



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
TODD SHEPHERD AND THE	:	
DELAWARE VALLEY JOURNAL,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2020-1390
	:	
PENNSYLVANIA DEPARTMENT OF	:	
HEALTH,	:	
Respondent	:	

INTRODUCTION

Todd Shepherd, a reporter with the Delaware Valley Journal (collectively, the “Requester”), submitted a request (“Request”) to the Pennsylvania Department of Health (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking emails to and from two identified individuals for a period of three days. The Department denied the Request, arguing, in part, that the Request is insufficiently specific. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **dismissed as moot in part**, and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On July 7, 2020, the Request was filed, seeking “[a]ll inbound and outbound emails for Director Rachel Levine and Executive Deputy Secretary Sarah Boateng for and including the days

of March 16-18, 2020.” On July 24, 2020, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the Department denied the Request, arguing that the Request is insufficiently specific, 65 P.S. § 67.703. The Department further asserted that “[t]o the extent that the Department may be in possession of records responsive to [the R]equest,” such records are exempt from public access because they include individually identifiable health information, 65 P.S. § 67.708(b)(5), exempt personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), and records related to a noncriminal investigation, 65 P.S. § 67.708(b)(17). The Department further contends that responsive records are confidential under the Disease Prevention and Control Law of 1955, 53 P.S. § 521.1 *et seq* (“DPCL”) and its related regulations. Lastly, the Department asserted that the Requester has previously requested the same records. *See* 65 P.S. § 67.506(a)(1).

On August 14, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 20, 2021, the Department submitted a position statement, arguing that the Request is insufficiently specific, 65 P.S. § 67.703, and that “many of the records are exempt under the [DPCL].”² The Department also states that it provided the Requester with certain responsive records. The Requester did not submit additional evidence on appeal.

¹ In the appeal, the Requester granted the OOR an additional thirty days to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1).

² On appeal, the Department does not argue that the records are exempt from public access because they include individually identifiable health information, 65 P.S. § 67.708(b)(5), exempt personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), or records related to a noncriminal investigation, 65 P.S. § 67.708(b)(17). Additionally, the Department does not assert that the Requester made previous RTKL requests for the same records. Accordingly, the Department has abandoned these arguments on appeal, and they will not be addressed in this Final Determination.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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)).

1. The Department provided responsive records during the appeal

During the appeal, the Department provided records that are responsive to the Request. As such, the appeal as to the records provided on appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Request is sufficiently specific

The Department argues that the Request is insufficiently specific pursuant to Section 703 of the RTKL, which provides 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 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 at 824).

In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dept 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). First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep’t of Educ.*, 119 A.3d at 1125. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *Id.* Third, “[t]he timeframe of the request should identify a finite period of time for which the 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.* None of these factors are dispositive, instead, the Commonwealth Court has emphasized the importance of a “flexible, cases by case, contextual application of the test.” *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Commw. Ct. 2017).

Additionally, while burden may be a factor in determining that a request is insufficiently specific, the fact that a request is burdensome does not, in and of itself, deem it overbroad. *See Pa. Dep’t of Envtl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (“The fact that a request is burdensome does not deem it overbroad”); *see also Ruggiero v. Lackawanna County*, OOR Dkt. AP 2014-0043, 2014 PA O.O.R.D. LEXIS 157 (“[A] request involving the detailed review of voluminous documents does not relieve the agency of its requirements to presume the records are open and available and respond in accordance with the RTKL.”).

In this instance, the Department asserts that the Request is not sufficiently specific because it “clearly fails to provide any subject matter by which the Department may narrow its search for records....” *Pa. Dep’t of Educ.*, 119 A.3d at 1125. However, the Request satisfies the second prong, as it is limited by recipient or sender, namely, Dr. Levine and Ms. Boateng, and also

identifies documents by type (emails). *See id.* Finally, the Request provides a narrow timeframe of three days. *See id.* at 1126.

In *Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, 2020 Pa. Commw. Unpub. LEXIS 8, *1 (Pa. Commw. Ct. 2020), the requester sought, among other things:

A copy of all correspondence sent and received (including text messages and written memos) by Acting Department Secretary Dr. Rachel Levine, Communications Director April Hutcheson, Press Secretary Nate Wardle, and Nursing Home Division Director Susan Williamson, between April 1, 2018 to present [(May 18, 2018)].

Id. at *2-4. The OOR, relying on *Easton Area School District v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012), concluded that while the *Keystone* request lacked a subject matter, it was limited in scope and time, and therefore was sufficiently specific. *Id.* The Commonwealth Court reversed the OOR's decision, holding that unlike *Baxter*, the *Keystone* request sought all correspondence sent and received by four individuals over a 48-day timeframe, and was therefore insufficiently specific. *Id.* at *53-54. The Court also noted that "the secretary of a state agency is likely to send and receive more communications in a 30-day time period than a member of a local school board and that these communications are likely to contain exempt information." *Id.* at *55.

The within matter is distinguishable from the facts set forth in *Keystone*. Specifically, in *Keystone*, the request sought records of four identified individuals, while the instant Request seeks emails to and from two identified individuals. *Id.* at *53-54. Moreover, the Request is for a period of three days, whereas *Keystone* was for a one-month period. *Id.* at *55. Additionally, the Request is distinguished by the fact that it seeks only "emails," rather than "all correspondence," as sought in *Keystone*.

Given that the Request seeks emails sent or received by two individuals over three days, the fact that no subject matter is articulated is not fatal to the specificity of the Request.

Accordingly, the Request is sufficiently specific.³ See *Nichilo v. Radnor Twp.*, OOR Dkt. AP 2020-0893, 2020 PA O.O.R.D. LEXIS 1159; *Commonwealth v. Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016) (finding that a request with a broad subject matter requires a narrow scope and timeframe that render the request specific); *but see Shepherd v. Pa. Dep't of Health*, OOR Dkt. AP 2020-2730, 2021 PA O.O.R.D. LEXIS 188 (finding that a RTKL request seeking emails amongst five individuals, including two organizations, with a timeframe of four months and no subject matter, is insufficiently specific).

3. The Department has not demonstrated that the responsive records are confidential under the DPCL

The Department maintains in its unsworn position statement that “many of the [responsive] records are exempt under the [DPCL].” Under the RTKL, a sworn affidavit is generally competent evidence to sustain an agency’s burden of proof. 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). However, unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL. See *Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City’s counsel is a legal brief, it cannot be ... evidence at all”). Here, other than a single conclusory statement, the Department has not presented any

³ The Department maintains that because the Request is not sufficiently specific, it “did not catalog the exemptions it applied nor did it have a duty to do so.” However, as the OOR is under strict timeframes to issue its final determinations, an agency must assert any relevant exemptions concurrent with its specificity argument. See *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638 (Pa. Commw. Ct. 2016); see also *Tepper v. County of Berks*, OOR Dkt. AP 2017-1010, 2017 PA O.O.R.D. LEXIS 920; *Pa. Dep’t of Conserv. & Nat. Res. v. Vitali*, No. 1013 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 479 (Pa. Commw. Ct. 2015) (finding that “there is no statutory support” permitting an agency to review records and raise objections after the OOR finds that a request is sufficiently specific).

evidence demonstrating that the responsive records are confidential under the DPCL or do not contain data that is public under Act 77.⁴ As such, the Department has failed to meet its burden.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **dismissed as moot in part**, and the Department is required to provide the Requester with all remaining responsive records 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 Commonwealth Court. 65 P.S. § 67.1301(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.⁵ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 8, 2021

/s/ Magdalene C. Zeppos-Brown

MAGDALENE C. ZEPPOS-BROWN, ESQ.
APPEALS OFFICER

⁴ Act 77, which is an amendment to the Administrative Code of 1929 that went into effect on July 27, 2020, provides that the following categories of records are expressly public during a disaster declaration, subject to Section 708 of the RTKL:

- (1) Data used by a Commonwealth agency for any rules, policies or actions taken by the Commonwealth agency in relation to a disaster declaration.
- (2) The process by which a Commonwealth agency determines how the Commonwealth agency will collect the data used by the Commonwealth Agency for any rules, policies or actions taken by the Commonwealth agency in relation to a disaster declaration.
- (3) Any quantitative or predictive models based on the data collected by a Commonwealth agency which are then used by the Commonwealth agency for any rules, policies or actions taken by the Commonwealth agency in relation to a disaster declaration.

71 P.S. § 720.305. *See also Spotlight PA v. Pa. Dep't of Health*, OOR Dkt. AP 2020-1305, 2020 PA O.O.R.D. LEXIS ____ (finding that Act 77 applied to a RTKL request the Department had responded to prior to Act 77's enactment but was appealed to the OOR after its effective date).

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

Sent to: Todd Shepherd (via email only);
Christopher Gleeson, Esq. (via email only); and
Lisa Keefer, AORO (via email only)