



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
AMANDA ST. HILAIRE AND	:	
ABC27 NEWS,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2017-0416
	:	
CAMP HILL BOROUGH,	:	
Respondent	:	

INTRODUCTION

Amanda St. Hilaire, a reporter for *ABC27 NEWS* (collectively, the “Requester”), submitted a request (“Request”) to Camp Hill Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a variety of records relating to towing services and RTKL requests. The Borough partially denied the Request, arguing that certain records do not exist. 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 Borough is required to take further action as directed.

FACTUAL BACKGROUND

On January 6, 2017, the Request was filed, seeking:

1. All records showing which towing companies were contacted for each crash in Camp Hill Police jurisdiction between 2010 and present.

2. All emails to and from Camp Hill police and/or Camp Hill council members about or related to towing services, including but not limited to emails from the public about towing services, between 2010 and present.
3. All emails to and from Camp Hill police and/or Camp Hill employees and/or Camp Hill Council members about or related to Right to Know requests in 2016.
4. All Camp Hill police memos sent out about towing services between 2010 and present.
5. All text messages to and from Camp Hill police about or related to towing services, including but not limited to text messages about towing vehicles from the scene of a crash between 2010 and present.
6. All text messages to and from Camp Hill police and/or Camp Hill employees about or related to Right to Know Requests in 2016.
7. All text messages and emails to and from Camp Hill police and/or Camp Hill employees about or related to local media in 2016.
8. All itemized bills for Camp Hill police vehicle repairs and maintenance between 2010 and present.

On January 18, 2017, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902, the Borough granted access to records responsive to Item 8 of the Request and denied Items 1 through 7 of the Request, alleging that it did not possess any responsive records.

On January 26, 2017, the Requester contacted the Borough and claimed that additional responsive records exist. On February 7, 2017, the Borough responded to the Requester's claims and provided additional records that are responsive to Items 7 and 8 of the Request. The Borough also asserted that it located additional records that are responsive to Item 2 of the Request, but withheld the records, arguing that they relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17).

On February 28, 2017, the Requester appealed to the OOR, challenging the Borough's response to Items 1 through 7 of the Request. The OOR invited both parties to supplement the

record and directed the Borough to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On March 3, 2017, the Requester submitted a position statement, asserting that the Borough did not provide all responsive records and provided a copy of an e-mail that she received outside of the Request, claiming it to be responsive to the Request. On March 10, 2017, the Borough submitted a position statement, arguing that this appeal is untimely and that the Request is insufficiently specific, 65 P.S. § 67.703.¹ The Borough also reiterates its argument that the records responsive to Item 2 of the Request are exempt from disclosure because they relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17). In support of its position, the Borough provided an affidavit from Pat Dennis, the Borough's Open Records Officer, who attests that "the Borough does not possess any records that are responsive to the [R]equest that have not already been disclosed."

In response to a request for clarification from the OOR, wherein the Borough was requested to clarify what responsive records were provided for each Item of the Request, the Borough responded on March 31, 2017, by stating that it "will not make any further submissions."

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

¹ The Borough is permitted to assert this new reason for denying access to records on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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, neither of the parties requested a hearing; however, that OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Borough 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)). Likewise, “[t]he 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 appeal is timely

The Borough first argues that the appeal should be dismissed in its entirety because it was filed on February 28, 2017, which is 28 business days after the Borough issued its response on January 18, 2017. Under the RTKL, a requester must file their appeal within 15 business days of an agency denial. 65 P.S. § 67.1101(a)(1). Although the date of an agency’s final response and the date a request is denied are usually identical, exceptions exist. *See Commonwealth v. Engelkemier*, 148 A.3d 522 (Pa. Commw. Ct. 2016) (holding that, because the agency had substantively responded to a RTKL request on two different dates, it was proper to have two separate appeals from the same request).

In *Buehl v. Pa. Dep’t of Corrections*, the Commonwealth Court examined the effect of various actions on the timeliness of an appeal filed under the RTKL.² No. 198 C.D. 2015, 2015 Pa. Commw. Unpub. LEXIS 552 (Pa. Commw. Ct. 2015). In *Buehl*, a requester submitted a request to the Department of Corrections (“Department”) on September 11, 2014, seeking medical information and a contract. *Id.* at *1-2. After taking a thirty-day extension, the Department issued a final response on October 15, 2014, partially granting the request and

² An unreported opinion of the Commonwealth Court may be cited for its persuasive value, but not as binding precedent. Internal Operating Procedures of the Commonwealth Court § 414(a), 210 Pa. Code § 69.414(a). The OOR cites to the case here because it is persuasive and relevant.

directing the Requester to prepay the associated duplication fees. The requester paid the fees in November 2014, and the Department mailed him the records on December 4, 2014. However, the requester found that a substantial number of the records were blank and filed an appeal, which the OOR dismissed as untimely. *Id.* at *2.

The Commonwealth Court reversed the OOR, finding that the appeal was timely because “it was an appeal from the [Department’s] December 4, 2014 actions of mailing him blank pages for which it had charged him copying costs and not including certain records ... not an appeal from [the Department’s] October 15, 2014 response to his Right-to-Know Law request.” *Id.* at *3-4. The court in *Buehl* identifies two separate events that cause the appeal period set out in 65 P.S. § 67.1101(a)(1) to begin running—a denial or constructive denial in an agency’s final response, or a defect in the agency providing records about which the requester had no notice. *Id.* at *4-5.

Here, as in *Buehl*, there are two separate events that trigger appeal rights—the Borough’s response of January 18, 2017, and the Requester’s receipt of additional records on February 7, 2017. The Requester had no way of knowing, without viewing the additional records provided on February 7, 2017, whether the Borough had provided all the requested records. As a result, the Requester had until March 1, 2017 to file an appeal. Because the appeal was filed on February 28, 2017, the appeal is timely.

2. Portions of the Request are sufficiently specific

The Borough argues that Items 1-7 of the Request are insufficiently specific to enable the Borough to ascertain which records are 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.*

a. Items 1, 3, 4, 6 and a portion of Item 5 of the Request are sufficiently specific

In the instant matter, Item 1 of the Request seeks “[a]ll records showing which towing companies were contacted for each crash in Camp Hill Police jurisdiction between 2010 and present.” While Item 1 involves a period of seven years, a lengthy timeframe does not

necessarily render a request insufficiently specific. The timeframe must be viewed in the context of the entire request and whether the request provides a specific subject matter and scope to enable an agency to conduct a search. *Compare Pa. Dep't of Env'tl. Prot. v. Legere*, 50 A.3d 260, 264-65 (Pa. Commw. Ct. 2012) (concluding a request seeking “a clearly defined universe of documents” spanning almost four years was sufficiently specific), with *Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011) (concluding a request seeking all e-mails between township supervisors regarding any township business or activity for a period of one-to-five years was insufficiently specific).

Although the scope of Item 1 is broad, as it seeks “all records” without identifying a discrete type of record, the Request as a whole provides a narrow search context to sufficiently describe to the Borough what records are being sought. Specifically, the subject matter of Item 1 is limited to “which towing companies” were contacted for “each crash” within the Borough’s jurisdiction during the specified timeframe. As Item 1 limits its inquiry to scenarios involving crashes, the context of the Request sufficiently guides the Borough’s search for records containing names of towing companies contacted in the event of a crash. The Commonwealth Court has noted that “the specificity of a request must be construed in the request’s context, rather than envisioning everything the request might conceivably encompass.” *Montgomery County v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012); *see also Pass v. Capital Area Transit*, OOR Dkt. AP 2014-0173, 2014 PA O.O.R.D. LEXIS 247. Accordingly, Item 1 of the Request is sufficiently specific to ascertain which records are being requested. *See Legere*, 50 A.3d at 264-265 (holding that, because a request delineated “a clearly-defined universe of documents[,]” there was no need to make a judgment call as to whether any records were related to the request).

Items 3 and 6 of the Request, which seek all e-mails and text messages “to and from Camp Hill police and/or Camp Hill employees and/or Camp Hill Council members about or related to Right to Know requests in 2016,” are also sufficiently specific. Both Items identify a specific record type (all e-mails and text messages) to a specific group of recipients, *i.e.*, those sent from or received by Camp Hill police, employees or Council members. Additionally, Items 3 and 6 of the Request are limited to a period of one year. Although the subject matter of Items 3 and 6 is relatively broad (“about or related to Right to Know requests”), a request for records related to a topic or topics does not necessarily make a request insufficiently specific; however, a request must provide enough specificity in its scope and timeframe to help guide the agency in its search for records. *See Engelkemier*, 148 A.3d at 532-33 (holding that “although [the] keyword list is lengthy and in some respects broad, in consideration of the narrow timeframe and scope of the [request] ... [the] request, on balance, meets the specificity requirement...”). As a result, based on a totality of the circumstances, Items 3 and 6 of the Request are sufficiently specific.

Similarly, Item 4 of the Request, which seeks “[a]ll Camp Hill police memos sent out about towing services between 2010 and present,” is sufficiently specific. Item 4 of the Request identifies a specific record type (all police memos) regarding a specific subject matter (towing services). Additionally, while Item 4 of the Request has a lengthy timeframe, it provides a specific subject matter and scope to enable the Borough to conduct a search. *See Legere*, 50 A.3d at 264-65. Accordingly, Item 4 of the Request is sufficiently specific. Moreover, as outlined below, the Borough was able to search for responsive records and concluded that no such responsive records exist. *See Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa.

Commw. Ct. 2012) (noting that “the request was obviously sufficiently specific because the school district has already identified potential records included within the request”).

Lastly, the portion of Item 5 of the Request seeking “[a]ll text messages to and from Camp Hill police ... about towing vehicles from the scene of a crash between 2010 and present” is sufficiently specific. Similar to Item 4 of the Request, Item 5 identifies a specific record type (all text messages) regarding a specific subject matter (towing vehicles from the scene of a crash). Additionally, while Item 5 of the Request has a lengthy timeframe, it provides a specific subject matter and scope to enable the Borough to conduct a search. *See Legere*, 50 A.3d at 264-65.

b. Items 2, 7 and a portion of Item 5 of the Request are not sufficiently specific

Item 2 of the Request seeks “[a]ll emails to and from Camp Hill police and/or Camp Hill council members about or related to towing services, including but not limited to emails from the public about towing services, between 2010 and present.” Although Item 2 seeks a discrete group of documents (all e-mails), the subject matter is overly broad, as it seeks records “about or related to towing services.” Further, the language of Item 2 broadens the scope of records requested by seeking e-mails that include those from the public about or related to towing services, in addition to e-mails to and from entities that may ordinarily communicate with the Borough in the course of a day.

Additionally, Item 2 encompasses a lengthy timeframe (seven years). While a similar request with a much shorter timeframe may be specific, *see Engelkemier*, 148 A.3d at 532-33, without specifying a particular transaction or activity of the agency, the Borough is not able to reasonably focus its search of the e-mail communications. As a result, Item 2 of the Request is insufficiently specific to enable the Borough to ascertain which records are being requested. *See*

Pa. Dep't of Educ., supra; see also City of Pittsburgh v. Intergovernmental Cooperation Auth. for Cities of the Second Class, OOR Dkt. AP 2015-1872, 2015 PA O.O.R.D. LEXIS 1855 (finding that a request for certain specific types of records over a ten (10) year period regarding very broad subject matters is insufficiently specific).

However, to the extent the Borough was able to identify a responsive complaint from a private citizen, Item 2 is sufficiently specific. In certain situations, the ability to identify responsive records demonstrates that a request is sufficiently specific. *See Baxter*, 35 A.3d at 1265. However, the mere “identification of potentially responsive records ... is not sufficient to satisfy Section 703 of the RTKL on its own.” *See Pa. Dep't of Educ.*, 119 A.3d at 1126 n.8.

The portion of Item 5 of the Request, which seeks “[a]ll text messages to and from Camp Hill police about or related to towing services ... between 2010 and present,” is also insufficiently specific. Similar to Item 2 of the Request, Item 5 seeks a discrete group of documents (all text messages). However, the subject matter is overly broad, as it seeks records “about or related to towing services” over a lengthy timeframe (seven years). Consequently, this portion of Item 5 of the Request is insufficiently specific.

Item 7 of the Request, which seeks “[a]ll text messages and emails to and from Camp Hill police and/or Camp Hill employees about or related to local media in 2016,” is also insufficiently specific. Similar to the request in *Pa. Dep't of Educ.*, Item 7 has not “limited the subject matter ... in any meaningful way,” as it is unclear what is meant by “about or related to local media.” *Pa. Dep't of Educ.*, 119 A.3d at 1126. Additionally, the timeframe does not overcome the failure to identify a narrow subject matter. As such, Item 7 of the Request is insufficiently specific to guide the Borough’s search for responsive records. The Requester is

not precluded from filing a new request with the Borough to include additional details to guide the Borough's search for records responsive to Items 2, 5 and 7.

3. Portions of the records responsive to Item 2 of the Request relate to a noncriminal investigation

The Borough asserts that portions of the records responsive to Item 2 of the Request are exempt from disclosure because they relate to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[c]omplaints submitted to an agency.” 65 P.S. § 67.708(b)(17)(i). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

In *Stein v. Plymouth Township*, the Commonwealth Court found that “the names of individuals who [file a] complaint that [prompt an] investigation” are exempt from disclosure under Section 708(b)(17) of the RTKL. 994 A.2d 1179, 1182 (Pa. Commw. Ct. 2010). The Court also stated that “all complaints are exempt from disclosure whether they caused [an] investigation to commence in whole or in part or not at all.” *Id.*; *see also Dotan v. Blair Township*, OOR Dkt. AP 2013-1843, 2013 PA O.O.R.D. LEXIS 1079 (finding that the request for complaints, along with information contained within the complaint, are exempt regardless of whether an investigation occurred).

Here, Open Records Officer Dennis attests that the Borough identified a complaint received from a private citizen regarding towing services as responsive to Item 2 of the Request.

Based on the evidence submitted, as well as the plain language of Section 708(b)(17)(i) of the RTKL, which specifically exempts “complaints submitted to an agency,” the Borough has met its burden of proving that the requested complaint is exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

4. The Borough has demonstrated that records responsive to Item 4 of the Request do not exist

The Borough asserts that it does not possess any records that are responsive to Item 4 of the Request. In support of its position, Open Records Officer Dennis states, under the penalty of perjury, that “[t]he Borough Police Chief has confirmed that the Police Department has not sent any memorandums regarding towing services between 2010 and present.” Under the RTKL, an affidavit 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 Borough has acted in bad faith or that the records do, in fact, exist, “the averments in [the affidavit] 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 Borough has met its burden of proof that no records responsive to Item 4 of the Request exist in the Borough’s possession, custody or control.

5. The Borough has failed to demonstrate that it does not possess records responsive to Items 1, 3 and 6 of the Request

Lastly, the Borough argues that it does not possess any records that are responsive to the Request. Specifically, Open Records Officer Dennis verifies that he “directed the Borough’s IT consultant to search for responsive records. The search did not reveal any records that are responsive to the [R]equest.” Under the RTKL, a statement made under the penalty of perjury

may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. However, the affidavit submitted by the Borough does not detail what type of search was performed by the Borough's IT consultant. Consequently it is unknown whether a search of the Borough's mail server was performed or whether a search of hard copies was conducted with respect to Item 1, which seeks "all records." *See Pa. Dep't of Labor and Indust. v. Earley*, 126 A.3d 355, 358 (Pa. Commw. Ct. 2015) (concluding that "to establish that the email records do not exist, the [agency] must also establish that they no longer exist on the mail server."). Moreover, in response to the OOR's request for additional evidence to further develop the record, the Borough responded that it "will not make any further submissions." As such, the Borough has failed to prove that records responsive to Items 1, 3 and 6 of the Request do not exist in the Borough's possession, custody or control.

The OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records sought in the Request. Absent the Borough providing a sufficient evidentiary basis that no records exist that are responsive to Items 1, 3 and 6 of the Request, the OOR will order disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the Borough is required to provide the Requester with all records responsive to Items 1, 3, 6 and the portion of Item 5 of the Request identified above 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 Cumberland 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 14, 2017

/s/ Magdalene C. Zeppos

APPEALS OFFICER
MAGDALENE C. ZEPPOS, ESQ.

Sent to: Amanda St. Hilaire (via e-mail only);
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³ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).