

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 48 C.D. 2024

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

FAYE ANDERSON and ALL THAT PHILLY JAZZ (OFFICE OF OPEN
RECORDS),

Respondents.

BRIEF OF RESPONDENTS

ON APPEAL FROM THE DECEMBER 20, 2023 DECISION IN THE OFFICE OF OPEN
RECORDS AT NO. AP 2023-2268

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COUNTER STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court may exercise plenary review of the findings of the OOR, applying a *de novo* standard of review. *Bowling v. Off. of Open Recs.*, 75 A.3d 453, 459 (Pa. 2013). However, there is “nothing in the [Right to Know Law] that would prevent a Chapter 13 court from simply adopting the findings of fact and conclusions of law of an appeals officer when appropriate, thus, in the proper case, effectively achieving the result sought by the OOR.” *Id.* at 473. Critically, “courts reviewing OOR[] decisions[] must construe” exceptions to disclosure “strictly, lest they subvert the [Right to Know Law’s] purpose.” *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 656–57 (Pa. 2020).

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Did the OOR correctly determine that Ms. Anderson’s request was sufficiently specific pursuant to Section 703 of the Right to Know Law (“RTKL”)?

Suggested answer: Yes.

2. Is SEPTA time-barred from seeking leave of court to identify documents exempt under the RTKL because SEPTA improperly failed to notify potentially impacted third parties at the time it received Ms. Anderson’s RTKL request?

Suggested answer: Yes.

3. Should this Court award costs and attorneys fees to Respondent and impose a civil penalty for Petitioner’s failure to conduct a good faith search upon receipt of the Request?

Suggested answer: Yes.

COUNTERSTATEMENT OF THE CASE

Faye Anderson is a Philadelphia-based independent journalist and citizen watchdog who writes for several publications, including All That Philly Jazz and PHL Watchdog. R.008a. Her reporting covers various issues within the City of Philadelphia, including the Philadelphia professional basketball team, the 76ers, and its proposal to build a new arena in the 1000 block of Market Street, which would impact Philadelphia's historic Chinatown. R.38a, 60.a. In furtherance of her reporting on the basketball team's proposed expansion, Ms. Anderson on August 1, 2023, submitted a Right to Know Law request to the Southeastern Pennsylvania Transportation Authority ("SEPTA") seeking twenty categories¹ of records (hereinafter the "Request"). R004a-008a.² In the Request, Ms. Anderson sought various third-party entities' communications with SEPTA: the Philadelphia 76ers basketball corporation, the Pennsylvania Department of Transportation, Gensler Design, Langan Engineering and Environmental Services, Inc., and the Philadelphia Industrial Development Corporation. *Id.*

SEPTA's deputy general counsel responded to Ms. Anderson the same day and advised her that the agency required thirty days to review the Request and would

¹ The categories within the Request will be hereinafter referred to by item number, corresponding with the OOR's description of each category as an "item."

² All citations to the record are to the reproduced record filed by SEPTA on April 23, 2024 or the supplemental reproduced record filed on August 30, 2024.

respond to her on or before September 7, 2023. R.009a. SEPTA’s deputy general counsel further informed Ms. Anderson that “SEPTA generally solicits input from the other parties to the communications and documents in order to determine what constitutes such protected information and redaction thereof.” *Id.*

Thereafter, on September 7, 2023, SEPTA—through its outside counsel— informed Ms. Anderson that it was denying her Request in full. R.010a–015a. The denial was based upon the agency’s determination that the Request was insufficiently specific, citing 65 P.S. § 67.703. R.013a–014a. Except for a passing reference to its “general” practice regarding third parties (R.010a), there is no indication in the record—from the time Ms. Anderson submitted the Request until SEPTA’s denial on September 7, 2023—that SEPTA or any person acting on its behalf advised potentially impacted third parties that their records were implicated in the Request.

On September 21, 2023, Ms. Anderson appealed SEPTA’s denial of her Request to the Office of Open Records (“OOR”). R.016a. After the OOR docketed the appeal, it sent its standard instructions to the parties. R.002b–005b. Part of the OOR’s standard instructions to the parties includes a form with large font at the top stating:

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

R.003b–005b. The form further states, in relevant part:

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, **the agency shall notify the Appeals Officer immediately**. The Appeals Officer may direct the agency to notify such parties of the appeal and provide proof of that notice. **If directed to provide notice**, such notice will include: (1) A copy of all documents included with this letter; and (2) A statement advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer or completing the form at <https://www.openrecords.pa.gov/Appeals/DIPRequest.cfm> (see 65 P.S. § 67.1101(c)). The Commonwealth Court has held that “the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

R.003b.

After the OOR issued its standard instructions, the appeal proceeded with briefing and argument only by Ms. Anderson and SEPTA; no third parties sought to participate. Instead, the record is silent as to the involvement or invitation for participation of any third parties despite the OOR’s instructions. *Id.*

SEPTA submitted a verified statement to the OOR detailing its employee’s search for responsive email records using some of the search terms from Ms. Anderson’s Request: “76 Place” and “76 Devcorp.” R.072a–073a. Those search terms were the names of a prospective sports arena to be built on the 1000 block of

Market Street (76 Place) planned by a third-party company, 76 Devcorp. R.008a. Using the search terms “76 Place” and “76 Devcorp,” the SEPTA manager of records and information identified 8,674 emails and 1,223 SharePoint items responsive to the Request. R.072a–073a. SEPTA did not provide an exemption log or other documentation explaining the nature of the identified records, or whether any of them involved third parties.

After reviewing the parties’ arguments and submissions, on December 20, 2023 the OOR appeals officer determined that parts of the Request were sufficiently specific to require Petitioner’s compliance under the RTKL, R.085a, thus granting in part and denying in part the appeal, and ordering SEPTA to conduct a good faith search and provide all responsive records within thirty days. R.091a. Specifically, after reviewing each Item in the Request separately³, the OOR determined that Request Items 1, 4–13, 15–20, and Item 14 partially met the specificity requirements of Section 703 of the RTKL. R.086a, 090a.

Writing about the Request in its entirety, the appeals officer reasoned that,

... while there are portions of the Request that do not meet the specificity requirements of Section 703 of the RTKL, there are also parts of the Request that do, and therefore, the Request is sufficiently specific in part. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa.

³ After reviewing Items 1, 4–13 and 15–20, the OOR appeals officer next discussed Items 2 and 3 of the Request and found they were not specific. R.090a. Respondent is not contesting the OOR’s decision with regard to Items 2 and 3 and therefore they are not addressed in this brief.

Commw. Ct. 2010) (finding certain parts of the underlying RTKL request sufficiently specific).

R.085a.

On January 19, 2023, SEPTA petitioned this Court for review of the OOR’s December 20, 2023 final determination. R.093a. On April 23, 2024, SEPTA filed its brief and reproduced record, including for the first time the input of a third party in the form of a declaration dated April 22, 2024 from the chief executive officer for CBL Real Estate LLC d/b/a 76DevCo (“76DevCo”). R.123a. The declaration had not been submitted to the OOR and had not been shared with Respondent before that date. *See generally* R.016a–092a. Following a stay in briefing for settlement discussions, the Court issued a revised briefing schedule on July 22, 2024. The instant brief is filed in accordance with that order.

SUMMARY OF THE ARGUMENT

The OOR’s final determination was correct and reflected the purpose of the RTKL, which provides access to public records containing the type of information Respondent seeks here, and allows the public to “scrutinize the actions of public officials[] and make public officials accountable for their actions.” *ACLU of Pa*, 232 A.3d at 656 (citation omitted). The General Assembly enacted the RTKL 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, 1042 (Pa. 2012). As explained by this Court, 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. Off. of Open Recs.*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). To effectuate these goals, courts “must” interpret the statute “to maximize access to public records.” *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 400 (Pa. 2021); accord *Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19, 29 (Pa. 2015). Here, Respondent seeks to shed light on how the 76ers’ proposed expansion through construction of a new arena will affect Philadelphia’s historic Chinatown as well as transportation routes in the city. The OOR’s decision, which properly applied the RTKL to permit access to certain records between SEPTA employees and various outside individuals, should be affirmed.

It cannot be said, as Petitioner aims to do in its appeal, that Respondent’s Request lacked specificity. To the contrary, as properly analyzed by the OOR pursuant to this Court’s three-part test, Items sought in the Request detailed subject matter (documents related to 76 Place); scope (specific types of records or senders or named individuals); and timeframe (April 2022-July 2023 for Items 1 through 16, March 2023-July 2023 for Items 17 through 20) to facilitate Petitioner’s compliance with the RTKL. R.083a–084a. *See 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). When such specificity is provided by a public

records requester, an agency must fulfill its duties to search for and produce responsive records. *See Dep't of Env't Prot. v. Legere*, 50 A.3d 260, 266 (Pa. Commw. Ct. 2012) (“Section 301(a) of the RTKL provides that ‘[a] Commonwealth Agency *shall* provide public records in accordance with this act.’ 65 P.S. § 67.301(a) (emphasis added). There is simply nothing in the RTKL that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so.”) Petitioner’s failure to do so in this case requires Court intervention.

Like all public records laws, the RTKL contains exceptions. *See* 65 P.S. § 67.708. Prior to initiating this appeal, SEPTA had ample opportunity not only to raise any exemptions but also to notify implicated third parties so that they could have requested to participate and assert their objections to disclosure. Yet SEPTA did not assert any exemptions to disclosing the public records sought by Respondent, nor did it notify third parties during its initial response to Ms. Anderson’s Request, or on appeal to the OOR, despite the office’s explicit instructions to do so. R.001b–004b. Instead, Petitioner waited until this appeal to, for the first time, attempt to argue that the Request may “implicate the trade secret or confidential proprietary information of CBL Real Estate LLC d/b/a 76DevCo.” Petitioner’s Br. 33.

As part of its argument, the agency attempts to advance a third party declaration created more than eight months after the Request was submitted, which

Petitioner did not submit into the record before the OOR as it was required to do. R.123a; *see Pa. Dep't of Educ. v. Bagwell (Bagwell 2015)*, 131 A.3d 638, 654 (Pa. Commw. Ct. 2015) (this Court “consistently requires agencies to raise and defend all applicable exemptions before the initial fact-finder.”); *See Levy v. Senate of Pa.*, 94 A.3d 436, 441–42 (Pa. Commw. Ct. 2014) (“an agency must raise all its challenges before the fact-finder closes the record” to “allow efficient receipt of evidence . . . at the appeals officer stage[.]”) Accordingly, neither Petitioner nor Respondent presented any argument to the OOR on the question of whether a third party should be allowed to participate in this RTKL proceeding, nor did the OOR make any ruling on that issue. *See* R.091a. Petitioner’s attempt to belatedly inject new arguments and facts into the appellate record is improper and must be rejected. *McKelvey*, 255 A.3d at 409 (“allowing evidence to be supplemented at each stage of the proceedings undercuts the RTKL’s goals of openness and providing expedient access to information.”). Indeed, without timely-filed evidence or the participation of a third party, any argument made by SEPTA or 76DevCorp now in front of the Commonwealth Court is time-barred. *Id.* And, moreover, Petitioner cannot and has not met its burden to establish any exemption permitting SEPTA to withhold the public records sought in Respondent’s Request. *Bagwell 2015*, 131 A.3d at 656 (when the government withholds information responsive to a RTKL request, it must prove by a preponderance of the evidence that at least one exception applies); *Off.*

of Dist. Att’y of Phila. v. Bagwell (Bagwell 2017), 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (in determining whether the government has carried its burden, the RTKL’s exceptions “must be narrowly construed.”); *see also Off. of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013).

In sum, this Court should affirm the OOR and order the release of the responsive records in SEPTA’s possession. In addition, due to SEPTA’s failure to perform a good faith search upon receipt of the Request, Petitioner should be sanctioned, and Respondent should be awarded costs, sanctions and attorneys’ fees pursuant to 1304(b) of the RTKL.

ARGUMENT

I. This Court should affirm the OOR’s determination that Ms. Anderson’s Request was, in part, sufficiently specific.

As the OOR correctly concluded, Items 1, 4–13, and 15–20, and 14 of Respondent’s Request were sufficiently specific in part and Petitioner must produce all responsive records. R.085a, 091a. The RTKL directs requesters to “describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. This Court has developed a three-part test for determining whether a request is sufficiently specific: (1) subject matter, (2) scope of records sought and (3) timeframe. *See Pittsburgh Post-Gazette*, 119 A.3d at 1124–25. This Court has recently explained that the three-part test is not a “conjunctive, bright-line rule requiring each ‘element’ of the test to be satisfied;

rather, it set forth a flexible approach, consistent with the cases it summarized.” *Pa. Off. of Governor v. Brelje*, 312 A.3d 928, 937 (Pa. Commw. Ct. 2024). One of the cases summarized by *Pittsburgh Post-Gazette* explained that “[t]he fact that a request is burdensome will not, in and of itself, deem the request to be overbroad,” though a request may be overbroad if it is “an open-ended request that fails to give a local agency guidance in its search for the information sought.” *See Bagwell 2017*, 155 A.3d at 1143 (citing *Legere*, 50 A.3d at 265). Here, the foregoing enumerated Items of Respondent’s Request substantially complied with the RTKL’s specificity requirements, and the OOR’s decision should be affirmed.

The OOR first looked at the timeframe prong of this Court’s specificity test and properly concluded that Respondent’s Request properly defined “a finite timeframe.” R.086a. In particular, the OOR determined that “Items 1 through 16 include a 15-month timeframe (April 2022-July 2023) and Items 17 through 20 specify a 4-month timeframe (March 2023-July 2023).” R.086a. For Item 14, the OOR determined that a 15-month timeframe was sufficiently specific. R.090a. Petitioner does not argue on appeal that the timeframe prong of the specificity test was not met. *See* Petitioner’s Br. 25 (arguing only that the test as a whole was not met due to alleged deficiencies in other prongs).

Next, the OOR reviewed whether the Items sufficiently specified the subject matter. R.086a. For Items 1, 4–13 and 15–20 and Item 14, the appeals officer found

that the Request provided detailed subject matter, including “76 Place” and “meetings about proposals to independently evaluate 76 Place proposal.” R.086a. The appeals officer rejected SEPTA’s argument that the Request was overly broad and that it involved many different departments and issues within the agency. R.086a.

On appeal, SEPTA argues that specific subject matter was lacking, focusing on the extent to which Respondent’s Request did not provide SEPTA with search terms or key words. Petitioner’s Br. 23. The OOR correctly found that,

where specific senders and recipients are identified in the Request, those Items of the Request are sufficiently specific as to the specific individuals named. . . . Those named individuals, in conjunction with the specifically identified types of documents and time frames, should adequately limit the scope of the Request to allow SEPTA to conduct a search for responsive records.

R.088a. Key words and search terms are not required under the RTKL to render a request “sufficiently specific.” *See Montgomery County v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) (holding list of fourteen search terms, standing alone, did not render an RTKL request sufficiently specific). Instead, the proper inquiry is whether the subject matter of the request identifies the transaction or activity of the agency for which the record is sought. *See Pittsburgh Post-Gazette*, 119 A.3d at 1125 (citing Section 102 of the RTKL, 65 P.S. § 67.102). Here, the OOR correctly determined that the subject matter in the Items was “sufficient to alert SEPTA as to

the particular topic about which records are sought,” because the Request defined “76 Place” as “the proposal to build a sports arena on the 1,000 block of Market Street.” R.086a.

Lastly, the OOR correctly determined that the scope of Respondent’s Request was sufficient because the Items “identified types of documents, and specifically named individuals and specified timeframes.” R.089a. To meet the RTKL’s specificity requirement, “[t]he scope of the request must identify ‘a discrete group of documents, either by type . . . or by recipient.’” *Pittsburgh Post-Gazette*, 119 A.3d at 1125 (citing *Carey*, 61 A.3d at 372). Here, the OOR correctly determined that the scope provided in Respondent’s Request was sufficient for Items 1, 4–13, and 15–20 because they identified certain documents, including “invoices, reports, feasibility studies, traffic impact studies, architectural designs and cost estimates,” which provided “guidance to SEPTA as to the specific types of records sought.” R.087a, 089a. Similarly, the OOR found that for Items 1, 4–13, and 15–20 “where specific senders and recipients are identified in the Request,” the scope of the Request was sufficient “as to the specific individuals named.” R.088a. Separately, the OOR correctly determined that the scope of types of records requested in Item 14 (outside of letters and emails) were sufficiently specific because the specifically named document types themselves (invoices, reports, feasibility studies, traffic

impact studies, architectural designs and cost estimates) “potentially suggest where SEPTA might conduct its search for such records.” R.90a–091a.

Because the OOR correctly determined that Items 1, 4–13, 15–20 and Item 14 were specific in part, this Court should reject Petitioner’s argument that the Request lacked sufficient specificity and therefore the agency is not required to interpret or modify the Request. *See* Petitioner’s Br. 27. This Court has previously held that “[w]hile the OOR cannot refashion a request, if from the context of the request the agency can reasonably discern that a request is for a specific time-period, the OOR can find the request sufficiently specific.” *See Pa. State Sys. of Higher Educ. (PASSHE) v. Assoc. of Pa. State Coll. and Univ. Facs. (APSCUF)*, 142 A.3d 1023, 1030 (Pa. Commw. Ct. 2016); *see also Iverson*, 50 A.3d at 283 (“[T]he specificity of a request must be construed in the request’s context, rather than envisioning everything the request might conceivably encompass.”). Here, Petitioner can effectively search for and disclose public records responsive to Respondent’s Request, as dictated by the OOR’s decision. Petitioner’s claim that the set of responsive records is too large, *see* Petitioner’s Br. 26–27, does not excuse the agency from its obligations under the RTKL. *APSCUF*, 142 A.3d at 1031 (“Just because a request is for a large number of records does not mean that an agency is excused from its obligation to produce the requested documents.”).

For the above reasons, the OOR correctly determined that Items 1, 4–13, 15–20 and Item 14 were specific in part, and this Court should affirm its decision.

II. SEPTA’s request to submit supplemental argument and evidence that it did not present at the OOR must be denied.

In the alternative, SEPTA argues that if the Court affirms the OOR’s final determination, it should grant SEPTA and any impacted third parties leave to identify documents they believe should be withheld under RTKL exemptions, and supplement the record with evidence in support of those asserted exemptions. Petitioner’s Br. 29. The Court should deny SEPTA’s request.

The Commonwealth’s appellate courts have consistently rejected government agencies’ attempts to submit supplemental argument they did not raise at the OOR. *See McKelvey*, 255 A.3d at 404; *Bagwell 2015*, 131 A.3d at 655–56. In *McKelvey*, the Supreme Court rejected the Department of Health’s request to submit additional arguments and evidence that it had not offered at the OOR level, affirming the unanimous, *en banc* Commonwealth Court opinion barring it. *Id.* As the Court explained, “allowing the submission of additional evidence at the judicial review stage would undermine the presumption of openness attendant to the RTKL, as doing so would permit agencies to withhold records, without legal ground to do so, until reaching a court.” *Id.* at 393. This Court further explained in *Bagwell 2015* that “an agency must raise all its challenges before the fact-finder closes the records When the agency did not submit evidence of exemptions, and rested on its

specificity argument, this Court precluded the agency from submitting evidence of any exemptions on remand.” *See Bagwell 2015*, 131 A.3d at 660 (citation omitted). Petitioner’s request to restart the record in this case, assert new grounds to withhold public records, and introduce third parties, is wholly improper and must be denied.

Like the agency in *Bagwell 2015*, SEPTA here relied upon its claim at the OOR level that the Request was insufficiently specific, only to later argue in the alternative before this Court that if the Request were to be found to be sufficiently specific under Section 703, the agency should be permitted to review the responsive records for exemptions. The Court rejected this bifurcated approach in *Bagwell 2015*, explaining “strict timeframes set forth in the RTKL and the legislative intent to foster expeditious resolution of RTKL disputes” *Id.* at 660. Indeed, it is indisputable that Petitioner was required to raise all of its arguments—including any claimed exemptions—before the OOR.

It is only through an appeal of an OOR final determination to this Court that a party can litigate the merits of the determination, including any redactions and privileges presented to the OOR. Moreover, this principle applies even when an agency asserts that a request is insufficiently specific, if that assertion is not credited, or that the response involves large volumes of materials. In such cases, this Court has explained that an agency’s inability to ascertain what exemptions or privileges may apply, did not excuse the agency from its obligation to produce the records.

Roddy v. Pa. Off. of the Governor, No. 561 M.D. 2020, 2020 Pa. Commw. Unpub. (Pa. Commw. Ct. 2020) (RTKL enforcement action finding that the agency could not raise additional grounds for withholding records after relying on its specificity argument before the OOR (citing *APSCUF*, 142 A.3d at 1031)), *petition for allowance of appeal denied*, 166 A.3d 1218 (Pa. 2017).

Here, SEPTA had ample opportunity in September and October 2023 to present all evidence, argument, and the involvement of any third parties to the OOR, as it is required to do. *See Levy*, 94 A.3d at 441–42 (“an agency must raise all its challenges before the fact-finder closes the record” to “allow efficient receipt of evidence . . . at the appeals officer stage.”). Indeed, with respect to identifying third parties, SEPTA did not avail itself of the OOR’s specific instructions to do so at the onset of proceedings. R.001b–004b. As the evidence shows by SEPTA’s verified statement submitted to the OOR using terms like “76 Place” and “76 Devcorp” to search for responsive records, SEPTA could have easily identified 76 DevCorp as a third party at the outset of the proceeding before the OOR. And SEPTA was fully aware of its obligation to identify any pertinent exemptions, but asserted none before the OOR. *See R.063a–077a*. Even when simply invoking a 30-day extension to respond to Respondent’s Request on August 1, 2023, SEPTA’s counsel stated that he required an extra thirty days to respond because he had to review the public records to determine what exemptions might apply under 708(b) of the RTKL, 65

P.S. § 67.708(b). R.003a. In the same response, SEPTA noted that it generally “solicits input” from the other parties involved in communications and documents related to the Request. *Id.* There is thus no justification for Petitioner’s failure to present any asserted exemptions and any impacted third parties at the onset of proceedings before the OOR.

Finally, Petitioner has improperly sought to supplement the record on this appeal with a declaration of a third party that was not submitted to the OOR. The OOR record shows that no third parties sought to participate as a direct interest participant. *See* R.003b–004b, 008b–009b. Yet, when SEPTA filed its Opening Brief to this Court in April 2024, it submitted into the record on appeal a third party declaration from 76DevCo that had not been presented to the OOR. R.123a–125a. SEPTA’s belated submission was improper and should not be considered on this appeal. *See McKelvey*, 255 A.3d at 404 (“[W]e reject the Department’s request for supplementation of the record. We note that the Department received numerous opportunities to submit evidence and argument before the OOR, and chose not to take advantage of those opportunities.”) Furthermore, Petitioner’s and the asserted third party’s speculative arguments that unspecified public records responsive to the Request are exempt under Section 708(b)(11) of the RTKL because they may contain “confidential” or “trade secret” information should not be considered on this appeal because the declaration and argument were not presented to the OOR. *See*

Eiseman, 125 A.3d at 29 (stating that agency’s assertion of non-possession “is not well taken” where the agency “did not claim non-possession in its response to the initial open-records requests” nor during the hearing before the OOR, appellate review of the record by the Commonwealth Court, but for the first time on discretionary review to the Supreme Court.) Even if there were circumstances in which supplementing the record could be appropriate — which are not present in the instant case — SEPTA still failed to seek Court permission to supplement the record and therefore the April 2024 declaration found in the reproduced record should be disregarded. *Com. v. Preston*, 904 A.2d 1, 6–7 (Pa. Super. 2006) (“The law of Pennsylvania is well settled that matters which are not of record cannot be considered on appeal...[A]ny document which is not part of the officially certified record is deemed nonexistent.”)

Under the circumstances, this Court should bar Petitioner from the “proverbial [third] bite at the apple.” *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 130 (Pa. Commw. Ct. 2019), *aff’d in part, vacated in part sub nom., McKelvey*, 255 A.3d 385 (quoting *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017)). Accordingly, this Court should reject Petitioner’s request to submit new argument and evidence it did not present to the OOR.

III. SEPTA’s conduct entitles Ms. Anderson to recover court costs and attorneys fees under Pennsylvania’s RTKL.

Under the RTKL, a requester is entitled to recover court costs and reasonable attorney fees under certain circumstances. 65 P.S. § 67.1304(a)(1)–(2); *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr. (Uniontown III)*, 243 A.3d 19, 34 (Pa. 2020) (citation omitted). Where a party engages in bad faith conduct,⁴ the Court may award attorney fees even “when the relevant statutory scheme does not so provide.” *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr. (Uniontown II)*, 197 A.3d 825, 835 (Pa. Commw. Ct. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020). Pennsylvania courts have recognized grounds upon which it may award attorneys fees and otherwise sanction an agency for its failure to comply with the RTKL.

Importantly, a court may find that an agency acted in bad faith when it engaged in “an abnegation of mandatory duties,” including failing to perform “a detailed search and review of records to ascertain if the requested material exists, or if any exclusion may apply, prior to denial of access will support a finding of bad faith.” *Uniontown III*, 243 A.3d at 25 (citation omitted). In *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr. (Uniontown I)*, 185 A.3d 1161, 1170 (Pa. Commw. Ct. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020), this Court found bad faith based on the

⁴ Importantly, whether an agency acted in bad faith “is predicated ‘not on the mental state of the actor but [upon] the actions taken by the agency.’” *Sawicki v. Wessels*, No. 1046 C.D. 2021, 2022 WL 17750940, at *7 (Pa. Commw. Ct. Dec. 19, 2022), *recons. denied* (Feb. 10, 2023) (quoting *Bagwell 2017*, 155 A.3d at 1141).

agency's (i) denial of a public records request without conducting a good faith search, (ii) its decision to contest the requester's appeal to the OOR and claim that records were exempt without having reviewed them, and (iii) its failure to comply with the OOR's disclosure order. *Id.* at 1172–73. An agency's denial of access to information that it knew was a "public record" or engaging in "persistent denial of access" likewise constitutes bad faith. *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 650 (Pa. Commw. Ct. 2006); *Uniontown I*, 185 A.3d at 1174.

In addition to the award of attorneys fees, an agency's bad faith refusal to grant access to public records may also result in the imposition of a civil penalty against the agency. *See* 65 P.S. § 67.1305(a). "[T]he maximum statutory civil penalty is warranted" where an agency engages in "noncompliance throughout the RTKL process," including failing to "perform the steps required upon receiving the Request" such that the Requester is "precluded access to public records." *Uniontown I*, 185 A.3d at 1175–76

As an agency subject to the RTKL, SEPTA had a duty to make a "good faith," reasonable inquiry in response to Ms. Anderson's August 1, 2023 RTKL Request, which was sufficiently detailed and sought records that were identifiable and clearly public. *See* 65 P.S. § 67.901; *see also In re Silberstein*, 11 A.3d 629, 633 (Pa. Commw. Ct. 2011) ("[T]he burden [is placed] upon a local agency, through its

designated open-records officer, to first make a good faith determination as to whether any requested record is in fact a ‘public record’ and, if so, then determine whether the identified public record is within its possession, custody[,] or control.”). Indeed, under the RTKL, SEPTA “bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist.” *Dep’t of Lab. & Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015). Yet, the record is clear that it was not until eight months after Respondent submitted her Request, after this case had already progressed through the OOR, and after briefing in this Court, that SEPTA assessed the scope of the public records at issue, whether any exemptions might apply, and whether a third party might be impacted by the release of the subject records. R.123a–125a. SEPTA’s self-evident failure to adequately search for responsive records, both at the outset of the RTKL Request and during the OOR process, evinces bad faith. *Chambersburg Area Sch. Dist. v. Dorsey*, 97 A.3d 1281, 1291–93 (Pa. Commw. Ct. 2014) (finding agency’s failure to diligently search for responsive records may suffice as grounds for finding of bad faith). Indeed, SEPTA’s conduct and arguments before this Court, *see* Petitioner’s Br. 19–35, indicate that, at minimum, the agency did not attempt a good faith search in response to Ms. Anderson’s Request until months into litigation. *See Uniontown I*, 185 A3d at 1172 (finding that not “locat[ing] responsive records until motivated by litigation evinces bad faith.”).

Because of this conduct, this Court should award Respondents not only their reasonable attorney fees and costs but also impose a civil penalty against SEPTA for its bad faith failure to diligently and promptly search for and review responsive records resulting in noncompliance with the RTKL process.

CONCLUSION

For these reasons, Respondents respectfully requests that this Court affirm the Final Determination of the OOR, order the release of the specific documents, and award attorney's fees and impose the maximum statutory civil penalty.

Dated: August 30, 2024

/s/ Paula Knudsen Burke

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