



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**MICHELLE GROVE,  
Requester**

**v.**

**GREGG TOWNSHIP,  
Respondent**

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**Docket No: AP 2018-1972**

### **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 records of payments related to the installation of a volleyball court. The Township granted the Request, and 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 October 12, 2018, the Request was filed, seeking “[a]ll receipts for sand volleyball court.” On October 18, 2018, the Township granted the Request upon payment of \$1.00.

On November 1, 2018, the Requester appealed to the OOR, arguing that the Township had provided quotes instead of receipts, and should have sought the requested receipts from a third

party. 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 November 3, 2018, the Township submitted a position statement, arguing that the Township had provided all records responsive to the appeal, and that any receipts in the hands of the third party were not records of the Township. 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 paid from a quote rather than a receipt, and that any items paid for by the Penns Valley Youth Center ("Center") that were not part of the quote would not be records of the Township.

On November 21, 2018, in response to an inquiry from the OOR, the Township explained that the Center had assembled the volleyball court itself after receiving permission from the Township, and that the Township had paid the Center the amount of money indicated in the quotes that the Center had turned in from suppliers. The same day, the Requester submitted an argument that only the actual receipts possessed by the third parties would show whether the materials were ordered prior to the Township's authorization. On November 30, 2018, in response to a request from the OOR, the Requester submitted copies of the quotes provided by the Township.

### **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)). “The 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).

The record shows that the Center, a tenant of the Township, was hosting or planning to host a youth event when they approached the Township with a proposal to install a sand volleyball court on the premises of the Old Gregg School Community Center.<sup>1</sup> The Township voted to pay for the materials to construct the sand volleyball court at a public meeting, and the Center ordered the materials from one or more online retailers, which provided quotes to the Center. The Center constructed the sand volleyball court during the youth event as a public service project, and then provided the quotes to the Township, which reimbursed the Center’s material expenditures.

The Township argues that it has provided all responsive records that are within its possession, custody, or control. In support of this position, the Township submitted the sworn verification of Jennifer Snyder, the Township’s Agency Open Records Officer, who attests that:

5. [T]o the extent that the Township paid for the sand volleyball court, the Township did so from a quote rather than a receipt.
6. Consequently, [Requester’s] insistence that there will be a separate receipt is incorrect.
7. Second, the Penns Valley Youth Center installed the sand volleyball court, as part of their ServeCamp, and may have paid for certain items relating to the sand volleyball court, independently from the Township. These receipts would not be in my possession, custody or control.

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<sup>1</sup> A former schoolhouse used by the Township as a community and recreation center, which includes the facilities that the Center leases from the Township.

8. The Penns Valley Youth Center rents space in the Old Gregg School, which is owned by the Township, but the Penns Valley Youth Center is not otherwise associated with the Township.

The parties agree that the receipts, if any exist, are within the possession of the Center. Therefore, the sole issue on appeal is whether the Township is obligated to seek the receipts from the Center in response to the Request.

Public records in the possession of third parties are accessible through Section 506(d) of the RTKL. *See Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (citing *Honaman v. Lower Merion Twp.*, 13 A.3d 1014 (Pa. Commw. Ct. 2011)), *aff'd by*, 124 A.3d 1214 (2015). Section 506(d)(1) of the RTKL provides that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency...

65 P.S. § 67.506(d)(1). “Under the RTKL, to reach records outside an agency’s possession the following two elements must be met: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to the performance of that function.” *Eiseman*, 86 A.3d at 939 (citations omitted).

Several issues prevent the OOR from ordering disclosure in this case. First, while there is a contract between the Center and the Township to lease space in the Old Gregg School building, nothing in this appeal indicates that the lease is a contract through which the Township has ceded any governmental function, or that the Center performs any services for the Township.<sup>2</sup> *See Esack v. Lehigh County*, OOR Dkt. AP 2018-1277, 2018 PA O.O.R.D. LEXIS 1030 (finding that records involving naming a velodrome could be obtained through Section 506(d) because of special

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<sup>2</sup> As noted, the Township has demonstrated that it possesses no other formal contracts with the Center.

provisions requiring the contractor to promote the facility). Instead, the meeting minutes submitted by the Requester state only that:

The Penns Valley Youth Center is holding their annual serve camp. They would like to install a sand volleyball pit as well as a pavilion at the ball field during this serve camp. The pavilion was a budgeted item from the Rec Fee In Lieu fund. There is enough funding in the playground account and/or the Rec Fee in Lieu fund for the sand volleyball court. The estimated cost for the volleyball court is \$3500.

Stover made a motion to pay for the sand volleyball court out of the Rec Fee In lieu and Playground account. Second by Bierly. Vote in favor was unanimous. 3-0

It is not clear that this constitutes a contract. The requirement that an agency have a contract with the third party from whom records are sought under Section 506(d) is essential. *See Dental Benefit Providers, Inc. v. Eiseman*, 124 A.3d 1214, 1223 (Pa. 2015) (“Upon consideration, we agree ... that the [RTKL] channels access to third-party records through Section 506(d)(1), and that such provision contemplates an actual contract with a third party in possession of salient records”). Further, the concerns identified by the Requester—*i.e.*, that a negative holding will allow the Township to play “shell games” with public money—have been specifically rejected by the courts as reason to overlook the lack of a contract. *Id.*

To the extent that the Township’s motion to pay for the sand volleyball court constitutes a contract, the Center was not delegated any essential governmental function. A third party performs a governmental function on behalf of an agency where it performs “a function generally performed by that agency and is not ancillary to the agency’s functions.” *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 939 (Pa. Commw. Ct. 2014) (citing *Wintermantel*, 45 A.3d at 1044). This must include the “delegation of some substantial facet of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors.” *Wintermantel*, 45 A.3d at 1043. While the OOR has repeatedly held that the construction of government buildings is a governmental function, in this case, the construction project at issue is a sand volleyball court

used for recreational purposes. *See Monaco v. Upper Darby School District*, OOR Dkt. AP 2017-1516, 2017 PA O.O.R.D. LEXIS 1475 (the installation of communications cabling and wireless access points was a government function).

Finally, to the extent that the motion at the Township supervisor's meeting constitutes a contract and the construction of the sand volleyball court constitutes a governmental function, the receipts are not clearly related to that governmental function. At the Township's meeting, the Township agreed to provide money to the Center based on the estimate they were given, the records of which were contained in the quotes the Township received. While the Center may have spent more or less on the sand volleyball court than the Township agreed to pay, the Township's sole interest under the agreement was to pay the estimates contained within the quotes, copies of which were provided to the Requester. *See Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010) (the Department of Corrections was not required to seek records of what vendors paid for items offered at the prison commissaries, because the contract between the Department and those vendors did not regulate margins of sale).

For all of the above reasons, the Township does not have an obligation to seek the receipts from the Center, and therefore it has proven that the responsive receipts do not exist within its possession, custody, or control. *Hodges*, 29 A.3d at 1192.

### 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>3</sup> This Final Determination shall be placed on the OOR website at <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 17, 2018**

*/s/ Jordan Davis*

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APPEALS OFFICER  
JORDAN C. DAVIS

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

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