



FINAL DETERMINATION

IN THE MATTER OF

**MICHELLE GROVE,
Requester**

v.

**GREGG TOWNSHIP,
Respondent**

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Docket No.: AP 2018-1510

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 certain surveillance footage. The Township denied the Request, stating, in part, that no responsive records exist. 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 August 13, 2018, the Request was filed, seeking the “[s]urveillance footage of campaign sign being run over AND replaced along school street between 10/10/2017-10/11/2017, 10/15/2017-10/16/2017, 10/16/2017-10/17/2017, 11/1/2017-11/2/2017. Include involved vehicles entering and exiting frames.” On August 20, 2018, the Township denied the Request, stating that

“the same information has been sought on multiple previous occasions” and that the requested footage does not exist.

On August 22, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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. *See* 65 P.S. § 67.1101(c).

On September 4, 2018, the Township submitted a position statement, asserting that no responsive records exist and further arguing that the Request is disruptive, *see* 65 P.S. § 67.506(a), and that the Requester is “collaterally estopped from seeking these records.” In support its position, the Township provided the attestation of Jennifer Snyder (“Ms. Snyder”), the Township’s Open Records Officer. On September 4 and 5, 2018, the Requester submitted multiple sworn position statements, asserting that the Request is not duplicative and burdensome and further stating that the Township has failed to prove the requested surveillance footage does not exist.

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). 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)). Likewise, “[t]he 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 is not disruptive

The Township argues that the Request is disruptive. *See* 65 P.S. § 67.506(a). To deny a request under Section 506(a) of the RTKL, “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 and 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. *See Borough of West Easton v. Mezzacappa*, No. C-48-CV-2012-7973 (North. Com. Pl. 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 asserts that this is the Requester's third request for the same records. Specifically, the Township states that the Requester previously requested the same surveillance footage in *Grove v. Gregg Twp.*, OOR Dkt. AP 2018-1288, 2018 PA O.O.R.D. LEXIS 999 ("*Grove I*"), and *Grove v. Gregg Twp.*, OOR Dkt. AP 2018-0605, 2018 PA O.O.R.D. LEXIS ____ ("*Grove II*"). In *Grove I*, the Requester sought, in relevant part, the "[s]urveillance footage of campaign sign being run over along School Street 10/10/17-10/11/17, 10/15/17-10/16/17, 10/16/17-10/17/17, 11/1/17-11/2/17. Include footage of sign being replaced." While there are slight differences in how the request in *Grove I* and the instant Request are phrased, both are seeking the same records. The request in *Grove II*, in contrast, was for "the following security footage of school street: 10/10/2017 7PM-10/11/2017 7PM[;] 10/15/2017 5PM-10/16/2017 11AM[;] 10/16/2017 7PM-10/17/2017 11 AM[;] [and] 11/1/2017 12AM-11/2/2017 12AM." This request seeks surveillance footage at specific times on specific dates. Moreover, the request in *Grove II* does not relate to a specific incident, i.e., the campaign sign being run over and replaced. As such, the OOR finds that the instant Request and the request in *Grove II* are not for the same records.

The Township also argues that the repeated requests have placed an unreasonable burden on the agency. In support of this argument, Ms. Snyder attests that:

6. For the prior two matters, the solicitor invoiced the Township for approximately 6.4 hours of time at the rate of \$140.00 per hour.
7. Although this matter is not yet complete, ... it can only be assumed that this matter will require similar input from the solicitor.
8. The Township has already exceeded its annual legal services budget by more than four-thousand dollars....
9. Further exceeding that budget for a request that has already been requested and litigated on two prior occasion is, in my opinion, unreasonable....

This attestation, however, serves only to establish that the Township has been required to respond to these requests. In *Bari*, the Governor’s Office argued that repeated requests had created an unreasonable burden because “the Office had to ‘1) expend duplicative staff and attorney time for responding at length to a request that ... was duplicative; 2) in a time of significant budgetary and staffing constraints; and 3) having to devote attorney and staff time to ... a request that has been asked and answered.’” 20 A.3d at 645. The Commonwealth Court held that this demonstrated only that the request was repeated and did not establish an unreasonable burden. *Id.*

Likewise, Ms. Snyder’s attestation demonstrates only that the Township has had to respond to similar requests. Moreover, the Township asserts that the requested footage in the instant matter does not exist, thus calling into question how responding to such a request can be deemed unreasonably burdensome. Therefore, because the Requester has sought the instant records on only one previous occasion, and the Township has not submitted sufficient evidence to demonstrate that the requests have placed an “unreasonable burden” on the Township, Section 506(a) does not prevent the Requester from seeking the requested records. *See, e.g., Pastorius v. Redev. Auth. of the County of Greene*, OOR Dkt. AP 2016-1872, 2017 PA O.O.R.D. LEXIS 12.

2. The appeal is not barred by collateral estoppel

The Township also argues that the Requester is barred from seeking an adjudication on the same records that she previously sought due to the doctrine of collateral estoppel, which prevents a party from re-litigating an issue if: 1) the issue decided in the earlier case is identical to the issue presented in the latter case; 2) there was a final judgment on the merits; 3) the party against whom estoppel is asserted was a party to the prior case; and 4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior case. *City of Pittsburgh v. Zoning Bd. of Adjustment*, 599 A.2d 896 (Pa. 1989). Collateral estoppel does not require mutuality of

parties in both cases; but rather, only the party against whom collateral estoppel is asserted need be a party in the prior case. *In re: Stevenson*, 40 A.3d 1212 (Pa. 2012).

In this case, the records at issue are the same records as those in *Grove I*; however, there was not a final judgment on the merits of the case in *Grove I*. Rather, the appeal in *Grove I* was dismissed as untimely because it was filed after the RTKL appeal period lapsed. Accordingly, the Request is not barred by collateral estoppel. *See Pa. Dep't of Corr. v. Maulsby*, 121 A.3d 535 (Pa. Commw. Ct. 2015) (applying collateral estoppel in the context of RTKL appeals).

3. The Township has proven that the requested surveillance footage does not exist

The Township claims that it does not possess the requested surveillance footage. In its initial response to the Request, the Township stated that the security camera only captures “the parking lot, fountain and a small portion of School Street.” Additionally, Ms. Snyder attests, in relevant part, as follows:

12. ... [T]he Township does not, in any event, have surveillance footage of a campaign sign ... being run over.

13. This is because the surveillance footage is centered on the Old Gregg School playground and parking lot and does not extend to the portion of the street that [the Requester] is seeking....

Under the RTKL, an attestation may serve as sufficient evidentiary support for the nonexistence of records. *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). In the absence of any competent evidence that the Township acted in bad faith or that the records exist, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based upon the evidence provided, therefore, the Township

has proven that the requested surveillance footage not exist within the Township's possession, custody or control. *See Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the Requester's 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 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.¹ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 21, 2018

/s/ Magdalene C. Zeppos

MAGDALENE C. ZEPPOS
APPEALS OFFICER

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

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