



FINAL DETERMINATION

IN THE MATTER OF

**SHAKUR CAPITAL, LLC,
Requester**

v.

**PHILADELPHIA POLICE
DEPARTMENT,
Respondent**

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Docket No: AP 2021-2243

INTRODUCTION

Shakur Capital, LLC (“Requester” or “Shakur Capital”) submitted a request (“Request”) to the Philadelphia Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information regarding a specific granted Act 22 request. The Department denied the Request, arguing that the Department is not required to respond to anonymous RTKL requests. 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 Department is not required to further action.

FACTUAL BACKGROUND

On August 26, 2021, the Request was filed, seeking:

[T]he names of every officer involved in Act 22 request #13273 granted to [the Requester]. Requesting first and last names and the[ir] graduation class picture with them being circled or another image of them provided. I believe there w[ere]

at least 3-5 law enforcement employees from [the Department] involved in this inside of the 35th district station and the[ir] voice[s] can be heard.

On October 1, 2021, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Department denied the Request, arguing that “[t]he RTKL does not require that the [Department] act upon an anonymous request.”

On October 1, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal.² 65 P.S. § 67.1101(c).

On October 26, 2021, the Requester submitted a position statement arguing that the Request was not anonymous because the Requester is a valid “requester” under the RTKL. The Requester also argued that the Department was required to rely upon the reasons for denial set forth in its final response to the Request and was not, therefore, permitted to raise new grounds for denial on appeal. The Requester also submitted several documents related to other RTKL requests filed with the Department and the City of Philadelphia. On November 2, 2021, the Requester made a supplemental submission, reasserting that the Request was not anonymous, and the Department denied access to the responsive records inappropriately.

On November 16, 2021, after being afforded additional time to do so, the Department submitted a position statement arguing the Request is not a proper request under the RTKL because it seeks answers to questions, rather than records.³ The Department also argues that the Request

¹ The appeal was filed by James Glover, the Requester’s Chief Executive Officer.

² Because of an administrative oversight, the appeal was not docketed and, therefore, the parties did not receive a notice of appeal or a timeline for submissions when the appeal was filed. On October 22, 2021, the OOR provided the parties with an extended timeline to supplement the record and established a deadline for the issuance of a final determination. Also, the Requester granted the OOR additional time to issue the Final Determination. See 65 P.S. § 67.1101(b)(1)

³ The Department also purports to “preserve” several grounds for denial “should the Appellant appeal beyond the OOR....” Notably, however, the Commonwealth Court has stated that “an agency must raise all its challenges before

is insufficiently specific because it is subject to multiple interpretations. The Department further argues that based upon its interpretation of the Request, it conducted a search for the records, and the Department does not possess records responsive to the Request. In support of its position, the Department submitted an affidavit, made under the penalty of perjury, of Lt. Barry Jacobs, the Department's Open Records 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.

The Department 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

the fact-finder closes the record" and that, "[i]n 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." *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 660 (Pa. Commw. Ct. 2016).

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. Shakur Capital is a proper “requester” under the RTKL

As a preliminary matter, in its final response, the Department argues that the Requester is anonymous, and, as such, cannot be a “requester” for purposes of the RTKL and is not entitled to request records under the RTKL. A “requester” is defined by the RTKL as “[a] person that is a legal resident of the United States....” *See* 65 P.S. § 67.102. Thus, under the RTKL, a requester must be both a “person” and “a legal resident of the United States.” While not defined by the RTKL, the Statutory Construction Act of 1972 defines the term “person” to “[i]nclude[] a

corporation, partnership, *limited liability company*, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.” 1 Pa.C.S. § 1991 (emphasis added).

Here, the person making the Request was designated as Shakur Capital and an email address for Shakur Capital was provided on the Request. As noted in the statement attached to the Requester’s appeal form, Shakur Capital is “a business registered in the State of PA with CEO ... James Glover[,] the Company owner and operator who is a legal resident via a U.S. Citizen.” A search of the Pennsylvania Department of State’s website confirms that Shakur Capital is an active limited liability company established in July of 2019.⁴ While the Department purports to preserve this argument for proceedings beyond the OOR, it has not submitted an argument or evidence to contradict the statements in the Requester’s appeal documents or which would undermine the information contained on the Department of State’s website. Therefore, Shakur Capital, a limited liability company, meets the definition of a “person” and is, therefore, a “requester” under the RTKL.

2. The Request seeks records under the RTKL

The Department argues that the Request is not seeking records because it asks questions.⁵ Under the RTKL, a record is defined 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. A request must seek a record, rather than an answer to a question, in

⁴ See <https://www.corporations.pa.gov/search/corpsearch> (last accessed November 12, 2021).

⁵ On appeal, the Requester argues that the Department should be limited to the grounds for denial set forth in its final response to the Request. However, an agency is permitted to raise new reasons for denying access to records on appeal to the OOR. See *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013); *McClintock v. Coatesville Area Sch. Dist.*, 74 A.3d 378 (Pa. Commw. Ct. 2013).

order to comply with the requirements of 65 P.S. § 67.703. *Walker v. Pa. Ins. Dep't*, No. 1485 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 425 at *16 (Pa. Commw. Ct. 2012) (“The RTKL is not a forum for the public to demand answers to specifically posed questions to either a Commonwealth or local agency. In fact, there is no provision in the RTKL that requires an agency to respond to questions posed in a request”). See *Gingrich v. Pennsylvania Game Commission*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012) (“[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]”).

Here, the Request seeks the first and last names of every officer, along with their respective photos, that were involved in a specific Act 22 request. Because the Request seeks various pieces of information regarding Department personnel that were involved with an Act 22 request and does not ask any questions, the Request is a valid request for records under the RTKL.

3. The Department reasonably interpreted the Request and proved that it does not possess the records responsive to the Request

The Request seeks “the names of every officer involved in Act 22 request #13273 granted to [the Requester]. Requesting first and last names and the[ir] graduation class picture with them being circled or another image of them provided. I believe there w[ere] at least 3-5 law enforcement employees from [the Department] involved in this inside of the 35th district station and the[ir] voice[s] can be heard.” On appeal, the Department argues that the Request is insufficiently specific because it is not clear if the Request is seeking the names of the officers that processed the Requester’s Act 22 request or if the Request is seeking which officers are the subjects of the video granted in response to this Act 22 request. Irrespective, the Department interpreted the Request to seek the names of the officers that processed the Act 22 request as well as for the officer that were the subjects of the responsive Act 22 video; and further, based upon its interpretation, it conducted a search for the responsive records.

An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Garland v. Pa. Dep't of Envntl. Prot.*, OOR Dkt. AP 2017-1490, 2017 PA O.O.R.D. LEXIS 1310; *Ramaswamy v. Lwr. Merion Sch. Dist.*, OOR Dkt. AP 2019-1089, 2020 PA O.O.R.D. LEXIS 2095. When a request is subject to multiple reasonable interpretations, the OOR's task on appeal is to determine if the agency's interpretation was reasonable. *Ramaswamy*, 2020 PA O.O.R.D. LEXIS 2095. The OOR determines this from the text and context of the request alone, as neither the OOR nor the requester is permitted to alter a request on appeal. *See McKelvey v. Pa. Office of the Attorney Gen.*, 172 A.2d 122, 127 (Pa. Commw. Ct. 2016); *Smith Butz, LLC v. Pa. Dep't of Env't Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016).

Here, the language of Request indicates that it sought identifying information (names and photos) of police officers in the granted video in response to the Requester's Act 22 request. This is further confirmed because the Requester provides context by referring to the audio that can be heard in the video. Consequently, the Department reasonably interpreted the Request and conducted a search for records based on that interpretation. As a result of the Department's search, it asserts that the Department does not possess records responsive to the Request. In support of the Department's assertions, Lt. Jacobs attests in relevant part, as follows:

2. I attest that I directed a search of [the Department] records to the best of my ability for any records responsive to [the] Request.

a. To the best of my knowledge, information, and belief, [the Department] possesses no records responsive to [the] [] Request.

i. Specifically, [the Department] has no records listing every [Department] officer who was involved with the processing of the Act 22 request referenced in [the] [] Request. [The Department] does not keep records that list every officer that is involved with processing Act 22 requests.

- ii. Further, [the Department] has no record listing every officer that was a subject of the video responsive to the [Requester's] [] referenced Act 22 request. [The Department] does not keep records that list every officer that is a subject of an Act 22 request video.

Under the RTKL, an affidavit made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Department acted in bad faith or that responsive records exist, "the averments in [the affidavit] 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)). Therefore, based upon the evidence provided, the Department has proven that no responsive records to the Request exist within the Department's possession, custody or control. *See Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Department is not required to take any additional 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 Court of Common Pleas of Philadelphia. 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

FINAL DETERMINATION ISSUED AND MAILED: December 16, 2021

/s/ Bina Singh

BINA SINGH
APPEALS OFFICER

Sent via email to: James Glover;
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