



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
TODD SHEPHERD AND BROAD + LIBERTY,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2021-2929
	:	
CITY OF PHILADELPHIA OFFICE OF THE CITY COMMISSIONERS,	:	
Respondent	:	

INTRODUCTION

Todd Shepherd and Broad + Liberty (collectively “Requester”) submitted a request (“Request”) to the City of Philadelphia, Office of the City Commissioners (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking emails. The Request was deemed denied 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** and **denied in part**, and the Office is not required to take any further action.

FACTUAL BACKGROUND

On September 17, 2021, the Request was filed,¹ seeking:

[A] copy of all emails (and all attachments) between Commissioner Lisa Deeley, Commissioner Al Schmidt, Commissioner Omar Sabir, and Nick Custodio, for the

¹ The Request was dated September 16, 2021 but was not received by the Office until September 17, 2021.

dates of June 1, 2020, to and including Sept. 15, 2020 (dates inclusive) with any of the following persons and/or emails:

Marc Solomon, (msolomon@civitaspublicaffairs.com, or any other email used by Marc Solomon)
Gwen Camp (gwen.camp@gmail.com, or any other email used by Gwen Camp)
Any email ending in @modernelections.org
Any email ending in @techandciviclife.org
Any email ending in @deliverstrategies.org
Jessica Walls-Lavelle
Sam Oliker-Friedland
Joseph Hill (jhill@cozen.com, or any other email used by Joseph Hill)
Christine Reuther (reutherc@co.delaware.pa.us, or any other email used by Christine Reuther)
Marianne Jackson (majack1011@gmail.com, or jacksonm@co.delaware.pa.us, or any other email used by Marianne Jackson).

On September 24, 2021, October 22, 2021, and November 23, 2021, the Office requested additional time to issue a final response. The Requester granted each extension. However, when the Office failed to issue a final response by December 7, 2021, the Request was deemed denied.

On December 21, 2021, the Requester appealed to the OOR, challenging the redactions and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 3, 2022, the Office submitted a position statement arguing, among other things, that the Request is insufficiently specific.³ See 65 P.S. § 67.703. In support of its position,

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).”).

³ The Office also argues that 1) the records are not accessible through the RTKL but instead through the Election Code, 2) that the Request seeks non-public record and the records would be exempt under 65 P.S. §§ 67.708(b)(6), (10), (12), and (13), and 3) that there are no records between Commissioner Schmidt and anyone identified in the Request.

the Office submitted the affidavit of Nick Custodio, Deputy Commissioner and the Office'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 Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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 Request is sufficiently specific.

Here, the Office argues that the Request is insufficiently specific because it “fails to include a subject matter of the emails sought or even provide keywords.” 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 at 824). 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 included a limiting timeframe was 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.*

In *Easton Area School District v. Baxter*, the Commonwealth Court held that a request for all emails sent to or received by nine school board members and the school’s superintendent over a one-month period was sufficiently specific because of the narrow scope and timeframe, even though the request did not specify a subject matter. 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012). Here, similar to *Baxter*, the Request seeks emails between three Office Commissioners, an Office Deputy Commissioner, seven listed individuals, and three email addresses ending in @modernelections.org, @techandcivicliflife.org, and @deliverstrategies.org. Although the Request does not identify a subject matter, it is limited in scope and time, as it seeks emails over a three and a half month period. *Cf. Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, 2020 Pa. Commw. Unpub. LEXIS 8 (Pa. Commw. Ct. 2020) (holding that, unlike *Baxter*, the request sought all correspondence sent or received by four individuals over a 48-day timeframe and was, therefore, insufficiently specific).

Most recently, the Commonwealth Court, in *Methacton School District v. Office of Open Records*, followed its decision in *Baxter*, finding that a request for emails sent and received by specific school district employees for four discrete one-month time periods was sufficiently specific, despite lacking a subject matter. 250 C.D. 2021, 2021 Pa. Commw. Unpub. LEXIS 670, *5 (Pa. Commw. Ct. 2021) (“...given the requests’ restrictions to limited timeframes and emails of only four specific persons, as well as the fact that the [s]chool [d]istrict was able to locate the responsive documents, the absence of a stated subject matter for the requested emails was not solely determinative of whether the requests were sufficiently specific under Section 703 of the RTKL”). The Commonwealth Court held that “the School District should have ascertained the emails’ status as records and reviewed them for the presence of exemptions and protected information.” *Id.* at *8.

In support of its position, the Office submitted the attestation of Mr. Custodio, who attests, in relevant part, as follows:

5. The City is unable to search for emails from “any other email used by” someone; the City is also unable to search for emails from someone without an email address.
6. [The] request did not include a subject associated with the emails [the Requester] was seeking.
7. For the reasons set forth in paragraphs 4-6, it is not clear to the OCC which emails [the Requester] intended to seek through his RTKL request.
8. Despite the insufficiently nature of the request, the OCC attempted to search for records responsive to the request; however please be advised of the following:
 - a. Joseph Hill is a principal in the law firm Cozen O’Connor Public Strategies group who volunteered his time with the OCC in the time before the elections.
 - b. The 2020 General Election was in November 2020, and the time frame of the request is three months prior to the 2020 General Election which required a tremendous amount of preparation.

- c. The 2020 General Election was extremely charged throughout the country, and due to circumstances unique to this election, the three Commissioners and I received a higher than usual volume of emails in connection with this election.
 - d. The emails concerned:
 - i. Absentee and/or mail in voting
 - ii. Personal protective equipment
 - iii. The pandemic
 - iv. Secure voting
9. Some records yielded from the search results are communications from an electronic list serve of county commissioners that were sent to everyone on the list serve and not in responsive to a specific outreach from the Commissioner.
10. Other records in the search results are emails reflecting communications between government employees discussing how to proceed with specific issues before a decision on the issue was made.
11. Other records in the search results are emails containing personal information of individuals, such as their home addresses, home telephone numbers and non-work email addresses.
12. There were no emails between Commissioner Schmidt and anyone identified in the request.

In *Office of the Governor v. Engelkemier*, the Commonwealth Court discussed an agency's failure to raise specificity during the pendency of the Request:

In short, instead of objecting to and seeking further specificity of the request, the Office sought only additional time to identify responsive records and review such records to determine whether they should be exempted from production. Requester agreed to the requested extension, as well as a rolling production schedule that the Office proposed. If the Office had any lingering concerns over the specificity of the request, it should have raised the specificity concern at that time. It did not. It clearly acted as if it had sufficient information upon which it could fully process Requester's request and, based on that representation, secured from Requester an extension of time and agreement to a rolling production schedule.

Id.

Similar to *Engelkemier*, on October 22, 2021, the Office requested a three-week extension. On October 25, 2021, the Requester agreed to an extension. Again, on November 15, 2021, the Office sent the Requester a request for more time to issue a final response until November 19,

2021 to issue a final response. The Requester agreed to that extension. When the Requester did not hear from the Office by November 19, 2021, he reached out to the Office and asked whether the documents were ready for production. On November 23, 2021, the Office requested another two week extension and indicated that it had “discovered an unexpected technology issue last week” and was “unable to confirm a complete response.” The Requester agreed to another extension on November 24, 2021. When the Requester did not hear from the Office, he sent correspondences to the Office on December 8 and 13, 2021. When the Office failed to issue a final response, the Request was deemed denied and the Requester appealed to the OOR.

On appeal, the Office now raises, among other things, that the Request is overly broad and challenges the sufficiency of the Request. Although the Office characterizes the Request as “still very broad,” it did not seek further clarification from the Requester. Instead, the Office informed the Requester that it needed more time and that there was an “unexpected technology issue.” Further, despite arguing that the Request was insufficiently specific, the Office conducted a search that revealed responsive records. Specifically, these records relate to i) absentee and/or mail in voting, ii) personal protective equipment, iii) the pandemic, and iv) secure voting. *See* Attestation of Custodio at ¶ 8.

Based on the foregoing, although the Request does not have a subject matter, in consideration of the narrow timeframe of three and a half months, the Office’s response during the pendency of the Request, and the fact that the Office was able to identify records responsive to the Request, the Request, on balance, meets the specificity requirement of Section 703 of the RTKL. *See Engelkemier, supra* (holding that the Requester’s request, on balance, meets the specificity requirement of Section 703 of the RTKL).

2. Access to the responsive records must be provided in accordance with the Election Code.

The Office argues that the requested records are not subject to public access under the RTKL, as the RTKL conflicts with the Election Code. Specifically, the Office asserts that Section 2648 of the Election Code proscribes the way in which records of a county board of election may be accessed and copied. The Election Code provides, as follows:

The records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents and records in its custody, except the contents of ballot boxes and voting machines and records of assisted voters, shall be open to public inspection, except as herein provided, and may be inspected and copied by any qualified elector of the county during ordinary business hours, at any time when they are not necessarily being used by the board, or its employees have duties to perform thereto: Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employee of the county board, and shall be subject to proper regulation for safekeeping of the records and documents, and subject to the further provisions of this act: And provided further, That general and duplicate returns, tally papers, affidavits of voters and others, and all other papers required to be returned by the elections officers to the county board sealed, shall be open to public inspection only after the county board shall, in the course of the computation and canvassing of the returns, have broken such seals and finished for the time, their use of said papers in connection with such and canvassing.

25 P.S. § 2648.

Section 3101.1 of the RTKL states that “[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.” 65 P.S. § 67.3101.1. When examining the conflict between the Election Code and the RTKL, the OOR has found that, while the Election Code makes many records in the custody of the Election Board subject to public inspection by qualified electors, 25 P.S. § 2648, it does not make these records unconditionally available to the public. *See 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: 1) to qualified electors of the county, 2) during ordinary business hours, and 3) when the

records are not being used by the elections board”); *see also Bloch v. Adams Cnty.*, OOR Dkt. AP 2018-2227, 2019 PA O.O.R.D. LEXIS 95. In addition, because the records are not unconditionally public under the Election Code, the OOR would be required to examine any exemptions from disclosure under the RTKL asserted by an agency when records of a County Elections Board are sought by a RTKL request. *See Pa. Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (Pa. Commw. Ct. 2014). Thus, the Election Code controls access to the requested records. *See id.*; *see also* 65 P.S. § 67.3101.1.

Therefore, to the extent that any of the records concern matters governed by the Election Code, the Office may provide the Requester with access to those records in accordance with the access provisions of the Election Code.⁴ However, it does not appear that all records are subject to the Election Code. For example, the Office has identified emails relating to “personal protective equipment” and “the pandemic” but does not provide evidence on how these records would be subject to the Election Code. Accordingly, these records must be provided to the Requester, pursuant to the RTKL’s normal access provisions, subject to redaction of personal identification information, as discussed below.

3. The Office may redact personal identification information.

Section 708(b)(6)(i)(A) of the RTKL exempts, among other things, “home, cellular or personal telephone numbers” and “personal e-mail addresses.” 65 P.S. § 67.708(b)(6)(i)(A). It is clear that some of the redactions consist of contact information, i.e., email addresses and telephone numbers. This information may be redacted pursuant the personal identification information exemption.

⁴ Mr. Custodio attests that the Office has searched the Pennsylvania voter registration database and the Requester is not a qualified Philadelphia County voter. *See* Attestation of Custodio at ¶ 13.

Mr. Custodio also attests that “[o]ther records in the search results are emails containing personal information of individuals, such as their home addresses, home telephone numbers and non-work email addresses.” Attestation of Custodio at ¶ 11.

In *Pa. State Education Association v. Commonwealth*, the Pennsylvania Supreme Court held that an individual possesses a right to privacy in certain types of personal information, including his or her home address. 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual’s interest in informational privacy with the public’s interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; see also *Pa. State Univ. v. State Employees’ Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, by their very nature, implicate privacy concerns and require balancing. *Id.* at 156-57; see also *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test).).

Here, the Requester does not argue that there is a public interest that would overcome the interest in privacy identified by the Supreme Court in *Pa. State Educ. Ass’n.*, and the OOR cannot perceive any such public benefit. Therefore, in this instance, the public benefit to disclose a home

address does not outweigh the privacy interests of the individual, and the Office is not required to disclose the information. *See Doaty v. Pa. Dept. of Conservation and Natural Res.*, OOR Dkt. AP 2021-0987, 2021 PA O.O.R.D. LEXIS 1068 (finding home addresses of campsite lessees are protected by the constitutional right to privacy and can be redacted); *Puricelli v. Bucks County Water and Sewer Auth.*, OOR Dkt. AP 2021-0327, 2021 PA O.O.R.D. LEXIS 727 (finding home addresses of residential customers are protected by the constitutional right to privacy and can be redacted).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Office is required to provide responsive records in accordance with the access provisions of the Election Code and provide copies of records not covered by the Election Code 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 Philadelphia 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 4 March 2022

/s/ Lyle Hartranft
Lyle Hartranft, Esq.
Appeals Officer

Sent to: Todd Shepherd (via email only);
Nick Custodio, AORO (via email only);
Feige Grundman, Esq. (via email only)

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