



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**STEVEN BURDA,  
Requester**

**v.**

**MONTGOMERY COUNTY,  
Respondent**

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**Docket No: AP 2018-1338**

### **INTRODUCTION**

Steven Burda (“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 records related to property management. The County asked the Requester to resubmit his request on a RTKL form, and 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 County is not required to take any further action.

### **FACTUAL BACKGROUND**

On July 25, 2018, the Request was filed, seeking “documents or records or list of all the HOA management company / companies that manage townhomes/HOA or other properties in or within [the County] and in or for years 2016, 2017 and 2018” (emphasis in original). On the same date, the County informed the Requester that its Open Records Policy required the use of the

OOR's Uniform RTKL Request Form or the County's RTKL request form. The County provided hyperlinks to its policy and both forms; it also attached its form to the email.

On the same date, the Requester appealed to the OOR, arguing that the County's response constituted a denial of his Request. 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. *See* 65 P.S. § 67.1101(c).

On August 6, 2018, the County submitted the affidavit of Joshua Stein, Esq., the First Assistant Solicitor in the County Solicitor's Office, who argues that the appeal is moot because the Requester subsequently filed an identical request in compliance with the County's policy.

### **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 Requester requested a hearing; however, this request is denied, as the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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).

The County argues that it properly denied the Request because the Requester did not use the standard, state-wide request form in accordance with its Open Records Policy.<sup>1</sup> The RTKL provides that a requester may submit a request in person, by mail, by e-mail or facsimile. 65 P.S. § 67.703. While the RTKL does not require the use of any specific form, an agency may promulgate regulations and policies to govern its administration of the RTKL. *See* 65 P.S. § 67.504. An agency that has a posted policy requiring the use of a form may deny access to the

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<sup>1</sup> Available at <https://www.montcopa.org/DocumentCenter/View/4077/RTK-Policy-Updated-11-20-2017?bidId>.

requested records where the requester fails to use the required form, provided that the agency timely responds to the request notifying the requester of the policy. *See Donahue v. Hazleton Area Sch. Dist.*, OOR Dkt. AP 2013-1702, 2013 PA O.O.R.D. LEXIS 996 (holding that the District could not use its policy as a basis for denying a request because the District deemed denied the request, rather than timely responding to the request by notifying the requester of its policy).

Here, the Requester failed to comply with the County's posted RTKL policy requiring the use of either the standard, state-wide form or the form available on its website. On the same day the Request was submitted, the County informed the Requester that this was the case and directed him to its website, where its policy is posted. Therefore, the County was permitted to deny the Request for failing to use the proper form. *See, e.g., Fennell v. Phila. Police Dep't*, OOR Dkt. AP 2016-0393, 2016 PA O.O.R.D. LEXIS 513; *Fennell v. Phila. Police Dep't*, OOR Dkt. 2014-1457, 2014 PA O.O.R.D. LEXIS 1184. Regardless, Mr. Stein attests that the Requester resubmitted the Request in a manner consistent with the County's policy, and the Requester is not prohibited from appealing any denial or deemed denial pursuant to 65 P.S. § 67.1101(a)(1).

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the County 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 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. 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>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: August 22, 2018**

/s/ Blake Eilers  
Blake Eilers, Esq.  
Appeals Officer

Sent to: Steven Burda (via email only);  
Frank Dean (via email only);  
Joshua Stein, Esq. (via email only)

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<sup>2</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).