FINAL DETERMINATION

IN THE MATTER OF:

TERRY SMITH, Requester

v. Docket No.: AP 2019-0922

DONEGAL TOWNSHIP, Respondent

INTRODUCTION

Terry Smith (“Requester”) submitted a request (“Request”) to Donegal Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 et seq., seeking specific video footage from the Township’s main office. The Township granted the Request, stating that the Requester would be required to pay a fee for downloading the video. 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 May 17, 2019, the Request was filed, seeking:

Video footage from all three cameras that record within the office (main office, back room & meeting room) for dates April 22, 23, 24, 25, 26, 29, 30, May 1, 2, 3, 6, 7, 8, 10, 13, 14 & 15, 2019 from 7:30 am to 4:00 pm.
Video footage from all three cameras that record within the office (main office, back room & meeting room) for dates May 9, 2019 from 7:30 am to 9:00 pm and May 16, 2019 from 7:30 am to 4 pm.

On May 21, 2019, the Township invoked a thirty-day extension to respond. See 65 P.S. § 67.902(b)(1). On June 7, 2019, the Township granted the Request, stating that “[t]here will be a charge of $260.00 (4 hour minimum) and $65.00/hour for anything exceeding the initial 4 hours” to download the responsive videos.

On June 13, 2019, the Requester appealed to the OOR, challenging the fees imposed and stating grounds for disclosure. Specifically, the Requester asserts that she has “requested video for different days from these same cameras before and … didn’t have to pay anything…..” The OOR invited the parties to supplement the record and directed the Township to notify third parties of their ability to participate in the appeal. 65 P.S. § 67.1101(c).

On July 10, 2019, after being provided additional time to do so, the Township made a submission, providing a copy of the supplemental response it issued to the Requester on July 8, 2019. The response indicates that the Township denied access to the responsive videos because the requested records relate to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17), the Request lacks specificity, 65 P.S. § 67.703, and “production of the video may violate the Sunshine Act, … relating to executive sessions closed to the public.” The Requester did not submit additional evidence on appeal.

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. Wintermanthel, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is

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1 In the appeal, the Requester granted the OOR an additional thirty days to issue a final determination. See 65 P.S. § 67.1101(b)(1).

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; however, 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 of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this 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 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. 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

1. The Request is sufficiently specific

The Township asserts that the Request is not sufficiently specific to enable it to identify responsive records. Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. See Gingrich v. Pa. Game Comm’n, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing Bowling, 990 A.2d at 824).

In determining whether a particular request under the RTKL is sufficiently specific, the OOR applies a three-part balancing test set forth by the Commonwealth Court in Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and Carey v. Pa. Dep’t of Corr., 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). The OOR examines to what extent the request identifies (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. Pa. Dep’t of Educ., 119 A.3d at 1125.

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” Pa. Dep’t of Educ., 119 A.3d at 1125. The subject matter should provide a context to narrow the search. Id. (citing Montgomery County. v. Iverson, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) (en banc)). Second, the scope of the request must identify a
discrete group of documents (e.g., type or recipient). Id. Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” Id. at 1126. “The timeframe prong is … the most fluid of the three prongs, and whether or not the request’s timeframe is narrow enough is generally dependent upon the specificity of the request’s subject matter and scope.” Id.


In the instant matter, the Township asserts that Request lacks specificity because it “seek[s] video from three different cameras for eighteen (18) dates spanning four-hundred seventy-four (474) total video hours.” The Request provides a specific subject matter and scope, as it seeks video from specified cameras in certain Township rooms. The Request also contains a timeframe, as it provides the specific dates and times that it seeks the video footage. Furthermore, the Township has identified 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) (noting that “the request was obviously sufficiently specific because the School District has already identified potential records included within the request”); but cf. Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121, 1126 n.8 (Pa.
Commw. Ct. 2015) (stating that the mere “identification of potentially responsive records … is not sufficient to satisfy Section 703 of the RTKL on its own.”).

The crux of the Township’s argument is that the Request is burdensome because it entails over 474 video hours. However, “an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the request[er].” Legere, 50 A.3d at 265. Additionally, the fact that a request may be burdensome does not, in and of itself, deem the request overbroad. See id.; see also Ruggiero v. Lackawanna County, OOR Dkt. AP 2014-0043, 2014 PA O.O.R.D. LEXIS 157 (“[A] request involving the detailed review of voluminous documents does not relieve the agency of its requirements to presume the records are open and available and respond in accordance with the RTKL”). As such, the Request is sufficiently specific.

2. The Township has not demonstrated that the requested records relate to criminal and noncriminal investigations

The Township also argues that the requested records are exempt because they relate to criminal and noncriminal investigations. Section 708(b)(16) of the RTKL exempt from disclosure records “relating to or resulting in a criminal investigation….“ 65 P.S. § 67.708(b)(16). A local agency claiming that records are exempt under Section 708(b)(16) does not automatically divest the OOR of jurisdiction over an appeal. Section 503(d) of the RTKL, 65 P.S. § 67.503(d)(2), creates a two-step analysis for determining when cases should be heard by the OOR and when they should be heard by the appeals officer appointed by a District Attorney. First, jurisdiction is properly transferred from the OOR to the District Attorney’s Office when an appeal on its face involves records that relate to a criminal investigation. (e.g., search warrants, witness statements, etc.). See Porter v. Allegheny County Sheriff’s Office, OOR Dkt. AP 2014-1910, 2014 PA
O.O.R.D. LEXIS 1444 (Appeal transferred to County District Attorney where the request for a search warrant was on its face related to a criminal investigation).

Second, when it is unclear whether the requested records relate to a criminal investigation, the local agency must provide some evidence showing how the records relate to a specific criminal investigation. While a low threshold for transferring a case is needed, an agency must provide more than a conclusory affidavit that merely repeats the language of Sections 503(d) and 708(b)(16). See Bush v. Westtown-East Goshen Police Dep’t, OOR Dkt. AP 2016-1869, 2016 PA O.O.R.D. LEXIS 1708 (Agency submitted affidavit demonstrating how the requested records related to a specific criminal investigation); Burgess v. Willistown Twp. Police Dep’t, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding that where a local agency made a preliminary showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal).

a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Chawaga*, 91 A.3d at 259.

Here, the requested videos are not facially related to a criminal investigation. The only evidence offered by the Township is its unsworn position statement, whereby the Township generally asserts that the requested videos are being denied under Sections 708(b)(16) and (17) of the RTKL. However, the Township fails to provide evidence of any criminal and noncriminal investigations and how the responsive records relate to those investigations. As noted by the Commonwealth Court, “it is not incumbent upon [the] OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts.” *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (en banc).

Accordingly, the Township has failed to meet the threshold for transferring the case; similarly, it has not demonstrated that the responsive records relate to any particular noncriminal investigation or are, themselves, investigative in nature. Consequently, the Township has failed to prove that the records are exempt from disclosure. 65 P.S. § 67.708(a)(1).

3. **The Township has failed to demonstrate that the requested records are otherwise exempt from public access**

Finally, the Township states that “the request for video from May 9, 2019, is further denied to the extent that production of the video may violate the Pennsylvania Sunshine Act … relating to executive sessions closed to the public.” The RTKL and the Sunshine Act, 65 Pa.C.S. §§ 701, *et seq.*, are to be read in *para materia*. The Sunshine Act permits, but does not require, an agency to conduct certain business in executive session, and, under the RTKL, such discussions are exempt from disclosure.\(^2\) *See* 65 P.S. § 67.708(b)(21)(ii).

In this instance, the Township has not presented any evidence establishing that the video requested for May 9, 2019, is exempt from public access.\(^3\) As such, the Township has not met its burden of proof under the RTKL. 65 P.S. § 67.708(a)(1).

4. **The Township may charge the actual cost of duplicating the responsive videos**

On appeal, the Requester challenges the fees imposed by the Township for downloading the responsive videos. Specifically, the Township states in its initial response to the Request that “[t]here will be a charge of $260.00 (4 hour minimum) and $65.00/hour for anything exceeding the initial 4 hours” to download the responsive videos. The Township explains that “[d]ue to the volume of videos requested, [the Township] ha[s] to call someone in [to] do the downloading.”

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\(^2\) Of note, violations of the Sunshine Act do not fall within the OOR’s jurisdiction. *See* 65 Pa.C.S. § 715 (providing for the jurisdiction and venue of judicial proceedings).

\(^3\) While an agency may be entitled to withhold a recording of an executive session from public access under the RTKL, releasing such a recording would not violate the Sunshine Act.
On appeal, the Township did not respond to the Requester’s arguments or make any argument regarding the fees assessed.

The permissibility of fees is within the OOR’s jurisdiction and a challenge to the fees assessed is properly raised in an appeal. See 65 P.S. § 67.1307(b); Mangino v. Shenango Area Sch. Dist., OOR Dkt. AP 2018-1339, 2018 PA O.O.R.D. LEXIS 1367. Although the Township’s July 10, 2019 submission does not address the fees imposed, to the extent the Township seeks to charge fees for copying the requested records, the OOR has found that an agency is permitted to impose reasonable fees necessarily incurred to comply with the RTKL. 65 P.S. § 67.1307(g); see also Linko v. Sewickley Borough, OOR Dkt. AP 2018-2215, 2019 PA O.O.R.D. LEXIS 250. However, an agency is not permitted to charge for labor costs incurred in complying with its obligations under the RTKL. State Employees Ret. Sys. v. Office of Open Records, 10 A.3d 358, 363 (Pa. Commw. Ct. 2010). An agency may charge the “actual cost” of duplication of an electronic record, including a video recording. McElroy v. Pa. Dep’t of Pub. Welf., OOR Dkt. AP 2014-0194, 2014 PA O.O.R.D. LEXIS 318. Section 1307(b)(2) of the RTKL requires only that the fee for duplication be “reasonable and based on prevailing fees for comparable duplication services[.]” 65 P.S. § 67.1307(b)(2). In this instance, because the Township denied the Request and has not proven any duplication costs, the Township is only entitled to charge the Requester for the actual cost of the medium, such as flash drive or CD-ROM, transmitting the responsive videos to the Requester. See Landis v. Springettsbury Twp., OOR Dkt. AP 2013-0829, 2013 PA

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4 See Official RTKL Fee Schedule, available at https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm. Section 1307(b) of the RTKL states that fees for duplication, among other things, shall be established by the OOR for both Commonwealth and local agencies. 65 P.S. § 67.1307(b)(i). Additionally, upon receipt of the records, the Requester may have a right to appeal the sufficiency or completeness of the records. See Buehl v. Pa. Dep’t of Corr., No. 198 C.D. 2015, 2015 Pa. Commw. Unpub. LEXIS 552 (Pa. Commw. Ct. 2015) (finding that appellate rights may be triggered from an agency’s response to a RTKL request and from the requester’s receipt of the requested records).
O.O.R.D. LEXIS 448 (finding that “the charge of $10.00 for a flash drive containing the requested audio recording is reasonable”).

**CONCLUSION**

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Township is required to provide the Requester with all responsive records as directed 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 Washington 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.5 This Final Determination shall be placed on the OOR’s website at: [https://openrecords.pa.gov](https://openrecords.pa.gov).

**FINAL DETERMINATION ISSUED AND MAILED:** August 23, 2019

/s/ Magdalene C. Zeppos

MAGDALENE C. ZEPPOS, ESQ.
APPEALS OFFICER

Sent to: Terry Smith (via email only); and Sharon Balach, AORO (via email only)

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