



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**JUSTIN SERFASS,
Requester**

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:

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v.

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Docket No.: AP 2019-1664

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**NORTHAMPTON COUNTY,
Respondent**

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:

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INTRODUCTION

Justin Serfass (“Requester”) submitted a request (“Request”) to Northampton County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking 911 call records. The County denied the Request, arguing that the responsive records were exempt as records or parts of records pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel. 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 County is required to take additional action as directed.

FACTUAL BACKGROUND

On September 18, 2019, the Request was filed, seeking “[a]ll 911 records available under RTK for all calls from the Social Security Administration Easton District Office at above address from 1/1/2014-9/18/2019, including date, time, type of call and any other information available.”

On September 22, 2019, the County denied the Request, arguing that the responsive records were exempt as records or parts of records pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel (*see* 65 P.S. § 67.708(b)(18)).

On September 24, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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. 65 P.S. § 67.1101(c).

On October 9, 2019, the County submitted a position statement reiterating its grounds for denial. The County claims that the request is insufficiently specific (*see* 65 P.S. § 67.703), that the responsive records are exempt as records pertaining to transmissions received by emergency dispatch personnel, (*see* 65 P.S. § 67.708(b)(18)), and that the release of this information is prohibited by 35 Pa.C.S. § 5399, which provides that "...a [public safety answering point] may not release individual identifying information of an individual calling a 911 center, victim or witness." In support of its position, the County submitted the affidavit of Tim Brennan, Esq., its Open Records Officer.

On October 10, 2019, the Requester submitted a rebuttal statement, arguing that the County could redact the individual identifying information and provide responsive records to the extent permitted by the RTKL and superseding statutes.

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 parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The County 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

The County argues that the Request is “insufficiently specific” because the Request “does not specifically state the record [the Requester] is seeking and requires the Agency to guess and/or exert discretion in providing a response.” Section 703 of the RTKL provides: “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 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. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *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.* None of these factors are dispositive, instead, the Commonwealth Court has emphasized the importance of a “flexible, cases by case, contextual application of the test.” *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Commw. Ct. 2017).

In support of its argument that the language of the Request is not sufficiently specific, the County relies on *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010). However, the *Pennsylvania State Police v. Office of Open Records* holding was limited to a finding of insufficient specificity as to the portion of the request seeking “any and all records, files or communications,” finding that the remainder of the request was, in fact, sufficiently specific. *See id.* In rebuttal, the Requester notes that he has previously sought and obtained similar information from this County and from other agencies.

In this case, the subject matter of the Request clearly identifies a “transaction or activity” of the agency (*see Pa. Dep’t of Educ.*, 119 A.3d at 1125), namely, 911 calls. This Request also outlines a discrete group of documents, by both a type of record (“911 records available under RTK”) and by sender and recipient (“all calls from the Social Security Administration Easton District Office at above address”). *See id.* Finally, although the timeframe of the Request is five years (“from 1/1/2014-9/18/2019”), it is a defined period. As the Requester seeks only records of 911 calls between two specific parties, the breadth of the time period for which records are sought does not create insufficient specificity. *Id.* at 1126 (explaining that the timeframe of a Request is the most fluid factor in determining whether the Request is sufficiently specific). Because the

Request has a clearly identified subject matter, scope, and timeframe, it is sufficiently specific. *Pa. Dep't of Educ.*, 119 A.3d at 1125.

2. The County may redact information from the records that is exempt from disclosure pursuant to 65 P.S. § 67.708(b)(18) and 35 Pa.C.S. § 5399

Alternatively, the County argues that the records are exempt from disclosure because they are records “pertaining to audio recordings...received by emergency dispatch personnel...,” and that the County is not required to perform a balancing test to determine whether the public interest in disclosure outweighs the interest in disclosure. *See* 65 P.S. § 67.708(b)(18); *see also Brown v. City of Philadelphia Police Dep't*, OOR Dkt. AP 2015-1858, 2015 PA O.O.R.D. LEXIS 1612.

Section 708(b)(18) of the RTKL exempts from disclosure “[r]ecords or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.” *See* 65 P.S. § 67.708(b)(18). However, the plain language of the statute carves out a strict exception to the exemption for time response logs. *See id.*

Similarly, the County argues that the 911 Emergency Communications Act, codified at 35 Pa.C.S. § 5399, mandates the confidentiality of the record. *See* 65 P.S. § 67.3101.1 (“If the provisions of [the RTKL] regarding access to records conflict with any other Federal or State law, the provisions of [the RTKL] shall not apply.”).

Section 5399(a) of the 911 Emergency Communications Act provides that, “[n]otwithstanding any other law, in a response to a request under [the RTKL], a PSAP may not release individual identifying information of an individual calling a 911 center, victim or witness.”¹ 35 Pa.C.S. § 5399(a). The statute defines the term “identifying information” to include

¹ A “PSAP,” or “public safety answering point,” is defined by statute as “[t]he agency-approved entity that receives 911 communications from a defined geographic area and processes those calls according to a specific operational policy,” and refers to “a county or county-based regional 911 system.” 35 Pa.C.S. § 5302.

a name, telephone number and home address. *See* 35 Pa.C.S. § 5399(c). The term does not include “[t]he location of the incident, unless the location is the caller’s, victim’s or witness’s home address or the disclosure of the location would compromise the identity of the caller, victim or witness,” nor does the term include “[t]he street block identifier, the cross street or the mile marker nearest the scene of the incident, which shall be public.” *See id.*

However, contrary to the County’s argument, neither 65 P.S. § 67.708(b)(18) nor 35 Pa.C.S. § 5399 expressly prohibits the disclosure of all records “pertaining to audio recordings...received by emergency dispatch personnel...” *See* 65 P.S. § 67.708(b)(18) (expressly allowing the disclosure of time logs); *see also* 35 Pa.C.S. § 5399 (expressly limiting the exemption to certain “identifying information,” further defined by the statute, and excluding the location of the incident and the street block identifier).

Furthermore, in the vast majority of cases, the RTKL’s requirement that an agency demonstrate that a record is exempt from disclosure before withholding it means that the agency must provide (1) an acknowledgement that the records exist, (2) a description of the records, and (3) an analysis of why the records are exempt. While the County has failed to identify a specific record for which it claims the exemption, since the RTKL exemption broadly covers “all records pertaining to” 911 calls, with the exception of time logs, the County may withhold all responsive records except time logs, subject to redaction as required by 35 Pa.C.S. § 5399(c). *See* 65 P.S. § 67.708(b)(18).

However, the County may not claim Section 708(b)(18) or the provisions of 35 Pa.C.S. § 5399 as a blanket exemption for *all* records pertaining to a 911 call, when the statutes themselves provide access to certain information. The Requester reiterates that his Request “only asks for information available under RTK,” and offers that “[a]ny information not available under RTK

when providing call logs may be redacted.” Accordingly, to the extent that the County has in its possession time response log(s), which the RTKL clearly delineates as public record,² it must provide the same to the Requester, subject to the redaction of “identifying information,” as defined by the 911 Emergency Communications Act. *See id.*; *see also* 35 Pa.C.S. § 5399(c).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the County is required to provide time response logs, subject to the redaction of “identifying information” as defined by 35 Pa.C.S. § 5399, 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 Northampton 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 6, 2019

/s/ Joy Baxter

APPEALS OFFICER
JOY BAXTER

Sent to: Justin Serfass (via email only);
Tim Brennan, Esq. (via email only)

² Although the RTKL does not define the term “time response log,” the OOR has noted that the term is generally understood to include the time the call was received, the time the dispatcher contacted or dispatched the responding unit(s), the time the responding unit(s) responded to the dispatch, the time the responding unit(s) arrived on the scene, the time the responding unit(s) became available, and the address of the incident or the street block identifier, the cross street or the mile marker nearest the scene of the incident.

See <https://www.openrecords.pa.gov/Documents/RTKL/rtkguidelawenforcement.pdf>, last accessed Nov. 5, 2019.

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