



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**CHRISTOPHER BORDELON,
Requester**

v.

**CITY OF PHILADELPHIA,
Respondent**

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Docket No.: AP 2018-1888

INTRODUCTION

Christopher Bordelon (“Requester”) submitted a request (“Request”) to the City of Philadelphia (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to a bridge and other accesses at Byberry Road. The City denied the Request, arguing that no responsive records exist. 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 City is not required to take any further action.

FACTUAL BACKGROUND

On August 28, 2018, the Request was filed, seeking:

1. [A]ll records generated within the last 5 years containing specific discussion of the weight limit on the bridge over the CSX tracks on Byberry Road, its retention, its removal, its replacement, or its adjustment;
2. [A]ll records generated within the last 5 years containing specific discussing of a plan for a driveway or a road providing access to Byberry Road from the south,

the southeast, or the southwest within the area extending from the bridge over the CSX tracks on Byberry Road to Worthington road, inclusive; and

3. [A]ll records reflecting agreements made within the last 5 years with any party by the City or any of its agencies regarding,

a. the weight limit on the bridge over the CSX tracks on Byberry Road, its retention, its removal, its replacement, or its adjustment, or

b. any plan for a driveway or a road providing access to Byberry Road from the south within the area extending from the bridge over the CSX tracks on Byberry Road to Worthington Road, inclusive.

On September 28, 2018, after taking a thirty-day extension to respond, 65 P.S. § 67.902(b), the City denied the Request, arguing that it did not possess any records responsive to the Request because the bridge in question was controlled by the Pennsylvania Department of Transportation (“PENNDOT”).¹ The City also noted that it had no knowledge of planned driveways or projects adjacent to Byberry Road.

On October 18, 2018, the Requester appealed to the OOR, arguing that statements by City and PENNDOT officials show that responsive records do exist. In support of his appeal, the Requester attached several emails that he argues are responsive to his Request. The OOR invited the parties to supplement the record and directed the City to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On December 10, 2018, the Requester submitted a notarized statement attesting to the accuracy of the factual claims made in his appeal submission. On January 10, 2019, the City submitted a position statement, arguing that no responsive records exist because the bridge at issue is presently being reconstructed by PENNDOT, and PENNDOT has not yet sent the City a memorandum determining the bridge’s weight limit. The City explains further that it is not

¹ Upon receipt of the City’s extension letter, the Requester sent a follow-up email noting that “although I think the language is clear” he wanted to confirm that the word ‘its’ in Item 1 of the Request referred to the weight limit on the bridge, not the bridge itself.

involved in the reconstruction process or in the weight studies performed by PENNDOT. Next, the City argues that it has no responsive records related to Byberry Road because the City has decided not to act on past alternative traffic plans suggested by the City's planning commission, and that it has no plans for accesses to Byberry Road. The City also argues that it has no agreements with outside parties concerning the weight limits of the bridge or accesses to Byberry Road. Finally, the City argues that the emails attached to the appeal were not responsive to the Request because the City did not have the authority to act on the emails and that they were analogous to notes and working papers, which are exempt under Section 708(b)(12) of the RTKL. 65 P.S. § 67.708(b)(12).² In support of these arguments, the City submits the attestations of Darin Gatti, the Chief Engineer for the City's Department of Streets, and Richard Montanez, the Deputy Commissioner of Transportation for the City's Department of Streets, who both attest that the records sought do not exist.

On January 17, 2019, the Requester submitted a response, arguing that the affiants had not attested to the nature of any search performed for responsive records, and were conclusory. The Requester further argues that the City's interpretation of the Request is impermissibly narrow, and that the emails submitted are records of the City and are not subject to Section 708(b)(12) of the RTKL because they were not created by any person within the agency. Finally, the Requester renewed his motion that the OOR conduct an *in camera* review of the City's records to determine if responsive records exist.³ The Requester further submits several more exhibits to demonstrate responsive records that the City had denied exist.

² Section 708(b)(12) of the RTKL exempts from disclosure "[n]otes and working papers prepared by or for a public official or agency employee used solely for that official's own use." However, because the records at issue were created by members of the public, they cannot be notes and working papers. 65 P.S. § 67.708(b)(12).

³ The OOR hereby denies the Requester's motion for an *in camera* review; the OOR does not believe that such a review is necessary to adjudicate the City's Section 708(b)(12) claim, and the records the City has proven do not exist cannot be produced. Finally, the substantive arguments raised by the City regarding the communications the Requester

On January 25, 2019, the City submitted a response, arguing that the City’s interpretation of the Request was reasonable because of the Requester’s role in prior discussions with the City and PENNDOT regarding the bridge weight limits, and that to the extent the Requester sought communications, the Request is insufficiently specific. Finally, the City submits the supplemental attestations of Mr. Gatti and Mr. Montanez, who attest that they searched the records of the Department of Streets for responsive records and did not locate any.

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; however, 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 Requester seeks an *in camera* review; however that request is denied, as the OOR has the requisite information and evidence before it to properly adjudicate this matter.

argues should be produced would not benefit from a private review. Therefore, the OOR does not believe that an *in camera* review is necessary.

The City 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 to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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)). “The 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. The City has demonstrated that it has no studies or calculations responsive to Items 1 and 2 of the Request

The City argues that it has no records responsive to Items 1 and 2 of the Request. In support of this argument, the City provides the verifications of Darin Gatti, the Chief Engineer for the City’s Department of Streets, and Richard Montanez, the Deputy Commissioner of Transportation for the City’s Department of Streets. Mr. Gatti and Mr. Montanez collectively attest that they

conducted a search for “official records, such as studies and calculations” and determined that they did not possess such records, explaining that PENNDOT presently has ownership of the bridge project and is responsible for the work of determining its weight limit. Furthermore, Mr. Montanez attests that the City has no plans to study or implement any alternative routes on Byberry Road at present. The affiants further attest that the City possesses no records regarding PENNDOT’s process and has no responsive communications between City and PENNDOT employees.

Under the RTKL, a verification 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 the City has acted in bad faith or that responsive studies and calculations exist, “the averments in [the verification] 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)). Based on the evidence provided, the City has met its burden of proving that no responsive studies or calculations exist within the City’s control. *Hodges*, 29 A.3d at 1192.

2. The City has demonstrated that it has no records responsive to Item 3 of the Request

The City also argues that it does not possess any records responsive to Item 3 of the Request. In support of this argument, the City provided the attestation of Mr. Gatti, who attests;

There are no agreements between Streets and any outside party concerning the weight limit of the bridge or plans for a driveway or road providing access to Byberry Road from the South, the southeast, or the southwest within the area extending from the bridge over the CSX on Byberry Road to Worthington Road.

Because the City has not entered into any such agreement, there can be no records responsive to Item 3, and the City has met its burden of proving that it possesses no records responsive to Item 3. *Hodges*, 29 A.3d at 1192.

3. The remainder of the Request is not sufficiently specific

The City argues that, to the extent that the Request does seek communications, the Request is insufficiently specific. 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 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). Finally, “[t]he fact that a request is burdensome does not deem it overbroad, although it may be considered as a factor in such a determination.” *Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012).

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). *Id.* Finally, “[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, Items 1 and 2 of the Request each have a specific subject matter, an unlimited scope (“all records”), and a five-year timeframe.⁴ 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). As in *Pa. State Police*, this Request does not narrow the scope of records to permit the City to determine which records it should search for. Therefore, the OOR concludes that the Request is not sufficiently specific.⁵

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the City is not required to take any further 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 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 according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating

⁴ The City argues on appeal that the Request is not specific because it is “subject to multiple interpretations”, citing to *Pa. Hous. Fin. Agency v. Ali*, where the Commonwealth Court found that a request for correspondence was insufficiently specific because it was unclear from the request whether the requester sought only communications received by the agency’s board relating to specific proposals or a broad and undefined set of correspondence. 43 A.3d 532 (Pa. Commw. Ct. 2012). These cases are not analogous; here, it is plain from the face of the Request that the Requester sought a broad universe of records.

⁵ Nothing in this Final Determination precludes the Requester from filing a new request.

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>.

FINAL DETERMINATION ISSUED AND MAILED: February 11, 2019

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Christopher Bordelon (via email only);
Jill Freeman, Esq., (via email only)

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