



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**EDWARD SOTHERDEN,
Requester**

v.

**MONTGOMERY COUNTY,
Respondent**

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Docket No: AP 2021-1229

INTRODUCTION

Edward Sotherden (“Requester”) submitted a request (“Request”) 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 copying fees in order to continue to process the Request. 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 May 10, 2021, the Request was filed, seeking:

electronic copies of all correspondence including emails, memorandum, reports or call logs of County Commissioners Valerie Arkoosh and Kenneth Lawrence, as well as the Voter Service Office staff Karley Sisler, Frank Dean, Matt Macekura, Caroline Benitz, Sharon Proietto, Brenna Costello, Justin Evert, Josh Hannock, Mila Hayes, Sarah Piening, and Dori Sawyer as relates to the following.

Any grants or monies received from Center of Tech and Civic Life (CTCL), the Brennan Center for Justice (BCJ), or the National Vote at Home Institute (NVHI). Any communications or reporting back to CTCL and/or BCJ and/or NVHI.

Most specifically I am requesting the emails of the above mentioned county employees and officials dating from March 1, 2020 through December 31, 2020 which contain any/all of the following keywords.

“@techandcivicliflife.org” “CTCL” “@voteathome.org” “grant”
“Zuckerberg” “report” “conditions” “@brennan.law.nyu.edu”
“@nyu.edu” “ballot reconstruction”

On June 16, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the County sought prepayment from the Requester, stating that it estimates at least 21,150 pages of records are responsive and that duplication costs total approximately \$5287.50. *See* 65 P.S. § 67.1307(h).

On June 23, 2021, the Requester appealed to the OOR, challenging the fees assessed by the County and its ability to electronically redact.¹ More specifically, the Requester notes that he sought electronic copies and the County provided no evidence as to whether it had the capability to electronically redact records. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On July 7, 2021, the County submitted the affidavit of Joshua Stein, the County’s Open Records Officer and Solicitor, asserting the Request is insufficiently specific and addressing prepayment costs.

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

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 the Request. In support of this argument Attorney Stein attests that in response to the Request, “the County conducted a keyword search for the e-mail accounts of the two (2) county commissioners and Voter Services Staff members...for the time period of March 1, 2020, through December 31, 2020, and the search yielded 21,150 e-mails.” Attorney Stein explains that the County sought prepayment “requesting an initial estimated cost of \$5287.50.”

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 attests that the Request is insufficiently specific, thus the search yielded a large number of potentially responsive records. He does not raise any potential exemptions with the RTKL that might require records be redacted.

Here, the County has provided evidence of its search for records; however, it has not established how many of those records will actually need to be duplicated for redaction. 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.

Additionally, the County has not provided any evidence regarding its ability to redact records electronically. 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. 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.*; see also *Brock v. Montgomery Cnty.*, OOR Dkt. AP 2021-0905, 2021 PA O.O.R.D. LEXIS 1133.

Finally, although the County asserts that the Request is insufficiently specific because the search provided a large number of potentially responsive records, the County was able to identify potentially responsive records. In certain situations, the ability to identify responsive records demonstrates that a request is sufficiently specific. See *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012). Further, the County did not raise the issue of specificity until this appeal was filed and seemingly would have complied with the Request had the Requester paid the quoted duplication costs. See *Office of the Governor v. Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016) (an agency’s failure to object to specificity and seek further clarification during the request stage is a factor in determining whether a request is sufficiently specific).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County has not established that it may seek prepayment and that it cannot electronically redact records. Within thirty days, the County shall provide the responsive records to the Requester subject to permissible copying fees,

with redactions made electronically if possible.² 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 18, 2021

/s/ Erin Burlew

ERIN BURLEW, ESQ.
APPEALS OFFICER

Sent to: Edward Sotherden (via email only);
Joshua Stein, Esq. (via email only);
Lauren Raikowski (via email only)

² The OOR does not take a position regarding whether copying fees are permissible at this time.

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