



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF :
 :
KATHLEEN GALLAGHER AND THE :
REPUBLICAN NATIONAL COMMITTEE, :
Requester :
 :
v. : **Docket No: AP 2021-2528**
 :
BUCKS COUNTY, :
Respondent :

INTRODUCTION

Kathleen Gallagher, Esq., on behalf of the Republican National Committee (collectively “Requester”), submitted a request (“Request”) to Bucks County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to the 2020 General Election. The County denied the Request, arguing that it is insufficiently specific, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part, and dismissed as moot in part**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On October 27, 2021, the Request was filed, seeking:

1. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.

2. Any and all communications to the Pennsylvania Department of State, Bureau of Elections, regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
3. Any and all communications from the Pennsylvania Department of State, Bureau of Elections, regarding training for poll workers and judges of elections for the 2020 General Election.
4. Any and all documents reviewed or utilized by the Bucks County Board of Elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
5. Any and all documents regarding and/or relating to any training sessions regarding the procedures to be used in counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
6. Any and all documents reflecting the procedure used to count, process, cure, or reject mail-in or absentee ballots for the 2020 General Election.
7. Any and all documents relied upon and/or referred to during the Canvass, as that term is described in the Pennsylvania Election Code.
8. Any and all communications to or from any employee or staff member of the Bucks County Board of Elections including the administrator of mail-in elections regarding the counting, processing, curing, or rejection of mail-in or absentee ballots for the 2020 General Election.
9. Any plan, documents, training materials, or other materials created or used by the Bucks County Board of Elections, its employees, officers, or agents for creating the system used to process, count, cure, or reject mail-in or absentee ballots for the 2020 General Election.

The Requester also submitted a six-part definitional section, which, among other things, provided examples of responsive documents, noted that the Request included communications sent by third-party vendors of the Department of State, and referenced the Pennsylvania Election Code, 25 P.S. §§ 2601 *et seq.*, with regard to the definitions of several terms used in the Request. When the County did not respond to the Request by November 3, 2021, it was deemed denied on that date. *See* 65 P.S. § 67.901. On November 4, 2021, the County purported to deny the Request, arguing that it is insufficiently specific to enable a response. *See* 65 P.S. § 67.703.

On November 19, 2021, the Requester appealed to the OOR, challenging the purported denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On December 3, 2021, the County submitted a position statement, reiterating its argument that the Request is insufficiently specific and that access to records responsive to Items 4, 5, 6, 7, and 9 of the Request is governed by the Election Code, 25 P.S. § 2648, and not the RTKL. *See* 65 P.S. § 67.3101.1 (“[i]f the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply.”). The County also submitted a statement made under the penalty of unsworn verification by Robbie Cain, Esq., the County’s Open Records Officer. The County also provided a link to the election manual that is available on its website.

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

¹ The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

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 County 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)(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 appeal is moot in part

As a preliminary matter, the OOR notes that the County has provided a link to its election manual, which it argues is responsive, at least in part, to Items 4, 5, 6, 7, and 9. *See* 65 P.S. §

67.704(b)(1) (“an agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means....”). Accordingly, insofar as it seeks that manual, the appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Request is sufficiently specific in part

The County argues that the Request is insufficiently specific. *See* 65 P.S. § 67.703. In determining whether a particular request under the RTKL is sufficiently specific, the OOR applies a three-part balancing test set forth 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). The OOR examines to what extent the request identifies (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep’t of Educ.*, 119 A.3d at 1125.

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Id.* The subject matter should provide a context to narrow the search. *Id.* (citing *Montgomery Cnty. v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) (*en banc*)). Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *Id.*

Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. “The timeframe prong is ... the most fluid of the three prongs, and whether or not the request’s timeframe is narrow enough is generally dependent upon the specificity of the request’s subject matter and scope.” *Id.* Failure to identify a finite timeframe will not render an otherwise sufficiently specific request overbroad. *See Pa. Hous. Fin. Agency v.*

Ali, 43 A.3d 532, 536 (Pa. Commw. 2012) (concluding request for proposals and sales agreements relating to two specific projects that did not specify timeframe was sufficiently specific). Similarly, an extremely short timeframe will not rescue an otherwise overbroad request. *Cf. Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. 2011) (finding request for all emails sent or received by any school board member in thirty-day period to be sufficiently specific because of short timeframe), *appeal denied*, 54 A.3d 350 (Pa. 2012).

Here, as far as subject matter, Items 1, 2, 4, 5, 6, 8, and 9 identify the agency activities of counting, processing, curing, or rejecting mail-in or absentee ballots; Items 3 and 5 mention training related to the election; and Item 7 mentions the canvass.² The scope for Items 1, 2, and 3 is communication between the County and the Department; Item 8 seeks communications to and from the County Board of Elections. While, as the County points out, the Request does not include a timeframe, its focus is the 2020 General Election; thus, the Request implies a limited timeframe. *See Iverson*, 50 A.3d at 284 (“[T]he specificity of a request must be construed in the request’s context, rather than envisioning everything the request might conceivably encompass.”) (internal citation omitted).

The County argues that the Items fail to identify a specific transaction or activity, as “relating to counting, processing, curing, or rejection of mail-in or absentee ballots” is overly broad. However, counting, processing, curing, or rejecting mail-in or absentee ballots are undoubtedly County activities; as such, they provide context to narrow the search. While burden may be a factor in determining that a request is insufficiently specific, the fact that a request is burdensome does not, in and of itself, deem it overbroad. *See Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012).

² “Canvass” is defined by the Election Code as “the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” 25 P.S. § 2602(a.1).

Recently, the OOR found that a request for “any and all electronic correspondence” between an agency and the Department of State about absentee ballot cure procedures over the span of nearly a year to be sufficiently specific, with one exception. *Snead v. Phila. Office of the City Commissioners*, OOR Dkt. AP 2021-0160, 2021 PA O.O.R.D. LEXIS 426 (“*Snead I*”); but see *Snead v. Montgomery Cnty.*, OOR Dkt. AP 2021-0157, 2021 PA O.O.R.D. LEXIS 409 (“*Snead I*”) (finding insufficiently specific a request that was nearly identical to the request in *Snead II* because the agency had attempted a search for responsive record that returned over 50,000 results). In *Snead II*, the agency argued that Department employees do not have a unique domain name that could limit the scope of that request. The OOR found this argument unavailing, holding that a limited subject matter may counteract a broad scope.

The County raises a nearly identical argument in the instant matter; while the Request seeks records related to counting, processing, and rejection of mail-in or absentee ballots in addition to absentee ballot cure procedures, the fact remains that the Request does identify County activities. Therefore, difficulty distinguishing Department employees by domain name does not render the Request insufficiently specific.

The County also argues that, in the absence of the identification of specific individuals in the Department, it cannot conduct a reasonable search; however, the request in *Snead II* did not identify individuals and that agency employed 140 individuals with 60 email accounts. Here, the County Board of Elections currently has 15 employees and an additional 35 employees were hired during the election. *Cain Aff.* ¶¶ 13-14. Consequently, while the subject matter in the instant Request is broader than that in *Snead II*, the universe of potentially responsive records is much more limited. See *Legere*, 50 A.3d at 264-65 (holding that, because a request delineated “a clearly-defined universe of documents[,]” there was no need to make judgment calls as to whether any

records were related to the request). Further, unlike the agency in *Snead I*, the County provides no evidence that it has attempted a search. Therefore, since Items 1, 2, 3, and 8 identify County activities, are limited in scope and contain an implied timeframe, they are sufficiently specific to guide the County's search for responsive records.

However, Items 4, 5, 6, and 7 seek "any and all documents" "reviewed or utilized" (Item 4), "regarding and/or relating to" (Item 5), "reflecting" (Item 6), and "relied upon and/or referred to" (Item 7) the identified activities. Similarly, Item 9 seeks "any plan, documents, training materials, or other materials." Furthermore, the definitional section accompanying the Request devotes a half-page expounding upon the inclusivity of "document." Such expansive language does not meaningfully limit the Request. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010) (holding that the portion of a request seeking "any and all records, files or communications" related to vehicle stops, searches, and seizures was insufficiently specific, but that the portion of the request seeking manuals was sufficiently specific.); *see also Snead II* (finding that the portion of the request seeking "any variation" of the provided key words was insufficiently specific).

These Items of the Request would require the County to make judgments as to whether a given record was "reviewed or utilized," "regard[s] and/or relat[es] to," or was "relied upon and/or referred to." The OOR has repeatedly held that a request that requires an agency to make judgments as to whether each potentially responsive record is properly "related to" a request is insufficiently specific. *See, e.g., Brown v. Office of the Governor*, OOR Dkt. AP 2017-1118, 2017 PA O.O.R.D. LEXIS 996. Therefore, Items 4, 5, 6, 7, and 9 are insufficiently specific to enable the County to locate responsive records.³

³ The County also argues that the Election Code establishes the procedure to access records responsive to these Items. The Election Code makes many records in the custody of the Election Board subject to public inspection by qualified

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part, and dismissed as moot in part**, and the County is required to produce records responsive to Items 1, 2, 3, and 8 within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks 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. 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>.

FINAL DETERMINATION ISSUED AND MAILED: January 14, 2022

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent via email to: Kathleen Gallagher; Robbie Cain, Esq.

electors. See 25 P.S. § 2648; *Obernier v. Crawford Cnty.*, OOR Dkt. AP 2017-2107, 2018 PA O.O.R.D. LEXIS 110 (analyzing that section of the Election Code and noting that it “creates a separate process for obtaining these records and conditions public inspection and copying.”). Because the records are not unconditionally public under the Election Code, the OOR must examine any exemptions from disclosure under the RTKL that are asserted by an agency. See *Pa. Dep't of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (Pa. Commw. Ct. 2014). Because the County only argues that the Election Code applies to the Items that are insufficiently specific, the OOR need not address the issue.

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