pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
TIMOTHY DALY,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2024-2459**
	:	
BUCKS COUNTY	:	
DISTRICT ATTORNEY'S OFFICE,	:	
Respondent	:	

FACTUAL BACKGROUND

On August 20, 2024, Timothy Daly ("Requester") submitted a request ("Request") to the Bucks County District Attorney's Office ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking "copies of the Statement of Financial Interests form submitted by Jennifer Schorn Kroiss for the years 2020 through 2024."

On that same date, an out-of-office email reply was sent, indicating that the Office was invoking a thirty-day extension during which to respond, 65 P.S. § 67.902(b). On September 19, 2024, the Office denied the Request, claiming that the records sought were exempt from public access because such records contain personal identification information, which is protected from disclosure under Section 708(b)(6)(i)(A) of the RTKL.

On September 20, 2024, the Requester sent a follow-up email to the Office contending, among other things, that the requested forms were public records required by the Pennsylvania Ethics Act.

On September 24, 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 Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 2, 2024, the Office submitted a position statement asserting that (1) the appeal was insufficient and did not meet the requirements of Section 1101(a)(1) of the RTKL, 65 P.S. § 67.1101(a)(1), and that (2) the records sought are exempt under the RTKL because they contain exempt personal identification information, including personal financial information, 65 P.S. § 67.708(b)(6)(i)(A). The Office contends that the Pennsylvania State Ethics Commission would be the proper agency from which to obtain the requested information.

On that same date, the Requester also filed a submission in support of his appeal, reiterating his argument that the records requested are public under the Ethics Act and subject to release, and further explaining his reasons for making the underlying Request. The Requester also asks that the OOR find that the Office acted in bad faith.

On October 18, 2024, the OOR requested that the Office address the Requester's argument that the Office acted in bad faith. The Office filed a supplemental submission, made subject to 18 Pa.C.S. § 4904, on October 24, 2024, in response to the Requester's arguments.

LEGAL ANALYSIS

The Office 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 Office 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 appeal is sufficient under Section 1101(a) of the RTKL.

As part of its response to this appeal, the Office contends that the Requester failed to properly challenge the Office's denial of the Request as is required by Section 1101(a) of the RTKL. 65 P.S. § 67.1101(a)(1). That Section requires requesters to "address any grounds stated by the agency for ... denying the request." *Id.; see also Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) ("[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency's stated reasons for denying a RTKL request"). Pursuant to this Section, the Commonwealth Court has held that a requester must "state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access." *Saunders v. Pa. Dep't of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012).

Here, when the Requester submitted his appeal, he asserted that the Office "denied [R]equest with non-applicable exemptions given that all public officials are required to file and release [the Statement of Financial Interest forms] upon demand per Pennsylvania state law." In addition, the Requester used the OOR's standard appeal form. Importantly, the appeal form states that the Requester is "appealing the Agency's denial ... because the requested records are public

records in the possession, custody or control of the Agency: the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation...." *See Barnett v. Pa. Dep't of Pub. Welfare*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). The OOR has consistently found that this statement is sufficient to satisfy a requester's burden under Section 1101(a) of the RTKL. 65 P.S. § 67.1101(a)(1); *see also, e.g., Phillips and WHYY v. Pa. Dep't of Envtl. Prot.*, OOR Dkt. AP 2016-1782, 2017 PA O.O.R.D. LEXIS 222; *Tomassi v. Municipality of Mt. Lebanon*, OOR Dkt. AP 2017-0644, 2017 O.O.R.D. LEXIS 896, *Brock v. Bucks County Intermediate Unit # 22*, OOR Dkt. AP 2021-2597, 2022 PA O.O.R.D. LEXIS 469. We see no reason to conclude anything different in this case. Accordingly, given the language on the appeal form, including the Requester's assertions, we find the Requester has sufficiently challenged the Office's withholding of the records responsive to the Request.

2. Statements of Financial Interests are public records accessible under the RTKL.

The Office contends that the requested records are exempt from public access because they contain personal identification information, including personal financial information, which is exempt under Section 708(b)(6)(i)(A) of the RTKL.

In the appeal record before us, there is nothing suggesting that the Requester seeks a record other than Statements of Financial Interests filed pursuant to the Ethics Act.[1] Indeed, the Requester

[1] Section 1104(a) of the Ethics Act provides that:

> Each public official of the Commonwealth shall file a statement of financial interests for the preceding calendar year with the [State Ethics Commission] no later than May 1 of each year that he holds such a position and of the year after he leaves such a position. Each public employee and public official of the Commonwealth shall file a statement of financial interests for the preceding calendar year with the department, agency, body or bureau in which he is employed or to which he is appointed or elected no later than May 1 of each year that he holds such a position and of the year after he leaves such a position. Any other public employee or public official shall file a statement of financial interests with the governing authority of the political subdivision by which he is employed or within which he is appointed or elected no later than May 1 of each year that he holds such a position and of the year after he leaves such a position....

65 Pa.C.S. § 1104(a).

cites to the Ethics Act in support of his appeal. Although the Office contends that the Requester did not mention the Ethics Act until sending an email in follow-up to his Request, this assertion has no bearing on our decision. The Office has not argued that the Request was insufficiently specific; nor does the record before us support a conclusion that the Office did not know what records were being sought by the Requester. The Office cited to the RTKL's personal identification exemption as a basis for withholding information it asserted was contained in the responsive records.

Statements of Financial Interests created pursuant to the Ethics Act are public records subject to disclosure in their entirety. *Guydish v. Crestwood Sch. Dist.*, OOR Dkt. AP 2019-0643, 2019 PA O.O.R.D. LEXIS 458. The Ethics Act provides that "[a]ll statements of financial interests ... shall be made available for public inspection and copying..." 65 Pa.C.S. § 1104(e). The Ethics Act further provides that, in the event of a conflict with another statute, "the provisions of [the Ethics Act] shall control." *See* 65 Pa.C.S. § 1112; *see also* 65 P.S. § 67.3101.1 ("If the provisions of [the RTKL] regarding access to records conflict with any other ... state law, the provisions of [the RTKL] shall not apply"). Thus, the Ethics Act unconditionally establishes the public nature of Statements of Financial Interests and the RTKL's exemptions do not apply. Statements of Financial Interests filed pursuant to the Ethics Act are subject to public access in their entirety, without redaction. *McPherson v. City of Scranton*, OOR Dkt. AP 2023-0784, 2023 PA O.O.R.D. LEXIS 927, *Baravordeh v. Folcroft Borough*, OOR Dkt. AP 2023-1078, 2023 PA O.O.R.D. LEXIS 1385; *Hughes v. Exeter Twp.*, OOR Dkt. AP 2019-1424, 2019 PA O.O.R.D. LEXIS 1403; *Guydish, supra.* In addition, there is nothing in the Ethics Act which prevents an individual from obtaining a copy of such records through a request under the RTKL.

In its submission, the Office suggests that it only possesses portions of the records responsive to the Request; however, it does not offer further explanation of the records it has. Regardless, per this Final Determination, the Office shall produce the responsive records, in the format that they exist, which are within its possession, custody or control. In addition, we note that regulations promulgated pursuant to the Public Official and Employee Ethics Act require statements of financial interest to be kept on file for five years. *See* 51 Pa. Code § 19.4; *see also* 65 Pa.C.S. § 1107(9) (obligating the State Ethics Commission to advise local agencies to preserve such statements for five years from the date of receipt).

3. The Office may have acted in bad faith.

The Requester argues that the Office has acted in bad faith due to the Office's Open Records Officer's alleged "professional misconduct of knowingly violating the RTKL on multiple levels."

Although the OOR may make a finding of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting 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. § 67.1305(a) ("A court may impose a civil penalty of not more than $ 1,500 if an agency denied access to a public record in bad faith"). "In the RTKL context, "bad faith" does not require a showing of fraud or corruption. The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the level of bad faith." *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161, 1170 (Pa. Commw. 2018). A requester bears the burden of proving an agency committed bad faith. *Id.* A finding of bad faith is typically reserved only for an egregious or blatant violation of the RTKL.

Among other things, the Requester asserts that the Office acted in bad faith when it invoked an extension of time to respond to the Request via an automated email response without first having reviewed the Request or making any good faith effort to locate responsive records. Under Section 902 of the RTKL, an agency is permitted to extend the time in which to respond to a request. 65 P.S. § 67.902. The reasons an agency may extend its response period are specifically set forth in Section 902(a) of the RTKL. 65 P.S. § 67.902(a). In this instance, upon the Requester's submission of the Request to the Office, the Office's automatic email response that was sent to the Requester identified four reasons under Section 902 of the RTKL for which the Office was invoking a thirty-day extension of time to respond. The four subsections under Section 902 that were cited in the Office's automatic response were Section 902(a)(1), which permits an agency to take an extension of time when the request requires redaction, Section 902(a)(2), which permits an extension when the "request for access requires the retrieval of a record stored in a remote location, Section 902(a)(4), which permits an extension when a legal review is necessary, and Section 902(a)(7), which permits an extension when "the extent or nature of the request precludes a response within the required time." *See* 65 P.S. §§ 67.902(a)(1), (2), (4) and (7). Despite the Office's citation to these reasons, it is clear upon a reading of the express language of Section 902(a) that Section 902(a) contemplates that an agency's open records officer will review a submitted request in order to "determine" the applicability of the listed reasons in that Section. *See* 65 P.S. §§ 67.902(a) (*Upon receipt* of a written request for access, the open-records officer for an agency *shall determine* if one of the following applies...) (emphasis added). By using the automatic response to respond to RTKL requests and automatically invoke an extension, the Office clearly did not review any requests submitted, including the Request here, prior to determining whether one of the cited factors in Section 902(a) applies.

In the Office's supplemental submission, the Office's Open Records Officer indicates that he was out-of-state on vacation when the Office received the Requester's Request. Office Supp. Sub. ¶ 4. He further attests that he is the only one with access to the Office's email account where Right-to-Know requests are submitted and the only individual that reviews such requests. *Id.* at ¶ 3. The Open Records Officer affirms that:

> The out of office message was implemented while I was on vacation as I would have no means of conducting a legal review of the request, the potential redactions, and/or determining the location of the records requested. Thus, to avoid any request from being deemed denied for a complete failure to answer, I used the out of office message to invoke the extension so that I could conduct a proper review of the request upon my return. Through an inadvertent error in setting the out of office message, I mistakenly included the date of "11/13/23," which related to a separate vacation from the year prior.

Id. at ¶ 4.

The evidence before us substantiates that the Office chose to invoke an extension of time via an automatic email response due to the temporary absence of its Open Records Officer, who was on vacation. We would caution the Office about utilizing an automatic email response to invoke an extension under Section 902 before actually reviewing a submitted request, as such action, as discussed above, does not comport with the express language of Section 902(a). Nevertheless, we also are unable to conclude that the Office's actions in this instance rise to the level of bad faith. A finding of bad faith is typically reserved only for an egregious or blatant violation of the RTKL. The Office's purpose in setting up its automatic email response was well-intentioned, *i.e.* to avoid deemed denials of requests, and was not designed to prevent the Requester, or any other individuals submitting requests during the temporary time frame, from accessing records requested. Although the better practice for the Office would have been to have an alternative open records officer on duty while its primary Open Records Officer was out of the office, the failure to do so in this matter did not amount to an act in bad faith.

Next, the Requester argues that the Office's denial of his Request was outright frivolous. As mentioned in the preceding section of this Final Determination, statements of financial interest are public records under the Ethics Act, 65 Pa.C.S. § 1104(e). In addition, the RTKL is clear that it does not "supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree," 65 P.S. § 67.306. And, "if the provisions of [the Ethics Act] conflict with any other statute ..., the provisions of [the Ethics Act] shall control." 65 Pa.C.S. § 1112. Moreover, the OOR has repeatedly found that Statements of Financial Interests are subject to release under the RTKL. *John v. Milbourne Borough,* OOR Dkt. AP 2024-2434, 2024 PA O.O.R.D. LEXIS 2294; *Curry and FOIA Buddy v. City of Pottsville*, OOR Dkt. AP 2024-1585, 2024 PA O.O.R.D. LEXIS 1607, *Monaghan v. Montgomery Borough,* OOR Dkt. AP 2023-2369; 2023 PA O.O.R.D. LEXIS 2767; *Mahon and Spotlight PA v. Somerset County,* OOR Dkt. AP 2023-1939, 2023 PA O.O.R.D. LEXIS 2139; *Baravordeh, supra.*; *McPherson, supra.*; and *Guydish, supra.*

Given the express language of the Ethics Act and the RTKL, as well as the expansive number of Final Determinations issued by the OOR on this particular issue, it is possible that the Office's denial of access to the requested Statements of Financial Interests could be considered an act of bad faith as the Office's denial is based on an unreasonable interpretation of the law.

In its appeal submission, the Office seems to take issue with the fact that the Requester did not specifically identify the "Ethics Act" in his Request or appeal. Although the Request did not explicitly mention the Ethics Act, such was not required by the Requester and the Office's own submission on appeal clearly demonstrates that it understood that the Ethics Act, along with the RTKL, are the relevant laws at issue. Nevertheless, despite the clear language of those laws, the Office again reaffirmed on appeal its denial of the requested records, which are explicitly public

records. The failure to furnish these records now may subject the Office to sanctions under the RTKL. 65 P.S. §§ 67.1304, 1305. Any such decision, however, would be made by a court, not the OOR.

Lastly, to the extent that the Requester asserts any other arguments that the Office has otherwise acted in bad faith, we find that such claims are without merit.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Office is required to provide access to all responsive records, without redactions, 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 to the Bucks 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.[2] 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: November 14, 2024

/s/ Angela Edris

ANGELA EDRIS
APPEALS OFFICER

Sent via the OOR Appeals Portal to: Timothy Daly;
Timothy Lutes, AORO

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