



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**JOHN YAKIM,  
Requester**

**v.**

**GREGG TOWNSHIP,  
Respondent**

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**Docket No: AP 2018-1712**

### **INTRODUCTION**

John Yakim (“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 solicitor invoices. The Township granted the Request but sought copying fees. 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 September 11, 2018, the Request was filed, seeking “all bills from township solicitor regarding right to know requests, date range January 1 – August 31, 2018.” On September 18, 2018, the Township invoked a thirty-day extension to respond to the Request, but on September 21, 2018, the Township sent a second letter, granting the Request upon payment of \$4.00 in copying fees. The same day, the Township sent a corrected response, noting that it was providing

some records in electronic format, and revising the cost of the remaining responsive records to \$3.00.

On September 21, 2018, the Requester appealed to the OOR, arguing that the Township had to prove that it did not possess the records in electronic form. 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 October 3, 2018, the Township submitted a position statement, arguing that the appeal is not sufficient under Section 1101(a) of the RTKL and that the Township had correctly sought copying fees for records that do not exist in electronic format. In support of this argument, the Township submitted the verification of Jennifer Snyder, the Township's Agency Open Records Officer, who attests that the Township was unable to provide the remainder of the records in electronic form because they do not exist in electronic form.

On October 4, 2018, the Requester submitted a statement arguing that the attestation should be disregarded because it made a claim the affiant could not have been aware of and incorrectly stated that he had refused to pay the fee when in fact he had paid it and is seeking a refund.

### **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)).

### **1. The appeal is sufficient under Section 1101(a)**

The Township argues that the Request is not sufficient under Section 1101(a) of the RTKL. Pursuant to Section 1101 of the RTKL, a requester “must state the grounds upon which the requester asserts that the record is a public record ... and ... address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1); *see also Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request”); *Saunders v. Pa. Dep’t of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012) (holding that a requester must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access”).

Here, the Requester’s grounds for appeal are “Agency must prove that the records are not available in electronic format.” The Township argues that this statement is analogous to *Pa. Dep’t of Corrections v. Office of Open Records*, in which a request was denied for insufficient specificity, and the appellant filed an appeal stating only “the above Pa. right to know requests are public.” 18 A.3d 429, 431 (Pa. Commw. Ct. 2011). The Commonwealth Court held that this statement was not enough to satisfy Section 1101(a) of the RTKL, explaining that the RTKL places “a burden on a requester to *identify* the flaws in an agency’s decision denying a request.” *Id.* at 434.

This case is readily distinguishable from *Pa. Dep’t of Corrections* in that the Requester’s appeal identifies exactly the purported flaw he is appealing in the Township’s response—that the

Township charged money for duplication fees instead of providing electronic records. The permissibility of fees is within the OOR's jurisdiction and may be challenged on appeal. *See Prison Legal News v. Office of Open Records*, 992 A.2d 942 (Pa. Commw. Ct. 2010); *State Emples. Ret. Sys. v. Office of Open Records*, 10 A.3d 358 (Pa. Commw. Ct. 2010). Therefore, because the Requester identified a basis for appeal, the appeal is sufficient under Section 1101(a) of the RTKL.

## **2. The Township was entitled to charge copying fees**

The Township assessed the Requester a \$3.00 duplication fee for paper copies of the responsive records. On appeal, the Requester argues that the Township must prove that it does not possess electronic copies of the records. Section 705 of the RTKL provides that an agency "shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. § 67.705; *see also Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that the agency cannot be made to create a record which does not exist). Therefore, an agency is not required to create electronic records if the records do not exist electronically. *See, e.g., Campbell v. Franklin Regional Sch. Dist.*, OOR Dkt. AP 2017-1636, 2017 PA O.O.R.D. LEXIS 1418 (where the agency had proven that records did not exist electronically, the District was not required to create electronic copies).

On appeal, the Township argues that it was entitled to duplication fees for hardcopy because it does not maintain the records in electronic format. In support of this argument, the Township submitted the verification of Jennifer Snyder, the Township's Agency Open Records Officer, who attests that the Township usually receives solicitor's bills in paper form and does not store them in electronic form, but that it had provided those responsive electronic copies that it did

possess. Under the RTKL, an attestation may serve as sufficient evidentiary support. *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 evidence that the Township has acted in bad faith or that the records exist in electronic form, “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)). Therefore, the Township has met its burden of proving that it was entitled to charge duplication fees.<sup>1</sup>

### CONCLUSION

For the foregoing reasons, 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 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>2</sup> This Final Determination shall be placed on the OOR website at <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 19, 2018**

/s/ Jordan Davis

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<sup>1</sup> The Requester challenges the Township’s affidavit, arguing that it should be discounted as evidence because it incorrectly states that the Requester had not paid the \$3.00, and because it assumes that the Requester received the Township’s follow-up letter on September 21, 2018 despite the affiant’s lack of personal knowledge. Even if true, neither of these arguments address the Township’s actual position on appeal, and neither shows any intentional bad faith or deception on the part of the affiant. Therefore, the OOR accepts the Township’s evidence.

<sup>2</sup> *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

APPEALS OFFICER  
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