



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION UPON REMAND

IN THE MATTER OF	:	
	:	
ERIK STEINHEISER,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2022-1908
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
Respondent	:	

This Final Determination Upon Remand stems from the Commonwealth Court’s (“Court”) January 5, 2024 Order, which vacated an October 13, 2022 Final Determination issued by the Office of Open Records (“OOR”) and remanded the matter to the OOR for further proceedings. Specifically, the OOR was directed to determine whether estimated redaction costs that were presented to the Court by the Southeastern Pennsylvania Transportation Authority (“SEPTA”) were both necessary and reasonable under Section 1307(g) of the Right-to-Know Law (“RTKL”), 65 P.S. § 67.1307(g).¹

¹ The Court’s opinion explained:

SEPTA’s affidavit and estimate indicate it lacks the ability to redact the video in compliance with the OOR’s final determination and will necessarily incur the cost of retaining a third-party vendor to perform the redactions. If the cost of redactions is necessary and reasonable under Section 1307(g), SEPTA may require prepayment under Section 1307(h) before producing the redacted video. Nonetheless, due to the procedural posture of this case, the OOR has not had the opportunity to address the necessity and reasonableness of SEPTA’s estimated cost. We believe the best course of action is to remand so that SEPTA may supplement the record and the OOR may rule on these issues in the first instance.

On remand, SEPTA submitted the verified statement, made under penalty of 18 Pa.C.S. § 4904, of William Marchesani, SEPTA’s Technical Manager of the Video Surveillance Department. This verified statement, dated November 9, 2022, states that “SEPTA does not have the capability or software to redact the faces and identifying information of the SEPTA personnel depicted in the video footage,” and that because SEPTA does not have this capability, it “will have to seek the services of an unaffiliated third party to perform the redactions.” Since it has been over a year since the verified statement was made, the OOR requested that SEPTA provide additional evidence concerning SEPTA’s current capabilities and that SEPTA address whether it has explored obtaining software that would enable SEPTA to make the redactions.² In response, SEPTA provided an additional verified statement from Mr. Marchesani (“Supplemental Verified Statement”). The Supplemental Verified Statement attests, in relevant part:

6. As the Technical Manager of the Video Surveillance Department for SEPTA, I am aware that the video sought by the Requester ... is approximately 2 (two) hours long and encompasses approximately fifty-six (56) different cameras for a total of approximately one hundred twelve (112) video hours being sought in this request.
7. As the Technical Manager of the Video Surveillance Department for SEPTA, I am ... aware that as of February 2024, SEPTA does not have the capability or software to redact the faces and identifying information of the SEPTA personnel depicted in the video footage.
8. More specifically, the software capturing the video at issue is a proprietary software that was initially contracted for use by SEPTA in 2008; SEPTA does not own the rights to nor has SEPTA itself developed the software in use to capture the video at issue.

Southeastern Pa. Transp. Auth. v. Steinheiser (Office of Open Records), No. 1255 C.D. 2022, *8 (Pa. Commw. Ct. Jan. 5, 2024). The redactions itself are not at issue on remand. Therefore, to the extent that the Requester seeks an *in camera* review, such a review is unnecessary.

² The OOR asked, in relevant part: “Specifically, does SEPTA currently have the capability of making in-house video redactions, and has SEPTA explored the availability of software to make video redactions? If SEPTA has explored the availability of software, please elaborate as to why software is incapable of making the redactions; if SEPTA has not explored the availability of software, please elaborate as to why.”

9. This proprietary software does not utilize high-definition video capture technology that is currently available; but rather, reflects the technology readily available in 2008, nearly sixteen (16) years ago.
10. Additionally, SEPTA, in its normal course of business, does not have the need for software or technology that can apply redactions to the proprietary software at issue in this RTKL request.
11. I myself do not have any training or experience that would allow me to apply redactions to the facts and identifying information of the SEPTA personnel depicted in the video sought by Mr. Steinheiser.
12. I am not aware of any SEPTA employee who has the training or experience that would allow SEPTA itself to apply redactions to the faces and identifying information of the SEPTA personnel depicted in the video sought by Mr. Steinheiser.
13. Because SEPTA does not have the capability to perform these redactions, SEPTA is required to seek the services of an unaffiliated third party to perform the necessary redactions.
14. Because SEPTA does not have the capability to perform these redactions, I am unaware of the customary and usual costs that may be charged to perform the redactions.

Section 1307(g) of the RTKL states that “[e]xcept as otherwise provided by statute, 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). There is limited caselaw on this Section of the RTKL; in a prior case, the Court found that labor fees charged by an agency for the creation of a spreadsheet that it was not required to create were not “necessarily” incurred because “it was not ‘necessary’ for [the agency] to create such record.” *State Employees Ret. Sys. v. Office of Open Records*, 10 A.3d 358, 363 (Pa. Commw. Ct. 2010). That case is not applicable here, as both the OOR and the Court have determined that SEPTA is required to provide video records, with redactions, to the Requester.

The estimated redaction costs provided to the Court by SEPTA are set forth in an estimate from Veritext Legal Solutions (“Veritext”), dated November 8, 2022. Veritext estimated that it

would take 120 editing hours, at \$185 per hour, to complete the project, at an estimated total of \$22,000. Veritext’s estimate notes that “[t]his is a very large project,” that there are “some ... particular rough moments in the video,” and that additional time is required “due to the fact that there is a multi-cam set-up, so there are moments in the video where one person is being see[n] on a dozen different cameras and each of those cameras need the same work applied to them to blur the subjects.” On remand, SEPTA also provided to the OOR a separate estimate from Magna Legal Services (“Magna”), dated January 29, 2024, for comparison purposes. Magna estimates that the redactions will result in 288-536 total hours of work, at an estimated cost of \$67,680-\$125,960.

Under Section 1307(g), we must first determine whether the fees set forth in Veritext’s estimate are necessarily incurred. Neither the RTKL nor case law defines “necessarily,” so we must look to common uses of the word. Merriam-Webster defines “necessarily” as “of necessity: UNAVOIDABLY” or “as a logical result or consequence.” https://www.merriam-webster.com/dictionary/necessarily?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last accessed Feb. 7, 2024). The RTKL establishes that agencies must redact exempt information from public records, when redactions are possible. 65 P.S. § 67.706. However, the RTKL is silent as to the necessity of fees for such redactions, providing only that the OOR shall establish duplication fees for Commonwealth and local agencies,” 65 P.S. § 67.1307(b), and that “[n]o fee may be imposed for an agency’s review of a record to determine whether the record is a public record ... subject to access in accordance with this act.” 65 P.S. § 67.1307(g). The OOR has adopted a Fee Schedule, which states only that “[n]o additional fee[s] may be imposed” for redaction. <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm> (last accessed Feb. 7, 2024). The Court read this statement “to prohibit fees for time spent redacting records ..., rather than fees

for the cost of retaining a third-party vendor to redact requested videos,” *Steinheiser*, * 8-9 n. 4, and we agree with that interpretation.³ Therefore, the Court is correct that the OOR has not prohibited, or addressed, the necessity of third-party vendors for video redactions in its Fee Schedule.

Due to the requirements of Section 706 of the RTKL, redactions to public records are commonplace. For example, email addresses, which are often considered personal identification information,⁴ are often redacted from email records. Commonwealth and local agencies routinely perform their own redactions to paper and electronic records in-house; this is evidenced by how common redaction is, and the dearth of caselaw wherein an agency has attempted to outsource the work. Therefore, for the majority of redactions made under the RTKL, the use of a third-party vendor is neither a necessity nor unavoidable, nor should it be a common result or consequence. If agencies were to routinely outsource their redactions to third-party vendors, and requesters were forced to pay those costs, the intent of the RTKL would be compromised as there would be substantial financial barriers to obtain access to public records.

The RTKL does not treat videos differently from any other record possessed by an agency, as the RTKL places electronic and hardcopy documents and files under the same definition of “record.” 65 P.S. § 67.102 (defining “Record” as “[i]nformation, regardless of physical form or characteristics”). While there may be some inherent difficulties associated with segregating exempt portions of video footage, courts have been wary of an agency’s claim that video redaction is impossible. *See, e.g., Cent. Dauphin Sch. Dist. v. Hawkins*, 286 A.3d 726, 743 n.12 (Pa. 2022) (“... [I]t is clear that Section 706 of the RTKL mandates agencies like the District to redact

³ The OOR will further clarify its Fee Schedule after its next biannual review.

⁴ Agency-issued email addresses may be subject to the exemption, and thus redacted. *See Office of the Lieutenant Gov. v. Mohn*, 67 A.3d 123 (Pa. Commw. Ct. 2013), reversed on other grounds, *Pa. State Educ. Ass’n v. Commonwealth*, 148 A.3d 142 (Pa. 2016).

information exempt from disclosure and does not give them discretion in this regard; they are simply required to comply with the law”); *Cent. Dauphin Sch. Dist. v. Hawkins*, 253 A.3d 820, 835 (Pa. Commw. Ct. 2021) (“The government further does not explain why it cannot [segregate] by use of such techniques as blurring out faces, either in the video itself or in screenshots.... The same teenagers who regale each other with screenshots are commonly known to revise those missives by such techniques as inserting cat faces over the visages of humans”) (quoting *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 587 (D.C. Cir. 2020)); *Stahl v. Dep’t of Justice*, No. 19-cv-4142, 2022 U.S. Dist. LEXIS 43483 (U.S. E. Dist. of N.Y., March 11, 2022) (“As this Court previously observed, other courts have required the government to edit videos to obscure identifying information in order to comply with FOIA.... More broadly, video editing has become commonplace in litigation...”). Agencies cannot simply claim that they do not possess video redaction tools, when those tools exist. *See* Technology Committee – Best Practices for Video Redaction Report, Technology Committee of the Chief FOIA Officers Council Video Redaction Working Group, <https://www.foia.gov/chief-foia-officers-council/best-practices-for-video-redaction> (last accessed Feb. 12, 2024). Therefore, because agencies routinely perform their own redactions, and software options exist that permit agencies to make their own redactions to electronic records, including videos, we cannot conclude that the use of a third-party vendor is ever “necessary” for redactions, without evidence that an agency is unable to procure software to perform those redactions themselves.

The Supplemental Verified Statement sets forth that the responsive video was captured by “proprietary” software “initially contracted for” in 2008 which “does not utilize high-definition video capture technology that is currently available.” Supplemental Verified Statement ¶¶ 8-9. Regarding this software, the Supplemental Verified Statement further explains that “SEPTA does

not own the rights to nor has SEPTA itself developed the software in use to capture the video at issue,” that Mr. Marchesani does “not have any training or experience that would allow [him] to apply redactions” and he is unaware of any SEPTA employees with such training or experience,” and that “SEPTA, in its normal course of business, does not have the need for software or technology that can apply redactions to the proprietary software at issue in this RTKL request.” Supplemental Verified Statement ¶¶ 8, 10-12.

These reasons do not support a finding that the use of a third-party contractor is necessary. SEPTA does not explain why it is relevant that the “proprietary” video-capturing software was contracted for in 2008 or that it “does not utilize high-definition video capture technology that is currently available.” While the inference is that SEPTA considers its video technology outdated⁵, SEPTA does not identify the video-capturing software or the file format of the captured video. Notably, neither estimate provided by SEPTA references a need to convert the files to a different format. Thus, we are left to conclude that the video is in a file format capable of redaction.

Further, SEPTA’s own internal limitations are unavailing, as an agency cannot simply hide behind its lack of expertise or experience. SEPTA’s focus appears to be on the technology it *currently* possesses, as evidenced by the statement in the Supplemental Verified Statement that SEPTA “in its normal course of business, does not have the need for software or technology that can apply redactions to the proprietary software at issue.” However, responding to RTKL requests is a duty within SEPTA’s “normal course of business,” as well as redacting those records SEPTA has a legal duty to provide. *See* 65 P.S. § 67.301 (“A Commonwealth agency shall provide public records in accordance with this act”). Section 1307(g) of the RTKL only permits SEPTA to pass

⁵ Outdated records still fall under the RTKL’s definition of record. For example, the definition explicitly includes “tape[s].” 65 P.S. § 67.102.

along costs that are *necessarily* incurred; it does not authorize agencies to pass along costs for methods which agencies may simply find to be more convenient.

However, the Supplemental Verified Statement also sets forth that with the requested video recordings span 56 different cameras, for approximately 112 hours of video.⁶ Supplemental Verified Statement ¶ 6. The record supports an inference that the redactions to be made are complex. Veritext's estimate provides some context and the number of hours quoted in both estimates make clear that the third-party vendors contemplate a great deal of work in order to complete the redactions.⁷ It is reasonable to conclude that SEPTA staff may require more time and effort to effectuate the necessary redactions, especially in light of their inexperience and lack of expertise on the subject. Nevertheless, without evidence that SEPTA is unable to procure software to effectuate the redactions, the record cannot support a finding that the use of either Veritext or Magna is *necessary*.⁸

Because SEPTA has not explored the costs for software, there is nothing in the record concerning those costs. We cannot determine whether those hypothetical costs are reasonable, but we can determine they are, more likely than not, necessary. The Supplemental Verified Statement is clear that SEPTA does not currently have software to perform video redactions; thus, SEPTA would be required to procure such software. The purchase of this software is therefore necessary, meaning that SEPTA will necessarily incur costs upon its purchase.⁹ However, the Requester has

⁶ Although the Court raised the possibility that the parties may negotiate for the production of less video, the parties have not come to such a resolution. Therefore, we must reach a decision on the amount of video that was at issue before the Court.

⁷ There is nothing in the record which makes us question the credibility of either estimate; however, Veritext's estimate is more credible due to its additional explanation.

⁸ There may very well be a situation where the use of a third-party vendor is more cost efficient than the procurement of software; however, without any evidence before us, this is not that case.

⁹ We are not aware of any free software that would securely redact video and do not suggest that SEPTA can simply use the technology used by teenagers to "insert[] cat faces", as referenced in *Evans*.

made clear that he does not wish to incur *any* costs for redactions.¹⁰ Therefore, although SEPTA would be entitled to require prepayment under Section 1307(h) of the RTKL, 65 P.S. § 67.1307(h), in the event that software costs more than \$100, SEPTA is not required to incur any costs for the redaction of the requested video footage here, because the Requester does not wish to incur any costs, no matter how reasonable.

For the foregoing reasons, the appeal is **denied**, and SEPTA 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 or petition for review to the Commonwealth Court. 65 P.S. § 67.1301(a). The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.¹¹ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION UPON REMAND ISSUED AND MAILED: February 14, 2024

/s/ Kyle Applegate

CHIEF COUNSEL
KYLE APPLGATE, ESQ.

Sent via e-file portal: Erik Steinheiser; Justine Baakman, Esq.

¹⁰ In January 12, 2024 correspondence, the Requester explains that he is “not required nor can I be compelled to pay for redactions under any circumstances,” and that he is only willing to settle the matter if SEPTA “redact[s] the video and give[s] it to [the Requester] at [SEPTA’s] expense.” In January 31, 2024 correspondence, the Requester further explains that “[m]y previous answer with regards to ... refusing to pay the fees ... stands and is solid.” While the Requester has referenced the possibility of a conference call between the parties and the OOR, the OOR does not believe a conference call is necessary, as the parties’ positions are clear.

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