



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:	
	:	
<b>MARGARET MAZUR,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2016-1258</b>
	:	
<b>PENNSYLVANIA DEPARTMENT OF</b>	:	
<b>MILITARY AND VETERANS AFFAIRS,</b>	:	
<b>Respondent</b>	:	

### INTRODUCTION

Margaret Mazur (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Military and Veterans Affairs (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records regarding a disciplinary incident. The Department partially denied the Request, arguing that certain records are 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, denied in part, and dismissed as moot in part**, and the Department is required to take further action as directed.

### FACTUAL BACKGROUND

On July 8, 2016, the Request was filed, seeking:

[C]opies of records that are in my personnel file or any Agency records that have my name and/or SSN listing any information pertaining to: me being labeled as dishonest and/or a thief; the police report that was conducted on 05/18/2016; and any information that correlates with my PDC from 05/26/2016. Specifically to include any and all correspondence form the Agency to the Unemployment

Compensation Office regarding my unemployment claim which is currently under appeal. Specifically to include the Agency investigation and the police report leading to my suspension.

On July 15, 2016, the Department granted access to the letter confirming the Department's decision to suspend the Requester, but denying the other records on the basis that personnel records are exempt from disclosure under Section 708(b)(7) of the RTKL. *See* 65 P.S. § 67.708(b)(7).

On July 26, 2016, the Requester filed a timely appeal with the OOR, arguing that she is entitled to the records because no grievance had been signed and that the records related to the Requester directly. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 1, 2016, the Requester submitted a position statement and a "Designation of Representative" form, designating Carl Eric Owen, a resident of Idaho, as her representative. The same day, the Department submitted a position statement, along with two objections, asking the OOR to dismiss the Requester's argument because it was unsupported by an affidavit and because the OOR's Procedural Guidelines do not authorize non-attorney representatives of private citizens.<sup>1</sup>

On August 3, 2016, the Requester submitted a second position statement, a motion disclaiming her earlier designation of representation, a motion for *in camera* review, and an affidavit. On August 8, 2016, the OOR requested clarification of the Department's position statement and ruled on earlier objections and motions. On August 11, 2016, the Department

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<sup>1</sup> On August 2, 2016, the OOR took the objections under advisement. The OOR ultimately determined that the objection as to factual support would be addressed in this Final Determination and found that the Department's other objection was mooted by the Requester's withdrawal of representation. The OOR has not considered any of the argument submitted by Mr. Owen in this Final Determination.

submitted the affidavit of Jennifer Miller, a human resource analyst with the Department. On August 15, 2016, the Requester submitted a second verification and position statement.<sup>2</sup>

On August 16, 2016, the OOR requested further clarification regarding the August 11, 2016 affidavit. On August 19, 2016, the Department responded with a supplemental position statement and two additional affidavits from Ms. Miller. On August 24, 2016, the Requester filed another position statement arguing against the Department's submissions. On September 12, 2016, the Requester filed a final position statement.

### 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.

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<sup>2</sup> The Requester's August 15, 2016 submission and following submissions were received after the record closed; however to develop the record, the submissions were considered. *See* 65 P.S. § 1102(b)(2) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

*Id.* Here the Requester sought a hearing and an *in camera* review; however, these requests are denied because the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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 burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The Request seeks various regarding regarding the Requester’s employment with the Department. The Department claims that the withheld records are protected by Sections

708(b)(7)(vii) and 708(b)(7)(viii) of the RTKL. Section 708(b)(7)(vii) permits an agency to withhold “grievance material” and Section 708(b)(7)(viii) permits agencies to withhold information “regarding discipline, demotion or discharge contained in a personnel file.” 65 P.S. §§ 67.708(b)(7)(vii)-(viii). The Department withheld the following records:

1. Check #30196 issued from the Southwestern Veterans’ Center Members Fund in the amount of \$4784.00
2. Commonwealth Witness Statements (3 employees)
3. Business Analysis Checking Statements (listing May 16, 2016 transaction)
4. Written notice of Pre-disciplinary Conference
5. Pre-disciplinary Conference Minutes
6. Accounting office diagram and pictures and accompanying description
7. Employee Notice of Suspension Pending Investigation Letter
8. Grievance Resolution Letter
9. Notice of Financial Determination (Employer Copy) – Unemployment Compensation Board
10. Notice of Determination, Unemployment Compensation Board
11. Petition to Appeal, Unemployment Compensation Board
12. The requested Police Incident Report

**1. On appeal, the Requester produced certain records**

During the course of the appeal, the Requester entered Items 4, 7, 8 and part of Item 2 into the record. Because the Requester has verified that she possesses these records, the appeal is dismissed as moot as to these records.

**2. Items 2, 5, 9, 10 and 11 are personnel records that document employee discipline**

The Department argues that Items 1 through 11 are exempt under Section 708(b)(7), which exempts from disclosure certain “records relating to an agency employee,” including “[a] performance rating or review,” “[w]ritten criticisms of an employee,” “[g]rievance material,” 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)(ii), (vi), (viii).<sup>3</sup>

The Requester argues that Section 708(b)(7)(viii) is inapplicable because the exemption applies only to records of employee discipline that are contained within a personnel file, but the Department asserts that the documents at issue are “NOT accessible by the requester via DMVA intranet as these files are not maintained within her official personnel file; they are maintained within a separate electronic disciplinary file.”

The RTKL does not define the term “personnel file,” but the OOR has previously relied on the Inspection of Employment Records Law (“IERL”), which defines “personnel file” as follows:

If maintained by the employer, any application for employment, wage or salary information, notices of commendations, warning or discipline, authorization for a deduction or withholding of pay, fringe benefit information, leave records, employment history with the employer, including salary information, job title, dates of changes, retirement record, attendance records and performance evaluations. The term “personnel file” shall not include records of an employee relating to the investigation of a possible criminal offense, letters of reference, documents which are being developed or prepared for use in civil, criminal or grievance procedures, medical records or materials which are used by the employer to plan for future operations or information available to the employee under the Fair Credit Reporting Act (84 Stat. 1127-1136, 15 U.S.C. § 1681 et seq.)

43 P.S. § 1321; *see also Baraco and WGAL, News 8 v. Cumberland County*, OOR Dkt. AP 2014-1570, 2014 PA O.O.R.D. LEXIS 1212; *Blatcher and NBC Philadelphia v. City of Philadelphia*, OOR Dkt. AP 2015-2919, 2016 PA O.O.R.D. LEXIS 150.

Because the term “personnel file” has a statutory meaning, the Department’s characterization of the disposition of the documents does not control. The definition in the IERL

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<sup>3</sup> The Department attests that it did provide the Requester with the letter memorializing the final action of the agency in this case.

demonstrates that information related to warning or discipline is contained within the personnel file, except for documents prepared for use in civil, criminal or grievance procedures.

From the descriptions of the records in the Department's third position statement and supplemental affidavit, it is apparent that Items 9, 10 and 11 are filings and notices provided to or by the employee, made for the purposes of discipline but neither related to the grievance filed by the employee's union or the police investigation. Item 5 relates to a pre-disciplinary conference, during which the employee was provided information regarding her suspected wrongdoing and offered a chance to explain herself in order to determine what, if any, disciplinary action was merited. There is no evidence that this conference was related to the grievance or the police investigation, and, therefore, the materials memorializing it constitute disciplinary material contained within the statutory definition of a personnel file. Item 2 consists of three witness statements, one of which was provided by the Requester on appeal. The other two witness statements are matters relating to the employee discipline which are not grievance material, and, therefore, are part of the personnel file.

Because Items 2, 5, 9, 10, and 11 constitute disciplinary materials and filings within a personnel file, they are exempt from disclosure under Section 708(b)(7)(viii).

### **3. Items 1, 3 and 6 are not exempt under Section 708(b)(7)**

The Department argues that Items 1, 3 and 6 are exempt as items "preserved as evidence" in the record of an agency investigation which led to employee discipline, and, therefore, exempt from disclosure under Section 708(b)(7). Item 1 is a check which the Department asserts was preserved for the proceedings which resulted in the employee discipline at issue in this matter. This item cannot be exempt under Section 708(b)(7) because it is a financial record of the agency. The RTKL defines "financial records" to include "[a]ny account, voucher or contract

dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.” 65 P.S. § 67.102. Section 708(c) of the RTKL states that “[t]he exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (16), or (17).” 65 P.S. § 67.708(c). Because a check is a voucher dealing with the receipt or disbursement of funds by an agency, it is a financial record, and not subject to Section 708(b)(7).

Item 3 is a set of “Business analysis checking statements” that list the transaction on May 16, 2016 upon which the discipline was based, and Item 6 is a diagram of the accounting office accompanied by photographs of six employees and descriptions thereof. The Department asserts that these items are protected because they were preserved in relation to the incident that formed the basis for employee discipline. While the affidavits submitted by the Department describe most of the Items clearly, the Department’s affidavits are conclusory as to Items 3 and 6. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Further, the Department does not explain how Items 3 and 6 relate to the disciplinary action against the Requester. Because the Department has not demonstrated how Items 3 and 6 relate to employee discipline or why they would be in a personnel folder, they not exempt from disclosure.

#### **4. The Department does not possess a copy of the requested police report**

The Department submitted the affidavit of Jennifer Miller, an employee of the Department, who attests that a search was conducted and that the requested police report, Item 12, does not exist in the Department’s possession, custody or control. Under the RTKL, an

affidavit may serve as sufficient evidentiary support. *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 evidence that the Department has acted in bad faith or that the records do, in fact, exist, “the averments in [the affidavit] 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 Department has met its burden of proof that it does not possess the requested police report.

### CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part, denied in part**, and **dismissed as moot in part**, and the Department is required to produce Items 1, 3, and 6 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 Commonwealth Court. 65 P.S. § 67.1301(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.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 14, 2016**

*/s/ Jordan Davis*

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APPEALS OFFICER  
JORDAN C. DAVIS, ESQ

Sent to: Margaret Mazur (via e-mail only);  
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<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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