



FINAL DETERMINATION
UPON RECONSIDERATION

IN THE MATTER OF	:	
	:	
CRAIG MCCOY, JOSEPH DISTEFANO	:	
AND THE PHILADELPHIA INQUIRER,	:	
Requester	:	
	:	
v.	:	
	:	
PENNSYLVANIA PUBLIC SCHOOL	:	
EMPLOYEES' RETIREMENT SYSTEM,	:	
Respondent	:	Docket No: AP 2021-1856
	:	
and	:	
	:	
AON INVESTMENTS, USA INC,	:	
Direct Interest Participant	:	
	:	
and	:	
	:	
BUCK GLOBAL, LLC,	:	
Direct Interest Participant	:	

INTRODUCTION

Craig McCoy, Joseph DiStefano and The Philadelphia Inquirer (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Public School Employees’ Retirement System (“PSERS”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, in relevant part, written communications between PSERS staff and three consulting firms. PSERS partially denied the Request, arguing it was insufficiently specific and that responsive records are

exempt criminal and noncriminal investigative records. The Requester appealed to the Office of Open Records (“OOR”). The OOR granted in part, denied in part, and dismissed as moot in part the appeal and the Requester filed a Petition for Reconsideration. For the reasons set forth in this Final Determination upon Reconsideration, the appeal is **granted in part, denied in part and dismissed as moot in part**, and PSERS is required to take additional action as directed.

FACTUAL BACKGROUND

On May 19, 2021, the Request was filed, stating, in relevant part:

3A- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of ACA Compliance Group, related to investment performance reporting.

3B- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of ACA, related to risk-sharing calculations.

3C - Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos), from December 2020 to the present, between PSERS staff and any employee or representative of ACA, related to the discovery or identification of an error in calculating the historical investment performance, as part of the shared-risk determination. Please include, for example, the notice given ACA on Feb. 18, 2021 that Aon’s source data was in error, and details of such error and its effect on the scale and direction of the calculation, and other notices related to the error.

4A- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of Aon, related to investment performance reporting; including but not limited to memos Aon sent PSERS on March 5, 2021 and April 16, 2021 and since that date.

4B- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of Aon, related to risk-sharing calculations.

4C- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from December 2020 to the present,

between PSERS staff and any employee or representative of Aon, related to the [] discovery of, or the identification of an error in, calculating the historical investment performance, as part of the shared-risk determination.

5A- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of Buck Global, related to investment performance reporting.

5B- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of Buck Global, related to risk-sharing calculations.

5C- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from December 2020 to the present, between PSERS staff and any employee or representative of Buck Global, related to the [] discovery of, or the identification of an error in, calculating the historical investment performance, as part of the shared-risk determination.

On August 25, 2021, following several extensions to respond, 65 P.S. § 67.902(b), PSERS partially denied the Request, providing some responsive records and arguing that certain Items are insufficiently specific, 65 P.S. § 67.703 and, alternatively, that the requested records would all be exempt criminal and noncriminal investigative records, 65 P.S. §§ 67.708(b)(16)-(17).

On September 3, 2021, the Requester appealed to the OOR, challenging the denial of Items 3-5 only and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the PSERS to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 8, 2021, PSERS requested to keep the record open for an additional five days. The Requester consented to the extension and, on the same date, the OOR extended the final determination issuance date accordingly. 65 P.S. § 67.1101(b)(1).

¹ The Requester initially granted the OOR a 30-day extension to issue a final determination and on October 6, 2021, granted the OOR additional time. *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).”).

On September 21, 2021, the OOR received a statement under Section 1101(c) of the RTKL from Aon Investments USA, Inc. (“Aon”) asserting that it has a direct interest in this matter, and it is not being represented by the other parties. Aon asserts that the requested information would contain its confidential proprietary information that is exempt under the RTKL. *See* 65 P.S. § 67.708(b)(11). With this Final Determination, the OOR grants Aon Direct Interest Participant status.

On September 21, 2021, the OOR received a statement under Section 1101(c) of the RTKL from Buck Global, LLC (“Buck”) asserting that it has a direct interest in this matter, and it is not being represented by the other parties. Buck asserts that Items 5A-C are insufficiently specific and that it objects to the production of any Excel spreadsheets in native format as those include proprietary formulas and confidential macros. *See* 65 P.S. § 67.708(b)(11). With this Final Determination, the OOR grants Buck Direct Interest Participant status.

On September 21, 2021, PSERS submitted a position statement reiterating its grounds for denial. PSERS claims that the Items at issue are insufficiently specific, relate to a noncriminal investigation, and responsive records contain trade secrets or confidential proprietary information, 65 P.S. § 67.708(b)(11).² In support of its position, PSERS submitted the statement made under the penalty of perjury of Evelyn Williams, PSERS’ Open Records Officer and Communications Director.

On September 23, 2021, the Requester submitted additional argument in support of the appeal.³ The Requester disclaims any interest in Excel formulas and trade secrets and makes no

² In its submission, PSERS did not address the argument asserted in its denial letter that the records are criminal investigative records; as such, the OOR deems the argument abandoned on appeal and will not address that issue in this Final Determination.

³ The Requester’s September 23, 2021, submission was received after the record closed; however, to develop the record, the submission was considered. *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”).

objection to the redaction of such information but cautions that the calculation of investment returns is a matter of arithmetic that is of great interest to a lay audience.

On October 18, 2021, the OOR issued a final determination and on October 27, 2021, the Requester filed a Petition for Reconsideration, challenging the OOR's determination that records created in summer 2020 were exempt noncriminal investigative records and arguing those records are records of routine agency duties. On November 8, 2021, the OOR granted the Petition for Reconsideration, instructing the parties to address how certain Commonwealth Court decisions and other cases involving an agency's performance of routine duties apply to the actions taken by PSERS. On November 23, 2021, PSERS submitted a response to the Petition for Reconsideration, and the Requester submitted additional argument in support of reconsideration. Aon also submitted argument on November 23, 2021, opposing reconsideration.

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.

PSERS 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)).

1. The Items are sufficiently specific in part

During the response period, PSERS contacted the Requester seeking more information to assist with the search for records. Specifically, PSERS asked for a narrower subject matter and the individual/individuals for whom they were requested records for Items 3A-B, 4A-B, and 5A-B. PSERS did not request any clarification for Items 3C, 4C and 5C. On June 8, 2021, the

Requester provided a response narrowing the Request language. The Requester clarified the Items as follows:

- a. 3A sought “the engagement letter and contract for ACA; and correspondence between Glen Grell, Jackie Lutz, Cathy Gusler, Chris Santa Maria, Francis X. Ryan Sen. Patrick Browne, and James Grossman, Tom Bauer, Charles Spiller, all of PSERS and Christie Horsman Dillard, Karen Foley and Kemmling, of ACA; and other ACA employees in relation to the contract.”
- b. 4A sought: “the engagement letter and contract for AON, further correspondence regarding the 2020 [‘]risk-sharing[’] calculation including reports sent by AON to PSERS regarding that calculation in the second half of 2020 and in 2021, including correspondence between Glen Grell, Jackie Lutz, Chris Santa Maria, Francis X. Ryan, Sen. Patrick Browne; James Grossman, Tom Bauer, Charles Spiller, all of PSERS; and Steve Voss and Claire Shaughnessy of AON and other AON employees related to that contract.”
- c. 4B was clarified to seek records of the parties named in 4A
- d. 5A sought: “correspondence involving Glen Grell, Sen. Patrick Browne; James, Grossman, Tom Bauer, Charles Spiller, all of PSERS; and Buck employees David Driscoll; Edward Quinn and Salvador Nakar, and other Buck employees related to that cont[r]act.”
- e. 5B also sought “correspondence involving Glen Grell, Sen. Patrick Browne; James, Grossman, Tom Bauer, Charles Spiller, all of PSERS; and Buck employees David Driscoll; Edward Quinn and Salvador Nakar, and other Buck employees related to that cont[r]act.”

The Requester did not clarify Item 3B as requested.

Although a Requester may not modify the Request on appeal; here, PSERS properly sought clarification at the request stage, *see Office of the Governor v. Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016) (an agency’s failure to object to specificity and seek further clarification during the request stage is a factor in determining whether a request is sufficiently specific), thus the OOR will review the Request for specificity following the June 8, 2021 clarification. In the Requester’s appeal response, there is an attempt to modify the Items by asking PSERS to “put aside the references to “other PSERS’ staff,” “other ACA employees,” “other AON employees,”

“other Buck employees,” etc.” This is an improper modification and the OOR cannot consider it on appeal.⁴

PSERS partially denied the Items arguing they are insufficiently specific but did provide the engagement letters and contracts. In its appeal submission, PSERS asserts that Items 3-5 are insufficiently specific even with the June 8, 2021 clarification because the Requester did not sufficiently limit either the scope or the subject matter of the records requested. PSERS makes no objection to the timeframe within the Request.

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). 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. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See Id.* at 1125. Third, “[t]he timeframe of the request should identify a finite period of time for which the records are sought.” *Id.* at 1126. This factor is the most fluid and is

⁴ The Commonwealth Court has held that a requester may not modify or expand a request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Michak v. Dep’t of Pub. Welfare*, 56 A.3d 925 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal argue that an agency must instead disclose a different record in response to the request”).

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.*

a. Item 3B is insufficiently specific due to lack of scope and broad subject matter

The scope of Item 3B “written communications” “between PSERS staff and any employee or representative of ACA” was never limited by the Requester, despite PSERS seeking clarification. PSERS argues that the Item is insufficiently specific because the scope is not limited by sender or recipient and has too broad of a subject matter. The scope of a request must identify a discrete group of documents. *Pa. Dep’t of Educ.*, 119 A.3d at 1125.

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 *Montgomery County v. 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. 50 A.3d 281, 224 (Pa. Commw. Ct. 2012). 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 *Pa. State Police v. Office of Open Records*, the Commonwealth Court held that the portion of a request seeking “any and all records, files or communications” related to vehicle stops, searches, and seizures was insufficiently specific under Section 703 of the RTKL, and that only

the portion of the request seeking a particular type of document – manuals related to vehicle stops, searches, and seizures – was sufficiently specific. 995 A.2d 515, 517 (Pa. Commw. Ct. 2010). Here, the scope encompasses written communications between “all PSERS staff and any employee or representative of ACA.” This does not seek a clearly defined universe of documents. *See Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260 (Pa. Commw. Ct. 2012).

Furthermore, the subject matter does not identify a transaction or activity of the agency with sufficient specificity. Ms. Williams attests that the “calculation of PSERS’ shared risk/shared gain provision is derived from its overall fund performance, meaning all of PSERS’ investments are tied to the shared risk/shared gain provision.” She affirms that the Item “call[s] for practically any and all documents in [PSERS’] possession related to the investment management of the Fund, which extends to the entire investment operation of PSERS.”⁵

This broad scope, combined with a subject matter that encompasses all of PSERS business, makes the Item insufficiently specific. *See Commonwealth v. Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016) (finding that a request with a broad subject matter requires a narrow scope and timeframe that render the request specific); *see also Shepherd v. Pa. Dep’t of Health*, OOR Dkt. AP 2020-2730, 2021 PA O.O.R.D. LEXIS 188 (finding that a RTKL request seeking emails amongst five individuals, including two organizations, with a timeframe of four months and no subject matter, is insufficiently specific). Item 3B seeks a broad subject matter and scope of records over a 15-month time period. Because there was no limitation on either scope or subject matter to limit the universe of potentially responsive records, this Item is insufficiently specific.

⁵ Under the RTKL, a sworn affidavit or statement 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). In the absence of any evidence that PSERS has 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)).

b. Items 3A, 4A-B and 5A-B are insufficiently specific due to their broad subject matters and lengthy timeframe

PSERS argues that to the extent the Items above seek “any documents” or include communications with “all of PSERS staff,” or “all of PSERS,” the scope is too broad. However, on June 8, 2021, the Requester limited the scope of individuals whose communications were sought to a specific list for Items 3A, 4A-B, and 5A-B.

The scope of the Items encompasses “all written communications” regarding subject matters and the scope of Items 3A, 4A-B and 5A-B is limited to written communications between defined senders or recipients.

While the limitations did include the phrase “all of PSERS,” that phrase followed a list of PSERS staff or officials and is an identifier that the named individuals are all PSERS-related, rather than employees of the consulting firms. When limiting the scope of individuals, the Requester also identified groups of consulting firm employees and referred to them as “of” the firm. Furthermore, to the extent the Items initially read “PSERS staff” and “any employee or representative” of a consulting firm, that was clarified by the Requester on June 8, 2021 and should not have been considered by PSERS when performing a search for responsive records.

While responding to a RTKL request must entail a good faith effort to provide all of the records sought, it is not an exact science, and must also encompass reasonable discretion by the agency to identify and provide the requested information, particularly where the Request is a broad one. Here, the Requester defined the scope of Items 3A, 4A-B and 5A-B by the type of documents sought and recipients or senders within PSERS and the firms, and, by doing so, satisfied the scope element of the sufficiently specific test. *Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Commw. Ct. 2017). However, to the extent that the clarified Items used the phrase

“other employee of [firm] related to [that firm’s] contract,” that phrasing is insufficiently specific as it includes all firm employees.⁶

However, PSERS also argues that the subject matters of these Items are too broad. Items 3A, 4A and 5A seek communications between PSERS and each of the three firms “related to investment performance reporting,” and Items 4B and 5B seek communications between PSERS and two of the three firms “related to risk-sharing calculations.”

Ms. Williams attested that “calculation of PSERS’ shared risk/shared gain provision is derived from its overall fund performance, meaning all of PSERS’ investments are tied to the shared risk/shared gain provision.” She affirms that the Item “call[s] for practically any and all documents in [PSERS’] possession related to the investment management of the Fund, which extends to the entire investment operation of PSERS.”

Although a request with a limited scope and a broad subject matter may be sufficiently specific, the extremely broad subject matter of Items 3A, 4A-B, and 5A-B combined with a 15-month timeframe renders them insufficiently specific. *See Shepherd v. Pa. Dep’t of Health*, OOR Dkt. AP 2020-2730, 2021 PA O.O.R.D. LEXIS 188 (finding that a RTKL request seeking emails amongst five individuals, including two organizations, with a timeframe of four months and no subject matter, is insufficiently specific).

c. Items 3C, 4C and 5C are sufficiently specific

Items 3-5C seek communications between PSERS and each of the three firms “related to the discovery of, or the identification of an error in, calculating the historical investment performance, as part of the shared-risk determination.” PSERS did not seek clarification as to specific individuals whose communications were sought as it relates to this subject matter.

⁶ Per the communications between the parties, prior to the appeal, the firms have anywhere from 600 to 50,000 employees.

As Ms. Williams affirms, the agency business is investing and determining contribution rates of members and therefore records “related to” investment performance or the risk-sharing calculation would entail nearly every agency record. Conversely, the subject matter of records that relate to the discovery of, or the identification of an error in, calculating the historical investment performance, as part of the shared-risk determination is not insufficiently specific. It is well known that an error in the shared-risk calculation occurred and that PSERS re-certified a new calculation to rectify that error. *See Carey*, 61 A.3d at 372 (“[T]he specific subject matter and timeframe, coupled with the fact that the Transfer is well-known to DOC, suffice to apprise DOC of the records sought.”)

Here, the subject matter identifies a well-known matter of agency business but the Items do not identify senders and recipients. That is, the Items have a broad scope, specific subject matter and 15-month timeframe. The OOR has found that a request for “all communications” to and from a set of email addresses is a broad scope, though not necessarily unreasonable if there is sufficient limitation in either the subject matter or timeframe of a request. *Briggs v. City of Phila.*, OOR Dkt. AP 2019-0647, 2019 PA O.O.R.D. LEXIS 625 (finding a request insufficiently specific because of a lengthy timeframe). Unlike in *Briggs*, the Items here identify a specific subject matter – the discovery or identification of a calculation error. While 15 months is a lengthier timeframe, it is not so lengthy as to render it difficult to search for communications about the identification of such an error. Furthermore, when PSERS sought clarification to assist with the search, PSERS did not include Items 3C, 4C and 5C as Items it believed were insufficiently specific such that it could not perform a search for records. *See Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016) (an agency’s failure to object to specificity and seek further clarification during the request stage is a factor in determining whether a request is sufficiently specific).

Thus, Items 3C, 4C and 5C are sufficiently specific insofar as they identify a specific subject matter. PSERS must perform a good faith search to identify the records responsive to Items 3C, 4C, and 5C.

2. Some records are exempt noncriminal investigative records

While PSERS asserts that it was unable to identify records, it does acknowledge that potentially responsive records exist as PSERS has communicated with the various firms and asserts that the potentially responsive records are exempt noncriminal investigative records. Furthermore, as Items 3C, 4C, and 5C are sufficiently specific, PSERS may raise exemptions in support of withholding the records.

In *Pa. Dep't of Educ. v. Bagwell*, the Commonwealth Court explained:

[I]t is well-established that:

[A]n agency must raise all its challenges before the fact-finder closes the record. This will allow efficient receipt of evidence from which facts may be found to resolve the challenges. In the ordinary course of RTKL proceedings, this will occur at the appeals officer stage, and a reviewing court will defer to the findings of the appeals officer

In addition, there is no statutory authority for a two-step process. This Court recently rejected an agency's challenge to OOR's refusal to bifurcate proceedings to resolve an issue of insufficient specificity separate from the merits. We rejected bifurcation as infeasible given the timelines under the RTKL. This Court also reasoned an agency had ample opportunity to present evidence of substantive exemptions at the appeals officer level. When the agency did not submit evidence of exemptions, and rested on its specificity argument, this Court precluded the agency from submitting evidence of any exemptions on remand.

Pa. Dep't of Educ. v. Bagwell, 131 A.3d 638, 660 (Pa. Commw. Ct. 2016) (citations omitted).

PSERS was obligated to raise this exemption despite not identifying or reviewing potentially responsive records. PSERS is similarly obligated to provide sufficient evidence of the exemption.

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "[i]nvestigative materials, notes, correspondence and

reports,” “work papers underlying an audit,” and “[a] record that, if disclosed, would...[d]eprive a person of the right to an impartial adjudication.” 65 P.S. §§ 67.708(b)(17)(ii),(v); 65 P.S. § 67.708(b)(17)(vi)(B). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

Here, at issue are written communications between the identified individuals related to the discovery or identification of the rate calculation error (Items 3-5C).⁷ In our Final Determination, the OOR determined that a noncriminal investigation began in summer 2020, and the Consultant Records are exempt noncriminal investigative materials. In the Petition for Reconsideration and supplemental argument, the Requester asserts that PSERS cannot meet its burden of proof that the Consultant Records are exempt noncriminal investigative records, and that they are in fact financial records that cannot be withheld in their entirety even if they are subject to an exemption.⁸

⁷ In the Requester’s Brief in Support of Requesters’ Petition for Reconsideration, the Requester use the term “Consultant Records” to describe the records at issue. The OOR will also use this term to describe records that were created prior to March 2021, when all parties acknowledge that a formal investigation began.

⁸ This is the first time the Requester asserts that the records are financial records and may not be withheld in their entirety; however, the OOR does not accept newly raised bases for disclosure in reconsiderations. *See Pa. Dep’t of Conserv. & Nat. Res. v. Vitali*, No. 1013 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 479 (Pa. Commw. Ct. 2015) (stating the OOR cannot accept new evidence submitted in conjunction with a petition for reconsideration.)

The Requester argues that the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. §§ 8101 *et seq*, requires actuarial review and annual audits and the actions described in Ms. William's affidavit are merely those routine duties and that the Consultant Records document routine, cyclical, legislatively mandated inquiries. Further, the Requester argues that PSERS has no authority to conduct special investigations.

Ms. Williams attests, in relevant part:

38. In the summer of 2020, as the global COVID-19 pandemic impacted global markets and investment performance, PSERS became aware that net investment returns were in the narrow range of potentially triggering the shared risk/shared gain provision.

39. PSERS launched a detailed examination into its performance reporting and calculation of the shared risk/shared gain provision for the time period ending June 30, 2020.

40. This detailed review included working in close coordination with Aon to investigate the size and scope of financial return adjustments over a historical period, the reasons that PSERS' consultants reported certain figures, whether the Comprehensive Annual Financial Report ("CAFR") or any other financial document should be amended, and the use of previous returns in determining contribution calculations.

41. This review also led the PSERS Board's Audit/Compliance Committee to engage an independent performance verification firm, ACA Compliance Group, to conduct the verification of the investment return for the nine years ending on June 30, 2020. The purpose of this review was, among other things, to perform a calculation review of the investment performance data.

42. PSERS' review included PSERS' work and communications with Buck.

43. PSERS's detailed review continued up through the certification of the shared-risk rate calculation in December 2020 and continues to the present day.

...

45. One reason the investigation exempts the requested materials from disclosure is that communications between PSERS and its agents Aon, ACA, and Buck, beginning in the summer of 2020, including the attachments to those communications constitute investigative materials, notes, correspondence, and reports....

46. Another reason the investigation exempts the requested materials from disclosure is that PSERS performed a formal examination of its accounting records through its own investigation in the summer, fall, and winter of 2020, and through its engagement of ACA....

47. These activities involved a formal examination of PSERS' accounting records, financial situation, and compliance with its own internal standards and broader accounting standards.

48. Furthermore, the investigation exempts the requested materials from disclosure because the records related to PSERS' noncriminal investigation, if released, could be accessed by members of the grand jury that has been empaneled to gather and evaluate information concerning the shared-risk calculation, depriving PSERS and its employees of the right to an impartial adjudication...

In the appeal submission, the Requester states:

It is true that the FBI and PSERS itself have launched inquiries into the calculation mistake...

There was debate within PSERS about the performance calculation as far back as August 2020. The fund hired ACA to review the numbers on Oct. 4, 2020, the contract shows....

All of this is before the FBI and PSERS itself launched special investigations of the matter, in late March 2021. The fund minutes shows that PSERS did not task its board audit committee to look into these issues until March 12, 20[21] and did not hire law firms for that purpose [until] March 19, 2021. The first federal grand jury subpoenas to the fund are dated March 24, 2021. And the fund's chief counsel, did not order staff to save documents related to the probes until April 8.

While it is uncontested that PSERS and other agencies did, and continue to, investigate the calculation error, the OOR notes that the PSERS board is granted the "power and privileges of a corporation," 24 Pa.C.S. § 8501(e), and is governed by a Statement of Organization Bylaws, and Other Procedures.⁹ Article VI of Section 4.2(b) sets forth the Audit/Compliance Committee duties, which include, but are not limited to, reviewing the findings and recommendations of any

⁹ Available at

<https://www.psers.pa.gov/About/Board/Documents/Governance%20Manual/Statement%20of%20Organization,%20Bylaws,%20and%20Other%20Procedures.pdf> (last accessed October 4, 2021).

examination by regulatory agencies, auditor, staff and/or consultant observations related to compliance. The Committee is also empowered to oversee special investigations as needed. The Board has “exclusive control and management” of the fund and has the authority to perform “such other functions as are required” for the execution of its administrative duties. 24 Pa.C.S. §§ 8521(a), 8502. Thus, contrary to the Requester’s assertion, PSERS does have the requisite statutory authority to perform noncriminal investigations or special investigations; however, not all agency fact-finding constitutes a noncriminal investigation. *Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

Items 3C, 4C and 5C seek records from January 2020 to the date of the Request; therefore, the date on which a noncriminal investigation commenced is determinative of which, if any, records are exempt. PSERS explains that there are several overlapping noncriminal investigations in this matter. According to PSERS, a noncriminal investigation was initiated by PSERS alone in the summer of 2020 as a result of the COVID-19 pandemic and its impact on global markets and investment performance. Ms. Williams affirms that PSERS became aware that the net investment returns were in the range that could potentially trigger the shared risk/shared gain provision of the Retirement Code, 24 Pa.C.S. § 8321(b), and so began reviewing its investment performance and calculations at that point. The Requester, meanwhile, argues that the summer 2020 activities were merely routine agency duties.

The Retirement Code provides:

(j) Actuarial investigation and valuation. The board shall have the actuary make an annual valuation of the various accounts of the fund within six months of the close of each fiscal year. In the fiscal year 1975 and in every fifth year thereafter, the board shall have the actuary conduct an actuarial investigation and evaluation of the system based on data including the mortality, service, and compensation experience provided by the board annually during the preceding five years concerning the members and beneficiaries of the system. The board shall by resolution adopt such tables as are necessary for the actuarial valuation of the fund

and calculation of contributions, annuities, and other benefits based on the reports and recommendations of the actuary....The board shall include a report on the significant facts, recommendations and data developed in each five-year actuarial investigation and evaluation of the system in the annual financial statement published pursuant to the requirements of subsection (n) for the fiscal year in which such investigation and evaluation were concluded.

24 Pa.C.S. § 8502(j). The Board is also required to provide for annual audits by an independent certified public accounting firm. 24 Pa.C.S. § 8502(o).

The Requester acknowledges that PSERS hired ACA to “review the numbers” on Oct. 4, 2020, and that special investigations by both the FBI¹⁰ and PSERS were launched in late March 2021. Thus, there are three relevant investigational timelines. First, the PSERS investigation, started in summer 2020 into the fund’s performance; second, any investigation that occurred following October 4, 2020, when ACA was hired to conduct the verification of the investment return for the nine years ending on June 30, 2020; and third, the PSERS investigation initiated in March 2021.¹¹

According to Ms. Williams, in summer 2020, PSERS began reviewing its investment performance and the calculation because the COVID-19 pandemic was affecting global markets and investment performance, and this might trigger the shared/risk shared gain provision. PSERS “launched a detailed investigation into its performance reporting and the calculation of the shared risk/shared gain provision for the time period ending June 30, 2020.” Ms. Williams Affidavit Para. 39. PSERS worked with Aon to investigate the size and scope of financial return adjustments, the

¹⁰ Section 708(b)(17) only protects records of the agency conducting the investigation. *See Hayes v. Pa. Dep’t of Public Welf.*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530; *see also Bagwell v. Pa. Office of the Governor*, OOR Dkt. AP 2013-1551, 2013 PA O.O.R.D. LEXIS 1227 (finding records possessed by the Office that relate to an investigation conducted by a law firm on behalf of a state-related institution are not exempt under Section 708(b)(17)); *Silver v. City of Pittsburgh*, OOR Dkt. AP 2013-1395, 2013 PA O.O.R.D. LEXIS 886; *Hockeimer v. City of Harrisburg*, OOR Dkt. AP 2015-1853, 2015 PA O.O.R.D. LEXIS 1655, *affirmed by*, No. 2015-CV-9289-MP (Dauph. Com. Pl. Mar. 11, 2016).

¹¹ The Requester concedes that a special investigation commenced on March 12, 2021, with the adoption of a resolution instructing the Audit Committee to oversee an investigation into the possible error. *See Petition for Reconsideration*, ¶ 2; *Requesters’ Brief in Support of Requesters’ Petition for Reconsideration* § II.

reason for certain figures being reported and whether any official documents needed to be amended. The Requester acknowledges that there was “debate within PSERS about the performance calculation as far back as August 2020.” *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions); *see also Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record).

This investigation led to Audit/Compliance Committee to hire ACA in October 2020 “to conduct the verification of the investment return for the nine years ending on June 30, 2020. The purpose of this review was, among other things, to perform a calculation review of the investment performance data.” In March 2021, after certifying a rate that did not trigger the shared risk provision in December 2020, PSERS announced the discovery of the error and launched an investigation.

First, any written communications between the identified individuals related to the identification or discovery of the rate calculation error from January 2020 to the date the PSERS summer 2020 investigation began are not exempt. PSERS did not provide evidence that a noncriminal investigation was occurring at that point, as PSERS asserts that the first investigation began in summer 2020.

Ms. Williams attests that PSERS’ internal review beginning in summer 2020 is a formal examination of its accounting records; that is, an audit. PSERS argues that its investigation in the performance reporting and calculation was a formal examination of its accounting records, financial situation, and compliance with accounting standards and thus constitute an audit. Black’s Law Dictionary defines audit as “a formal examination of an individual’s or organization’s

accounting records, financial situation, or compliance with some other set of standards,” BLACK’S LAW DICTIONARY (11th ed. 2019), or “to make an official investigation and examination of accounts and vouchers.” BLACK’S LAW DICTIONARY Free Online 2nd Ed. By definition, a financial audit is an investigation and PSERS does have investigatory authority, including audit authority.

A financial audit report is a public record under the RTKL, 65 P.S. § 67.102, however, Section 708(b)(17)(v) specifically exempts works papers underlying an audit, 65 P.S. § 67.708(b)(17)(v). Therefore, the issue becomes whether the requested records are work papers underlying an audit, or constitute “investigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(ii).

The RTKL does not define “work papers underlying an audit,” but the OOR has relied on the definition promulgated by the American Institute of Certified Public Accountants, which defines “work papers” as records of “the procedures applied, the tests performed, the information obtained, and the pertinent conclusions reached in the engagement.” *See Harmon v. Londonderry Twp.*, OOR Dkt. AP 2017-2276, 2018 PA O.O.R.D. LEXIS 140 (*citing Kelly & Assoc. v. NEIU*, 36 Pa. D. & C. 5th 300, 316 (Lackawanna C.C.P. 2014)).¹²

Ms. Williams attests that these “activities involved a formal examination of PSERS’ accounting records, financial situation and compliance with its own internal standards and broader accounting standards.” This conclusory statement is insufficient to demonstrate that any written communications between the identified individuals related to the discovery or identification of the

¹² This definition, including the section raised by the Department below, is found in the American Institute of Certified Public Accountants’ lists of standards archived as of 2017, indicating that those standards may no longer be in effect. *See* <https://pcaobus.org/Standards/Archived/Pages/AU339A.aspx>. However, the OOR is not relying on this definition as a statement of law, but as an interpretive aid in construing terms in the RTKL according to their common and approved usage. 1 Pa.C.S. § 1903(a). The OOR has no basis to believe that the common understanding of an auditor’s “working papers” has changed significantly since 2017.

calculation error are records of the procures, tests, information and pertinent conclusions.¹³ Specifically, there is no evidence that the communications contained any tests performed, or procedures applied that would make these records work papers underlying an audit.

However, Section 708(b)(17)(ii) exempts “investigative materials, notes, *correspondence* and reports.” 65 P.S. § 67.708(b)(17)(ii) (emphasis added). In *Cal. Univ. of Pa. v. Schackner*, 168 A.3d 413 (Pa. Commw. Ct. 2017), the Court determined that a University’s gathering of information regarding the cause of a parking garage structural failure was not a noncriminal investigation. The Court held that because the University did not show how the steps it took following the structural failure amounted to a noncriminal investigation and there was no showing that the University had an official duty to investigate the cause of the structural failure, the inquiry was ancillary to the University’s public safety services. Conversely, in *Sherry*, 20 A.3d 515, the Court determined that honor code violations were noncriminal investigative records because they surpass the District’s routine performance of its duties, comparing the honor code violation forms to Pennsylvania State Police incident reports. Finally, in *Chawaga*, 91 A.3d 257, the Court determined that a performance audit report was not part of a noncriminal investigation because it was neither a systematic or searching inquiry, a detailed examination, nor an official probe.

In this matter, PSERS’ daily activities include investment performance review; however, PSERS argues that there was nothing routine in the activities of summer 2020. In its Response to Reconsideration, PSERS acknowledges that in its day-to-day activities, it must respond to market volatility and changing market dynamics and that a volatile market rarely requires it to change its day-to-day activities and routine, ordinary course of business practices; but, in summer 2020, the

¹³ An agency cannot rely on conclusory statements to sustain its burden of proof. See *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”).

COVID-19 pandemic had caused a worldwide economic crash and PSERS asserts it took steps beyond its usual duties with regard to the shared risk provision.

Ms. Williams affirms that PSERS began investigating its investment performance due to the COVID-19 pandemic, working in close coordination with Aon to determine the size and scope of financial return adjustments over a historical period, the reasons that consultants reported certain figures, whether any official document should be amended, and the use of previous returns in determining the contribution calculations. She affirms PSERS corresponded with Aon and Buck regarding the investigation into its fund performance as early as summer of 2020. Under the RTKL, an agency must only prove that a record is exempt from disclosure by a preponderance of the evidence. 65 P.S. § 67.708(a)(1). “[A] preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry.” *Delaware County v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). A statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof under the RTKL. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909.

PSERS has thus demonstrated that communications with Aon and Buck following the commencement of the 2020 review of its investment performance are exempt noncriminal investigative records. Ms. Williams affidavit is sufficient to demonstrate that PSERS began investigating its performance due to market volatility caused by the COVID-19 pandemic, and not the required annual valuations, or the actuarial investigation performed every five years. Furthermore, because PSERS contracted with ACA in October 2020 to perform independent verification of its performance, communications with ACA following that contract are exempt noncriminal investigative correspondence.

The OOR notes that the RTKL is not a confidentiality statute meaning it allows but does not require an agency to withhold records. An agency generally has the discretion to release otherwise nonpublic records. *See* 65 P.S. § 67.506(c). Based on any number of factors, an agency may release otherwise nonpublic or deidentified records in the public interest. Such an approach can be used to build trust and confidence in the agency especially when dealing with such compelling issues.

3. The appeal is moot in part

Aon and Buck are both granted Direct Interest Participant status. Aon argues that PSERS is in possession of records that constitute or reveal a trade secret or confidential proprietary information. Aon asks that “prior to turning over any documents or information provided by Aon to PSERS pursuant to this request, PSERS advise Aon specifically what information and/or documents it proposes to provide, so that Aon can consider its options...Aon would need adequate time to review what PSERS may intend to produce.” Buck, meanwhile, asserts that it agrees with PSERS’ reasons for denial and notes that the records may include confidential information regarding individual employees of PSERS and retirement system members, as well as objecting to the production of an Excel spreadsheets in their native format because such spreadsheets include proprietary formulas and macros that are confidential.

On September 23, 202, the Requester disclaimed interest in Excel formulas and trade secrets and notes no objection to the redaction of such information. Because the Requester has agreed to the redaction of trade secrets and Excel formulas, the appeal as to that information is not at issue.

4. Some records are exempt confidential proprietary information

Buck “objects to the production of any Excel spreadsheets...in native format because such spreadsheets include proprietary formulas and macros that are confidential.” Because the Requester has disclaimed interest in Excel formulas, that is not at issue. However, the macros remain at issue.¹⁴ Similarly, Aon argues that PSERS has documents that contain Aon’s proprietary and confidential information, trade secrets, and intellectual property that may be responsive to the Request and seeks time to review any records that PSERS would provide prior to PSERS providing them to the Requester.

PSERS, in turn, indicates its agreement with Buck and Aon that the records are exempt under Section 708(b)(11). Meanwhile, the Requester asserts that “the calculation of investment returns is a matter of arithmetic and a subject of great interest to a lay audience.”

Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). These terms are defined in Section 102 of the RTKL as follows:

“Confidential proprietary information.” Commercial or financial information received by an agency:

- (1) which is privileged or confidential; and
- (2) the disclosure of which would cause substantial harm to the competitive position of the [entity] that submitted the information.

“Trade secret.” Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use;
- and

¹⁴ An Excel macro is “an action or set of actions that you can run as many times as you want. When you create a macro, you are recording your mouse clicks and keystrokes.” See <https://support.microsoft.com/en-us/office/quick-start-create-a-macro-741130ca-080d-49f5-9471-1e5fb3d581a8>.

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102. Here, neither Buck nor PSERS provides evidence as to how a macro is a trade secret or constitutes confidential and proprietary information. In its response, Buck merely states that the macros are confidential. Under the RTKL, the agency, or third party, must provide sufficient evidence to demonstrate that a record is exempt. 65 P.S. § 67.708(a)(1). Because neither Buck nor PSERS has provided that evidence, to the extent that they are contained in records this final determination grants access to, the macros may not be redacted. *See Highmark Inc. v. Voltz*, 163 A.3d 485, 490-491 (Pa. Commw. Ct. 2017) (the party asserting an exemption bears the burden of proving the exemption applies and a direct interest participant who provided records to the agency may be in the best position to establish their protected nature). Aon, however, provided the statement made under penalty of perjury of Claire Shaughnessy, a Partner and the Lead Relationship Manager and Lead Consultant at Aon relating to the relationship with PSERS. Ms. Shaughnessy identifies several types of records that contain Aon's proprietary knowledge, and intellectual property:

- a. Email communications between Aon and PSERS employees containing information incorporating their thoughts or analysis related to PSERS performance, which include Aon's proprietary knowledge;
- b. Performance reports and analysis, which include the results of analysis done with Aon's proprietary business procedures and is part of Aon's intellectual property. Aon expects that this category may include:
 - 1. monthly performance reports;
 - 2. quarterly investment reports; and
 - 3. other portfolio analysis completed by Aon;
- c. Documents regarding Aon's service offerings, which include confidential information about Aon's business procedures and strategies; and

d. Documents and communications regarding the calculation that is at issue in requestors' requests, which include confidential and proprietary information regarding Aon's business procedures, strategies, and analytical processes.

She explains that the documents derive independent economic value, actual or potential, from not being generally known to or ascertainable by proper means. She explains that Aon's contract with PSERS contains a confidentiality provision pursuant to which PSERS is obligated to maintain the secrecy of Aon's proprietary documents. Therefore, Ms. Shaughnessy has provided evidence that Aon provided PSERS with information that meets the definition of a trade secret under the RTKL. As the Requester has disclaimed interest in any trade secrets, PSERS may redact or withhold any of Aon's trade secrets from any responsive records.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part** and **dismissed as moot in part**, and PSERS is required to perform a good faith search for written communications between PSERS and each of the three firms related to the identification or discovery of the rate calculation error, for the time period January 2020 to the date the summer 2020 investigation commenced and provide all responsive records within thirty days. PSERS may redact Excel formula and trade secrets. This Final Determination upon Reconsideration is binding on all parties. Within thirty days of the mailing date of this Final Determination upon Reconsideration, 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.¹⁵ This Final Determination upon Reconsideration shall be placed on the OOR website at:
<http://openrecords.pa.gov>.

**FINAL DETERMINATION UPON RECONSIDERATION ISSUED AND MAILED:
December 6, 2021**

/s/ Erin Burlew

ERIN BURLEW, ESQ.
APPEALS OFFICER

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¹⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).