



FINAL DETERMINATION

IN THE MATTER OF

**MICHELLE GROVE,
Requester**

v.

**GREGG TOWNSHIP,
Respondent**

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Docket No: AP 2019-0317

INTRODUCTION

Michelle Grove (“Requester”) submitted a request (“Request”) to Gregg Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking surveillance footage of two individuals entering and exiting the Township offices. The Township denied the Request, arguing, among other things, that release of the footage would jeopardize public safety and building security. 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 Township is required to take further action as directed.

FACTUAL BACKGROUND

On January 11, 2019, the Request was filed, seeking:

Security footage of Jennifer Snyder and Doug Bierly entering and exiting office for beginning of shifts, ending of shifts, and lunch breaks – from the same two cameras that were previously granted. Preserve date & time stamp.
4/13/18-4/26/18, 6/22/18-07/05/18, 7/20/18-08/01/18

On January 18, 2019, the Township invoked a thirty-day extension to respond to the Request. 65 P.S. § 67.902. On February 19, 2019, the Township denied the Request, stating that the records have been sought on prior occasions and this Request placed an unreasonable burden on the Township. 65 P.S. § 67.506(a). Additionally, the Township argued that disclosure of the footage would jeopardize public safety, 65 P.S. § 67.708(b)(2), endanger the safety or physical security of a building, 65 P.S. § 67.708(b)(3), and reveal a trade secret or confidential proprietary information, 65 P.S. § 67.708(b)(11).

On March 6, 2019, the Requester appealed to the OOR, challenging the denial, stating grounds for disclosure and seeking a finding of bad faith for a delayed response. 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 March 18, 2019, the Requester submitted a position statement, arguing that the Commonwealth Court has determined that records from the surveillance camera are public records. On March 22, 2019, the Township submitted a position statement, reiterating the arguments above but abandoning any argument as to the records constituting or revealing a trade secret or confidential proprietary information. The Township also submitted the attestation made under the penalty of perjury of Pamela Hackenburg, the Township's Open Records Officer. The Requester submitted a response on March 22, 2019.

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 parties did not request 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 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 burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Request was not deemed denied and the OOR declines to make a finding of bad faith

The Requester argues that the District is delaying its response in bad faith. While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith....”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$ 1,500 if an agency denied access to a public record in bad faith”).

Under the RTKL, an agency must invoke an extension of time to respond to a request by providing “written notice to the requester within five business days of receipt of the request....” 65 P.S. § 67.902(b)(1). When invoking the extension, the Township noted that the Request was received January 14, 2019. Therefore, the Township had five days from January 14, 2019 to respond, or invoke the 30-day extension of time. The Township invoked the extension of time in a timely manner and the final response was issued within the appropriate time frame. The Request

was not deemed denied. As a result, the OOR finds no evidence that the Township acted in bad faith and, accordingly, declines to make a finding of bad faith.

2. The Township has failed to demonstrate that the surveillance footage does not exist

Ms. Hackenburg attests that the requested records do not currently exist and the Township “would be required to create a record to respond....” In her attestation, Ms. Hackenburg explains that:

6. ... [T]he Township does not maintain the security footage in the manner requested by [the Requester]--i.e., security footage from one specific time to another, in a continuous recording.

7. Instead, the Township’s security footage automatically loops, and to remove the footage from that loop, the Township must undertake a series of ‘backup’ steps....

8. In short, the Township would need to create the record requested by [the Requester].

Under the RTKL, an attestation made under the penalty of perjury is competent evidence 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). While an agency is not “required to create a record which does not currently exist,” 65 P.S. § 67.705, copying, downloading, or exporting information from one device, drive or information management system to another is not the creation of a record. For example, “drawing information from a database does not constitute creating a record under the [RTKL].” *Pa. Dep’t of Env’tl. Prot. v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012) (emphasis in original). In *Gingrich v. Pa. Game Comm’n*, as summarized in *Cole*, the Commonwealth Court held that “an agency can be required to draw information from a database, although the information must be drawn in formats available to the agency.” No. 1254 C.D. 2011, Pa. Commw. Unpub. LEXIS 38

(Pa. 2012); *Cole*, 52 A.3d at 547. In short, “to the extent requested information exists in a database, it must be provided.” *Id.* Similarly, security footage that exists and can be extracted or downloaded must be provided. Because the surveillance footage exists within the Township’s control and the specific footage can be extracted, the Township has failed to prove that the surveillance footage does not exist within its possession, custody or control. *See Hodges*, 29 A.3d at 1192.

3. The Township has not proven that disclosure of the surveillance footage would endanger public safety or the physical security of a building

The Township argues that disclosure of the surveillance footage would endanger public safety and the physical security of a building. Section 708(b)(2) exempts from disclosure records “maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity[.]” 65 P.S. § 67.708(b)(2). To establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

Meanwhile, Section 708(b)(3) of the RTKL exempts from disclosure “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information storage system.” 65 P.S. § 67.708(b)(3); *see Crockett v. Southeastern Pa. Transp. Auth.*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under

this exemption). In order for this exemption to apply, “the disclosure of” the records – rather than the records themselves – must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3).

In support of withholding the surveillance footage, the Township relies upon the attestation of Ms. Hackenburg, who attests that disclosing the security footage would jeopardize public safety and create a reasonable likelihood of endangering the safety or physical security of the Old Gregg School, which houses the Township’s offices. With respect to public safety, Ms. Hackenburg attests as follows:

11. The Old Gregg School is a former school building that the Township has converted into a community building.
12. The Old Gregg School is open to the public every day from 8:30 a.m. to 9:30 p.m.
13. The Township rents portions of the Old Gregg School to private groups, and allows the public to use the remaining portions of the building at its leisure.
- ...
15. As the owner, landlord, and primary user of the Old Gregg School, the Township is responsible for ensuring public safety at the Old Gregg School.
16. The Township does not actively patrol the Old Gregg School for safety, meaning that the Township does not provide security services to ensure the safety of individuals in the Old Gregg School.
17. Instead, the Township relies on the relevant security cameras to ensure safety and verify that the public uses the Old Gregg School in an appropriate manner.
18. The Township installed the security cameras after a security assessment by local security officials, including a police lieutenant and the current Sheriff of Centre County.
- ...

21. While some of the security cameras are conspicuous to passive users of the building, other security cameras are not necessarily obvious to passers-by.
22. What is more, the extent to which the security cameras can capture the activities in the Old Gregg School is unknown to the public, meaning, for example, that users of the Old Gregg School are unaware of the width of the camera lenses' angles.

Regarding the physical security of the Old Gregg School, Ms. Snyder attests that:

27. ... [T]he security cameras are the primary means of ensuring safety at the Old Gregg School, which is left unmonitored on a daily and nightly basis.
28. [T]o fulfill this request would require disclosure of footage from multiple cameras throughout the building and many periods of time throughout the day which would further jeopardize the security and safety of the building.

In *Gregg Twp. v. Grove*, No. 1186 C.D. 2017, 2018 Pa. Commw. Unpub. LEXIS 343 (Pa. Commw. Ct. 2018), the Commonwealth Court determined that the Township failed to demonstrate that security camera footage of two individuals entering and exiting the Township offices located in the Old Gregg School was exempt from public access under Sections 708(b)(2) and (3) of the RTKL. The Court stated that the Township's affidavit established that cameras were installed for security of the building; however, the affidavit was silent as to what was depicted on the requested camera footage and how disclosure of the footage would jeopardize the building security and public safety. *Id* at *8; *see also Rome v. Exeter Borough*, OOR Dkt. AP 2016-0730, 2016 PA O.O.R.D. LEXIS 669 (determining that surveillance video footage capturing individuals arriving at and departing from the borough office and parking lot was not exempt from disclosure under Sections 708(b)(2) and 708(b)(3) because the video cameras were presumably located in public areas and the borough did not submit evidence that it had taken steps to hide or disguise the location of the cameras)

Here, as in *Gregg Twp v. Grove*, the Township has not adequately demonstrated how the disclosure of the requested surveillance footage would be reasonably likely to threaten public

safety or the security of the Old Gregg School. Speculation, alone, is not sufficient to meet the Township's burden. The areas described in the Request – where the individuals would have entered and exited the Township's offices – are public areas. As a result, the Township has not met its burden of proof. *See* 65 P.S. § 67.708(a)(1); *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”).

4. The Request is not disruptive

Th Township notes that the Requester routinely requests surveillance footage from the Township. Section 506(a) of the RTKL provides that “[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.” 65 P.S. § 67.506(a)(1). “Under this section ... an agency must demonstrate that (1) ‘the requester has made repeated requests for th[e] same record[(s)]’ and (2) ‘the repeated requests have placed an unreasonable burden on the agency.’” *Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011); *see also Slate v. Pa. Dep’t of Env’tl. Prot.*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 (“A repeated request alone is not enough to satisfy § 506(a)(1)”). Repeated requests for the same records, although phrased differently, may be denied as disruptive. *See Cohen v. Pa. Dep’t of Labor & Indus.*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton Sch. Dist.*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 (Slight differences in phraseology do not preclude application of [Section 506(a)]”).

In *Mezzacappa v. West Easton Borough*, the OOR held that a request must be repeated more than once to constitute a “repeated request” for purposes of 65 P.S. § 67.506(a). OOR Dkt. AP 2012-0992, 2012 PA O.O.R.D. LEXIS 967 (“Because the Borough has only established that

the Requester has made one repeated request, rather than multiple ‘repeated requests,’ the OOR finds that the Request was not disruptive”). The OOR’s decision in *Mezzacappa* was subsequently upheld by both the Northampton County Court of Common Pleas and the Commonwealth Court. *Borough of West Easton v. Mezzacappa*, No. C-48-CV-2012-7973 (North. Com. P1. Jan. 9, 2013) (“[A] request is not disruptive when a requester [seeks] the same records only twice”), *aff’d* 74 A.3d 417 (Pa. Commw. Ct. 2013). Here, the Township did not demonstrate that the same records were sought more than twice. *See Grove v. Gregg Twp.*, OOR Dkt. AP 2018-1971, 2019 PA O.O.R.D. LEXIS 1484 (granting an appeal from the Township’s denial of the exact same request). Therefore, the Request is not a “repeated request” for purposes of Section 506(a).

Notwithstanding the foregoing, the requested footage is currently the subject of an appeal before the Centre County Court of Common Pleas at docket 2018-4839 and that appeal has stayed the release of the records until the resolution of the appeal. *See* 65 P.S. § 67.1302(b) (“A petition for review under this section shall stay the release of documents until a decision ... is issued”); *see also Pennsylvanians for Union Reform v. Centre County*, OOR Dkt. AP 2015-2257, 2015 PA O.O.R.D. LEXIS 1877. Therefore, although the records are considered public at this time, the release of the records is stayed pending the Centre County Court of Common Pleas’ decision on the issue.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the Township is required to provide the surveillance footage to the Requester within thirty days following the lifting of the above-mentioned stay. 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 Centre 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 5, 2019

/s/ Erin Burlew

APPEALS OFFICER
ERIN BURLEW, ESQ.

Sent to: Michelle Grove (via email only);
David Gaines, Esq. (via email only);
Pamela Hackenburg (via email only)

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