



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

January 28, 2013

Michael F. Krimmel, Chief Clerk
Commonwealth Court of Pennsylvania
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106-9185

RE: *Pennsylvania Department of Education v. Ryan Bagwell,*
Commonwealth Court Docket No. ____ C.D. 2013

Dear Mr. Krimmel:

Attached for filing, please find an original and one copy of a Petition for Review for the above styled appeal from a December 28, 2012 Final Determination issued by the Office of Open Records. A check for payment of the \$73.50 filing fee is also attached.

Pursuant to the requirements of Pa.R.A.P. Rules 121-122 and 1514(c), and Section 1303(a) of the Right-to-Know Law, 65 P.S. § 67.1303(a), a copy of the Petition for Review has been served on each of the persons and in the manner indicated on the attached certificate of service.

If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,

Robert T. Datorre
Assistant Counsel

Enclosure

cc: Terry Mutchler
Office of Attorney General
Ryan Bagwell



15 A.3d 427 (2011). The Court is entitled to the broadest scope of review and is not limited to the rationale offered in the OOR's written decision. *Bowling*, 990 A2d. at 818.

Parties

2. The Department is a Commonwealth agency as defined in Section 102 of the RTKL, 65 P.S. § 67.102, and is subject to the RTKL pursuant to Section 301 of the RTKL, 65 P.S. § 67.301.
3. Ryan Bagwell (Respondent) is a resident of the State of Wisconsin and submitted the request for records to the Department under the RTKL that is the subject of this appeal.

Factual and Procedural Background

4. On October 18, 2012, Respondent filed an RTKL request with the Department (RTKL Request) seeking:

Copies of contracts, memorandums of understanding, letters of intent and any other agreements, regardless of title, to which the law firm of Freeh Sporkin & Sullivan, LLP, is a party.
5. The Department denied the request on the basis that the RTKL Request lacks sufficient specificity as required by Section 703 of the RTKL, 65 P.S. § 67.703. The RTKL Request does not identify or describe the records sought with sufficient specificity to enable the Department to ascertain which records are being requested.
6. Respondent filed an appeal with the OOR from the Department's denial of the RTKL Request, arguing that the request was sufficiently specific.
7. The Department and Respondent each filed additional information in the appeal before the OOR in the form of written arguments to support their respective positions on appeal. In its submission to the OOR, the Department also objected to the appeal on the basis that

the Respondent failed to properly address the grounds stated by the Department for denying the RTKL Request.

8. The OOR did not hold a hearing as authorized in Sections 1101(b)(3) and 1102(b)(2) of the RTKL, 65 P.S. §§ 67.1101(b)(3) and 67.1102(b)(2), to take additional evidence or resolve any purported disputed issues of material fact.

Determination Sought to be Reviewed

9. By Final Determination dated December 28, 2012, the OOR granted Respondent's appeal, and ordered the Department to provide "all responsive records." *Ryan Bagwell v. Pennsylvania Department of Education*, OOR Docket No. AP 2012-2020. A true and correct copy of the OOR's Final Determination is attached hereto as Exhibit A.
10. The OOR found there is "no judgment needed to determine whether a particular document meets the categories provided and is responsive to the request." Ex. A, Pg. 7.

Objections to the Determination

11. The OOR erred in concluding that the Respondent properly addressed the grounds stated by the Department for denying the RTKL Request.
12. The OOR erred in concluding that the RTKL Request is sufficiently specific to meet the requirements of Section 703 of the RTKL.
13. The OOR erred in concluding that the Department failed to adequately raise exemptions from access that could be reasonably discerned from the RTKL Request as written.

Relief Sought

WHEREFORE, Petitioner, Pennsylvania Department of Education, respectfully requests that this Honorable Court REVERSE the Final Determination of the Office of Open Records and

affirm the Department's denial of access to requested records on the basis of lack of sufficient specificity.

Respectfully submitted,



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Date: January 28, 2013

EXHIBIT A

On October 23, 2012, the Department extended its deadline to respond for up to thirty (30) days, citing Section 902 of the RTKL. On October 25, 2012, the Department asked the Requester whether he was willing to amend his Request by including more specific information such as time restriction, subject matter or name(s) of any other party to the requested agreements. The Department also asked the Requester to confirm that his Request for “any other agreements, regardless of title” is limited to agreements for the procurement of products or services.

On October 30, 2012 the Requester declined to alter his Request. The Requester stated that he had previously made two (2) other requests for the same information, which were both denied by the Department as insufficiently specific. His second request for this information sought “copies of contracts, memorandums of understanding and other agreements between: 1. Penn State University and The Freeh Group, and/or its representative, and/or; 2. Penn State University and the law firm of Pepper Hamilton, and/or its representative.” The Requester alleges this request was denied by the Department because: 1) it did not identify a specific representative of Penn State University or The Freeh Group; 2), it did not specify a person who might possess the records, and 3) it did not list a transaction or activity of the Department. The Requester states that the instant Request uses the formal name of the party to any agreements, i.e., Freeh, Sporkin & Sullivan, LLP

On November 26, 2012, the Department denied the Request on the basis that the Request was insufficiently specific to enable the Department to determine the records sought in the Request. The Department argues that because the Request does not include a time or date restriction, subject matter, or parties other than the identified law firm, the Department is unable to determine whether it possesses any responsive records. The Department further denied the Request because it does not identify the Department as a party to any of the requested records nor

does it indicate that the Requester is seeking a “record” of the Department. As part of its denial with respect to specificity, the Department stated that it is “unable to determine which exemptions might be applicable,” but indicated that certain exemptions or privileges could possibly apply, alleging that it should be provided an opportunity to “meaningfully assert” exemptions at a later, unidentified time.

On December 4, 2012, the Requester appealed to the OOR, stating grounds for disclosure and asserting that his Request was sufficiently specific. The OOR invited both parties to supplement the record and directed the Department to notify third parties of their ability to participate in this appeal pursuant to 65 P.S. § 67.1101(c).

On December 13, 2012, the Department reiterated its position that the Request lacks specificity. The Department also argued the appeal should be dismissed for failing to comply with Section 1101 of the RTKL because the Requester did not adequately address the grounds stated by the Department for denying the Request. The Department contends the Requester provided only a conclusory statement that his request was sufficiently specific. On December 13, 2012, the Requester supplied a position statement reiterating his position. No third parties sought to participate in this appeal.

LEGAL ANALYSIS

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *appeal granted* 15 A.3d 427 (Pa. 2011). 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 decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth 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. The RTKL defines a “record” as: “Information, regardless of physical form or characteristics that document a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. 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 clearly 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). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011), *appeal granted* 44 A.3d 1146 (Pa. 2012); *DOT v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) (“[T]he RTKL places an evidentiary burden upon agencies seeking to

deny access to records even when a privilege is involved”); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Requester’s appeal sufficiently addresses the Department’s reason for denial

The Department initially objects to the Requester’s appeal, arguing that the Requester failed to “address any grounds stated by the agency for delaying or denying the request.” *See* 65 P.S. § 67.1101(a)(1). The Department argues the Requester’s appeal includes only a conclusory statement, and is insufficient to meet the Requester’s obligation under Section 1101(a)(1). In *DOC v. OOR*, the Commonwealth Court held that a requester is required to “address” the agency grounds for denial; however, and more pertinently, the Commonwealth Court stated that in requiring a requester to “address” the agency grounds for denial, the RTKL does not “require[e] a requester to *prove* anything; [Section 1101(a)(1)] merely requires the requester to *identify* an agency’s flaws in a decision denying a request.” 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (emphasis in original). Here, the Department’s denial relied entirely on specificity and couched possible exemptions and privileges in terms of the alleged lack of specificity of the Request. As a result, the Requester was only required to address the one identified flaw in the Department’s denial, namely, that the Request lacks specificity in order to comply with 65 P.S. § 67.1101(a)(1). In the appeal form submitted and by inclusion of an October 30, 2012 letter to the Department

the Requester extensively addressed the Department's assertion that the Request lacks specificity. Therefore, the Department was amply on notice of the alleged deficiency in its denial.

2. The Request is sufficiently specific

The Department claims that the Request was properly denied because it is insufficiently specific to enable the Department to determine what records were 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.” 65 P.S. § 67.703. The determination of whether a request is sufficiently specific is made on a case-by-case basis and “[i]f the OOR can determine what the Requester sought, it will find the request to be sufficiently specific.” *See Lauff v. Fort Cherry School District*, OOR Dkt. AP 2010-0128, 2010 PA O.O.R.D. LEXIS 180. Further, where a request seeks a “clearly-defined universe of documents” and no judgment was required to determine whether a document was related to the request, the request is sufficiently specific. *See DEP v. Legere*, 50 A.3d 260, 264-65 (Pa. Commw. Ct. 2012) (holding that a request for all compliance letters issued by the agency pursuant to a specific statute was sufficiently specific).

Here, the Request seeks “contracts, memorandums of understanding, letters of intent and any other agreements” with the specifically identified law firm of “Freeh, Sporkin & Sullivan, LLP.” The Department argues that it cannot determine what records are sought because the Request fails to set a time or date restriction or provide a subject matter or other parties involved. The OOR disagrees. The Department does not assert that it is unclear what is meant by “contracts, memorandums of understanding, letters of intent and any other agreements, regardless of title” or claim an inability to discern what is meant by “is a party.” Therefore, both the type of record sought and the identity of one party to the agreement are identified. Even without an

identified subject matter, no judgment is needed to determine whether a particular document meets the categories provided and is responsive to the request. As such, the Request is sufficiently specific to enable the Department to know what records are sought and for which records it should search. Unlike *Legere*, the Department does not provide any evidence that it made an attempt to look for responsive documents. See 50 A.3d at 265-266 (“DEP’s affidavits indicate that it used various methods to attempt to locate the Section 208 determination letters and orders”).

3. The Request seeks records

The Department also argues that the Request does not specify that it seeks a “record” of the Department. By making a request for records to the Department, the Requester is presumed to be seeking “records” of the agency. Unlike a previous appeal involving the same parties, this Request does not seek documents reflecting personal activities of agency employees or officials. See *Bagwell v. Pennsylvania Department of Education*, OOR Dkt. AP 2012-1355, 2012 PA O.O.R.D. LEXIS ___ (dismissing appeal seeking records sent to the Secretary of Education “in his official capacity as a member of Penn State’s Board of Trustees....”). The Department is not required to provide records that document personal transactions, business or activities of individuals. See *Bagwell, supra*; *Lavinge v. Pennsylvania State University Police*, OOR Dkt. AP 2011-1470, 2011 PA O.O.R.D. LEXIS 1201; see also *Roy v. Pennsylvania State University*, 568 A.2d 751 (Pa. Commw. Ct. 1990); *Cerulli and The New York Times v. Office of the Governor*, OOR Dkt. AP 2012-0249, 2010 PA O.O.R.D. LEXIS 309. However, it must provide records responsive to this specific Request, which seeks agency, and not personal, documents.

4. The Department failed to establish that any exemption or privilege protects responsive records from public access

The Department denies that the Request is insufficiently specific and asserts that certain responsive records may be withheld as privileged or subject to one or more RTKL exemptions, stating that agencies “should have [the] opportunity to later assert exemptions, unless ‘the reason for denying access can be reasonably discerned when the request is made.’” *See Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010). On appeal, however, the Department did not provide evidentiary support for any exemptions or privileges.

The Department’s argument related to the ability to later raise exemptions has previously been rejected by the Commonwealth Court. In *Legere*, the Commonwealth Court stated

DEP argues the OOR erred when it concluded that DEP failed to offer evidence supporting its claims of exemption, despite having provided some of the responsive records to *Legere*, and having discerned the possible justifications for withholding access to responsive records at that time. We disagree.

This Court has held:

agencies as a normal practice should raise all objections to access when the request is made *if the reason for denying access can be reasonably discerned when the request is made*. Otherwise, review will be piecemeal, and the purpose of the RTKL in allowing access to public records in a timely manner will be frustrated.

Pennsylvania State Police, 995 A.2d at 517 (emphasis added).

DEP asserts in its brief that it is not possible to discern reasons for denying access to the records and to provide evidence in support thereof without reviewing the particular documents at issue. Thus, DEP claims that it should still be able to assert the exemptions to particular records if they apply.....

As noted by the OOR in its final determination, DEP has direct knowledge of the information contained in the Section 208 determination letters and related orders. No evidence was offered to support the application of the exemptions under the RTKL. It should be noted that had DEP undertaken the search that it was required to perform to meet its obligations under the RTKL, it would have located the required records and would have been able to discern any applicable exemptions related to the specific records located at that time. We will not reward DEP’s failure to timely adhere to the RTKL by granting it yet another opportunity to

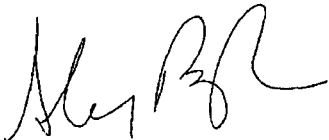
impede access to the records. Accordingly, the OOR properly concluded that DEP failed to offer evidence supporting its claims of exemption.

50 A.3d 260, 267 (Pa. Commw. Ct. 2012). As in *Legere*, the Department failed to provide evidentiary support for the exemptions and privileges it asserted and, accordingly, did not meet its burden of proof. See 65 P.S. § 67.708(a)(1) ; *Levy*, 34 A.3d at 249.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Department is required to provide all responsive records to the Requester within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: December 28, 2012



APPEALS OFFICER
AUDREY BUGLIONE, ESQ.

Sent to: Ryan Bagwell (via e-mail only);
Karen Feuchtenberger (via e-mail only)

