



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**MICHAEL ELLIS,
Requester**

v.

**CITY OF PITTSBURGH,
Respondent**

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Docket No: AP 2016-1351

INTRODUCTION

Michael Ellis (“Requester”), an inmate at SCI-Pittsburgh, submitted two requests (“Requests”) to the City of Pittsburgh (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to two police officers. The City partially denied the Requests, arguing that certain records 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 in part** and **dismissed as moot in part**, and the City is not required to take any further action.

FACTUAL BACKGROUND

On June 27, 2016, the first request was filed, seeking:

Records of Jeffrey W. Labella employed by the City of Pittsburgh as a police officer:

[1] Any conduct records before and after becoming a police officer,

including misconduct records.

- [2] Test scores on becoming a police officer, including excessive force scores or ratings.
- [3] Records of any charges or lawsuits filed against him before & after becoming a police officer.
- [4] Records of any incidents exhibiting racial bias, excessive force, or any unlawful acts.
- [5] Records of any drivers [sic] license suspension, including reasons therefrom [sic].
- [6] Any reprimands enforced before and after becoming a police officer, including records while employed as an EMT.

On the same day, a nearly identical request was filed, seeking the same information regarding Elizabeth Vitalbo, another police officer.¹

On June 27, 2016, the City invoked a thirty-day extension to respond to the Requests. *See* 65 P.S. § 67.902. On August 4, 2016, the City denied Items 1, 4, 5 and 6 of the Requests,² asserting that, to the best of its knowledge, the requested records do not exist in the City's possession, custody or control, and that any records responsive to Items 1 and 6 would be employee records, and therefore, exempt from disclosure. *See* 65 P.S. § 67.708(b)(7). The City provided test scores in response to Item 2 of the Requests and noted that lawsuits responsive to Item 3 could be found online.

On August 16, 2016, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.³ The OOR invited both parties to supplement the record and

¹ The only difference in the Requests was that Item 6 of the second request specified "prior employment" instead of "while employed as an EMT."

² The Requester claims the Requests were deemed denied on August 4, 2016, but the City mailed a timely response on that day.

³ The appeals were docketed at OOR Dkt. AP 2016-1351 and 2016-1352; however, because they involve almost identical requests, the appeals are hereby consolidated under OOR Dkt. AP 2016-1351.

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

On August 24, 2016, the City submitted a position statement reiterating its grounds for denial, arguing that records responsive to Item 4 of the Requests are also employee records, 65 P.S. § 67.708(b)(7), and providing hard copies of docket records in response to Item 3 of the Requests. In support of its position, the City submitted three notarized statements made under penalty of perjury by Commander Clarence Trapp, Officer Labella's commanding officer; Deborah Walker, the Director of the Office of Municipal Investigations; and Commander Daniel Herrmann, Officer Vitalbo's commanding officer. On August 30, 2016, the Requester submitted a position statement, challenging the City's assertions and stating that he does not have access to a computer.

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. 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 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. 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. 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)). Likewise, “[t]he 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).

1. The City has proven that conduct records, including reprimands, are exempt from disclosure

The City argues that records responsive to Items 1, 4 and 6 of the Requests are exempt from disclosure because they are employee records. 65 P.S. § 67.708(b)(7). Section 708(b)(7) exempts from disclosure certain records relating to an agency employee, including “[a] performance rating or review,” “[w]ritten criticisms of an employee” and “[i]nformation regarding discipline, demotion or discharge contained in a personnel file.” 65 P.S. §§ 67.708(b)(7)(ii), (vi), (viii). However, Section 708(b)(7)(viii) of the RTKL also states that “[t]his subparagraph shall not apply to the final action of an agency that results in demotion or discharge.” 65 P.S. § 67.708(b)(7)(viii).

Here, Commander Trapp, Officer LaBella’s commanding officer, and Commander Herrmann, Officer Vitalbo’s commanding officer, both attest to the fact that records responsive to Items 1 and 4 of the Requests exist in the Officers’ personnel files. Director Walker, the Director of the Office of Municipal Investigations also attests to the fact that, while other the charges were unfounded or the officers have been exonerated, two investigations remain open. 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 City has acted in bad faith “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)). From Director Walker’s affidavit, it is clear that there has not been a final action resulting in the demotion or discharge of

either one of the officers. Therefore, the City has met its burden of proof that the records responsive to Items 1, 4, and 6 of the Requests are exempt from disclosure. 65 P.S. § 67.708(a)(1).

2. The City has proven that records responsive to Items 2 and 5 and a portion of Item 6 of the Requests do not exist

With respect to the records sought in Item 2 of the Request, the City provided the Officers' Civil Service Examination scores, and both Commanders Trapp and Herrmann attest to the fact that there are no test scores for excessive force or ratings. Similarly, with respect to a portion of Item 6 of the Requests, Commanders Trapp and Herrmann attest to the fact that, after thorough searches of the Officers' personnel files, the Commanders are unaware of any reprimands from the time *before* the Officers joined the police force. Finally, with respect to Item 5 of the Requests, both Commanders attest to the fact that they have checked for driver's license suspensions and found none. Accordingly, the City has met its burden of proof in showing records responsive to these Items of the Requests do not exist. 65 P.S. § 67.708(a)(1).

3. The City provided records responsive to Item 3 of the Requests during the appeal

With respect to Item 3 of the Request, the City provided copies of the publically-available docket records regarding three law suits. Accordingly, the appeal of Item 3 of the Requests is dismissed as moot.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied in part** and **dismissed as moot in part**, and the City 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 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 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: September 15, 2016

/s/ Blake Eilers

Blake Eilers, Esq.
Appeals Officer

Sent to: Michael Ellis, LQ-2894;
Celia Liss (via e-mail only);
Benjamin Smith (via e-mail only);
Eileen Hotham (via e-mail only)

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