

COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF OPEN RECORDS

TODD SHEPHERD AND THE  
DELAWARE VALLEY JOURNAL,  
Requester,

v.

Docket No. AP 2020-1390

PENNSYLVANIA DEPARTMENT  
OF HEALTH,

Respondent.

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DEPARTMENT OF HEALTH'S PETITION FOR RECONSIDERATION

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The Department of Health (the “Department”), by and through the undersigned attorneys, and pursuant to 1 Pa. Code § 35.241, files this Petition for Reconsideration of the Final Determination issued on March 8, 2021, for the reasons set forth below:

The initial request sought “[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.”

While the Final Determination, dated March 8, 2021, holds that the request is sufficiently specific pursuant to 65 P.S. § 67.703, such a holding is inconsistent with well-settled case law. As the Final Determination dated March 8, 2021 correctly notes, the Office of Open Records (the “OOR”) utilizes the “three-part balancing test employed by the Commonwealth Court in Pa. *Pennsylvania Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Cmwlth. 2015), and *Carey v. Pa. Dep't*

*of Corr.*, 61 A.3d 367, 372 (Pa. Cmwlth. 2013). The first prong of the three-part test is that “[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 (emphasis added).<sup>1</sup>

In reviewing the sufficiency of the request, the Final Determination quotes from *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Cmwlth. 2017). Specifically, the Final Determination notes that “the Commonwealth Court has emphasized the importance of a ‘flexible, cases by case, contextual application of the test.’” *Bagwell*, 155 A.3d at 1145. It is important to note that the language referenced in the Final Determination deviates from the suggested premise. To provide context, the entirety of the language in *Bagwell* reads: “Rather, although *Iverson* was decided prior to this Court's **clear recitation of the sufficiently specific test in Pittsburgh–Post Gazette**, the reasoning in *Iverson* highlights the flexible, cases by case, contextual application of the test.” *Id.* (emphasis added).

The Final Determination misapplies the above referenced precedent by finding that an element of the three-prong sufficient test can be wholly ignored. It is important to note that no point does the Commonwealth Court in *Bagwell* abrogate any one of the prongs in the *Pittsburgh Post-Gazette* three-part test and hold that

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<sup>1</sup> The second prong of the three-part test for specificity maintains that “[t]he scope of the request **must** identify ‘a discrete group of documents, either by type ... or by recipient.’” *Pa. Dep’t of Educ.*, 119 A.3d at 1125 (emphasis added). Finally, the final prong states that “[t]he timeframe of the request **must** identify a finite period of time for which the documents are sought. (emphasis added)”

where two prongs are met, the third need not have merit.<sup>2</sup>

Additionally, the Final Determination cites to *Commonwealth v. Engelkemier*, 148 A.3d 522 (Pa. Cmwlth. 2016) in support of its reasoning that the instant request is sufficiently specific. However, such reliance is misplaced.

In *Engelkeimer*, the Commonwealth Court held that a request was sufficiently specific, as the requester provided the agency with a list of keywords, *and the agency subsequently did not challenge the list of keywords for lack of specificity*. See *Id.* at 531-532. Accordingly, the Commonwealth Court's reasoning in *Engelkeimer* cannot reasonably support a finding of sufficient specificity in the instant request.<sup>3</sup>

In further contrast to the OOR's Final Determination, this matter is controlled by *Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, 2020 Pa. Commw. Unpub. LEXIS 8, \*1 (Pa. Cmwlth. 2020). Therein, the Commonwealth Court reversed the OOR and held that a request for all correspondence sent and received by four individuals, including the Secretary of Health, over a 48-day timeframe was insufficiently specific. While the request in *Keystone* sought all correspondence for four persons over a 48-day timeframe in 2018, the current

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<sup>2</sup> In fact, the Department is unable to locate a Commonwealth Court case since *Pa. Dep't of Educ.* was issued to support this holding, nor has any authority been cited in the Final Determination. While the Department appreciates that the *Pittsburgh Post-Gazette* three-part test should necessarily be applied fluidly, such fluidity does not grant the OOR authority to ignore that "[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 (emphasis added).

<sup>3</sup> While the Final Determination posits that the *Engelkeimer* court found "that a request with a broad subject matter requires a narrow scope and timeframe that render the request specific," as discussed *supra*, this does not accurately reflect that court's reasoning.

request seeks email records for the Secretary of Health, Dr. Rachel Levine, and Executive Deputy Secretary Sarah Boateng, from March 16 to March 18, 2020. These dates are significant in that the Department largely commenced working remotely in response to the rapidly developing COVID-19 pandemic.

Indeed, the OOR's determination is internally inconsistent on this point. For example, the Final Determination correctly 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." OOR Dkt. AP 2020-1390, Final Determination dated March 8, 2021 p. 6. The OOR, however, failed to apply this logic to the instant matter, and failed to recognize the myriad topics, issues and matters that the Department responded to at the outset of this pandemic. *Id. quoting Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Cmwlth. 2012).

In support of its reasoning, OOR cites to *Nichilo v. Radnor Twp.*, OOR Dkt. AP 2020-0893.<sup>[1]</sup> *Nichilo*, however, recognized that the Commonwealth Court's reasoning in *Keystone* was directly applicable to the Secretary of the Department of Health, and *Nichilo* thus contradicts the OOR's determination here. Notably, at issue in *Nichilo* was a request for emails and text messages to and from a Township Manager. Upon review, the OOR recognized that "the Township's argument that the

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<sup>[1]</sup> The OOR's Final Determination in *Nichilo* was appealed to the Court of Common Pleas for Delaware County, at Civil Docket No. 2020-005395. However, the case was settled and discontinued on or around February 23, 2021.

Township Manager’s correspondence volume rivals that of the Secretary of the Department of Health is unpersuasive.” *Nichilo* at 7. Indeed, in *Nichilo*, the OOR relied upon the large volume of emails transmitted and received by the Secretary to distinguish *Keystone*.

No such distinction can be made here. Rather, given the timeframe of the instant request, during which the Secretary served as the point of contact to numerous state and federal agencies, as well as to an expansive number of advisors, interest groups, legislators, and other persons involved in the COVID-19 response, this matter is directly synonymous with *Keystone*. By citing *Nichilo* in support of its attempt to distinguish *Keystone*, the OOR effectively overrules *Keystone* in opposition direct contravention of the Opinion rendered by the Commonwealth Court.

Finally, the Final Determination states that “an agency must assert any relevant exemptions concurrent with its specificity argument,” citing to several cases in support of this proposition. OOR Dkt. AP 2020-1390, Final Determination dated March 8, 2021, n.3. However, the facts underlying the court’s decision in *Bagwell* do not stand for the proposition cited by the OOR.<sup>4</sup> In *Bagwell*, the agency did not actually raise exemptions before the OOR; rather, the agency sought to have the OOR adjudicate a prepayment dispute and subsequently “develop a record to

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<sup>4</sup> The OOR also cites to *Tepper v. County of Berks*, OOR Dkt. AP 2017-1010 in support of its holding. However, the relevant language in *Tepper* merely parrots the language in n.3 of the instant Final Determination and inaccurately cites *Bagwell* for the unsupported premise that. “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. Cmwlth. 2016)” *Tepper* at n.2.

support substantive exemptions.” *Bagwell* at 660. Unlike the Department in the instant case, the agency in *Bagwell* did not raise its prepayment argument concurrently with its proposed substantive exemptions. Instead, the agency in *Bagwell* reserved the right to invoke exemptions *only once the prepayment dispute had been decided by OOR*. In the instant case, the Department correctly raised its specificity argument and exemptions before the OOR in its response.

The instant Final Determination abrogates the subject matter prong set forth in the *Pittsburgh Post-Gazette* test and creates a slippery slope whereby a requester may circumvent the Commonwealth Court’s specificity requirements by submitting successive requests that lack subject matter, provided they are confined to short periods of time. As it is in direct conflict with established Commonwealth Court precedence and unsupported by any other authority, the OOR’s Final Determination in the instant case was clearly erroneous.

Even if the OOR disagreed with the Department’s specificity assertion, it should have allowed additional time for the Department to review documents for exemptions under the Disease Prevention and Control Law of 1955 (DPCL), per the Department’s January 20, 2021 response to the OOR. Such action is unequivocally supported by the Commonwealth Court in *Pennsylvania State Sys. of Higher Educ. v. Ass’n of State College and Univ. Faculties*, 142 A.3d 1023 (Pa. Cmwlth. 2016) (*APSCUF*), *petition for allowance of appeal denied*, 166 A.3d 1218 (Pa. 2017). In *APSCUF*, the Commonwealth Court concluded that an agency should not be

“foreclosed from carrying out its statutory duty to determine whether exemptions apply when it is incapable of reviewing the requested documents within the time-period it is given.” *Id.* at 1031.

Per *APSCUF*, the Department is “to provide the OOR with a valid estimate of the number of documents being requested [and] the length of time . . . require[d] to conduct this review.” *Id.* at 1032. With this information, “the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply.” *Id.* The Department believes there are approximately 2,000 records to review and, therefore, avers that a review for records deemed confidential by the DPCL will take approximately 45 days.

WHEREFORE, the Department respectfully requests that the OOR modify its Final Determination to reflect that the underlying request lacks specificity as it fails to provide a subject matter pursuant to relevant case law, in violation of 65 P.S. § 67.703. Alternatively, the Department respectfully requests additional time to review documents for exemptions under the DPCL, as permitted by *APSCUF*.

Respectfully submitted,

/s/ Christopher J. Gleeson

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