pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SYDELLE ZOVE,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2019-0739**
	:	
WHITEMARSH TOWNSHIP,	:	
Respondent	:	

INTRODUCTION

Sydelle Zove ("Requester") submitted a request ("Request") to Whitemarsh Township ("Township") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking development plans related to a specified property. The Township granted the Request in part, but refused to duplicate certain materials marked as copyrighted, and the Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

On April 11, 2019, the Request was filed, seeking to inspect and obtain electronic copies of "Re: 4046/4006 Butler – Hovnanian project – All documents/plans/memos concerning preliminary plan, including 36 pages of plan." On April 18, 2019, the Township provided the

requested records, but informed the Requester that she could inspect but could not duplicate any record marked with a copyright symbol.

On May 8, 2019, the Requester appealed to the OOR, arguing that the Township had not provided meaningful access to the records.[1] The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On May 20, 2019, the OOR received a Request to Participate from K. Hovnanian Pennsylvania Acquisitions, LLC ("Hovnanian"), the developer of the property at issue, along with a position statement arguing that the Township had properly provided access under the standard articulated by the Commonwealth Court for access to copyrighted materials, that the Township could not be required to undertake a fair use analysis, and that the Township is not required to demonstrate lack of consent on behalf of the copyright holder.[2]

The same day, the Township submitted a position statement reiterating the above arguments. The Township also submitted the affidavit of Charles Guttenplan, the Township's Director of Planning & Zoning, who attests that he provided all records, but that the preliminary plan set, stormwater plans and plans within the soils and foundation subsurface investigation contained copyright marks from Gregory Elko, of Langan Engineering.

On May 31, 2019, in response to an inquiry from the OOR, the Township explained that it would ordinarily permit the Requester to use the Township's conference room for the purposes of

[1] The Requester primarily argues that copies of the records should be provided, but she also states that she was required to stand at a narrow counter which did not offer an opportunity to examine the maps and plans on a flat surface.

[2] The OOR asked that any objections to Hovnanian's participation be filed by May 22, 2019. Although the OOR received no objections to the Request to Participate, the Township's filing makes clear that the copyright holder in this case is actually Hovnanian's subcontractor, Langan Engineering. Because Hovnanian is not the copyright holder and the only issue briefed on appeal is the treatment of copyrighted materials, they do not have a legal interest in the records and the Request to Participate is hereby denied. Furthermore, because their submission is duplicative of the Township's argument, the OOR will not consider it. *See* 65 P.S. § 67.1102(a)(2) ("The appeals officer may limit the nature and extent of evidence found to be cumulative").

inspection, but that the Requester had arrived at a time when the room was already in use and she had to be seated at a counter.[3]

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, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Township 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

[3] On June 4, 2019, the attorney for the Requester reached out to clarify that the Requester was primarily interested in obtaining copies of the records but did not withdraw her argument on appeal that the inspection was insufficient.

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)).

1. The Township is not required to provide copies of the records

The first issue on appeal is whether the responsive records labeled with a copyright must be reproduced and provided to the Requester. 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 that 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 this case, it is uncontested that "certain plans contain copyrights belonging to … Gregory Elko, P.E. of Langan Engineering" and that the allegedly copyrighted material "included the preliminary plan set, stormwater plans within the stormwater report by Langan Engineering, and plans within the Soils and Foundation Subsurface Investigation and Carbonate Hazards Analysis Report by Rettew Associates, Inc." The Township, in consultation with its solicitor, decided to presume an absence of consent by the copyright holder and offered only the inspection access provided for in *Ali*. On appeal, the Requester argues that the Township should not be permitted to presume an absence of consent, that fair use doctrine should apply to the records, that the Township's approval of the plans would transform the records into a public record, and that inspection creates unreasonable obstacles to review of the plans.

Contrary to the first argument, *Ali* is unambiguous in directing an agency, and the OOR on appeal, to presume an absence of consent to duplication by the copyright holder when an agency

invokes the Copyright Act. *Id.* at 105.[4] Likewise, the OOR cannot consider the Requester's argument that this duplication would be permitted by the "fair use" doctrine because, as the Commonwealth Court noted in *Ali*, ordering the Township to rely on such a doctrine could subject it to substantial fines if a federal court were to disagree with the OOR's assessment later.[5] *Id.* at 102 ("All the while, the local agency is expending taxpayer dollars in costs and attorney's fees to defend itself in an infringement action occasioned not by its own assessment of the risk and subsequent voluntary disclosure, but by forced disclosure of the OOR or this Court"). Finally, the Requester's argument that the Township's approval would transform these plans into public records is irrelevant—the parties both agree that the planning records already constitute public records, and the Requester has not articulated a reason that the Township's approval would void the asserted copyright. *See, e.g., Barosh v. Philadelphia Fire Dep't*, OOR Dkt. AP 2015-2919, 2016 PA O.O.R.D. LEXIS 129 (while the International Model Fire Code is a copyrighted document, when the City adopted it as an ordinance, that ordinance could not have been copyrighted) (*citing Veeck v. Southern Building Code Congress Int'l, Inc.*, 293 F.3d 791, 800 (5th Cir. 2002)). Therefore, the OOR concludes that the Township has properly invoked the Copyright Act and was only required to provide access to the Requester via inspection.

2. The Township has not demonstrated that it provided sufficient inspection

The Township argues that the Requester was provided with an opportunity to inspect the records, and the Township further argues that the Requester was offered a seat at a counter to

[4] The Requester argues that the presence of two copyrighted pages on the Township's website related to the project is evidence that the Township does have the copyright holder's consent. However, under certain circumstances, the discretionary release of records is permitted under the RTKL, *see* 65 P.S. § 67.506(c), and there has been no indication that such a disclosure, which may have been permissible, somehow grants the OOR the ability to permit duplication of otherwise copyrighted records.

[5] Nothing in *Ali*, however, prevents the Township from determining that a duplication is fair use and providing records on its own initiative. Furthermore, the agency is explicitly empowered to seek the copyright owner's consent where it decides that such provision is in the public interest. *See Ali*, 125 A.3d at 129, n.15 ("We can envision several ways in which a local agency could, if it wished, secure the consent of the copyright owner.")

review the records but declined to do so. The Township has not submitted any evidence or argument to rebut the Requester's argument on appeal that the venue provided for inspection was insufficient to allow the Requester to perform a reasonable review.

An agency has the burden of proving that all records were provided on appeal. *See Zettlemoyer v. Towamensing Twp.*, OOR Dkt. AP 2012-2016, 2013 PA O.O.R.D. LEXIS 5. Similarly, it is the agency's burden to establish that it provided a reasonable opportunity for the Requester to inspect the records. Under the RTKL, an affidavit may serve as sufficient evidentiary support. *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). However, the unsworn statements in the Township's emails are not competent evidence. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) "Because the letter written by City's counsel is a legal brief, it cannot be … evidence at all"). Therefore, the Township has not demonstrated that the venue provided to the Requester was sufficient to permit a review of the records.[6]

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Township is required to permit inspection of the records as set forth above within thirty days. 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

[6] Neither party offered an opinion on what would constitute a sufficient venue for inspection; however, the Township states that it has a conference room which would be better-suited for the Requester's purposes.

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.[7] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: June 14, 2019

/s/ Jordan Davis

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APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Terry Mutchler, Esq. (via email);
Jennifer Prior, Esq. (via email);
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[7] *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).