



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

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**MEGAN BROCK,  
Requester**

**v.**

**: Docket No: AP 2021-0905  
: (Consolidated)**

**MONTGOMERY COUNTY,  
Respondent**

### **INTRODUCTION**

Megan Brock (“Requester”) submitted two requests (“Requests”) to Montgomery County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking communications. The County sought prepayment of the copying fees in order to continue to process the Requests. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the County has not demonstrated that it can seek prepayment.

### **FACTUAL BACKGROUND**

On March 16, 2021, a Request was filed, seeking:

Copies of all communications, emails, presentations, and documents received by any/all Montco Department of Health staff or directors from June 1, 2020 to March 15, 2021 that reference the following terms: CHOP, Children’s Hospitals of Philadelphia, Policy lab, Dr. Rubin, Pilot testing program, assurance testing program, in school COVID rapid testing, Dr. Damsker, Val Arkoosh.

On March 23, 2021, the County invoked a thirty day extension to respond to the Request pursuant to 65 P.S. § 67.902. On April 22, 2021, the County stated that it requires prepayment because the responsive records total 124,007 pages and the duplication cost is \$31,001.75.

On April 22, 2021, the second Request was filed seeking:

Copies of all communications, emails, presentations, and documents received by and/all Montgomery County staff or directors on the domain monctopa.org from December 10, 2020 to December 22, 2020 that reference the following terms: Dave Rubin, Rachel Levine, Sec. of Health, Secretary of Health, CLIA licenses, CLIA license, Michael Huff.

On April 23, 2021, the County sought prepayment from the Requester, stating that it estimates a total of 4,579 pages of records and that duplication costs total \$1,189.75.

On May 5 and May 7, 2021, respectively, the Requester appealed to the OOR, challenging the fees assessed by the County.<sup>1</sup> More specifically, the Requester notes that he wants to inspect the summary document. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 18, 2021, the County submitted two affidavits of Joshua Stein, the County's Open Records Officer and Solicitor, discussing its search for records and prepayment costs.

On March 21, 2021, the Requester stated that no records have been identified or granted in response to the Requests.

## 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

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<sup>1</sup> The appeals were docketed at OOR Dkt. AP 2021-0905 and OOR Dkt. AP 2021-0918. Because they involve the same parties and issues, the appeals are hereby consolidated at OOR Dkt. AP 2021-0905.

“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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, the Requester requested a hearing; however, because the OOR has the necessary information and evidence before it to properly adjudicate the matter, the request is hereby denied.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local 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 County seeks prepayment of duplication costs in both Requests. In support of this argument Attorney Stein attests that in response to the first Request, “the County conducted a good faith search of all of the County e-mails received by any/all Montgomery County Department of Health or directors from June 1, 2020 to March 15, 2021 and found 124,007 responsive e-mails...” Attorney Stein explains that the first Request “covers a rough estimate of at least 124,007 pages of material. The estimated cost of fulfilling your request is \$31,001.75 (\$.25 per page for duplication).” As for the second Request, Attorney Stein attests that “the County conducted a good faith search of all the e-mails from every County e-mail account and found 4,759 e-mails or 3.76 GB of data.”

The OOR has jurisdiction over an appeal of a request for prepayment. *See Prison Legal News v. Office of Open Records*, 992 A.2d 942, 946 (Pa. Commw. Ct. 2010). Section 1307(h) of the RTKL states that “[p]rior to granting access in accordance with this act, an agency may require a requester to prepay an estimate of the fees authorized under this section if the fees required to fulfill the request are expected to exceed \$ 100.00.” 65 P.S. § 67.1307(h). However, an agency is only permitted to require prepayment of duplication fees if the fees are estimated exceed \$ 100.00. *See* 65 P.S. § 67.1307(h).

In *Pa. Dep’t of Educ. v. Bagwell*, the Commonwealth Court noted that “[a]n agency may only pass on the cost of duplication that corresponds to those pages to which an agency is granting access.” 131 A.3d 638, 654 (Pa. Commw. Ct. 2016). The Commonwealth Court explained that:

An agency is not permitted to seek prepayment until it has reviewed the request, reviewed responsive records, and decided it is granting access to certain records reviewed. Accordingly, an agency must assess public status before it has the right to demand prepayment under Section 1307(h) of the RTKL....

As explained above, an agency needs to assess which records are being produced in order to formulate a reasonable fee estimate. Here, the Department claims it did not assess public status before sending the Prepayment Demand. In so doing, the Department erred...

...the Department is copying or printing 644 pages in order to review the records to then assess their public status is not a fee that may be passed on to the requester unless the Department intends to send the requester copies of all 644 pages. Because the Department sought to assert a number of exemptions to disclosure, and thus reduce the number of records ultimately disclosed, it is apparent the fee estimate did not correspond to the fees that may be passed on to a requester.

From our review of the Department's Prepayment Request, it did not determine whether all 644 pages would be disclosed to Requester. The Department did not analyze the content of the 644 pages as to public status at all. It reserved that aspect of 'processing' the Request until after it received payment of more than \$300.

*Id.* at 653-54.

Attorney Stein states that *Bagwell* is unlike the matters here, attesting that “the records requested in the instant matter are not simply a few hundred pages of mostly unprotected correspondence between officials over an issue of clear public import, but are over one hundred thousand emails between public health professionals during a global pandemic.”<sup>2</sup> He further attests that he,

personally reviewed a number of these records of the Montgomery County Department of Health, and attest that an overwhelming number of these records inherently contain personal identification information, individually identifiable health information, records of a minor under the age of 17 years of age, and much of the information in the e-mails is confidential under the Pennsylvania's Disease Control and Prevention Law ('DPCL') or for records where the County may be considered the medical provider, the federal Health Information Portability and

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<sup>2</sup> The County could have sought additional time to perform its duties under the test enunciated by the Commonwealth Court in *Pa. State Sys. of Higher Educ. v. Ass'n of State Coll. & Univ. Faculties* (“APSCUF”), 142 A.3d 1023 (Pa. Commw. Ct. 2016), for requests involving voluminous records: namely, (1) a valid estimate of the number of documents being requested; (2) the length of time the personnel charged with reviewing the request require to conduct the review; and, (3) any difficulties the agency anticipates in fulfilling the Requester's requests in electronic format.

Accountability Act of 1996 (“HIPAA”)... Accordingly, the Agency has assessed public status before it demanded prepayment under the RTKL pursuant to 65 P.S. § 1307(h).

Here, the County’s evidence of its search for records appears to include all emails from the accounts referenced in the Request; however, it is unclear if those searches were limited by the search terms listed in each Request. If not, then the search could possibly include emails that were not requested. Additionally, while the County identified at least 124,007 pages in response to the first Request and 4,759 emails responsive to the second Request, it has not established how many of those pages will actually need to be duplicated for redaction.<sup>3</sup> Attorney Stein does state that the Agency has assessed public status before if demanded prepayment; however, the remainder of the factual allegations in the affidavits do not support that conclusory statement. Such as, the County has identified “a *rough* estimate” of the responsive records and Attorney Stein’s attestation that:

there is no reasonable method of which the County is aware to separate out records which may require legal review or redaction from those which might be public records not subject to any exception, privilege or other legal protection from the 124,007 [and 4,759] records identified as responsive, other than a manual review by an attorney and/or other personnel authorized to view and handle protected personal and medical information.

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<sup>3</sup> The County argues that the records cannot be produced electronically due to the need for redactions. Attorney Stein argues that records can only be securely redacted by printing the records and redacting them by hand. However, the County has not provided sufficient evidence that it is incapable of electronic redaction. In *Central Dauphin Sch. Dist. v. Hawkins*, 1154 C.D. 2017, 2021 Pa. Commw. LEXIS 367, \*28, (Pa. Commw. Ct. Apr. 22, 2021) the Court rejected the agency’s statement that it was technologically and financially unable to make electronic redactions where there was no evidence of the basis of this conclusion. The evidence in this matter is conclusive and merely suggests that there is no reasonable method the County can use to separate the records that require redaction from those that are public. Here, like in *Hawkins*, “there was no testimony that [the affiant] had personal knowledge of the technological capabilities of the [Agency] nor that [the affiant] had consulted with its IT Department to explore what was and was not possible in that regard.” *Id.* at \*30. Accordingly, electronic redaction should be conducted, unless the County, under *Hawkins*, can provide evidence that it is impossible to do so. *Id.*

As such, the County has not discussed its good faith search for the responsive records sought, limited by the search terms in the Requests, and it appears the County has not yet reviewed the records and determined which records require redaction and which records may be granted. Neither Section 1307 of the RTKL, nor the OOR's Fee Schedule permits an agency to charge duplication fees simply so that an agency may review the records in hard copy. Accordingly, the County has not demonstrated that it may seek prepayment under Section 1307(h) of the RTKL in this instance.

### CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County has not established that it may seek prepayment. Within thirty days, the County shall provide the responsive records to the Requester subject to permissible copying fees, with redactions made electronically if possible.<sup>4</sup> 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 Montgomery 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. 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>5</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 6, 2021**

*/s/ Jill S. Wolfe*

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

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<sup>4</sup> The OOR does not take a position regarding whether copying fees are permissible at this time.

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

Sent via email to: Megan Brock;  
Joshua Stein, Esq.