

PETITION FOR RECONSIDERATION

DATE ISSUED AND MAILED: March 31, 2021

IN RE: *Todd Shepherd v. Pennsylvania Department of Health*, OOR Dkt. AP 2020-1390

Upon review of the petition for reconsideration filed with the Office of Open Records (“OOR”) to the above-referenced docket number, for the reasons set forth below, it is determined that the petition is **DENIED**.

This appeal involved a request for “[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.” In the Final Determination, the OOR found that the request was sufficiently specific under 65 P.S. § 67.703.

The Department has filed for reconsideration, arguing that the OOR erred in law by determining that the request was sufficiently specific, and in the alternative, requests additional time so that the Department can review the approximately 2,000 responsive records to determine whether they contain information made confidential by the Disease Prevention and Control Law.

The Department argues that this matter is specifically controlled by two Commonwealth Court cases: *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015) and *Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, 222 A.3d 1226, 2020 Pa. Commw. Unpub. LEXIS 8 (Pa. Commw. Ct. 2020).

First, the Department argues that the test set forth in *Pa. Dep’t of Educ.* mandates that a request identify the subject matter. *See Pa. Dep’t of Educ.*, 119 A.3d at 1125 (“The subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.”). However, the Court explained that this is only one factor of “a three-part balancing test.” *Id.* at 1125; *see also Schackner v. Edinboro Univ.*, 227 A.3d 975 (Pa. Commw. Ct. 2020) (unreported) (referring to “the specificity review as a multi-factor assessment”). The Court’s decision made clear that the subject matter and scope prongs of the test were the most determinative in evaluating whether a request was overbroad; in fact, when discussing the timeframe prong, it noted that “failure to identify a finite timeframe will not render an otherwise sufficiently specific request overbroad ... [but] an extremely short timeframe will not rescue an otherwise overbroad request, except for in the most extraordinary circumstances.” *Pa. Dep’t of Educ.*, 119 A.3d at 1126. As one of those “extraordinary circumstances,” the Court cited to *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012), wherein the Court found that a request for thirty days of emails to and

from nine school board members, without any subject matter, was sufficiently specific. Thus, there is no requirement that every request contain a subject matter, although the lack of one will cause a request to be overbroad if there is the lack of a sufficiently limited scope and timeframe. As recognized by the Court, we must conduct a balancing test, considering subject matter, scope, and timeframe together.

Next, the Department argues that this matter is controlled by *Simmons-Ritchie*. The relevant Item in *Simmons-Ritchie* sought “all correspondence sent and received (including text messages and written memos) by Acting Department Secretary Dr. Rachel Levine, Communications Director April Hutchenson, Press Secretary Nate Wardle, and Nursing Home Division Director Susan Williamson, between April 1, 2018 to ... [May 18, 2018].” *Simmons-Ritchie*, at *2-3. The Court, in discussing *Baxter*, found that it “does not stand for the proposition that a RTKL request that is limited to a short timeframe is always, by itself, sufficiently specific.” *Id.* at *53. Ultimately, the Court held that the request for “all correspondence” in *Simmons-Ritchie* was insufficiently specific. However, it did not do so solely due to the lack of a subject matter. Instead, it also noted that the request sought all correspondence, as opposed to a specific *type* of correspondence, and that the request had a 48-day timeframe, which did not sufficiently limit the specificity of the request due to the volume of communications sent by a secretary of a Commonwealth agency and higher-ranking employees. *Id.* at *54-55.

While the Department argues that “this matter is directly synonymous with *Keystone*,” the Appeals Officer did not err in finding that it was different. The request at issue in the underlying appeal had a much more defined and limited scope: it sought only emails and identified only two senders and recipients. Further, the request’s timeframe was three days, as opposed to the forty-eight in *Simmons-Ritchie*. Although the OOR understands that these three days were a particularly busy time for the Department, the Appeals Officer did not err as a matter of law in determining that this request was different from the one in *Simmons-Ritchie*, and therefore sufficiently specific.

Finally, the Department argues that the OOR should have provided the Department with an opportunity to review the documents to determine whether they can be released under the Disease Prevention and Control Law, citing *Pa. State Sys. of Higher Educ. v. Ass’n of State Colleges and Univ. Faculties*, 142 A.3d 1023 (Pa. Commw. Ct. 2016) (“APSCUF”). In APSCUF, the Court recognized that the OOR may grant agencies additional time to review records when requests are voluminous. *Id.* at 1032. However, the Court did not grant the OOR authority to do so after it has issued its final determination. Further, the OOR is unable to bifurcate its proceedings to permit an agency to review records and assert exemptions after the OOR issues a final determination granting an appeal for sufficient specificity. See *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 660 (Pa. Commw. Ct. 2016) (citing *Pa. Dep’t of Conserv. & Nat. Res. v. Vitali*, 2015 Pa. Commw. Unpub. LEXIS 479) (Pa.

Commw. Ct. 2015)). Instead, any exemptions must be raised and evidence provided to the OOR Appeals Officer. *Bagwell, supra; Vitali, supra.*

For the above reasons, we deny the petition for reconsideration.

Issued by:

[/s/ Kyle Applegate](#)

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