



pennsylvania

OFFICE OF OPEN RECORDS

AMENDED FINAL DETERMINATION¹

IN THE MATTER OF

:

**TODD MUENZ,
Requester**

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:

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v.

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Docket No.: AP 2015-1021

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**TOWNSHIP OF RESERVE,
Respondent**

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INTRODUCTION

Todd Muenz (“Requester”) submitted a request (“Request”) to the Township of Reserve (“Township”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”) seeking to inspect records regarding expenses incurred by the Township for its involvement with the Pennsylvania State Association of Township Commissioners. The Township granted the Request and permitted the Requester to inspect records; however, the Township would not allow the Requester to photograph the records. The Requester appealed to the Office of Open Records (“OOR”). 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

¹ While this final determination was issued on August 14, 2015, it has been amended on August 18, 2015 to reflect the correct docket number and the correct year of issuance.

On April 30, 2015, a three item Request was filed, seeking to inspect records related to a Township Commissioner's and the Township Solicitor's involvement with the Pennsylvania State Association of Township Commissioners, including expenses such as lodging, meals, golf outings, and fuel. On May 1, 2015, the Township invoked a thirty-day extension of time to respond to the Request pursuant to 65 P.S. § 67.902. On May 30, 2015, the Township granted the Request, notifying the Requester that he would be able to examine and inspect the records during regular business hours at a time that would be mutually convenient for both the Requester and the Township's Open Records Officer.

On June 15, 2015, the Requester appealed to the OOR, arguing that he was required to inspect records at the Township's police station under the supervision of the police chief, and that he was not permitted to photograph documents for which he was granted access. 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 pursuant to 65 P.S. § 67.1101(c).

On June 23, 2015, the Township submitted a position statement, arguing that nothing in the RTKL prevents the Township from supervising the Requester's review of records, nor does the RTKL require that the Township allow the Requester to photograph records. The Township also submits the attestation of Donna Kaib, Township Secretary, who attests to the events that occurred on June 11, 2015, the date that the Requester was permitted to inspect responsive records, but was prohibited from taking photographs of the records. On June 24, 2015, the Requester submitted a position statement arguing that he should be permitted to photograph responsive records.

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 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 and the OOR has the necessary, 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 clearly 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)).

1. Township personnel may supervise the inspection of records

The Requester asserts that he was permitted to inspect the requested records, but challenges the fact that he had to do so in the police station under the supervision of the Township’s police chief, which the Requester argues created an “intimidating atmosphere.” Along with his appeal, the Requester submitted a photograph of the police chief. The Township argues that the RTKL does not grant unrestricted access to Township records and that the RTKL also does not prohibit the Township from supervising review of requested records. The Township further argues that the Requester “has a history of engaging in unprovoked disruptive and harassing behavior as it pertains to Township employees and public officials” and that “[u]nder the circumstances, special security measures are not unreasonable to protect those in the building while [the Requester] conducts his review and inspection of the documents.” Donna Kaib, Secretary for the Township, attests that “there were other occasions when [the Requester] had disrupted the office and upset staff in the course of his document reviews, and for that reason

I was instructed that any future reviews should be done under the observation of the police chief.”

Section 701 provides that an agency’s records “shall be available for access during the regular business hours of an agency.” 65 P.S. § 67.701(a). When inspection is sought, an agency may schedule times for the inspection so that a records review occurs under the supervision of agency staff. *See Frame v. Menallen Township*, OOR Dkt. AP 2009-0878, 2009 PA O.O.R.D. LEXIS 338 (“[I]t was not unreasonable for the Township to require the Requester to schedule an appointment so it could have the records ready and ensure that it has appropriate personnel to assist the Requester”); *see also Mezzacappa v. Borough of West Easton*, OOR Dkt. AP 2010-1012, 2010 PA O.O.R.D. LEXIS 929 (“An agency may require a requester to schedule an appointment to inspect records”).

Under the RTKL, a statement made under made under the penalty of perjury may serve as sufficient evidentiary support 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). Here, there is no dispute that the Township permitted access to the requested records. Additionally, Ms. Kaib attests that the Requester has disrupted the office and upset staff in the past, therefore, making it reasonable for the Township to have personnel, in this case, the Township’s police chief, supervising the Requester’s inspection of records. Therefore, the appeal with respect to the Township’s supervision of the Requester is denied.

2. The Requester is permitted to photograph records

The Requester argues that the Township did not permit photographs of responsive records to be taken. Specifically, the Requester asserts that while inspecting the requested

records, upon attempting to photograph documents, he was informed by the Township police chief that he would be permitted to pay for copies of the records but that he would not be able to take photographs. The Township does not dispute these facts and argues that there is no provision in the RTKL that requires the Township to permit the Requester to photograph of records.

Section 701(a) of the RTKL requires that public records be accessible for inspection and duplication. 65 P.S. § 67.701(a). Agencies, under the RTKL, may adopt “regulations and policies necessary for ... [agencies] to implement” the RTKL. *See* 65 P.S. § 67.504(a). In *Gries v. Philadelphia City License Marriage Bureau*, the OOR upheld an agency’s policy of prohibiting requesters from photographing copies of records where the agency’s fee policy was governed by a statute other than the RTKL. OOR Dkt. AP 2009-0552, 2009 PA O.O.R.D. LEXIS 660. In *Wright v. Department of Corrections*, the OOR held that, pursuant to an agreement between a requester and an agency, the agency was required to allow the requester “to bring his own copier or scanner.” OOR Dkt. AP 2009-0174, 2009 PA O.O.R.D. LEXIS 608.

This matter is distinguishable from *Gries* in that here there is no evidence that the Township is permitted by statute to impose a fee schedule separate than that set by the OOR. *See* 65 P.S. § 67.1307(g) (“Except as otherwise provided by statute, no other fees may be imposed unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable.”) In *Gries*, a separate statute set the fee schedule for the agency, in addition to authorizing the agency to set fees not expressly provided for by statute. As part of its statutory obligations, the agency adopted a policy prohibiting the use of photography.

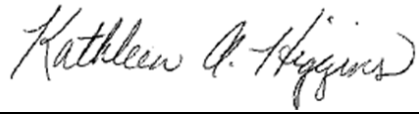
Section 1307 of the RTKL addresses duplication, providing that “[a]n agency may waive fees for duplication of a record, including, but not limited to, when...the requester duplicates the

record[.]” 65 P.S. § 67.1307(f)(1). Therefore, the RTKL contemplates situations in which requesters themselves duplicate records, rather than seeking duplication by the agency. Photographing a document is a form of duplication and, therefore, is permissible under the RTKL. Allowing an agency which lacks separate statutory authority to set a fee schedule prohibiting the photographing of documents would be contrary to the purpose of the RTKL, which is “to maximize access to government records.” *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012). To hold otherwise would not only permit agencies to allow the public to inspect public records, but would also, following the reasoning to its logical conclusion, permit agencies to prohibit the public from taking written notes about public records or recording an audio dictation describing public records. Such an interpretation of the RTKL would lead to an absurd and unreasonable result, and cannot be said to have been the intention of the General Assembly. *See* 1 Pa.C.S. § 1922. Therefore, under Section 701(a) of the RTKL, the Township must make responsive records available to the Requester for his inspection and duplication by photography.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Township is required to provide the Requester with the opportunity to inspect and photograph responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing of this Final Determination, any party may appeal to the Allegheny 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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 14, 2015



APPEALS OFFICER
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