



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**JEFFREY BENZING AND  
*PUBLICSOURCE*,  
Requester**

v.

**MUNICIPALITY OF MONROEVILLE,  
Respondent**

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: **Docket No: AP 2016-1126**  
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### **INTRODUCTION**

Jeffrey Benzing, on behalf of *PublicSource* (“Requester”), submitted a request (“Request”) to the Municipality of Monroeville (“Municipality”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking an incident run sheet from the Monroeville Police Department for a specified date. The Municipality denied the Request, stating, among other reasons, that the record was related to a noncriminal investigation. 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 Municipality is required to take additional action as directed.

### **FACTUAL BACKGROUND**

On June 9, 2016, the Request was filed, seeking incident run sheet No. 16-003573 for February 13, 2016, from the Monroeville Police Department. On June 16, 2016, the Municipality denied the Request, claiming that it is a disruptive request and exempt from

disclosure because it relates to a noncriminal investigation. *See* 65 P.S. § 67.506(a)(1); 65 P.S. § 67.708(b)(17).

On June 29, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Municipality to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On July 7, 2016, the Municipality submitted correspondence and attached an e-mail of that same date from Kenneth D. Cole, Chief of Police for the Monroeville Police Department, addressing the requested records. In Chief Cole's e-mail, he indicates that incident No. 16-003573 of February 13, 2016 is an open investigation and that the lead investigative agency is the Allegheny County Police Department. The Municipality did not submit any further evidence in support of the denial. The Requester did not submit anything additional on appeal.

### **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. 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 parties did not request a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Municipality 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)(1). 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)).

Under the RTKL, an affidavit may serve as sufficient evidentiary support 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). However, an unsworn statement is not competent evidence to meet an agency's burden of proof that under the RTKL. *See Housing Authority of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) ("Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all"). Here, the Municipality has not submitted any evidence demonstrating that the requested incident run sheet is related to a noncriminal investigation pursuant to 65 P.S. § 67.708(b)(17). The unsworn e-mail of Chief Cole states that the incident is an open investigation being led by the Allegheny County Police; however, it does not specify what kind of investigation it is or why the information contained in the record would be exempt from disclosure. Furthermore, the RTKL's investigative exemptions apply only to records of the agency carrying out the investigation. *Hockheimer v. City of Harrisburg*, OOR Dkt. AP 2015-1793, 2015 PA O.O.R.D. LEXIS 1588 (citing *Hayes v. Pa. Dep't of Pub. Welf.*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530). Even if Chief Cole's submission were supported by affidavit, the Municipality has acknowledged that the Allegheny County Police is the agency conducting an investigation.

Further, the Municipality has not submitted evidence that the Request is a disruptive request pursuant to Section 506(a)(1) of the RTKL. *See* 65 P.S. § 67.506(a)(1). To invoke Section 506(a)(1) as basis to deny a request, an agency must establish that the "(1) 'the requester has made repeated requests for th[e] same record[(s)]' and (2) 'the repeated requests have placed

an unreasonable burden on the agency.” *Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011); *see also Slate v. Pa. Dep’t of Env’tl. Prot.*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 (“A repeated request alone is not enough to satisfy § 506(a)(1)”). Chief Cole’s e-mail does not address this basis for denial at all.

Because the Municipality has not submitted any evidence to withhold the requested record, it has not established that the requested incident call sheet is exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the Municipality is required to provide the responsive incident call sheet 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 Allegheny 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 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.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 27, 2016**

*/s/ Kelly C. Isenberg*

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APPEALS OFFICER  
KELLY C. ISENBERG, ESQ.

Sent to: Jeffrey Benzing (via e-mail only);  
Joe Sedlak, ORO (via e-mail only)

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<sup>1</sup> *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).