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On December 10, 2020, the Office denied the Request, arguing that the Request is insufficiently specific, 65 P.S. § 67.703.

On January 4, 2021, the Requester appealed to the 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 January 14, 2021, the Office submitted a position statement reiterating its grounds for denial, along with an affidavit made under the penalty of perjury from Steven Latzer, Deputy District Attorney. The Office claims that the Request is overly broad and that it fails to state a specific subject matter.

Also, on January 14, 2021, the Requester submitted a position statement arguing that he filed a similar request in 2019 and this is a continuation of that Request. *See Hatziefstathiou v. Montgomery County District Attorney's Office*, OOR Dkt. AP 2019-0774, 2019 PA O.O.R.D. LEXIS 705 (“*Hatziefstathiou I*”).

### **LEGAL ANALYSIS**

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the

request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 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). “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).

The Office argues that the Request is insufficiently specific because it fails to provide a sufficiently narrow subject matter and the scope is too broad in that the Request fails to identify a transaction or activity of the Office. 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 260, 265 (Pa. Commw. Ct. 2012) (*en banc*).

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.*

The Request seeks electronic communications sent to or from a member of the Office containing a list of nine keywords for June 1, 2020 through the date of the Request, December 7, 2020. The fact that a request uses keywords in place of a subject matter is not necessarily fatal to the request, but broad keywords alone do not provide a sufficient limiting context. *See Montgomery County v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct 2012) (“incredibly broad” search terms do not provide a limiting subject matter); *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”). A broad keyword search may still be sufficiently specific where a request specifies senders or recipients of emails. *See Office 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. Iverson*, 50 A.3d 281 (finding that a request with no timeframe, a broad scope, and some “incredibly broad” keywords was insufficiently specific).

The OOR has previously found that a request for a keyword search where the keywords do not reasonably involve some business of an agency, over the course of nineteen months, was insufficiently specific. *Palochko v. Executive Education Academy Charter Sch.*, OOR Dkt. AP 2018-1397, 2018 PA O.O.R.D. LEXIS 1220. The OOR has also held that a request for a keyword search over the course of two years is insufficiently specific where the keywords consisted only of four names. *LeConte-Spink v. Butler County*, OOR Dkt. AP 2018-1268, 2018 PA O.O.R.D. LEXIS 1018. However, the OOR has found keyword lists specific where they relate to well-known matters of agency business and the request identifies senders and recipients. *See Benzing v. City of Pittsburgh*, OOR Dkt. AP 2018-0188, 2018 PA O.O.R.D. LEXIS 383; *Winklosky v. Pa. Office of Admin.*, OOR Dkt. AP 2018-1438, 2018 PA O.O.R.D. LEXIS 1391; *Seybert v. West Chester Univ. of Pa.*, OOR Dkt. AP 2018-2102, 2018 PA O.O.R.D. LEXIS \_\_\_\_.

Here, the Request provides a list of names as keyword subjects and may include the general subject of William H. Cosby, but, again, it does not narrow the search field by identifying a specific transaction or activity of the Office to which the electronic correspondence would pertain. In addition, while the introductory language of the Request indicates that emails are being sought, the remainder of the Request seeks a broader category of “all electronic correspondences,” which may implicate text and other electronic messages. Further, the Requester neither identifies the Office sender or recipient (“a member of the Office”) nor the corresponding senders or recipients. Finally, the records are sought for a limited timeframe of six month.

In *Hatziefstathiou I*, the OOR found that the request for all electronic correspondence for a five year period to or from members of the Office containing keywords that identified seventeen individuals was insufficiently specific because it did not contain a well-defined subject matter, limited scope for a lengthy timeframe. In the same appeal, the OOR found that a request for

electronic correspondence with keywords of Bill Cosby, Cosby or William H. Cosby for four specific days was sufficiently specific because, although the keywords are in some respects broad, the shorter timeframes and the Office's familiarity with the subject enables the Office to further narrow the scope and meets the specificity requirements. Here, regarding this Request, the Office states that:

Seven out of nine keywords contained in the request do not relate to well-known matters of Agency business; with the exception of "Bill Cosby" and "Cosby," the remaining keywords do not involve one particular subject or well-known matters of Agency business. Activity related to the "Supreme Court," for instance, is integral to the general business of the Agency and employees are likely to be involved with matters related to the Supreme Court on any given day.

Here, the shortened timeframe does not overcome the broad keywords ("Supreme Court", "Justice Saylor", "Justice Dougherty", "Justice Wecht", "Justice Baer", "Justice Donohue" or "Andrew Wyatt"), along with the vague subject matter and thus, does not enable the Office to conduct a search for responsive records related to those keywords. However, the Office states above that the keywords "Cosby" and "Bill Cosby" relate to well-known matters. Like *Hatziefstathiou I*, the shortened timeframe and the Office's familiarity with the subject of "Cosby" and "Bill Cosby" enables it to conduct a search for those responsive records.

As the Office has not raised any additional reasons for withholding these records under the RTKL, the records are subject to public access. *See* 65 P.S. § 67.305(a).

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Office is required to records responsive to the portion of the Request citing "Cosby" and "Bill Cosby" as set forth in this Final Determination, 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 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.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: February 3, 2021**

*/s/ Jill S. Wolfe*

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent to: Nik Hatziefstathiou (via email only);  
Steven Latzer, Esq. (via email only)

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<sup>1</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).