

Court of Common Pleas of Philadelphia County
Trial Division

Civil Cover Sheet

For Prothonotary Use Only (Docket Number)

DECEMBER 2023

00944

E-Filing Number: 2312014538

PLAINTIFF'S NAME CITY OF PHILADELPHIA PLANNING COMMISSION		DEFENDANT'S NAME FAYE ANDERSON	
PLAINTIFF'S ADDRESS 1515 ARCH STREET 13A PHILADELPHIA PA 19102		DEFENDANT'S ADDRESS 1427 N 10TH ST PHILADELPHIA PA 19122	
PLAINTIFF'S NAME		DEFENDANT'S NAME	
PLAINTIFF'S ADDRESS		DEFENDANT'S ADDRESS	
PLAINTIFF'S NAME		DEFENDANT'S NAME	
PLAINTIFF'S ADDRESS		DEFENDANT'S ADDRESS	
TOTAL NUMBER OF PLAINTIFFS 1	TOTAL NUMBER OF DEFENDANTS 1	COMMENCEMENT OF ACTION <input type="checkbox"/> Complaint <input type="checkbox"/> Petition Action <input checked="" type="checkbox"/> Notice of Appeal <input type="checkbox"/> Writ of Summons <input type="checkbox"/> Transfer From Other Jurisdictions	
AMOUNT IN CONTROVERSY <input type="checkbox"/> \$50,000.00 or less <input type="checkbox"/> More than \$50,000.00	COURT PROGRAMS <input type="checkbox"/> Arbitration <input type="checkbox"/> Mass Tort <input type="checkbox"/> Commerce <input type="checkbox"/> Settlement <input type="checkbox"/> Jury <input type="checkbox"/> Savings Action <input type="checkbox"/> Minor Court Appeal <input type="checkbox"/> Minors <input type="checkbox"/> Non-Jury <input type="checkbox"/> Petition <input type="checkbox"/> Statutory Appeals <input type="checkbox"/> W/D/Survival <input checked="" type="checkbox"/> Other: AGENCY APPEAL		
CASE TYPE AND CODE 51 - MISC ADMINISTRATIVE AGENCY			
STATUTORY BASIS FOR CAUSE OF ACTION			
RELATED PENDING CASES (LIST BY CASE CAPTION AND DOCKET NUMBER)		<p style="text-align: center;">FILED PRO PROTHY DEC 07 2023 I. LOWELL</p>	
		IS CASE SUBJECT TO COORDINATION ORDER? YES NO	
<p>TO THE PROTHONOTARY: Kindly enter my appearance on behalf of Plaintiff/Petitioner/Appellant: <u>CITY OF PHILADELPHIA PLANNING COMMISSION</u> Papers may be served at the address set forth below.</p>			
NAME OF PLAINTIFF'S/PETITIONER'S/APPELLANT'S ATTORNEY OMAR J. RABADY		ADDRESS ONE PARKWAY BUILDING 17TH FL 1515 ARCH ST PHILADELPHIA PA 19102	
PHONE NUMBER (215) 683-5032	FAX NUMBER none entered		
SUPREME COURT IDENTIFICATION NO. 307311		E-MAIL ADDRESS Omar.Rabady@phila.gov	
SIGNATURE OF FILING ATTORNEY OR PARTY OMAR RABADY		DATE SUBMITTED Thursday, December 07, 2023, 02:45 pm	

CITY OF PHILADELPHIA LAW DEPARTMENT

KRISTIN K. BRAY, ACTING CITY SOLICITOR

By: Omar Rabady, Deputy City Solicitor

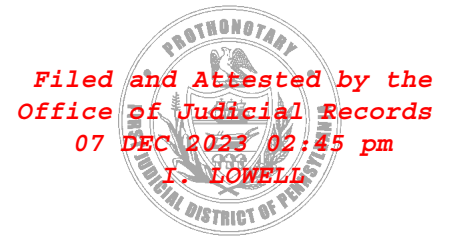
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City of Philadelphia	:	COURT OF COMMON PLEAS
Planning Commission	:	PHILADELPHIA COUNTY
	:	
Appellant	:	
	:	
vs.	:	
	:	
	:	
Faye Anderson	:	
	:	
Appellee	:	NO.

NOTICE OF APPEAL

Appellant City of Philadelphia Planning Commission hereby appeals from the decision of the Office of Open Records made on November 20, 2023, and indexed as O.O.R. Dkt. AP 2023-1840. A copy of the decision is attached as “Exhibit A.”

/s/ Omar Rabady
Omar Rabady
Deputy City Solicitor
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102

Date: December 7, 2023

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
SPECIAL DOCKET PROGRAM**

**Appeal of the City of Philadelphia Planning Commission
from a Decision of the Office of Open Records**

NOTICE OF APPEAL

The City of Philadelphia Planning Commission hereby appeals from a decision of the Office of Open Records dated November 20, 2023 and indexed as O.O.R. Dkt. AP 2023-1840, a copy of which is attached hereto. The following persons entered an appearance in the proceedings below:

Dated: November 20, 2023

Omar Rabady
Deputy City Solicitor
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102

Paula Burke Knudsen (counsel for Ms. Anderson)
4000 CRUMS MILL RD.STE.101
Harrisburg, PA 17112
pknudsen@rcfp.org

Kelly Isenberg
Senior Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Kisenberg@pa.gov

Exhibit A



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
FAYE ANDERSON AND ALL THAT	:	
PHILLY JAZZ,	:	
Requester	:	
	:	Docket No: AP 2023-1840
v.	:	
	:	
CITY OF PHILADELPHIA PLANNING	:	
COMMISSION,	:	
Respondent	:	

FACTUAL BACKGROUND

On July 26, 2023, Faye Anderson, on behalf of All That Jazz Philly, (collectively “Requester”) submitted a twenty-seven part request (“Request”) to the City of Philadelphia (“City”) Planning Commission (“Commission”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:¹

[1.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and David Adelman, chairman of 76 Devcorp, regarding the proposal to build a sports arena on the 1000 block of Market Street, hereinafter 76 Place;

[2.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning

¹ The Requester utilized roman numerals in the Request; however, for clarity purposes we will use Arabic numerals in this Final Determination.

Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and David Adelman, chairman of 76 Devcorp, regarding meetings about 76 Place;

[3.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and the Mayor's Office regarding 76 Place;

[4.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and the Mayor's Office regarding meetings about 76 Place;

[5.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and Councilmember Mark Squilla and his staff regarding 76 Place;

[6.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and Councilmember Mark Squilla and his staff regarding meetings about 76 Place;

[7.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and representatives of Harris Blitzler Sports & Entertainment, including Sherveen Baftechi, Nicole Ellis, Jonathan Fascitelli, David Gould, Jessica Granger, Alex Kafenbaum and Jim Leonard regarding 76 Place;

[8.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and representatives of Harris Blitzler Sports & Entertainment, including Sherveen Baftechi, Nicole Ellis, Jonathan Fascitelli, David Gould, Jessica Granger, Alex Kafenbaum and Jim Leonard regarding meetings about 76 Place;

[9.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp,

Ian Litwin and David Kanthor, and representatives of CBL Real Estate LLC, including Tabb Bishop, Edward Hazzouri and Hadji Maloumian about 76 Place;

[10.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, about meetings with representatives of CBL Real Estate LLC, including Tabb Bishop, Edward Hazzouri and Hadji Maloumian regarding 76 Place;

[11.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and Hercules Grigos and Katherine Missimer of Klehr Harrison Harvey Branzburg LLP regarding 76 Place;

[12.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor about meetings with Hercules Grigos and Katherine Missimer of Klehr Harrison Harvey Branzburg LLP regarding 76 Place;

[13.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and Sam Rhoads and PIDC staff regarding 76 Place;

[14.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and Sam Rhoads and PIDC staff regarding meetings about 76 Place;

[15.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and employees of the Department of Planning and Development, including Anne Fadullon, Eleanor Sharpe and John Mondlak regarding 76 Place;

[16.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and employees of the Department of Planning and Development, including Anne Fadullon, Eleanor Sharpe and John Mondlak regarding meetings about 76 Place;

[17.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and employees of the Philadelphia Law Department, including Frances Beckley and Andrew Richman regarding 76 Place;

[18.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and employees of the Philadelphia Law Department, including Frances Beckley and Andrew Richman regarding meetings about 76 Place;

[19.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 regarding “Philadelphia Weekly Connect” meetings about 76 Place;

[20.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and SEPTA Chief Operating Officer Scott Sauer regarding 76 Place;

[21.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and SEPTA Chief Operating Officer Scott Sauer regarding meetings about 76 Place;

[22.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and the Pennsylvania Department of Transportation, hereinafter PennDOT, and Langan Engineering and Environmental Services, Inc., hereinafter Langan, regarding 76 Place;

[23.] Records, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and PennDOT and Langan regarding meetings about 76 Place;

[24.] Records, including but not limited to, written or email communications from March 1, 2023 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp,

Ian Litwin and David Kanthor, and Sam Rhoads and PIDC staff regarding requests for proposals to independently evaluate 76 Place proposal;

[25.] Records, including but not limited to, written or email communications from March 1, 2023 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and Sam Rhoads and PIDC staff regarding meetings about proposals to independently evaluate 76 Place proposal;

[26.] Records, including but not limited to, written or email communications from March 1, 2023 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and Sam Rhoads and PIDC staff regarding funding of proposals to independently evaluate 76 Place proposal; and

[27.] Records, including but not limited to, written or email communications from March 1, 2023 to July 21, 2023 between employees of the City Planning Commission, including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor, and Sam Rhoads and PIDC staff naming members of advisory committee created to review and evaluate the responses for proposals to independently evaluate 76 Place Proposal.

As the Requester did not receive the Commission's response within five business days of the Request, on August 7, 2023, the Requester filed an appeal with the Office of Open Records ("OOR"), claiming that the Request was deemed denied. *See* 65 P.S. § 67.901.² The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 25, 2023,³ the City submitted a position statement, arguing that the Request is insufficiently specific and overly burdensome, that the Request may not be modified on appeal and, also arguing that various RTKL exemptions would likely apply to responsive records such as, the attorney-client privilege and Section 708(b)(10)(i)(A). 65 P.S. § 67.708(b)(10)(i)(A). In

² The Requester granted the OOR additional time 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 On August 17, 2023, the OOR granted the City's request to extend the record closing date in this matter, until August 25, 2023. *See* 65 P.S. § 67.1102(a)(2).

addition, the City asserts that the Request is repetitive and burdensome, as the Requester has allegedly submitted eighteen requests that seek “all records,” “naming the same agencies and requesting the same documents about or regarding certain topics.” 65 P.S. § 67.506(a). In support of its position, the City submitted the statements made under penalty of perjury pursuant to 18 Pa.C.S. § 4904, from Antoinette Garcia, the Department of Planning and Development’s Open Records Officer (“Garcia Attestation”), and Feige Grundman, Esq., Chief Deputy Solicitor for the City’s Law Department (“Grundman Attestation”).

On October 17, 2023, the Requester submitted a position statement in reply to the City’s argument. The Requester argues that the Request is sufficiently specific and has satisfied Section 703 of the RTKL because the Request seeks records for a single topic, not “regarding several topics,” as asserted by the City, in that it relates to “the Philadelphia 76ers’ proposal to build a sports arena on the 1000 block of Market Street” The Requester also argues that the City cannot assert that RTKL exemptions would apply to the records when a search has not yet been conducted for responsive records. The Requester further argues that the timeframe is clear in the context of the Request, as it consists of the “time period that the Commission officials met with 76 Place lobbyist and representatives, and other parties regarding 76 Place” and the 15-month timeframe is less than other much longer request timeframes that were determined to be sufficiently specific. The Requester cites as authority in support of the argument, *Lancaster Cnty. Dist. Attorney’s Office v. Walker*, 245 A.3d 1197, 1204 (Pa. Commw. Ct. 2021) (timeframe of ten years was sufficiently specific) and *Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (*en banc*) (timeframe of four years was sufficiently specific). In addition, the Requester asserts that specific individuals are named in the Request and the subject involves a well-known project to the City, such that no judgments are necessary to determine whether records are responsive.

Additionally, the Requester argues that the OOR should not consider the City's argument that the number of requests submitted to various City agencies close in time to the instant Request makes the Request insufficiently specific because the point is irrelevant to the RTKL process and the volume of records that are "potentially" responsive does not make the Request overly burdensome. Finally, the Requester argues that how the City has structured its RTKL request response systems or how the City's case management system functions has no bearing on the City's obligation to comply with the RTKL. More specifically, the Requester states, "[t]o the extent the request is 'burdensome,' it is due to the City's policy of consolidating responses to RTKL requests within a single agency, the Law Department, rather than having the open records officer of the recipient agency handle the request. I have no control over how the Respondent chooses to process [RTKL] requests." The Requester also asserts that, should the OOR determine that a portion of the Request is insufficiently specific, such as the portion stating "including but not limited to," the OOR should order the release of records that are responsive to the sufficiently specific portions. The Requester's appeal statement included attachments consisting of copies of documents referenced in support of the argument.

On October 20, 2023, the City submitted a surreply, addressing the points raised in the Requester's appeal statement. The City argues that the City's various governmental departments are all parts of one agency and that the Law Department represents all of the departments, which results in the Law Department reviewing all requests and responsive documents. In addition, the City states that email searches for all City departments must be run through the City's Office of Information and Technology. The City also argues that a search does not have to be conducted for the Request to be found insufficiently specific. The City next argues that the timeframe is insufficiently broad when viewed in the context of the Request that, "is seeking emails and all

other types of communication from 42 City accounts with no way to limit the accounts on the side of the communication, about or regarding various topics” and, as compared to the cases cited by the Requester, which are about very specific types of records that do not require email searches, this Request’s timeframe is quite broad. The City argues that the Request is much broader than the Requester’s statement that, “it is neither likely nor very likely representatives of the billionaire owners of the Philadelphia 76ers met or communicated with thousands of random City, State and third party employees,” in that Request language was not limited to representatives of the 76ers owners as it seeks various communications about 76 Place, not just communications the 76ers owners had with City, State, and third party employees. Finally, the City disputes the Requester’s assertion that the Request is about a single topic because, while all of the subparts relate to 76 Place, the language is not the same for each and would require different distinct search terms and judgements to assess responsiveness. In support of the City’s surreply, a supplemental Grundman Attestation (“Second Grundman Attestation”) was submitted.

LEGAL ANALYSIS

The City 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 City 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 not disruptive or repetitive

The City argues that the Request is repetitive and burdensome under Section 506(a) of the RTKL, 65 P.S. § 67.506(a), arguing that the RTKL “does not permit individuals to file multiple repetitive and overlapping requests that create an unreasonable administrative burden.” The City further argues that the instant Request is “one of eighteen requests that this Requester has sent to various City departments in the past month for all ‘records’ ‘including but not limited to written and email communications’ naming the same agencies and requesting the same communications about or regarding certain topics.

“Under [Section 506(a)] ... an agency must demonstrate that (1) ‘the requester has made repeated requests for th[e] same record[(s)]’ and (2) ‘the repeated requests have placed an unreasonable burden on the agency.’” *Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011). Repeated requests for the same records, although phrased differently, may be denied as disruptive. *Cohen v. Pa. Dep’t of Labor and Indus.*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton Sch. Dist.*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 (“Slight differences in phraseology do not preclude application of [Section 506(a)]”).

The Grundman Attestation states, in pertinent part, the following:

24. The same requester made 10 other requests about 76 Place within a 7-day period. These requests all ask for a similar amount of email and other records, from a similar volume of individuals employed by the City as well as those not employed by the City. For example:

- a. Request 23528, received by the City on July 25, 2023, seeks almost five months of emails and all other medium of records between members of the of the Mayor’s office, with 20 custodians on one side of the communication, and 60 on the other. It also seeks almost 5 months of emails and all other records between the Mayor’s Office and Public Engagement (OPE) and PDIC, which have about 20 and 213 employees, respectively.

b. Request 23598, also received by the City on July 25, 2023, seeks also 17 months of emails and all other medium of records between Councilwoman Sharon A. Vaughn and her staff (at least 10 accounts) and on the other side of the communication David Adelman, all Harris Blitzer Sports & Entertainment Staff (HSBE), CBL Real Estate LLC (CBL)

c. Request 23599, also received by the City on July 25, 2023, seeks almost 17 months of emails and all mediums of records between councilman Driscoll and his staff (at least 10 employees) and David Adelman, all HSBE employees, and all CBL employees

d. Request 23601, also received on July 25, 2023, seeks almost 17 months of emails and all other mediums of records between councilmember Quetcy M. Lozada and his staff (at least 10 employees) and the following entities: David Adelman, all HSBE employees, and all CBL employees

e. Request 23602, also received on July 25, 2023, seeks almost 17 months of emails and all other mediums of records between councilmember Anthony Phillips and his staff (at least 10 employees) and the following entities: David Adelman, all HSBE employees, and all CBL employees

f. Request 23595, also received July 25, 2023, requests almost 17 months of emails and all other mediums of records between the Managing Director's Office and the following entities: David Adelman, HSBE, Leslie Richards, Scott Sauer, all PIDC, all HSBE employees, Hercules Grigos, Katherine Missimer,

g. Request 23588, also received on July 25, 2023, seeks almost 17 months of emails and all other mediums of records between councilmember Mark Squilla and his staff (at least 10 employees) and David Adelman, all HSBE employees, all CBL employees, Leslie S. Richards, Scott Sauer, Sam Rhoads, The Pennsylvania Department of Transportation, Langan, Hercules Grigos, Katherine Missimer, all

h. Request 23555, received by the City on July 27, 2023, seeks almost 17 months of emails between all Department of Streets employees (Streets) and the following entities, the Mayor's Office (60 employees), Councilmember Squilla and his staff, all HSBE, all PDIC staff, the City Planning Commission, The Philadelphia Law Department, and PennDot.

i. Request 23540, received by the City on July 27, 2023, seeks almost 16 months of communications, including emails, between Anne Nadol had with the following entities: David Adelman, the Mayor’s Office, Mark Squilla and his staff, HSBE, CBL, Hercules Grigos, Katherine Missimer, PIDC, DPD, the Law Department, and regarding “Philadelphia Weekly Connect”

j. Request 23591, received by the City on July 25, 2023 Seeks almost 16 months of communications, including emails, that the Mayor’s office had with David Adelman, HSBE, Leslie S. Richards, PIDC Staff, PennDOT, Langan, CBL, Hercules Grigos, Katherine Missimer, about 76 place.

k. Request 23541, received by the City on July 27, 2023 seeks almost 16 months of communications, including emails, between Frances Beckley and Andrew Richman, and the following entities: David Adelman, the Mayor’s Office, Mark Squilla and his Staff, HSBE, CBL, PIDC, DPD, regarding 76 place.

25. I’ve included a spreadsheet detailing the exact language contained within each of these requests. As of the date of this attestation, the requester has submitted nearly 20 other similar requests.

26. On its own, the request at issue in this appeal is not specific enough to process, burdensome, and extremely large in scope. Taken as a whole, the requests from this requester are burdensome, repetitive, and have caused a tremendous amount of administrative time to process thus far.

27. I also act as the administrator for the case management system used by the City to track RTKL requests. Because of the overlapping broad subject matter and repetitive nature of the requests, the case management system’s artificial intelligence will no longer recognize requests from these individuals as separate requests and will try to attach new requests to existing ones. This means that we cannot use the case management system’s artificial intelligence to intake new requests, and each one must be manually entered by hand—that in and of itself has taken several hours of time on administrative tasks before we can begin a full analysis of what records may be implicated.

Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

In *Mezzacappa v. West Easton Borough*, the OOR held that a request must be repeated more than once to constitute a “repeated request” for purposes of 65 P.S. § 67.506(a). OOR Dkt. AP 2012-0992, 2012 PA O.O.R.D. LEXIS 967 (“Because the [b]orough has only established that the [r]equester has made one repeated request, rather than multiple ‘repeated requests,’ the OOR finds that the [r]equest was not disruptive”). The OOR’s final order in *Mezzacappa* was subsequently upheld by both the Northampton County Court of Common Pleas and the Commonwealth Court. See *Borough of West Easton v. Mezzacappa*, No. C-48-CV-2012-7973 (North. Com. Pl. Jan. 9, 2013) (“[A] request is not disruptive when a requester [seeks] the same records only twice”), *aff’d* 74 A.3d 417 (Pa. Commw. Ct. 2013). A review of the record in this matter, including the “request summary” chart submitted by the City, shows that, while the Requester has submitted several requests seeking records relating to 76 Place, there are variations in each request. There are timeframe variations, there are differences in the individuals and agencies identified as involved in the communications and, in some instances, categories of records beyond “written or email communications” are sought such as, “reports, feasibility studies, traffic impact studies, architectural designs and cost estimates.” More importantly, although the Requester has submitted more than one request regarding 76 Place to certain agencies, only one request was submitted to the Commission, the Request underlying the instant appeal. While “[s]light differences in phraseology” do not preclude application of Section 506(a)(1) of the RTKL, the evidence must still show that the Request is, in fact, repetitive. *Mezzacappa, supra*. Furthermore, the evidence does not demonstrate that a series of requests that are somewhat similar in subject matter, but also with some variations, submitted to a wide variety of City agencies renders the instant Request overly burdensome. *C.f. Carmencita Maria Pedro and Kerry L. Fisher, Jr. v. City of Phila., Dep’t of Behavioral Health and Intellectual Disability Svcs.*, OOR Dkt. AP

2023-1889 (consolidated), 2023 PA O.O.R.D. LEXIS 2185 (concluding that requests which are “duplicative in whole or in part of one or more RTKL requests” and OOR appeals submitted to a single agency are repetitive and burdensome under Section 506(a) of the RTKL).

2. Portions of the Request are sufficiently specific

The City argues that, considering the context of the Request, the timeframes for the various Items are lengthy, in that the scope of the Request includes “all mediums of records, included all emails and other communications, between CPC employees” and multiple City, State and private entities. The City further argues that the multiple Request Items encompass various topics and would require the search of over 23,000 email accounts, without a clearly expressed City transaction or activity to narrow the search for a universe of potential records. The City further asserts that, because of the breadth of the Request language and the lack of “limiting accounts on the other side of communications due to the City not having the names or email addresses (let alone access to the email accounts of multiple non-City agencies and private institutions),” renders the Request vague and lacking the specificity elements set forth in the RTKL. The City relies on the analysis in *Calefati v. Phila. Sch. Dist.*, OOR Dkt. AP 2019-1289, 2019 PA O.O.R.D. LEXIS 1261, in support of its position that the Request is insufficiently 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). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed

by the Commonwealth Court in *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). Specifically, the OOR examines to what extent the request sets forth (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.*, 119 A.3d at 1124-25. Finally, “[t]he fact that a request is burdensome does not deem it overbroad, although it may be considered as a factor in such a determination.” *Pa. Dep't of Env'tl. Prot. v. Legere*, 50 A.3d at 265.

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

In support of the City’s argument, the Garcia Attestation provides, the following:

2. For the time period of April 1, 2022, to July 21, 2023, the City Planning Commission (CPC) had a total of at least 43 employees.
3. For the time period of March 1, 2023, to July 21, 2023, CPC had a total of at least 43 employees.
4. Based on my past experience with RTK requests generally and specifically RTK requests that involve email records, this request would be quite burdensome for

DPD⁴ to comply with due to the long time period; the number of individuals implicated; and the vagueness and broadness of the records sought.

5. Unlike most RTKL requests I receive and assist with, this request isn't seeking a specific agency action or decision, but a broad range of communications.

6. Based on my past experience with email reviews, many exemptions would apply to the requested communications, such as attorney-client privilege and internal pre-decisional deliberations, although it's impossible to predict all the exemptions before reviewing the communications, as each communication needs to be assessed on a document-by-document basis.

In further support of the City's position, the Grundman Attestation provides, the following:

2. As of the date of this attestation, I have coordinated more than 75 email searches for RTKL requests through the Office of Innovation Technology (OIT) in 2023 alone. I have been coordinating Citywide email searches for all RTKL requests since 2019. I therefore have many years of experience with OIT searches and the results of those searches.

3. When OIT runs email searches of employees' accounts based on instructions from the Law Department, they create a custom code based on each of the search criteria identified as far as keywords, time period, and specific user accounts.

4. The request does not limit itself to seeking email communications. Each of the 27 subparts of the request specifically states that it seeks "records, including but not limited to written or email communication." This makes it unclear what records the requester is seeking.

5. The requester does not identify specific City transactions but instead asks for all communications and other records, concerning or about various topics, that were possibly discussed between thousands of individuals, from multiple government agencies, at least one private practice law firm, and multiple private institutions.

6. Based on my past experience with RTK requests generally and specifically RTK requests that seek email records, even if we limited this request to only seek emails from within DPD and CPC, this request would be burdensome for the City to respond to due to: the long time period; the number of individuals implicated; and the vagueness and broadness of the records sought.

7. I interpreted the phrase "Records including, but not limited to written or email communications" as it is written, which is to encompass emails as well as every other possible medium of record.

⁴ Department of Planning and Development. The Philadelphia City Planning Commission is part of a team of agencies housed under the DPD. See <https://www.phila.gov/departments/departments-of-planning-and-development/> (last accessed November 7, 2023).

8. For the two timeframes requested, Planning had at least 123 employees and CPC had at least 42 employees.

9. The request does not limit itself to communications/records between CPC and DPD. The request also asks for communications between CPC and entire other City Departments and Offices, such as the Mayor's Office (at least 60 employees during the requested time periods), the Law Department (at least 345 employees during the requested time period), and Councilman Squilla's Office (at least 8 employees during the requested time period).

10. The request also seeks communications between the City and other state agencies such as the Southeastern Pennsylvania Transit Authority (SEPTA), the Pennsylvania Department of Transportation (PennDOT), Philadelphia Industrial Development Corporation (PIDC).

11. Based on online sources from each respective non-City agency, PIDC has approximately 213 employees, SEPTA has approximately 9,500 current employees, and PennDOT has approximately 12,000 employees.

12. In addition, the requester has asked for communications between CPC and various private companies. The City does not have internal access to employee counts, most of the email addresses, or the names of these employees. However, based on publicly available information from Zoominfo.com, Langan Engineering has 1300 employees, Klehr Harrison Harvey Branzburg has 123 employees, and CBL Properties has 400 employees.

13. The request on its face seeks all "[r]ecords, including but not limited to, written or email communications" between CPC and tens of thousands of individuals, including City and non-City agency employees; and employees of private companies. The first 23 subparts of the request seek 17 months of such communications, the last 5 subparts seek 5 months of such communications.

14. Unlike most of the thousands of RTKL requests received by the City each year, this request isn't seeking records of a specific agency actions, transactions, or decisions, but a broad range of communications and any other type of record between CPC employees and tens of thousands of named and unnamed individuals.

15. The above-captioned appeal's underlying request has 27 parts. For the City to comply with even one of these 27 subparts would be burdensome for the City.

16. This is based on the long time periods, the potentially tens of thousands of accounts implicated, the request for email and unspecified types of records, and lack of specified City transactions identified....

21. In practice, an OIT search for the requested email records would need to be run across 43 CPC employee accounts, with search terms, but without any accounts on the other side of the communication to limit the results. The City does not have a list of all the email addresses—or even names—to limit the search to between the CPC employees and the other thousands of individuals implicated. Even if the City did have the email addresses of all of the above-implicated individuals, an OIT search would not compile with thousands of individuals on the other side of the communication from CPC.

22. Even if the communication was limited to between CPC members and other City employees, there would be an estimated 536 employees on the other side of the communication. Such a search would also be too large to compile in OIT's system....

The Requester submitted a position statement in reply to the City's appeal submission, claiming that the Request includes a specific, well-known topic, 76 Place, as well as identified individuals, such that the Request's context is narrow enough to enable the City to search for responsive records. The Requester also asserts that the Request "identifies a discrete universe of documents, defined by a clear subject matter and finite timeframe" and that the Request "identified specific activities and specific individuals." The Requester further disputes the City's claim of technological limitation due to the number of email accounts implicated and the lack of email addresses on the opposite side of the communication with the Commission's employees.

Regarding the Requester's arguments, the Second Grundman Attestation provides:

2. The City of Philadelphia functionally operates as a single agency made up of more than 25 departments, commissions, boards, and offices.

3. The City's Office of Information and Technology (OIT) coordinates technology and IT across all of the City departments, commissions, boards, and offices. OIT must run searches for email records on behalf of the City's departments, commissions, boards, and offices citywide, including email of the Philadelphia Planning Commission, the Mayor's Office, the City Council (which includes Mark Squilla and his staff), the Department of Planning and Development....

5. Although the requester states that her request is about a single topic and not multiple topics, it can only reasonably be considered a single in the most overarching sense of the word when considered in the context of functioning of the City like Philadelphia and a proposed project of this magnitude—which is known

to Ms. Anderson and reflected in the more than 20 separate recursive, duplicative, and unreasonably burdensome requests she has sent for records of multiple City offices, agencies, departments, and boards, and currently under appeal with the OOR at 2023-2222 (the final response underlying that appeal is attached for reference).

6. Although every subpart of the request relates to 76 Place, they are not all the same, nor do they relate to any discrete transaction or activity of the proposed project other than somehow relating to 76 Place— Therefore, to process the request would require different search terms to be used and different judgments to be made as to whether records are responsive to different subparts of this (and the more than 20 other) request(s). For example:

a. Item i. is regarding the proposal to build a sports arena on the 1000 block of Market Street, (76 Place)

b. Item ii. is regarding meetings about 76 Place[;]

c. Item xix. Is regarding “Philadelphia Weekly Connect” meetings about 76 Place[;]

d. Item xxiv. “regarding requests for proposals to independently evaluate 76 Place proposal”[;]

e. Item xxvii. members of advisory committee created to review and evaluate the responses to independently evaluate 76 Place proposal[.]

7. Based on my experience, there is no comparison regarding the context of the underlying RTKL requests in the two cases cited by the requester, *Lancaster Cnty. Dist. Attorney’s Office v. Walker*, 245 A.3d and *Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012, and the RTKL request underlying this appeal. Requests for email records are orders of [a] magnitude more extensive and time-consuming to go through than finding specific determination letters or documentation on the processing of forfeited letters.

The twenty-seven subparts of the Request can be grouped into categories based on the common elements of the respective subparts and, therefore, for clarity purposes, we will identify and analyze the Request Items by categories.

a. Portions of Items 1-18 and 20-23 are not sufficiently specific

Items 1-18 and 20-23 of the Request all state a timeframe of April 1, 2022 to July 21, 2023, and seek “[r]ecords, including but not limited to, written or email communications” “between employees of the City Planning Commission [“CPC”], including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor,” and other City agencies, State agencies or private entities, depending on the individual subpart. Items 1-2 seek records between employees of CPC and David Adleman, the chairman of 76 Devcorp “regarding the proposal to build a sports arena on the 1000 block of Market Street, hereinafter 76 Place” and “regarding meetings about 76 Place.” Items 3-4 seek records between employees of CPC and the “Mayor’s Office regarding 76 Place” and “regarding meetings about 76 Place.” Items 5-6 seek records between employees of the CPC and Councilman Mark Squilla and his staff “regarding 76 Place” and “regarding meetings about 76 Place.” Items 7-8, seek records between employees of CPC and “representatives of Harris Blitzer Sports & Entertainment, including Sherveen Baftechi, Nicole Ellis, Jonathan Fascitelli, David Gould, Jessica Granger, Alex Kafenbaum and Jim Leonard regarding 76 Place” and “regarding meetings about 76 Place.” Item 9-10, seeks records between employees of CPC and “and representatives of CBL Real Estate LLC, including Tabb Bishop, Edward Hazzouri and Hadji Maloumian about 76 Place” and “about meetings with representatives of CBL Real Estate LLC, including Tabb Bishop, Edward Hazzouri and Hadji Maloumian regarding 76 Place.” Items 11-12 seek records between employees of CPC and Hercules Grigos and Katherine Missimer of Klehr Harrison Harvey Branzburg, LLC “regarding 76 Place” and “about meetings with Hercules Grigos and Katherine Missimer of Klehr Harrison Harvey Branzburg, LLC regarding 76 Place.” Items 13-14 seeks records between employees of CPC and “Sam Rhoad and PIDC staff regarding 76 place” and “regarding meetings about 76 Place.” Items 15-16 seek records employees of the CPC

and “employees of the Department of Planning and Development, including Anne Fadullon, Eleanor Sharpe, and John Mondlak regarding 76 Place” and “regarding meetings about 76 Place.” Items 17-18 seek records between employees of CPC and “employees of the Philadelphia Law Department, including Frances Beckley and Andrew Richman regarding 76 Place” and “regarding meetings about 76 Place.” Items 20-21 seek records between employees of CPC and “SEPTA⁵ Chief Operating Officer regarding 76 Place” and “regarding meetings about 76 Place.” Items 22-23 seek records between employees of CPC and the “Pennsylvania Department of Transportation, hereinafter PennDOT, and Langan Engineering and Environmental Services regarding 76 Place” and “regarding meetings about 76 Place.”

Based upon a review of the Request language as a whole, portions of Items 1-18 and 20-23 of the Request are insufficiently specific in that they fail to seek a clearly defined universe of documents; however, certain portions of the Request Items provide sufficient detail such as, names of sender or recipients that would serve to guide the City’s search. *See, Legere, supra*. “A request for a broad category of documents, such as all records, may be sufficiently specific if confined to a particular recipient or recipients.” *Pa. Dep’t of Educ.* 119 A.3d at 1125; *see also Carey*, 61 A.3d at 372 (concluding request for “all records that were provided to the transferred inmates” was sufficiently specific because it sought “a discrete group of documents” limited by recipient); *but see Iverson*, 50 A.3d at 284 (concluding request which “does not identify specific individuals, email addresses, or even departments, but requests any applicable emails sent from the County’s domain to four other domains” was insufficiently specific).

In *Pa. State Police v. Office of Open Records*, the Commonwealth Court held that the portion of a request seeking “any and all records, files or communications” related to vehicle stops,

⁵ Southeastern Pennsylvania Transportation Authority. *See* <https://www5.septa.org/> (last accessed November 7, 2023).

searches and seizures was insufficiently specific under Section 703 of the RTKL, and that only the portion of the request seeking a particular type of document—manuals related to vehicle stops, searches, and seizures—was sufficiently specific. 995 A.2d 515, 517 (Pa. Commw. Ct. 2010). Accordingly, *Pa. State Police* establishes that a determination may be made that a request is sufficiently specific, but only in part.

Items 1-18 and 20-23 seek “[r]ecords, including but not limited to, written or email communications,” which essentially encompasses any category of documents, not a discrete universe of records as asserted by the Requester. In addition, while 76 Place may be a large, well-known project in Philadelphia, as demonstrated by the July 19, 2023 press release from the City’s Mayor’s Office about a sports arena project on 1000 Market Street that was included with the Requester’s appeal submission, the subject matters in the Request do not sufficiently clarify the exact types of records sought. However, the Items do identify “written or email communications,” which provides guidance as to specific types of records sought.

Similar to the portion of the Request in *Pa. State Police* that was determined to be sufficiently specific, certain Items here, do provide names of Commission personnel and names of certain governmental and private entities, that would serve as senders or recipients of the “written or email communications.” It is unclear why the City would be unable to conduct a search for records between “Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor” and “David Adelman, chairman of Devcorp” related to 76 Place, especially since individuals are identified and Item 1 provides a description of 76 Place as being “a sports arena on the 1000 block of Market Street.”⁶ Item 1 is an example of one of the many subparts in which

⁶ Agencies need not undertake an all-encompassing search of their email servers when specific employees are mentioned; they merely need to inquire with those specific employees whether they possess responsive records. *Dep’t of Labor & Indus.*, 126 A.3d 355, 357-58 (Pa. Commw. Ct. 2015). Indeed, reaching out to possible custodians of records is a necessary component of an agency’s requirement to conduct a good faith search under 65 P.S. § 67.901.

specific Commission personnel are listed and an identified corresponding sender or recipient is named. By contrast, while some of these Items name Commission personnel, the corresponding sender or recipient is not named, as only a governmental entity or private entity is identified. An example is Item 22, wherein “Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor” are named but the corresponding sender or recipient of the records are only generally identified as “PennDOT” and “Langan Engineering and Environmental Services, Inc.” Therefore, to the extent that specific individuals are named in Items 1-2, and 5-18, those portions of such subparts are sufficiently specific only as to those named individuals. By way of further illustration of the context and framing of the request, the Items that name Commission personnel and a corresponding individual such as Councilmember Mark Squilla, but also include “and his staff,” are insufficiently specific as to records of “his staff.”

However, Items 3-4 and 22-23 do not name any individuals other than the Commission personnel. As in *Pa. State Police*, these Items do not narrow the scope of records enough to permit the City to determine which records it should search for, such that the City is required to make judgments as to whether individual records regard 76 Place or regard meetings related to 76 Place. Moreover, the City’s evidence demonstrates that Items 3-4 and 22-23 would require the search of “an estimated 536 employees” if the search were limited to Commission employees and just the other City Department employees implicated in the Request. Further, Items 3-4 and 22-23 also implicate the City’s Mayor’s Office, a Commonwealth agency and a private engineering firm. Even if the City were able to access all of the email addresses for the staff and employees, these factors expand the Request to implicate thousands of potential senders and recipients of just emails,

We note that the Request was directed to the Commission, which has its own open-records officer. <https://www.phila.gov/open-records-policy/>. There is nothing in the record indicating that the open-records officer inquired, or attempted to inquire, with the 5 named Commission employees whether they possess responsive records, or why those 5 employees are unable to perform a search for responsive records.

in addition to written correspondence. The broad scope does not allow the City to infer any specific employees likely to have responsive records, and so would require the City to search each account individually. *See, e.g., Winklosky v. Pa. Office of Admin.*, OOR Dkt. AP 2018-1438, 2018 PA O.O.R.D. LEXIS 1391 (“Seeking 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”); *Butts v. Chester Water Auth.*, OOR Dkt. AP 2023-1280, 2023 PA O.O.R.D. LEXIS 1827. While the approximately fifteen month timeframe in certain circumstances may not excessively long, in the context of a request that seeks an overly broad category of records, without sufficiently limiting the broad scope to include specific individuals, the timeframe does not save Items 1-18 and 20-23 from being insufficiently specific. *See Pa. Dep’t of Educ.* at 1126; *c.f. Legere*, 50 A.3d at 264-65 (holding that, because a request delineated “a clearly-defined universe of documents[,] there was no need to make judgment calls as to whether any records were related to the request”). Therefore, we conclude that Items 3-4 and 22-23 are insufficiently specific under Section 703 of the RTKL.

b. Item 19 is not sufficiently specific

Item 19 seeks “[r]ecords, including but not limited to, written or email communications from April 1, 2022 to July 21, 2023 regarding ‘Philadelphia Weekly Connect’ meetings about 76 Place.” Item 19 states a timeframe and the “Philadelphia Weekly Connect meetings” may possibly be considered a keyword to use for a search. However, Item 19 fails to identify a recipient, sender or potential records custodian for the broad category of records sought that could encompass any type of document. Therefore, we conclude that Item 19’s scope causes it to be insufficiently specific under *Pa. Dep’t of Educ.* *See* 119 A.3d at 1125.

c. Items 24-27 are partially specific

Items 24-27 state a timeframe of March 1, 2023 to July 21, 2023, and seek “[r]ecords, including but not limited to, written or email communications” between employees of the City Planning Commission [“CPC”], including Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor,” and Sam Rhoads and PIDC⁷ staff “regarding requests for proposals to independently evaluate 76 Place proposal,” “regarding meetings about proposals to independently evaluate 76 Place proposal,” “regarding funding of proposals to independently evaluate 76 Place proposal,” and “naming members of advisory committee created to review and evaluate the responses for proposals to independently evaluate 76 Place [p]roposal.”

Items 24-27 seek records from Commission employees and a non-City agency, PIDC. The Grundman Attestation establishes that for the respective timeframes, “Planning had at least 123 employees and [the Commission] had at least 42 employees” and “[b]ased on online sources ... PIDC has approximately 213 employees.” Further, none of the PIDC employees were identified in the Request language as a recipient, sender or custodian of a potentially responsive record. However, as discussed above, to the extent that individuals are named, such as, “Paula Brumbelow Burns, Sarah Chiu, Martine DeCamp, Ian Litwin and David Kanthor,” and “Sam Rhoads,” the Request subparts are sufficiently specific because the identification of a sender or recipient of records narrows the scope enough to permit the City to conduct a search for “written or email communications.” Accordingly, we conclude that Items 24-27 are partially specific under Section 703 of the RTKL.⁸

3. The City has not proven that records are exempt under the RTKL

⁷ Philadelphia Industrial Development Corporation. See <https://pidcphila.com/> (last accessed November 7, 2023).

⁸ Nothing in this Final Determination prevents the Requester from filing new, more detailed request with the Commission.

In the position statement, the City states the communications would have to be reviewed to determine whether exemptions under the RTKL would be applicable. The City asserts, “[a]lthough it’s not possible to identify all applicable exemptions in advance...,” it lists the exemptions that may apply as being the attorney-client privilege and the internal, predecisional communications exemption, 65 P.S. § 67.708(b)(10)(i)(A). In support of the City’s assertion that some responsive records would likely be exempt from disclosure, the Grundman Attestation states, in relevant part:

18. Based on my extensive experience with email reviews as well as responding to thousands of RTKL requests as well as my understanding of and participation in email regarding DPD and CPC activities, many exemptions would apply to the requested communications, such as attorney-client privilege—as the request seeks (among other things) communications between DPD/CPC and attorneys of the Law Department. To the extent such communications took place, they likely implicate attorney-client privilege. The Law Department acts as the general counsel for DPD.

19. The request also likely implicates internal pre-decisional deliberations, as the request specifically calls for communications between City of Philadelphia departments, and between the City and other state agencies, such as SEPTA and PennDOT.

The Garcia Attestation further states, “[b]ased on my past experience with email reviews, many exemptions would apply to the requested communications, such as attorney-client privilege and internal pre-decisional deliberations, although it’s impossible to predict all the exemptions before reviewing the communications, as each communication needs to be assessed on a document-by-document basis.”

The City’s evidence regarding any possible applicable exemption is limited to the three paragraphs above and the statements fail to contain any factual support for the exemptions asserted. If the presence of exempt information is undisputed, an affidavit may be unnecessary, *see Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2014) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record); however,

conclusory statements are insufficient to meet an agency's burden of proof under the RTKL. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records.”); *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”). Here, the City has failed to prove that any RTKL exemptions would, in fact, apply to the responsive records. Moreover, in *Pa. Dep't of Educ. v. Bagwell*, the Commonwealth Court explained:

[I]t is well-established that:

[A]n agency must raise all its challenges before the fact-finder closes the record. This will allow efficient receipt of evidence from which facts may be found to resolve the challenges. In the ordinary course of RTKL proceedings, this will occur at the appeals officer stage, and a reviewing court will defer to the findings of the appeals officer.

In addition, there is no statutory authority for a two-step process. This Court recently rejected an agency's challenge to OOR's refusal to bifurcate proceedings to resolve an issue of insufficient specificity separate from the merits. We rejected bifurcation as infeasible given the timelines under the RTKL. This Court also reasoned an agency had ample opportunity to present evidence of substantive exemptions at the appeals officer level. When the agency did not submit evidence of exemptions, and rested on its specificity argument, this Court precluded the agency from submitting evidence of any exemptions on remand.

131 A.3d 638, 660 (Pa. Commw. Ct. 2016); *see also Pa. Dep't of Conserv. & Nat. Res. v. Vitali*, No. 1013 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 479 (Pa. Commw. Ct. 2015). Although the City asserts that the responsive records may contain non-public information, like in *Bagwell*, the City failed to submit non-conclusory evidence in support of any specific argument; instead, the City relied upon its claim that the Request was insufficiently specific and attempted to reserve

its right to review the records for exemptions after denying the Request based on Section 703. Because there is no statutory mechanism enabling the OOR to bifurcate an appeal, the City was required to raise all of its arguments and support them with evidence in the normal course of the appeal. *See Roddy v. Pa. Office of the Governor*, 561 M.D. 2020, 2020 Pa. Commw. Unpub. LEXIS (Pa. Commw. Ct. 2020) (finding that the Office could not raise additional grounds for withholding records after relying about its specificity argument before the OOR); *see also Brelje v. Pa. Off. of Gov.*, OOR Dkt. AP 2022-0459, 2022 PA O.O.R.D. LEXIS 779.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the City is required to search for responsive records as set forth in the Final Determination above and provide responsive records to the Requester 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 or petition for review 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 according to court rules as per Section 1303 of the RTKL, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁹ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

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

FINAL DETERMINATION ISSUED AND MAILED: November 20, 2023

/s/ Kelly C. Isenberg

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