



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
OPEN RECORDS DATA RETRIEVAL,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2016-1063
	:	
MUNICIPALITY OF MT. LEBANON,	:	
Respondent	:	
	:	

INTRODUCTION

Ariane Nelson, on behalf of Open Records Data Retrieval, (“Requester”) submitted a request (“Request”) to the Municipality of Mt. Lebanon (“Municipality”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking electronic records. The Municipality did not timely respond to the Request, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Municipality is required to take further action as directed.

FACTUAL BACKGROUND

On April 29, 2016, the Request was filed, seeking:

[A] copy of electronic records (nothing scanned or printed) containing all residential and commercial building and sub/trade (mechanical, electrical, plumbing, HVAC, etc.) permits issued from January 1, 1990 to present or as far back as electronically available....

The information I am seeking would include permit number, issue date, location, permit type, and a description of the work done as well as contractor details and valuations.

On May 6, 2016, the Municipality invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b). As the Municipality did not respond by June 6, 2016, the Request was deemed denied on that date. *See* 65 P.S. § 67.902(b)(2). On June 9, 2016, the Municipality responded to the Request, stating that the requested records are confidential under the Uniform Construction Code (“UCC”), 34 Pa. Code § 403.85(e), and arguing that the Request was “overly broad” and, therefore, insufficiently specific.¹

On June 17, 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 Municipality to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On June 23, 2016, the Requester submitted a position statement, arguing that the Request seeks electronic records, rather than paper copies. On June 27, 2016, the Municipality submitted a position statement, along with the sworn affidavits of Bonnie Cross, the Municipality’s Open Records Officer, and Joseph Berkley, the Municipality’s Chief Inspector.

On July 6, 2016, in response to an OOR request for clarification, the Municipality confirmed that it possesses some electronic permit information, including address, lot and block, permit type, and a description.

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.*

¹ The Municipality is permitted to raise grounds for denial after a request has been deemed denied. *See McClintock v. Coatesville Area Sch. Dist.*, 74 A.3d 378 (Pa. Commw. Ct. 2013).

Wintermantel, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Municipality is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such

proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The Request seeks electronic records containing the Municipality’s permits, which the Requester states consists of “an export from the [Municipality’s] permit tracking software.” The Municipality argues that this explanation is a modification of the Request, which according to the Municipality, seeks only electronic copies of the Municipality’s permits. A requester may not modify, explain or expand a request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Michak v. Dep’t of Pub. Welfare*, 56 A.3d 925 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal argue that an agency must instead disclose a different record in response to the request”). Here, however, the Requester’s statements on appeal did not modify or expand the Request. The Request seeks electronic records, that are neither scanned nor printed, containing “permit number, issue date, location, permit type, and a description of the work done, as well as contractor details and valuations.” As a result, the Request clearly implicates electronic information contained in a database, rather than electronic copies of the Municipality’s permits.² Therefore, the Requester did not modify the Request on appeal.

The Municipality also argues that the Request is insufficiently specific and “overbroad” because it seeks records from 1990 to the present, which encompasses approximately 23,400

² Both Mr. Berkley and Ms. Cross attest that the Municipality does not possess electronic copies of permits; however, if these records did exist, they would necessarily be electronically scanned, thus making them not responsive to the Request as written.

permits issued by the Municipality. As a result, the Municipality reasons that “[t]his places an unreasonable burden on the Municipality to review a broad set of records over a period of time so long it might as well be infinite.” Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” *Id.* When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n.*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813). In determining whether a particular request under the RTKL is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013).

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep’t of Educ.*, 119 A.3d at 1125. In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting timeframe to be sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d 367. Second, the scope of the request must identify a discrete group of documents (*e.g.*, type or recipient). *See Pa. Dep’t of Educ.*, 119 A.3d at 1125. Finally “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render

a sufficiently specific request overbroad; likewise a short timeframe will not transform an overly broad request into a specific one. *Id.*

Here, the Municipality's argument is premised on the Request seeking electronic copies of permits; however, as explained above, the Request seeks electronic information regarding permits contained in the Municipality's database. There is no evidence that the Request would entail a lengthy review of the Municipality's database. Notwithstanding the foregoing, however, "[t]he fact that a request is burdensome does not deem it overbroad, although it may be considered as a factor in such a determination." *Pa. Dep't of Env'tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012). The Request includes a timeframe, albeit lengthy, and identifies activities of the Municipality and the type of record requested. As a result, the Request implicates "a clearly-defined universe of documents" contained in the Municipality's database. *Id.* Therefore, the Request includes enough specificity to guide the Municipality's search for responsive electronic records.

Information contained in an agency's database is considered a record under the RTKL and is subject to disclosure, and providing information from an agency database does not constitute the creation of a record. *See Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012) (holding that "drawing information from a database does not constitute creating a record under the Right-to-Know Law"); *see also Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *21 (Pa. Commw. Ct. 2012) ("[P]ulling information from a database is not the creation of a record"). "To hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases." *Cole*, 52 A.3d at 549.

When providing access to the information, “[a]n agency need only provide the information in the manner in which it currently exists.” *Id.* at 547. An agency is not required to create a list or spreadsheet containing the requested information; however, “the information ... must simply be provided to requestors in the same format that it would be available to agency personnel.” *Id.* at 549 n.12. The Municipality states that the information would be provided in a .txt file, and will include information regarding all permits issued by the Municipality, rather than just “residential and commercial building and sub/trade” permits. The information will include address, lot and block, the permit type, and a description; however, the information will *not* include names.³ Under the RTKL and pursuant to *Cole*, this information is subject to disclosure.

Finally, the Township states that the .txt file that would necessarily be created may be too large to provide via e-mail. If the document is too large to be provided via e-mail, it may be provided in via CD-ROM or a flash drive at the actual cost of that media. *See* OOR Fee Structure, available at http://www.openrecords.pa.gov/Using-the-RTKL/Fee-Schedule/Documents/fee_structure.pdf; *Buskey v. Pa. Dep’t of Pub. Welfare*, OOR Dkt. AP 2010-0822, 2010 PA O.O.R.D. LEXIS 778.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the Municipality is required to provide the Requester with all responsive records within thirty days. This Final

³ Ms. Cross attests that she is “aware that law enforcement officers and judges live in Mt. Lebanon, and may have received permits since 1990.” *See* 65 P.S. § 67.708(b)(6)(i)(C) (exempting from disclosure “[t]he home address of a law enforcement officer or judge.” However, in this instance, because the electronic information does not include names, the addresses would not identify law enforcement officers or judges. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (“The requested information does not itself identify individuals who apply for or receive social services or the type of social services received by those individuals”). Further, because the Request does not implicate copies of the documents identified in the UCC, the Municipality cannot withhold the requested information pursuant to the UCC. *See* 34 Pa. Code § 403.85(e).

Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Allegheny County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 18, 2016

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Ariane Nelson (via e-mail only);
Philip Weis, Esq. (via e-mail only);
Bonnie Cross (via e-mail only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).