pennsylvania
OFFICE OF OPEN RECORDS

AMENDED FINAL DETERMINATION

RYAN BAGWELL, **Complainant**	:	
v.	:	**Docket No: 2013-1586**
PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, **Respondent**	:	

INTRODUCTION

Ryan Bagwell (the "Requester") submitted a request (the "Request") to Philadelphia District Attorney's Office ("Office") pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq*., ("RTKL") seeking e-mails. The Office denied the Request, stating that the Request does not seek "records" as defined by the RTKL. 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 Office is required to take further action as directed.

FACTUAL BACKGROUND

On July 22, 2013, the Request was filed, seeking

> [A]ll e-mails that were sent or received by Frank G. Fina between December 1, 2012 and July 15, 2013, and were sent to or from the following individuals:
> 1. Louis Freeh
> 2. Tom Cloud
> 3. Greg Paw
> 4. Barry Feudale
> 5. Randy Feathers

On July 29, 2013, the Office invoked a thirty (30) day extension of time to respond pursuant to 65 P.S. § 67.902. On August 23, 2013, the Office denied the Request, stating that the Request does not seek "records" as defined by 65 P.S. § 67.102. The Office's denial stated that "none of the five persons listed in your request conducts, or has conducted any business[,] transaction or activity, either independently or in conjunction with Mr. Fina, with the Philadelphia District Attorney's Office."

On September 3, 2013, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester asked the OOR to conduct an *in camera* review of the requested documents.[1] The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c). On September 12, 2013, the Office filed a position statement explaining that Mr. Fina was formerly employed by the Pennsylvania Office of Attorney General ("OAG"), which conducted an investigation into allegations involving Pennsylvania State University ("Penn State") football coach Jerry Sandusky. The Office states that, following Sandusky's arrest, Penn State retained Louis Freeh, Esq. and the Freeh Group to investigate these allegations, and that it is believed that 1) Mr. Freeh, Mr. Cloud, Mr. Pay are employed by the Freeh Group; 2) Judge Feudal oversaw the grand jury that investigated Mr. Sandusky; and 3) Mr. Feathers was an investigator for the OAG. The Office sets forth the following argument:

> [The R]equest does not implicate public records of the … Office….
>
> The RTKL defines the term "record" to encompass "[i]nformation, regardless of physical form or characteristics, that documents 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 (emphasis added). Plainly, the precise words chosen by the General Assembly illustrate that there is only one agency at issue: the one who had the documented transaction or

[1] The OOR hereby declines to conduct an *in camera* review in this matter based on the content of the record before it.

activity. Thus, the phrase "of the agency" amplifies the earlier "an agency" to demonstrate that they are, in fact, one and the same agency under this definition. In other words, there are two components to the definition: an agency must have had a transaction or activity, and that agency (or "the agency" in the General Assembly's parlance) must have created, received or retained documentation of the activity or transaction. The burden of proving that a requested piece of information is a "public record" lies with the requester. *Barkeyville Borough v. Stearns*, 35 A.3d 91, 94 (Pa. Commw. Ct. 2012).

Here, the OAG conducted a grand jury investigation and ultimately prosecuted Sandusky. The Freeh Group was retained by Penn State — not the OAG — to investigate the University with respect to Sandusky's activities. Mr. Fina separated from the OAG in January 2013 and, since then, has been employed by the … Office. The … Office is wholly separate from the OAG. The … Office did not participate in either the OAG criminal investigation into Sandusky's abuse or the Freeh investigation into Penn State's involvement. Furthermore, the … Office has not conducted any business transactions or activities with the Freeh Group. Since his separation from the OAG and since becoming employed by the DA's Office, Mr. Fina has not conducted any business activities or transactions with any OAG investigations, including the Sandusky investigation or the investigations and prosecutions of Penn State administrators, nor has he had any business activities or transactions with the Freeh Group.

The instant RTKL request was directed to the … Office and, therefore, seeks records of the … Office. Again, the … Office has not conducted any activities relating to the Sandusky criminal investigation and prosecution or the Freeh investigation. Indeed, there are no official activities of the … Office being implicated by the request. Rather, the activities at issue were conducted by the OAG or the Freeh Group, and any "record" of the OAG's activities relating to the Sandusky or Penn State investigations would be in the possession of the OAG. [Footnote omitted]. Mr. Bagwell cannot direct a request to the … Office, a separate agency, for documentation pertaining to the OAG's activities.

Moreover, there is absolutely no support for Mr. Bagwell's broad and absurd argument that the General Assembly intended that the requirements set forth in the RTKL would travel with individual public employees should they happen to subsequently be employed by a completely different public agency. Rather, the statute plainly is directed at agencies, not individuals, that have conducted public business or transactions and documented said activities. As a former employee, Mr. Fina is now a private citizen *vis a vis* the OAG. That he happens to be employed by another public agency does not mean that any personal communications he currently may have are subject to access via a request to his current employer. Such a convoluted interpretation of the statute would have far-reaching consequences and provide far greater access than the General Assembly intended.

The Office also provided a declaration signed under penalty of perjury from an Assistant District Attorney for the Office, who affirmed that the Office did not investigate Sandusky or "conduct[] any business[,] transactions or activities with the Freeh Group," and that Mr. Fina "has not conducted any business[,] activities or transactions with any OAG investigations … nor has he has any business[,] activities or transactions with the Freeh Group."

On September 12, 2013, the Requester filed an additional statement objecting to the Office's submission, arguing that the Office "bears the burden of proving the records are not public records, not the requester." The Requester also asserted that the Office modified his Request by assigning a subject matter (investigations related to Sandusky) to it. Later that day,[2] the Office submitted an additional position statement, asserting that, because the Request is insufficiently specific, it interpreted the Request as related to the Sandusky investigations. The Office also reiterated its argument that "[t]he requestor must prove that the request seeks records; only if he meets that burden does the burden shift to the agency to prove that the records are exempt under" 65 P.S. § 67.305(a).

After reviewing the submissions, the OOR, in order to further develop the evidentiary record, reopened the record[3] and directed the Office to provide "an index of all responsive withheld e-mails that, for each e-mail, **details** whether that e-mail 'documents 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.'" On September 30, 2013, the Requester submitted an additional statement asserting that the withheld e-mails constitute "records" under the RTKL. On September 30, 2013, the Office provided an additional unsworn statement

[2] Although the submission was received after 5 p.m. on that day, the OOR accepts this submission as part of the evidentiary record before it. *See* 65 P.S. § 67.1102(b)(3) (permitting "the appeals officer … [to] rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

[3] The OOR obtained the Requester's consent to an extension of time of the issuance of a final order in this matter pursuant to 65 P.S. § 67.1101(b)(1).

asserting that "there has been no … showing" that the Request seeks "records" and objecting to the OOR's request for an index of withheld e-mails. For the first time on appeal, the Office also asserts that "the ... Office does not possess any documents that would be responsive to the … [R]equest."

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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* No. 20 MAP 2011, 2013 Pa. LEXIS 1800 (Pa. Aug. 20, 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." 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*. 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*. Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Office 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 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). 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)). "The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Request is sufficiently specific

Although mentioned in passing in one of the Office's submissions during the course of the appeal, the Office states that the Request is insufficiently specific as written, requiring it to interpret the Request as seeking records related to the Sandusky investigations.[4] Section 703 of the RTKL provides that a request must "identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." *See* 65 P.S. § 67.703. As noted by the OOR, the determination as to whether a request has been described as

[4] Pursuant to the Supreme Court's decision in *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013), the Office is permitted to raise new reasons for denying access on appeal.

sufficiently specific must be 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; *Mollick v. Methacton School District*, OOR Dkt. AP 2009-0180, 2009 PA O.O.R.D. LEXIS 287; *see, e.g.*, *Shaw v. South Eastern School District*, OOR Dkt. AP 2010-0720, 2010 PA O.O.R.D. LEXIS 718.

The Commonwealth Court has issued a number of opinions involving similar requests for e-mails. In *Easton Area Sch. Dist. v. Baxter*, for example, the Commonwealth Court held that a request seeking e-mails that set forth a timeframe and a limited number of e-mail addresses was sufficiently specific, even though no subject matter was identified. 35 A.3d 1259 (Pa. Commw. Ct. 2012); *see also Barkeyville Borough*, 35 A.3d at 93 (involving a request for "[a]ll e-mails ... from-to [four individuals] ... from March through December 2010"); *but see Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011) (holding that a request for several years worth of e-mail without a subject matter was insufficiently specific). In *Montgomery County v. Iverson*, an individual sought e-mails containing any of fourteen (14) words that were sent to and from an agency e-mail server without any limitation as to time period, individual employees, e-mail addresses, or by subject matter. 50 A.3d 281 (Pa. Commw. Ct. 2012). While the Court noted that the request was limited to e-mails containing one of 14 words, the Court opined that "some of these search terms, such as 'Trail,' are incredibly broad" and concluded that the request "was too broad to enable the [agency] to determine which records the Requestor sought." *Id.*

In this particular case, the Request seeks e-mails spanning a period of seven and a half (7 1/2) months that were received by or sent to one (1) identified employee involving any of five (5) listed individuals. Because the Request is more limited than the request at issue in

Barkeyville Borough and similar to that involved in *Baxter*, the OOR finds that the Request is sufficiently specific as written pursuant to 65 P.S. § 67.703. Therefore, the Office erred in limited the Request to a specific subject matter.

2. The Request seeks "records"

As its main argument, the Office alleges that the Request does not seek "records" as defined by the RTKL. The RTKL defines a "record" as

> Information, regardless of physical form or characteristics, that documents 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. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a dataprocessed or image-processed document.

65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a "transaction or activity of an agency?" and 2) if so, was the material "created, received or retained ... in connection with a transaction, business or activity of the agency?" *See* 65 P.S. § 67.102; *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of "record" must be liberally construed. *See A Second Chance*, 13 A.3d at 1034; *Gingrich v. Pennsylvania Game Commission*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. Jan. 12, 2012) ("[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]").

The Office posits that the Requester – and not an agency – bears the burden of proving that "information" constitutes a "record" under the RTKL. According to the Office, once a requester has proven that a request seeks a "record," the "burden shift[s] to the agency to prove that the records are exempt…" The Office cites no statutory provision in the RTKL evidencing the burden-shifting scheme it proposes. Instead, the Office references a sentence from the

Commonwealth Court's decision in *Barkeyville Borough* as support, which states "The burden of proving that a requested piece of information is a 'public record' lies with the requester." 35 A.3d at 94; *see also Office of the Governor v. Bari*, 20 A.3d 634, 640 (Pa. Commw. Ct. 2011) (same); *but see* 65 P.S. § 67.708(a)(1). Importantly, the Commonwealth Court in these decisions did not evaluate whether the requester in each case met a threshold burden of establishing how requested "information" constitutes "records" under the RTKL or set forth what the applicable evidentiary burden would be for *pro se* requesters using this remedial legislation. Nor did the Commonwealth Court pronounce that all information held by the government is presumptively not subject to public access unless a requester proves that such information is a "record" under the RTKL. In fact, the OOR is unaware of any examples in case law where an appeal was denied or dismissed as a result of a requester's failure to meet a burden of proving that "information" constitutes a "record" as proposed by the Office. Based on the lack of any statutory support for the Office's position, and the fact that the RTKL is remedial legislation, the OOR finds that it is agencies that bear the burden – by a preponderance of the evidence – that requested "information" does not constitute either "records" or "public records." *See* 65 P.S. § 67.305(a) (stating that all agency records are presumptively public); 65 P.S. § 67.708(a)(1) ("The burden of proving that a record … is exempt from public access shall be on the … agency receiving a request by a preponderance of the evidence").[5]

With this framework in mind, the OOR can now reach the merits as to whether the requested e-mails constitute "records" under the RTKL. As a result of the Office's failure to provide the OOR with an index clarifying what e-mails have been withheld, the only evidence before the OOR is the declaration from an Assistant District Attorney signed under penalty of

[5] The OOR notes that, even if the burden were flipped, the Requester provided argument asserting that the requested e-mails constitute both "records" and "public records" in both the appeal and subsequent submissions.

perjury. This declaration affirms that the Office did not "conduct[] any business[,] transactions or activities with the Freeh Group," and that Mr. Fina "has not conducted any business[,] activities or transactions with any OAG investigations … nor has he has any business[,] activities or transactions with the Freeh Group." While statements made under penalty of perjury can serve as evidence supporting a reason for denying access under the RTKL,[6] "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013). Here, the OOR finds that the statements presented by the Office are conclusory and offer no details as to the nature or content of the records requested and fail to demonstrate how such e-mails do not constitute "records" as defined by the RTKL. Accordingly, based on the evidence provided and the Commonwealth Court's guidance in *A Second Chance* and *Gingrich*, the OOR finds that the Request seeks "records."

In light of the Pennsylvania Supreme Court's ruling in *Levy*, the Office could have raised additional reasons for denying access to the responsive records on appeal to the OOR, just as it could have substantiated its claim that "no responsive records exist." 65 A.3d 361, 383 (Pa. 2013); *see Hodges*, *supra* (holding that agencies bear the burden of proving that records do not exist). As the Office has not presented any alternative reasons for denying access to the responsive records or supporting evidence, it has not met its burden of proving that the requested records are not subject to public access. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Office is required to provide all responsive records within thirty (30) days. This Final Determination is binding on all

[6] *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Philadelphia 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 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: November 4, 2013

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APPEALS OFFICER/ ASSISTANT CHIEF COUNSEL
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Sent to: Ryan Bagwell (via e-mail only);
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