

[1.] All Work Activity Status Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.

[2.] All Operator's Accident/Incident Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.

[3.] An electronic summary (for guidance, an Excel format or similar digital spreadsheet) of all Employee Injury Reports that related to incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021, including date and description of incident.

[4.] A summary reflecting the cumulative number of FMLA days taken each year from 2016 to 2020 by employees due to sexual harassment or sexual assault.

[5.] A summary reflecting the total amount of workman's comp paid out to employees each year from 2016 through 2020 due to sexual harassment or sexual assault.

On April 2, 2021, SEPTA invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On May 10, 2021, SEPTA was provided additional time to respond to the Request. *Id.* On May 13, 2021, SEPTA partially denied the Request, providing some responsive records and arguing that additional records are not within the possession, custody and control of SEPTA.

On June 3, 2021, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed SEPTA to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On June 11, 2021, SEPTA submitted a position statement reiterating its grounds for denial. SEPTA also argues that the Request seeks medical records exempt under the RTKL, 65 P.S. § 67.708(b)(5). In support of its position, SEPTA submitted the affidavits of Vicky Dugan,

¹ The Requester's appeal form indicates the only records at issue are related to Items 1, 2, 3 and 4. As a result, the Requester has waived any objections regarding some records that may have initially been sought in the Request, and this Final Determination will only address Items 1, 2, 3 and 4. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

SEPTA's Absence Management Program Manager, Christopher Valentin, SEPTA's Senior Director of Surface Transportation, and Richard Graham, SEPTA's Chief Risk Officer.

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.

SEPTA 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. Item 1 of the Request is a medical record exempt from public disclosure.

SEPTA argues that the requested records in Item 1 are exempt as medical records under Section 708(b)(5) of the RTKL, which states:

A record of an individual’s medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers’ compensation and unemployment compensation; or related information that would disclose individually identifiable health information

65 P.S. § 67.708(b)(5).

In support of its argument, SEPTA provides the verified statement of Mr. Graham, who attests, as follows:

SEPTA does not maintain a database or electronic summary of Employee Injury Reports.

When a SEPTA employee is injured and completes an injury report along with their incident report, the injury report is sent to SEPTA's Workmen's Compensation department.

SEPTA contracts with a third-party administrator, Sedgwick, to administer its Workmen's Compensation Program.

...

Sedgwick contracts with Concentra as a healthcare provider.

...

I inquired with our account manager at Concentra, Juliann Klintz, regarding Concentra's ability to perform a search of medical records by accident cause (i.e. to search for Work Activity Status Reports involving incidents of sexual harassment and sexual assault) and was informed that the Work Status Reports are maintained in individual patient files and cannot be sorted by accident cause.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 SEPTA acted in bad faith, "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)).

Here the Requester is seeking "Work Activity Status Reports" specifically related to incidents of sexual harassment or sexual assault. The evidence presented by SEPTA shows that responsive records are in the possession of Concentra and are maintained in individual patient files. Furthermore, the records that would be disclosed would be those that are expressly exempt under Section 708(b)(5), as Item 1 seeks a record that would document an individual's medical, psychiatric or psychological history or disability status. Because Item 1 is seeking a medical record of an employee indicating their medical status, the appeal as it relates to Item 1 is denied.

2. Item 2 does not require SEPTA to perform legal research and is sufficiently specific

SEPTA argues that Item 2 of the Request is insufficiently specific as it requires it to perform legal research. An agency cannot be required to perform legal research for a requester. *See Gilmore v. Pa. Bd. of Prob. and Parole*, OOR Dkt. AP 2017-0821, 2017 PA O.O.R.D. LEXIS 778; *Lerner v. City of Phila. Dep't of Revenue*, OOR Dkt. AP 2016-1470, 2016 PA O.O.R.D. LEXIS 1306; *Neal v. Pa. Dep't of State*, OOR Dkt. AP 2014-1470, 2014 PA O.O.R.D. LEXIS 1189; *Whitaker v. Pa. Dep't of State*, OOR Dkt. AP 2014-1463, 2014 PA O.O.R.D. LEXIS 1191 (holding that the agency is not required to locate laws and identify officials involved in the creation of Title 18); *Maddrey v. Pa. Dep't of State*, OOR Dkt. AP 2013-2204, 2013 PA O.O.R.D. LEXIS 1249 (holding that an agency is not required to locate “enacting clause” in Title 18). The Commonwealth Court has found that “[a] request that explicitly or implicitly obliges legal research is not a request for a specific document; rather it is a request for someone to conduct legal research with the hopes that the legal research will unearth a specific document that fits the description of the request.” *Askew v. Pa. Office of the Governor*, 65 A.3d 989, 993 (Pa. Commw. Ct. 2013); *see also* 65 P.S. § 67.703.

Additionally, 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.” 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 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 Envtl. 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.” *Pa. Dep't of Educ.*, 119 A.3d 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. Third, “[t]he 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.*

In support of its argument, SEPTA provides the verified statement of Mr. Valentin, who attests, as follows:

SEPTA’s Operator’s Accident/Incident Reports are handwritten reports written by SEPTA employees in response to accidents and incidents that occur on the job.

SEPTA maintains its Operator's Accident/Incident Reports in hard copy at each of its nine [9] City and Suburban depots.

The reports entered into a database [are] categorized as either "Accidents" or "Miscellaneous." This database cannot be searched for reports involving sexual harassment/assault.

The Reports database is searchable by name and date.

Approximately 850 Operator's Accident/Incident Reports are generated each month across all of SEPTA.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry* at 520-21.

In this case, SEPTA argues that the Request is seeking access to specific records that are not tracked by anything other than "Accident" or "Miscellaneous," and would require SEPTA to perform a search of each report to determine whether or not the record is responsive to the Request where a legal determination would then be necessary to determine if it was responsive. SEPTA's argument is more closely based on the burden of conducting a factual review of many records in its search for responsive records than conducting a legal analysis to interpret what records are responsive. SEPTA argues that it would be required to review each potential record in order to make a determination as to whether or not the record is responsive.

However, this type of search is what the RTKL requires. 65 P.S. § 67.901. Searching for records that contain responsive factual information is not the same as conducting legal research. *See, e.g., Lerner v. City of Phila., Dep't of Rev., OOR Dkt. AP 2017-1470, 2017 PA O.O.R.D. LEXIS 1306.* The Commonwealth Court has found that "[a] request that explicitly or implicitly obliges legal research is not a request for a specific document; rather it is a request for someone to conduct legal research with the hopes that the legal research will unearth a specific document that fits the description of the request." *Askew v. Pa. Office of the Governor, 65 A.3d 989, 993 (Pa.*

Commw. Ct. 2013); *see also* 65 P.S. § 67.703. Legal research requires an agency to make a legal judgment and is not a request for any specific existing information. Here, the Request does not require SEPTA to make legal judgments about what constitutes proper legal authority, what statutes apply to SEPTA or if any allegations or facts in an incident report pose any criminal or civil liability. This is a request for specific existing information. As such, the facts here do not support a finding that SEPTA would be required to perform legal research to make a determination as to whether or not a record is responsive.

Additionally, a request is not too broad simply because a search results in numerous potential responsive records. In *Legere*, the Commonwealth Court held that “[t]he fact that a request is burdensome does not deem it overbroad, although it may be considered a factor in such a determination” and that “an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against [a] requestor.” *Id.* at 265.

Here, not only does Item 2 of the Request identify the types of records sought, Item 2 expressly limits the subject matter to “incidents of sexual harassment or sexual assault.” Like the Request in *Carey*, Item 2 of the Request seeks a specific subject matter (i.e., type of incident), a scope (Accident/Incident Reports) and a finite timeframe (January 2016- April 2021). Therefore, Item 2 of the Request is sufficiently specific, and although it may be a burdensome task to uncover the responsive records, that does not prevent disclosure. The appeal as it relates to Item 2 of the Request is granted.

3. SEPTA does not possess records responsive to Items 3 and 4 of the Request

SEPTA argues that it does not possess records responsive to Items 3 and 4 of the Request. In support of its argument, SEPTA first relies on the verified statement of Mr. Graham that “SEPTA does not maintain a database or electronic summary of Employee Injury Reports.” Mr.

Graham continues, as previously quoted above, to state that SEPTA contacts with a third party, Sedgwick, who does maintain a database; however, this database does not summarize Employee Injury Reports and would only list the type of claim, and the total amount paid pursuant to the claim.

Additionally, SEPTA provides the verified statement of Ms. Duggan, who attests that “SEPTA does not maintain [a record responsive to Item 4 of the Request].” Ms. Duggan further explains the process by which an employee would apply for FMLA, and that SEPTA is not made aware of the nature of the reason for FMLA, such as sexual harassment or sexual assault, as sought in Item 4 of the Request. Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support for the nonexistence of evidence. *See Sherry* at 520-21.

Section 102 of the RTKL defines a “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.” 65 P.S. § 67.102. Under Section 705 of the RTKL, when responding to a request, “an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705; *see also Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that an agency cannot be made to create a record that does not exist).

However, providing information from an agency database does not constitute the creation of a record. *See Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012) (“[D]rawing information from a database does not constitute creating a record under the Right-to-Know Law”);

see also Gingrich v. Pa. Game Comm'n, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *21 (Pa. Commw. Ct. 2012) (“[P]ulling information from a database is not the creation of a record”). “To hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases.” *Cole*, 52 A.3d at 549. “An agency need only provide the information in the manner in which it currently exists.” *Id.* at 547. An agency is not required to create a list or spreadsheet containing the requested information; “the information ... must simply be provided to requestors in the same format that it would be available to agency personnel.” *Id.* at 549 n.12.

In this instance, SEPTA has demonstrated that it does not maintain responsive records in a format that can be either drawn upon from a database or provided in a manner consistent with the Request. Based on the evidence provided, SEPTA has thus met its burden of proving that responsive records are not within its possession, custody or control and would require the creation of a record. *See Hodges*, 29 A.3d at 1192; 65 P.S. § 67.705.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and SEPTA is required to provide responsive records to Item 2 of the Request 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 26, 2021

/s/ Ryan W. Liggitt

RYAN W. LIGGITT, ESQ.
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Sent to: Michaela Winberg (via email only);
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² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).