pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
EDWARD EVANS,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2024-0815**
	:	
BERKS COUNTY,	:	
Respondent	:	

FACTUAL BACKGROUND

On March 15, 2024, Edward Evans ("Requester") submitted two requests (collectively "Requests") to Berks County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

> [Request 1] Any Correspondence or Communication, such as Emails or Letters or Memos, with "Constable" or "Constables" in the Title, Subject, or Text Body for the last 2 years.
>
> [Request 2] 1. Any Policies or Procedures relating to Constables.
> 2. Any Constable Manuals.

On March 22, 2024, the County denied the Requests, arguing that the Requests were misdirected as the Court of Common Pleas oversees the constables as elected officials.

On March 25, 2024, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. The OOR invited both parties to

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

On April 9, 2024, the County submitted a position statement reiterating its grounds for denial. The County claims that Request 1 is insufficiently specific and Request 2 is misdirected as it seeks records that are not records of the County. In support of its position, the County submitted the affidavit of Stacey Ditizio, the Network Administrator for the County ("Ditizio Affidavit") and Carmen Torres, the Open Records Officer for the County ("Torres Affidavit").

LEGAL ANALYSIS

The County 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 County is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access or does not exist. 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)).

In response to a request for records, "an agency shall make a good faith effort to determine if … the agency has possession, custody or control of the identified record[.]" 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort," in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court stated:

> As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession… When records are not in an agency's physical possession, an open records officer has a duty to contact

> agents within its control, including third-party contractors ... After obtaining all potentially responsive records, an agency has the duty to review the records and assess their public nature under … the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

1. The County proved that certain records do not exist in the County's possession, custody or control

The County argues that Request 2 was misdirected as the County does not maintain or possess policies, procedures, or manuals related to constables. The County submitted a sworn affidavit from Carmen Torres, who attests that a search was conducted and that no responsive records exist in the County's possession, custody or control.[1] The Torres Affidavit states in relevant part:

> 11. In my capacity as Open Records Officer and Chief Clerk for the County, I am aware that the County does not maintain records related to Berks County constables, including any policies or procedures relating to constables or any constable manuals, as these records, if they exist, would be maintained by the Berks County Court of Common Pleas.
> 12. The Berks County Court of Common Pleas has its own Open Records Officer, Julia Bagnoni.
> 13. Ms. Bagnoni is also the District County Administrator for the Berks County Court of Common Pleas.

[1] 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 County has acted in bad faith or that the requested records exist, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)).

See Torres Affidavit ¶¶ 11-13. Based on the evidence provided, the County has met its burden of proof that it does not possess the records sought in Request 2. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

2. The County proved that Request 1 is insufficiently specific

The County argues that Request 1 is insufficiently specific because it seeks all correspondence or communications, such as emails, letters, or memos, for a two-year timeframe containing either the words "constable" or "constables" in the title, subject line, or body of the written communication. 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").

Here, Request 1 does not have a defined subject matter but, instead, uses the keywords "constable" or "constables." The scope of Request 1 is broad in that it seeks all communications; the Request does set forth some limitations in that it indicates that such communications include emails, letters, or memos. Nevertheless, the scope is also broad in that it seeks all communications sent or received by presumably every employee of the County. Request 1 has a rather lengthy but finite timeframe of two years.

Using keywords in place of a subject matter is not fatal to a request; however, the keywords provided must help to guide the agency in its search and must serve to help the agency limit the universe of potentially responsive records. *See Slaby v. City of Pittsburgh*, OOR Dkt. AP 2017-0142, 2017 PA O.O.R.D. LEXIS 238 ("A keyword list 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"); *see also Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, No. 1631 C.D. 2018, 2020 Pa. Commw. Unpub. LEXIS 8 (Pa. Commw. Ct. 2020). In *Office of the Governor v. Engelkemier*, the request sought all emails sent and received by the Governor's Chief of Staff for a five-and-a-half-month period where the requester provided a list of 109 search terms to guide the search, including names of public officials

and employees, as well as topics such as "2015-2016 budget," "Senate Republicans," "Liquor Privatization," and "Expenses." In finding the request sufficiently specific, the Court stated:

> A keyword list is not necessarily a substitute for a properly-defined subject matter(s)-- i.e., a particular transaction or activity of an agency. If terms on a list are too general or too broad, a requester runs the risk that the request will be rejected for lack of specificity, if not by the agency then by the OOR or this Court. A clearly-defined subject matter, such as 'liquor privatization,' by contrast, has a better chance of passing the specificity test.

48 A.3d 522, 531 (Pa. Commw. Ct. 2016). Therefore, the Court found that, although the keyword list was lengthy and broad, the fact that the request had a narrow timeframe and scope, along with the Office's response stating that it was producing records, meant that the request was sufficiently specific. *Id.* at 532.

The keywords for Request 1 clearly indicate that the Requester seeks all communications which relate to or reference constables. The term constable is a broader topic and all communications in the possession of the County is a very broad scope. The County produced evidence that it conducted a search for only emails which contain the keywords from March 15, 2022 to March 15, 2024 and this search returned 46,751 responsive items.[2] To conduct the search for the remaining communications, the County would be required to inquire of every County employee as to whether they have ever sent or received any communication containing the word constable over the past two years. Without the inclusion of additional limiting parameters, it is not certain that the County would be able to effectively conduct a search for all responsive records; furthermore, the County would be required to review a vast array of records that were discovered and make judgments as to which communications are responsive to Request 1. *See Pa. Dep't of Educ.*, *supra*; *see also Legere*, *supra*. Thus, Request 1 is insufficiently specific as written to meet

[2] While the County was ultimately able to conduct a partial search and identify some responsive email records, that fact alone does not make a request sufficiently specific. *See Pa. Dep't of Educ.*, 119 A.3d at 1126, n.8.

the requirements of Section 703 of the RTKL. *See* 65 P.S. § 67.703. However, nothing in this Final Determination prevents the Requester from filing new, more detailed request with the County.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the County 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 Berks 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 65 P.S. § 67.1303, but 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] 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: April 22, 2024

/s/ Catherine R. Hecker

APPEALS OFFICER
CATHERINE R. HECKER

Sent via the OOR Portal to: Edward Evans
Carmen Torres
Matthew Fessler, Esq.

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