



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**RODNEY BALTIMORE,
Requester**

v.

**BOROUGH OF HUMMELSTOWN,
Respondent**

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Docket No.: AP 2016-1179

INTRODUCTION

Rodney Baltimore (“Requester”) submitted a request (“Request”) to the Borough of Hummelstown (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of municipal property violations and a list of abandoned houses. The Borough denied the Request, arguing that the records were compiled in furtherance of noncriminal investigations or do not exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Borough is not required to take any further action.

FACTUAL BACKGROUND

On June 22, 2016, the Request was filed, seeking “[a]ll code violations filed with the borough through 1/1/2016 – 6/17/2016. Also all houses classified as ‘abandon[ed]’ if that information is available.” On June 29, 2016, the Borough denied the Request, stating that no list

of abandoned houses exists¹ and that the remaining records were related to noncriminal investigations conducted by the Borough. 65 P.S. § 67.708(b)(17).

On July 13, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester argued that investigations of closed municipal violations should be considered public. The OOR invited the parties to supplement the record, and directed the Borough to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 21, 2016, the Borough submitted a position statement and the affidavit of Stephen M. Wyld, the Borough's Assistant Code Enforcement Officer. Mr. Wyld attests that, while no municipal property citations have been issued since 2006, certain records relating to investigations of possible code violations exist. The Borough further asserts that all such records were created for the purpose of conducting a non-criminal investigation.

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

¹ On appeal, the Requester does not challenge the nonexistence of the list of abandoned houses. Therefore, the Requester has waived this issue. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

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; however, 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, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The Borough 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 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 *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The records at issue are letters created by the Borough when it observes violations of the 2012 International Property Maintenance Code and related ordinances (“Code”), which govern property maintenance standards within the Borough. These letters are issued by the Code Enforcement Officer, and contain the address of the property, the name of the owner of record, the details of the investigation conducted, a description of the violation and a timeframe in which to correct the problem. In his affidavit, Mr. Wyld attests that “90 to 95 percent of the Code violations” are corrected in time, a minority require further notification or extensions of time, and no Code violation has resulted in a filed citation in the past decade.

The Borough argues that these letters are exempt because they relate to noncriminal investigations conducted by the Borough. Section 708(b)(17) of the RTKL exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports” or a record that, if disclosed, would “[r]eveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814. An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep’t of Public Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

The Borough is incorporated under the Borough Code. *See* 8 Pa.C.S. §§ 101 *et seq.* As part of its charter, the Borough is vested with the power to create ordinances regulating private maintenance and use of property. 8 Pa.C.S. § 3301(b)(4)(iii). The Borough has chosen to use this power to adopt the 2012 International Property Maintenance Code² and vest a Code Enforcement Officer with the power to investigate violations of that code and remedy any breaches. HUMMELSTOWN BOROUGH, PA., CODE §§ 5-103-04 (2014) *available at* <http://www.ecode360.com/30982277>; HUMMELSTOWN BOROUGH, PA., CODE §§ 11-201-02 (Sept. 21, 1989) (Adopting by reference the model 2012 International Property Maintenance Code as amended by § 11-201) *available at* <http://www.ecode360.com/30828834>.

The 2012 International Property Maintenance Code sets out a list of violations in Section 106, and also provides for enforcement against such violations in Section 107. Sections 104.2, 106.2 and 107.2 specifically provide that the designated code enforcement officer shall make inspections of property and, upon determining that a violation exists, provide notice to the property owner in the form prescribed. The attestation of Mr. Wyld demonstrates that the notice letter required by Section 107.2³ is the type of responsive document possessed by the Borough. The description of the process, both in the Borough's ordinances and in Mr. Wyld's affidavit makes it clear that this letter is the culmination of an investigation.

Therefore, the Borough Code provides the authority for the Borough to conduct inspections pursuant to its enacted ordinance, and Mr. Wyld attests that the letters were produced as the result of an investigation conducted to determine compliance with the Borough's ordinance. As a result, the Borough has met its burden of proving that it conducted noncriminal

² Full text available at <https://law.resource.org/pub/us/code/ibr/icc.ipmc.2012.html>.

³ Hummelstown's adoption of the 2012 International Property Maintenance Code specifically deletes Section 107, as well as parts of Section 106. That does not affect this analysis because substantially identical language replaces it. HUMMELSTOWN BOROUGH, PA., CODE § 5-108 (1989) *available at* <http://www.ecode360.com/30981493>.

investigations, and that the records relate to these noncriminal investigations. Consequently, the Borough has met its burden of proving that these records are exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

The Commonwealth Court has cautioned that “it [is] incumbent upon [an agency] to determine whether records exist that [do] not fall within the exception or whether an exception to the noncriminal investigation [exemption] require[s] that certain documents be disclosed.” *Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1075 (Pa. Commw. Ct. 2013); *see also* 65 P.S. § 67.708(b)(17)(vi)(A). Therefore, the OOR must determine whether an exception to Section 708(b)(17) applies — namely, whether the record documents “the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.” *See* 65 P.S. § 67.708(b)(17)(vi)(A).

The Request seeks “[a]ll code violations filed with the borough through 1/1/2016 – 6/17/2016.” Mr. Wyld’s affidavit demonstrates that any responsive records are related to the initiation, progress or result of an investigation, but they would still be available if the exception to Section 708(b)(17) applies. In this case, however, Mr. Wyld attests that the Borough has not taken any action beyond sending their notice of violation for the past ten years — well beyond the time-frame specified by the Request. Since the Borough has not imposed a fine or penalty, nor made any other changes to the properties investigated, none of the responsive records could document such. As a result, the Borough has proven that all responsive records are exempt under Section 708(b)(17) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the Borough is not required to take any further action. 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 Dauphin 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: August 5, 2016

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Rodney Baltimore (via e-mail only);
Michael O'Keefe. (via e-mail only);
Jarad Handelman, Esq. (via e-mail only)

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