pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JILL HARDINA,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2023-1121**
	:	
CITY OF PHILADELPHIA DEPARTMENT OF HEALTH,	:	
Respondent	:	

FACTUAL BACKGROUND

On March 30, 2023, Jill Hardina ("Requester") submitted a request ("Request") to the City of Philadelphia Department of Health ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

> [Part 1]
> All emails concerning fetal deaths; all races, genders, causes; 2020
> All emails concerning fetal deaths; all races, genders, causes; 2021
> All emails concerning fetal deaths; all races, genders, causes; 2022
> [Part 2]
> Information concerning when this data will be available on the City of Philadelphia Department of Public Health website.

On May 4, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Department denied the Request, arguing that the Request is insufficiently specific and seeks answers to questions and not records.

On May 19, 2023, the Requester appealed to the Office of Open Records ("OOR"),

challenging the denial and stating grounds for disclosure. The Requester attached to her appeal submission a document entitled "PhilaStats Technical Notes" that was updated in March 2023 and contains information regarding how to access the statistical data reported to the public via the PhilaStats portion of the Philadelphia Department of Health website. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On June 2, 2023, the Department submitted a position statement reiterating its grounds for denial. The Department claims that Part 1 of the Request is insufficiently specific, and Part 2 of the Request does not seek records, but asks a question. In support of its position, the Department submitted the attestations of Feige Grundman, Chief Deputy City Solicitor for the Philadelphia Law Department ("Grundman Attestation") and Tracy Jones, the Open Records Officer for the Department ("Jones Attestation").

LEGAL ANALYSIS

The Department 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 Department 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. **Part 1 of the Request is insufficiently specific**

Part 1 of the Request seeks "[a]ll emails concerning fetal deaths; all races, genders, causes" for calendar years 2020, 2021, and 2022. The Department argues that the Request as written is insufficiently specific. The Requester did not provide a submission on appeal, but included information related to the PhilaStats portion of the Department's website which contains data reports of fetal deaths searchable for all of Philadelphia for all races, genders, and causes.[1]

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." 65 P.S. § 67.703. In determining whether a particular request under the RTKL is sufficiently specific, the OOR uses the three-part balancing test employed by the *Commonwealth Court in Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep't of Corr*., 61 A.3d 367, 372 (Pa. Commw. Ct. 2013).

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

[1] The OOR notes that the PhilaStats website contains data for all fetal deaths for Philadelphia, with downloadable content for citywide mortality that is current through 2019. See https://opendataphilly.org/datasets/philadelphia-vital-statistics-mortality-deaths/ (last accessed June 8, 2023), for links to the Mortality Citywide (CSV).

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.* The Commonwealth Court in *Keystone Nursing* explained that the actual context of the request is central in deciding whether a request is sufficiently specific. *Keystone Nursing*, at *54-55. Further, it explained that the number of records likely within the possession of an agency, and the burden placed on the agency to review records, are important to consider when performing the specificity balancing test. *Id.* at 55; *see also Sanchez v. Chester County*, OOR Dkt. AP 2021-1129, 2021 PA O.O.R.D. LEXIS 1168 (finding a request for all emails from three identified individuals over the period of 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").

In the instant appeal, the Request seeks all emails either received by or sent from members of the Department "concerning fetal deaths" for three one-year periods. The scope is broad in that it seeks all emails to and from an entire Department. The subject-matter is "concerning fetal deaths" and "fetal deaths" is defined as "deaths that occurs at or after 20 weeks of gestation but before birth." *See* PhilaStats Technical Notes, p. 10. Though it is a subject-matter, determining whether an email concerns the death of a human after 20 weeks gestation but prior to birth is a difficult task. The Jones Attestation states that the Department had between 944 and 983 employees during the relevant timeframe. *See* Jones Attestation ¶ 6. Such a request, without identifying specific senders or recipients, would require the Department to search over 900 email accounts seeking emails which potentially relate to fetal deaths and require the Department to conduct a review to determine if the emails discovered relate to the subject matter. The Grundman Attestation further states that the Department is currently unable to run a search over the entire

Department for all emails due the size of the Department. *See* Grundman Attestation, ¶¶ 2-5.

Despite having a clearly defined timeframe, the broad scope and subject matter of Part 1 of the Request does not seek a clearly defined universe of responsive records; therefore Part 1 of the Request is insufficiently specific to enable the Department to respond. *See* 65 P.S. § 67.703; *Pa. Dep't of Envtl. Prot. v. Legere*, 50 A.3d 260, 264-265 (Pa. Commw. Ct. 2012) (finding that a request that would require an agency to review all potentially responsive files and "make judgments as to the relation of the documents to the specific request" would be insufficiently specific); *see also Calaboro v. Southeast Delaware County Sch. Dist*., OOR Dkt. AP 2018-0180, 2018 PA O.O.R.D. LEXIS 327 (request seeking all emails between school board member for a four-month period insufficiently specific); *Pa. Dep't of Educ*. 119 A.3d at 1125 ("A request for a broad category of documents, such as all records, maybe sufficiently specific if confined to particular senders or recipients."); *Montgomery County v. Iverson*, 50 A.3d 281 (Commw. Ct. 2012) (holding that a request was not sufficiently specific because it was not limited by sender or recipient). However, nothing in this Final Determination prevents the Requester from filing a new request with a narrowed scope or subject matter, and if necessary, filing an appeal pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

2. Part 2 of the Request does not seek records

Part 2 of the Request seeks "[i]nformation concerning when this data will be available on the City of Philadelphia Department of Public Health website." The Department argues that Part 2 of the Request is not a request for records but is a question veiled as a request for information. Under the RTKL, a request must seek records rather than answers to questions. *Walker v. Pa. Ins. Dep't*, No. 1485 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 425 at *16 (Pa. Commw. Ct. 2012) ("The RTKL is not a forum for the public to demand answers to specifically posed questions to

either a Commonwealth or local agency. In fact, there is no provision in the RTKL that requires an agency to respond to questions posed in a request."); *Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *14 (Pa. Commw. Ct. 2012) (noting that the portion of a request "set forth as a question" did not "trigger a response"); *see also Stidmon v. Blackhawk Sch. Dist*., No. 11605-2009 at 5 (Beav. Com. Pl. Dec. 14, 2009) ("The [RTKL] did not provide citizens the opportunity to propound interrogatories upon local agencies, rather it simply provides citizens access to existing public records").

In the instant appeal, Part 2 of the Request contains no punctuation, but seeks information regarding "when this [fetal death] data will be available on the [Department] website". The Requester is clearly seeking access to more recent years' data regarding fetal deaths in Philadelphia as the Department's website contains detailed data regarding fetal deaths from 2012 through 2019[2] which can be compared and downloaded via Excel spreadsheets. Notwithstanding, Part 2 of the Request seeks the answer to an inquiry, but does not identify a particular record that would satisfy the inquiry of Part 2, thus leaving the Department to guess as to which existing public record or type of record could satisfy this inquiry. Because Part 2 of the Request seeks an answer to an inquiry and not access to public records, it must be dismissed. *See Michalski v Governor's Office of Administration*, OOR Dkt. AP 2014-0887, 2014 PA O.O.R.D. LEXIS 729 (holding that a portion of a request seeking records related to government contracts that seeks to know "a tentative date when the contract will be awarded" is not a request for records under the RTKL); *Hasara v Pa. Turnpike Comm'n*, OOR Dkt. AP 2023-0547, 2023 PA O.O.R.D. LEXIS 906 (holding that a request seeking to know when a sound barrier will be installed on a portion of the turnpike was not a request for records).

[2] Certain aspects of the Department's website contains data regarding fetal deaths through 2021, but the comprehensive downloadable content appears to exist through 2019.

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed in part**, and the Department is not required to take any further action. 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 Philadelphia 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.[3] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: June 13, 2023

/s/ *Catherine R. Hecker*

CATHERINE R. HECKER, ESQ.
APPEALS OFFICER

Sent via email to: Jill Hardina
Omar Rabady
Feige Grundman

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