents that its lack of timely notice of the RTKL request, deprived it of the opportunity to present "several defenses and exemptions" which it posits "directly impacted the decision of the [OOR] and potentially this Court." *Id.* ¶6, 11, 15. More specifically, Intervenor asserts that its Licensing Agreement with Petitioner does not include

“records,” as defined by Section 102 of the RTKL, 65 P.S. § 67.102, or as considered by Section 506(d)(1) of the RTKL, § 65 P.S. 67.506(d)(1), governing private, third-party records subject to public disclosure. Application ¶16. Rather, Intervenor avers that the requested documents contain confidential work product and intellectual property. *Id.* ¶17.

Although it is within this Court’s authority to issue a ruling on the Application and subsequently filed Supplemental Record,² the Court finds, particularly where there is opposition to the Application, that the resolution of this issue is best housed within the capable hands of the OOR. This Court has previously concluded that:

[] the OOR is specifically obligated to assume the sensitive and delicate task of adjudicating the disclosure or non-disclosure of government documents, and the legislature intended the RTKL to provide independence to accomplish this function 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.

Arneson v. Wolf, 117 A.3d 374, 393 (Pa. Cmwlth.), *aff’d and adopted*, 124 A.3d 1225 (Pa. 2015) (citations omitted). To that end, the OOR has “wide discretion with respect to the procedure for deciding appeals.” *Id.* at 386. This authority includes

² In RTKL appeal proceedings, this Court is afforded “the broadest scope of review.” *Bowling v. OOR*, 990 A.2d 813, 820 (Pa. Cmwlth. 2010), *appeal granted*, 15 A.3d 427 (Pa. 2011). The Court conducts an independent review of the OOR’s determination and may substitute its own factual findings for that of the agency. *Id.* at 818. Sitting within this inherent authority, a court ruling on a statutory appeal may “take reasonable measure to ensure that a record sufficient for judicial review exists.” *Pa. State Police v. Am. C.L. Union of Pa.* (Pa., No. 44 MAP 2022, filed Aug. 22, 2023) 2023 WL 5354792, at *4. In other words, the Court has discretion to enlarge the record on appeal as necessary by directing supplementation of the record or accepting additional evidence. *Bowling*, 990 A.2d at 818. Additionally, within the RTKL landscape, this Court maintains authority to remand disclosure requests to the OOR to resolve outstanding questions of fact, to allow an agency the opportunity to make limited redactions, and where the court identified evidence that should not have been considered. *Pa. State Police*, at *4.

the discretion to: “hold a hearing, [] accept and assess evidence that is deemed probative, ... determine whether a privilege is applicable, and is obligated to rule on all procedural issues related to the disposition of the matter.” *Id.* at 386-87.

On this basis, this Court grants Intervenor’s Application and remands this matter back to the OOR.

ORDER

NOW, September 18, 2023, upon consideration of Intervenor’s Application, the Application is GRANTED IN PART.

This appeal is remanded to the OOR for such action as the OOR deems necessary, including issuance of a new order from which any aggrieved party may appeal. *See* Rule 1701(b)(5) of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 1701(b)(5) (authorizing a government unit to “[t]ake any action directed or authorized by an appellate court” after appeal).

Intervenor’s Second Extension Request is DISMISSED AS MOOT.
Jurisdiction relinquished.