



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOHN MAGUIRE,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2020-0260
	:	
LEWISTOWN BOROUGH,	:	
Respondent	:	

INTRODUCTION

John Maguire (“Requester”) submitted a request (“Request”) to Lewistown Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking all email communications between several Borough Council members and a document titled “Narrative for Job Eliminations.” The Borough denied the Request, arguing that the Request is insufficiently specific in part and some of the records are related to labor relations or collective bargaining strategy or negotiations. 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 16, 2020, the Request was filed, as follows:

I am making a public request for all emails from the borough council manager and Council member Venus Shade from November 1, 2019 to January 1, 2020. I [am] requesting all emails from November 1, 2019 to January 1, 2020 between Council

member David Campbell and the borough manager. I am requesting all emails from November 1, 2019 to January 1, 2020 between Venus Shade and David Campbell.

I am also requesting the attachment in the previously provided public records request entitled NARRATIVE FOR JOB ELIMINATIONS[.]docx.

On January 17, 2020, the Borough invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On February 9, 2020, the Borough denied the Request, arguing that the part seeking emails was insufficiently specific, and that the referenced document is related to labor negotiations and contains internal, predecisional deliberations of the Borough. 65 P.S. §§ 67.703; 67.708(b)(8); 67.708(b)(10)

On February 10, 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 Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 18, 2020, the Borough submitted position statement, reiterating its earlier arguments. In support its arguments, the Borough provided the affidavit of Dianna Walter, the Borough's 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 provides 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 party requested a hearing; however, the 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 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 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. Item 1 of the Request is sufficiently specific

The Borough argues that Item 1 of 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 Envtl. 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. 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. 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, the timeframe of Item 1 is sixty-one days. The scope of Item 1 encompasses all email correspondence sent or received between several members of the Borough Council. However, the subject matter is not defined in the Request.

The OOR has previously found that communications between multiple parties with no subject matter is insufficiently specific, and the Commonwealth Court has held that only a short timeframe can rescue a request with no subject matter. *See Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012) (request for copies of all emails sent and received for a month from nine accounts was sufficiently specific); *Calabro v. Southeast Delaware County Sch. Dist.*, OOR Dkt. AP 2018-0180, 2018 PA O.O.R.D. LEXIS 327 (a request seeking all emails between school board members for a four-month period is not sufficiently specific). While Item 1 does not have a finite subject matter, it has a clearly defined, limited scope and seeks records over a sixty-one day period. Item 1 limits the scope to three groups of email communications between three identified individuals, the Borough Manager, Venus Shade and Dave Campbell over a short time period. Therefore, Item 1 more closely resembles the request in *Baxter*. Based on a totality of the circumstances, the Request is sufficiently specific and the Borough is directed to provide responsive records to the Requester.

2. Item 2 of the Request seeks a record exempt under Section 708(b)(8)

Item 2 of the Request seeks a specific document titled “Narrative for Job Eliminations.” The Borough argues that this record is exempt from public disclosure as it was drafted by attorneys for the Borough and labor counsel for the purpose of labor negotiations.

Section 708(b)(8)(i) of the RTKL exempts from disclosure a “record pertaining to strategy or negotiations relating to labor relations or collective bargaining[.]” 65 P.S. § 67.708(b)(8)(i). Therefore, the only question is whether a “narrative for job eliminations” necessarily document “negotiations relating to labor relations.”

Neither the RTKL nor the Statutory Construction Act of 1972, 1 Pa.C.S. §§ 1501 et seq., defines “negotiations” or “labor relations”; and therefore, the words must “be construed according to the rules of grammar and to their common and approved usage ...” 1 Pa.C.S. § 1903(a). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm’n*, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2011) (“The RTKL must be construed to maximize access to government records”).

The term “labor relations” is defined as “[t]he relationship between workers and employers.” BLACK’S LAW DICTIONARY 1006 (10th ed. 2014). The term “negotiations” is defined as “[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter” and “[d]ealings conducted between two or more parties for the purpose of reaching an understanding.” *Id.* at 1900.

In support of the Borough’s argument, Ms. Walter attests, in part, as follows:

Upon receipt of the request, I conducted a thorough examination of files in the possession, custody and control of the Agency for records responsive to the request underlying this appeal. Additionally, I have inquired with relevant Agency

personnel and, if applicable, relevant third-party contractors as to whether the requested records exist in their possession.

...

The requested document NARRATIVE FOR JOB ELIMINATIONS contains strategy related to labor relations and sets forth the strategy formulated by Borough Council and labor counsel relating to the potential elimination of union positions.

The requested document NARRATIVE FOR JOB ELIMINATIONS was formulated by Borough Council and labor counsel and is subject to attorney - client privilege.

The NARRATIVE FOR JOB ELIMINATIONS was created as an internal document of the Borough before the decision by Borough Council to eliminate certain positions, and therefore pertains to the proposed action of Borough Council to eliminate said positions, and while it was updated after the action, the portions created before and after the actions can not be separated.

Under the RTKL, an affidavit or sworn statement 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 requested list exists, “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)). Therefore, the Borough has proved that Item 2 of the Request seeks a record that is pertaining to strategy or negotiations relating to labor negotiations or collective bargaining.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Borough is required to provide responsive records to Item 1 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 Mifflin County Court of Common Pleas. 65 P.S. §

67.1302(a).¹ 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 20, 2020

/s/ Ryan W. Liggitt

RYAN W. LIGGITT, ESQ.
APPEALS OFFICER

Sent to: John Maguire (via email only);
Dianna Walter, AORO (via email only);
Mark J. Remy, Esq. (via email only)

¹ Regarding the deadlines in this section, note that the Supreme Court has suspended all time calculations and deadlines relevant to court cases or other judicial business through April 30, 2020. See <http://www.pacourts.us/assets/files/page-1305/file-8846.pdf> (last accessed April 20, 2020).

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).