



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ALEXANDRA WISSER,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2023-2598
	:	
SOUDERTON AREA SCHOOL DISTRICT,	:	
Respondent	:	

FACTUAL BACKGROUND

On September 18, 2023, Alexandra Wisser (“Requester”) submitted a request (“Request”) to the Souderton Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq*, stating:

I am requesting the following public records under Pennsylvania’s Right-to-Know law regarding whether the Independence Law Center advised, drafted, or consulted with the [District] about the drafting of [District] policies or directives about transgender students, bathrooms, review of library books, display of advocacy symbols, locker rooms and interscholastic athletics/sports participation by gender.

1. Correspondence, proposals, emails, text messages (personal cell phones and district-issued cell phones), letters of engagement, scope of work agreements, invoices, fee agreements, account statements, calendar entries, recordings, created or circulated by or between any of the individuals or parties specified below from January 2023 to March 2023:
 - a. Frank Gallagher, Christopher Hey, Katie Kennedy-Reilly, Megan Zweiback, Thomas Kwiatkowski, Courtney Barbieri, Andrew Landis, Ken Keith, Donna Scheuren, Jeremy Samek, Randall Wenger or any other attorneys, staff or paralegal at Independence Law Center; Michael Geer, Thomas Shaheen, Emily Kreps, Kenneth Stracuzzi, or any other staff of Pennsylvania Family Institute or the Souderton Area School District solicitor.
2. The subject matter of the record mentioned above: the drafting of school district

policies or directives regarding transgender students, bathrooms, review of library books, display of advocacy symbols, locker rooms, and interscholastic athletics/sports participation by gender.

On October 25, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(2), the District denied the Request, arguing that the Request was insufficiently specific, 65 P.S. § 67.703.

On October 25, 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 supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 6, 2023,² the Requester submitted a position statement arguing that the Request is sufficiently specific, 65 P.S. § 67.703, and that the District failed to meet its burden that records are exempt under the attorney-client privilege.³

On November 14, 2023, the District submitted a position statement reiterating its grounds for denial. The District argues that “the Request [is] insufficiently specific due to the Request identifying an overly broad scope of types of documents and using insufficiently specific subject matters.” The District further argues that “[i]t would be overly burdensome to require the District to review thousands of emails to potentially make voluminous redactions and/or identify records exempt from production given the insufficient specificity of the Request.” Finally, the District argues that it “properly denied the Request to the extent it sought communications protected by the attorney-client privilege.” In support of its arguments, the District submitted the declaration,

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).”).

² The position statement was dated October 27, 2023.

³ Although the District does not raise this issue in its final response, the Requester addresses this issue on appeal.

made subject to penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities, of Michael Taylor (“Taylor Declaration”), Director of Business Affairs and Open Records Officer for the District.

LEGAL ANALYSIS

The District 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 District 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

The District argues that “[b]ecause of the overly broad subject matter and the extremely voluminous search results yielded, [it] was unable to reasonably conduct a search for records responsive to the Request, beyond having the District’s Network Systems Administrator run a preliminary search to obtain the total number of results yielded.” Taylor Declaration, ¶ 22.⁴ Upon conducting a search of only emails using the keywords provided in the subject matter of the Request, 3,083 email records were located. *Id.* at ¶¶ 16-17. Given the number of potentially

⁴ Under the RTKL, a sworn affidavit or statement made under the 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 the absence of any evidence that the District has acted in bad faith, “the averments in [the declaration] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

responsive records located, the District additionally claims that “[i]t would be extremely burdensome for the District to review and analyze more than three thousand emails, in addition to the various other types of documents noted in the Request, in order to determine what records were public versus exempt from production versus requiring redaction.” *Id.* at ¶ 19.

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. When 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).

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 (quoting 65 P.S. § 67.102). Second, “[t]he scope of the request must identify ‘a discrete group of documents, either by type ... or by recipient.’” *Id.* (quoting *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013)). Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126 (citing *Carey, supra*). “The timeframe prong is, however, the most fluid of the three prongs, and whether or not the request’s timeframe is narrow enough is generally dependent upon the specificity of the request’s subject matter and scope.” *Id.*

The above factors are intended “to facilitate an analysis in order to determine whether an agency can ascertain which records are being requested.... The subject matter, scope, and timeframe of a request are flexible, analytical elements, not evidentiary requirements.” *Pa. Dep’t of Health v. Shepherd*, No. 377 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 207 *6-7 (Pa. Commw. Ct. 2022), *appeal denied*, No. 334 MAL 2022, 2022 Pa. LEXIS 1862 (Pa. 2022). Finally, we must analyze the entirety of a request, as it is possible that portions of a request are

insufficiently specific, while other portions provide sufficient guidance. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010) (noting “the valid part of the request was included in a laundry list of requested materials”).

A review of the Request shows that it includes a defined subject matter relating to “the drafting of school district policies or directives regarding transgender students, bathrooms, review of library books, display of advocacy symbols, locker rooms, and interscholastic athletics/sports participation by gender.” In *Carey*, the Commonwealth Court found that a request essentially seeking all records related to an inmate transfer was sufficiently specific despite its broad scope because it related to a subject well-known to the agency and contained a limited timeframe. Thus, the instant Request includes a defined subject matter that allows the District to identify records responsive to the Request. In conducting a search for responsive records, the District used the following search terms: “transgender; library books; advocacy symbols; locker rooms; bathrooms; policies; directives; interscholastic athletics; interscholastic sports, and; gender.” Taylor Declaration, ¶ 16.

Next, the Request lists several types of records (i.e. correspondence, proposals, emails, text messages (personal cell phones and District-issued cell phones), letters of engagement, scope of work agreements, invoices, fee agreements, account statements, calendar entries and/or records), and the scope of the Request is also limited by the number of listed potential senders/receivers. While the OOR notes that not all individuals listed are District employees, the District was provided with enough information to conduct a search of its records.

Finally, the narrow time frame of three months significantly narrows the District’s search. *See Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012) (finding a request for all emails sent or received by any school board member in thirty-day period to be

sufficiently specific because of short timeframe), *appeal denied*, 54 A.3d 350 (Pa. 2012).

The crux of the District’s argument appears to be that the Request is burdensome, as it argues that it has identified 3,083 records from emails alone. In conducting a search for responsive records, the District used the following search terms: “transgender; library books; advocacy symbols; locker rooms; bathrooms; policies; directives; interscholastic athletics; interscholastic sports, and; gender.” Taylor Declaration, ¶ 16. We note that these search terms appear to unnecessarily broaden the scope of the Request beyond what is requested, but nevertheless, the fact that a request implicates voluminous records does not necessarily render it insufficiently specific. *See Pa. State sys. of Higher Educ. v. Ass’n of State Colleges and Univ. Faculties* (“*PASSHE*”), 142 A.3d 1023, 1029-30 (Pa. Commw. Ct. 2016) (finding that the request in that case sought a discrete group of documents, defined by a clear subject matter, limited subject matter and finite timeframe). Here, the Request contains a defined subject matter, has a limited scope (i.e. senders/receivers) and a short, finite time period. Accordingly, the Request is sufficiently specific to guide a search for responsive records.⁵

2. The District has not demonstrated that records are exempt under the RTKL

In its position statement, the District argues that it “would be required and/or records withheld from production whenever the email: [r]eferenced a minor child attending school in the District (requiring a redaction of the minor’s name); [w]as sent to a personal email address of a parent, guardian, or community member (requiring a redaction of the personal email address); [c]onstituted privileged communication sent to the District’s Solicitor from one of the identified administrators or School Directors; or [i]dentified a particular LGBTQ+ and/or transgender

⁵ *Cf. Wisser v. Souderton Sch. Dist.*, OOR Dkt. AP 2023-2597 (finding that the Request is insufficiently specific because it fails to include a subject matter and the keywords are not sufficient substitutes for a subject matter that would identify specific areas of District business).

student, which would be maintained as confidential and never shared with the public.” See Taylor Declaration, ¶ 20. The Taylor Declaration also states that responsive records would be exempt under the attorney-client privilege because “[c]ommunications between the District and its legal counsel are maintained confidentially, and are not shared with members of the public and/or outside entities. Taylor Declaration, ¶ 24.

Here, the District’s evidence regarding the applicability of the relevant exemptions is limited to a brief statement by its Open Records Officer (i.e. Taylor Declaration ¶ 20) and does not contain any factual information to support the asserted exemptions. 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 District asserts that the responsive records may contain non-public information, like in *Bagwell*, the District failed to submit non-conclusory evidence in support of any specific argument; instead, the District 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 of the RTKL, 65 P.S. § 67.703. Because there is no statutory mechanism enabling the OOR to bifurcate an appeal, the District was required to raise all 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 on 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.

Further, it is not clear from the record how any responsive records are exempt from disclosure, based on the subject matter. Specifically, it is unclear why communications with the Independence Law Center or Pennsylvania Family Institute, or any records concerning the drafting of policies with the Independence Law Center's input, would implicate the information identified in the Taylor Declaration. As noted above, the search terms used by the District appear to unnecessarily broaden the scope of the Request beyond what is requested. However, to the extent that the information is actually contained within responsive records, personal email addresses and the names, home addresses, and dates of birth of students are exempt under the RTKL and may be redacted. *See* 65 P.S. §§ 67.708(b)(6)(i)(A) and (b)(30).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the District is required to search for responsive records and provide responsive records to the Requester within thirty days, subject to the redactions noted above. 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 Montgomery 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.⁶ 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 OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 26, 2023

/s/ Lyle Hartranft

LYLE HARTRANFT, ESQ.
APPEALS OFFICER

Sent via e-file portal to: Alexandra Wisser; Michael Taylor, AORO; Alicia Luke, Esq.

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).