



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**SHAWN BREEN,  
Requester**

**v.**

**PENNSYLVANIA STATE POLICE,  
Respondent**

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**Docket No: AP 2020-2192**

### **INTRODUCTION**

Shawn Breen (“Requester”) submitted a request (“Request”) to the Pennsylvania State Police (“PSP”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the PSP’s RTKL Request Logs for various years. The PSP granted the Request subject to a fee. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the PSP is not required to take further action.

### **FACTUAL BACKGROUND**

On September 8, 2020, the Request was received, seeking “[a]ll PSP Right to Know request logs for the years 2017, 2018, 2019 and 2020.... In the event there are any fees, I would be grateful if you inform me of the estimated charges before fulfilling the request. I would prefer the request be filled electronically, by email attachment.”

On October 15, 2020, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the PSP granted the Request, providing a compact disc with the requested logs and charging \$3.00 for the CD pursuant to the OOR's Fee Schedule.

On October 28, 2020, the Requester appealed to the OOR, challenging the imposition of the fee only. He argues that the cost of a CD is not \$3.00 and further that he should not have been charged at all as he requested that the records be provided electronically via email attachment. The OOR invited both parties to supplement the record and directed the PSP to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 6, 2020, the PSP submitted a position statement reiterating its grounds for charging the fee and arguing that "although a requester may request that records be provided in a certain medium, 65 P.S. 67.701(a), an agency is not required to use the means (i.e. e-mail) to provide the information to the Requester." The PSP indicated it would rely upon its final response to the Requester.

On November 6, 2020, the Requester filed supplemental argument in support of his appeal. He explains that the actual cost of a CD is substantially less than \$3.00 and the PSP improperly charged him under the OOR's Fee Schedule.<sup>1</sup> The Requester argues that the PSP improperly interprets Section 701(a). He argues that the manner in which an agency provides information to a requester directly relates to the medium it actually exists in. That is, because the information he sought exists in an Excel file, the PSP can and should have provided it by email attachment.

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<sup>1</sup> The Requester also argues that he is "a taxpayer in the State of Pennsylvania and has been since 2012. The requester funds the Pennsylvania State Police by paying their taxes. The Pennsylvania State Police is legally allowed to rob (for lack of a better word) the requester by charging a fee for providing information the taxpayer already funded by way of paying their taxes. Although it is incredibly improper for the Pennsylvania State Police to legally charge the requester again for information they already paid for once, the issue at hand is the 'actual cost' of the disc."

On November 17, 2020, the OOR sought additional evidence from the PSP regarding the actual cost of a CD, the size of the log files, and additional details. However, the PSP did not respond.

### **LEGAL ANALYSIS**

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed 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.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The PSP is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed

public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 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)).

The OOR has jurisdiction over the permissibility of fees. *See Prison Legal News v. Office of Open Records*, 992 A.2d 942, 946 (Pa. Commw. Ct. 2010) (“An agency’s requirement that a requester pay a fee before receiving access to records constitutes a denial of access because it places a condition precedent on allowing the requester to access the records”). Section 1307 of the RTKL governs the assessment of fees. “Fees for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication” are established by the OOR, with respect to Commonwealth agencies such as the PSP. 65 P.S. § 67.1307(b)(1)(i). These fees are set forth in

the OOR's Fee Schedule.<sup>2</sup> Therefore, the fees set forth in the OOR's Fee Schedule apply to the Request.

In the Request, the Requester expresses a preference for the records to be provided “electronically, by email attachment.” Under the OOR's Fee Schedule, fees may not be imposed for the transmission of records via email and fees may not exceed actual cost for records provided via a CD/DVD, flash drive, or other electronic medium. However, if records only exist in hard copy, an agency is not required to convert those records into electronic copies. *See* 65 P.S. § 67.705. Instead, 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. 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 Requester also contests the cost of a CD. Here, the Requester expressed a preference for electronic copies, and there is no dispute that the Requester has been provided electronic copies of the records on an electronic medium. Although it is unclear why the PSP chose to send the records on a CD as opposed to using email, such a decision is within the agency's discretion. Further, as the OOR Fee Schedule allows a charge of “up to \$3.00,” the PSP may charge \$3.00.<sup>3</sup>

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<sup>2</sup> Available at <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm>.

<sup>3</sup> While the Requester focuses on the phrase “actual cost up to...” in the OOR's Fee Schedule, CDs are often purchased in bulk. The RTKL tasked the OOR with developing the Fee Schedule, in part, to provide simple, consistent costs across the Commonwealth. The OOR did not intend to require agencies to perform multiple calculations to determine the absolute specific cost of a single CD. Further, there is no evidence that the PSP charged for postage, which it could have done under the Fee Schedule.

## CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the PSP 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 Commonwealth Court. 65 P.S. § 67.1301(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>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 24, 2020**

*/s/ Erin Burlew*

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ERIN BURLEW, ESQ.  
APPEALS OFFICER

Sent to: Shawn Breen (via email only);  
Nolan Meeks, Esq. (via email only);  
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<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).