



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
MICHAEL LONG,	:
Requester	:
	:
v.	:
	:
	:
BATH BOROUGH,	:
Respondent	:
	:
and	:
	:
	:
DRIVELOCKER, LLC,	:
Direct Interest Participant	:

Docket No: AP 2022-2675

FACTUAL BACKGROUND

On September 27, 2022, Michael Long (“Requester”) submitted a request (“Request”) to Bath Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, in relevant part:

[Request 1] – Detailed complete financial records for the years 2016, 2017, 2018, 2019, 2020, 2021, and 2022. I ask to include the preliminary Managers budget, the approved budget, and end-of-year actual budget results for each of the aforementioned years.

[Request 2] – [a] Any and all debt obligations for which the borough is financial liable that exceeds \$10000

[b] Any and all financial records and digital record communications as related to any and all expenses exceeding \$5000 that was termed IT.

[c] This would include software, hardware, services as related to cameras made within the last 7 years. Any that had gone through a disclosed bid process may be omitted

[Request 3] A complete detailed accounting and financial records for the Borough

of Bath's federal disbursement of build back better funds issued during the Covid pandemic.

[Request 4] – [a] Detailed accounting of any no bid contract awarded during the current borough managers time of employee, specific to any purchases in excess of \$10,000.

[b] For those [no bid contracts] exceeding \$25000 [awarded] during this same period, I also require all digital records related to communication or negotiation of said purchases.

[Request 5] – [a] Disclosure of any and all digital records from 2019 to current as it relates to in any and all ways to health insurance coverage issued to the position of mayor. As well as what dates this coverage was active and discounted. If and when this was reimbursed back to the boroughs general fund or what [became] of any repayment.

[b] Disclosure as is related to any discussion starting 6 months prior to issuance, while coverage was active up to and including current and in any digital record form.

[c] Disclosure of any and all requests or inquiries of legal guidance as is related directly or indirectly associated with this insurance

[Request 6] – [a] Lastly I request disclosure of any and all records as it relates to the employment contract of the Borough Manager so as to include terms of contract, Disclosure to the amount of performance bonuses paid out, as well as the specific performance that triggered these payouts.

[b] A detailed accounting of any and all records as is related to the same employees line item Dues and Subscriptions in accordance with a time line of employee. Complete and detailed accounting of education payout, vehicle expense reimbursement and

[c] any and all references to such compensation packages to include any digital record communications such as text message, email or any other form that is legally required to be retained including negotiation leading up to a approved final deal for each of the years requested previously. The basis used in determining the contract structure was valid, inline with comparable positions and in accordance with applicable law[.]¹

¹ The original appeal consisted of seven subparts which ranged in subject-matter related to the Borough. On appeal, the Requester stated that the issues that remained on appeal were as follows:

Complete Financial records from the term of the current borough manager 2016-Current[.] Information with regards to the current mayor's insurance, issuance and payments[.] Records regarding discussion negotiation, and the actual contract of the current borough manager for his terms of employ[.]

Accordingly, the portions of the Request that were properly preserved on appeal are subparts 1-6. The seventh portion of the Request which sought records related to the Requester, another specified individual, and a specified address has been deemed as waived on appeal.

On November 3, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Borough denied the Request in part, arguing that the Request is insufficiently specific, seeks records that are exempt under attorney/client privilege, and seeks records that do not exist. The Borough granted the Request in part and provided responsive records to the Requester in the form of a CD-ROM.

On November 29, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the partial denial and stating grounds for disclosure.² The Requester states in his appeal that he does not believe the Requests are insufficiently specific as defined by the RTKL and that the Borough provided the records on a compact disc which the Requester has no ability to access. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 6, 2022, the Borough submitted argument that the Requester’s appeal in the matter was untimely. This argument does not have merit because the appeal was timely filed with the OOR in light of the Commonwealth holidays of Veteran’s Day, Thanksgiving Day, and the day after Thanksgiving. On December 8, 2022, the Borough submitted a verified position statement reiterating its grounds for denial. The Borough argues that the Requester waived all issues on appeal but for Request 1, Request 5(a) and (b), and Request 6.³ The Borough further argues that Request 1, Request 5(a) and (b), and Request 6 are insufficiently specific. In support of its position, the Borough submitted the attestation of Bradford Flynn, the Borough Manager,

² The Requester granted the OOR an extension to issue a 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 Because the appeal raises as issues on appeal, “financial records from the term of the current borough manager”, records related to the mayor’s health insurance, and records regarding the negotiation and contract of the borough manager, the OOR finds that Requests 1-6 have been adequately raised on appeal.

who attested to the factual statements contained in the position statement submitted by the Borough. On December 15, 2022, the Borough sent a copy of responsive records to the Requester on a flash drive and provided a copy of the flash drive as evidence in this appeal.⁴

On January 30, 2023, in response to the OOR's inquiry regarding Request 2(b) and Request 4, the Borough submitted a verified position statement and additional responsive records.

On February 9, 2023, Drivelocker, LLC ("Drivelocker") submitted a position statement and the sworn attestation of Anthony Panuccio, the owner of Drivelocker. Drivelocker argues that the consulting agreement and invoices responsive to Request 2(b) are exempt under Section 708(b)(3) (relating to security of public infrastructure), (b)(4) (relating to computer security), and (b)(11) (relating to trade secrets and confidential proprietary information).

On February 13, 2023, the Borough submitted argument and additional 89 pages of records responsive to Requests 2(b). In addition to its agreement with the arguments presented by Drivelocker, the Borough argues that portions of the Altronics contracts are exempt under Section 708(b)(3) (relating to security of public infrastructure), (b)(4) (relating to computer security), and (b)(6)(i)(a) (relating to personal identification information). On February 16, 2023, Drivelocker, LLC submitted a request to participate as a direct interest participant, which was granted by the OOR.

Between January 9, 2023 and February 16, 2023, the Requester made additional submissions in this appeal challenging the accuracy, responsiveness, and completeness of the Borough's disclosures and disputing the arguments presented by Drivelocker.

On February 22, 2023, the Requester submitted a "Motion to Intervene" on behalf of himself to intervene in the instant appeal. In this motion, Requester argues that the Borough and

⁴ The flash drive contained 826 pages of documents.

agents on behalf of the Borough did not have the legal authority to respond to the Request and requesting that the attorney for the Borough be barred from providing submissions on behalf of the Borough in this appeal. On February 23, 2023 and in response to the OOR's inquiry and the Requester's submissions, the Borough submitted an unsworn statement and an additional 68 pages of documents. The record in this matter closed on February 23, 2023.

LEGAL ANALYSIS

The Borough is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Borough is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 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 Borough provided certain records on appeal

During the appeal, the Borough produced over 900 pages of responsive records as part of its submissions, which are comprised of the following:

1. Borough Manager employment evaluation for 2017
2. Borough performance-based bonus policy for September 2017
3. Amended Borough performance-based bonus policy dated October 2019
4. Borough budgets for years 2016 to 2022
5. Municipal annual audit for the Borough for years 2016 to 2020
6. Profit and loss statements for the Borough for years 2016 to September 2022
7. Draft budgets of the Borough for years 2016 to 2022

8. Bids and contracts for the current solid waste management contractor for the Borough through 12/31/2025
9. Employment contract for the Borough Manager for 2020 to 2022 and 2022 to 2024
10. Borough ordinance re: indebtedness dated 3/1/21
11. Letter regarding mayor's health insurance coverage dated October 15, 2018
12. Spreadsheet regarding the Delaware Valley Health Trust of payments recorded in Quickbooks
13. Spreadsheets of subscription-based services for the Borough (*i.e.* Quickbooks, IT services, Borough Association fee, etc.) from 2016 to September 2022
14. Resolution dated May 13, 2015 regarding appointment of Borough Manager
15. January 2015 to December 2022 payments to Altronics, Inc.
16. Invoices from Altronics, Inc. dated July 2019 and March 2022
17. January 2015 to December 2022 payments to DriveLocker LLC
18. General Fund Vendor Summary for years 2015 to 2022
19. Spreadsheet of Borough payments to Altronics
20. Five Altronics agreements for 2018 through 2021
21. Spreadsheet of Borough payments to Drivelocker
22. Drivelocker LLC invoices from 2018 to 2022
23. Spreadsheet Summary of Mayor's Insurance Payments and Reimbursements
24. Spreadsheets for 2018 through 2022 containing accounting of Delaware Valley Health Trust payments
25. Redacted Copies of Cancelled Checks for Mayor's Insurance Premiums

As such, the appeal as it pertains to the records provided on appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The OOR declines to make a finding regarding the accuracy of the Borough's financial records

The Requester suggests in various submissions that there is a discrepancy between certain financial records submitted by the Borough when compared to audit records. The Requester argues that the discrepancies he believes exist in the Borough documents raise questions about the validity

of the documents and requests a thorough investigation by the OOR into the Borough's records. The OOR notes that the records' accuracy is beyond the purview of the OOR. The OOR has jurisdiction to determine if an agency properly withheld records in response to requests. It does not review the contents of the records for accuracy. *See, e.g., MacNeel v. Bucks County*, OOR Dkt. AP 2010-0104; *see also Clippinger v. City of Harrisburg*, OOR Dkt. AP 2010-0600, 2010 PA O.O.R.D. LEXIS 693. The OOR also does not have jurisdiction to determine whether additional records should exist, nor does it have investigatory powers. *See Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731 ("While ... evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such a [record] - the OOR may only determine whether a responsive record does, in fact, exist"); *Dreyer v Pa. Dep't of Env'tl. Prot.*, 2009 PA O.O.R.D. LEXIS 205, OOR AP Dkt. 2009-0450 (noting that the OOR has no authority to investigate an agency's motive for denial of records). Accordingly, the OOR does not make a finding regarding the accuracy of the financial records provided to the Requester by the Borough.

3. Request 1

Request 1 seeks "Detailed complete financial records for the years 2016 [through] 2022. I ask to include the preliminary Managers budget, the approved budget, and end-of-year actual budget results for each of the aforementioned years." The Borough provided certain responsive records to Requester on appeal and argues that the portion of Request 1 seeking "detailed complete financial records" is insufficiently specific and overly burdensome on the Borough due to the volume of potentially responsive records.

a. Request 1 is moot as to specific records requested

Request 1 specifically identifies as responsive records (1) the preliminary manager's

budget, (2) the approved budget, and (3) end-of-year budget of the Borough from 2016 to 2022. During the course of the appeal, the Borough provided the Requester with copies of (1) the Borough budgets for 2016 through 2022; (2) the municipal annual audit for 2016 to 2020; (3) the profit and loss statements for the Borough from 2016 to 2022⁵; and (4) the Borough draft budgets for 2016 to 2022. The OOR finds that the profit and loss statements provided by the Borough is responsive to the portion of Request 1 seeking “end-of-year actual budget results[.]” Requester argues that the documents he received are “fictitious” based on his review of the documents and comparing them to other records of the Borough. Notwithstanding his interpretation of the records responsive to Request 1, the Requester does not provide evidence to demonstrate that the records provided are not the records of the Borough. Upon review of the records as they relate to Request 1, the Borough provided the specific records requested in Request 1 and accordingly, the appeal is moot as to the specific records identified in Request 1.

b. Request 1 is insufficiently specific as to generally seeking “detailed complete financial records”

The Borough argues that the portion of Request 1 seeking “detailed complete financial records” is insufficiently specific and overly burdensome on the Borough due to the volume of potentially responsive records. The three-part balancing test set forth in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette* provides the standard to determine whether a request is sufficiently specific: (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121, 1124 (Pa. Commw. Ct. 2015).

In the case at hand, while the Requests reference financial records, there is no specific subject matter given beyond this general and broad classification of records. Nothing in the

⁵ The 2022 profit and loss statement was current to September 2022.

Requests identifies a specific transaction of the Borough nor are there any defined keywords that the Borough could use to potentially narrow its search for responsive records. Nevertheless, “[t]he absence of a stated subject matter is only one factor to consider in determining whether [a] request is sufficiently specific[,]” and “[a] requester’s failure to identify a subject matter may be accorded more or less weight depending upon other factors.” *Methacton Sch. Dist. v. Office of Open Records*, 250 C.D. 2021, 2021 Pa. Commw. Unpub. LEXIS 670 (Pa. Commw. Ct. 2021).

The second prong of the test is the scope of records. Here, the remainder of Request 1 seeks detailed, complete financial records. The RTKL has defined the “meaning of ‘financial record’ [as] encompassing not merely accounts, vouchers and contracts but also records bearing a sufficiently close connection to such ‘fiscally related’ categories, so long as they also ‘deal with the receipt or disbursement of funds by an agency.’” *City of Harrisburg v. Prince*, 219 A.3d 602, 612 (Pa. 2019); *see also* 65 P.S. § 67.102 (defining “financial record”). The Commonwealth Court held that where a Request does not seek a clearly defined universe of documents and requires files to be reviewed and judgments to be made as to the relation of the documents to the specific request, such a request is insufficiently specific. *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Commw. Ct. 2017) (contrasting the requests in *Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) and *Mollick v. Township of Worcester*, 32 A.3d 859, 871 (Pa. Commw. Ct. 2011)). While Request 1 seeks financial records, the scope is wide-ranging and could encompass countless types of financial records related to many different types of financial transactions. The breadth of potential documents was made plain in Requester’s various submissions where he states that he believes (1) contracts and agreements; (2) payroll records; (3) investment and debt documents; (4) financial reports; (5) bank statements; (6) copies of cancelled checks; (7) expense reports and reimbursement records for all Borough employees; (8) records of

audits by the IRS or Pennsylvania Office of Auditor General; and (9) the mayor's unredacted tax records are encompassed in the realm of records responsive to Request 1. *See* Requester Submissions, January 9, 2023, February 16, 2023. Aside from the potential records noted by the Requester, other potential responsive records could include the invoices of every vendor, every check paid to the Borough by residents, receipts for purchases, etc. Accordingly, the scope of Request 1 is very broad. *See Mollick v. Twp. of Worcester*, 32 A.3d 859, 871 (Pa. Commw. Ct. 2011) (holding that a Request seeking all emails between the township supervisors regarding any township business and/or activities for the past five years was insufficiently specific).

The third part of the test is that of timeframe for which records are sought. A request with no subject matter may be sufficiently specific if it includes a very short timeframe. *See Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. 2011), *appeal denied*, 54 A.3d 350 (Pa. 2012) (finding that a request for all emails exchanged between nine school board members over a 30-day period was sufficiently specific). While a timeframe cannot be open-ended or unlimited, if a request is narrow, timeframe for the records can be longer, whereas the broader the subject matter, the shorter the timeframe should be. *Askew v. Pa. Office of the Governor*, 65 A.3d 989, 992 (Pa. Commw. Ct. 2013). Request 1 seeks all financial records for just under seven years. While the timeframe is defined, Request 1 is still overly broad since it does not possess sufficient limitations in subject matter and scope. While *Baxter* held that a short time period and a limited scope can be sufficiently specific, such is not the case here. *See Baxter*, 35 A.3d at 1265. In Request 1, there is no defined subject matter, the scope is expansive, and the timeframe is not insignificant in that it is just under seven years. Accordingly, Request 1 as it relates to "detailed complete financial records" is insufficiently specific.

4. Request 2

a. Request 2(a) is insufficiently specific

Request 2(a) seeks “[a]ny and all debt obligations for which the [B]orough is financial liable that exceeds \$10000[.]” The Borough argues that this portion of the Request is insufficiently specific. During the course of the appeal, the Borough provided three records in response Request 2(a) consisting of an Ordinance dated March 1, 2021 regarding the Borough’s indebtedness, the proposal and contract for the Borough’s solid waste management, and the Borough Manager’s employment contract.

Request 2(a) fails the three-part balancing test set forth in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121, 1124 (Pa. Commw. Ct. 2015). Request 2(a) fails to identify the types of records sought (*i.e.*, notes, mortgages, etc.) and provides a broad subject matter (*i.e.*, “debt obligations for which the borough is financial liable”).⁶ While there is no listed timeframe in Request 2, based on the phrasing it can be inferred that Request 2 is limited to only that which the Borough is currently financially liable. *See Mitchell v. Phila. Police Dep’t*, OOR Dkt. AP 2015-2335, 2015 PA O.O.R.D. LEXIS 1944 (finding a request interpreted to seek current agency policies to have an implied timeframe); *Zimolong v. Tredyffrin-Easttown Sch. Dist.*, OOR Dkt. AP 2021-1843, 2021 PA O.O.R.D. LEXIS 2286 (finding that a request for records related to a service agreement with a vendor has an implied timeframe of the duration of the contract). Because Request 2(a) seeks a broad scope of records for an indistinct subject-matter, the Borough would be required to review every potentially responsive record and make judgment calls as to what

⁶ The definition of “debt obligation” is a term that is subject to multiple interpretations. The term debt obligation is not term that has a clear definition in the context of Request 2(a). The Local Government Unit Debt Act, 53 Pa.C.S. §§ 8001, *et seq.* defines debt as: “The amount of all obligations for the payment of money incurred by the local government unit, whether due and payable in all events, or only upon the performances of work, possession of property as lessee, rendering of services by others or other contingency” *See* 53 Pa.C.S. § 8002(a). Subsection (a) of Section 8002 goes on to state five exceptions and subsection (b) of Section 8002 then states certain exclusions to subsection (a) such as self-liquidating debt and subsidized debt.

records are responsive. *See Legere*, 50 A.3d at 265. Accordingly, Request 2(a) is insufficiently specific.

b. Responsive records to Request 2(b) do not exist and the Borough is not required to create records

Request 2(b) seeks “Any and all financial records and digital record communications as related to any and all expenses exceeding \$5000 that was termed IT. . . . Any [expenses] that had gone through a disclosed bid process may be omitted[.]” Although the Borough argues that Request 2(b) is insufficiently specific, in its verified position statement dated January 30, 2023, the Borough states that it uses Quickbooks to track accounts receivable and payable and that the Borough’s Quickbooks was not set up with the ability to single out categories or purchasing type by group. *See Borough Submission*, January 30, 2023, pp. 3-4. The Borough’s accounting software does not maintain a category termed IT through which the Borough can search and identify responsive records. *Id.* Thus, the Borough does not have the ability to search for “all financial records . . . [of] expenses exceeding \$5000 that was termed IT” and the only means of providing responsive records according to the requested parameters would be to manually review the Borough’s transactions over a seven-year period of time and compile such records.

In a good faith effort to provide responsive records, the Borough provided its General Vendor Summaries for the years 2015 through 2022. The Borough’s General Vendor Summaries are not categorized by expenses “termed IT[.]” Section 705 of the RTKL states that “[w]hen responding to a request for access, an agency shall not be required . . . 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.” *See* 65 P.S. § 67.705; *see also Wright v. City of Pittsburgh*, OOR Dkt. AP 2015-1268, 2015 PA O.O.R.D. LEXIS 1329 (holding that the City was not required to organize its data in a different manner than it was organized, however it was required to provide the

underlying data responsive to the request in the manner in which it existed).

c. Request 2(c) is sufficiently specific

Request 2(c) seeks “Any and all financial records and digital record communications as related to any and all expenses exceeding \$5000 . . . [including] software, hardware, services as related to cameras made within the last 7 years. Any that had gone through a disclosed bid process may be omitted[.]” The Borough argues that Request 2(c) is insufficiently specific. While the syntax of Request 2, as a whole, is imprecise, Request 2(c) provides a narrower subject-matter than Request 2(b). The Borough attests that Altronics, Inc. and Drivelocker, LLC have been the sole technology consultants that the Borough has utilized during the last seven years. *See* Borough Submission, January 30, 2023, p. 4. During the course of the appeal, the Borough identified and provided the following records responsive to Request 2(c):

January 2015 to December 2022 payments to Altronics, Inc.
Invoices from Altronics, Inc. from July 2019 and March 2022
Spreadsheet of Borough payments to Altronics
Altronics agreement for 2018 through 2021
January 2015 to December 2022 payments to DriveLocker LLC
Spreadsheet of Borough payments to Drivelocker
Drivelocker LLC invoices 2018 through 2022

Despite its phrasing, the Borough was able to conduct a good faith search for responsive records, identified responsive records, and then provided those records with redactions. Accordingly, Request 2(c) is sufficiently specific, and the remaining issue surrounds the basis for the redactions of the responsive records.

- i. Portions of the Altronics Agreements are not exempt under Section 708(b)(3), (b)(4), and (6)(i)(A)*

The Altronics agreements were redacted by the Borough pursuant to Sections 708(b)(3) (jeopardize security of building or facility and information storage system), 708(b)(4) (jeopardize computer security) and 708(b)(6)(i)(A) (personal identification information). The Borough

submitted arguments in support of the redactions to the agreements and clarified in an unsworn statement the nature of the account numbers redacted pursuant to Section 708(b)(6)(i)(A). Altronics did not seek to participate in the appeal.

1. Section 708(b)(3)

Section 708(b)(3) exempts from public disclosure:

A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

- (i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;
- (ii) lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National Infrastructure Protections, which are deemed critical due to their nature and which result from risk analysis; threat assessments; consequences assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and
- (iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

65 P.S. § 67.708(b)(3). For the public infrastructure exemption to apply “the disclosure of the records, rather than the records themselves, must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructures.” *Smith on behalf of Smith Butz, LLC v. Pennsylvania Department of Environmental Protection*, 161 A.3d 1049, 1062 (Pa. Cmwlth. 2017). Reasonably likely has been interpreted as “requiring more than speculation.” *Id.* at 1062-63 (citing *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 375 (Pa. Commw. Ct. 2013)).

The Borough provided no evidence regarding how the disclosure of information regarding

the security camera system located on the first, third, and fourth pages of the various Altronics agreements creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, or facility. 65 P.S. § 67.708(b)(3). Accordingly, the Borough has not met its burden that the Altronics agreements were properly redacted.

2. *Section 708(b)(4)*

Section 708(b)(4) exempts from public disclosure records “regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.” The Borough provided no evidence to demonstrate that public disclosure of the redacted portions of the Altronics agreements would be reasonably likely to jeopardize computer security; therefore, the Borough has also failed to meet its burden that the Altronics agreements were properly redacted under Section 708(b)(4). *See* 65 P.S. § 67.708(a).

3. *Section 708(b)(6)(i)(A)*

The Borough argues that it redacted portions of the Altronics agreements on the first page because it contains “an account number.” The Borough states that the relevant account number is the account number that Altronics assigned to the Borough. The Borough specifically argues that if that account number were to be publicly disclosed, “[a] person may contact Altronics and improperly attempt to inquire about information (i.e. type of security equipment installed and/or locations of security equipment) regarding the Borough’s account and/or attempt to impersonate an employee of the Borough and improperly attempt to order equipment on behalf of the Borough.” *See* Borough Unsworn Statement, February 23, 2023, p. 1. Section 708(b)(6)(i)(A) exempts from public disclosure records or portions of records “containing all or part of a person’s Social Security number, driver’s license number, personal financial information, home, cellular or personal

telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.” The Commonwealth Court define “personal identification information” under the RTKL as:

[I]nformation that is unique to a particular individual or which may be used to identify or isolate an individual from the general population. It is information which is specific to the individual, not shared in common with others; that which makes the individual distinguishable from another.

Office of Lieutenant Governor v. Mohn, 67 A.3d 123, 133 (Pa. Cmwlth. 2013) (quoting *Delaware County v. Schaefer ex rel. Phila. Inquirer*, 45 A.3d 1149, 1153 (Pa. Cmwlth. 2012)). The Borough cited general security concerns regarding the potential misuse of the account number by a nefarious actor but provided no evidence to support that the account number contains the personal identification information of an individual person. *See* 1 Pa.C.S. § 1991 (defining “individual” as “[a] natural person”). Accordingly, the OOR cannot find that the information redacted on the first page of the Altronics agreements is exempt under Section 708(b)(6)(i)(A).

ii. *The Drivelocker Consulting Agreement and portions of the Drivelocker Invoices are not exempt under Section 708(b)(3), (b)(4), and (11)*

The invoices and consulting agreement of Drivelocker were redacted by the Borough with the Borough and Drivelocker arguing that such redactions contain information exempted under Sections 708(b)(3) (relating to security of public infrastructure), (b)(4) (relating to computer security), and (b)(11) (relating to trade secrets and confidential proprietary information).

1. *Section 708(b)(11)*

Section 708(b)(11) exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). The RTKL defines the terms “trade secret” and “confidential proprietary information.” First, a trade secret is defined as:

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 person 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.

65 P.S. § 67.102. Confidential proprietary information is defined as “[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” *Id.*

In its verified position statement, the Borough states that it withheld the Drivelocker Consulting Agreement under Section 708(b)(11) because the agreement contains a mutual confidentiality/trade secrets clause in Paragraph 6 and the signature page contains a confidential proprietary information statement.⁷ The Panuccio Affidavit states that certain information contained with the Drivelocker Consulting Agreement contains both trade secret and confidential proprietary information and that the detailed invoices of Drivelocker submitted to the Borough contains its confidential pricing information. *See* Panuccio Affidavit, ¶¶ 4-17.

Section 708(c) states “[t]he exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17)” *See* 65 P.S. § 67.708(c). The RTKL defines a “financial record”, in relevant part, as any of the following:

- (1) Any account, voucher or contract dealing with:
 - (i) the receipt or disbursement of funds by an agency; or
 - (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property. . . .

⁷ Contract provisions, or the parties’ construction of them, do not govern the public status of records. *Commonwealth v. Eiseman*, 2016 Pa. Commw. LEXIS 334, at *8 (Commw. Ct. June 28, 2016) citing *Tribune-Review Publ’g Co. v. Westmoreland Cnty. Housing Auth.*, 574 Pa. 661, 833 A.2d 112 (Pa. 2003).

See 65 P.S. § 67.102. The consulting agreement and invoices are financial records as defined by Section 102 as they are contracts or vouchers dealing with the disbursement of agency funds and use of services and/or equipment. As such, of the exemptions cited by the Borough and Drivelooper only Sections 708(b)(3) (relating to security of public infrastructure) and 708(b)(4) (relating to computer security) may be claimed as exemptions to information contained in financial records.

2. *Section 708(b)(3)*

Section 708(b)(3) exempts from public disclosure “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system . . .” 65 P.S. § 67.708(b)(3). For the public infrastructure exemption to apply “the disclosure of the records, rather than the records themselves, must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructures.” *Smith on behalf of Smith Butz, LLC v. Pennsylvania Department of Environmental Protection*, 161 A.3d 1049, 1062 (Pa. Cmwlth. 2017). Reasonably likely has been interpreted as “requiring more than speculation.” *Id.* at 1062-63 (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375 (Pa. Commw. Ct. 2013)).

The Pannucio Affidavit states that the redacted information, “if disclosed to the public, could be used to compromise the internal security and integrity of the [Borough’s] computer networks and result in unauthorized access to such confidential information that could prevent the [Borough] to act in the capacity of a governmental organization on behalf of the general populous.” See Pannucio Affidavit, ¶ 16. In *California Borough v. Rothery*, the Commonwealth Court examined the RTKL’s security related exemptions as applied to the video footage of an interaction between an individual and a police officer in a police department holding cell. 185 A.3d at 456.

The Commonwealth Court agreed with the OOR that the police chief's attestation that "were the video to be distributed publicly, a future prisoner might learn where the blind spots in the holding cell are located and use that knowledge to conceal drugs or weapons not discovered by the police" was insufficient to satisfy the "reasonable likelihood" test, and that an agency must "offer more than speculation or conjecture to establish the security-related exceptions under the Right-to-Know Law." *Id.* at 460, 468 (citing *Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010)).

Subsequently, in *Borough of Pottstown v. Suber-Aponte*, the Court applied the "reasonable likelihood" test announced in *Rothey* to a request for a copy of police video footage from "the time [the requester was] brought in [to the police department] . . . and all the activity at [the department] that day." 202 A.3d 172, 177 (Pa. Commw. Ct. 2019). In *Suber-Aponte*, the Court found that the testimony provided by the borough's police chief was more detailed, and included a description of the locations and operations of the surveillance cameras, the specific weaknesses in the system, the steps taken to monitor safety in the building, and particular examples of events that would likely occur should the video footage be disclosed that would place individuals and the public at risk. *Suber-Aponte*, 202 A.3d at 180-82. The Court concluded that this testimony was the type of evidence that would sufficiently demonstrate an "actual or real and apparent" risk of harm, rather than a general conclusion or speculation of harm to individuals or the public at large. *Id.*

In the instant appeal, the evidence provided does not demonstrate *how* disclosure of such records presents a reasonable likelihood to threaten the safety of public building, resource, or infrastructure, but states a generalized concern that someone who wanted to hack the Borough's networks could do so. *See Borland v. City of Wilkes-Barre*, OOR Dkt. AP 2016-0497, 2016 PA O.O.R.D. LEXIS 1017 (noting that conclusory affidavits which describe serious general concerns are insufficient for an agency to meet its burden to show records are exempt under 708(b)(3)).

Accordingly, the Borough, through the evidence submitted by Drivelocker has not met its burden to prove that the disclosure of the consulting agreement and unredacted invoices would create a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, or facility. *See* 65 P.S. § 67.708(b)(3).

3. *Section 708(b)(4)*

Section 708(b)(4) exempts from public disclosure records “regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.” The Borough and Drivelocker provided argument and submitted the Panuccio Affidavit, which states that the detailed nature of the invoices reveal “security procedures, equipment utilized, and conversations with, and support incurred for, external vendors” and [t]he release of this . . . information will pose a risk to network security and the privacy of such information maintained on the network . . . [and will] pose a risk to the security of the Borough[.]” *See* Panuccio Affidavit, ¶ 10 & 11. The Panuccio Affidavit further states that the information contained in the invoices would place the Borough “at risk for unauthorized access (“hacking”) of specified vendor equipment, malware and ransomware attacks, as well as providing physical geographical locations (and destruction of such equipment) whose sole purpose was to setup install, and configure to avoid such incidents.” *Id.* at ¶ 12. Similar to the analysis regarding Section 708(b)(3) above, the evidence provided states serious, general concerns, but does not adequately explain what content in the invoices creates a credible risk or demonstrate how the public disclosure of the redacted contents of the invoices would be reasonably likely to jeopardize computer security. Accordingly, the Borough through the evidence submitted by Drivelocker, LLC, has not met its burden to prove that the consulting agreement and the redacted portions of the invoices are exempt under Section 708(b)(4).

5. Request 3 seeks records that do not exist

Request 3 seeks “[a] complete detailed accounting and financial records for the Borough of Bath’s federal disbursement of build back better funds issued during the Covid pandemic[.]” The Borough argues that no responsive records to Request 3 exist as the Borough did not receive any disbursement of “build back better funds” from the federal government. In its denial, the Borough states:

[T]he proposed Build Back Better Act was proposed legislation (a bill) introduced in the 117th Congress to fulfill aspects of President Biden’s Build Back Better Plan. The bill was passed 220-213 by the House of Representative on November 19, 2021. But, the bill did not pass the Senate so it never became a federal law.

The Requester argues that he mistakenly put “build back better funds” in the Request when he meant American Rescue Plan Act funds and that the Borough knew what he was referencing. *See* Requester Submission, February 16, 2023. The OOR has repeatedly held that 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. Pa. 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”). Therefore, the OOR’s review on appeal is confined to Request 3 as written, and any modification or explanation of Request 3 on appeal will not be considered.

In the instant appeal, while the Requester’s confusion regarding the various federal pandemic-related funding bills is understandable, the Borough appropriately responded to Request 3 as written. The Borough cannot produce records related to funds it never received and the Borough is not required to interpret the Request beyond the plain meaning of the words. Accordingly, the Borough met its burden to prove that records relating to “build back better funds issued during the COVID pandemic” are not within the Borough’s possession, custody, or control.

See Pa. Dep't of Health v. Mahon, 2022 Pa. Commw. LEXIS 136 (Pa. Commw. Ct. 2022); *see also Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294. However, nothing in this Final Determination precludes the Requester from filing a subsequent RTKL request seeking records of the Borough related to American Rescue Plan Act funds, and if necessary, filing an appeal pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

6. Request 4 is insufficiently specific

Request 4 seeks:

Detailed accounting of any no bid contract awarded during the current borough managers time of employee [sic], specific to any purchases in excess of \$10,000. For those exceeding \$25000 during this same period, I also require all digital records related to communication or negotiation of said purchases.

During the course of the appeal, the Borough provided the Requester with copies of the Borough's General Vendor Summaries for the years 2015 through 2022, as the Borough Manager's time of employ relevant to the Request is from May 11, 2015 to September 27, 2022. To the extent the Requester seeks records other than those referenced above, the Borough argues that Request 4 is insufficiently specific and is overly burdensome to respond to as drafted because the relevant time frame is over seven years, and the Borough maintains seven transactional accounts. Because of how the Borough's accounting software maintains the expenditures from the various accounts, the Borough staff would be required to search all expenditures in the software for those paid to contractors over the seven transactional accounts which for each of the relevant years total over \$10,000 and \$25,000, locate the invoices that correspond to the expenditure, and locate the contract for the invoices to determine if payment was in reference to a no-bid contract. The Borough attests there are at least 158 total vendors that exceed \$10,000 over the relevant timeframe and the process to isolate the transactions and invoices to respond to Request 4 would require over two years of manpower. The OOR has found that a request may be insufficiently

specific where that request places an unreasonable burden on the agency due to too broad of a scope or timeframe. *Blystone v. North Penn School District*, OOR AP Dkt. 2021-2407, 2022 PA O.O.R.D. LEXIS 100; *Boyle v. Neshaminy School District*, OOR AP Dkt. 2021-0669, 2021 PA O.O.R.D. LEXIS 968. In *Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, the Commonwealth Court acknowledged that due to the number of responsive records likely to be within the agency’s possession, which also likely contain exempt information, the request placed an unreasonable burden on the agency to compile responsive records. 2020 Pa. Commw. Unpub. LEXIS 8, *54-55 (Pa. Commw. Ct. 2020); *see also Sanchez v. Chester County*, OOR Dkt. AP 2021-1129 (finding a request for all emails from three identified individuals over one month to be insufficiently specific where the agency submitted evidence “regarding the amount of potentially responsive records, the length of time it would take to review those records, and the burden . . . impose[d] on the agency due to the lack of a subject matter”). Thus, the Borough has demonstrated that Request 4 is insufficiently specific.

7. Request 5

Request 5 seeks

[a] [A]ll digital records from 2019 to current [relating] to health insurance coverage issued to the position of mayor. As well as what dates this coverage was active and discounted. If and when this was reimbursed back to the boroughs general fund or what [became] of any repayment.

[b] Disclosure as is related to any discussion starting 6 months prior to issuance, while coverage was active up to and including current and in any digital record form.

[c] Disclosure of any and all requests or inquiries of legal guidance as is related directly or indirectly associated with this insurance

a. Request 5(a) is dismissed as moot in part, insufficiently specific in part

Request 5(a) seeks “all digital records from 2019 to current [relating] to health insurance coverage issued to the position of mayor. As well as what dates this coverage was active and

discounted. If and when this was reimbursed back to the boroughs general fund or what [became] of any repayment[.]” The Borough argues that Request 5(a) is insufficiently specific. In a good faith effort to respond to Request 5(a), the Borough provided (1) a letter dated October 15, 2018 which indicates the mayor’s enrollment, premium rates, and terms of reimbursement for the health insurance coverage; (2) reports of premium amounts paid by the Borough and then reimbursed by the mayor for the mayor’s Delaware Valley Health Trust for the years 2018 through October 31, 2022; and (3) spreadsheets and canceled checks demonstrating payments and reimbursements for the mayor’s health insurance for the years 2018 through 2022. These records provided satisfy the portion Request 5(a) seeking “the dates this coverage was active and discounted[,] . . . [and] [i]f and when this was reimbursed” Accordingly, this portion of Request 5(a) is dismissed as moot.

The remainder of Request 5(a) seeks “all digital records from 2019 to current [relating] to health insurance coverage issued to the position of mayor” and “what [became] of any repayment.” The portion seeking all digital records from 2019 to September 27, 2022 relating to health insurance coverage issued to the position of mayor is insufficiently specific. Considering the three-part balancing test set forth in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, the scope is “all digital records”, the subject-matter is relating to the mayor’s health insurance coverage, and the timeframe is approximately three years and nine months. While the subject-matter and timeframe are generally defined, the scope is very broad. The OOR has previously held that requests are insufficiently specific where the scope is broad, the timeframe is lengthy and the requests provide little context to guide the agency’s search for responsive records. *See Winklosky v. Pa. Office of Admin.*, OOR Dkt. AP 2018-1438, 2018 PA O.O.R.D. LEXIS 1391 (“[s]eeking all records related to a topic or topics does not necessarily make a request insufficiently specific;

however, a request must provide enough specificity in its scope and timeframe to help guide the agency in its search for records”). Request 5(a) “[a]ll digital records” does not provide a clearly defined universe of documents for the Borough to search and in consideration of the time frame, Request 5(a) is insufficiently specific.

b. Request 5(b) is insufficiently specific

Request 5(b) seeks “[d]isclosure as is related to any discussion starting 6 months prior to issuance, while coverage was active up to and including current and in any digital record form[.]” The Borough argues that Request 5(b) is insufficiently specific. Considering the three-part balancing test set forth in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, the scope is “any discussion” and the subject-matter is relating to the mayor’s health insurance coverage. Based upon the evidence provided in this appeal, the timeframe for Request 5(b) is April 15, 2018⁸ to September 27, 2022. Similar to the analysis in Part 3.b. and 7.a. above, Request 5(b), while possessing a finite timeframe of approximately four and a half years, has an incredibly broad scope of “any discussion” in digital form. It is not clear whose “discussions” are sought, whether it be the mayor, Borough staff, Borough council, attorneys for the Borough, members of the public, the selected insurance company, and/or other insurance providers considered. The Commonwealth Court has held that where a request does not seek a clearly defined universe of documents and requires files to be reviewed and judgments to be made as to the relation of the documents to the specific request, such a request is insufficiently specific. *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Commw. Ct. 2017) (contrasting the requests in *Department of Environmental Protection v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) and *Mollick v. Township of Worcester*, 32 A.3d 859, 871 (Pa. Commw. Ct. 2011)). Accordingly, Request 5(b) is

⁸ This is six months prior to the date of the letter dated October 15, 2018 which granted the mayor health insurance coverage.

denied as insufficiently specific.

c. Request 5(c) is insufficiently specific

Request 5(c) seeks disclosure of any and all requests or inquiries of legal guidance as is related directly or indirectly associated with this insurance. The Borough argues that responsive records are protected by attorney/client privilege and that this portion of the Request is insufficiently specific. The Borough provided no evidence regarding the applicability of attorney/client privilege and given that the Request does not whose inquiries and whose legal guidance is being sought, the OOR finds that the Borough has not met its burden of proof that attorney/client privilege applies to any potentially responsive records.

However, and for similar reasons as set forth above, Request 5(c) is insufficiently specific. Request 5(c) seeks records of “any and all requests or inquiries of legal guidance as is related directly or indirectly associated with [the mayor’s health] insurance.” This portion of Request 5 does not set forth a timeframe and determining a timeframe is difficult given that the other two portions of Request 5 have separate timeframes. Assuming the longest timeframe applies, the timeframe would be approximately four and a half years. The subject-matter of the Request is that which is directly or indirectly associated with the mayor’s health insurance. This “directly or indirectly” phraseology adds both breadth and ambiguity to the subject-matter. The scope is any requests or inquiries of legal guidance. The scope is broad as it does not specify the individuals seeking legal guidance or providing legal guidance that the Requester seeks records relating to. In light of this and considering the specificity factors as set forth in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, Request 5(c) is insufficiently specific as written.

8. Request 6

[Request 6] – [a] Lastly I request disclosure of any and all records as it relates to the employment contract of the Borough Manager so as to include terms of contract,

Disclosure to the amount of performance bonuses paid out, as well as the specific performance that triggered these payouts.

[b] A detailed accounting of any and all records as is related to the same employees line item Dues and Subscriptions in accordance with a time line of employee. Complete and detailed accounting of education payout, vehicle expense reimbursement and

[c] any and all references to such compensation packages to include any digital record communications such as text message, email or any other form that is legally required to be retained including negotiation leading up to a approved final deal for each of the years requested previously. The basis used in determining the contract structure was valid, inline with comparable positions and in accordance with applicable law[.]

The Borough argues that Request 6 is insufficiently specific.

d. Request 6(a) is sufficiently specific

Request 6(a) seeks all records relating to the Borough Manager’s employment contract including the terms of contract, amount of performance bonuses paid out, and the specific performance that triggered these payouts. The Borough argues that Request 6(a) is insufficiently specific as it seeks “any and all records” relating to the employment contract of the Borough Manager. While the beginning of Request 6(a) is couched in sweeping terms (*i.e.* any and all records as it relates to . . .”), when reading Request 6(a) in its entirety, it is limited to (1) the terms of the Borough Manager’s contract, (2) the amount of performance bonuses paid out, and (3) the specific performance that triggered the payout of the performance bonuses. The Borough provided the Requester with copies of the Borough Manager’s 2020 and 2022 employment contracts, a 2015 resolution of the Borough which appointed Bradford Flynn as Borough Manager, the Borough’s Step Raise System and Performance Based Program policy (Policy Number HR-2017-01), and an explanation of the performance payout structure. The evidence demonstrates that the Borough Manager has been employed by the Borough since May 2015 and has been under contract with the Borough since 2020. The Borough provided both of the Borough Manager contracts with evidence

demonstrating that the performance bonus referenced by the Requester was not paid out under those contracts but was instead paid out while the Borough Manager was a non-contract employee under the Borough's performance bonus program. The Borough has provided all records responsive to Request 6(a); accordingly, Request 6(a) is dismissed as moot.

e. Request 6(b) is sufficiently specific

Request 6(b) further seeks “a detailed accounting of” records related to dues, subscriptions, education payouts, and vehicle expense reimbursements expended for the Borough Manager. The Borough argues that Request 6(b) is insufficiently specific. The scope of the Request is records that provide a “detailed accounting[.]” The subject-matter is relating to the Borough Manager's dues, subscriptions, education payouts, and vehicle expense reimbursements. The timeframe stated in Request 6(b) is ambiguous in that it states “in accordance with a time line of employee[.]” Notwithstanding, it appears that the Borough interpreted the timelines as being from 2016 until September 2022 and the Requester has not challenged that interpretation. Reviewing Request 6(b) under the three-part specificity test, the OOR finds Request 6(b) has a finite timeframe and that along with the limited subject matter and scope of the request renders it sufficiently specific to “enable the [Borough] to ascertain which records are being requested[.]” *See* 5 P.S. § 67.703.

The various budgets for 2016-2022 provided in response to Request 1 list as expenses under the designation “Borough Manager” the following:

- Dues & Subscrip. . . .
- Vehicle / Gas Exp. . . .
- Mileage Reimbursement . . .
- Education Exp. . . .

Furthermore, the Borough's profit and loss statements designate under the Borough Manager category the following:

- 401.111 – Borough Manager . . .
- 401.16 – Dues & Subscriptions . . .
- 401.17 – Vehicle/Gasoline Stipend / Exp . . .
- 401.18 – Educational Expense . . .

The Borough provided a spreadsheet of the subscription-based services of the Borough Manager for the years 2016-2022, which provides a detailed accounting of expenditures for subcategory 401.16 (Dues & Subscriptions). The Borough did not provide the same spreadsheet regarding subcategories 401.17 (Vehicle/Gasoline Stipend / Exp) and 401.18 (Educational Expense) which are clearly sought in Request 6(b). Unlike other types of detailed financial records requested, the Borough has shown it is capable of generating the responsive report and that it would not be unduly burdensome to do so. Accordingly, the Borough is directed to provide to Requester the “Transaction Detail By Account” for subcategories “401.17 – Vehicle/Gasoline Stipend / Exp” and “401.18 – Educational Expense” for the year 2016 up through September 2022.

f. Request 6(c) is insufficiently specific

Request 6(c) seeks:

[A]ny and all references to such compensation packages to include any digital record communications such as text message, email or any other form that is legally required to be retained including negotiation leading up to a approved final deal for each of the years requested previously. The basis used in determining the contract structure was valid, inline with comparable positions and in accordance with applicable law

The Borough argues that Request 6(c) is insufficiently specific. Request 6(c) seeks emails and text messages as a part of a greater request for any digital record communications related to the Borough Manager’s compensation package. The timeframe is “relating to the employment contract of the Borough Manager” which can be inferred to mean in the months leading up to January 1, 2020 until September 27, 2022. It is not clear whose emails, texts, or communications are sought, whether it be the Borough Manager, Borough staff, Borough council, attorneys for the

Borough, members of the public or records from all of these individuals. The Commonwealth Court has held that where a request does not seek a clearly defined universe of documents and requires files to be reviewed and judgments to be made as to the relation of the documents to the specific request, such a request is insufficiently specific. *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Commw. Ct. 2017) (contrasting the requests in *Department of Environmental Protection v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) and *Mollick v. Township of Worcester*, 32 A.3d 859, 871 (Pa. Commw. Ct. 2011)). Similar to the analysis in Part 7.b. above, a request seeking “any and all references to” without a sufficiently limiting timeframe and subject-matter is insufficiently specific. Accordingly, Request 6(c) seeking “any and all references to”, texts, emails, and “all digital communications” relating to the Borough Manager’s compensation package is denied as insufficiently specific.

9. The OOR declines to make a finding of bad faith

The Requester argues that the Borough should be found to have acted in bad faith for (1) violating Section 502(a) of the RTKL by designating Attorney Kratz to serve as the Borough’s open records officer involving RTKL requests that require legal review, (2) denying access to the records sought in this Request, and (3) producing records that the Requester believes contradict each other.

Under the RTKL, a finding of bad faith is appropriate where an agency refuses to comply with its statutory duties under the RTKL. *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 243 A.3d 19, 28-29 (Pa. 2020); *California Univ. of Pa. v. Bradshaw*, 210 A.3d 1134 (Pa. Commw. Unpub. 2021), *appeal denied* 2019 PA LEXIS (Pa. 2019) (awarding attorney’s fees, costs and statutory damages for bad faith when the University failed to contact third-party contractor in search for records prior to asserting that no responsive records exist and subsequently litigating

the frivolous basis for denial); *Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Commw. Ct. 2017) (a finding of bad faith was warranted where the agency based a denial on the identity of the requester, refused to provide a legal rationale for denial and did not perform a good faith search). A finding of bad faith is typically reserved only for an egregious or blatant violation of the RTKL. The OOR has made a finding of bad faith where an agency failed to provide evidence that it conducted a good-faith search and repeatedly ignored deadlines set by the OOR and the RTKL and declined to address the OOR's requests for clarification. *See Towne v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2021-0292, 2021 PA O.O.R.D. LEXIS 307. The OOR has also found that an agency acted in bad faith where it demonstrated a pattern of invoking extensions but failing to respond to requests or participate in the appeals. *See Hayden v. City of Reading*, OOR Dkt. AP 2018-0244, 2018 PA O.O.R.D. LEXIS 402.

Although the OOR may make such a finding, only the courts have the authority to impose sanctions on agencies. *See* 65 P.S. § 67.1304; *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013) (“As we observed, Section 1304 of the RTKL permits a Chapter 13 court to award costs and attorneys’ fees, and to impose sanctions, after the court, not the appeals officer, makes relevant factual findings and legal conclusions.... Section 1304(a)(1) requires a court to make factual findings regarding whether an agency denying access to records acted ‘willfully or with wanton disregard’ or ‘otherwise ... in bad faith.’”); *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 138 (Pa. Commw. Ct. 2019) *aff’d in part*, 255 A.3d 385 (Pa. 2021) (“the statute is clear that only a court may make a finding regarding an agency’s bad faith”); *Uniontown, supra*. (“[t]he RTKL reserves bad faith determinations for disposition by Chapter 13 Courts”).

Section 502(a)(1) states that “[a]n agency shall designate an official or employee to act as the open-records officer.” *See* 65 P.S. § 67.502(a)(1). Requester argues that the appointment of

Attorney Kratz by the Borough Council to serve as the Borough's open records officer involving RTKL requests where legal review is required is in violation of Section 502. The OOR finds that the Borough Council's appointment of Attorney Kratz to serve as an open records officer was not an action taken to repudiate its duties under the RTKL; thus, such an action does not warrant a finding of bad faith. Furthermore, in his capacity as solicitor for the Borough, Attorney Kratz provided submissions in this appeal on behalf of the Borough and such submissions are appropriately before the OOR.

As stated in Part 2 of this Final Determination, the accuracy of the Borough's financial records is outside the OOR's jurisdiction and the OOR declines to make a finding of bad faith against the Borough due to the Requester's perception of the Borough's financial records. Similarly, the OOR declines to find that the Borough acted in bad faith when it denied the Request in part. The evidence submitted in this appeal does not demonstrate that the Borough willfully repudiated its duties and obligations under the RTKL. Accordingly, the OOR declines to make a finding of bad faith against the Borough.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, dismissed in part and dismissed as moot in part**, and the Borough is required to provide (1) the "Transaction Detail By Account" for subcategories "401.17 – Vehicle/Gasoline Stipend / Exp" and "401.18 – Educational Expense" for the year 2016 up through September 2022; and (2) unredacted versions of the Altronics and Drivelocker, LLC contracts and invoices of Drivelocker, LLC which were already provided to Requester in redacted form within thirty days. 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 Northampton 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. 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.⁹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 24, 2023

/s/ Catherine R. Hecker

CATHERINE R. HECKER, ESQ.
APPEALS OFFICER

Sent via email to: Michael Long
Bradford Flynn
James Kratz, Esq.
Jeff Ogren, Esq.

⁹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).