INTRODUCTION

Brian Nichilo, Esq. (“Requester”) submitted a request (“Request”) to Radnor Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 et seq., seeking texts and emails sent and received from a Township employee, for three nonconsecutive thirty-day time periods. The Township denied the Request, arguing 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 additional action as directed.

FACTUAL BACKGROUND

On March 9, 2020, the Request was filed, seeking:

1. From February 22, 2019 to March 24, 2019, all emails sent and received by then Township Manager Robert Zienkowski at rzienkowski@radnor.org that document activities of Radnor Township.

2. From February 22, 2019 to March 24, 2019, all text messages sent and received...
by then Township Manager Robert Zienkowski that document activities of Radnor Township.

3. From August 28, 2019 to September 27, 2019, all emails sent and received by then Township Manager Robert Zienkowski at rzienkowski@radnor.org that document activities of Radnor Township.

4. From August 28, 2019 to September 27, 2019, all text messages sent and received by then Township Manager Robert Zienkowski that document activities of Radnor Township.

5. From January 3, 2020 to February 2, 2020, all emails sent and received by then Township Manager Robert Zienkowski at rzienkowski@radnor.org that document activities of Radnor Township.

6. From January 3, 2020 to February 2, 2020, all text messages sent and received by then Township Manager Robert Zienkowski that document activities of Radnor Township.

On March 16, 2020, the Township invoked a thirty-day extension to respond. 65 P.S. § 67.902(b).

On May 1, 2020, the Township denied the Request, arguing that the Request is insufficiently specific, and explaining that its response was untimely due to office closures related to the COVID-19 pandemic.¹

On May 22, 2020, 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 Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

¹ This Request was technically deemed denied on April 15, 2020. See 65 P.S. § 67.902(b)(2). Section 1101(a)(1) of the RTKL states that a requester may appeal to the OOR “within 15 business days of the mailing date of the agency’s response or within 15 business days of a deemed denial.” 65 P.S. § 67.1101(a)(1). However, pursuant to the Governor’s Proclamation of Disaster Emergency, the OOR considers this appeal timely as it was filed within 15 business days of the agency’s response, which was delayed due to the COVID-19 pandemic. Available at: https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf (last accessed on July 20, 2020).
On June 16, 2020, the Township submitted a position statement reiterating its grounds for denial. In support of its position, the Township submitted the affidavit of Melissa Conn, its Open Records Officer.

On July 1, 2020, the Requester provided rebuttal argument as to specificity. On July 10, 2020, the Township submitted a reply to the Requester’s rebuttal.

**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 Township 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)).

The Township argues that the Request is insufficiently specific pursuant to Section 703. 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. Dept 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). *Id*. 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).

Additionally, 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 Envir. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (“The fact that a request is burdensome does not deem it overbroad”); *see also Ruggiero v. Lackawanna County*, OOR Dkt. AP 2014-0043, 2014 PA O.O.R.D. LEXIS 157 (“[A] request involving the detailed review of voluminous documents does not relieve the agency of its requirements to presume the records are open and available and respond in accordance with the RTKL.”).

The first prong, that “[t]he subject matter of the request must identify the 'transaction or activity' of the agency for which the record is sought,” is not met by this Request. *Pa. Dep’t of*
Educ., 119 A.3d at 1125. The Request seeks documents that “document activities” of the Township, instead of naming the particular activity or transaction to which the documents relate. However, the Request satisfies the second prong, as it is limited by recipient or sender, namely, the Township Manager, and also identifies documents by type (emails or text messages). See id. Finally, the Request presents three nonconsecutive thirty-day timelines for which it seeks these records. See id. at 1126.

The Township presents the recent case of Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie, 2020 Pa. Commw. Unpub. LEXIS 8, *1 in support of its argument that the Request is insufficiently specific. In Keystone, the requester sought, among other things:

A copy of all correspondence sent and received (including text messages and written memos) by Acting Department Secretary Dr. Rachel Levine, Communications Director April Hutcheson, Press Secretary Nate Wardle, and Nursing Home Division Director Susan Williamson, between April 1, 2018 to present [(May 18, 2018)].

Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie, 2020 Pa. Commw. Unpub. LEXIS 8, *2-4. Citing to Easton Area School District v. Baxter, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012), the OOR had previously concluded that while the Keystone request lacked a subject matter, it was limited in scope and time, and therefore was sufficiently specific. Id. The Commonwealth Court reversed the OOR’s decision, holding that unlike Baxter, the Keystone request sought all correspondence sent and received by four individuals over a 48-day timeframe, and was therefore insufficiently specific. Id. at *53-54 (emphasis added). The Court also noted that “the secretary of a state agency is likely to send and receive more communications in a 30-day time period than a member of a local school board and that these communications are likely to contain exempt information.” Id. at *55.
The Township explains that it provided responsive records to two prior similar requests made by this Requester, which sought records from the Township Commissioner. However, the Township relies upon *Keystone* to explain that this Request is different, arguing that the Township Manager is busier than the Township Commissioner to the same degree that the Secretary of the Department of Health is busier than a school board member. Accordingly, the Township’s Open Records Officer attests that this Request, more so than the prior requests, would constitute an unreasonable burden upon the Township.

However, we cannot find that this Request is similar to the request at issue in *Keystone*. Unlike *Keystone*, this Request is limited to texts and emails, as opposed to “all correspondence.” *Id.* at *53-54. Unlike *Keystone*, this Request seeks the records of one individual, as opposed to four. *Id.* Finally, the Township’s argument that the Township Manager’s correspondence volume rivals that of the Secretary of the Department of Health is unpersuasive. *Id.* at *55.*

Given that this Request seeks records sent or received by one person over three nonconsecutive, brief time periods, and given that the Request carefully defines the type of documents sought, the fact that no subject matter is articulated is not fatal to the specificity of the Request—pursuant to the most recent guidance in *Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, 2020 Pa. Commw. Unpub. LEXIS 8, *1.*

**CONCLUSION**

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide 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 Delaware 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.\textsuperscript{2} This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

**FINAL DETERMINATION ISSUED AND MAILED: July 24, 2020**

\textit{/s/ Joy Ramsingh}

\underline{APPEALS OFFICER}

JOY RAMSINGH

Sent to: Brian Nichilo, Esq. (via email only);
        Joel Steinman, Esq. (via email only);
        Melissa Conn (via email only)