



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**MICHELLE GROVE,  
Requester**

**v.**

**GREGG TOWNSHIP,  
Respondent**

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**Docket No.: AP 2018-0953**

### **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 browser history from Township-owned computers. The Township partially denied the Request by granting access to redacted copies of the responsive internet browser histories. 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 Township is not required to take any further action.

### **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 May 30, 2018, the Requester filed an appeal with the OOR, challenging the Township's denial and stating grounds for denial. On appeal, the Requester limited her challenge to the Township's redaction of the responsive internet browsing history and the imposition of a duplication fee for information available in electronic form.<sup>1</sup> The Requester also argued that the Township failed to raise any legal basis for redacting the responsive records. 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 June 11, 2018, the Requester submitted a position statement reiterating her arguments on appeal and claimed that, to the extent the Township redacted browser history showing personal use of computers by Township employees, those redactions were not supported under the RTKL.

On June 13, 2018, the Township submitted a position statement arguing that the Township's redaction of the responsive internet browser history was proper because the information related to an employee's personal use of Township's computers is not a record under the RTKL because it does not document a transaction or activity of the agency.<sup>2</sup> In the alternative, to the extent the internet browsing history is determined to be a record of the Township, the Township claimed that the information was exempt as personal notes, 65 P.S. § 67.708(b)(12). Finally, the Township argued that its imposition of a duplication fee for the redaction of electronic records was proper and noted that the Requester has not remitted payment for, or accessed, the responsive records. In support of its assertion, the Township submitted the affidavit of Jennifer Snyder, the Township's Open Records Officer.

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<sup>1</sup> On appeal, the Requester does not challenge the sufficiency of the Township's response to the remainder of the Request. As a result, the Requester has waived any objections regarding the sufficiency of the Township's response. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

<sup>2</sup> The Township's June 12, 2018 and the Requester's June 13, 2018 submissions were received after the record closed, however to develop the record, the submissions were considered. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

On June 13, 2018, the Requester submitted a supplemental position statement arguing that the Township has not met its burden to prove that it redacted personal information from the responsive records. The Requester also reiterated her challenge to the Township's duplication fee, claiming that imposing a duplication fee prior to accessing responsive records would hinder the access of requesters to public information. The Requester also sought an *in camera* review of the withheld information.

### 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 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 that the OOR conduct an *in camera* review of the withheld information; however, as the

OOR has the necessary information and evidence before it to properly adjudicate the matter, that request is denied.

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 may impose a duplication fee for the redaction of electronic records**

The Requester challenges the fees assessed by the Township for records that exist electronically. Specifically, the Requester argues that because the Township can create PDF versions of the requested internet browser histories, that information should be provided to her in electronic form. Pursuant to Section 701 of the RTKL, “[a] record being provided to a requester

shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists.” 65 P.S. § 67.701. The RTKL does not define “medium”; however, the OOR has defined it “as the substance through which something is transmitted or carried, a ‘means,’ such as on paper or on the hard-drive or on a database or over the internet.” *Acton v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2009-0926, 2009 PA O.O.R.D. LEXIS 786, *aff’d*, No. 2010-719 (Wash. Com. Pl. July 26, 2011), *aff’d*, 38 A.3d 1092 (Pa. Commw. Ct. 2012), *petition for allowance of appeal denied*, 57 A.3d 72 (Pa. 2012).

Here, the Township claims that it was required to make redactions to electronic files to remove information claimed to be not subject to access under the RTKL.<sup>3</sup> Section 1307 of the RTKL provides that the OOR has the authority to establish fees for duplication by photocopying for Commonwealth and local agencies. *See* 65 P.S. § 67.1307(b)(1)(i). Pursuant to this authority, the OOR has approved a Fee Structure and posted the information on its website. *See id*; Official RTKL Fee Structure (available at <http://www.openrecords.pa.gov/RTKL/FeeStructure.cfm>). The OOR has approved fees up to \$ 0.25 a page for the duplication of records as set forth in the OOR’s Fee Schedule. 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 Mollick v. Worcester Twp.*, OOR Dkt. AP 2015-0678, 2015 PA O.O.R.D. LEXIS 797. As the Township claimed that it redacted information not subject to access under the RTKL and the information existed in electronic form, the Township’s conversion of the responsive record to paper in order to securely redact the information is proper under the OOR’s Fee Schedule.

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<sup>3</sup> On appeal, the Township argued that it redacted browser history entries that were related to the personal use of Township computers because the information is not a record of the Township under the RTKL. Where a record contains both public and nonpublic information, an agency may redact the information not subject to public access that is an integral part of the public record and cannot be separated. *See* 65 P.S. § 67.706 (providing for redaction of nonpublic information). Information redacted by an agency is considered a denial of access under the RTKL. *Id.* As a result, an agency is required to state “[t]he specific reasons for the denial, including a citation of supporting legal authority” in its response for a denial of access through redaction. *See* 65 P.S. § 67.706; 65 P.S. § 67.903(2).

## **2. The Requester cannot appeal the redactions without first reviewing the records**

The Requester asserts that she is challenging the Township's redaction of responsive records. However, the Requester has neither paid for nor retrieved the records for inspection. In *Indiana Univ. of Pa. v. Loomis*, a requester was granted access to redacted records; however, rather than paying for the assessed copy charges and obtaining the records, the requester appealed directly to the OOR, challenging the fees and redactions. 23 A.3d 1126 (Pa. Commw. Ct. 2011). The Commonwealth Court held that because the RTKL allows an agency to withhold access to records until all fees are paid, *see* 65 P.S. § 67.901, and the requester did not pay the copy fees for the redacted records, "the OOR should have denied his appeal." 23 A.3d at 1128.

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).

## **CONCLUSION**

For the foregoing reasons, the appeal is **denied**, and the Township 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 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.<sup>4</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: June 29, 2018**

/s/ Benjamin A. Lorah

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BENJAMIN A. LORAH, ESQ.  
APPEALS OFFICER

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

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<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).