



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**MICHELE WHITNEY,
Requester**

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:

:

v.

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Docket No: AP 2023-0680

:

**LAMAR TOWNSHIP,
Respondent**

:

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FACTUAL BACKGROUND

On February 10, 2023, Michele Whitney (“Requester”) submitted a request (“Request”) to Lamar Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “copies of all settlement agreements from 2020 to present.”

On March 15, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Township denied the Request, arguing that the requested records are confidential and are not public records and are exempt under the RTKL as containing confidential proprietary information or trade secret information. *See* 65 P.S. § 67.708(b)(11).

On March 27, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to

¹ The Requester granted the OOR a 30-day 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).”).

supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 6, 2023, the Requester provided a position statement arguing that the Township has not presented credible arguments and thus has not met its burden to demonstrate that the requested settlement agreements are not subject to public access. On April 6, 2023, the Township submitted a position statement reiterating its grounds for denial. The Township claims that the Request is insufficiently specific, that any responsive settlement agreements of civil disputes do not meet the definition of financial records under the RTKL, and that the responsive settlement agreements are subject to a confidentiality agreement contained within the agreements and are thus not subject to disclosure under the RTKL. In support of its position, the Township submitted the attestation of Tracy Roberts, the Open Records Officer for the Township (“Roberts Attestation”).

On May 2, 2023 and in response to the OOR’s inquiry, the Township submitted the supplemental attestation of Tracy Roberts (“Supplemental Roberts Attestation”), which clarifies that the Township identified one settlement agreement responsive to the Request and noted that the Township provided notice to the relevant third parties related to that settlement agreement.

LEGAL ANALYSIS

The Township 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 Township 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 Request is sufficiently specific

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.” 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). An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Bradley v. Lehighon Area Sch. Dist.*, OOR Dkt. AP 2021-0333, 2021 PA O.O.R.D. LEXIS 715; *Ramaswamy v. Lwr. Merion Sch. Dist.*, OOR Dkt. AP 2019-1089, 2020 PA O.O.R.D. LEXIS 2095. When a request is subject to multiple reasonable interpretations, the OOR’s task on appeal is to determine if the agency's interpretation was reasonable. *Ramaswamy*, 2020 PA O.O.R.D. LEXIS 2095. The OOR determines this from the text and context of the request alone, as neither the OOR nor the requester is permitted to alter a request on appeal. *See McKelvey v. Off. of the Att'y Gen.*, 172 A.3d 122, 127 (Pa. Commw. Ct. 2016); *Smith Butz, LLC v. Pa. Dep't of Env'tl. Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016).

The Township argues that the Request seeking “settlement agreements” is insufficiently specific as the Township believes that term can be interpreted multiple ways. The Township states that settlement agreements could relate to agreements pertaining to the purchase or sale of real estate by the Township or it could relate to settlement agreements pertaining to the resolution of civil disputes. In real estate transactions, while settlement statements, purchase agreements, and

agreements of sale are all terms of art relating to real estate transactions, the use of the term “settlement agreement” is most often referring to the settlement of a disputed legal issue between adversarial parties and is not common nomenclature relating to contracts for the sale of real estate. When viewing the Request in context and applying common meanings of words to the Request, the term “settlement agreement” relates to agreements pertaining to the resolution of a civil dispute. Furthermore, the Township was able to identify a responsive record to the Requester, namely one settlement agreement related to a civil dispute. The ability to identify responsive records can demonstrate that a request is sufficiently specific. *See Pa. Dep’t of Educ.*, 119 A.3d at 1126 n.8; *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012); *see also Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 179 (Pa. Commw. Ct. 2019) (“the [R]equest as obviously sufficiently specific because the [Borough] has already identified potential records included within the [R]equest”). Accordingly, the OOR finds that the Request for settlement agreements from 2020 until the date of the filing of the Request is sufficiently specific.

2. The Township failed to prove that the responsive settlement agreement is not a public record under the RTKL

The Township argues that the responsive settlement agreement pertaining to the settlement of a civil dispute is not public records under the RTKL.

Specifically, Roberts Attestation states in relevant part:

5. As set forth in the March 15, 2023 response to the request, the Township denied Ms. Whitney’s request for several reasons.
6. First, the requested information is confidential, not “public records” and/or exempt under the Right-to-Know Law.
7. Specifically, the Township is not in possession of any “settlement agreements” pursuant to which it received or disbursed funds. Rather, any payment made under such an agreement was paid by the Township’s liability carrier.
8. Second, the requested information directly affects a legal or security interest of a third party and, if an appeal is filed, the relevant third party must be notified and have the opportunity to participate in the appeal.

See Roberts Attestation, ¶¶ 5-6. The Township argues that funds disbursed under these settlement agreements are not the funds of the Township, but instead are payments paid by the Township's liability carrier and because of this, the responsive settlement agreement does not meet the definition of financial records under the RTKL and is exempt from disclosure in its entirety. A public record is defined as:

A record, including a financial record, of a Commonwealth or local agency that:

- (1) is not exempt under section 708;
- (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or
- (3) is not protected by a privilege.

See 65 P.S. § 67.102. Under the RTKL, financial records are given a specific exception to exemptions to *promote openness*; “[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 [.]” 65 P.S. § 67.708(c). Whether a record of a local agency is a financial record is not dispositive as to whether that record is subject to public access.² Thus, the Township's argument that the responsive settlement agreement is not a financial record of the Township and therefore is not a public record must fail. All records of a local agency, both financial and non-financial, are presumed to be public and the RTKL does not state that only contracts where governmental funds are expended are subject to public disclosure. See *Rittmeyer & The Tribune Review v. Highland School District*, OOR AP Dkt. 2021-0458, 2021 PA O.O.R.D. LEXIS 771 (noting that a MOU of a local agency is not a financial record as defined by the RTKL and is clearly subject to public access as a settlement agreement between the local agency and an education association).

² Unlike local agencies, all records of judicial and legislative agencies are not subject to public access. Thus, whether a record meets the definition of a financial record is critical whether a record of a judicial or legislative agency is subject to public access. The record is clear that the Township is a local agency and not a legislative or judicial agency. Accordingly, all records of the Township are presumed to be public, and the Township bears the burden of proving that its records are exempt under Section 708, another state or federal law, or are protected by privilege. Compare 65 P.S. § 67.102 (definition of public record) & 65 P.S. § 67.302; with 65 P.S. § 67.303 & 65 P.S. § 67.304.

3. The Township failed to prove that the responsive settlement agreement is exempt from access under the RTKL

The Township stated in its March 15, 2023 denial letter that the responsive settlement agreement “may affect a legal or security interest of a third party; contain confidential proprietary or trade secret information; or are held by a contractor or vendor.”³ The Roberts Attestation submitted on appeal states generally, “the requested information is confidential, not ‘public records’ and/or exempt under the Right-to-Know Law [and] the requested information directly affects a legal or security interest of a third party . . .” *See* Roberts Attestation, ¶¶ 6, 8. Through the Supplemental Roberts Attestation, the Township attests that it notified the relevant third party and to date, that party has not provided evidence or sought to participate in this appeal. The Township provided no evidence related to whether the settlement agreement contains confidential proprietary or trade secret information or evidence of *how* the disclosure of the settlement agreement would affect the security of a third party. The Township’s evidence does not establish the elements of any exemptions under the RTKL but merely asserts that exemptions apply; thus, it is a conclusory statement and insufficient to support that the responsive settlement agreement contains confidential proprietary or trade secret information or affects the legal or security interest of a third party. *See Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statement are not sufficient to justify the exemption of public records”).

The Township further argues that the responsive settlement agreement is exempt from

³ Section 506(d)(1) states that “[a] public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.” Accordingly, the Township’s argument that the responsive settlement agreement is held by a contractor or vendor is not alone dispositive of whether that settlement agreement is subject to public access.

disclosure because “the Township expressly agreed not to disclose the requested records/information ‘to any person or individual or company/business unless required by any governmental authority or required by law.’”⁴ 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). As previously stated, it is the agency’s burden to prove that a record is exempt from disclosure under the RTKL. *See* 65 P.S. § 67.708(a). The Township argues that settlement agreement is confidential, but has not provided any evidence, such as a judicial order or decree sealing the settlement agreement, which show that responsive settlement agreements not subject to public access under the RTKL. *See The Citizens’ Voice v. Luzerne County*, OOR Dkt. AP 2014-0272, 2014 PA O.O.R.D. LEXIS 349 (“Without a copy of the court order specifically sealing the records at issue, the County has not met its burden of proving that the requested records are sealed pursuant to court order”).

The Request seeks a settlement agreement involving a local agency and to which the local agency is a party. The courts of this Commonwealth have consistently held that settlement agreements involving public agencies are public records subject to disclosure. *Tribune-Review Publishing Co. v. Westmoreland County Housing Authority*, 833 A.2d 112 (Pa. 2003); *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644 (Pa. Commw. Ct. 2006) (each holding

⁴ The Township states that a third-party insurance carrier was involved with the payment of the terms of the settlement agreement, but the Township is unclear as to whether that agreement is solely in the possession of the third-party insurance carrier. Records in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency are presumptively public records subject to public access, so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL. *See* 65 P.S. § 67.506(d)(1). The Township provided no evidence that the Township was uninvolved with the decision to enter a settlement agreement or that the Township's approval was not sought or required to arrive at an agreement to end the litigation. *See Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010); *Jo Ciavaglia and The Bucks County Courier Times v. Bucks Cnty.*, OOR AP Dkt. 2021-0876, 2021 PA O.O.R.D. LEXIS 1317. Accordingly, the OOR cannot find that a settlement agreement involving the Township’s third-party insurance carrier is a record in possession of a third-party contractor that does not directly relate to a governmental function of the Township.

settlement agreements were public records under the RTKL's predecessor legislation). The Pennsylvania Supreme Court has also noted that a public agency's agreement to hold confidential a public record is unenforceable as a matter of public policy. *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) (stating that contract provisions, or the parties' construction of them, do not govern the public status of records). Accordingly, the Township has not met its burden of proving that the requested settlement agreement is confidential under the RTKL.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide all responsive settlement agreements 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 Clinton 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 26, 2023

/s/ Catherine R. Hecker

CATHERINE R. HECKER, ESQ.
APPEALS OFFICER

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

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