

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LYCOMING COUNTY,	:	NO. 21 - 0123
Petitioner	:	
vs.	:	
	:	CIVIL ACTION
	:	
RUSSELL F. BOHLIN,	:	
Respondent	:	<i>Appeal from OOR</i>

**ORDER**

AND NOW, following an evidentiary hearing held July 14, 2021 on Lycoming County's Petition for Review of a Final Determination, the Court hereby issues the following ORDER.

***Background***

The foregoing matter relates to a Right to Know Request ("RTK Request") sent by Respondent, Russell F. Bohlin, to the Lycoming County Right to Know Officer on September 23, 2020. In the request, Respondent sought: "[a] digital copy of a backup of all files in the Land[M]arc Property Records System and all digitalized files of microfilms of maps and survey records in the Register and Recorder[s] Office on a portable USB hard drive."<sup>1</sup> On October 1, 2020, Lycoming County exercised its right to a thirty-day extension. On October 9, 2020, the Register and Recorder's Office issued a Response denying the request for the foregoing reasons:

Right to Know Law Section 701, provides that public records shall be accessible for inspection and duplication during regular business hours of an agency. These records are available in the Register and Recorder's office during regular business hours, for access and duplication. Section 701(b) provides that the agency is not required to give access to any computer as a result of this section. Bohlin is essentially requesting that the Register and Recorder's office copy the contents of a computer database, that is currently maintained by its contractor for the Register and Recorder's office. Access to this computer database is not permitted under Section 701(b).

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<sup>1</sup> See Respondent's Right to Know Request attached as Exhibit A to the Petition for Review of a Final Determination.

Further, Pursuant to Section 704, the Register and Recorder's office has chosen to make its records available through a publically [sic] assessable [sic] electronic means on pa.uslandrecords.com. At the present time, these records are being made available to the public at no cost.

Further, Section 705 provides that the Register and Recorder's office is not 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." Bohlin is requesting compilation of records in a format that does not currently exist. Under Section 705, this is an improper request.<sup>2</sup>

Respondent appealed the denial to the Office of Open Records ("OOR") on or about October 15, 2020.<sup>3</sup> On January 15, 2021, the OOR denied the appeal in part, and granted the appeal in part. Specifically, the OOR found that the Register and Recorder's Office kept map and survey records in paper form and on microfilm, but not as digital files, and so could not be compelled under the Right to Know Law ("RTKL") to convert such documents into a digital format. However, the OOR required the Register and Recorder's Office to provide a digital copy of all documents uploaded to the LandMarc system, allowing that under 42 P.S. § 21051, the Register and Recorder's Office could require prepayment of \$0.50 per page. The OOR estimated that the cost for documents from July 7, 1907 through the end of 1953 alone would total approximately \$166,814.00.<sup>4</sup>

### ***Procedural History***

The County appealed the OOR's decision on February 12, 2021 by filing a Petition for Review of a Final Determination.<sup>5</sup> Within the Petition, the County argues

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<sup>2</sup> See Response to Right to Know Request of Russell F. Bohlin attached as Exhibit B to the Petition for Review of a Final Determination.

<sup>3</sup> Right to Know Law appeal documents are attached as Exhibit C to the Petition for Review of a Final Determination.

<sup>4</sup> The Determination of the OOR is attached as Exhibit D to the Petition for Review of a Final Determination.

<sup>5</sup> 65 P.S. § 67.1302(a) ("Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b)1 or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document

that the OOR's decision was erroneous because data files used in a County software program are confidential and proprietary information exempt from disclosure under Section 708 of the RTKL. The County further argues that any data backup would include information on how the LandMarc software creates and accesses data, which is protected by a license agreement entered into with Conduent Enterprise Solutions, LLC, now known as Avenu Insights and Analytics, LLC. The County therefore contends that such information is a protected "trade secret" under Section 102 of the RTKL. The County argues that the OOR also misapprehended the nature of the data files constituting the LandMarc program. The County specifically argues that such files as currently constituted cannot be accessed discreetly from the LandMarc program. The County maintains that under Section 705 of the RTKL, the Register and Recorder's Office is not required to create a record in a format that does not currently exist, or format a record in a manner that the agency does not currently employ. Finally, the County argues that by making all public records accessible for inspection and duplication during regular business hours, as well as accessible online at [pa.uslandrecords.com](http://pa.uslandrecords.com), the Register and Recorder's Office had satisfied its obligation to make records accessible under Section 701 of the RTKL.

Upon receiving the County's Petition, the Court scheduled a court conference for March 16, 2021. Following the conference, by Order dated March 24, 2021, the Court scheduled an evidentiary hearing for May 25, 2021. The Court's Order further directed Mr. Bohlin, who appeared *pro se* at the status conference and expressed his intent to continue *pro se* through the proceedings, to file a Response to the Petition for Review of a Final Determination within thirty days.

In late April, Mr. Bohlin emailed the Court requesting an extension of time to respond to the Petition and a continuance of the evidentiary hearing. Mr. Bohlin explained that he was awaiting the results of a second RTK Request made upon the Recorder's Office, which he believed would uncover documents supportive of his case. The Court relayed this request to counsel for the County. Counsel communicated that

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as required by rule of court with the court of common pleas for the county where the local agency is located.").

the County would not object to an extension. The Court thereby issued an Order dated May 4, 2021, continuing the evidentiary hearing to July 14, 2021, and providing Mr. Bohlin additional time to submit a response. On July 7, 2021, Mr. Bohlin emailed his Response to the Petition for Review of a Final Determination to the Court and to opposing counsel. He formally filed his Response with the Court on July 13, 2021.

### ***Evidentiary Hearing***

In opening argument, counsel for the County emphasized that unlike the typical RTKL appeal, there are no allegations in this case that the Register and Recorder's Office has not made records publicly available. Rather, Mr. Bohlin's claim is that he is entitled to no-cost access to the documents in the format of his choosing, inclusive of proprietary software. Counsel emphasized that Mr. Bohlin's RTK Request extends far beyond the contours of the RTKL.

Mr. Bohlin then had the opportunity to present his own theory of the case. Mr. Bohlin averred that this began as a project to research his family history and expressed frustration that his attempts to obtain a digital copy of records have dragged on for over a year. He emphasized that under Section 701(a) of the RTKL, records shall be provided in the medium requested. He maintained that he was not seeking access to the County's software, but merely wanted a copy of the requested data on a CD or thumb drive so he could use his own programming capabilities to fashion a more effective search engine.

#### **A. David Huffman**

The County called as their first witness David A. Huffman, the Lycoming County Register and Recorder. Mr. Huffman provided that he took office on January 6, 2020. Mr. Huffman explained that as part of the duties of his Office he serves as the Recorder of Deeds, preserving documents relating to real estate transactions in Lycoming County, as well as maps and surveys, dating from 1795 onward. The Office also retains a fee sheet, which tracks assignments of mortgages, leases, easements, right-of-ways, subdivision and land developments, highway maps, and property surveys and maps.

Mr. Huffman testified that the Recorder's Office maintains maps and surveys in physical form and on microfilm, but has not digitized these documents. Other documents such as deeds, mortgages, and other property records, are available both digitally and physically. Mr. Huffman testified that in 2012, the Recorder's Office contracted with software company IRM to have deed, mortgage, and record books from 1954 through 2003 digitized and then uploaded to the LandMarc system. Mr. Huffman estimated that approximately 1.9 million pages had been uploaded through this project. The cost of the contract was \$233,502.00.<sup>6</sup>

Mr. Huffman testified that in 2017, the Office entered into an Agreement with Conduent Enterprise Solutions, LLC, to manage the LandMarc system. This Agreement became effective on August 1, 2017, and is to continue through July 31, 2022.<sup>7</sup> In 2018, Avenu Insights & Analytics, LLC acquired Conduent. Mr. Huffman provided that the County has most recently contracted with Avenu to have property records absent from the LandMarc system, including property records dating from 1795 until the present, digitized and uploaded to the LandMarc site.<sup>8</sup> The cost of this contract is just over \$200,000.00. Mr. Huffman testified that the project commenced in October of 2020 upon receiving a grant approval by the County. By the date of the evidentiary hearing, Mr. Huffman provided the scanning process was nearly complete and all that remained was proofing. Mr. Huffman estimated that some 75,400 documents had been scanned as a part of this project, although he was unclear as to the specific number of pages.

Mr. Huffman testified regarding accessibility of property records. He explained that the Register and Recorder's Office is open during regular business hours for any individual to come to view land records. The Recorder's Office also has the LandMarc software available to the public for searching needs. While viewing either physical documents or digital copies on the County's internal system, the Office charges \$0.50

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<sup>6</sup> See Agreement Between County of Lycoming and IMR for Professional Services entered as Petitioner's Exhibit 2.

<sup>7</sup> See Agreement for Information Technology Products and Services entered as Petitioner's Exhibit 1.

<sup>8</sup> See Agreement Between County of Lycoming and Avenu Insights & Analytics, LLC for Professional Services entered as Petitioner's Exhibit 1.

per page for copies, which it retains to defray costs. Mr. Huffman further testified that individuals may also access land records online remotely through pa.uslandrecords.com. Typically, in order to view a document remotely, an individual must pay \$0.50 per page viewed. Mr. Huffman elaborated, however, that since the COVID-19 pandemic, the Office has received a grant under the The Coronavirus Aid, Relief, and Economic Security ("CARES") Act, by which CARES will cover all costs of document access on the LandMarc system through 2021. Mr. Huffman clarified that the system, while now is no cost to users, is not technically "free" as costs are covered through the CARES grant. He provided that over \$1,000 per month is paid through the grant to Avenu as operator of the LandMarc system. He added that the Recorder's Office receives no compensation from CARES.

Mr. Bohlin had the opportunity to cross-examine the witness. Mr. Huffman acknowledged upon questioning that the contract between the County and Avenu has not been fully executed, as it is missing the signatures of the County Commissioners, but maintained that it still functions as an official contract. Mr. Huffman also elaborated that the County received an invoice from Avenu in December of 2020 for \$200,000. He explained that the County has not paid the invoice because the digitization project remains incomplete. There was some back-and-forth pursuant to which Mr. Bohlin asserted that the Register and Recorder's Office charge of \$0.50 per transferred page is unreasonable, maintaining that under statute, the Office should at most charge \$7.00 per CD or thumb drive device used to transfer digital copies.

B. Ashley Harman

Petitioner called as their second witness Ashley Harman, the Deputy Recorder of Deeds in the Register and Recorder's Office. Ms. Harman testified that she had reviewed the number of documents in the LandMarc system from July 29, 1907 through January 1, 1954. She found that there were 166,814 documents. Estimating

that documents within the system average two pages each, a \$0.50 access fee to these documents would total \$166,814.00.<sup>9</sup>

C. Jerry Kennedy

Petitioner called as their third witness Jerry Kennedy, Director of Information Services for Lycoming County. Mr. Kennedy testified that he had been in this position for a year, but has performed computer services for the County for almost fourteen years. Mr. Kennedy attempted to clarify the functioning of the LandMarc system. Mr. Kennedy testified that the files on the LandMarc system are backed up onto a virtual server. He explained that the backup server is not limited to the LandMarc files, but functions as a backup server for all Orphans' Court documents as well. As a backup system, Mr. Kennedy was unsure whether the files could be accessed without first doing a full restore of the server. Mr. Kennedy explained that the data files are formatted as image files. Image files, unlike a text file, are not searchable by term. He explained that each file in the system is assigned a random number and the files are organized serially.<sup>10</sup> He estimated that some 4-6 million pages are catalogued in the LandMarc system alone.

Mr. Bohlin has requested a backup copy of the LandMarc system. However, Mr. Kennedy explained the licensing agreement with Conduent (now Avenu) does not allow the County to share the LandMarc software program with third parties, adding that a backup copy of the LandMarc system would include the software's search functions, which is Avenu's protected intellectual property. He added that the data would be unreadable, and therefore unusable, if not accessed through the LandMarc system. He also testified that aside from LandMarc's proprietary information, if the County were to provide Mr. Bohlin a copy of the backup file, a County employee would need to first manually review the files and pull out the data unrelated to the LandMarc system. Mr. Kennedy testified that while this would be technically possible, it would

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<sup>9</sup> Petitioner's Exhibit 4 provides a breakdown of these expenses.

<sup>10</sup> Petitioner's Exhibit Ex. 5 is a sample page of one of these text files.

take a significant amount of time and effort for an employee to manually review the millions of pages and remove all of the unrelated files.

Once Petitioner's counsel rested, Mr. Bohlin took the opportunity to cross-examine the witness. Mr. Bohlin asked Mr. Kennedy if he was familiar with how data would be searchable within a computer program. Mr. Kennedy testified that he was unsure of the specific method used in the LandMarc system, but acknowledged that many programs use an index file as a search directory. Mr. Kennedy also admitted that the data files within the LandMarc system relating to deeds, wills, and other property records remained the property of the County under its contract with Avenu. However, he elaborated that if the County were to move to another vendor, it would need to pay Avenu to extract the data from the LandMarc system and convert it into a readable format transferable to a new system.

The Court then took the opportunity to ask Mr. Kennedy some clarifying questions. Mr. Kennedy explained that Avenu's LandMarc system is the Court's internal system, while Avenu also hosts an external search engine at [pa.uslandrecords.com](http://pa.uslandrecords.com). Mr. Kennedy also clarified that almost all land records dating back to 1795 (excluding surveys and maps) have now been uploaded to both the internal and external systems, with only a small number still held back for proofing.

#### D. Louis Schiavone

Petitioner called as their fourth witness Louis Schiavone, the President and Chief Customer Officer of Avenu Insights and Analytics, LLC. Mr. Schiavone testified that Avenu provides records management software to local governmental entities. He elaborated that Conduent Enterprise Solutions, LLC had managed the County's LandMarc "data repository" software system until October of 2018, when Conduent was purchased by Avenu. Mr. Schiavone explained that through Avenu's agreement with the County, the County owns the data stored in the LandMarc system, but Avenu retains a proprietary interest in access to the software itself, and to information about how the software is built and functions. In other terms, the "database schema," i.e.



how the database is structured for data access, is proprietary. Mr. Schiavone added that the data in its native format would not be readable.

Mr. Schiavone testified that if the County chose to move to another vendor, Avenu would be able to provide the data stored within the LandMarc system. However, Mr. Schiavone clarified that the data files would first need to be extracted and placed into “flat” files without additional paths or folders, such as on an excel spreadsheet. The files could then be converted into another format. Mr. Schiavone stated that the process in extracting data and converting them into flat files would take an Avenu employee two to four weeks, at a charge of \$150.00 per hour.

On cross-examination, Mr. Bohlin questioned Mr. Schiavone further regarding the functionality of the LandMarc system. Mr. Schiavone explained that the database consists of an image file of scanned documents, and a separate index file that controls the database’s search functions. Avenu updates the index file regularly as more files are scanned and added to the system. Mr. Schiavone reiterated that the data files as they currently exist are unreadable without the LandMarc software system, and that the data schema used for formatting and searching the files is proprietary to Avenu. He also provided that, as the data itself is the property of the County, Avenu would not respond to a record request from third parties.

#### E. Russel Bohlin

Mr. Bohlin did not call any witnesses. The Court asked Mr. Bohlin if he wished to testify or make closing argument. Mr. Bohlin averred that he had laid out his position in his Response to the Petition for Review of a Final Determination, but made a few closing statements. Mr. Bohlin complained that the Register and Record’s Office’s fee sheet made no reference to the cost of making electronic copies, and characterized the \$0.50 fee for downloading files as unjustified by law or by the internal policy of the Office. He also complained that the county’s computers did not allow individuals to insert a thumb drive in order to download files. Mr. Bohlin referenced the County Commissioner’s then-recent celebration of “Sunshine Week”, asserting that the County was behaving hypocritically by not following the provision of

the Sunshine Act requiring that public records in the possession of government agencies be provided to the public within the framework of the law.

When asked by the Court to clarify the scope of his request, Mr. Bohlin explained that his request is limited to deeds rather than all land records. He seeks a downloaded copy of all deeds as well as LandMarc's index file on a CD or thumb drive. Mr. Bohlin characterized the County as obstructive in failing to comply with this request. Mr. Bohlin explained the importance of the index file. He stated that the index file exists much like an index in a book, or index cards in a library's physical filing system. He stated that that absent the index file, the other files would be functionally worthless, as an individual would need to sift through each document to create their own index to render the large volume of documents searchable.

Petitioner's counsel then had the opportunity to make closing argument. Counsel first asserted that while Mr. Bohlin had characterized the County as fighting to deprive him of access to records, the County has in fact made documents dating back hundreds of years available online to the public. Further, online access to these documents is free through December of 2021. Counsel further maintained that, pursuant to the testimony of Mr. Kennedy and Mr. Schiavone, to provide data stored in the backup file in a readable format would require an extensive conversion process, which is not required under the RTKL. It would also include a timely and costly process of removing documents nonresponsive to the request. Finally, counsel emphasized that Mr. Bohlin's goal to program advanced search functions is predicated on his ability to access and build upon the LandMarc system's index file. However, this index file is part of Avenu's proprietary "data schema" and would constitute a trade secret.

### ***Analysis***

This appeal is subject to *de novo* review.<sup>11</sup> The question before the Court is whether Mr. Bohlin within his RTK request seeks documents exempt from disclosure

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<sup>11</sup> See *Bowling v. Off. of Open Recs.*, 75 A.3d 453, 474 (Pa. 2013).

under the RTKL. The Court addresses Petitioner's first argument, that Mr. Bohlin seeks proprietary information as would constitute a trade secret under the RTKL.

Under the RTKL, an agency's "public records" are subject to disclosure.<sup>12</sup> The RTKL defines a "public record" as, "[a] record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under [RTKL] section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege."<sup>13</sup> Those records exempt under section 708 include, in relevant part, records that constitute "a trade secret or confidential proprietary information."<sup>14</sup> A "trade secret" is defined as follows:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

(1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.<sup>15</sup>

The Court emphasizes this final provision, as it is clear that Mr. Bohlin's request encompasses data processing software. Specifically, Mr. Bohlin seeks a copy of the backup file for the LandMarc software system, including the index file developed by Avenu as a directory. Mr. Bohlin avers that he plans to use his programming skills to build upon the existing index file to create a more sophisticated search engine. He has explained that a copy of Avenu's land record files without the index file would be useless, as Mr. Bohlin would then need to perform his own painstaking review and indexing of the data files. In other terms, the purpose of Mr. Bohlin's record request is

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<sup>12</sup> See 65 P.S. § 67.301(a).

<sup>13</sup> 65 P.S. § 67.102.

<sup>14</sup> 65 P.S. § 67.708(b)(11).

<sup>15</sup> 65 P.S. § 67.102 (emphasis added).

to create a system with a more expansive search functionality as a timesaving procedure while researching his family history; without the index file, there is no timesaving benefit. Be that as it may, it is clear to the Court that the index file is part of the “data schema,” and is proprietary as protected by the licensing agreement between the County and Avenu, and is therefore not a “public record” subject to disclosure under the RTKL.

As both Mr. Kennedy and Mr. Schiavone testified, the land use record data is unreadable if not accessed through the proprietary LandMarc system. To the extent that the land record files could be extracted from the LandMarc backup system and converted into a readable format, i.e. flat files, the Court is satisfied by the testimony of Mr. Kennedy and Mr. Schiavone that this would not only be a timely and costly process, but inherently would require the files to be converted into a format in which they do not currently exist. Section 701 of the RTKL provides that records provided to a record 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.”<sup>16</sup> Section 705 further expounds that an agency, in responding to a record request, “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.”<sup>17</sup>

The Court notes that under the caselaw, “**drawing information from a database does not constitute creating a record** under the RTKL[,]” and generally provides even if the information contained within the database is not within the format specified in the request, it should be provided to the requester in the same format as available to agency personnel.<sup>18</sup> However, the Court believes that this doctrine is only implicated when the files in question are not otherwise subject to remote public access by electronic means. Under Section 701, “public records must be available for access

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<sup>16</sup> 65 P.S. § 67.701(a).

<sup>17</sup> 65 P.S. § 67.705.

<sup>18</sup> *Feldman v. Pennsylvania Comm'n on Crime & Delinq.*, 208 A.3d 167, 173 (Pa. Commw. 2019), *appeal denied*, 218 A.3d 374 (Pa. 2019) (quoting *Com., Dep't of Env't Prot. v. Cole*, 52 A.3d 541, 547 (Pa. Commw. 2012)) (internal quotation marks omitted) (emphasis in original).

during an agency's regular business hours.<sup>19</sup> Section 704 further provides, "an agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means or that the agency will provide access to inspect the record electronically."<sup>20</sup> The Register and Recorder's Office included in its Response to Mr. Bohlin's RTK Request that land records are publically accessible at both the Register and Recorder's Office during regular business hours and at [pa.uslandrecords.com](http://pa.uslandrecords.com), with currently no-cost access online. There was testimony from Mr. Huffman, Mr. Kennedy, and Mr. Schiavone that this includes all deed records dating back to the County's founding in 1795. Questions of "trade secret" aside, the Court believes that this in itself is sufficient for the County to have met the public accessibility requirement.

### ***Conclusion***

Pursuant to the foregoing, the Court hereby REVERSES IN PART the Final Determination of the Pennsylvania Office of Open Records. The Court holds that Mr. Bohlin's RTK Request for a backup file of the LandMarc software system seeks information constituting a "trade secret." Such information is proprietary and the sharing of such information is precluded by the County's licensing agreement with Avenu Insights and Analytics, LLC. Additionally, the Court finds that the County has fully complied with the RTKL by making land records electronically available both within the Register and Recorder's Office during business hours and online through [pa.uslandrecords.com](http://pa.uslandrecords.com), and thereby has no additional obligation to compile such records on a CD or thumb drive upon request.

The Court hereby AFFIRMS IN PART the Final Determination of the Pennsylvania Office of Open Records. The Court specifically affirms the OOR's holding that, pursuant to section 705 of the RTKL, Mr. Bohlin is not entitled to a digital copy of maps and surveys when such documents currently exist only in a physical format or on microfilm. Lastly, the Court affirms that under 42 P.S. § 21051, which

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<sup>19</sup> 65 P.S. § 67.701(a).

<sup>20</sup> 65 P.S. § 67.704(b).

creates a fee sheet for the Records of Deeds in second A, third, fourth, fifth, sixth, seventh, and eighth class counties, the Register and Recorder's Office may charge \$0.50 per page for every document copied within the Office, or for every page viewed remotely on pa.uslandrecords.com.<sup>21</sup> Indeed the Commonwealth Court has expressly held that any RTKL provisions relating to a limitation on fees for the duplication of public records are superseded by section 21051.<sup>22</sup> The Court notes that duplication fees received by the Recorder of Deeds are payable directly to the County.<sup>23</sup> The County can then elect to reinvest the money into salutary projects, such as the prior-discussed projects digitizing land records and making the records available online. Mr. Bohlin regards fees as reasonable only if they cover the costs of duplication, but it is clear from statute that the legislature has authorized such fees as a method of raising funds for the County.

IT IS SO ORDERED this 23<sup>rd</sup> day of September 2021.

BY THE COURT,

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Eric R. Linhardt, Judge

cc: Austin White, Esquire  
Gary Weber, Esquire  
Russell F. Bohlin  
165 Belmar Blvd., Farmingdale, NJ 07727  
Lycoming Reporter

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<sup>21</sup> Lycoming County is a fifth class county.

<sup>22</sup> See *Inkpen v. Roberts*, 862 A.2d 700, 706 (Pa. Commw. 2004).

<sup>23</sup> See *id.* at 704 (quoting Pa. Const., Art. 9, § 4, ¶ 3).