

October 4, 2021

**FILED VIA PACFILE**

Michael Krimmel, Esq.  
Prothonotary  
Commonwealth Court of Pennsylvania  
Pennsylvania Judicial Center  
601 Commonwealth Avenue, Suite 2100  
Harrisburg, PA 17106-2575

**RE: Submission of Record in:**  
***Southeastern Pennsylvania Transportation Authority v. Michaela Winberg and***  
***WHYY, No. 926 CD 2021***

Dear Mr. Krimmel:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, (“RTKL”), defines the Record on Appeal as “the record before a court shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all “evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2).” The record in this matter consists of the following:

**Office of Open Records Docket No. 2021-1079:**

1. The appeal filed by Michaela Winberg and WHYY (“Requester”) to the Office of Open Records (“OOR”), received June 2, 2021.
2. Official Notice of Appeal dated June 2, 2021, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Southeastern Pennsylvania Transportation Authority’s (“SEPTA”) submission dated June 11, 2021.
4. SEPTA’s completed submission dated June 12, 2021.
5. Email chain dated July 8, 2021, wherein Requester agrees to a two-week extension of time to issue the Final Determination.
6. Final Determination issued by the OOR on July 26, 2021.

Prothonotary  
Commonwealth Court of Pennsylvania

October 4, 2021  
Page Two

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kyle Applegate".

Kyle Applegate  
Chief Counsel

Attachments

cc: See certificate of service

# Commonwealth of Pennsylvania

**Agency Docket Number: AP 2021-1079**

**Appellate Court Docket Number: 926 CD 2021**

I, Elizabeth Wagenseller, certify that the accompanying electronically transmitted materials are true and correct copies of all materials filed in the Office of Open Records and constitute the record for :

Southeastern Pennsylvania  
Transportation Authority,  
Petitioner

v.

Michaela Winberg and  
WHYY (Office of Open Records),  
Respondents

\_\_\_\_\_  
/s/ Elizabeth Wagenseller

\_\_\_\_\_  
10/04/2021

Executive Director

Volumes:

Agency Record (2)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY,  
Petitioner,

v.

MICHAELA WINBERG and WHYY,  
Respondent.

:  
:  
:  
:  
:  
:  
:  
:

No. 926 CD 2021

---

**CERTIFIED RECORD**

Kyle Applegate  
Chief Counsel  
Commonwealth of Pennsylvania  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2334  
Phone: (717) 346-9903  
Fax: (717) 425-5343  
Email: [kyapplegat@pa.gov](mailto:kyapplegat@pa.gov)

October 4, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY,  
Petitioner,

v.

MICHAELA WINBERG and WHYY,  
Respondent.

:  
:  
:  
:  
:  
:  
:  
:  
:

No. 926 CD 2021

---

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record  
upon the following by Email at the email listed below:

Mark E. Gottlieb, Esquire  
Megan K. Shannon, Esquire  
Offit Kurman, P.C.  
1801Market Street, Suite 2300  
Philadelphia, PA 19103  
[mgottlieb@offitkurman.com](mailto:mgottlieb@offitkurman.com)  
[mshannon@offitkurman.com](mailto:mshannon@offitkurman.com)

Michaela Winberg  
WHYY  
150 N. 6<sup>th</sup> Street  
Philadelphia, PA 19106  
[mwinberg@whyy.org](mailto:mwinberg@whyy.org)



---

Michele K. Grant, Administrative Officer  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234  
Phone: (717) 346-9903  
Fax: (717) 425-5343  
Email: [mkuser@pa.gov](mailto:mkuser@pa.gov)

Dated: October 4, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
Petitioner,	:	
	:	
v.	:	No. 926 CD 2021
	:	
MICHAELA WINBERG and WHYY,	:	
Respondent.	:	

---

TABLE OF CONTENTS  
RECORD

*Michaela Winberg and WHYY v. Southeastern Pennsylvania Transportation Authority,*  
OOR Dkt. AP 2021-1079

**Office of Open Records Docket No. 2021-1079:**

1. The appeal filed by Michaela Winberg and WHYY (“Requester”) to the Office of Open Records (“OOR”), received June 2, 2021.
2. Official Notice of Appeal dated June 2, 2021, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Southeast Pennsylvania Transportation Authority’s (“SEPTA”) submission dated June 11, 2021.
4. SEPTA’s completed submission dated June 12, 2021.
5. Email chain dated July 8, 2021, wherein Requester agrees to a two-week extension of time to issue the Final Determination.
6. Final Determination issued by the OOR on July 26, 2021.

# **OOR EXHIBIT 1**

## Devenyi, Dylan

---

**From:** no-reply@openrecordspennsylvania.com  
**Sent:** Wednesday, June 2, 2021 9:56 AM  
**To:** mwinberg@whyy.org  
**Subject:** [External] PA Office of Open Records - Appeal Confirmation

**ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to [CWOPA\\_SPAM@pa.gov](mailto:CWOPA_SPAM@pa.gov).



You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

<b>Name:</b>	Michaela Winberg
<b>Company:</b>	WHYY
<b>Address 1:</b>	150 N 6th St
<b>Address 2:</b>	
<b>City:</b>	Philadelphia
<b>State:</b>	Pennsylvania
<b>Zip:</b>	19106
<b>Phone:</b>	908-731-2444
<b>Email:</b>	mwinberg@whyy.org
<b>Agency (list):</b>	Southeastern Pennsylvania Transportation Authority
<b>Agency Address 1:</b>	1234 Market St
<b>Agency Address 2:</b>	
<b>Agency City:</b>	Philadelphia
<b>Agency State:</b>	Pennsylvania
<b>Agency Zip:</b>	19107
<b>Agency Phone:</b>	215-580-7800
<b>Agency Email:</b>	
<b>Records at Issue in this Appeal:</b>	File attached, labeled "Records at Issue in this Appeal"



<b>Request Submitted to Agency Via:</b>	e-mail
<b>Request Date:</b>	04/01/2021
<b>Response Date:</b>	05/13/2021
<b>Deemed Denied:</b>	No
<b>Agency Open Records Officer:</b>	Megan Shannon, Attorney at Offit Kurman
<b>Attached a copy of my request for records:</b>	Yes
<b>Attached a copy of all responses from the Agency regarding my request:</b>	Yes
<b>Attached any letters or notices extending the Agency's time to respond to my request:</b>	Yes
<b>Agree to permit the OOR additional time to issue a final determination:</b>	No
<b>Interested in resolving this issue through OOR mediation:</b>	Yes
<b>Attachments:</b>	<ul style="list-style-type: none"> <li>• Appeal SEPTA RTK 6.2.2021.pdf</li> <li>• MW SEPTA RTK April 2021.pdf</li> <li>• RTK submission 4.1.2021.pdf</li> <li>• Interim response 4.2.2021.pdf</li> <li>• Interim response 5.10.2021.pdf</li> <li>• Interim response 2 5.10.2021.pdf</li> <li>• Final response 5.13.2021.pdf</li> <li>• RTKL Response letter to M. Winberg 5.13.21 (1).pdf</li> <li>• SEPTA Sexual Assault Claims 05 10 21 (redacted) (Sedgwick) 4838-9893-3737 v.1 (2).xlsx</li> <li>• Records at Issue in this Appeal.pdf</li> </ul>

**I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.**

To: Office of Open Records  
From: Michaela Winberg, WHYY  
Re: Southeastern Pennsylvania Transportation Authority (SEPTA) RTKL denial  
Date: June 2, 2021

## **BACKGROUND**

On April 1, 2021, I submitted via email a Right to Know Law request to SEPTA's public records officer for five categories of records. On April 2, 2021, I received an interim response. On May 10, 2021, I received another interim response requesting an extension, which I granted via email that same day. On May 13, 2021, I received a final response granting in part and denying in part my request. All this correspondence is attached to my appeal.

I am only appealing the denials of requests #1, 2, 3 and 4. I am not appealing request #5, which SEPTA granted.

## **REASONS FOR AGENCY'S DENIALS:**

SEPTA asserts various grounds for denial. For my first request, it denied access because it states the agency does not maintain "Work Activity Status Reports."

For my second request, for incidents of sexual harassment or sexual assault, the agency denied access because it said the language was overly broad under § 703 of the RTKL. "SEPTA maintains copies of its Operator's Accident/Incident Reports stored in chronological order; they are not searchable by incident type. Your request for five years' worth of incident reports is overly broad."

For my third request — an electronic summary of employee injury reports relating to sexual harassment or assault — the agency denied access because it states it does not maintain such a summary record.

For my fourth request — a summary of FMLA days taken due to sexual harassment or sexual assault — the agency denied access because it states it does not maintain this type of record.

SEPTA redacted records and provided responsive records to my fifth request.

## **GROUND UPON WHICH REQUESTER ASSERTS RECORDS ARE PUBLIC:**

### **Records requests #1, 3 and 4: Work Activity Status Reports; Summary of Employee Injury Reports; Summary of FMLA days taken**

For records requests 1, 3 and 4, the agency makes a bold assertion that "it does not maintain this type of record." There is no accompanying affidavit or sworn statement supporting and explaining these assertions.

Section 708(a) of the Right to Know Law places the burden of proof on an agency to demonstrate by a preponderance of evidence that a record is exempt from public access. One of

the ways that an agency could provide sufficient evidentiary support is through testimonial affidavits that lay out factual statements. See *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In contrast, courts have found insufficient as evidence statements that have not been sworn or backed up by affidavits. See *Housing Auth. of the City of Pittsburgh v. Van Osdol*, No. 795 C.D. 2011, 2012 Pa. Commw. LEXIS 87 (Pa. Commw. Ct. 2012); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011).

SEPTA is familiar with this process, as evidenced by a statement submitted and described in a different Office of Open Records case, *Debra Gardner-Lozada v. SEPTA*, No AP 2021-0456 (May 3, 2021 Final Determination). David Schweibenz, the Authority's Senior Director, Compensation and Human Resources Information System, made a statement under penalty of perjury, according to page 2 of the final determination in *Gardner-Lozada*.

If SEPTA cannot provide more detailed information and evidence about why the records sought in 1, 3 and 4 do not exist, including, if necessary, sworn affidavits, it fails to meet its burden and the records should be provided on appeal.

Additionally, regarding request #1, I have seen this type of record and therefore am certain it exists. A SEPTA employee has supplied me with their own personal Work Activity Status Reports, which outline whether the employee is healthy enough to work at present moment. These records are created by Concentra, and SEPTA likely has access to them, since they explain whether the agency's own employees are able to work.

### **Records request # 2: Operator's Accident/Incident Reports**

SEPTA argues it cannot search by incident type due to the manner of storing the Operator's Accident/Incident Reports. This response is insufficient and illustrates a misunderstanding and misapplication of the law. The courts have been clear: burden on an agency, real or perceived, is irrelevant for purposes of the law. *Com., Dep't of Env't Prot. v. Legere*, 50 A.3d 260 (Pa. Commw. Ct. 2012) "There is simply nothing in the RTKL that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so." *Legere* at 264. SEPTA admittedly holds responsive records and as such, it must provide access in accordance with the law.

As stated in a recent Office of Open Records Final Determination<sup>1</sup>, "[a]n agency must show that it has conducted a search reasonably calculated to uncover all relevant documents; an agency may do so by providing relatively detailed and non-conclusory affidavits submitted in good faith by officials or employees with knowledge of the records and the search for the records." See *Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); see also *In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is "the open records officer's duty and responsibility" to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

---

<sup>1</sup> *Burr v. Pennsylvania Department of Health*, AP 2021-0747 (May 10, 2021)

There is no evidence submitted by SEPTA demonstrating that it conducted a good faith search, nor are there any detailed and non-conclusory affidavits. SEPTA has failed to meet its burden and the records should be provided on appeal.

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

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

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.

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

May 13, 2021

**Via e-mail ([mwinberg@whyy.org](mailto:mwinberg@whyy.org))**

Michaela Winberg  
WHYY  
150 N. 6<sup>th</sup> Street  
Philadelphia, PA 19106

**Re: RTKL Request of 3/30/2021**

Dear Ms. Winberg,

I am writing on behalf of Southeastern Pennsylvania Transportation Authority (“SEPTA”) in response to your Right-to-Know Law request of March 30, 2021. You requested:

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

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

*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.*

*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*

*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.*

With respect to your first request, this request is denied on the basis that SEPTA does not maintain “Work Activity Status Reports.”

Your second request, for Operator’s Accident/Incident Reports that include incidents of sexual harassment or sexual assault, is denied as overly broad under §703 of the RTKL. SEPTA

Trust. Knowledge. Confidence.

maintains copies of its Operator's Accident/Incident Reports stored in chronological order; they are not searchable by incident type. Your request for five years' worth of incident reports is overly broad.

Your request for an electronic summary of employee injury reports relating to sexual harassment or assault is denied because SEPTA does not maintain such a summary record. Your request for a summary of FMLA days taken due to sexual harassment or sexual assault is also denied on the basis that SEPTA does not maintain this type of record.

Your request for a summary reflecting the amount of worker's compensation paid to employees for sexual harassment or sexual assault is granted. Enclosed please find a spreadsheet compiled by SEPTA's third-party administrator, Sedgwick. Please note that individual employee names have been redacted.

If you wish to appeal SEPTA's response, § 1101 of the RTKL states: "If a written request for open access to a record is denied or deemed denied, the requester may file an appeal with the Office of Open Records or judicial, legislative or other appeals officer designated under section 503(d) within 15 business days of a deemed denial. The appeal shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request."

Please contact me if you have any questions.

Sincerely,



Megan K. Shannon

enclosures

CC: Neil Petersen, Esq. ([npetersen@septa.org](mailto:npetersen@septa.org))  
Mark Gottlieb, Esq. ([mgottlieb@septa.org](mailto:mgottlieb@septa.org))

4816-0248-6761, v. 2

## RTK Response

Shannon, Megan <mshannon@offitkurman.com>

Thu 5/13/2021 1:57 PM


To: Michaela Winberg <mwinberg@whyy.org>

Cc: Gottlieb, Mark <mgottlieb@offitkurman.com>; Neil Petersen (NPetersen@septa.org) <NPetersen@septa.org>

📎 2 attachments (227 KB)

SEPTA Sexual Assault Claims 05 10 21 (redacted) (Sedgwick) 4838-9893-3737 v.1.xlsx; RTKL Response letter to M. Winberg 5.13.21.pdf;

Michaela, please see the attached. If you have any questions, please don't hesitate to give me a call.



**Offit Kurman**  
Attorneys At Law

**Megan Shannon**  
*Pronouns: she, her, hers*

---

Attorney  
D [267.338.1328](tel:267.338.1328)

[mshannon@offitkurman.com](mailto:mshannon@offitkurman.com)





Ten Penn Center  
1801 Market Street  
Suite 2300  
Philadelphia, PA 19103  
T [267.338.1300](tel:267.338.1300)  
F [267.338.1335](tel:267.338.1335)  
[offitkurman.com](http://offitkurman.com)



---

### PRIVILEGED COMMUNICATION/PRIVACY NOTICE

Information contained in this transmission is attorney-client privileged and confidential. It is solely intended for use by the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and delete this communication.

Any tax advice included in this communication may not contain a full description of all relevant facts or a complete analysis of all relevant tax issues or authorities. This communication is solely for the intended recipient's benefit and may not be relied upon by any other person or entity.

External-Please exercise caution when opening any attachments or clicking on links.



**RTKL Request to SEPTA of 4/1/21**

Shannon, Megan &lt;mshannon@offitkurman.com&gt;

Mon 5/10/2021 3:24 PM

To: Michaela Winberg &lt;mwinberg@whyy.org&gt;

 1 attachments (187 KB)

MW SEPTA RTK April 2021.pdf;

Dear Ms. Winberg,

I am writing on behalf of SEPTA regarding the attached RTKL request. SEPTA requires an additional week to provide its response. SEPTA will provide you with its response by May 17. Please give me a call at 267-338-1328 if you have any questions.

**Megan Shannon***Pronouns: she, her, hers*

Attorney

D [267.338.1328](tel:267.338.1328)[mshannon@offitkurman.com](mailto:mshannon@offitkurman.com)

View My Bio &gt;&gt;



CONNECT ON LINKEDIN

Ten Penn Center  
1801 Market Street  
Suite 2300  
Philadelphia, PA 19103  
T 267.338.1300  
F 267.338.1335  
[offitkurman.com](http://offitkurman.com)

**PRIVILEGED COMMUNICATION/PRIVACY NOTICE**

Information contained in this transmission is attorney-client privileged and confidential. It is solely intended for use by the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and delete this communication.

Any tax advice included in this communication may not contain a full description of all relevant facts or a complete analysis of all relevant tax issues or authorities. This communication is solely for the intended recipient's benefit and may not be relied upon by any other person or entity.

External-Please exercise caution when opening any attachments or clicking on links.

⏮ Reply all    ⏮    🗑 Delete    ⓧ Junk    Block    ⋮

## Re: RTK submission from WHYY

① You forwarded this message on Fri 4/2/2021 11:54 AM

NP

Neil Petersen <NPetersen@septa.org>

Fri 4/2/2021 11:26 AM

To: Michaela Winberg

Cc: Gottlieb, Mark <mgottlieb@offitkurman.com>; Shannon, Megan <mshannon@offitkurman.com>



Dear Ms. Winberg:

This is in response to your request under the Right-to-Know Law (RTKL) with respect to obtaining various records pertaining to claims/incidents of either sexual assault or sexual harassment from January 1, 2016 thru April 1, 2021.

Due to the nature of your request and Authority-wide bona fide staffing constraints within the departments possessing the subject information, coupled with record retrieval and legal review problems caused by the August 2020 IT malware attack on SEPTA's entire database/storage systems, SEPTA is precluded to respond to your request within the required five (5) business day period. Based upon the foregoing, SEPTA hereby invokes its right to a 30-day time extension (in addition to the five business days) in accordance with Section 902 of the RTKL. Accordingly, we hopefully expect to respond by May 10, 2021, but will earlier produce any responsive records upon receipt and legal review thereof, and not otherwise falling within any of the stated exceptions to the RTKL which are deemed exempt from access.

---

**From:** Michaela Winberg <mwinberg@whyy.org>

**Sent:** Thursday, April 1, 2021 2:56 PM

**To:** Neil Petersen <NPetersen@septa.org>

**Cc:** Open Records Officer <OpenRecordsOfficer@septa.org>

**Subject:** RTK submission from WHYY

Hi Neil,

Michaela Winberg here, reporter at WHYY in Philadelphia. I've attached a right-to-know request for SEPTA.

Let me know if you have any questions. Looking forward to hearing from you.

Thanks,  
Michaela

Michaela Winberg  
Reporter, Billy Penn at WHYY  
908-731-2444 | @mwinberg\_  
She/her

External-Please exercise caution when opening any attachments or clicking on links.

**Re: RTKL Request to SEPTA of 4/1/21****Michaela Winberg** <mwinberg@whyy.org>

Mon 5/10/2021 5:25 PM

**To:** Shannon, Megan <mshannon@offitkurman.com>

Thanks for the update, Megan. Looking forward to it.

**Michaela Winberg**Reporter, Billy Penn at WHYY908-731-2444 | @mwinberg

She/her

**From:** Shannon, Megan <mshannon@offitkurman.com>**Sent:** Monday, May 10, 2021 3:23 PM**To:** Michaela Winberg <mwinberg@whyy.org>**Subject:** RTKL Request to SEPTA of 4/1/21

Dear Ms. Winberg,

I am writing on behalf of SEPTA regarding the attached RTKL request. SEPTA requires an additional week to provide its response. SEPTA will provide you with its response by May 17. Please give me a call at 267-338-1328 if you have any questions.

**Megan Shannon***Pronouns: she, her, hers*

Attorney

D 267.338.1328mshannon@offitkurman.com

View My Bio &gt;&gt;



CONNECT ON LINKEDIN

Ten Penn Center  
1801 Market Street  
Suite 2300  
Philadelphia, PA 19103  
T 267.338.1300  
F 267.338.1335  
offitkurman.com

**PRIVILEGED COMMUNICATION/PRIVACY NOTICE**

Information contained in this transmission is attorney-client privileged and confidential. It is solely intended for use by the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and delete this communication.

Any tax advice included in this communication may not contain a full description of all relevant facts or a complete analysis of all relevant tax issues or authorities. This communication is solely for the intended recipient's benefit and may not be relied upon by any other person or entity. External-Please exercise caution when opening any attachments or clicking on links.

OOR Exhibit 1 Page 013





**pennsylvania**  
OFFICE OF OPEN RECORDS

## Standard Right-to-Know Law Request Form

*Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.*

**SUBMITTED TO AGENCY NAME:** SEPTA (Attn: AORO)

Date of Request: 4/1/2021 Submitted via: ☒ Email ☐ U.S. Mail ☐ Fax ☐ In Person

**PERSON MAKING REQUEST:**

Name: Michaela Winberg Company (if applicable): WHYY

Mailing Address: 150 N. 6th St

City: Philadelphia State: PA Zip: 19106 Email: mwinberg@whyy.org

Telephone: 908-731-2444 Fax: N/A

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☒ Email ☐ U.S. Mail

**RECORDS REQUESTED:** *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

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

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

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.

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

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

**DO YOU WANT COPIES?** ☐ Yes, printed copies (default if none are checked)  
☒ Yes, electronic copies preferred if available  
☐ No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☒ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than ☒ \$100 (or) ☐ \$\_\_\_\_\_.

**ITEMS BELOW THIS LINE FOR AGENCY USE ONLY**

Tracking: \_\_\_\_\_ Date Received: \_\_\_\_\_ Response Due (5 bus. days): \_\_\_\_\_

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: \_\_\_\_\_) Actual Response Date: \_\_\_\_\_

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$\_\_\_\_\_

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

**NOTE:** In most cases, a completed RTKL request form is a public record.  
More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Feb. 3, 2020

## RTK submission from WHYY

Michaela Winberg <mwinberg@whyy.org>

Thu 4/1/2021 2:56 PM

To: NPetersen@septa.org <NPetersen@septa.org>

Cc: openrecordsofficer@septa.org <openrecordsofficer@septa.org>

 1 attachments (187 KB)

MW SEPTA RTK April 2021.pdf;

Hi Neil,

Michaela Winberg here, reporter at WHYY in Philadelphia. I've attached a right-to-know request for SEPTA.

Let me know if you have any questions. Looking forward to hearing from you.

Thanks,  
Michaela

Michaela Winberg  
Reporter, Billy Penn at WHYY  
908-731-2444 | @mwinberg\_  
She/her



**SEPTA**

**Loss Run Data Detail**

Measurement Period by Loss Date from 01/01/2016 to 04/01/2021 as of 04/30/2021

Sedgwick Copyright © 2021 All rights reserved. This document is provided for informational purposes only.

<b>As of Date</b>	<b>Account Name</b>	<b>Unit Name</b>	<b>Formatted File Number</b>
04/30/2021	Southern	SOUTHERN OPERATORS	40200205419-0001
04/30/2021	Comly	COMLY OPERATORS	4301190039481

<b>Claimant Full Name (Last Then First)</b>	<b>Date of Loss</b>	<b>Date Claim Reported to Client</b>	<b>Date Claim Reported to CMS</b>	<b>Date Claim Opened</b>
	02/25/2020	02/25/2020	02/25/2020	02/28/2020
	10/10/2018	10/10/2018	10/11/2018	10/16/2018



Date Claim Closed	Date Claim Reopened	Claim Status	State Of Jurisdiction	State Of Loss	Line Type	Line Code	Coverage Description	Coverage Code	WC Claim Type as of Query As Of Date
		O	PA	PA	WC	WC	Workers Cd	WC	IN
10/17/2018		C	PA	PA	WC	WC	Workers Cd	WC	MO

<b>WC Claim Type - Financial Definition</b>	<b>Subtype</b>	<b>Claim Substatus</b>	<b>Examiner Office Name</b>	<b>Examiner Supervisor's Full Name</b>
IN		Accepted	PHILADELPHIA, PA - SEPTA	Renee Henry
MO		Denied	PHILADELPHIA, PA - SEPTA	Renee Henry

<b>Examiner Correspondence Name</b>	<b>Litigation Status (Yes/No)</b>	<b>Date in Litigation</b>	<b>Date Of Attorney Representation</b>	<b>Settlement Type</b>	<b>Settlement Date</b>
Steven M. Rule	No				
Theresa Dougherty	No				

<b>Method of Settlement</b>	<b>Subrogation Status (Yes/No)</b>	<b>Cause Description (Interaction)</b>	<b>Result/Nature Description</b>
0	N	Rubbed or Abraded, NOC	Unclassified, Insufficient Data
0	N	Other Injury NEC	Mental Stress

Target/Part of Body Description	Last Payment Date	Days Since Last Payment	Claim Paid - Ind/Loss	Claim Paid - Medical	Claim Paid - Expense
Multiple Body Parts	04/26/2021	4	\$35,696.79	\$4,195.27	\$3,260.50
No Physical Injury			\$0.00	\$0.00	\$0.00

<b>Claim Paid - Total</b>	<b>Claim Future Reserve - Ind/Loss</b>	<b>Claim Future Reserve – Medical</b>	<b>Claim Future Reserve – Expense</b>	<b>Claim Future Reserve – Total</b>	<b>Claim Incurred - Ind/Loss</b>	<b>Claim Incurred – Medical</b>
\$43,152.56	\$6,186.47	\$9,054.73	\$4,750.00	\$19,991.20	\$41,883.26	\$13,250.00
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00

<b>Claim Incurred – Expense</b>	<b>Claim Incurred - Total</b>	<b>Claim Recovery - Ind/Loss</b>	<b>Claim Recovery - Expense</b>	<b>Claim Recovery – Medical</b>	<b>Claim Recovery – Total</b>	<b>Policy - Policy Number</b>
\$8,010.50	\$63,143.76	\$0.00	\$0.00	\$0.00	\$0.00	SP4060343
\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	SP4058526

<b>Plan - Carrier Name</b>	<b>Policy - Inception Date</b>	<b>Policy - Expiration Date</b>	<b>Plan Number</b>	<b>Structure Level Name 01</b>	<b>Structure Level Name 02</b>
	05/01/2019	04/30/2020	1	SEPTA	2100 - City Transit Division (CTD)
	05/01/2018	04/30/2019	1	SEPTA	2100 - City Transit Division (CTD)



<b>Structure Level Name 03</b>	<b>Structure Level Name 04</b>	<b>Client Name</b>	<b>Client Number</b>	<b>Account Number</b>	<b>Unit Number</b>
Southern	SOUTHERN OPERATORS	SEPTA	9301	21000018	14507
Comly	COMLY OPERATORS	SEPTA	9301	21000008	14504

# **OOR EXHIBIT 2**

## **NOTICE RELATED TO THE CORONAVIRUS (COVID-19) EMERGENCY**

Pennsylvania is currently under a declared state of emergency related to the coronavirus (COVID-19). Some agencies and requesters may face challenges in regard to their ability to meaningfully participate in Right-to-Know Law (RTKL) appeals. Accordingly, and to ensure due process, the Office of Open Records (OOR) is taking the following temporary steps.

**The timeline for this RTKL appeal may be extended by the OOR during the appeal.** This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **July 2, 2021**.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **June 11, 2021**.

**If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.**

Every staff member of the OOR is working remotely, and we are only able to receive postal mail on a limited basis at this time. Accordingly, we urge agencies and requesters to use email for all communication with the OOR at this time.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters during this time to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.

June 2, 2021

**Via Email Only:**

Mr. Terry Lang  
802 West 33 Street  
Erie, PA 16508  
LangT1984@gmail.com

**Via Email Only:**

Dianntha McCaughtry  
Agency Open Records Officer  
Erie Rise Leadership Academy Charter School  
1006 West 10th St  
Erie, PA 16502  
dmccaughtry@erieriseacademy.org

**RE: OFFICIAL NOTICE OF APPEAL - Lang v. Erie Rise Leadership Academy Charter School  
OOR Dkt. AP 2021-1078**

Dear Parties:

**Review this information and all enclosures carefully as they affect your legal rights.**

The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on June 2, 2021. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **subject to the enclosed information regarding the coronavirus (COVID-19).**

**Notes for both parties (more information in the enclosed documents):**

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,



Elizabeth Wagenseller  
Executive Director

Enc.: Description of RTKL appeal process  
Assigned Appeals Officer contact information  
Entire appeal as filed with OOR

# The Right-to-Know Law Appeal Process

**Please review this information carefully as it affects your legal rights.**

The Office of Open Records (“OOR”) has received the enclosed appeal, which was filed under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the enclosed information regarding the coronavirus (COVID-19). If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

---

## **Submissions to the OOR**

**Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer.** Please contact the Appeals Officer as soon as possible.

**Any information provided to the OOR must be provided to all parties involved in this appeal.** Information submitted to the OOR will not be considered unless it is also shared with all parties.

**Include the docket number on all submissions.**

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

---

## **Agency Must Notify Third Parties**

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; **or** are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. Â§ 67.1101(c)).

The Commonwealth Court has held that “the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

**A third party's failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.**

*NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.*

---

---

## Statements of Fact & Burden of Proof

Statements of fact **must** be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, [openrecords.pa.gov](http://openrecords.pa.gov).

*Any evidence or legal arguments not submitted or made to the OOR may be waived.*

---

## Preserving Responsive Records

**The agency must preserve all potentially responsive records during the RTKL appeal process**, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

---

## Mediation

**The OOR offers a mediation program as an alternative to the standard appeal process.** To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



## **MEDIATION NOTICE**

**Appeals before the Office of Open Records (OOR) are stayed for seven business days pending the parties' decision to participate in the OOR's Informal Mediation Program.**

**The Parties may agree to mediation.** To participate in mediation, the Parties must submit a completed copy of the attached Mediation Agreement. If both Parties agree to mediation, the appeal will be further stayed, and the Parties will be contacted by an OOR Mediator to begin the mediation process.

**The Parties may decline mediation.** If either Party declines to participate in mediation or fails to submit a signed Mediation Agreement within seven business days:

- The record will remain open for seven additional business days for the parties to submit evidence and argument in support of their positions; and
- The OOR will decide the appeal and issue a Final Determination by the date set forth in the attached Official Notice of Appeal.

Even if mediation is declined at this time, the Parties may agree to mediate the dispute at any time prior to a Final Determination being issued, and the appeal will be stayed pending mediation.

**Questions.** If the Parties have questions about mediation or what to expect during the mediation process, please email the assigned Appeals Officer or visit the OOR's website at <https://www.openrecords.pa.gov/Appeals/Mediation.cfm>.



## OOB MEDIATION AGREEMENT

OOB Dkt. No. 2021-1079

Requester Name: Winberg, Michaela

Agency Name: Southeastern Pennsylvania Transportation Authority

The Requester and Agency (collectively, the "Parties") agree to participate in the OOR's Informal Mediation Program to resolve the matters at issue in this appeal.

The Parties agree to participate in the mediation process in good faith. If the Parties agree, there may be more than one session if the Mediator determines that the appeal could be resolved. The Parties acknowledge that mediation sessions are not open to the public and the content of discussions during mediation is confidential and not admissible as evidence in this appeal.

The Parties agree to extend the Final Determination deadline in this appeal for 30 calendar days beyond the conclusion of the mediation process or, if the Requester agreed to grant the OOR a 30-day extension on the appeal form initiating this appeal, the Final Determination deadline will include that extension. If the Requester does not withdraw the appeal, the Mediator will indicate the conclusion of the mediation process in writing if further mediation sessions are not likely to result in a resolution of the dispute. The Parties acknowledge that this Mediation Agreement, the Requester's withdrawal, and the OOR's withdrawal acknowledgement will be included in the OOR's administrative appeal file and subject to public access.

Upon receipt of this completed Mediation Agreement, a Mediator will contact the Parties to establish a mutually convenient date, time and location to conduct a joint mediation session.

Requester Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Agency Representative Signature: \_\_\_\_\_ Date: \_\_\_\_\_





**APPEALS OFFICER:**

**Bina Singh, Esq.**

**CONTACT INFORMATION:**

Commonwealth of Pennsylvania  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234

**FACSIMILE:**

**(717) 425-5343**

**EMAIL:**

**binsingh@pa.gov**

**Preferred method of contact and  
submission of information:**

**EMAIL**

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.  
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot  
speak to parties individually without the participation of the other party.**

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review  
prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff  
are also available to provide general information about the appeals process by calling (717) 346-9903.

## REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

**NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.**

OOR Docket No: \_\_\_\_\_

Today's date: \_\_\_\_\_

Name: \_\_\_\_\_

**PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.**

Address/City/State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Fax Number: \_\_\_\_\_

Name of Requester: \_\_\_\_\_

Address/City/State/Zip \_\_\_\_\_

Telephone/Fax Number: \_\_\_\_\_ / \_\_\_\_\_

E-mail \_\_\_\_\_

Name of Agency: \_\_\_\_\_

Address/City/State/Zip \_\_\_\_\_

Telephone/Fax Number: \_\_\_\_\_ / \_\_\_\_\_

E-mail \_\_\_\_\_

Record at issue: \_\_\_\_\_

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) \_\_\_\_\_

**I have attached a copy of all evidence and arguments I wish to submit in support of my position.**

Respectfully submitted, \_\_\_\_\_ (must be signed)

**Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.**

# **OOR EXHIBIT 3**

**From:** [Shannon, Megan](#)  
**To:** [Liggitt, Ryan](#)  
**Cc:** [Gottlieb, Mark](#); [Neil Petersen \(NPetersen@septa.org\)](#); [Michaela Winberg](#)  
**Subject:** [External] OOR AP 2021-1079  
**Date:** Friday, June 11, 2021 4:53:38 PM  
**Attachments:** [image005.png](#)  
[image006.png](#)  
[image007.png](#)  
[image008.png](#)  
[image003.png](#)  
[SEPTA Submission OOR AP 2021-1079.pdf](#)  
[Chris Valentin verified statement.pdf](#)  
[WHYY RTW Verified Statement signed RPG.pdf](#)  
[Vicky Duggan Verified Statement.pdf](#)

---

**ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to [CWOPA\\_SPAM@pa.gov](mailto:CWOPA_SPAM@pa.gov).

Dear Appeals Officer Liggitt:

Please see the attached on behalf of SEPTA.



**Offit | Kurman**  
Attorneys At Law


**Megan Shannon**

*Pronouns: she, her, hers*

Attorney

D [267.338.1328](tel:267.338.1328)

[mshannon@offitkurman.com](mailto:mshannon@offitkurman.com)

 [View My Bio](#) »



Ten Penn Center  
1801 Market Street  
Suite 2300  
Philadelphia, PA 19103  
T [267.338.1300](tel:267.338.1300)  
F [267.338.1335](tel:267.338.1335)  
[offitkurman.com](http://offitkurman.com)



---

**PRIVILEGED COMMUNICATION/PRIVACY NOTICE**

Information contained in this transmission is attorney-client privileged and confidential. It is solely intended for use by the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and delete this communication.

Any tax advice included in this communication may not contain a full description of all relevant facts or a complete analysis of all relevant tax issues or authorities. This communication is solely for the intended recipient's benefit and may not be relied upon by any other person or entity.

Mark E. Gottlieb, Esquire  
267-338-1318 (Direct Dial)  
267-338-1335 (Facsimile)  
[mgottlieb@offitkurman.com](mailto:mgottlieb@offitkurman.com)

June 11, 2021

**Via e-mail (rliggitt@pa.gov)**

Ryan Liggitt  
Commonwealth of Pennsylvania  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234

**Re: OOR AP 2021-1079 (Winberg/WHYY)**

Dear Appeals Officer Liggitt:

I am writing on behalf of Southeastern Pennsylvania Transportation Authority (“SEPTA”) in response to the appeal filed by Michaela Winberg/WHYY docketed as AP 2021-1079. Ms. Winberg submitted a request to SEPTA on April 1, 2021 seeking:

- *All Work Activity Status Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.*
- *All Operator’s Accident/Incident Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.*
- *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.*
- *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.*
- *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 May 13, 2021, SEPTA produced a spreadsheet from SEPTA’s third-party administrator with details of worker’s compensation claims arising from sexual harassment or sexual assault, in response to the fifth request (“summary reflecting the total amount of workman’s comp...”). SEPTA denied the remaining requests. Requester filed a timely appeal on June 2, 2021.

In light of the Requester's argument that SEPTA's response was insufficient because no affidavits were provided with SEPTA's initial response, SEPTA notes that there is no requirement within the RTKL that an agency supply a requester with affidavits in support of its initial denial of a request for records. Section 903 of the RTKL requires that the agency provide the "specific reasons for the denial, including a citation of supporting legal authority", but does not require an agency to provide affidavit evidence to a requester in support of a denial. "Testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption." Heavens v. Pennsylvania Dep't of Env'tl. Protection, 65 A.3d 1069, 1073 (Pa. Commw. 2013). However, the Right to Know Law itself does not *require* submission of affidavits.

The Requester's appeal should be denied with respect to each portion of her Request for the following reasons.

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

The Appeal should be denied with respect to the Request for Work Activity Status Reports for the following three reasons: (1) they are the medical records of SEPTA employees exempt under § 708(b)(5) of the RTKL, (2) they do not exist within SEPTA's possession pursuant to §506(d)(1), and because the request is insufficiently specific under §703 of the RTKL.

SEPTA contracts with a Third-Party Administrator, Sedgwick, to manage and administrate its Workmen's Compensation claims. (See Verified Statement of Richard Graham, ¶ 5.) Sedgwick, in turn, utilizes Concentra as one of its healthcare providers. (Graham, ¶¶ 8-9.) Concentra's Work Activity Status Reports document the medical condition and recovery progress of SEPTA's employees to determine if the employee's condition enables the employee to work in any capacity. (Graham, ¶ 9.) Requester herself describes the documents as medical records, which "outline whether the employee is healthy enough to work at present moment."

Section 708(b)(5) of the RTKL explicitly exempts "[a] record of an individual's medical... history or disease status, including an evaluation, consultation, prescription, diagnosis or treatment... enrollment in a health care program or program designed for participation by persons with disabilities, including... worker's compensation... or related information that would disclose individually identifiable health information." A requester may not even access their *own* medical records via a RTKL request. See Charles Hoyer v. Pa. Dep't of Corrections, - AP 2021-0082 ("the medical records of a requester are not subject to disclosure to any person for any reason including the requester himself") (cleaned up). Accordingly, this appeal should be denied.

Furthermore, although the Requester makes the unsworn claim that she has seen a Work Activity Status Report, this does not establish that these reports are within SEPTA's possession. Indeed, they are not. The RTKL states in part that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

RTKL § 506(d)(1). “Work Activity Status Reports” are maintained by Concentra, the contractor of one of SEPTA’s contractors (Sedgwick). The RTKL places an express limit on the records of government contractors that are considered public records: the party must be “contracted to perform a governmental function on behalf of the agency” and the records must relate to that function. RTKL § 506(d)(1). A contractor performs a governmental function on behalf of an agency when the agency delegates “some non-ancillary undertaking of government.” SWB Yankees v. Wintermantel, 615 Pa. 640, 662 (Pa. 2012).

Administering medical evaluations in the context of a Workmen’s Compensation program is not a government function. The SWB Yankees Supreme Court explained that a contractor performs a governmental function when there has been “delegation of some substantial facet of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors.” Id. at 664. Concentra’s role is that of a routine service provider, not a company brought in to fulfill a core purpose of SEPTA. Therefore, SEPTA is not in “possession” of Concentra’s records.

Finally, the appeal of this request should be denied because the request is insufficiently specific. A request that requires an agency to conduct “legal research and analysis, not only to ascertain that which is being requested, but also to determine whether a particular law and/or document possesses the legal significance necessary to make it responsive to the request” lacks specificity. Askew v. Office of the Governor, 65 A.3d 989, 994 (Pa. Cmwlth. 2013). Here, to respond to this request, SEPTA would be required to review the Work Activity Status Reports and patient files and determine whether the elements of sexual assault or harassment are present. A request that calls for this type of legal analysis is insufficiently specific under § 703 of the RTKL, therefore the appeal should be denied on this basis as well.

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

The appeal should be denied with respect to the request for Operator’s Accident/Incident Reports because it is insufficiently specific pursuant to § 703 of the RTKL. Whether a request is sufficiently specific falls to the three-part balancing test of scope, subject matter, and timeframe set forth in Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121, 1125-6.

SEPTA’s Operator/Incident Reports are maintained in hard copy, across 9 City and Suburban depots. (Verified Statement of Christopher Valentin, ¶¶ 3-4.) SEPTA enters its Incident Reports into a database, classifying the reports as either “Accident” or “Miscellaneous”.

(Valentin, ¶ 5.) The database can also be searched by name and date. (Valentin, ¶ 6.) As such, there is no database which can be searched to identify all Reports including incidents of sexual harassment/assault. (Valentin, ¶ 5.)

The Requester seeks more than five years' worth of these reports. To provide these reports, SEPTA would be required to read each of the more than approximately 50,000 incident reports filed from January 1, 2016 through April 1, 2021 and analyze each report to make a legal determination of whether the incident described qualifies as sexual assault or sexual harassment. As stated above, a request that requires an agency to conduct "legal research and analysis, not only to ascertain that which is being requested, but also to determine whether a particular law and/or document possesses the legal significance necessary to make it responsive to the request" lacks specificity. Askew v. Office of the Governor, 65 A.3d 989, 994 (Pa. Cmwlth. 2013).

Therefore, the appeal should be denied with respect to the request for all Operator's Accident/Incident Reports that include incidents of sexual harassment or sexual assault.

**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.**

The appeal should be denied with respect to this request because SEPTA does not maintain a database or electronic summary of "Employee Injury Reports".

SEPTA employees can fill out an injury report for work-related injuries, and that report would accompany their standard Operator's Accident/Incident Report. These reports are forwarded from the employee's depot to worker's compensation. (Graham, ¶ 4.) SEPTA's third-party administrator Sedgwick maintains a database of workmen's compensation claims, searchable by type of claim, including sexual harassment/assault, which has previously been produced. (Graham, ¶¶ 6, 10.) SEPTA does not maintain a separate database or summary of injury reports. (Graham, ¶ 3.)

Pursuant to § 705 of the RTKL, agencies "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." Accordingly, this appeal should be denied with respect to the request for a summary of Employee Injury Reports.



**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.**

SEPTA does not maintain 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.” (Verified Statement of Vicky Duggan, ¶ 3.)

SEPTA uses a third-party administrator, Work Partners, to manage FMLA leave requests. (Duggan, ¶ 4.) Employees seeking approval for FMLA leave due to injury have their treating physician complete the Department of Labor’s WH-385 Form. (Duggan, ¶ 5.) The physician indicates whether the employee has a serious health condition; the form does not contain the cause of the employee’s injury or health condition. (Duggan, ¶ 7.)

As stated above, § 705 of the RTKL states that agencies “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.” Accordingly, this appeal should be denied with respect to the request for a summary of FMLA days taken each year 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.**

SEPTA previously produced a spreadsheet created by its Workmen’s Compensation administrator, Sedgwick. SEPTA properly redacted the names of employees who filed Workmen’s Compensation claims. The Requester has not stated any objection with respect to this response.

For the above-stated reasons, SEPTA respectfully requests that the Office of Open Records deny this appeal.

Respectfully submitted,



MARK E. GOTTLIEB



MEGAN K. SHANNON

cc: Neil Petersen, Esq. ([npetersen@septa.org](mailto:npetersen@septa.org))

**Verified Statement of Vicky Duggan, Absence Management Program Manager  
Southeastern Pennsylvania Transportation Authority**

I, Vicky Dugan, am the Absence Management Program Manager for the Southeastern Pennsylvania Transportation Authority ("SEPTA") and am authorized to execute this verified statement on its behalf. I state the following to the best of my knowledge, information and belief under penalty of perjury pursuant to 18 Pa.C.S. § 4904 relating to unsworn falsification of authorities:

1. I am currently the Manager for SEPTA's Absence Management Program.
2. I am aware of the requests at issue in the Office of Open Records Appeal 2021-1079, in which the following was requested:
  - *All Work Activity Status Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.*
  - *All Operator's Accident/Incident Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.*
  - *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.*
  - *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.*
  - *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.*
3. SEPTA does not maintain 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."
4. To apply for FMLA leave, a SEPTA employee calls SEPTA's Third Party Administrator, Work Partners, which is based out of the University of Pittsburgh Medical Center.
5. Work Partners sends the employee a Department of Labor Certification Form (Form WH-380-E) along with all required information related to FMLA rights and responsibilities. The employee then has their treating physician complete the WH-380-E Form.

which is in turn returned to Work Partners.

6. Work Partners reviews the WH-380-E form completed by the treating physician and either approves or denies the request for FMLA leave.

7. The WH-380-E form requires the employee's treating physician to provide medical information regarding the employee medical condition, and the amount of leave needed. This form does not state the cause of the health condition.

By:

  
Vicky Duggan

Absence Management Program Manager

Southeastern Pennsylvania Transportation Authority

1234 Market Street

Philadelphia, PA 19107

4820-1159-8062, v. 1

**Verified Statement of Christopher Valentin, Senior Director of Surface Transportation  
Southeastern Pennsylvania Transportation Authority**

I, Christopher Valentin, am the Senior Director of Surface Transportation for Southeastern Pennsylvania Transportation Authority ("SEPTA") and am authorized to execute this verified statement on its behalf. I state the following to the best of my knowledge, information and belief under penalty of perjury pursuant to 18 Pa.C.S. § 4904 relating to unsworn falsification of authorities:

1. I am currently the Senior Director of Surface Transportation for SEPTA.
2. I am aware of the requests at issue in the Office of Open Records Appeal 2021-1079, in which the was requested:
  - *All Work Activity Status Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.*
  - *All Operator's Accident/Incident Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.*
  - *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.*
  - *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.*
  - *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.*
3. 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.
4. SEPTA maintains its Operator's Accident/Incident Reports in hard copy at each of its nine [9] City and Suburban depots.
5. The Reports are entered into a database categorized as either "Accidents" or "Miscellaneous." This database cannot be searched for reports involving sexual harassment/assault.

6. The Reports database is searchable by name and date.

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

By:



on

6/10/2021

Christopher Valentin  
Senior Director, Surface Transportation  
Southeastern Pennsylvania Transportation Authority  
1234 Market Street  
Philadelphia, PA 19107

4851-1072-5614, v. 1

9. Pennsylvania's Worker's Compensation Act allows employers to create a "Physician Panel" which must be posted at the work location. The panel contains a list of medical providers that the employee must treat with for the first 90 days following a work injury or illness if they want their medical bills covered as part of the claim. There are multiple providers on the panel. Concentra is one of several providers on these panels.

10. I facilitated Sedgwick's production of a spreadsheet of SEPTA's workmen's compensation claims responsive to the request for "[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." This spreadsheet listed two SEPTA employees.

11. I inquired with our account manager at Concentra, Juliann Kintz, 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.

By:  on 6/11/2021

Richard Graham  
Chief Risk Officer  
Southeastern Pennsylvania Transportation Authority  
1234 Market Street  
Philadelphia, PA 19107

# **OOR EXHIBIT 4**

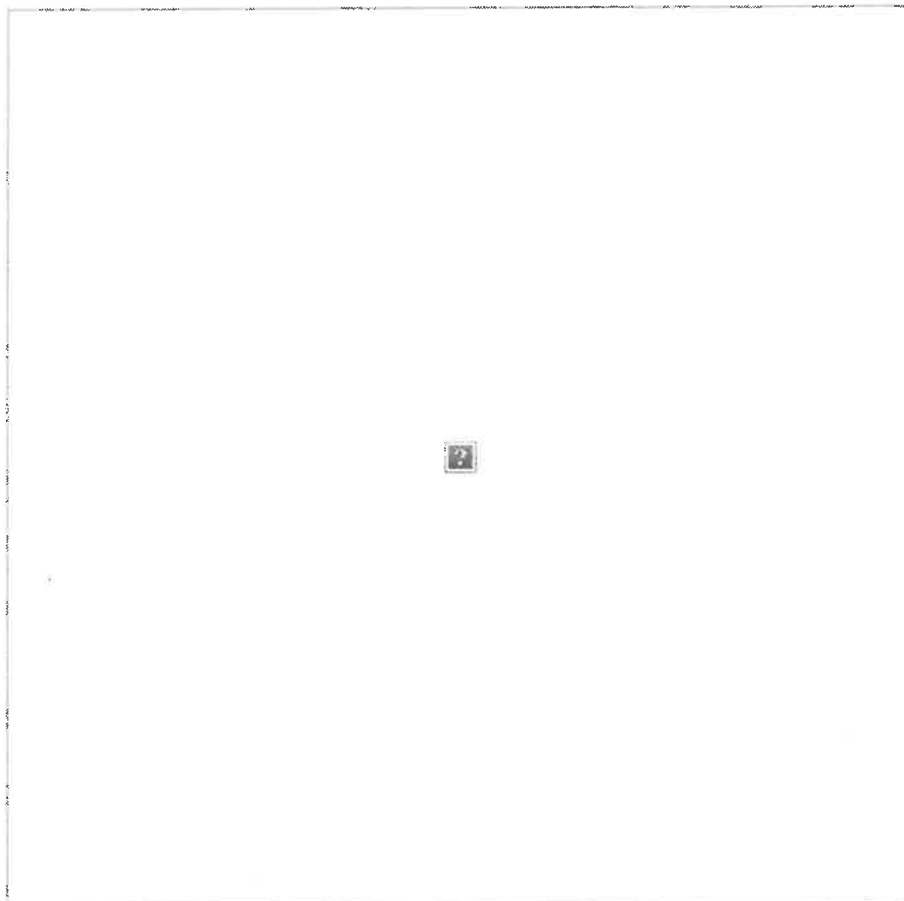
**From:** [Shannon, Megan](#)  
**To:** [Liggitt, Ryan](#)  
**Cc:** [Gottlieb, Mark](#); [Neil Petersen \(NPetersen@septa.org\)](#); [Michaela Winberg](#)  
**Subject:** [External] RE: OOR AP 2021-1079  
**Date:** Saturday, June 12, 2021 9:40:10 AM  
**Attachments:** [image004.png](#)  
[image005.png](#)  
[image006.png](#)  
[image007.png](#)  
[image008.png](#)  
[image848251.png](#)  
[image890788.png](#)  
[image064273.png](#)  
[image528115.png](#)  
[Rick Graham verified statement 6.11.21.pdf](#)

---

**ATTENTION:** *This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to [CWOPA\\_SPAM@pa.gov](mailto:CWOPA_SPAM@pa.gov).*

Dear Appeals Officer Liggitt:

I apologize for this technical issue – we inadvertently attached only the signature page of Rick Graham’s verified statement. The full verified statement is included here.





**Verified Statement of Richard Graham, Chief Risk Officer  
Southeastern Pennsylvania Transportation Authority**

I, Richard Graham, am the Chief Risk Officer for the Southeastern Pennsylvania Transportation Authority ("SEPTA") and am authorized to execute this verified statement on its behalf. I state the following to the best of my knowledge, information and belief under penalty of perjury pursuant to 18 Pa.C.S. § 4904 relating to unsworn falsification of authorities:

1. I am currently the Chief Risk Officer for SEPTA.
2. I am aware of the requests at issue in the Office of Open Records Appeal 2021-1079, in which the Requester sought, among other items:
  - *All Work Activity Status Reports that include incidents of sexual harassment or sexual assault from Jan. 1, 2016 to April 1, 2021.*
  - *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.*
  - *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.*
3. SEPTA does not maintain a database or electronic summary of Employee Injury Reports.
4. 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.
5. SEPTA contracts with a third-party administrator, Sedgwick, to administer its Workmen's Compensation Program.
6. Sedgwick maintains a database of workmen's compensation claims that indicates the type of claim (e.g., sexual harassment/assault) and the total amount paid pursuant to the claim.
7. Sedgwick's database of workmen's compensation claims does not summarize Employee Injury Reports.
8. Sedgwick contracts with Concentra as a healthcare provider.

9. Pennsylvania's Worker's Compensation Act allows employers to create a "Physician Panel" which must be posted at the work location. The panel contains a list of medical providers that the employee must treat with for the first 90 days following a work injury or illness if they want their medical bills covered as part of the claim. There are multiple providers on the panel. Concentra is one of several providers on these panels.

10. I facilitated Sedgwick's production of a spreadsheet of SEPTA's workmen's compensation claims responsive to the request for "[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." This spreadsheet listed two SEPTA employees.

11. I inquired with our account manager at Concentra, Juliann Kintz, 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.

By:  on 6/11/2021

Richard Graham  
Chief Risk Officer  
Southeastern Pennsylvania Transportation Authority  
1234 Market Street  
Philadelphia, PA 19107

# **OOR EXHIBIT 5**

**From:** [Liggitt, Ryan](#)  
**To:** [Michaela Winberg](#)  
**Cc:** [Shannon, Megan](#); [NPetersen@SEPTA.org](mailto:NPetersen@SEPTA.org); [Gottlieb, Mark](#)  
**Subject:** RE: [External] Re: Extension Request: Winberg v. SEPTA: AP 2021-1079  
**Date:** Thursday, July 8, 2021 5:58:00 PM

---

Thank you for your prompt response, I appreciate it.



**Ryan W. Liggitt, Esquire**

Appeals Officer  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234  
**(717) 346-9903** | [rliggitt@pa.gov](mailto:rliggitt@pa.gov)  
<https://openrecords.pa.gov> | [@OpenRecordsPA](#)

---

**From:** Michaela Winberg <[mwinberg@whyy.org](mailto:mwinberg@whyy.org)>  
**Sent:** Thursday, July 8, 2021 5:57 PM  
**To:** Liggitt, Ryan <[rliggitt@pa.gov](mailto:rliggitt@pa.gov)>  
**Cc:** Shannon, Megan <[mshannon@offitkurman.com](mailto:mshannon@offitkurman.com)>; [NPetersen@SEPTA.org](mailto:NPetersen@SEPTA.org); [Gottlieb, Mark](#) <[mgottlieb@offitkurman.com](mailto:mgottlieb@offitkurman.com)>  
**Subject:** [External] Re: Extension Request: Winberg v. SEPTA: AP 2021-1079

**ATTENTION:** *This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to [CWOPA\\_SPAM@pa.gov](mailto:CWOPA_SPAM@pa.gov).*

Hi, Appeals Officer Liggitt. A 2-week extension is totally fine on my end. Looking forward to hearing from you on July 26.

Thanks,  
Michaela

Michaela Winberg  
Reporter, [Billy Penn](#) at WHYY  
908-731-2444 | [@mwinberg](mailto:@mwinberg)  
She/her

---

**From:** Liggitt, Ryan <[rliggitt@pa.gov](mailto:rliggitt@pa.gov)>  
**Sent:** Thursday, July 8, 2021 5:52 PM  
**To:** Michaela Winberg <[mwinberg@whyy.org](mailto:mwinberg@whyy.org)>  
**Cc:** Shannon, Megan <[mshannon@offitkurman.com](mailto:mshannon@offitkurman.com)>; [NPetersen@SEPTA.org](mailto:NPetersen@SEPTA.org) <[NPetersen@SEPTA.org](mailto:NPetersen@SEPTA.org)>; [Gottlieb, Mark](#) <[mgottlieb@offitkurman.com](mailto:mgottlieb@offitkurman.com)>  
**Subject:** Extension Request: Winberg v. SEPTA: AP 2021-1079

Hello Ms. Winberg,

I am currently working on the Final Determination in this matter, however I am writing to ask for an extension of time.

This matter is currently due to be issued on Monday, July 12, 2021, and I am asking for a 2 week extension, allowing me until July 26, 2021. The reason for the extension is that I have been tasked with multiple additional responsibilities in the office due to the recent holiday, staffing changes, and my personal caseload is extremely high at the moment. With that being said, I would greatly appreciate the extra time.

Please let me know by responding to this email at your earliest convenience. Thank you for your time.



**Ryan W. Liggitt, Esquire**

Appeals Officer

Office of Open Records

333 Market Street, 16<sup>th</sup> Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | [rliggitt@pa.gov](mailto:rliggitt@pa.gov)

<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

External-Please exercise caution when opening any attachments or clicking on links

# **OOR EXHIBIT 6**



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

MICHAELA WINBERG AND WHY, Y,  
Requester

v.

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY,  
Respondent

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Docket No: AP 2021-1079

### INTRODUCTION

Michaela Winberg, a reporter for WHY, Y (collectively, “Requester”), submitted a request (“Request”) to the Southeastern Pennsylvania Transportation Authority (“SEPTA”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking specific types of records that would document incidents of sexual harassment or sexual assault from January 2016 to April 2016, as well as records related to FLMA days taken and worker’s compensation claims paid out to employees. SEPTA partially denied the Request, providing some responsive records and arguing that the remaining requested records are not in the possession of SEPTA and that the Request is insufficiently specific in part. 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 **denied in part**, and SEPTA is required to take further action as directed below.

### FACTUAL BACKGROUND

On March 30, 2021, the Request was filed, seeking:

[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.<sup>1</sup> 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,

---

<sup>1</sup> 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.<sup>2</sup> 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.  
APPEALS OFFICER

Sent to: Michaela Winberg (via email only);  
Megan Shannon, Esq. (via email only);  
Neil Petersen, AORO (via email only)

---

<sup>2</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).