



observations are too numerous to mention all of them, but to follow are my major issues:

1. ... I understand that the plan also allows for an exception to the grass paver to allow macadam for 14 spaces at the discretion of the township contingent upon off-sight [sic] drainage rights being secured.

I find no letter of authorization in the file from the township allowing this exception nor any information that would indicate offsite rights were secured to handle this additional run-off.

\* \* \* \*

I would suggest that in the absence of an authorization letter from the township to allow for macadam in lieu of grass pavers and no apparent offsite drainage rights being secured that the grass paver requirement for parking area be enforced.

2. I noticed there was no permanent U&O permit for the top floor of this property and no building permit or use and occupancy permit for basement south [sic] .... Is this an oversight or just sloppy recordkeeping by the township, back then? I believe one of the items on the punch list for the temporary Use & Occupancy for the top floor called for an elevator. (Where is it?)

Also, I believe commercial buildings in the township newly constructed exceeding 5,000 sq[.] ft. require a sprinkler system. This property has over 5,000 sq. ft. with all three floors. Where is the sprinkler system? ...

3. It appears to me, looking at the file, the approved parking lot and street lighting plan was not adhered to. If there were exceptions, I did not see anything in the file.

Ed, you mentioned to me that certain documents were redacted or withheld from the file due to client confidentiality and or under legal review. ... Could any of what I am not seeing, as stated above, been withheld (Township authorization letters, U&O's, etc. any notes or letters indicating waivers of any requirements)[?]

To re-state, my questions are:

1. Parking lot 14 spaces macadam vs. grass pavers?
2. Sprinkler system—why not? Please give explanation.
3. Elevator not installed when required, why not?
4. Has lighting plan been reviewed, if not, why is it not in compliance with the plan?

On August 18, 2016, the Township denied the Request, asserting that the Request asks questions and makes comments rather than seeking records.

On August 25, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c). On September 12, 2016, the Township submitted a position statement reiterating its position that the Request does not seek 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. 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct.

2011). Here, the parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. 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. 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)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Township argues that the Request does not seek records, but, rather, asks questions. A request must seek records, rather than answers to questions, in order to comply with the requirements of 65 P.S. § 67.703. *See Moll v. Wormleysburg Borough*, OOR Dkt. AP 2012-0308, 2012 PA O.O.R.D. LEXIS 197; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*14 (Pa. Commw. Ct. Jan. 12, 2012) (noting that the

portion of a request “set forth as a question” did not “trigger a response”); *see also Connelly v. Foster Twp.*, OOR Dkt. AP 2014-1256, 2014 PA O.O.R.D. LEXIS 1062 (“Each of the inquiries are phrased as a question, punctuated with a question mark, and the Requester asks the Township to e-mail the answers to the questions posed, further indicating the Requester’s intent to ask questions”). Here, the Requester specifically states that he has “several comments, questions and observations” regarding the property referenced in the Request and, at the end of the Request, lists his “questions” to the Township. While the Request generally discusses compliance with the Township building code, the OOR cannot refashion the questions asked in the Request into a request for records under the RTKL. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010) (“Nowhere in [the RTKL] has the General Assembly provided that the OOR can refashion the request”). Accordingly, the Request, as written, seeks answers to questions rather than records under the RTKL.

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **dismissed**, and the Township is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Montgomery County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>1</sup> *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: September 26, 2016**

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

Sent to: David Fisher;  
Edward Wagner (via e-mail only);  
Jennifer Hanlin, Esq. (via e-mail only)