



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**RALPH DUQUETTE,
Requester**

:

:

:

:

v.

:

Docket No: AP 2024-1535

:

**WEST SHORE SCHOOL DISTRICT,
Respondent**

:

:

FACTUAL BACKGROUND

On March 19,¹ 2024, Ralph Duquette (“Requester”) filed a request (“Request”) with the West Shore School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to “the policies and/or hirings of the [District] as noted within each individual category:”

1. Correspondence, proposals, emails, text/SMS messages (personal and [D]istrict issued cellphones, computers, tablets and other devices), letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, calendar entries, and/or recordings dated, sent or received between **September 1, 2023 thru and including March 18, 2024**, which relate to whether the Independence Law Center [(“ILC”)] advised, drafted, or consulted with members of the District’s administration (individually or collectively as groups) or the School Board (individually or collectively as groups) about the drafting of District policies or directives about LGBTQ members of the District community (hereinafter includes transgender students), about bathroom and/or locker room use by LGBTQ members of the District community, about the

¹ While the Requester argues that the Request was delivered by hand on the previous day, the District establishes that its Open Records Officer did not receive the Request until March 19, 2024. *See* 65 P.S. § 67.901 (stating that “[t]he time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency”); *see also* *Commonwealth v. Donahue*, 98 A.3d 1223, 1241 (Pa. 2014). Based upon the text of the RTKL and the precedent of *Donahue*, the District’s time for response did not start running until March 19, 2024.

review of library books, about the display of advocacy symbols (including Pride flags, pro-law enforcement flags, pro-Trump items, etc.), and about inter- and/or intra-scholastic athletics/ sports participation by gender;

2. Correspondence, proposals, emails, text/SMS messages [], letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, calendar entries, and/or recordings created or circulated by or between any of the individuals or parties specified below from **September 1, 2023 thru and including March 18, 2024**: Heidi Thomas, Dr. Todd Scholtz, Brenda Cox, Kelly Brent, Stevie Jo Boone, David Brinton, Dr. Nick Butt, Mrs. Crocenzi, Mandy Davis, Dr. Ryan Argot, Rhonda Fourhman, Dr. David Harrison, Mathew Gay, Brian Guistwhite, Dr. Tammi Jones, Christopher Kambic, Mr. Kapranos, Mrs. Moyer, Shannon Murphy, Thomas Ryan, Brett Sanders, Mr. Stoltenberg, Abigail Tierney, Adam Trone, Vangi Unti, Steven Vogelsong, Jeremy Samek, Randall Wenger, Cheryl Allen, Janice Martino-Gottshall, Michael Geer, Thomas Shaheen, Emily Kreps, Kurt Weaver, Robert Albino, Daniel Bartkowiak, Tina Brumagen, Michael Kaucher, Allison Rishel, Alexis Sneller, Kenneth Stracuzzi, Ruth Wilson, and/or and other attorneys, paralegals or staff members of [ILC], Pennsylvania Family Institute and/or PA Family Council;
3. Correspondence, proposals, emails, text/SMS messages [], letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, calendar entries, and/or recordings dated, sent or received between **January 1, 2020 thru and including March 18, 2024**, which relate to whether the America First Legal, America First Legal Foundation and/or Zimolong LLC advised, drafted, or consulted with members of the District's administration [] or the School Board [] about the drafting of District policies or directives about LGBTQ members of the District community (hereinafter includes transgender students), about bathroom and/or locker room use by LGBTQ members of the District community, about the review of library books, display of advocacy symbols (including Pride flags, pro-law enforcement flags, pro-Trump items, etc.), inter- and/or intra-scholastic athletics/sports participation by gender, and CharacterStrong and DEI activities;
4. Correspondence, proposals, emails, text/SMS messages [], letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, calendar entries, and/or recordings created or circulated by or between any of the individuals or parties specified below from **January 1, 2020 thru and including March 18, 2024**: Heidi Thomas, Dr. Todd Scholtz, Brenda Cox, Kelly Brent, Stevie Jo Boone, David Brinton, Dr. Nick Butt, Mrs. Crocenzi, Mandy Davis, Dr. Ryan Argot, Rhonda Fourhman, Dr. David Harrison, Mathew Gay, Brian Guistwhite, Dr. Tammi Jones, Christopher Kambic, Mr. Kapranos, Mrs. Moyer, Shannon Murphy, Thomas Ryan, Brett Sanders, Mr. Stoltenberg, Abigail Tierney, Adam Trone, Vangi Unti, Steven Vogelsong, Walter "Wally" Zimolong, Ian Prior, Nicholas Berry, James

Fitzpatrick, and/or other attorneys, paralegals or staff members of America First Legal, America First Legal Foundation and/or Zimolong LLC; and

5. Correspondence, proposals, emails, text/SMS messages [], letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, calendar entries, and/or recordings created or circulated by or between the West Shore School District Solicitor and: Jeremy Samek, Randall Wenger, Cheryl Allen, Janice Martino-Gottshall, Michael Geer, Thomas Shaheen, Emily Kreps, Kurt Weaver, Robert Albino, Daniel Bartkowiak, Tina Brumagen, Michael Kaucher, Allison Rishel, Alexis Sneller, Kenneth Stracuzzi, Ruth Wilson, and/or and other attorneys, paralegals or staff members of [ILC], Pennsylvania Family Institute and/or PA Family Council from **September 1, 2023 thru and including March 18, 2024**.
6. Correspondence, proposals, emails, text/SMS messages [], letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, calendar entries, meeting agendas, meeting minutes, and/or recordings (including the notice of meeting) related to the proposed Executive Session to be held on March 18, 2024. The time period for these records would be from the date of the most recent swearing in of the current School Board (December 7, 2023?) until March 18, 2024.

(emphasis in original). On April 9, 2024, after invoking a thirty-day extension to respond, *see* 65 P.S. § 67.902(b)(2), the District denied the first five Items of the Request, arguing that no records responsive to Items 1 and 3 exist in its possession, custody or control, Items 2 and 4 are insufficiently specific to enable the District to identify responsive records, *see* 65 P.S. § 67.703, and records responsive to Item 5 are protected by the attorney-client privilege and/or the attorney work-product doctrine and are not records of the District. On April 23, 2024, the District provided a calendar entry responsive to Item 6, but argued that the requested proposals, fee agreements, etc. do not exist and that the portion of the Item seeking correspondence is insufficiently specific, *see id.*

On May 13, 2024, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. Specifically, the Requester argues that the District impermissibly refashioned the Request by treating the Items separately and the District

confused the appeal deadlines by responding separately to Item 6. Further, the Requester argues that records responsive to Item 5 are records of the District and the District has not proven that records are privileged. Finally, the Requester argues that the Request is sufficiently specific, a contract with the ILC was circulated to the Board members and the District is trying to hide its relationship with the ILC. 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. *See* 65 P.S. § 67.1101(c).

On May 23, 2024, the District submitted a position statement, reiterating its arguments and also arguing that Items 1 and 3 are insufficiently specific. The District requests that, if the OOR finds that the Request or parts thereof to be sufficiently specific, the OOR provide an extension of time to review responsive records under the holding of the Commonwealth Court in *Pa. Office of the Governor v. Brelje*, 312 A.3d 928 (Pa. Commw. Ct. 2024), to redact personal identification information, *see* 65 P.S. § 67.708(b)(6), and redact or withhold material that is internal, predecisional and deliberative, *see* 65 P.S. § 67.708(b)(10)(a)(ii), privileged and/or does not comprise a record of the District. The District also requests directions regarding where to search for responsive records. In support of its arguments, the District submitted a statement made under the penalty of unsworn falsification to authorities by Ryan Argot, Director of Federal Programs and Open Records Officer (“Argot Attestation”). On the same day, the Requester submitted a position statement, which, among other things, reiterates his arguments that the Request is sufficiently specific, challenges the District’s search and the Argot Attestation and accuses the District of bad faith because it did not respond to all of his arguments. On June 3, 2024, the Requester submitted correspondence, noting that a recent OOR decision regarding officials’ use of private email accounts is relevant to the instant matter.

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. No records responsive to Items 1, 3 and parts of Items 5 and 6 exist

The District argues that no records exist that are responsive to Items 1, 3 and the parts of Items 5 and 6 seeking “proposals, letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, meeting agendas, meeting minutes, and/or recordings.” The Argot Attestation provides:

15. One of my responsibilities as an administrator is to facilitate the review and revision of Board policies. I have not had any communications from the ILC in regard to policy changed and during the time period of [Item 1], there have been no items on the Board Policy Committee agenda related to changing LGBTQIA+ related policies.
16. Additionally, in an attempt to provide the Requester with responsive information, I reviewed searches by our Technology Department to see if there were any emails from ILC within the District’s email archive. The only documents found are from August 2023, which predates [Item 1].
17. Similarly, based on other RTK requests[,] I had already asked Board members if they had any communication the ILC documented in the personal electronic communications [sic] and have been told that they did not.

18. As a result of this investigation and my own personal work on Board Policy, I determined that [ILC] did not advise, draft, or consult with the Administration or Board during the timeframe and “about the drafting of District policies or directives” for the topics listed in [Item] #1.
19. Moreover, the District has not entered into any contracts (including letters of engagement, scope of work agreements, invoices, fee agreements, account statements) with the [ILC].
- ...
28. ... I have not had any communications from [] America First Legal, America First Legal Foundation, and/or Zimolong in regard to policy changes and during the time period of [Item 3], there have been no items on the Board Policy Committee agenda related to changing LGBTQIA+ related policies.
29. As a result of this investigation, I determined that the America First Legal, America First Legal Foundation and/or Zimolong LLC did not draft [] District policies or directives[] about LGBTQIA+ members of the District community.
30. Moreover, the District has not entered into any contracts (including letters of engagement, scope of work agreements, invoices, fee agreements, account statements) with [] America First Legal, America First Legal Foundation and/or Zimolong LLC.
- ...
50. [Regarding Item 6, o]n March 18, 2024, the Board, Superintendent Stoltz and former solicitor Brooke Say hosted attorney Jeremy Samek from the [ILC] for a private informational session.
51. This session was scheduled following an invitation by Board President, Mrs. Heidi Thomas.
52. ... I contacted the District Superintendent, who attended the April 18,² 2024 meeting, and requested that he provide me with any proposals, letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, meeting agendas, meeting minutes, and/or recordings.
53. The Superintendent confirmed that no responsive [records] existed.

“The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

An attestation by the individual who searched for responsive records is sufficient to meet an

² The OOR notes the various references to March 18 and April 18. However, the Argot Attestation appears to refer to the same meeting.

agency's burden of proving the nonexistence of a record. *Id.*; see also *Pa. Dep't of Health v. Mahon*, 283 A.3d 929, 936 (holding that, when there is evidence that a record does not exist, “[i]t is questionable to what degree additional detail and explanation are necessary....”); *Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry); but see *Mack v. Pa. Dep't of Corr.*, No. 699 C.D. 2022, 2023 Pa. Commw. Unpub. LEXIS 393, *5 (finding that the agency failed to prove that no other records exist where the open records officer's affidavit provided only that she contacted an individual who “would likely have possess[ed] such records if they existed” and that individual reported that no records existed).

The Argot Attestation affirms that there are no records responsive to Items 1, 3, and part of 6. Additionally, Item 5 seeks the same types of records as Items 1 and 3, and the Argot Attestation provides that the District has not entered into any contracts with the ILC, America First Legal, America First Legal Foundation and/or Zimolong LLC. In the absence of any evidence that the District has acted in bad faith,³ “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Accordingly, the District has met its burden of proving that no records responsive to Items 1, 3 and parts of Items 5 and 6 exist in its possession, custody, or control. See *Hodges*, 29 A.3d at 1192.

³ The Requester does ask the OOR to make a finding of bad faith. Section 1304(a) of the RTKL states that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith...” 65 P.S. § 67.1304(a). Similarly, Section 1305(a) authorizes a court to “impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.” 65 P.S. § 67.1305; see also *Off. of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017) (“An example of bad faith is a local agency's failure to comply with the mandate of Section 901 of the RTKL, which requires that a local agency make a good faith search for information responsive to a request and determination of whether that information is public.”). However, the record does not support a finding of bad faith, and the OOR declines to make such a finding.

2. Items 2, 4 and parts of Items 5 and 6 are insufficiently specific

The District argues that Items 2, 4 and the parts of Items 5 and 6 seeking communications, emails and text messages are 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.” 65 P.S. § 67.703. When determining whether a particular request is sufficiently specific, the OOR undertakes a nonexclusive, multi-factor test, considering “the extent to which the request specifies subject matter, the extent to which it defines the scope of the records it seeks, and the extent to which it limits the timeframe of the request.” *Pa. Office of the Governor v. Brelje*, 312 A.3d 928, 937 (Pa. Commw. Ct. 2024) (citing *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015)). The test is not “a conjunctive, bright-line rule requiring each ‘element’ of the test to be satisfied; rather, it [is] a flexible approach” consistent with relevant caselaw. *Id.*

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pittsburgh Post-Gazette*, 119 A.3d 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).

Here, the Request generally seeks records related to “policies and/or hiring” of the District. Items 2, 4 and 5 do not further define a subject matter and Item 6 seeks records related to a proposed executive session. In terms of scope, all of the Items seek 12 record types; Item 2 identifies 42 individuals, Item 4 names 30 individuals, Item 5 lists 16 individuals and Item 6 does not specify.⁴ The timeframes of the Items vary, with Items 2 and 5 implicating about six-and-a-half months, Item 4 denoting a timeframe of over four years and Item 6 being limited to a little over three months.

Recently, in *Duquette v. Big Spring School District*, OOR Dkt. 2024-0969, 2024 PA O.O.R.D. LEXIS 1065, the OOR found that parts of a very similar request were insufficiently specific. The OOR rejected the Requester’s argument that the preamble to the request, indicating that it sought records related to “the policies and/or hirings of the [agency]”, defined a subject matter, holding that such topics are,

without further explanation overly broad and vague, especially when one considers the timeframes and scope of each of the [r]equest [i]tems at issue. In effect, there is essentially no subject matter identified, nor are there any defined keywords through which the [agency] could narrow its search for responsive records.

Id. at *12; citing *Off. of the Governor v. Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016) (holding that “although [the] keyword list is lengthy and, in some respects broad, in consideration of the narrow timeframe and scope of the [request] . . . [the] request, on balance, meets the specificity requirement”); *cf. Montgomery Cnty. v. Iverson*, 50 A.3d 281, (Pa. Commw. Ct. 2012) (finding that a request with no timeframe, a broad scope, and some “incredibly broad” keywords was insufficiently specific); and *Methacton Sch. Dist. v. Off. of Open Records*,

⁴ Although, as set forth above, records do not exist for 10 types of records responsive to Items 5 and 6.

250 C.D. 2021, 2021 Pa. Commw. Unpub. LEXIS (Pa. Commw. Ct. 2021) (“[t]he absence of a stated subject matter is but one factor to consider in determining whether [a] request is sufficiently specific” and “[a] requester’s failure to identify a subject matter may be accorded more or less weight depending upon other factors.”).

In *Duquette*, the OOR proceeded to discuss *Mollick v. Township of Worcester*, where the Commonwealth Court concluded that a request for “all emails between the Supervisors regarding any Township business” and “all emails between the Supervisors and the Township employees regarding any Township business and/or activities for the past one and five years” was insufficiently specific because it failed to specify an agency transaction or activity. 32 A.3d 859, 871 (Pa. Commw. Ct. 2011). Subsequent to that decision, however, the Court found that a request for all emails sent to or received by nine school board members, the school’s superintendent and general school board address, over a one-month period, was sufficiently specific because of its narrow scope and timeframe, even though it did not specify a subject matter. *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012), *appeal denied*, 54 A.3d 350 (Pa. 2012). The *Baxter* Court distinguished *Mollick*, stating that the request in *Baxter* “was not for years but for 30 days” and “the request was obviously sufficiently specific because the [agency] already identified potential records included within the request.” *Id.*

Turning to the instant Request, it is not clear exactly what Items 2, 4 and the portion of Item 5 relating to correspondence seek, as they do not specify a subject matter beyond the general “policies and/or hiring” that was already rejected in *Duquette*. Items 2 and 4 identify District employees, but also identify a number of individuals who are not affiliated with the District. Item 5 seeks records exchanged between the individual who served as the District’s Solicitor at the time

and individuals who are not affiliated with the District; it identifies no District employees.⁵

While Item 6 has a shorter timeframe, it seeks records from unspecified individuals related to a proposed executive session. As established by the Argot Attestation, the session that Item 6 appears to reference was a private informational session hosted by the District's Superintendent and its former Solicitor. Since there are no "proposals, letters of engagement, contracts, scope of work agreements, invoices, fee agreements, account statements, meeting agendas, meeting minutes, and/or recordings," it is not evident what correspondence would be responsive to the Item, as it does not identify senders or recipients.

In sum, as Items 2, 4 and the parts of Items 5 and 6 related to communications do not seek a clearly defined universe of responsive records and identifying responsive records would require the District to review potentially responsive records and make judgment calls as to their actual responsiveness, the Items are insufficiently specific.⁶ *See* 65 P.S. § 67.703; *Pa. Dep't of Env't Prot. v. Legere*, 50 A.3d 260, 264-265 (Pa. Commw. Ct. 2012) (finding that a request that would require an agency to review all potentially responsive files and "make judgments as to the relation of the documents to the specific request" would be insufficiently specific); *see also City of Phila. Off. of the Dist. Att'y v. Bagwell*, 155 A.3d 1119, 1143 (Pa. Commw. Ct. 2017) (finding that an open-ended request that fails to give an agency guidance in its search for the information sought may be so burdensome that the request will be found overbroad under the RTKL).

However, nothing in this Final Determination prevents the Requester from filing a more specific RTKL request, and if necessary, filing an appeal pursuant to the requirements of 65 P.S.

⁵ The Argot Attestation explains that: "I denied [Item 5] because any communications between the [former] solicitor and other agencies on [the District's] behalf would be [privileged, and] communication between [the former] solicitor and outside agencies for the solicitor's own business or on behalf of other districts would not ... reflect a transaction or activity of the District." Argot Attestation at ¶ 45; *see* 65 P.S. § 67.102 (defining "record").

⁶ As the District has proven that the portion of Item 5 seeking communications is insufficiently specific, the OOR need not address whether any potentially responsive records are privileged.

§ 67.1101(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the District 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 York 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, 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.⁷ 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>.

FINAL DETERMINATION ISSUED AND MAILED: June 10, 2024

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Delivered via E-File Portal to: Ralph Duquette, Ryan Argot and Christopher Voltz, Esq.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).