



FINAL DETERMINATION

IN THE MATTER OF

**MICHELLE GROVE,
Requester**

v.

**GREGG TOWNSHIP,
Respondent**

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Docket No.: AP 2018-1289

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 the internet browsing history from Township-owned computers. The Township partially denied the Request by granting access to redacted copies of the responsive internet browsing histories. 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 May 21, 2018, the Request was filed, seeking, in pertinent part: “5/13/2018 – 5/19/2018 Internet Browsing History of all [T]ownship-owned desktop or laptop computers.” The Requester specified that she sought electronic copies or inspection of the responsive records. On May 29, 2018, the Township partially granted the Request by making redacted copies of the

internet browsing history available for access subject to the payment of a duplication fee of \$41.00.

On July 18, 2018, the Requester filed an appeal with the OOR, challenging the Township's redactions and the imposition of a duplication fee.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. 65 P.S. § 67.1101(c).

On July 25, 2018, the Requester submitted a position statement arguing that the Township redacted browsing history showing personal use of computers by Township employees, those redactions were not supported under the RTKL and that the Township should not impose a duplication fee when she sought records in electronic format. The Requester also states that no records were provided for Supervisor Miller's laptop.

On July 27, 2018, the Township submitted a position statement arguing that the Township's redaction of the responsive internet browsing history was proper because the information related to an employee's personal use of Township computers and is not a record under the RTKL. With respect to Supervisor Miller's laptop, the Township asserts that it is not property of the Township. The Township contends that the OOR already decided that the redactions were proper in *Grove v. Gregg Township*, OOR Dkt. AP 2018-0953, 2018 PA O.O.R.D. LEXIS 764. In the alternative, the Township argues that, if the redacted information is determined to be a record under the RTKL, the information would also be exempt from disclosure because they are personal notes, 65 P.S. § 67.708(b)(12). Finally, the Township

¹ The Requester initially appealed this matter on May 30, 2018 at *Grove v. Gregg Township*, OOR Dkt. AP 2018-0953, 2018 PA O.O.R.D. LEXIS 764. The OOR denied the appeal stating that the Requester cannot challenge the redactions prior to reviewing the redacted records. However, the OOR did state that the Requester, upon reviewing the records, may appeal the redactions to the OOR. The Requester obtained the redacted records on July 11, 2018 and is now challenging the redactions. See *Buehl v. Pa. Dep't of Corr.*, No. 198 C.D. 2015, 2015 Pa. Commw. Unpub. LEXIS 552 (Pa. Commw. Ct. 2015).

argues that its imposition of a duplication fee for the redaction of electronic records was proper because the Township had to print the histories to perform the redactions. In support of its assertion, the Township submitted the affidavit of Jennifer Snyder, the Township's Open Records Officer.

On July 30, 2018, the Requester submitted an additional position statement arguing, among other things, that her challenge to the redactions is properly before the OOR and the Township's redactions are without merit. She further states that she would like information on the ownership of Supervisor Miller's laptop.²

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 local agencies. 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

² Ms. Snyder's affidavit explains that Supervisor Miller's laptop is not the property of the Township. The Requester asserts that the Board of Supervisors voted to approve the purchase of the laptop and that she now seeks information about the purchase and ownership status of that laptop. However, a requester may not modify, explain or expand a request on appeal. *See Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010). Therefore, the OOR's review on appeal is confined to the Request as written, and the modifications of the Request on appeal are not considered. *See Brown v. Pennsylvania Turnpike Comm'n*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998. The Requester is not precluded from filing a new request for this information.

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 necessary 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. 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. 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 has not met its burden of proving that the redactions are proper under the RTKL

The Township argues that the OOR has already decided the issue of whether the redactions were proper in *Grove v. Gregg Township*, OOR Dkt. AP 2018-0953, 2018 PA O.O.R.D. LEXIS 764. However, the OOR in that appeal specifically stated that:

Accordingly, because the Requester has not reviewed the redacted records, the appeal as to the redactions is denied. *See Kunkle v. Pa. Dep't of Env'tl. Prot.*, OOR Dkt. AP 2013-1359, 2013 PA O.O.R.D. LEXIS 812; *Parker v. Pa. Dep't of Agriculture*, OOR Dkt. AP 2011-1238, 2011 PA O.O.R.D. LEXIS 843. However, upon reviewing the records, the Requester may appeal the redactions to the OOR. *See Buehl v. Pa. Dep't of Corr.*, No. 198 C.D. 2015, 2015 Pa. Commw. Unpub. LEXIS 552 (holding that that a requester could timely file an appeal both from the date of an agency's response and the date when an agency mailed responsive records).

Id. Accordingly, the OOR has not issued a Final Determination on the merits of the Township's redactions, and the Requester is now properly challenging the redacted records.

The Township argues that it properly redacted portions of the internet browsing histories that do not document a transaction or activity of the Township, but reflect the personal matters of the Township employees. Upon reviewing the evidence submitted by the Township to support this assertion, it fails to provide a sufficient factual basis to withhold the redacted information.³ Ms. Snyder attests that the OOR has previously held that an agency is only required to disclose agency-related business from the browser histories and redact all other matters. Ms. Snyder attests to the relevant law, *Marshall v. South Whitehall Police Department*, OOR No. AP 2017-1702, but fails to provide any factual details that would allow the OOR to determine that the redacted information only reflects personal matters and not transactions or activity of the

³ The Township's submission includes a description of a conversation with an employee of the OOR. As part of its statutory duty to provide training about the RTKL and the Sunshine Act, *see* 65 P.S. §§ 67.1310(a)(4)-(5), the OOR routinely answers inquiries from both agencies and requesters. Comments made in the context of the OOR's duty to provide training on the RTKL are not a substitute for providing sufficient evidence during an appeal.

Township. As a result, the Township has failed to meet its burden of establishing that the redacted information is not a record under the RTKL.

Additionally, the Township argues in its unsworn position statement that Section 708(b)(12) of the RTKL would allow the Township to redact the personal browsing history of its employees. Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidence. This unsworn, conclusory statement is 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 unsworn 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”). Based on the Township’s failure to provide any evidentiary basis in support, it did not meet its burden of proof under the RTKL. *See* 65 P.S. § 67.305.

2. The Township cannot charge duplication fees for electronic records

The Township states that it was compelled to screen shot the browsing histories and physically redact the electronic records. In *Grove v. Gregg Township*, the OOR did not reach the merits of whether the redactions to the browsing history were proper under the RTKL and determined that the Township may assess duplication fees for the electronic records that required redaction. OOR Dkt. AP 2018-0953, 2018 PA O.O.R.D. LEXIS 764. However, in this matter, the OOR determined that the redactions are not supported by the evidence and the Township must provide unredacted records to the Requester.⁴

Under the OOR’s fee structure, an agency is not entitled to charge duplication fees for electronic records, unless it must print the records for permissible redaction. *See* Official RTKL

⁴ As stated above, there was no OOR determination on the merits with respect to the redactions until this Final Determination.

Fee Structure; *Mollick v. Worcester Twp.*, OOR Dkt. AP 2015-0678, 2015 PA O.O.R.D. LEXIS 797. Because the Request did not seek paper copies of the records and the Township has not demonstrated that electronic copies do not exist, the Township is not entitled to duplication fees for the records provided. *See State Employee's Ret. Sys. v. Office of Open Records*, 10 A.3d 258, 363 (Pa. Commw. Ct. 2010) (holding that an agency is not entitled to duplication fees for creating records that it was not required to create).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide the unredacted records to the Requester 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 or petition for review 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 according to court rules 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 website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 14, 2018

/s/ Jill S. Wolfe

JILL S. WOLFE, ESQ.
APPEALS OFFICER

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

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