



### **FINAL DETERMINATION**

IN THE MATTER OF	:	
	:	
MICHELLE GROVE,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2018-1654
	:	
GREGG TOWNSHIP,	:	
Respondent	:	

### **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 laptop receipts and internet browsing histories. The Township granted the Request, and the Requester appealed to the Office of Open Records (“OOR”), challenging the search for responsive records. 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 August 14, 2018, the Request was filed, seeking:

- \* 2017-2018 Laptop receipts (purchase, sale, improvements, software).
- \* January 29-February 9, 2018, Internet browsing history all computers

On August 16, 2018, the Township invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902. On September 12, 2018, the Township granted the Request, providing responsive records.

On September 13, 2018, the Requester filed an appeal with the OOR, arguing that the search for browsing history was not made in good faith.<sup>1</sup> 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 September 25, 2018, the Requester submitted a position statement arguing that the browsing history provided was incomplete, and that browsing history should have included privately owned computers used by Township employees to conduct Township business. On the same day, the Township also submitted a position statement, which was accompanied by an affidavit executed by Jennifer Snyder, the Township's Open Records Officer. On October 3, 2018, the OOR requested additional evidence addressing the Requester's allegations, and October 11, 2018, the Ms. Snyder explained why browsing history was only provided from one computer.<sup>2</sup>

On October 24, 2018, the OOR requested additional argument and evidence; the Requester submitted videos of Keri Miller, a Township Supervisor, working in the Township's office on a laptop, as well as a certified record from a previous appeal involving a request she made to the Township for browsing history.

## **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,

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

<sup>2</sup> The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

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, 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)). 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 Township reasonably interpreted the Request as seeking records from devices owned by the Township**

On appeal, the Requester argues that that two Township supervisors work on privately owned laptops and that browsing history from those computers, insofar as it reflects Township business, is responsive to the Request.

The Request sought “[i]nternet browsing history all computers,” and the Township’s response interpreted this as meaning all computers owned by the Township. An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Garland v. Pa. Dep’t of Environ. Prot.*, OOR Dkt. AP 2017-1490, 2017 PA O.O.R.D. LEXIS 1310; *Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513. As information must document a transaction or activity of an agency to constitute a record of that agency, this was a reasonable interpretation to make. *See* 65 P.S. § 67.102 (defining a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.”); *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011) (holding that, to be a record,

information must document a “transaction or activity of the agency” and also have been “created, received or retained ... in connection with a transaction, business or activity of [an] agency”); *see also In re: Silberstein*, 11 A.3d 629, 633 (Pa. Commw. Ct. 2011) (distinguishing records that document a transaction or activity of an agency from records of an individual public office holder).

Accordingly, the Requester’s explanation of the intended scope of the Request on appeal is not permissible, as a requester cannot modify, explain or expand upon a request on appeal. *See Michak v. Pa. Dep’t of Pub. Welfare*, 56 A.3d 925, 930 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal, argue that an agency must instead disclose a different record in response to the request”); *Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010). However, nothing in this Final Determination prevents the Requester from filing a new request for internet browsing history regarding Township business on personal computers and appealing any resulting denial.

## **2. The Township has not proven that it has provided all responsive records to the Requester**

The Requester argues that, while the Township has acknowledged that it owns three computers, it only provided browsing history from one. Ms. Snyder attests that:

5. Upon receipt of [the Request], I conducted a thorough examination of files in the possession, custody, and control of the Township for records responsive to the [R]equest underlying this appeal.

6. ... I personally accessed the Township’s computers to seek browser history.

7. After conducting a good-faith search of the Township’s files, I identified all records within the Township’s possession, custody, or control that are responsive to this [R]equest and provided them to [the Requester]; put differently, I provided all of documentation that [the Requester] requested.

In response to a request by the OOR for clarification, Ms. Snyder explains that she searched all three of the Township’s computers, as well as the Township-owned cell phone, but that only her

computer had browsing history. Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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, “the averments in [the affidavit] 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)).<sup>3</sup>

However, the browsing history provided by the Township, as submitted to the OOR by the Requester, omits some entries in part, as well as entries for some entire days, and the Township has not explained these gaps. Additionally, as the Requester notes, the Township has not addressed whether the Township uses other browsers that may have their own history. Accordingly, the Township must provide to the Requester any additional records that may exist.

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records. Absent an agency providing a sufficient evidentiary basis that additional responsive records do not exist, the OOR will order disclosure of responsive public records. *See Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

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<sup>3</sup> The Requester asks the OOR to make a finding of bad faith. Section 1305(a) of the RTKL states that “[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.” 65 P.S. § 67.1305(a); *Office of the Dist. Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017) (“An example of bad faith is a local agency’s failure to comply with the mandate of Section 901 of the RTKL, which requires that a local agency make a good faith search for information responsive to a request and determination of whether that information is public.”). However, the facts of this case do not support such a finding.

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Township must provide a complete copy of responsive browsing history from Township-owned computers 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.<sup>4</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 14, 2018**

/s/ Blake Eilers  
Blake Eilers, 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).