



FINAL DETERMINATION

IN THE MATTER OF

**MICHELLE GROVE,
Requester**

v.

**GREGG TOWNSHIP,
Respondent**

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Docket No.: AP 2018-1892

INTRODUCTION

Michelle Grove (“Requester”) submitted a request (“Request”) to Gregg Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking emails sent to or from the Township’s solicitor. The Township denied the Request, arguing, among other things, that the Request is insufficiently specific to enable the Township to respond. 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 further action as directed.

FACTUAL BACKGROUND

On September 11, 2018, the Request was filed, stating as follows:

6/25/2018-9/11/2018 All emails to/from Solicitor David Gaines
Search ALL email accounts used by:
Doug Bierly, Keri Miller, and Jennifer Snyder.

On October 16, 2018, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Township denied the Request, arguing that the Request is insufficiently specific, 65 P.S. § 67.703, and because “the [R]equest does not seek records that fall within the scope of relevant law....” Alternatively, the Township argues that the requested records are exempt from disclosure because they reflect the internal, predecisional deliberations of the Township, 65 P.S. § 67.708(b)(10)(i)(A), and are protected by the attorney-client privilege.

On October 22, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record and directed the Township to notify third parties of their ability to participate in the appeal. 65 P.S. § 67.1101(c).

On November 1, 2018, the Township submitted a position statement, reiterating the arguments above and further arguing that the appeal is deficient under Section 1101(a)(1) of the RTKL. In support of its arguments, the Township provided an attestation, made under the penalty of perjury, from Jennifer Snyder, the Township’s Open Records Officer. The Requester submitted several unsworn statements between November 2, 2018 and November 5, 2018.¹

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 parties’ submissions were received after the record in this matter closed; however, to further develop the record, the submissions were considered. *See* 65 P.S. § 67.1102(b)(3) (stating that “an appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

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 Requester asked the OOR to conduct an *in camera* review of the responsive records; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter. Therefore, the request for *in camera* review is denied.

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 to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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); *Pa. Dep’t of Transp. 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 *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The appeal is sufficient under Section 1101(a)(1) of the RTKL

The Township argues that the Requester’s appeal should be dismissed because she did not address any of the Township’s grounds for denying the Request. Pursuant to Section 1101 of the RTKL, a requester “must state the grounds upon which the requester asserts that the record is a public record ... and ... address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1); *see also Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request”); *Saunders v. Pa. Dep’t of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012) (holding that a requester must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access”).

When filing the appeal, the Requester used the OOR’s electronic Appeal Form, which states that “[b]y submitting this form, I am appealing the Agency’s denial, partial denial, or deemed

denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation...” Even though the Requester does not specifically address each reason for denial raised by the Township, the Commonwealth Court has held that a general statement that records are public and not subject to an exemption is sufficient to meet the requirements of 1101(a)(1). *See Barnett v. Pa. Dep’t of Pub. Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Therefore, the Requester sufficiently challenged the Township’s grounds for denying access to records, and the OOR may reach the merits of the appeal.

2. The Request is specific under Section 703 of the RTKL

The Township argues that 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.” *Id.* 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 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).

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 was 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 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.*

In this case, the Request seeks a particular type of record (*i.e.*, “emails”) sent or received by the email accounts of three specified Township representatives—Doug Bierly, Keri Miller and Ms. Snyder—to the Township’s Solicitor, David Gaines, Jr., Esq., for a period of eleven weeks. Because the Request limits the senders and recipients of those emails to three specific Township employees and the Township Solicitor, the Township is not required to make judgment calls as to the records being requested. *See Pa. Dep’t of Envtl. Prot. v. Legere*, 50 A.3d 260, 264-65 (Pa. Commw. Ct. 2012) (holding that, because a request delineated “a clearly-defined universe of documents[,]” there was no need to make judgment calls as to whether any records were related to the request). Further, and more importantly, the Township acknowledges that “Ms. Snyder ... compiled all relevant emails.” *See Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (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”), *appeal denied*, 54 A.3d 350 (Pa. 2012). Accordingly, the Request is sufficiently specific.²

3. The Township has not proven that the responsive emails are protected from disclosure

The Township also argues that the records reflect internal, predecisional deliberations of the Township, 65 P.S. § 67.708(b)(10)(i)(A), and are protected by the attorney-client privilege. In support of these arguments, the Township submits the attestation of Ms. Snyder, who affirms as follows:

Between September 11, 2018, when I received the [R]equest, and October 16, 2018, when I responded to the [R]equest, I worked with Mr. Gaines to address the foregoing [R]equest.

During this process, it became immediately clear that all responsive emails would be either internal, predecisional deliberations or attorney-client privileged.

This should make sense—generally, Mr. Gaines only communicates with the Township in representative capacity.

Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *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 order to meet its burden, a party must provide sufficient evidence. *But see Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements when construing exemptions). However, “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) (*en banc*); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (“Relevant and credible testimonial

² To the extent the Request seeks emails exchanged by Attorney Gaines and any individual other than those referenced in the Request, it would be insufficiently specific. However, as confirmed by the Requester in her correspondence of November 5, 2018, she only seeks emails from the Township email accounts of the individuals named in the Request.

affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *West Chester Univ. of Pa. v. Shackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (citing *Carey*, 61 A.3d at 375-79). “[I]t is not incumbent upon the OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts.” *Highmark, Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017).

Here, the Township has not established that the responsive emails are internal or that they reflect deliberative material used by the Township to make a decision or to choose a course of action. *Kaplan v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). In addition, the Township has failed to demonstrate, among other things, that the emails constitute confidential communications between client and attorney sent for the purpose of seeking or rendering legal advice.³ *Nationwide Mut. Ins. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007); *see also Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply

³ Notably, in her attestation, Ms. Snyder states that Attorney Gaines “generally ... communicates with the Township in a representative capacity[,]” implying that there are circumstances under which Attorney Gaines contacts the Township outside of his representative capacity; however, the Township has not indicated whether any such emails, which would presumably fall outside of the confidentiality provisions conferred by the attorney-client privilege, were determined to be responsive to the Request. Further, the Township has failed to address whether the responsive emails contain factual information that would not be exempt from disclosure. *See McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 385-88 (Pa. Commw. Ct. 2014) (records containing purely factual information are not exempt under Section 708(b)(10) of the RTKL); *Upjohn Co. v. United States*, 449 U.S. 383 (1931) (privilege extends only to communications and not to underlying facts).

invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide all responsive records to the Requester 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 Centre 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. 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 26 November 2018

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: Michelle Grove (via email only);
David Gaines, Jr., Esq. (via email only);
Jennifer Snyder, AORO (via email only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).