



FINAL DETERMINATION

IN THE MATTER OF

**DEBRA GARDNER-LOZADA,
Requester**

v.

**SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Respondent**

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Docket No: AP 2021-0456

INTRODUCTION

Debra Gardner-Lozada (“Requester”) submitted a request (“Request”) to the Southeastern Pennsylvania Transportation Authority (“Authority” or “SEPTA”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “agreement and release” documentation (“Agreements”) and related financial information. The Authority did not respond, and 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, denied in part** and **dismissed as moot in part**, and the Authority is required to take additional action as directed.

FACTUAL BACKGROUND

On February 4, 2021, the Request was filed, seeking:

1. All “agreement and release” documentation in their entirety for the following past employees”
 - a. Luther Diggs
 - b. Ronald Hopkins
 - c. Warren Montague

- d. Charles Gardner
- e. Rohan Hepkins
- f. Neil Patel
- g. James Foley
- h. Richard Hanratty
- i. John F. McGee
- j. Vincent DeLuca

2. The total dollar amount of salaries paid based on ALL above agreements specifically for work not performed – as the agreement and release allowed for until the individual reached the eligible retirement age or found gainful employment.
3. The reasoning for the agreement and releases for at-will employees.

The Authority did not respond within five business days, and the Request was, therefore, deemed denied on February 11, 2021. *See* 65 P.S. § 67.901.

On March 5, 2021, the Requester appealed to the OOR, stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Authority to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 16, 2021, after being afforded additional time to do so, the Authority submitted a position statement, arguing that the appeal is untimely and that parts of the Agreements responsive to Item 1 of the Request contain “written criticisms of an employee” and “information regarding discipline, demotion and discharge,” 65 P.S. §§ 67.708(b)(7)(vi), (viii), and that written agreements for some of the listed individuals do not exist. The Authority also argues that records responsive to Item 2 of the Request do not exist, and that Item 3 of the Request “seeks an answer to a question rather than a record.” In support of these arguments, the Authority provided the statement, made under the penalty of perjury, of David Schweibenz, the Authority’s Senior Director, Compensation and Human Resources Information Systems. Finally, the Authority

¹ The Requester granted the OOR an additional thirty days to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

provided the Requester with the “portions of the Releases which constitute the final action of the Agency ... result[ing] in the former employee’s discharge.”

On April 16, 2021, the Requester submitted an unsworn position statement, disputing the Authority’s claims that the appeal is untimely and that confidentiality provisions within the Agreements preclude their disclosure. The Requester further notes that, “by releasing the documents[,] the second and third portion of the [R]equest can be fulfilled since the documents contain the terms of payment for work not performed and use of a database is not needed.”

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 Authority 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)). Likewise, “[t]he 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).

1. The appeal is timely

As a preliminary matter, the Authority argues that the Requester’s appeal is untimely. As noted above, the Request was deemed denied on February 11, 2021, and the Requester had fifteen *business days* from the deemed denial, or until March 5, 2021, to file an appeal.² *See* 65 P.S. § 67.1101(a)(1) (“...the requester may file an appeal with the [OOR] ... within 15 business days of

² The OOR’s offices were closed on February 15, 2021 in observance of Presidents’ Day; as such, that day is not included in the calculation of the appeal period.

a deemed denial”). Because the Requester’s appeal was filed with the OOR on March 5, 2021, it is timely.

2. The Authority disclosed records during the appeal

During the course of the appeal, the Authority provided the Requester with portions “of the Agreement and Release documents for Neil Patel, Ron Hopkins, Rohan Hepkins, Jim Foley, Rich Hanratty, and Vince Deluca.” Accordingly, insofar as the appeal pertains to these records, it 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).

3. The Authority has proven that certain records do not exist

The Authority states that certain Agreements sought in Item 1 and the records requested in Item 2 do not exist. In support, the Authority provides the statement, made under the penalty of perjury, of Mr. Schweibenz, who attests, in pertinent part, as follows:

I am aware of the RTKL [R]equest submitted by [the Requester] requesting ten individuals’ termination agreements.

I have performed a search of SEPTA’s electronic and paper records and have located six of the requested agreements in SEPTA’s electronic HR database: Neil Patel, Ron Hopkin, Rohan Hepkins, Jim Foley, Rich Yanratty, and Vince Deluca. These separation agreements explicitly call for their terms to be kept confidential.

SEPTA is not in possession of Agreement and Release documents for Luther Diggs, John Magee, Warren Montague, or Charles Gardner.

This is consistent with my personal knowledge that these four individuals separated from SEPTA without a written agreement other than a standard retirement agreement.

Additionally, with respect to Item 2, the Authority explains that “[t]his information is not contained in any one Agreement and Release document, nor does SEPTA maintain a database reflecting” the information. Mr. Schweibenz attests that “SEPTA does not maintain a database reflecting the total dollar amount of salaries paid based on agreement and release documents for work not performed.”

Under the RTKL, a statement made under the penalty of perjury is 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). In the absence of any competent evidence that the Authority acted in bad faith or that these Agreements exist, "the averments in [the statement] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based upon the evidence provided, including the statement of Mr. Schweibenz, who, as a Senior Director of Human Resource for SEPTA, is in a position to know whether the requested records exist, the Authority has demonstrated that "agreement and release" documentation does not exist for Luther Diggs, John Magee, Warren Montague and Charles Gardner, and that records responsive to Item 2 do not exist. *Hodges*, 29 A.3d at 1192; *see also Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search was conducted by an agency when it contacted the department most likely to possess the records).

4. The Authority has not proven records are exempt under Section 708(b)(7)

The Authority denied access to portions of the responsive Agreements pursuant to Section 708(b)(7) of the RTKL, which exempts from disclosure certain records "relating to an agency employee[,]" including "[w]ritten criticisms of an employee" and "[i]nformation regarding discipline, demotion or discharge contained in a personnel file." 65 P.S. §§ 67.708(b)(7)(vi), (viii).

Regarding Section 708(b)(7), Mr. Schweibenz attests only that "Agreement and Release documents are maintained as part of an employee or former employee's personnel file."³ However,

³ In its unsworn position statement, the Authority recites the relevant provisions of Section 708(b)(7) and states that "[t]he Agreement and Release documents are contained in each former employee's personnel file...." This statement is equally conclusory and unsworn statements may not be relied upon as competent evidence to withhold records

under the RTKL, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo, supra*).

Records in the possession of a Commonwealth agency are presumed to be public records unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b). Here, the Authority has submitted only conclusory evidence in support of its arguments under Section 708(b)(7), which is insufficient to carry its burden.⁴ Accordingly, the Authority has failed prove that records are subject to this exemption.⁵ *See* 65 P.S. § 67.708(a)(1).

under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence).

⁴ Additionally, to the extent the Agreements contain information regarding the receipt or disbursement of agency funds, Section 708(c) of the RTKL states that Section 708(b)(7) is inapplicable, as the Agreements would be considered financial records. 65 P.S. § 67.708(c); 65 P.S. § 67.102 (defining “financial record”); *see also Ahner and the Times News v. Franklin Twp.*, OOR Dkt. AP 2019-1158, 2019 PA O.O.R.D. LEXIS 1135 (finding that a settlement agreement and release related to an agency employee cannot be redacted if it reflects the disbursement of agency funds and is, therefore, a financial record).

⁵ Mr. Schweibenz also states that “[t]hese separation agreements explicitly call for their terms to be kept confidential.” However, the RTKL does not permit an agency to withhold a record simply because it has promised confidentiality. It is well-settled that “[a] public entity may not enter into enforceable promises of confidentiality regarding public records.” *Tribune-Review Publ’g Co. v. Westmoreland County Hous. Auth.*, 833 A.2d 112, 120 (Pa. 2003). An agency “may not contract away the public’s right of access to public records because the purpose of access is to keep open the doors of government, to prohibit secrets, to scrutinize the actions of public officials and to make public officials accountable in their use of public funds.... A confidentiality clause contained in a settlement agreement that runs afoul of the RTKL violates public policy and is unenforceable.” *Newspaper Holdings, Inc. v. New Castle Area Sch.*

5. Item 3 of the Request seeks records and the Authority has not proven the records are exempt from disclosure

The Authority argues that Item 3 of the Request does not seek records. Under the RTKL, a request must seek records rather than answers to questions. *Walker v. Pa. Ins. Dep't*, No. 1485 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 425 at *16 (Pa. Commw. Ct. 2012) (“The RTKL is not a forum for the public to demand answers to specifically posed questions to either a Commonwealth or local agency. In fact, there is no provision in the RTKL that requires an agency to respond to questions posed in a request”); *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *14 (Pa. Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”). The presence or absence of a question mark is not determinative as to whether a request asks a question. *See Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766. While the Authority argues that the Request asks questions and should, therefore, be dismissed, the review of the Request shows that records regarding the “reasoning” for the Agreements was requested. *See* 65 P.S. § 67.102 (defining “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.”) (emphasis added). Accordingly, Item 3 seeks records, and the OOR will reach the merits of the appeal. *See, e.g., Spigler v. City of Pittsburgh*, OOR Dkt. AP 2020-1024, 2020 PA O.O.R.D. LEXIS 2417.

Furthermore, because the Authority has not submitted argument or evidence to support the withholding of the records sought in Item 3, the Authority has failed to meet its burden of proof. *See* 65 P.S. § 67.305; 65 P.S. § 67.708(a).

Dist., 911 A.2d 644, 649 n.11 (Pa. Commw. Ct. 2006) (citing *Tribune-Review Publ'g Co.*). The parties do not claim that these settlement agreements have been sealed by a court, *see* 65 P.S. § 67.305(a)(3); therefore, the cited confidentiality provisions are not a sufficient basis to withhold otherwise public records.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the Authority is required to provide all responsive Agreements, in unredacted form, as well as any records reflecting the reasoning for the Agreements, 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 3 May 2021

/s/ Joshua T. Young

JOSHUA T. YOUNG
ASSISTANT CHIEF COUNSEL

Sent to: Debra Gardner-Lozada (via email only);
Megan Shannon, Esq. (via email only);
Neil Peterson, AORO (via email only)

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).