



pennsylvania
OFFICE OF OPEN RECORDS

**DETERMINATION UPON
PETITION FOR RECONSIDERATION**

IN THE MATTER OF	:
	:
JARRETT RENSHAW and <i>The Morning Call</i>	:
Complainants	:
	:
v.	: Docket No.: AP 2009-1013
	:
CITY OF ALLENTOWN	:
Respondent	:

INTRODUCTION

Jarrett Renshaw, a reporter for *The Morning Call*, (the “Requester”) submitted a request to the City of Allentown (“City”) seeking e-mails and daily schedules for City officials and the Mayor’s “contact list” pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The City advised that redaction was necessary to deny access under certain § 708(b) exceptions. The Requester timely appealed to the Office of Open Records (“OOR”). The OOR issued a final determination on December 23, 2009 partially granting and partially denying the appeal (the “**Final Determination**”), OOR Dkt. AP 2009-1013.

The City filed a Petition for Reconsideration on January 8, 2010, asking the OOR to reconsider its Final Determination, alleging that the Final Determination contained errors of fact and law (the “**Petition for Reconsideration**”). Specifically, the City requests that the OOR reverse its determination and direct the Requester to prepay the estimated fees to fulfill the requests.

LEGAL ANALYSIS

The OOR has adopted the reconsideration provisions of Pennsylvania’s General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.241. It is by this authority that the OOR entertains the Petition for Reconsideration submitted by the City.

The City cites *Sharon Smith/Dan Miller v. Pennsylvania Gaming Control Board*, OOR Dkt AP 2009-0243 for support that the OOR has ruled that electronic records cannot be reliably redacted. In addition, the City argues that it is permitted to count pages and determine what the approximate cost of copying and redacting the records will be and require pre-payment prior to production of the documents. The City also argues that the OOR should have determined that it was permitted to combine the two requests where the total 3,592 pages at a cost of \$898.00. The City also challenges the OOR’s requirement that affidavits be submitted to support its claim that the pre-decisional deliberation exception applies to the requested records. The City contends that its due process rights were contravened because the OOR did not conduct a hearing.

1. Redaction.

The issue before the OOR was not whether the records could be provided in electronic format, but whether the records could be electronically redacted. In a letter dated December 16, 2009, the OOR requested the City to submit affidavits in support of

any factual grounds in support of its denial. The record is clear that the City never submitted an affidavit to the OOR supporting its claim that the requested e-mails could not be electronically redacted. As such, the City failed to demonstrate that it could not provide the records in electronic format. This left the OOR with no choice but to order the City to provide electronic copies of the requested records.

The City counters here by arguing that the OOR already determined in *Smith/Miller* that electronic records cannot be reliably redacted. This is an overly broad statement of that determination. In *Smith/Miller*, the OOR determined that the requested PDF files could not be electronically redacted. The OOR notes initially that the determination did not find that electronic records in general cannot be reliably redacted. It focused on records in PDF format. Each type of electronic record is different and may or may not be able to be redacted, hence, the necessity for an affidavit from a person with first hand knowledge of any electronic records at issue. Here, the City failed to provide any evidence in support of its claim that the requested records cannot be electronically redacted. The City cannot now submit such an affidavit after the determination has been issued.

In light of the above, the OOR correctly determined that the City failed to demonstrate that it could not electronically redact the requested records and directed it to provide the Requester with electronic copies. Once that determination was made the OOR's inquiry should have stopped there. Because the OOR directed the City to provide electronic copies, the issue of whether pre-payment of copy fees for paper copies functions as a denial was irrelevant. In sum, while the City asks the OOR to direct the Requester to pay the applicable fees for redacted copies, the City cannot charge fees

when the records can be provided in electronic format. Therefore, the OOR affirms its determination that the City is required to provide electronic copies of the requested records.

2. Pre-payment of fees.

With respect to clarifying the pre-payment of fees, as the OOR has previously determined, an agency is permitted to estimate the total cost of access based on a fee up to \$0.25 per page for paper copies. The agency then notifies the requester that it requires payment prior to granting access to the records, as also allowed for under the RTKL. An agency cannot be expected to copy and possibly redact thousands of pages of records without assurance that the requester will pay the associated copy costs. Section 1307(h) of the RTKL specifically allows for prepayment and provides agencies with a reasonable assurance that it will recoup the copy costs associated with a voluminous request.

Further, the OOR has specifically addressed the permissible fee structure when, as the Citizen is demanding here, a requester wants access to, but not necessarily copies of, all requested records.

Inspection of Redacted Records: If a requester wishes to inspect rather than receive a copy of a record and the record contains both public and non-public information, the agency shall redact the non-public information. An agency may not charge the requester for the redaction. However, the Agency may charge for the copies it must make of the redacted material in order for the requester to view the public record. The fee structure outlined above will apply. If, after inspecting the records, the requester chooses to obtain the copies, no additional fee may be charged.

See OOR webpage regarding “Fees” at

http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/fees/481854

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But again, the OOR did not have to reach this issue, as the City failed to meet its burden of proving that redaction of the records in their electronic format was impossible.

3. Due Process.

The City claims that its due process rights were violated because the OOR did not conduct a hearing. The OOR rejects this argument. The City was given ample opportunity to submit an affidavit stating that it was unable to electronically redact the requested records. It failed to do so. Even if a hearing had been held, the City would have foreseeably attempted to present evidence that the records could not be electronically redacted. This evidence could and should have been submitted to the OOR in the form of the requested affidavit. While the City offered to submit such an affidavit as part of its Petition for Reconsideration, factual evidence that could have been submitted prior to the determination cannot be considered here.

Further, we note that the OOR has discretion under the RTKL to hold a hearing. 65 P.S. §§ 67.1101(b)(3), 1102(a)(2). The decision to hold or not to hold a hearing is not appealable. 65 P.S. § 67.1102(a)(2)

For the reasons set forth in this Determination upon Petition for Reconsideration, we **affirm** the Final Determination.

CONCLUSION

For the foregoing reasons, we **affirm** the Final Determination granting the appeal. The City is required to provide electronic copies of the requested records. This Determination upon Petition for Reconsideration is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Court of Common Pleas Court of Lehigh County. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

DETERMINATION ISSUED AND MAILED February 8, 2010



APPEALS OFFICER

NATHANAEL BYERLY, ESQUIRE

BEFORE THE OFFICE OF OPEN RECORDS

IN THE MATTER OF:	:	Docket No.: AP 2009-1013
	:	
JARRETT RENSHAW, and	:	
<i>The Morning Call,</i>	:	
Complainants	:	
	:	
v.	:	
	:	
CITY OF ALLENTOWN	:	
Respondent	:	

MOTION FOR RECONSIDERATION OF THE RESPONDENT, CITY OF ALLENTOWN

The Petitioner, the Respondent, the City of Allentown, files this Motion for Reconsideration under the General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241, and respectfully represents:

1. On December 23, 2009, the Office of Open Records (“OOR”) issued and mailed a Final Determination in the above-captioned appeal, a true and correct copy of which is attached hereto and made a material part hereof as Exhibit “A.”

ERRORS ASSERTED

2. The Respondent, the City of Allentown (the “City”), asserts the following errors of fact and law:

A. The OOR found that the City did not submit Affidavits to support the fact that the records requested, the emails, schedules and Contact List, could not be electronically provided because of the required redaction, despite the OOR’s prior ruling in Sharon Smith/Dan Miller v. Pennsylvania Gaming Control Board Docket No. AP 2009-0243 that electronic records cannot be reliably redacted.

B. The OOR erroneously reconciled Sections 901, 902 and 1307 of the Right-to-Know Act (the “Act”) in determining the requested emails, schedules and Contact List must be released to the Complainants without prepayment of fees, specifically:

(1) Section 901 of the Act states: “... All applicable fees shall be paid in order to receive access to the record requested.”

(2) Section 902 lists seven (7) reasons the City may extend the five (5) business day response deadline, including, in material part, legal review to determine whether the record is subject to access under the Act (i.e. whether the requested record is a “public record” and

whether portions of a record are not subject to access and may be redacted) and the refusal to pay applicable fees under Section 902 (a) (4) and (6), respectively.

(3) The OOR's ruling misapprehends the notion that the agency uses the five (5) day period to compile and assemble the records in order to make a determination on whether and which records may be released; the Open Records designee cannot make this determination or estimate fees without first seeing the records. The paper records in this case consist of 3,592 pages.

(4) If the agency is not permitted to "count pages", as stated on page 8, within the five (5) day time frame, a sensible and defensible cost estimate cannot be made within the required time.

(5) If the agency is required to state the reasons for redaction, supported by facts and with citations to legal authority in the Extension of Time letter, under Section 902 (a) of the Act, as the OOR ruled, then Section 902(b) (2) is rendered meaningless and the agency would be compelled to basically answer every request in five (5) business days.

C. The OOR erroneously determined the City could not combine the Complainant's two (2) requests into one (1) for purposes of the fee estimate where the total pages for both requests was 3,592, at a cost \$ 898.00, far in excess of the \$ 100.00 set in Section 1307(h) under which the City may request prepayment, especially where the requests in case were submitted by the same requestor.

D. The OOR's finding on page 8 that "[T]he law does not require, however, an agency to count pages or perform its redactions in order to prepare or legitimize its estimate of fees under Section 1307(h)..." is contradictory to the ruling in this appeal.

E. The OOR's requirement that Affidavits be submitted to justify the application of the predecisional deliberation exemption essentially requires the City to divulge information about the substance of the executive deliberative process to the requestor which the statute and the executive privilege protects.

F. The OOR's letter, dated November 30, 2009, states: "You may submit an example of the redacted records to illustrate the protected nature of the material." In compliance with this correspondence, the City *did* submit examples, even though the ruling would have the City provide *all* of the redactions, and reasons therefor, in the Extension Letter under Section 902 (b) (2).

G. Contrary to the OOR's finding, there is a mechanism to refund an overpayment on a good faith cost estimate—a civil action initiated in any Court of competent jurisdiction.

H. The OOR's failure to convene a hearing under Section 1102(a) (2) of the Act in this case contravened the City's constitutional right of due process under the Administrative Law, 2 Pa. C.S.A. Section 504.

REQUEST FOR HEARING AND RECUSAL

3. The City requests a Hearing as authorized by Section 1102(a)(2) of the Act.
4. The City requests the recusal of the Hearing Officer, who was formerly employed by the Law Firm of Nauman Smith in Harrisburg, Pennsylvania, which has an extensive Right-to-Know and media law practice, the members of which have presented Pennsylvania Bar Institute (PBI) seminars on the subject of the 2009 amendments to the Right-to-Know in this state, which suggests bias, as this appeal involves The Morning Call newspaper's request for access.
5. The City requests the recusal of the Hearing Officer in all future matters involving The Morning Call newspaper and the City.

REQUEST TO SUPPLEMENT THE RECORD

6. The City requests leave to file an Affidavit of a qualified professional to verify that non-public information in the emails, schedules and Contact List cannot be redacted electronically without creating a new record, which the City has no obligation to do under the Act, or without printing a paper record.

WHEREFORE, the Petitioner, the Respondent, the City of Allentown, respectfully requests that the Office of Open Records grant reconsideration of its Final Determination, issued on December 23, 2009, and, thereafter, reverse its decision and direct the Complainants, Jarrett Renshaw and The Morning Call, to prepay the estimated fees to fulfill the requests or, in alternative, grant a Hearing as authorized by statute or leave to supplement the record.

Respectfully submitted,



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OFFICE OF OPEN RECORDS
FINAL DETERMINATION

IN THE MATTER OF
JARRETT RENSHAW, and
The Morning Call
Complainants
v.
CITY OF ALLENTOWN,
Respondent

Docket No. AP 2009-1013

INTRODUCTION

Jarrett Renshaw, a reporter, for *The Morning Call*, (the "Requester") submitted a request to City of Allentown ("City") seeking e-mails and daily schedules for City officials, and the Mayor's "contact list" pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, ("RTKL"). The City advised that redaction was necessary to deny access under several Section 708(b) exceptions. The Requester timely appealed to the Office of Open Records ("OOR").

For the reasons set forth in this Final Determination, the Requester's appeal is granted in part and denied in part, and the City is required to take further action.

FACTUAL BACKGROUND

On October 30, 2009, the Requester submitted two right-to-know requests. One seeks:

- Mayor Ed Pawlowski's daily schedule from January 1, 2009 to the date the information is compiled;
- Community & Economic Director Joyce Marin's daily schedule from January 1, 2009 to the date the information is compiled;
- Managing Director Ken Bennington's daily schedule from January 1, 2009 to the date the information is compiled; (the three collectively referred to as "Schedules"), and
- Mayor's contact list and/or the contact list maintained by his assistant if the two are different ("Contact List").

("Request 1"). He states after each of these subrequests that he wants the information "*in whatever electronic format it exists.*" (emphasis supplied).

He also requested in a separate request, ("Request 2"), "All emails sent from [these three individuals'] city accounts since January 1, 2009." ("E-mails"). He specifically stated "I am requesting the information in electronic format." (emphasis in original).

On November 6th, the Assistant City Solicitor Frances Fruhwirth responded to both Request 1 and Request 2 (collectively the "Requests"), stating:

Pursuant to Section 902(a)(1) and (7) of the Act, respectively a response to your request may require redaction as permitted by the Act and the extent and nature of your request precludes a response within the required five (5) day time period.

We will forward a response within thirty (30) days on or before December 7, 2009.

("Initial Response"). Three days later, the City sent a second response and in a single letter advised:

The records you requested cannot be furnished to you electronically. The emails sent by [the three individuals] on city accounts since January 1, 2009 along with the daily schedules of each within the same timeframe are subject to appropriate redaction. The contact list you requested may also be subject to appropriate redaction.

We estimate the cost of the redacted paper copies of the documents in response to your request will be in excess of \$350.00. Section 1307(h) of the Act authorizes the City to require prepayment of an estimate of fees in excess of \$100.00.

("Denial"). The Requester timely appealed on November 18th, stating "The city has not provided the reasons for the redaction." (the "Appeal").

On appeal, the City argued the Appeal is premature and that the Requester had to wait until December 7th to appeal any alleged denial. The City contends that the Requester is not entitled to know the reasons for the redactions at the time that the fee exceeding \$100 is quoted, and that it did not deny the Request; "the City simply asked for an advance on the total costs to fulfill the request as permitted by the statute." See Solicitor Letter. To supplement the Appeal,

the City explained that it undertook an investigation to assess whether redaction of the electronic records was needed, and advised the records could not be redacted without converting to paper.

The City did not submit any affidavits to support that the records cannot be electronically provided due to the alleged redaction needed. The City relies upon *Smith/Miller v. Pa. Gaming Control Board*, OOR Dkt. AP 2009-0243, as its basis for providing the records in hard-copy form. Nor did the City substantiate any asserted redactions, of which a few samples were identified. With regard to the Contact List, the City advises that it consists of names, addresses, phone numbers and e-mail addresses compiled over three administrations. The personal contacts have been redacted. With regard to the electronic Schedules, the City advises that the personal activities have been redacted, such as haircuts, wedding anniversary trip, etc. Meetings with the Solicitor have been redacted when regarding an eminent domain dispute. With regard to the E-mails, the City explains that content was redacted as follows: personal identification information under Section 708(b)(6); internal predecisional deliberations under Section 708(b)(10); draft ordinances under Section 708(b)(9); handling of resident complaints under Section 708(b)(17), and performance reviews of employees under Section 708(b)(7).

The City then provided a new estimate of fees showing the number of hard-copy pages at \$0.25 a page, (Mayor's Contact List at 166 pages; Mayor's e-mails at 1,397 pages; Mayor's schedules at 365 pages; Marin's e-mails at 631 pages; Marin's schedules at 344 pages; Bennington's e-mails at 355 pages; and Bennington's schedules at 334 pages) for a total of \$898.00. The City argues that it "cannot be expected to copy and *possibly* redact 3,592 pages of records without assurance that the request[er] will pay the associated copy costs." See Solicitor's Letter, p. 5 (emphasis added)(citing to *Hess v. Department of Corrections*, OOR Dkt. AP 2009-0413).

The Requester agreed to extend the Final Determination due date to December 23rd.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. Records of a local agency are presumed to be "public" unless the record is: (1) exempt under Section 708(b); (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. The City must overcome the presumption of openness for any denial issued.

Procedurally, the City complains that the appeal is not proper. The City argues that its response to the Requester does not constitute a "denial" under the RTKL because it sought the estimated fees for the completion of the Request. The City contends that its second response, stating that redaction was necessary and setting forth an estimate of fees, does not constitute an appealable denial and the Requester could not appeal until the thirty days had elapsed on December 7, 2009. The OOR addresses the alleged procedural defect at the outset.

1. The City's Second Response Was a Denial.

The City issued a timely response invoking the thirty-day extension, and then before its thirty-day extension had elapsed, provided another response to the Requester, from which he appealed. In its second response, the City advised that redaction of the records would be necessary, and did not explain the basis for its estimated fees. The City did not provide any electronic copies of any of the records requested, instead advising that a response would be forthcoming in paper form, because, it alleged, electronic redaction was infeasible. The City contended that prepayment of \$350 was necessary, and advised the Requests would not be processed until full payment was received. Notably, the City combined the two Requests in its fee estimate without a breakdown of the fees per request to establish the \$100 threshold.

Moreover, the Requester clearly sought electronic copies and the records as they exist in an electronic medium as opposed to paper copies for which up to a \$0.25 fee may be charged.

The RTKL does not define "denial;" "response" is defined in part as "an agency's written notice to a requester granting, denying or partially granting and partially denying access to a record." 65 P.S. §67.102. The City contends that its response did not qualify as a grant or denial, despite using the word "redaction." Section 706 explains redaction as follows:

if an agency determines that a public record ... contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access... *The agency may not deny access to the record if the information which is not subject to access is able to be redacted.* Information which an agency redacts in accordance with this subsection *shall be deemed a denial* under Chapter 9.

65 P.S. §67.706 (emphasis added). The City responded to the Requester twice; in the Initial Response, the City advised that the records may be subject to redaction, and additional time beyond the five days was needed to assess that. Then, three days later, the City advised the Requester that the E-mails and Schedules requested are subject to redaction and that the redaction could not be performed electronically. The City did not offer any of the E-mails or Schedules in electronic format as requested and did not advise that *none* of the records requested could be provided in electronic format. By stating that redaction was necessary, the City's response constitutes a denial of access.

"Access" is explained as making accessible for inspection and duplication in Section 701. Section 701 continues that "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." 65 P.S. §67.701. In this case, the Requester clearly sought the records at issue in "electronic format," "in whatever electronic format it exists." *See* Requests. However, the City did not provide any records in electronic format, and did not substantiate that each and

every record requested (all e-mails and electronic daily schedules of three individuals since January 1, 2009) required redaction so as to preclude granting any access. The City did not contest that the records exist in electronic format, only that redaction cannot be completed electronically. As a "denial," the City was required to comport with Chapter 9 in its response.

Section 901 mandates that "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 to respond as promptly as possible under the circumstances." 65 P.S. §67.901 (emphasis added). When the five business-day time period is not sufficient, the RTKL permits agencies to invoke an extension for up to thirty days for the reasons specified within Section 902. Section 902 provides that if one of the factors in subsection (a) applies, such as a request requiring redaction, the agency is to state "the reasonable date a response is expected to be provided and an estimate of applicable fees owed when the record becomes available." 65 P.S. §67.902(b)(2). The City's Initial Response did not provide an estimate of the fees or refuse to provide access to any records such as with redaction. Because the City advised that redaction of the E-mails and Schedules was necessary, the response was a denial and deficient in not including "the specific reasons for the denial, including citation of supporting legal authority."

The City is permitted to require the Requester to "pay applicable fees authorized by this Act," (Section 902(a)(6)), and the RTKL is clear that "all applicable fees shall be paid" (Section 901) in order for a requester to have access. Moreover, the RTKL expressly authorizes an agency, "prior to granting a request... [to] require a requester to prepay an estimate of the fees authorized under [Section 1307] if the fees required to fulfill the request are expected to exceed \$100." The RTKL requires an agency to provide requesters with an estimate in the initial five-day response under Section 902(b)(2), advises fees shall be paid in order for a requester to receive access and states that any fees for which the estimate is over \$100 may be required to be

prepaid before granting access. These provisions need to be reconciled and read *in para materia* in light of the RTKL as a whole to ensure a reasonable result.

The estimate that is permitted is one in which the fees are authorized by Section 1307, meaning that they must be consistent with the other provisions including the duplication fees set by the OOR Fee Schedule. Fees for copying records onto electronic media, or transmission by other electronic means shall be established by the OOR. The OOR does not authorize a fee for electronic transmission and files that are sent via e-mail. Thus, for the City to withhold any and all E-mails and Schedules from the Requester based upon alleged necessary pre-payment of fees requires some legal basis. First, the fees must be authorized and permitted under Section 1307. Section 1307 does not authorize fees for separate requests to be combined to reach the \$100 threshold as the City did here. As there are no fees for electronic transmission, and the fees for copying on electronic media are limited to the actual cost (such as for a CD-ROM), pre-payment is not a legitimate grounds for withholding the records sought, and the Requester was proper in deeming the response a denial and appealing to the OOR.

Were the OOR to construe the RTKL as the City does, then any time that a request for electronic transmission is made, an agency may allege without any support or substantiation that redaction is necessary, necessitating paper copies at \$0.25 a page despite the existence of the record in the electronic medium at less or no cost for access. In addition, were the City's second response not construed as a denial, then the Requester would have no recourse to challenge the allegation that redaction was necessary. Following the City's logic, the Requester would need to pre-pay the \$350 estimate without being entitled to challenge or question the accuracy of the estimate or any reasons for it—and only upon payment of the \$350 be permitted to have his Requests processed, and then only be able to challenge the redaction after payment was made. Such an interpretation renders an absurd result because the OOR has no ability to require

refunding of payments, leaving the requester without recourse. Yet, the OOR does have jurisdiction to assess whether fees are permissible and in accordance with the RTKL and the OOR Fee Schedule. The City's interpretation does not afford the Requester a remedy, whereas the RTKL offers one through the administrative appeal process. Because the City alleged that redaction was necessary, and granted none of the records requested in the electronic medium in which they exist, the City denied access and must provide its legal grounds for withholding the records requested in their entirety. The law does not require, however, an agency to count pages or perform its redactions in order to prepare or legitimize its estimate of fees under Section 1307(h).

2. The City did not prove that the Requested Records Require Redaction.

In order to withhold access to requested records, the City must establish that the records at issue are exempt from disclosure under one of the three grounds. In this case, the City has not argued that the records are exempt by other laws or privileges, and asserted a series of exceptions to protect the Contacts, the E-mails and Schedules. As the City issued a "denial," and advised redaction was necessary, the City should have provided grounds for the redaction with citation to proper legal authority. *See* 65 P.S. §67.903(2).

Under Section 708(a), the City must show that its claimed exceptions apply by a preponderance of the evidence. *See* 65 P.S. §67.708(a). To prove by "preponderance of the evidence" means to show by the "greater weight of the evidence." *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). In this case, the City asserted (b)(9) pertaining to draft ordinances and resolutions, and (b)(7) pertaining to performance reviews. Those items are expressly listed as material exempt from the RTKL, and therefore are subject to redaction.

With regard to the Schedules, in *Shields v. City of Philadelphia*, OOR Dkt. AP 2009-0788, the OOR determined that the information upon schedules must be proven to be exempt in order to qualify. Here, the City did not submit any evidence to show that the Schedules

contained information protected from disclosure. The only explanation offered that the Schedules require redaction are for personal activities. The City did not attest or otherwise seek to prove that the entirety of the over 1100 pages need to be printed to allow redaction contain personal information exempt from disclosure. Accordingly, the City did not establish that redaction of the Schedules was necessary, and cannot withhold them or charge for their production in paper when they exist electronically.

The E-mails may contain information that may be permissibly redacted under one or more of the exceptions within the RTKL. However, the City did not submit material to show that the E-mails contain protected information other than its Solicitor Letter. E-mails may not be protected as internal predecisional deliberations under Section 708(b)(10) unless the City can show that the e-mails actually reflect deliberations. Here, the City did not substantiate that the E-mails contain information that is "deliberative" in character. Unlike a "complaint" that may be exempt under Section 708(b)(17), if noncriminal in nature, the internal predecisional deliberative exception cannot be cited to establish the requisite underlying facts. Therefore, the City may only protect parts of records that are expressly listed as exempt within the exceptions, with minimal redaction. The City is required to disclose any and all responsive records in the electronic medium in which it exists. The City may only charge for the redacted pages containing the specifically exempted information if the Requester agrees to receive paper copies since he was explicit in seeking electronic copies only.

Provided the records requested qualify as records of the City, and contain information that is expressly enumerated as exempt as in a few of the examples the City cites in its Solicitor Letter, then they may be redacted with the nonpublic information redacted. For example, the Contacts List for the Mayor, which contains personal contacts that are not related to a transaction

or business of the City, need not be provided, and any personal identification information listed in Section 708(b)(6) may be properly redacted.

The OOR reminds the Requester that only records existing as of the date the Request is made are properly sought. The OOR advises that a proper request for records may only seek records that are in existence as of the date of a request; otherwise, an agency would be "creating" a record in order to respond to a request, which it cannot be compelled to do. *See* 65 P.S. §67.705. To the extent the Requests seek records up to the date the information is compiled, they are not proper, and no information post-dating the date of the Requests needs to be produced.

CONCLUSION

For the foregoing reasons, the Requester's Appeal is granted in part and denied in part. As it did not establish each of its asserted exceptions, the City is directed to provide the Requester the Contact List, to the extent it constitutes a record of the City, with only the personal identification information redacted, the E-mails and the Schedules with only nonpublic information redacted, to the Requester within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Lehigh 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. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: December 23, 2009



LUCINDA GLINN, ESQ.
APPEALS OFFICER

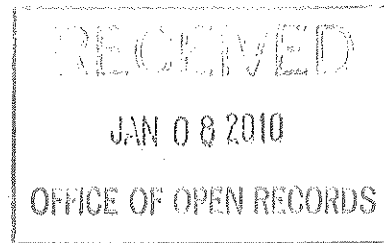
Sent to: Jarrett Renshaw of and for *Morning Call*; Frances Fruhwirth, Esq., for City



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Assistant City Solicitors
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FAX COVER SHEET

DATE: January 7, 2010
PLEASE DELIVER TO:
NAME Lucinda Glinn, Esquire
AGENCY/ORGANIZATION Office of Open Records
FAX TELEPHONE # (717) 425-5343
NAME Jarrett Renshaw
AGENCY/ORGANIZATION The Morning Call
FAX TELEPHONE # (610) 820-6693
NAME
FAX TELEPHONE #



SENDER:
NAME Frances A. Fruhwirth, Esquire
TITLE Assistant City Solicitor
PHONE NO. 610-437-7545
FAX NO. 610-437-8701

SUBJECT:
Renshaw v City of Allentown
Docket No. AP 2009-1013
Petition for Reconsideration is attached. Thank you.
TOTAL NUMBER OF PAGES (INCLUDING COVER PAGE): 14

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CONTACT US AS SOON AS POSSIBLE AT THE TELEPHONE NUMBER (NOT FAX NUMBER) LISTED ABOVE.

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VIA FIRST CLASS US MAIL

January 15, 2010

Jerry A. Snyder
City Solicitor
City of Allentown
435 Hamilton Street, Room 519
Allentown, PA 18101-1699

RE: Petition for Reconsideration dated January 8, 2010

Dear Mr. Snyder:

We are in receipt of your Petition for Reconsideration dated January 8 in connection with the Office of Open Records' Final Determination in *Renshaw v. City of Allentown*, OOR Dkt. AP 2009-1013. We hereby grant your Petition, although we do not admit or deny the specific errors you allege in paragraphs A through F thereof.

We note here that the Office of Open Records interim regulations regarding petitions for reconsideration provides that this office will follow the procedures set forth in Pennsylvania's General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241.

The requester in the underlying matter, Jarrett Renshaw and *The Morning Call*, may file a response in the nature of an answer within 15 days of the issuance of this order granting reconsideration, or by February 1, 2010.

This office will issue a determination responsive to this Petition for Reconsideration no later than 30 days from the "mailing date" of your petition, or by February 8, 2010.

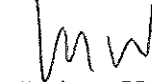
We hereby deny your request for a hearing in this matter. All proceedings upon Reconsideration in this matter will be conducted through written submissions.

We note here that it is our practice to assign determinations upon reconsideration to an appeals officer other than the office who rendered the final determination. The new appeals officer, Dena Lefkowitz, has been copied on this grant of your Petition and will be in touch with both parties shortly, particularly to discuss the submission schedule and in particular, the need for an affidavit from the City to substantiate its assertion that it cannot redact the records sought by Mr. Renshaw electronically.

Finally, we hereby deny that portion of your Petition in which you seek to have Lucinda Glinn recused from all future appeals involving the City of Allentown and *The Morning Call*.

Please contact me if you have any further questions.

Sincerely,



Corinna V. Wilson
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Jarrett Renshaw and *The Morning Call*

(“Request 1”). He states after each of these subrequests that he wants the information “*in whatever electronic format it exists.*” (emphasis supplied).

He also requested in a separate request, (“Request 2”), “All emails sent from [these three individuals’] city accounts since January 1, 2009.” (“E-mails”). He specifically stated “I am requesting the information in electronic format.” (emphasis in original).

On November 6th, the Assistant City Solicitor Frances Fruhwirth responded to both Request 1 and Request 2 (collectively the “Requests”), stating:

Pursuant to Section 902(a)(1) and (7) of the Act, respectively a response to your request may require redaction as permitted by the Act and the extent and nature of your request precludes a response within the required five (5) day time period.

We will forward a response within thirty (30) days on or before December 7, 2009.

(“Initial Response”). Three days later, the City sent a second response and in a single letter advised:

The records you requested cannot be furnished to you electronically. The emails sent by [the three individuals] on city accounts since January 1, 2009 along with the daily schedules of each within the same timeframe are subject to appropriate redaction. The contact list you requested may also be subject to appropriate redaction.

We estimate the cost of the redacted paper copies of the documents in response to your request will be in excess of \$350.00. Section 1307(h) of the Act authorizes the City to require prepayment of an estimate of fees in excess of \$100.00.

(“Denial”). The Requester timely appealed on November 18th, stating “The city has not provided the reasons for the redaction.” (the “Appeal”).

On appeal, the City argued the Appeal is premature and that the Requester had to wait until December 7th to appeal any alleged denial. The City contends that the Requester is not entitled to know the reasons for the redactions at the time that the fee exceeding \$100 is quoted, and that it did not deny the Request; “the City simply asked for an advance on the total costs to fulfill the request as permitted by the statute.” *See* Solicitor Letter. To supplement the Appeal,

the City explained that it undertook an investigation to assess whether redaction of the electronic records was needed, and advised the records could not be redacted without converting to paper.

The City did not submit any affidavits to support that the records cannot be electronically provided due to the alleged redaction needed. The City relies upon *Smith/Miller v. Pa. Gaming Control Board*, OOR Dkt. AP 2009-0243, as its basis for providing the records in hard-copy form. Nor did the City substantiate any asserted redactions, of which a few samples were identified. With regard to the Contact List, the City advises that it consists of names, addresses, phone numbers and e-mail addresses compiled over three administrations. The personal contacts have been redacted. With regard to the electronic Schedules, the City advises that the personal activities have been redacted, such as haircuts, wedding anniversary trip, etc. Meetings with the Solicitor have been redacted when regarding an eminent domain dispute. With regard to the E-mails, the City explains that content was redacted as follows: personal identification information under Section 708(b)(6); internal predecisional deliberations under Section 708(b)(10); draft ordinances under Section 708(b)(9); handling of resident complaints under Section 708(b)(17), and performance reviews of employees under Section 708(b)(7).

The City then provided a new estimate of fees showing the number of hard-copy pages at \$0.25 a page, (Mayor's Contact List at 166 pages; Mayor's e-mails at 1,397 pages; Mayor's schedules at 365 pages; Marin's e-mails at 631 pages; Marin's schedules at 344 pages; Bennington's e-mails at 355 pages; and Bennington's schedules at 334 pages) for a total of \$898.00. The City argues that it "cannot be expected to copy and **possibly redact** 3,592 pages of records without assurance that the request[er] will pay the associated copy costs." See Solicitor's Letter, p. 5 (emphasis added)(citing to *Hess v. Department of Corrections*, OOR Dkt. AP 2009-0413).

The Requester agreed to extend the Final Determination due date to December 23rd.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. Records of a local agency are presumed to be “public” unless the record is: (1) exempt under Section 708(b); (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. The City must overcome the presumption of openness for any denial issued.

Procedurally, the City complains that the appeal is not proper. The City argues that its response to the Requester does not constitute a “denial” under the RTKL because it sought the estimated fees for the completion of the Request. The City contends that its second response, stating that redaction was necessary and setting forth an estimate of fees, does not constitute an appealable denial and the Requester could not appeal until the thirty days had elapsed on December 7, 2009. The OOR addresses the alleged procedural defect at the outset.

1. The City’s Second Response Was a Denial.

The City issued a timely response invoking the thirty-day extension, and then before its thirty-day extension had elapsed, provided another response to the Requester, from which he appealed. In its second response, the City advised that redaction of the records would be necessary, and did not explain the basis for its estimated fees. The City did not provide any electronic copies of any of the records requested, instead advising that a response would be forthcoming in paper form, because, it alleged, electronic redaction was infeasible. The City contended that prepayment of \$350 was necessary, and advised the Requests would not be processed until full payment was received. Notably, the City combined the two Requests in its fee estimate without a breakdown of the fees per request to establish the \$100 threshold.

Moreover, the Requester clearly sought electronic copies and the records as they exist in an electronic medium as opposed to paper copies for which up to a \$0.25 fee may be charged.

The RTKL does not define “denial;” “response” is defined in part as “an agency’s written notice to a requester granting, denying or partially granting and partially denying access to a record.” 65 P.S. §67.102. The City contends that its response did not qualify as a grant or denial, despite using the word “redaction.” Section 706 explains redaction as follows:

if an agency determines that a public record ...contains information which is subject to access as well as information which is not subject to access, the agency’s response shall grant access to the information which is subject to access and deny access to the information which is not subject to access... ***The agency may not deny access to the record if the information which is not subject to access is able to be redacted.*** Information which an agency redacts in accordance with this subsection ***shall be deemed a denial*** under Chapter 9.

65 P.S. §67.706 (emphasis added). The City responded to the Requester twice; in the Initial Response, the City advised that the records may be subject to redaction, and additional time beyond the five days was needed to assess that. Then, three days later, the City advised the Requester that the E-mails and Schedules requested are subject to redaction and that the redaction could not be performed electronically. The City did not offer any of the E-mails or Schedules in electronic format as requested and did not advise that ***none*** of the records requested could be provided in electronic format. By stating that redaction was necessary, the City’s response constitutes a denial of access.

“Access” is explained as making accessible for inspection and duplication in Section 701. Section 701 continues that “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.” 65 P.S. §67.701. In this case, the Requester clearly sought the records at issue in “electronic format,” “in whatever electronic format it exists.” *See* Requests. However, the City did not provide any records in electronic format, and did not substantiate that each and

every record requested (all e-mails and electronic daily schedules of three individuals since January 1, 2009) required redaction so as to preclude granting any access. The City did not contest that the records exist in electronic format, only that redaction cannot be completed electronically. As a “denial,” the City was required to comport with Chapter 9 in its response.

Section 901 mandates that “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 to respond as promptly as possible under the circumstances.” 65 P.S. §67.901 (emphasis added). When the five business-day time period is not sufficient, the RTKL permits agencies to invoke an extension for up to thirty days for the reasons specified within Section 902. Section 902 provides that if one of the factors in subsection (a) applies, such as a request requiring redaction, the agency is to state “the reasonable date a response is expected to be provided **and** an estimate of applicable fees owed when the record becomes available.” 65 P.S. §67.902(b)(2). The City’s Initial Response did not provide an estimate of the fees or refuse to provide access to any records such as with redaction. Because the City advised that redaction of the E-mails and Schedules was necessary, the response was a denial and deficient in not including “the specific reasons for the denial, including citation of supporting legal authority.”

The City is permitted to require the Requester to “pay applicable fees authorized by this Act,” (Section 902(a)(6)), and the RTKL is clear that “all applicable fees shall be paid” (Section 901) in order for a requester to have access. Moreover, the RTKL expressly authorizes an agency, “prior to granting a request... [to] require a requester to **prepay an estimate of the fees authorized under [Section 1307]** if the fees required to fulfill the request are expected to exceed \$100.” The RTKL requires an agency to provide requesters with an estimate in the initial five-day response under Section 902(b)(2), advises fees shall be paid in order for a requester to receive access and states that any fees for which the estimate is over \$100 may be required to be

prepaid before granting access. These provisions need to be reconciled and read *in para materia* in light of the RTKL as a whole to ensure a reasonable result.

The estimate that is permitted is one in which the fees are authorized by Section 1307, meaning that they must be consistent with the other provisions including the duplication fees set by the OOR Fee Schedule. Fees for copying records onto electronic media, or transmission by other electronic means shall be established by the OOR. The OOR does not authorize a fee for electronic transmission and files that are sent via e-mail. Thus, for the City to withhold any and all E-mails and Schedules from the Requester based upon alleged necessary pre-payment of fees requires some legal basis. First, the fees must be authorized and permitted under Section 1307. Section 1307 does not authorize fees for separate requests to be combined to reach the \$100 threshold as the City did here. As there are no fees for electronic transmission, and the fees for copying on electronic media are limited to the actual cost (such as for a CD-ROM), pre-payment is not a legitimate grounds for withholding the records sought, and the Requester was proper in deeming the response a denial and appealing to the OOR.

Were the OOR to construe the RTKL as the City does, then any time that a request for electronic transmission is made, an agency may allege without any support or substantiation that redaction is necessary, necessitating paper copies at \$0.25 a page despite the existence of the record in the electronic medium at less or no cost for access. In addition, were the City's second response not construed as a denial, then the Requester would have no recourse to challenge the allegation that redaction was necessary. Following the City's logic, the Requester would need to pre-pay the \$350 estimate without being entitled to challenge or question the accuracy of the estimate or any reasons for it—and only upon payment of the \$350 be permitted to have his Requests processed, and then only be able to challenge the redaction after payment was made. Such an interpretation renders an absurd result because the OOR has no ability to require

refunding of payments, leaving the requester without recourse. Yet, the OOR does have jurisdiction to assess whether fees are permissible and in accordance with the RTKL and the OOR Fee Schedule. The City's interpretation does not afford the Requester a remedy, whereas the RTKL offers one through the administrative appeal process. Because the City alleged that redaction was necessary, and granted none of the records requested in the electronic medium in which they exist, the City denied access and must provide its legal grounds for withholding the records requested in their entirety. The law does not require, however, an agency to count pages or perform its redactions in order to prepare or legitimize its estimate of fees under Section 1307(h).

2. The City did not prove that the Requested Records Require Redaction.

In order to withhold access to requested records, the City must establish that the records at issue are exempt from disclosure under one of the three grounds. In this case, the City has not argued that the records are exempt by other laws or privileges, and asserted a series of exceptions to protect the Contacts, the E-mails and Schedules. As the City issued a "denial," and advised redaction was necessary, the City should have provided grounds for the redaction with citation to proper legal authority. *See* 65 P.S. §67.903(2).

Under Section 708(a), the City must show that its claimed exceptions apply by a preponderance of the evidence. *See* 65 P.S. §67.708(a). To prove by "preponderance of the evidence" means to show by the "greater weight of the evidence." *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). In this case, the City asserted (b)(9) pertaining to draft ordinances and resolutions, and (b)(7) pertaining to performance reviews. Those items are expressly listed as material exempt from the RTKL, and therefore are subject to redaction.

With regard to the Schedules, in *Shields v. City of Philadelphia*, OOR Dkt. AP 2009-0788, the OOR determined that the information upon schedules must be proven to be exempt in order to qualify. Here, the City did not submit any evidence to show that the Schedules

contained information protected from disclosure. The only explanation offered that the Schedules require redaction are for personal activities. The City did not attest or otherwise seek to prove that the entirety of the over 1100 pages need to be printed to allow redaction contain personal information exempt from disclosure. Accordingly, the City did not establish that redaction of the Schedules was necessary, and cannot withhold them or charge for their production in paper when they exist electronically.

The E-mails may contain information that may be permissibly redacted under one or more of the exceptions within the RTKL. However, the City did not submit material to show that the E-mails contain protected information other than its Solicitor Letter. E-mails may not be protected as internal predecisional deliberations under Section 708(b)(10) unless the City can show that the e-mails actually reflect deliberations. Here, the City did not substantiate that the E-mails contain information that is “deliberative” in character. Unlike a “complaint” that may be exempt under Section 708(b)(17), if noncriminal in nature, the internal predecisional deliberative exception cannot be cited to establish the requisite underlying facts. Therefore, the City may only protect parts of records that are expressly listed as exempt within the exceptions, with minimal redaction. The City is required to disclose any and all responsive records in the electronic medium in which it exists. The City may only charge for the redacted pages containing the specifically exempted information if the Requester agrees to receive paper copies since he was explicit in seeking electronic copies only.

Provided the records requested qualify as records of the City, and contain information that is expressly enumerated as exempt as in a few of the examples the City cites in its Solicitor Letter, then they may be redacted with the nonpublic information redacted. For example, the Contacts List for the Mayor, which contains personal contacts that are not related to a transaction

or business of the City, need not be provided, and any personal identification information listed in Section 708(b)(6) may be properly redacted.

The OOR reminds the Requester that only records existing as of the date the Request is made are properly sought. The OOR advises that a proper request for records may only seek records that are in existence as of the date of a request; otherwise, an agency would be “creating” a record in order to respond to a request, which it cannot be compelled to do. *See* 65 P.S. §67.705. To the extent the Requests seek records up to the date the information is compiled, they are not proper, and no information post-dating the date of the Requests needs to be produced.

CONCLUSION

For the foregoing reasons, the Requester’s Appeal is **granted in part and denied in part**. As it did not establish each of its asserted exceptions, the City is directed to provide the Requester the Contact List, to the extent it constitutes a record of the City, with only the personal identification information redacted, the E-mails and the Schedules with only nonpublic information redacted, to the Requester within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Lehigh 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. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: December 23, 2009



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Jarrett Renshaw of and for *Morning Call*; Frances Fruhwirth, Esq., for City