



FINAL DETERMINATION UPON RECONSIDERATION

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| IN THE MATTER OF | : | |
| | : | |
| DAVID BAYNE, | : | |
| Requester | : | |
| | : | |
| v. | : | Docket No: AP 2022-1011R |
| | : | |
| LOWER BURRELL CITY, | : | |
| Respondent | : | |

INTRODUCTION

David Bayne (“Requester”) filed a request with Lower Burrell City (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking an in-person review of a City police document. The City granted the request upon certain conditions, and the Requester appealed to the Office of Open Records (“OOR”). The OOR issued a Final Determination, wherein the appeal was **granted in part** and **denied in part**. Thereafter, the City filed a Petition for Reconsideration of the Final Determination, which the OOR granted. For the reasons set forth in this Final Determination Upon Reconsideration the appeal is denied and the City is not required to take further action.

FACTUAL BACKGROUND

On April 11, 2022, the Requester submitted the Request, seeking an in-person inspection of page 21 of the City’s police policy and procedure manual. *See Request.* On April 14, 2022,

the City granted the Request, notifying the Requester he was able to inspect the record at the City's police station at 7:30 AM on April 28, 2022. In its letter granting the Request, the City also notified the Requester that the City would not permit any video or photograph equipment during the inspection, and that the Requester, like all City Hall visitors, is subject to a search upon entering the building.

On April 27, 2022, the Requester filed an appeal with the OOR, challenging the date and inspection time, and claiming his Constitutional rights under the 1st and 4th Amendments are being violated, as he cannot video record the inspection or duplicate the record, and is subject to an unreasonable search. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On May 11, 2022, the City submitted a position statement, arguing the record cannot be duplicated under the Copyright Act, 17 U.S.C. §§ 106, 501, the City is willing to arrange the inspection for another day and time, and that no Constitutional violations occurred because the City granted inspection of the record in a public area at the location where the record is kept during the hours the location is open. The City also submitted the attestation of Amy Rockwell ("Ms. Rockwell"), the City's Open Records Officer, and John Marhafka ("Chief Marhafka"), the City's Chief of Police. Ms. Rockwell attests the City is willing to adjust the inspection date and time in coordination with the Requester, the document in question is protected by federal copyright law, and it is not unreasonable for the City to require an appointment for the record inspection. Rockwell Attestation ¶¶ 3-5. Chief Marhafka attests he met with the Requester at 7:30 AM in the past without objection, and the Requester appeared in the past for inspections with video recording equipment and a firearm. Marhafka Attestation ¶ 2. Chief Marhafka further attests the document

at issue is protected by federal copyright law. *Id.* at ¶ 3. The Requester did not submit additional evidence on appeal.

On May 18, 2022, the OOR attempted to contact the parties, the Requester and the City's counsel, to request the City expand on how it determined the record in question is protected by federal copyright, as attested to by Chief Marhafka and Ms. Rockwell by 12:00 noon on Monday, May 23, 2022. The City did not file a response. On May 24, 2022, having received no additional information from the City regarding the application of the Copyright Act to the record in question, the OOR attempted to contact the parties again and requested the City provide this information by May 25, 2022. The OOR did not receive a response and issued a Final Determination on May 26, 2022. The City filed a Petition for Reconsideration ("Petition") explaining it did not received the OOR's requests for clarification due to an inadvertent breakdown regarding the transmission of email messages and the OOR granted the Petition.

The May 26, 2022, Final Determination granted the appeal in part and denied the appeal in part. Specifically, the OOR granted the appeal to the extent that the City did not fully demonstrate the record sought for inspection was protected by the Copyright Act and therefore could not be copied. In all other aspects, the OOR determined the City complied with the RTKL. The May 26, 2022, Final Determination ordered the City to permit the inspection and duplication of the record sought in the Request.

On May 31, 2022, the City filed its Petition, because the City did not receive the OOR's emails requesting clarification regarding the Copyright Act. The City argues the responsive record is protected material under the Copyright Act. On June 2, 2022, the OOR granted the Petition because neither the City nor the City's solicitor received the Appeals Officer's request for additional information and ordered the City to file a response by June 9, 2022. The

Reconsideration Order also provided Mr. Bayne with the opportunity to file a response to the Reconsideration Order or the City's response by June 16, 2022. On June 9, 2022, the City submitted additional information. The Requester did not file a response to the Reconsideration Order or the City's response.

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). 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 reasonable probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2).

The City 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 to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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.” 65 P.S. § 67.708(a).

1. The City did not violate 65 P.S. § 67.701(a)

Section 701 of the RTKL provides that an agency’s records “shall be available for access during the regular business hours of an agency.” 65 P.S. § 67.701(a). When inspection is sought, an agency may schedule times for the inspection so that a records review occurs under the supervision of agency staff. *See Frame v. Menallen Township*, OOR Dkt. AP 2009-0878, 2009 PA O.O.R.D. LEXIS 338 (“[I]t was not unreasonable for the Township to require the Requester to schedule an appointment so it could have the records ready and ensure that it has appropriate personnel to assist the Requester”); *see also Mezzacappa v. Borough of West Easton*, OOR Dkt. AP 2010-1012, 2010 PA O.O.R.D. LEXIS 929 (“An agency may require a requester to schedule an appointment to inspect records”).

Here, Ms. Rockwell attests the Request was granted for inspection at 7:30 AM because the Requester appeared multiple times at that time without objections, and she attested if that time is inconvenient, the City will reschedule the inspection date and time in coordination with the Requester. Rockwell Attestation ¶ 4. Ms. Rockwell further attests that the City seeks to schedule an appointment for records inspection to ensure appropriate personnel is available. *Id.*

Additionally, Chief Marhafka attests that his shift is 7:30 AM to 3:30 PM, and in the past, he met several times with the Requester at 7:30 AM without objections. Marhafka Attestation ¶ 2. Chief Marhafka further attests that the Requester has an open carry permit and previously entered City Hall with a firearm. *Id.* Lastly, Chief Marhafka attests that the Requester has a hat

with a video recording device and tripod video equipment which is unnerving to City Hall staff. *Id.* Also, Chief Marhafka attests that the record in question is protected by the Copyright Act. *Id.* at ¶ 3. Chief Marhafka stated the City chose a time for the inspection that the Requester used to inspect records in the past; however, as Requester challenged this time upon appeal, the City is willing to schedule the inspection for another day and time. *Id.* at ¶ 2; Rockwell Attestation ¶¶ 3-4.

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the City acted in bad faith, "the averments in [the statements] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). As such, the Requester has the option of contacting the City to schedule another inspection appointment consistent with 65 P.S. § 67.701(a). Within thirty days, Requester may contact the City to schedule an appointment to inspect the record at the location where the record is kept, and the City is permitted to schedule a date and time for the inspection that is convenient for both parties.

2. The Requester's constitutional claims are beyond the scope of this appeal

The Requester claims he has the constitutional right to be free from unreasonable search and seizure and the right to video record his interaction with the police during the inspection under the 4th and 1st amendments. As discussed above, the RTKL provides an agency's records "shall be available for access during the regular business hours of an agency." 65 P.S. § 67.701(a). Here, in its submission, the City contends the record in question is located in City Hall and is available

for inspection in a secure area at this location. As such, the City has complied with 65 P.S. § 67.701(a), and the Requester's constitutional challenges to the City's security measures at the designated inspection location is beyond the scope of this RTKL appeal.

3. The City met its burden of proof to demonstrate that the record cannot be duplicated under the Copyright Act

The Requester is seeking to duplicate page 21 of the City police's "'Policy and Procedure' manual, as listed in the table of contents, of the manual, under chapter 2 – Organization and Administration, 203-Training." *See Request*. On appeal, the Requester contends "[i]n no way am I stealing or modifying the document by taking a picture of it" and "I am requesting that the OOR instruct [the City] to permit me to view the document during normal working hours of City Hall and in a public area where I can take a picture of the document if I so desire." The City argues that the responsive record cannot be duplicated under the Copyright Act.

The Copyright Act precludes the reproduction of any copyrighted works without the consent of the copyright holder. *See* 17 U.S.C. §§ 106, 501. In *Ali v. Philadelphia City Planning Commission*, the Commonwealth Court held the Copyright Act does not "exempt[] materials from disclosure under the RTKL"; instead, it "limits the level of access to a public record only with respect to duplication, not inspection." 125 A.3d 92, 101-05 (Pa. Commw. Ct. 2015). In *Ali*, the Commonwealth Court further explained:

Because we lack jurisdiction under federal law to resolve the question of whether a local agency's disclosure of copyrighted material pursuant to the RTKL without the owner's consent constitutes infringement under the Copyright Act, where a local agency has refused to duplicate a public record in response to a RTKL request by invoking the Copyright Act, our review must be confined to determining whether the local agency has met its burden of proving facts sufficient to show that forced duplication of copyrighted material under the RTKL implicates rights and potential liabilities arising under the Copyright Act that can only be resolved by the federal courts.

... a conflict between the Copyright Act and the RTKL with respect to access (*i.e.*, duplication) where (1) the public record in question is protected under a copyright held by a third party and (2) the local agency does not have the consent of the copyright owner to the duplication of the public record in response to a RTKL request. With respect to the second element, we do not hold that the local agency is under any obligation to seek out the copyright owner and endeavor to secure its consent. ... we hold that where a local agency invokes the Copyright Act as a basis to limit access to a public record to inspection only, the absence of consent by the copyright owner to duplication in response to a RTKL request should be presumed.

125 A.3d at 104-05.

In the instant case, the City, following its Petition, has provided evidence to show the responsive record in controversy, is subject to copyright protections. The City provided the additional attestation from Chief Marhefka who states:

I have reviewed the Lower Burrell Police Manual. At the bottom of every page there is a notation that it is Copyrighted by Lexipol. A page is attached as an example. It states, in pertinent part, "Copyright Lexipol, LLC 2020/1208. All Rights Reserved" The City pays a yearly fee of approximately \$6,700 to get updates to the manual. Lexipol permits the City to copy and distribute the copies to the [] members of the Police force.

Marhefka Additional Attestation ¶ 2. The City also provided a sample of the Copyright contained within the responsive record which further demonstrates the record is subject to the rights and potential liabilities under the Copyright Act.

Based on the evidence provided, the City met its burden of proof that the record is protected under the Copyright Act. The City provided the attestation of Ms. Rockwell, who stated "[i]t should be noted that the record [the Requester] wishes to review is protected by federal copyright."

Rockwell Attestation ¶ 5. Also, Chief Marhafka attests that "[t]he record [the Requester] wants to view is protected by federal copyright law." Marhafka Attestation ¶ 3. The City also provided the additional attestation of Chief Marhafka who stated the responsive record is copyrighted by Lexipol, specifically, "Copyright Lexipol, LLC 2020/1208." Marhafka Additional Attestation ¶

2.

The Requester seeks to take a photograph of the record and the OOR cannot order the City to permit the copyrighted material to be duplicated. The City met its burden to show the duplication of page 21 of the City police's 'Policy and Procedure' manual would be a violation of the Lexipol, LLC 2020/1208 Copyright and the duplication of the copyrighted material would subject the City to a copyright infringement action.

CONCLUSION

For the foregoing reasons, the appeal is **denied**. Within thirty days, the Requester may contact the City to arrange for an inspection, but not duplication, of the record sought in the Request. 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 Westmoreland 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 according to court rules 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.¹ This Final Determination shall be placed on the website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION UPON RECONSIDERATION ISSUED AND MAILED: July 14, 2022

/s/ Lois Lara

APPEALS OFFICER
LOIS LARA, ESQ.

Sent to: David Bayne (via email only);
Stephen Yakopec, Esq. (via email only);
Amy Rockwell, AORO (via email only)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).