



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF:	:	
	:	
CATHI BITTENBENDER,	:	
Complainant	:	
	:	
v.	:	Docket No.: AP 2009-1099
	:	
MONROE COUNTY	:	
Respondent	:	

## INTRODUCTION

Cathi Bittenbender (the “Requester”) filed a right-to-know request (the “Request”) pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.*, with Monroe County (the “County”). She sought copies of various records. The County denied the Request. The Requester timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part** and the County is required to proceed as set forth below.

## FACTUAL BACKGROUND

On October 29, 2009, the County received the Request. Specifically, the Requester sought:

Any and all electronic mail commonly referred to as e-mails and text messages via cellular phones or computer during the course of their employment assigned to, used by or loaned to Stacie Gill, Carolyn Reviello, Wendy Vega-D’Amico,

Nicole Hilfiger, Adelaide Grace, and Chris Black from August 15, 2009 to present, October 29, 2009. Any and all personnel records/disciplinary records for the aforementioned persons.

Any and all records, notes (handwritten, typed or electronic) reports (handwritten, typed, or electronic) internal memos (handwritten, typed or electronic) relating to or about Kenneth Lenning, Cathi Bittenbender, [the list of names included minors](as it relates to any of the above individuals).

In a letter dated November 4, 2009, the County indicated that it would need additional time to respond to the Request in order to conduct a legal review. On December 1, 2009, the County denied the Request based on the following:

1. The records, notes and internal memos are protected under the Child Protective Services law, PA code Section 3490.91, *et seq.*
2. Any and all e-mails, text messages sent via cell phone or through the computer system are denied as lacking in specificity of the information sought under § 703
3. Disciplinary records are exempt. The County also cited 65 P.S. §§ 67.703 and 67.708(b)(7)(i)(ii)(vi)(vii) and (viii).

The Requester filed a timely appeal on December 14, 2009. In support of the appeal, the Requester argues that she is a party to the investigation surrounding the records she seeks. She also references 55 Pa. Code § 3490.91 claiming that she is entitled to a copy of a report as the subject of the report.

In response to the appeal, the County argues that the Request is unclear as to the e-mails and text messages. The County states that email accounts are full of information pertaining to many topics and subjects and that without a very specific request it is difficult to ascertain what records are wanted. The County cites *Urbina v. Office of the Governor*, OOR Dkt. 2009-0972.

The County also contends that the Request relating to disciplinary records is exempt under 65 P.S. § 67.708(b)(7)(i)(ii)(vi)(vii). As to the Request relating to records, notes, reports, and internal memos relating to or about the listed individuals, the County

states that these records are confidential under the Child Protective Services Law, 55 Pa.Code § 3490.91, et seq.

The Requester subsequently granted the OOR additional time to issue a final determination.

### **LEGAL ANALYSIS**

The Office of Open Records is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). The County is a local agency subject to the RTKL. *See* 65 P.S. § 67.302. Section 102 of the RTKL, defines the term “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 data-processed or image- processed document.”

The RTKL provides further clarity in defining a “public record” as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.”

65 P.S. §67.102.

#### **1. E-mail and text messages**

The County denied the portion of the Request seeking any and all e-mails and text messages as lacking in specificity. The County cited 65 P.S. § 67.703 in support. The OOR disagrees.

Section 703 states in relevant part: “A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain what records are being requested ...” The OOR notes from the outset that there is no “bright line

standard” or “weighing of factors test” that determines whether a Request is sufficiently specific under 65 P.S. § 67.703. The OOR recognizes that determining whether a record request is specific enough under Section 703 is challenging. Such a determination is based on a detailed factual analysis on a case by case basis. A number of facts may be considered such as time restrictions, subject matter, date restrictions, parties involved, types of records, etc. However, there is no magic formula or combination thereof that can be identified to meet specificity requirements. If the OOR can determine what the requester sought, it will find the request to be sufficiently specific.

The Requester asked for any and all electronic e-mails and text messages sent during the course of employment by named employees from August 15, 2009 to October 29, 2009. The OOR has consistently held that a Request is not sufficiently specific if it does not set forth a subject matter for the communications, nor identify a specific and relatively limited number of people as senders and/or recipients of the communication. *See Mollick v. Methacton School District*, OOR Dkt. AP 2009-0180. Here, while the Request on its face does not set forth any subject matter, it is limited within a timeframe and identifies a specific and limited list of senders. This limitation gives sufficient specificity for the County to determine what records are sought. Therefore, it should not have denied this aspect of the Request under § 703. While review of numerous e-mails and text messages may be required, an agency may not deny access to records merely because retrieval requires searching for or extracting those records from a large or voluminous source. The OOR notes that the County is permitted to redact any information that is confidential under the Child Protective Services Law.

## **2. Records, notes and internal memos.**

The Requester seeks records, notes, and internal memos relating to herself and a number of other individuals, some minors. The County states that these records are confidential under the Child Protective Services Law, 55 Pa.Code § 3490.91, et seq. This law provides in relevant part:

Reports, report summaries and other accompanying information obtained under the CPSL and this chapter in the possession of the Department and a county agency are confidential. Except for the subject of a report, persons who receive information under this section shall be advised that they are subject to the confidentiality provisions of the CPSL and this chapter, that they are required to insure the confidentiality and security of the information and that they are liable for civil and criminal penalties for releasing information to persons who are not permitted access to this information. This material shall only be released under the CPSL and this chapter and be made available only to the following: [a list of individuals/parties follows]  
55 Pa.Code § 3490.91(a).

The plain language of the Child Protective Services Law renders the requested reports, report summaries, and internal memos confidential. The County also cited 23 Pa.C.S.A §§ 6339 and 6340 which have similar provisions. The Child Protective Services Law does list individuals/parties to which information may be released.

To compensate, the Requester claims to be one of the listed individuals/parties and points to § 3490.91(a)(12) which states that the material may be released to “a subject of the report upon written request.” The OOR declines to accept this argument. The exemption cited by the County was properly asserted, even if the Requester has the proper authority to seek access to the report under § 3490.91(a)(12). The RTKL is not the proper vehicle for gaining access to these records as they are exempt from public disclosure. While the Requester may seek a copy of the report via written request, this does not transform the report or supporting documents into a public record accessible under the RTKL.

**3. Personnel records/disciplinary records for the list persons.**

The County denied the Request seeking personnel records/disciplinary records for specific individuals under § 703 and § 708(b)(7)(i)(ii)(vi)(vii) and (viii). On its face, the Request seeks disciplinary records. These records are exempt under the plain language of §708(b)(7)(viii). As such, the County properly denied this portion of the Request.

While the Request also references personnel records, it is unclear whether the Requester is seeking additional personnel records or limiting her Request to disciplinary records. As such, it lacks sufficient specificity for the County to determine what records are sought. The County properly limited the Request to disciplinary records and denied it as set forth above.

**CONCLUSION**

For the foregoing reasons, the appeal is **granted in part and denied in part**. The County is directed to provide copies of any and all e-mails and text messages sent by the persons named in the Request. If the records do not exist, the County is required to provide the Requester with the sworn and notarized affidavit of a person with knowledge to that effect. The County is permitted to redact any information that is confidential under the Child Protective Services Law. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Chester County Court of Common Pleas. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED** February 5, 2010



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APPEALS OFFICER  
NATHANAEL J. BYERLY, Esquire

Sent to:  
Cathi Bittenbender  
Greg Christine