



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
GLENN HARMON,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2017-2357
	:	
LONDONDERRY TOWNSHIP,	:	
Respondent	:	

INTRODUCTION

Glenn Harmon (“Requester”) submitted a request (“Request”) to Londonderry Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records regarding grants. The Township denied the Request, asserting, among other things, that the Request is insufficiently specific. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

On November 7, 2017, a Request was filed, seeking “the Project Worksheets and Project Close outs for FEMA and PEMA for grants or Projects for which the money was received in 2007 and 2012.” On November 14, 2017, the Township invoked a thirty-day extension to respond to the Request. *See* 65 P.S. § 67.902. On December 14, 2017, the Township denied the Request,

arguing that it is not a *bona fide* RTKL request, asks questions and is insufficiently specific to enable the Township to respond. *See* 65 P.S. § 67.703. Additionally, the Township argues that responsive records are subject to various exemptions under the RTKL. *See* 65 P.S. § 67.708(b).

On December 14, 2017, the Requester appealed to the OOR, challenging the Township's denial of the Request and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On December 28, 2017, the Township submitted a position statement, reiterating its reasons for denial. In support of its position, the Township provided a sworn affidavit from Jeffrey Burkhart, the Township's Assistant 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 law also states that an appeals officer may admit into evidence testimony,

evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Township requested a hearing; however, that OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Township 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 submitted pursuant to the RTKL

As a preliminary matter, the Township argues that the Request underlying this appeal is not a *bona fide* request under the RTKL. Section 703 of the RTKL states that “[a] written request must be addressed to the open-records officer designated pursuant to section 502.” 65 P.S. § 67.703. In *Pa. Gaming Control Board v. Office of Open Records* (“*Schneller*”), the Pennsylvania Supreme Court determined that, where an agency failed to respond to a request, the request must be addressed to the appropriate agency open records officer in order to trigger appellate rights pursuant to the RTKL. 103 A.3d 1276 (Pa. 2014); *see also Prison Legal News v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1993, 2015 PA O.O.R.D. LEXIS 105. Here, the Request was e-mailed to the open records officer seeking records pursuant to the RTKL. As such, it is a request entitled to appeal rights under the RTKL.

Further, the Township attempts to argue that the Requester is abusing the RTKL by submitting numerous requests to the Township. However, there is nothing in the RTKL limiting the number of requests a citizen may submit to an agency. *But see* 65 P.S. § 67.506(a)(1) (“An agency may deny a requester access to a record if the requester has made repeated requests for the same record and the repeated request have placed an unreasonable burden on the agency.”)

2. The Request seeks records

The Township also argues that the Request does not seek records. Rather, the Township argues that the Request is an interrogatory. A request must seek records, rather than answers to questions. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *14 (Pa. Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”); *Moll v. Wormleysburg Borough*, OOR Dkt. AP 2012-0308, 2012 PA O.O.R.D. LEXIS 197; *see also Stidmon v. Blackhawk Sch. Dist.*, No. 11605-2009 at 5

(Beav. Com. Pl. Dec. 14, 2009) (“The [RTKL does] not provide citizens the opportunity to propound interrogatories upon local agencies, rather it simply provides citizens access to existing public records”). The presence or absence of a question mark is not determinative as to whether a request asks a question. *See Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766.

Here, the Request seeks worksheets and close outs, and does not pose questions. As a result, the Request seeks records. *Cf. Connelly v. Foster Twp.*, OOR Dkt. AP 2014-1256, 2014 PA O.O.R.D. LEXIS 1062 (“Each of the inquiries are phrased as a question, punctuated with a question mark, and the [r]equester asks the Township to e-mail the answers to the questions posed, further indicating the [r]equester’s intent to ask questions”).

3. The Request is sufficiently specific

The Township argues that the Request is insufficiently specific to enable the Township to ascertain the records being requested. Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 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 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 to be sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d 367. Second, the scope of the request must identify a discrete group of documents (*e.g.*, type or recipient). *See Pa. Dep’t of Educ.*, 119 A.3d at 1125. 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 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.*

Here, the subject matter of the Request is FEMA and PEMA grants. Secondly, the Request identifies a discrete group of records “[p]roject [w]orksheets and [p]roject close outs.” Moreover, the Request is limited to the timeframe of “grants or [p]rojects for which the money was received in 2007 and 2012.” As a result, the Request is sufficiently specific to enable the Township to ascertain which records are being requested. *See Pa. Dep’t of Educ.*, *supra*.

4. The Township failed to submit evidence to withhold responsive records

The Township asserts that records do not currently exist nor are they compiled, maintained or formatted in the manner requested. 65 P.S. § 67.705. Additionally, the Township asserts various RTKL exemptions—65 P.S. §§ 67.708(b)(9), (10), (12), (17), (21)—but does not discuss what responsive records exist or how the exemptions apply to the records. *See generally Heavens v. Pa. Dep’t of Envtl. Prot.*, 65 A.3d 1069 (Pa. Commw. Ct. 2013) (cautioning that “it [is] incumbent

upon [an agency] to determine whether records exist[] that [do] not fall within the [exemption]...”).

While an affidavit may serve as sufficient evidence in support of an exemption from public access, *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), unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all”). In the present case, the Township alleges in an unsworn statement that the requested records are exempt from disclosure under the cited exemptions. Although the Township provided Mr. Burkhardt’s affidavit, it does not discuss that records do not exist or the application of the asserted exemptions to the records. Accordingly, the Township has not met its burden of proof to withhold responsive records. *See* 65 P.S. § 67.708(a)(1).

Further, the Request seeks records regarding grants. These records are included in the definition of financial records in the RTKL. 65 P.S. § 67.102 (“... any account, voucher or contract dealing with...the receipt or disbursement of funds by an agency[.]”). As such, many of the RTKL’s exemptions could not apply to the records. *See* 65 P.S. § 67.708(c) (“exceptions set forth in [708](b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17).”

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted**, and the Township is required to provide the responsive records 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 Dauphin 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 12, 2018

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Glenn Harmon (via e-mail only);
Tricia Lontz, Esq. (via e-mail only);
Steven Letavic (via e-mail only)

¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).