



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**MICHELLE GROVE,  
Requester**

**v.**

**GREGG TOWNSHIP,  
Respondent**

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**Docket No: AP 2018-1973**

### **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 surveillance footage of the parking lot at the Township offices. The Township denied the Request, arguing, among other things, that release of the footage would jeopardize public safety and building security. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Township is required to take further action as directed.

### **FACTUAL BACKGROUND**

On October 22, 2018, the Request was filed seeking “5/8/2018 surveillance footage of entire parking lot from 7:30 – 8:30 A.M.” October 28, 2018, the Township denied the Request, stating that the requested surveillance footage does not exist as sought in the Request. Additionally,

the Township argued that disclosure of the footage would jeopardize public safety, 65 P.S. § 67.708(b)(2), and endanger the safety or physical security of a building, 65 P.S. § 67.708(b)(3).

On November 1, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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 1, 2018, the Requester submitted a position statement and the reasons for her Request. On November 14, 2018, the Township submitted a position statement, reiterating the arguments above, as well as the attestation made under the penalty of perjury of Jennifer Snyder, the Township's Open Records Officer.

### **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).

**1. The Requester sufficiently appealed the Township's denial**

As an initial matter, the Township argues that the appeal should be dismissed because the Requester failed to address the public nature of the record sought and the Township's grounds for denial. Section 1101(a)(1) of the RTKL requires that the "appeal shall state the grounds upon which the requester asserts that the record is a public record ... and shall address the grounds stated by the agency for delaying or denying the request." 65 P.S. § 67.1101(a)(1). In *Pa. Dep't of Corr. v. Office of Open Records*, the Commonwealth Court held that it is "statutorily required that the requester specify in [an] appeal to the [OOR] the particular defects in an agency's stated reasons for denying a RTKL request." 18 A.3d 429 (Pa. Commw. Ct. 2011).

The Township argues that, although the Requester uses the OOR's standard appeal form, in the section of the form entitled "Reasons for Appeal," the Requester states "Bad Faith Denial." The OOR's standard appeal form contains standard language stating:

By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

*See Barnett v. Pa. Dep't of Public Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013) (holding that a statement that records "do not qualify for any exemptions under [S]ection 708, are not protected by privilege, and are not exempted under any Federal or State law or regulation" satisfied Section 1101 of the RTKL). Because the OOR's appeal form largely mirrors the Commonwealth Court's language in *Barnett*, the use of this form sufficiently addresses an agency's grounds for denial. *See Phillips and WHYY v. Pa. Dep't of Env'tl. Prot.*, OOR Dkt. AP 2016-1782, 2017 PA O.O.R.D. LEXIS 222. Therefore, the Requester's appeal has sufficiently addressed the Township's grounds for denial.

**2. The Township has failed to demonstrate that the surveillance footage does not exist**

The Township argues that the requested surveillance footage does not exist within its possession, custody or control because the Township “must create a video recording to respond to [the] ... [R]equest.” In her attestation, Ms. Snyder explains that:

6. ...[T]he Township does not maintain the security footage in the manner requested by [the Requester]--i.e., security footage from one specific time to another, in a continuous recording.
7. Instead, the Township’s security footage automatically loops, and to remove the footage from that loop, the Township must undertake a series of ‘backup’ steps...
8. In short, the Township would need to create the record requested by [the Requester].

Under the RTKL, an attestation made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *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). However, copying, downloading, or exporting information from one device, drive or information management system to another is not the creation of a record. For example, “drawing information from a database does not constitute creating a record under the [RTKL].” *Pa. Dep’t of Env’tl. Prot. v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012) (emphasis in original). In *Gingrich v. Pa. Game Comm’n*, as summarized in *Cole*, the Commonwealth Court held that “an agency can be required to draw information from a database, although the information must be drawn in formats available to the agency.” No. 1254 C.D. 2011, Pa. Commw. Unpub. LEXIS 38 (Pa. 2012); *Cole*, 52 A.3d at 547. In short, “to the extent requested information exists in a database, it must be provided.” *Id.* Similarly, security footage that exists and can be extracted or downloaded must be provided. Because the Township acknowledges that the surveillance footage exists on a

database within the Township's control and that the footage can be extracted from the database, the Township has failed to prove that the surveillance footage does not exist within its possession, custody or control. *See Hodges*, 29 A.3d at 1192.

**3. The Township has not proven that disclosure of the surveillance footage would endanger public safety or the physical security of a building**

The Township argues that disclosure of the surveillance footage would endanger public safety and the physical security of a building. Section 708(b)(2) exempts from disclosure records “maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity[.]” 65 P.S. § 67.708(b)(2). To establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

Meanwhile, Section 708(b)(3) of the RTKL exempts from disclosure “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information storage system.” 65 P.S. § 67.708(b)(3); *see Crockett v. Southeastern Pa. Transp. Auth.*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under this exemption). In order for this exemption to apply, “the disclosure of” the records – rather than the records themselves – must create a reasonable likelihood of endangerment to the safety or

physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3).

In support of withholding the surveillance footage, the Township relies upon the attestation of Ms. Snyder, who attests that disclosing the security footage would jeopardize public safety and create a reasonable likelihood of endangering the safety or physical security of the Old Gregg School, which houses the Township's offices. With respect to public safety, Ms. Snyder attests as follows:

11. The Old Gregg School is a former school building that the Township has converted into a community building.
12. The Old Gregg School is open to the public every day from 8:30 a.m. to 9:30 p.m.
13. The Township rents portions of the Old Gregg School to private groups, and allows the public to use the remaining portions of the building at its leisure.
- ...
15. As the owner, landlord, and primary user of the Old Gregg School, the Township is responsible for ensuring public safety at the Old Gregg School.
16. The Township does not actively patrol the Old Gregg School for safety, meaning that the Township does not provide security services to ensure the safety of individuals in the Old Gregg School.
17. Instead, the Township relies on the relevant security cameras to ensure safety and verify that the public uses the Old Gregg School in an appropriate manner.
18. The Township installed the security cameras after a security assessment by local security officials, including a police lieutenant and the current Sheriff of Centre County.
- ...
21. While some of the security cameras are conspicuous to passive users of the building, other security cameras are not necessarily obvious to passers-by.

22. What is more, the extent to which the security cameras can capture the activities in the Old Gregg School is unknown to the public, meaning, for example, that users of the Old Gregg School are unaware of the width of the camera lenses' angles.

Regarding the physical security of the Old Gregg School, Ms. Snyder attests that:

27. ...the security cameras are the primary means of ensuring safety at the Old Gregg School, which is left unmonitored on a daily and nightly basis.
28. to fulfill this request would require disclosure of footage from multiple cameras throughout the building and many periods of time throughout the day which would further jeopardize the security and safety of the building.

In *Gregg Twp. v. Grove*, No. 1186 C.D. 2017, 2018 Pa. Commw. Unpub. LEXIS 343 (Pa. Commw. Ct. 2018), the Commonwealth Court determined that the Township failed to demonstrate that security camera footage of two individuals entering and exiting the Township offices located in Old Gregg School was exempt from public access under Sections 708(b)(2)-(3) of the RTKL. The Court stated that the Township's affidavit established that cameras were installed for security of the building; however, the affidavit is silent as to what was depicted on the requested camera footage and how disclosure of the footage would jeopardize the building's security and public safety. *Id* at \*8; *see also Rome v. Exeter Borough*, OOR Dkt. AP 2016-0730, 2016 PA O.O.R.D. LEXIS 669 (determining that surveillance video footage capturing individuals arriving at and departing from the borough office and parking lot was not exempt from disclosure under Sections 708(b)(2) and 708(b)(3) because the video cameras were presumably located in public areas and the borough did not submit evidence that it had taken steps to hide or disguise the location of the cameras).

Here, as in *Gregg Twp v. Grove*, the Township has not adequately demonstrated how the disclosure of the requested surveillance footage would be reasonably likely to threaten public safety or the security of the Old Gregg School. Speculation, alone, is not sufficient to meet the



Township's burden. The areas described in the Request – the Township parking lot – is a public area. As a result, the Township has not met its burden of proof. *See* 65 P.S. § 67.708(a)(1); *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records” ).<sup>1</sup>

## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Township is required to provide the surveillance footage 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 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: November 29, 2018**

/s/ Jill S. Wolfe

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

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

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<sup>1</sup> In its unsworn response to the Request, the Township also denied access to the surveillance footage pursuant to Sections 708(b)(10), (11), (16) and (17) of the RTKL. 65 P.S. §§ 67.708(b)(10)-(11); 65 P.S. §§ 67.708(b)(16)-(17). On appeal, the Township does not provide any evidence to support a denial under these sections of the RTKL. Because unsworn statements of counsel do not constitute evidence, *see Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015), the Township has not met its burden of withholding the surveillance records under any of the asserted exemptions.

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