

TRICIA MEZZACAPPA

VS.

BOROUGH OF WEST EASTON

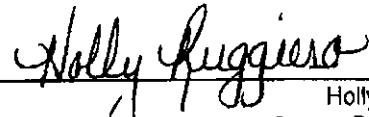
IN THE COURT OF COMMON PLEAS
OF NORTHAMPTON COUNTY, PA
CIVIL DIVISION
3RD JUDICIAL DISTRICT
CASE NUMBER
C-48-CV-2020-02806

NOTICE OF ORDER

STEPHANIE J STEWARD, ESQ
2940 WILLIAM PENN HIGHWAY
EASTON, PA 18045-5227

Enclosed is the order from the Court of Common Pleas of Northampton County, Pennsylvania

Entered on: August 19, 2020



Holly Ruggiero
Northampton County Prothonotary

Deputy



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**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION - LAW**

TRICIA MEZZACAPPA,

Appellant,

vs.

BOROUGH OF WEST EASTON,

Appellee.

No.: C-48-CV-2020-02806

FILED
2020 AUG 19 A 10:41
COURT OF COMMON PLEAS
NORTHAMPTON COUNTY
PA
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OPINION OF THE COURT

This matter is before the Court on Tricia Mezzacappa's ("Appellant") appeal of the Pennsylvania Office of Open Records ("OOR") Final Determination dated April 10, 2020. The parties have submitted briefs, and the matter is now ready for disposition. This matter was assigned to the undersigned on July 28, 2020 at the call of the Argument List.

FACTUAL AND PROCEDURAL BACKGROUND

The only facts submitted to the Court for resolution of this OOR review is the certified record submitted by Erik Anderson, Executive Director, Office of Open Records, dated June 11, 2020 and filed with the Prothonotary on June 16, 2020.

The certified record establishes that on February 21, 2020, Appellant's submission of an Open Records Request, requested pursuant to Pennsylvania's Right-to-Know Law ("RTKL") 65 P.S. §§ 67.101 et seq., was received by the Borough of West Easton ("Appellee") Appellee. See Notice of Appeal at Exhibit

A. In her request, the Appellant requested the following documents in electronic format:

1. A letter by Matthew Dees rescinding his resignation from Borough Council ("Item No. 1");
2. The 2019 Fire Department statement of revenue and expenses ("Item No. 2");
3. All documents, enforcement actions, emails, texts, etc., pertaining to "IQ fibers" business on Lehigh Drive from June 2019 to present ("Item No. 3");
4. All documents for the roof replacement of the Fire Department from JLK Contracting ("Item No. 4"); and
5. A list of all documents destroyed as per the January 2020 minutes, and corresponding paperwork sent to the Pennsylvania Historical Museum Commission ("Item No. 5").

See id.

On February 28, 2020, Joan Heebner, the Borough Manager/Secretary for West Easton, responded to Appellant's request indicating that at the time of her response, the Borough had available Items No. 1, 2, and 5, and that pursuant to the RTKL's Fee Schedule, there is a \$0.25 photocopying fee, per page, for the documents because they did not exist in electronic format. See Notice of Appeal at Exhibit B. Furthermore, Ms. Heebner's letter stated that Appellant's fifth item request sought documents that were not permanent records maintained by the Borough. According the Ms. Heebner's letter, some documents were destroyed as evidenced by the Appellee's January 2020 minutes and other documents were sent to the "PA Historical & Museum Commission". Finally, Ms. Heebner's letter also noted that an additional 30 days were needed to respond to items Numbered 3 and 4, citing the need for

legal review and the extent or nature of the request. *See Heebner Letter, January 28, 2020.*

On March 4, 2020, Appellant appeared at the Borough Hall to obtain the available records (in paper format). Accordingly, Appellant was charged \$1.25 for the production of five (5) pages, at \$0.25 per page.

Thereafter, on the same day, Appellant filed an appeal by website submission to the Office of Open Records ("OOR") averring that Items No. 1 and 2 were provided in paper medium (even though she requested an electronic medium), that Appellee overcharged her for the records, that the same requested records were furnished to another requester, two weeks prior, through email at no cost to that requester, and that the denial for Item No. 5 did not provide a responsive list, and that such denial was made in bad faith. *See Appellant's OOR Website submission dated March 4, 2020.*¹

Appellant supplemented her appeal with more factual detail via an eight (8) paragraph letter dated March 4, 2020, also submitted to the OOR. Attached to Appellant's letter was a sworn affidavit of John Yakim, who asserted that in January 2020, he filed a request for Appellee to furnish him an electronic copy of the Fire Department's expense record for the year 2018, and that subsequently, he was furnished the records through email at no cost. *See Appellant's Letter to OOR dated March 4, 2020 and attached Affidavit of John Yakim.*

¹ Apparently, the request for the outstanding items (3 and 4) are not part of this Appeal.

On March 30, 2020, Appellee responded to Appellant's appeal to the OOR with an Attestation from Joan Heebner, who apparently also wears the hat of the Open Records Officer for the Appellee. Included in her three page, single spaced attestation, Ms. Heebner asserted: (1) that all available records requested by Appellant were furnished to her, in compliance with Section 701 of the RTKL and that the fees were appropriate; (2) that paper format was the only available medium for the documents requested; (3) Ms. Heebner amplified her (the Appellee's) interaction with Mr. Yakim. Apparently, Mr. Yakim submitted a January 6, 2020 request for the year end reports for the Borough's Fire Department for 2018 and 2019. On January 13, 2020, Ms. Heebner responded by letter, granting his request for the 2018 report. However, the 2019 request was denied, as the 2019 report did not yet exist (no submission had been made by the Fire Chief as of January 13, 2020). (4) Ms. Heebner also asserted that the Fire Chief generally submits his financial reports in a paper format; however, the Chief did submit his 2018 Financial Report by email submission, so that Ms. Heebner was able to provide Mr. Yakim with the 2018 report by an email copy of the Chief's email submission. (5) Apparently, sometime prior to Appellant's February 21, 2020 request, the Fire Chief had delivered his 2019 Financial Report for the Fire Department by paper submission. (6) When Appellant came to retrieve the documents on March 4, 2020, she "stormed out of the office [and] grabbed 4 of the 5 papers waiting for her;" (7) That Appellant then "received the 5th page when she came down

for a visual inspection on Friday 3/13/2020;" and (8) that Appellant's Item No. 5 request is subject to the following policy contained in the Municipal Records Manual at paragraph (c): "*When a municipality wishes to destroy non-permanent records . . . [t]he Commission does not have to be notified of such action.*" See Joan Heebner's Attestation dated March 30, 2020; See also, Joan Heebner's letter to Mr. Yakim dated January 13, 2020.

On April 10, 2020, Pennsylvania Office of Open Records Hearing Officer Jill S. Wolfe, Esquire, apparently authored and issued a Final Determination denying Appellant's appeal to OOR. The Final Determination contained a review of the factual submission made to the OOR and a detailed legal analysis of the issues. See OOR's Final Determination dated April 10, 2020.

On April 13, 2020, Appellant submitted a Petition for Reconsideration to the OOR, which included additional legal argument and case citations.

On April 28, 2020 the OOR, through its Chief Counsel, Charles Rees Brown, denied Appellant's Petition for Reconsideration, specifically noting:

A review of the file indicates the agency [West Easton] submitted an affidavit attesting that the requested records provided to you were different from the ones provided to the other requester. The agency met its burden of proof that the records only existed in paper format, and that the copy charge was proper. Furthermore, an agency is not required to convert a paper record into an electronic record in response to a request if the record does not already exist electronically. Accordingly, we deny your petition for reconsideration.

See OOR Denial of Petition for Reconsideration dated April 28, 2020.

On May 11, 2020, Appellant filed seven-paragraph Notice of Appeal seeking judicial review of Appellee's Final Determination issued on April 10, 2020. Appellant requests this Court to reverse the Final Determination of OOR and, in the alternative, that this Court direct Appellee to furnish all future requests electronically.

LEGAL STANDARD

"[T]he objective of the Right-to-Know Law . . . is to empower citizens by affording them access to information concerning the activities of their government." See *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). Furthermore, the Commonwealth Court of Pennsylvania has recognized that the RTKL was "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, the exemptions from disclosure must be narrowly construed." See *Bowling v. Off. of Open Records*, 990 A.2d 813, 824 (Pa. Cmmw. 2010), *aff'd*, 75 A.3d 453 (Pa. 2013).

Section 708 of the RTKL places the burden of proof on the public body for purposes of demonstrating that a record is exempt from disclosure. In pertinent part, Section 708(a) states: ""(1) [t]he burden of proving that a record of a ... local agency is exempt from public access shall be on the ... 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. Cmwlth. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Cmwlth. 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. Cmwlth. Ct. 2011).

The Final Determination of the Office of Open Records with regard to local agency records is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Court of Common Pleas. See 65 P.S. § 67.1302(a).

A court's scope of review on a RTKL appeal is limited to a determination of whether the grant or denial of a request was for just and proper cause. *Tribune-Review Publ'g Co. v. Westmoreland Cnty. Hous. Auth.*, 795 A2d. 1094, 1096 n.4 (Pa. Commw. Ct. 2002) (citation omitted). A court should consider whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. *Rowland v. Comm., Pub School. Employees' Ret. Sys.* 885 A2d. 621, 626 n.5 (Pa. Commw. Ct. 2005) (citation omitted).

The court's decision "shall contain findings of fact and conclusions of law based upon the evidence as a whole" and "clearly and concisely explain the rationale for the decision." 65 P.S. Sec. 67.1301(a) and 1302(a).

The record on appeal includes the request, the agency's response, the appeal filed with the OOR, the hearing transcript, if any, and the appeals officer's final determination. 65 P.S. Sec. 67.1303(b).

DISCUSSION

On Appeal, Appellant argues that: (1) The documents requested were available in electronic format; (2) The documents should have been provided without a fee; (3) Item No. 5 was not provided despite payment; (4) The Fire Department's spreadsheet record was previously sent to Mr. Yakim electronically at no cost; and (5) the "list of records that West Easton destroyed was granted, but never furnished to [Appellee]." See Notice of Appeal at ¶¶ 2-3. Furthermore, Appellant asserts that Joan Heebner's affidavits are false, and that she "attested that the list of destroyed documents [were] not furnished to [Appellee] at first, but later furnished on a different date." See *id.* at ¶¶ 4, 6.

We first note that Appellant's arguments contain bald factual allegations and are not supported by the certified record.

I. Appellee has fully complied with the RTKL's mandates.

Appellant argues that she asked that the records be provided in electronic format and challenges the Borough's policy of imposing a \$.025 duplication fee per page, instead of providing the documents in electronic format free of charge.

The relevant portion of 65 P.S. § 67.901 states:

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record . . . and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested. The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency . . .

See 65 P.S. § 67.901.

Furthermore, 65 P.S. § 67.701 states:

Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act. **A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists.** Public records, legislative records or financial records shall be available for access during the regular business hours of an agency.

See 65 P.S. § 67.701 (emphasis added).

The certified record supports the following:

Appellant's request was received by Appellee on Friday, February 21, 2020. Appellee timely responded to Appellant's request in writing on Friday, February 28, 2020 – within the statutory time period. Further, Appellee provided appropriate factual and legal support for its response.

Appellee indicated that as of the date of the request, Items Numbered 1 and 2 were available in paper format at \$0.25 per page. Furthermore, that item Numbered 5, was identified in Appellee's January 2020 minutes as "non-permanent records" which were destroyed in part, with the other (apparently)

historically relevant documentation was sent to the Pennsylvania Historical Museum Commission. Therefore, those records were no longer in the possession of the Appellee.

On March 4, 2020, Appellant appeared at Appellee's site and paid \$1.25 for the production of five (5) pages for the records requested. The Appellant took only four pages of documentation and later returned to Appellee's offices on March 13, 2020 and recovered the fifth page at that time.

Section 705 of the RTKL provides that "[w]hen responding to a request for access, 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." See 65 P.S. Sec. 67.705. While Section 701 of the RTKL provides that "[a] record being provided to a requestor shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists." See 65 P.S. Section 67.701. Although the RTKL does not define "medium", the OOR has defined it as "the substance through which something is transmitted or carried, a 'means', such as on paper or on the hard-drive or on a database or over the internet." *Action v. Fort Cherry Sch Dist*, OOR Dkt . AP 2009-0926, 2009 Pa. O.O.R.D. LEXIS 786, *aff'd* No. 2010-719 (Wash. Com. Pl. July 26, 2011), *aff'd*, 38 A3d. 1092 (Pa. Commw. Ct. 2012), *Petition for Allowance of Appeal denied*, 57 A3d. 72 (Pa. 2012).

Section 1307 of the RTKL provides that the OOR has the authority to establish duplication fees for local agencies. See 65 P.S. Sec. 67.103(b)(1)(I). Pursuant to this authority, the OOR has approved a Fee Structure and posted the information on its website. See *id.* We believe that the fees charged were reasonable and obligatory as per the statute's mandate: "[a]ll applicable fees shall be paid in order to receive access to the record requested." See 65 P.S. § 67.901.

With regard to Appellant's objection and/or demand that the five pages should have been delivered electronically and free of charge to Appellant, because the same documentation was provided electronically and free of charge to Mr. Yakim, we reject Appellant's assertions. The factual record established that Mr. Yakim received the Fire Department's 2018 financial report because it existed in electronic format (as an attachment to an email from the Fire Chief). Further, the record established that the general practice of the Fire Department was to submit its financial reports in a paper document, as opposed to electronic format; and, at the time that Appellant requested the Fire Department's 2019 financial report, it had been submitted on paper and did not exist as an email attachment. Therefore, we find that Joan Heebner's attestations are credible and that Appellant has not introduced evidence indicating that the Fire Department's 2019 report was available in electronic format.

As part of this appeal, the Appellant seeks to obtain item Number 5 of her February 21, 2020 request: “[a] list of all documents destroyed as per the January 2020 minutes and corresponding paperwork sent to the Pennsylvania Historical Museum Commission.” By the language of Appellant’s very request, she has acknowledged that the documentation is no longer kept by or in the possession of the Appellee. Further the Appellee’s attestation of March 30, 2020, confirms the Appellant’s belief that the documentation is no longer in the possession of the Appellee. Therefore, it is uncontroverted that the documentation was no longer in the possession of Appellee at the time of Appellant’s request. Frankly, we cannot understand the rationale for Appellant’s request that we reverse the OOR determination and order the Appellee to disgorge documentation that does not exist.

For the reasons set forth *supra*, we find that: (1) Appellee has promptly responded to Appellant’s requests as required by 65 P.S. § 67.901; (2) Appellant has received all the requested documents in the medium that was available at the time of the request – in paper format; (3) the fees associated with Appellant’s request were reasonable and mandatory; and (4) Mr. Yakim’s affidavit is immaterial to the instant action because the records that he received, *i.e.*, the 2018 Fire Department report differs materially to the requested document in this case – the 2019 Fire Department report; (5) the unavailability of the 2019 Fire Department report in electronic format at the time of the request in conjunction with Mr. Yakim having received the 2018 Fire Department report via email, does not lead to an inference that Appellee

acted in bad faith, especially in light of the fact that the 2019 report was not available in electronic format; (6) regarding item numbered 5, the destroyed documents were non-permanent records and the other documents that may have historical value had been previously surrendered to another agency, as such the records sought in item numbered 5 were no longer available at the time of request; and (7) the Appellee and its agents have fully complied with their duties under the RTKL.

Therefore, we reaffirm the OOR's April 10, 2020 Final Determination on this matter, and Appellant's appeal is quashed.

II. At the present moment, Appellee is not entitled to costs and reasonable attorney fees.

Appellee argues that: (1) Appellant baldly stated that Appellee acted in bad faith when it provided the requested documents in paper format to Appellant; (2) Appellee fulfilled all of its obligations under the RTKL; (3) pursuant to 65 P.S. § 67.1304(b), the Appellee is entitled to an award of reasonable attorney fees because Appellant's basis for the administrative and judicial appeals are baseless and frivolous, and because this matter was initiated without sufficient legal or factual grounds; (4) Appellant filed the judicial appeal for purposes of burdening and annoying Appellee; and (5) Appellant's long history of filing RTKL requests with Appellee and other agencies in conjunction with her in-person conduct and her correspondence with Appellee and its agents, demonstrate her intent and purpose behind her

appeal, *i.e.*, vexation and frivolity, such that attorney fees are warranted. See Appellee's Brief in Support of Response at 13-20.

We first note that (1) Appellee has not submitted a Petition for attorney's fees; (2) nor has Appellee not provided a listing of or support for attorney's fees – no bill, no description of counsel's efforts, and no amount claimed for attorney fees; and (3) Appellee has not created a testimonial or evidentiary record in support of its claims of bad faith.

Therefore, at this juncture the claims related to Appellant's alleged bad faith are bald, unsupported assertions. Additionally, the Appellee has not been placed on notice or given the ability to contest the claim for fees.

For these reasons, we find that the claim for fees is a non-justiciable issue at this time.

Therefore, Appellee's request for an award of attorney fees and for costs of litigation is denied as premature and/or not properly presented.

WHEREFORE, we enter the following:

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION - LAW

TRICIA MEZZACAPPA,

Appellant,

vs.

BOROUGH OF WEST EASTON,

Appellee.

No.: C-48-CV-2020-02806

FILED
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COURT OF COMMON PLEAS
CIVIL DIVISION
NORTHAMPTON COUNTY, PA

ORDER OF COURT

AND NOW, this ^{18th} day of August, 2020, upon consideration of Appellant Tricia Mezzacappa's ("Appellant") Notice of Appeal to the Pennsylvania Office of Open Records Final Determination Dated April 10, 2020, and after review of the certified record and the argument submitted by the parties, it is hereby **ORDERED** that Appellant's appeal is **DENIED and/or QUASHED**; and, the Final Determination of the Pennsylvania Office of Open Records is **AFFIRMED**.

It is further **ORDERED** that Appellee's request for attorney fees and for costs of litigation is **DENIED without prejudice**.

BY THE COURT:



STEPHEN G. BARATTA, J.