



FINAL DETERMINATION

IN THE MATTER OF

**MEGAN BROCK,
Requester**

v.

**LANCASTER-LEBANON
INTERMEDIATE UNIT # 13,
Respondent**

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**Docket No: AP 2021-1768
(Consolidated)**

INTRODUCTION

Megan Brock (“Requester”) submitted two requests (“Requests”) to the Lancaster-Lebanon Intermediate Unit #13 (“Unit”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other items, communications sent or received by any or all Unit staff or directors. The Unit denied the Requests, arguing the Requests were insufficiently specific. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Unit is not required to take any further action.

FACTUAL BACKGROUND

On June 24, 2021, the Requests were filed, seeking:

Copies of all communications, emails, presentations, text messages, and documents received or sent by any/all Lancaster-Lebanon IU staff and/or directors on the iu13.org domain or agency issued phones from May 1, 2020 to August 31, 2020, to/from Erin Corrigan and/or BILL SENAVAITIS, and/or Rich Askey, regarding the following terms and/or topics: Dr. Damsker, PASPA sponsored webinar's, 520.1 school code, Dr. Damsker’s health and safety plan, Jeffrey Sultanik, hybrid

learning. Please include the following search terms: “Dr. Damsker,” “Jeffrey Sultanik,” “520.1”.

Copies of all communication, emails, presentations, text messages, and documents received or sent by any/all Lancaster-Lebanon IU staff and/or directors on the domain iul3.org or agency issued phones from May 1, 2020 to August 31, 2020, to/from Dr. William Harner, regarding the following terms and/or topics: regarding the following terms and/or topics: Dr. Damsker, PASPA sponsored webinar's, 520.1 school code, Dr. Damsker’s health and safety plan, Jeffrey Sultanik, hybrid learning, Bucks County IU. Please include the following search terms: “Dr. Damsker,” “Jeffrey Sultanik,” “520.1,” “Malamis”

On August 2, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the Unit denied the Requests, arguing that they were insufficiently specific in part, 65 P.S. § 67.703, records that contain information specifically and identifiably relating to any Unit students are protected by records are protected under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and that communications between Mr. Sultanik and the Unit are protected by the attorney-client privilege.

On August 23, 2021, the Requester appealed¹ to the OOR, challenging the denials and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Unit to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 3, 2021, the Unit submitted position statements reiterating its grounds for denial. The Unit claims that the appeals are insufficient, 65 P.S. § 67.1303(b), the Requests are insufficiently specific, and the records are protected by FERPA, the attorney-client privilege, the

¹ The Requester filed two appeals arising from the Requests docketed as OOR Dkt. AP 2021-1768 and OOR Dkt. AP 2021-1769. Because the appeals involved the same agency, requester, and arguments, the appeals are consolidated into OOR Dkt. AP 2021-1768 on this date. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

² The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

constitutional right to privacy and may contain exempt personal identification information, 65 P.S. § 67.708(b)(6), or identify a minor, 65 P.S. § 67.708(b)(30). In support of its position, the Unit submitted the affidavit of Brian Barnhart, the Open Records Officer for the Unit.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Unit is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local 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). 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)).

1. The appeals are sufficient

The Unit argues that the appeals are insufficient because they did not include the thirty-day extension letter and the requester provided the wrong final response for each Request. First, as it relates to the final responses – the OOR received two appeals from the Requester on the same day. The Requester provided her Requests and copies of the Unit’s final responses; however, at some point the final responses were switched – that is, the final response for AP 2021-1768 became associated with AP 2021-1769 and vice versa. As it is unclear whether the switch occurred at the time of filing the appeal, or during the OOR’s internal appeal docketing process, and as all the relevant information is before the OOR, this is not fatal to the appeal. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

Further, the Requester did not provide the thirty-day extension notice for either appeal; however, the Unit has affirmed that it invoked the thirty-day extension, and the extension is addressed in the final responses.³ As such, the Unit has demonstrated that it properly invoked a thirty-day extension; therefore, the Requester's failure to include the letters is not fatal to her appeals.

2. The Requests are insufficiently specific

The Unit argues the Requests are not sufficiently specific because it is unable to determine which records are being requested. 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 under the RTKL 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).

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

³ Under the RTKL, an affidavit made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

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. Finally, “[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.*

The fact that a request uses keywords in place of a subject matter is not necessarily fatal to a request, but broad keywords alone do not provide a sufficient limiting context. *See Montgomery County v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct 2012) (“incredibly broad” search terms do not provide a limiting subject matter); *Slaby v. City of Pittsburgh*, OOR Dkt. AP 2017-0142, 2017 PA O.O.R.D. LEXIS 238 (“A keyword list does not necessarily make a request insufficiently specific; however, a request must provide enough specificity in its scope and timeframe to help guide the agency in its search for records”). Also, a broad keyword search may still be sufficiently specific where a request specifies senders or recipients of emails.

In *Office of the Governor v. Engelkemier*, the request sought all emails sent and received by the Governor’s Chief of Staff for a five-and-a-half-month period where the requester provided a list of 109 search terms to guide the search, including names of public officials and employees, as well as topics such as “2015-2016 budget,” “Senate Republicans,” “Liquor Privatization,” and “Expenses.” In finding the request sufficiently specific, the Court stated:

A keyword list is not necessarily a substitute for a properly-defined subject matter(s) -- i.e., a particular transaction or activity of an agency. If terms on a list are too general or too broad, a requester runs the risk that the request will be rejected for lack of specificity, if not by the agency then by the OOR or this Court. A

clearly-defined subject matter, such as ‘liquor privatization,’ by contrast, has a better chance of passing the specificity test.

Office of the Governor v. Engelkemier, 148 A.3d 522, 531 (Pa. Commw. Ct 2016). Therefore, the Court found that, although the keyword list was lengthy and broad, the fact that the request had a narrow timeframe and scope, along with the Office’s response stating that it was producing records, meant that the request was sufficiently specific. *Id.* at 532.

In contrast, regarding the request in *Mollick v. Twp. of Worcester*, the Commonwealth Court concluded that a request for “all emails between the Supervisors regarding any Township business” and “all emails between the Supervisors and the Township employees regarding any Township business and/or activities for the past one and five years” was insufficiently specific because it failed to specify “what category or type of Township business or activity for which [the requester was] seeking information.” 32 A.3d 859, 871 (Pa. Commw. Ct. 2011). Further, in *Iverson*, the RTKL request sought emails from the county’s domain to four other email domains, with the subject and body containing fourteen different search terms and no timeframe provided. *Id.* at 282. The Commonwealth Court held that a request with no timeframe, a broad scope, and some “incredibly broad” keywords was insufficiently specific. *Id.* at 284.

In the instant matter, the Requests do not contain a subject matter; instead, they seek records “regarding” a list of various terms and topics. These terms and topics are fairly broad and do not, without additional context, enable the Unit to narrow the search for responsive records. In support of its position and to illustrate the inability of the Unit to search for the responsive records, Mr. Barnhart attests:

11. I was also unable to identify the specific subject matter of the records requested in the request, as the request did not provide a subject except that Ms. Brock asked for records “regarding” certain terms and did not narrow the scope, at all.

12. I interpret the word “regarding” in the request to mean that responsive records should concern those topics but need not actually use the words that Ms. Brock used. Thus, for example, an email regarding “hybrid learning” might read as a class with an “online component.”

13. Due to the above concern over Ms. Brock’s request for records “regarding” particular topics, I determined that a search for responsive [Unit] records would require that I examine all email and text messages of the [Unit] during the defined period that were either to or from any of the named individuals and make a judgment call on whether they are responsive or not.

The OOR has previously held that a request listing many of the same keywords was insufficiently specific, as the keywords did not serve as a substitute for a subject matter. *Brock v. Council Rock Sch. Dist.*, OOR Dkt. AP 2021-0942, 2021 PA O.O.R.D. LEXIS 1137; *Brock v. Bucks County Intermediate Unit No. 22*, OOR Dkt. AP 2021-1497, 2021 PA O.O.R.D. LEXIS 1839; *see also Brock v. Phila. Sch. Dist.*, OOR Dkt. AP 2021-0720, 2021 PA O.O.R.D. LEXIS 952 (holding that that a request which “reference[s] the following terms” is not seeking a list of keywords, but instead is directing an agency to identify records that relate to those terms, even without directly including them). As demonstrated by the evidence submitted by the Unit, many of the keywords listed in the Request pertain to a variety of Unit records, and without the limiting parameters of a transaction or activity, would require the Unit to review all potentially responsive files and “make judgments as to the relation of the documents to the specific request.” *Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 264-265 (Pa. Commw. Ct. 2012). As a result, the keywords provided do not narrow the search or enable the Unit to sufficiently identify a subject matter.

Next, the Unit argues that the scope of the Request is overly broad because it fails to identify a discrete group of documents. The Unit further argues that the only identifiable communication electronic records types contained in the Request are emails and text messages, but the remaining list of records is not clear. The Unit contends that because of the lack of clarity as it relates to the scope of documents, it is not able to search for the responsive records other than

emails and text messages. The Requests seek an extremely broad universe of documents sent or received by “any/all staff of the ... [Unit].” The Requests do not specify which of the Unit’s employees or email addresses may be senders or recipients. If the subject matters contained in the Requests were more distinct, this defect may not be fatal to the Requests, but many of the keywords are so broad that they fail to constitute sufficiently limited subject matters. Moreover, although the timeframe in the Requests is for a four-month period, it is not short enough to compensate for the fact that the Requests fail to identify a limited subject matter or scope, thus rendering the Requests to be insufficiently specific to enable the Unit to identify responsive records. *See, e.g., Brock v. Pa. Dep’t of Education*, OOR Dkt. AP 2021-1435, 2021 PA O.O.R.D. LEXIS 1753 (finding a similar request to this Request to be insufficiently specific). However, the Requester is not prohibited from filing a new RTKL request that provides additional details concerning records that are sought.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Unit is not required to take any further action. 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 Lancaster County Court of Common Pleas. 65 P.S. § 67.1302(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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: October 18, 2021

/s/ Erin Burlew

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APPEALS OFFICER

Sent to: Megan Brock (via email only);
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