



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>SEVERIN JOHNSON,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2016-1210</b>
	:	
<b>CITY OF BETHLEHEM,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Severin Johnson (“Requester”) submitted a request (“Request”) to the City of Bethlehem (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records pertaining to a particular police officer. The City denied the Request, arguing that if the records exist, they would be exempt personnel records. The Requester 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 City is required to take further action as directed.

**FACTUAL BACKGROUND**

On June 28, 2016, the Request was filed, seeking “records of [complaints and discipline] for Officer Leardi.”<sup>1</sup> On July 1, 2016, the City denied the Request, arguing that the “request[ed]

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<sup>1</sup> The Request did not indicate whether the Requester sought copies or to inspect the records.

records, if they existed, would be located in Lt. Leardi's personnel file and therefore are exempt under Section 708(b)(7)(viii) of the RTKL." *See* 65 P.S. § 67.708(b)(7)(viii).

On July 14, 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 City to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On July 26, 2016, the City submitted a position statement, again arguing that the records, if they existed, would be exempt under Section 708(b)(7)(viii) of the RTKL. The statement was verified by the affidavit of Erin Hefferan, the City's Open Records Officer. The City also submitted the attestation of Todd Repsher, Deputy Police Chief of the City's Police Department.

### **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." 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The City 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. 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). 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)).

As a preliminary matter, the City argues that the Requester failed to comply with Section 1101(a) of the RTKL, which requires appeals to “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"). Pursuant to this section, the Commonwealth Court has held that a requester must "state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access." *Saunders v. Pa. Dep't of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012); *see also ACLU of Pa. v. City of Pittsburgh*, No. 2213 C.D. 2013, 2015 Pa. Commw. Unpub. LEXIS 382 (Pa. Commw. Ct. 2015) (holding that an appeal did not sufficiently address an agency's grounds by "simply argu[ing] that the RTKL places the burden of proof upon the [agency] and that the [agency] has provided no ... information in support of its assertion that" the records were exempt).

Here, the Requester's appeal consists of two separate headings: "Why My Request Seeks A Public Record" and "Rebuttal for Agency's Grounds For Denial." Under each heading, the Requester sets forth his corresponding argument. 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 Section 1101(a)(1). *See Barnett v. Pa. Dep't of Pub. Welfare*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Therefore, regardless of whether the Requester's legal arguments are correct, the Requester's appeal meets the requirements of Section 1101(a)(1) of the RTKL.

The City next argues that any responsive records, to the extent that they exist, are exempt under Section 708(b)(7) of the RTKL because they would be contained in an employee's personnel file. Section 708(b)(7) exempts from disclosure certain "records relating to an agency employee," including "[w]ritten criticisms of an employee" and "[i]nformation regarding discipline, demotion or discharge contained in a personnel file[, ... with the exception of] the final action of an agency that results in demotion or discharge." 65 P.S. § 67.708(b)(7)(vi); 65 P.S. § 67.708(b)(7)(viii). Based on the underlying purpose of the RTKL, "exemptions from

disclosure must be narrowly construed.” *Bowling*, 990 A.2d at 824. As a result, subsections within Section 708(b)(7) only apply to records specifically mentioned therein, and do not protect a broad class of generic “personnel records.” *See American Federation of Teachers v. Sch. Dist. of Phila.*, OOR Dkt. AP 2016-0598, 2016 PA O.O.R.D. LEXIS 936.

In support of the City’s assertions, Deputy Chief Repsher attests:

1. The requested records, if they existed, would be located in Lieutenant ... Leardi’s personnel file.
2. To the extent that any reports of misconduct and/or complaints were lodged against Lieutenant ... Leardi and existed in his personnel file, said reports and/or complaints did not result in final action that would have resulted in demotion or discharge of Lieutenant ... Leardi’s employment with the City....
3. As of the date of this attestation, no such documentation exists which memorializes any demotion or discharge of Lieutenant ... Leardi.

Under the RTKL, an affidavit or 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 the absence of any competent evidence that the City acted in bad faith, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Based on the evidence provided, the City has established that the records, if they exist, would be contained in Lieutenant Leardi’s personnel file. Further, the City has established that no “final action” resulting in demotion or discharge has occurred in regard to Lieutenant Leardi. As a result, the City has demonstrated that any information concerning discipline contained in Lieutenant Leardi’s personnel file would not be subject to public access because there is no final action of the City resulting in demotion or discharge. *See* 65 P.S. § 67.708(a)(1).

However, the City has not met its burden of proving that all complaints made against Lieutenant Leardi would be exempt from disclosure as “written criticisms of an employee.” *See* 65 P.S. § 67.708(b)(7)(vi). Because the City has not acknowledged whether these records exist, there is no evidence regarding the contents of any complaints. As a result, it is unclear whether any complaints were made by members of the public, or made by the City, Lieutenant Leardi’s employer, and, if so, what the nature of those complaints might be. While “written criticisms and performance evaluations by the agency of an employee that originate in the employment context and relationship” are subject to this exemption, complaints made by members of the public are not, even if those complaints constitute criticism of an employee. *See Palermo v. West Jefferson Hills Sch. Dist.*, OOR Dkt. AP 2014-1320, 2014 PA O.O.R.D. LEXIS 1418; *see also Overton v. Phila. Police Dep’t*, OOR Dkt. AP 2015-0471, 2015 PA O.O.R.D. LEXIS 512 (“The Department has failed to provide any evidence regarding the nature or content of the complaints sufficient to prove that the responsive records contain written criticisms of Officer Norman within the meaning of Section 708(b)(7) of the RTKL”); *Bhaya v. Central Bucks Sch. Dist.*, OOR Dkt. AP 2014-0319, 2014 PA O.O.R.D. LEXIS 372. Due to this lack of evidence, the City has not demonstrated that complaints made by members of the public are exempt under Section 708(b)(7) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part**, and the City is required to provide all responsive complaints made by members of the public 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 Northampton 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>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: August 12, 2016**

/s/ Kyle Applegate

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APPEALS OFFICER  
KYLE APPLGATE, ESQ.

Sent to: Severin Johnson (via e-mail only);  
Erin Hefferan (via e-mail only)

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<sup>2</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).