



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ED MAHON AND SPOTLIGHT PA,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2022-1732
	:	
PENNSYLVANIA HUMAN RELATIONS	:	
COMMISSION,	:	
Respondent	:	

INTRODUCTION

Ed Mahon and Spotlight PA (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Human Relations Commission (“Commission”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking right to sue letters. The Commission denied the Request, arguing, among other things, that the Request is insufficiently specific and the records relate to noncriminal investigations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Commission is not required to take any further action.

FACTUAL BACKGROUND

On June 30, 2022, the Request was filed, seeking:

1. All right to sue letters issued by the ... Commission from Jan. 1, 2016, to the present, related to medical marijuana, medical cannabis, medical marijuana cards, and/or medical marijuana. I’m also requesting all such letters related to medical marijuana patients or medical cannabis patients.

2. If the [Commission] is unable or unwilling to determine which of its right to sue letters related to medical marijuana, medical cannabis, medical marijuana cards, and/or medical marijuana, then I am requesting all right to sue letters issued by the [Commission] from Jan. 1, 2016, to the present.

On July 7, 2022, the Commission denied the Request, arguing that the Request is insufficiently specific, 65 P.S. § 67.703.¹ The Commission also argues that the records are protected from disclosure under the “government executive or government interest privilege in that it would be against the government’s interest in releasing confidential investigation records because it would constitute an unwarranted invasion of privacy to complainants....” The Commission further argues that, because the Requester is not a party to the proceedings, the records requested are not public records and are exempt noncriminal investigative records, 65 P.S. § 67.708(b)(17).

On July 26, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Commission to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c). On August 1, 2022, the Requester sought an extension of the record closing deadline and, that same day, the OOR granted the request and extended the record closing date until August 17, 2022, for all parties.³

On August 17, 2022, the Requester submitted a statement in support of the appeal, arguing that the Request is sufficiently specific and that the Commission is relying on an “overly broad interpretation” of executive privilege, in that the complaints are not being sought rather, only the right to sue letters are being sought and they can be redacted.

¹ The Commission informed the Requester that he could provide the PHRC case number and indicate whether he was a party to the action to obtain records that he would be permitted to access.

² The Requester granted the OOR additional time to issue the Final Determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”)

³ *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

On August 24, 2022, the Commission submitted a position statement reiterating its grounds for denial. On August 25, 2022, the Requester sought clarification regarding the whether the Commission's late submission would be accepted. That same day, the OOR clarified that, while the Commission's submission was provided well beyond the amended record closing date, to develop the record, the submission was admitted. In addition, to ensure full due process for all parties, the OOR set an amended supplemental submission schedule permitting the Requester to submit a reply by September 1, 2022, and the Commission to submit a surreply by September 8, 2022. The Requester agreed to extend the Final Determination deadline, to accommodate the supplemental submission schedule. *See* 65 P.S. § 67.1102(b)(a)(2); 65 P.S. § 67.1102(b)(3).

The parties did not submit any additional information.

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. *See* 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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Commission is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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. 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. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL 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)).

1. The Request is sufficiently specific

The Commission argues that the Request is insufficiently specific because no subject matter, in that a transaction or activity of the Commission related to the records sought has not been identified. The Commission also asserts that the Request is insufficiently specific because the Requester did not provide specific Commission case numbers or case names, and the Request

seeks records for a six-year timeframe. The Commission argues that the Requester seeks, “a broad request of confidential documents found in exempt non-public PHRC investigative files”

Section 703 of the RTKL provides, in pertinent part, “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested” 65 P.S. § 67.703. In determining whether a particular request 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. Second, the scope of the request must identify a discrete group of documents (*e.g.*, type or recipient). *See Id.* at 1125. Third, “[t]he timeframe of the request should identify a finite period of time for which the 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.*

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Id.* 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. “The 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.*

A review of the Request language shows that all three prongs of the specificity balancing test have been satisfied. First, a subject matter is identified – claims related to medical marijuana – and the subject matter is further refined by suggested iterations of medical marijuana specifically, “medical cannabis [and] medical marijuana cards.” Next, the Request identifies the scope of the Request in that it names the discrete type of record being sought – right to sue letters. *See Pa. Dep’t of Educ.*, 119 A.3d at 1125.

In *Legere*, the Commonwealth Court held that a request for “[a]ll Act 223, Section 208 determination letters issued ... since January 1, 2008, as well as orders issued ... to well operators in relation to those determination letters” was sufficiently specific. 50 A.3d 260, 263-65 (Pa. Commw. Ct. 2012). In doing so, the Court found:

... [S]pecific types of documents have been requested -- documents that are created by DEP pursuant to statute. *Legere* has requested a clearly-defined universe of documents. There are no judgments to be made as to whether the documents are “related” to the request. The documents either are or are not Section 208 determination letters. The documents either are or are not orders issued by DEP arising from Section 208 determination letters.

Id. at 264-65. Similar to the records sought in *Pa. Dep’t of Env’t Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012), “[t]here are no judgments to be made as to whether the documents are ‘related’ to the request.” *Id.* at 265. Finally, the Request includes a finite, but somewhat lengthy timeframe of more than six years; however, “[t]he fact that a request is burdensome will not, in and of itself, [render] the request . . . overbroad.” *Id.* Accordingly, the Request is sufficiently specific.

2. The Commission has demonstrated that certain records are exempt under Section 708(b)(17) of the RTKL

The Commission also argues that the records sought are exempt from disclosure, as they relate to a noncriminal investigation conducted by the Commission in matters where a complaint has been filed with the agency and may not be disclosed pursuant to Section 708(b)(17) of the RTKL. More specifically, the Commission asserts that the records are exempt under Section 708(b)(17)(i)-(ii); (iv) and (vi)(A)-(D).

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[c]omplaints submitted to an agency,” “[i]nvestigative materials, notes, correspondence and reports,” “[a] record that includes information made confidential by law,” and “[a] record that, if disclosed, would ... ‘[r]eveal the institution, progress or result of an agency investigation...’ ‘[d]eprive a person of the right to an impartial adjudication,’ ‘[c]onstitute an unwarranted invasion of privacy’ and ‘[h]inder an agency’s ability to secure an administrative or civil sanction’.” 65 P.S. §§ 67.708(b)(17)(i)-(ii); (iv); and, (vi)(A)-(D). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

In the Pennsylvania Human Relations Act (“Act”), the Commission has been conferred with the power and the authority to, “[t]o initiate, receive, investigate and pass upon complaints charging unlawful discriminatory practices,” among other things. 43 P.S. § 957(f). Regarding the Commission’s authority to conduct investigations, the Act provides, in pertinent part, the following:

(a) Any person claiming to be aggrieved by an alleged unlawful discriminatory practice may make, sign and file with the Commission a verified complaint, in writing, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the Commission....

(b)

(1) After the filing of any complaint, or whenever there is reason to believe that an unlawful discriminatory practice has been committed, the Commission shall make a prompt investigation in connection therewith....

43 P.S. § 959(a)-(b); *see also* 16 Pa. Code §42.41 (Initiation of investigation). Accordingly, the Act provides the legislatively granted power to conduct investigations filed regarding discriminatory practices.

Regarding the investigative nature of the responsive records, the Commission’s consists of the Open Records Officer’s position statement. The Commonwealth Court has held that, in the RTKL context, “[a]ffidavits are the means through which a governmental agency details the search it conducted for the documents requested and justifies nondisclosure of the requested documents under each exemption upon which it relied upon. *The affidavits must be detailed, nonconclusory, and submitted in good faith. ... In other words, a generic determination or conclusory statements are not sufficient to justify the exemption of public records.*” *See Moore v. Pa. Dep’t of Corr.*, 177 A.3d 1073 (Pa. Commw. Ct. 2017) (citing *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa.

Commw. Ct. 2013)) (citation omitted) (emphasis in original). However, the Commonwealth has also concluded that uncontradicted facts from the face of the record may establish a RTKL exemption. In *Pa. Game Comm'n v. Fennell*, the Commonwealth Court held that the OOR can make a determination based on the record, and without a submission by either party, if a record is related to a noncriminal investigation under Section 708(b)(17) of the RTKL. 149 A.3d 101, 104-105 (Pa. Commw. Ct. 2016). In *Fennell*, the record established uncontradicted facts regarding a complaint made concerning a specific incident and the Commonwealth agency known to be actively investigating the complaint, and the requester sought a copy of the report from that specific incident. *Id.* at 105; *see also Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record).

Section 12(c) of the Act provides, in pertinent part, as follows:

(1) In cases involving a claim of discrimination, if a complainant invokes the procedures set forth in this act, that individual's right of action in the courts of the Commonwealth shall not be foreclosed. *If within one (1) year after the filing of a complaint with the Commission, the Commission dismisses the complaint or has not entered into a conciliation agreement to which the complainant is a party, the Commission must so notify the complainant. On receipt of such a notice the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to freedom from discrimination granted by this act....*

43 P.S. § 962(c)(1) (emphasis added). Because the Act mandates investigative action be taken upon receipt of a complaint, the OOR has previously found a legal presumption that the PHRC conducts a noncriminal investigation into every complaint filed. *Kawa v. Pa. Human Relations Comm'n*, OOR Dkt. AP 2019-2437, 2020 PA O.O.R.D. LEXIS 1845. Therefore, the PHRC

conducts a “systematic or searching inquiry, a detailed examination, or an official probe” into each complaint received under the Act.⁴

Further, 16 Pa. Code § 42.61, provides, in pertinent part, as follows:

(a) If, after investigation, the staff determines that no probable cause exists to credit the allegations of the complaint or if, during or after investigation, the staff determines that the case is untimely filed, that the case is moot, that the Commission lacks jurisdiction, that the parties have reached an agreement adjusting the complaint or that another reason exists which legally justifies the dismissal of the complaint, the staff will make a finding reflecting that determination....

(c) Whenever a case is closed, the Commission will notify all parties in writing of the following:

(1) The closing, together with a statement of the reason therefor.

(2) The right of the complainant to request a preliminary hearing in accordance with §42.62 (relating to request for a preliminary hearing).

(3) The right of the complainant to bring an action in the court of common pleas of the county wherein the alleged unlawful discriminatory practice took place. The duty of the complainant to serve a copy of the court complaint on the Commission, in an action so brought, at the same time the complaint is filed in court.

16 Pa. Code §42.61(a)-(c) (emphasis added). In addition, 16 Pa. Code § 42.74 provides that, in instances where the Commission has made a finding of probable cause:

Upon the dismissal of a complaint, the denial of a request for reconsideration, the dismissal of a complaint after reconsideration or the expiration of a statutory period in the act or the Fair Educational Opportunities Act, if the Commission has not entered into a conciliation agreement to which the complainant is a party, *the Commission will notify the complainant in writing of the right of the complainant to bring an action in the court of common pleas*, in accordance with section 12(c) of the act (43 P. S. § 962(c)), and of the duty of the complainant to serve a copy of the court complaint on the Commission, in any action so brought, at the same time the complaint is filed in court.

Finally, in *Blue Comet Diner v. Pa. Human Rels. Comm’n*, the Commonwealth Court succinctly explained the process leading up to the issuance of a right to sue letter:

⁴ On its website, the PHRC outlines the complaint investigation process. See <https://www.phrc.pa.gov/File-a-Complaint/Pages/Investigation-Process.aspx> (last accessed September 27, 2022).

The probable cause determination is made by Commission staff. 16 Pa. Code § 42.3(a) states that “staff ... [determines] whether or not probable cause exists to credit the allegations of the complaint.” If probable cause is not found, the complainant receives a no-action letter, which allows the complainant to file a private action against the perpetrator of the alleged discrimination in the appropriate court of common pleas. The complainant cannot file a civil action in a court without first presenting the complaint to the Commission for its review. 16 Pa. Code § 42.61; Section 12(c) of the Human Relations Act, 43 P.S. § 962(c)(1).

905 A.2d 1058, n.9 (Pa. Commw. Ct. 2006), *rev’d on other grounds*, 593 Pa. 516 (Pa. 2007).

Based upon the statutory and regulatory language, releasing the requested “right to sue” letters would, essentially, be a disclosure of the “result of an agency investigation,” specifically, the Commission’s investigation of a discrimination complaint and the resulting disposition. The record in this matter facially demonstrates that the right to sue letters represent the Commission staff’s determination that, following an investigation of a complaint, “no probable cause exists to credit the allegations of the complaint” and that the complainant has the right commence a civil action in court, if the individual chooses to do so. Accordingly, the Commission has proven that the responsive records are exempt from disclosure under Section 708(b)(17)(vi)(A) of the RTKL. *See* 65 P.S. § 67.708(a); 65 P.S. § 67.708(b)(17)(vi)(A).⁵

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Commission is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the

⁵ Because it has been determined that the responsive records are exempt from disclosure under Section 708(b)(17), it is not necessary address the PHRC’s argument that the records are exempt from discovery under 16 Pa. Code. § 42.58(a). Additionally, in its position statement, the PHRC explains that in its response to the Request, the PHRC informed the Requester “that any third-party requests will be denied because such files and documents are protected from disclosure under the government executive or government interest privilege in that it would be against the government’s interest in releasing confidential investigation records because it would constitute an unwarranted invasion of privacy to complainants seeking the PHRC’s assistance and Respondents who are being accused of discriminatory actions.” However, as in *Scolforo*, the PHRC did not develop a legal analysis regarding the application of the executive privilege nor did the PHRC develop a legal analysis regarding the application of the deliberative process privilege, 65 P.S. § 67.708(b)(10). 65 A.3d 1095 (Pa. Commw. Ct. 2013). Therefore, this argument was also not addressed in this Final Determination.

mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(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. 65 P.S. § 67.1303. 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 3, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG ESQ.

Sent to: Ed Mahon (via email only);
Debbie Walters (via email only);
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⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).