



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SHANE RALSTON,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-1340
	:	
YORK AREA REGIONAL	:	
POLICE DEPARTMENT,	:	
Respondent	:	

INTRODUCTION

Shane Ralston (“Requester”) submitted a request (“Request”) to the York Area Regional Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records pertaining to an investigation into a complaint. The Department denied the Request, stating that the records would document the discipline, demotion, or discharge of an agency employee. 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 Department is not required to take any further action.

FACTUAL BACKGROUND

On August 7, 2016, the Request was filed, seeking:

... an opportunity to inspect or obtain copies of public records that document the investigation of complaints against Corporal Daniel Miller in his handling of an incident on July 7, 2016, involving Shane and Jennifer Ralston. These records

shall include any reports, e-mails, letters, phone transcripts or other evidence gathered by Police Chief Timothy Damon or other employees of [the] Department as part of the aforementioned investigation.

On August 10, 2016, the Department denied the Request, stating that the responsive records constitute “information regarding discipline, demotion, or discharge contained in a personnel file.” 65 P.S. § 67.708(b)(7)(viii).

On August 15, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 22, 2016, the Department submitted a position statement, reiterating its ground for denial, and adding that the records are also related to a noncriminal investigation conducted by the Department, 65 P.S. § 67.708(b)(17).² The Department also provided the sworn affidavit of Timothy Damon, Chief of Police and Open Records Officer for the Department.

On September 2, 2016, in response to an OOR request for clarification, the Department provided an additional submission addressing the creation of the Department. In an additional sworn affidavit, Chief Damon verified the accuracy of the statements contained in this submission.

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.*

¹ The Requester provided the OOR with an additional thirty days to issue its final determination. *See* 65 P.S. § 67.1101(b)(1).

² The Department is permitted to assert these new reasons on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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 requisite information and evidence before it to properly adjudicate the matter.

The Department 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). 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)).

On appeal, the Department argues that the responsive records are related to a noncriminal investigation into the conduct of one of its police officers, and are, therefore, exempt from disclosure. 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.” 65 P.S. § 67.708(b)(17)(ii). 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. In *Chawaga v. Pa. Dep’t of Public Welfare*, the Commonwealth Court held that a performance audit was not part of the Department’s legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department’s public assistance services. 91 A.3d 257, 259 (Pa. Commw. Ct. 2014). The Court noted that “[a] contrary determination of an ‘official probe’ would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure.” *Id.*

In its verified supplemental submission, the Department explains that regional police departments are formed pursuant to the Pennsylvania Intergovernmental Cooperation Act, 53 Pa.

C.S. §§ 2301 *et seq.*, and Article IX, Section 5 of the Pennsylvania Constitution. Pursuant to this authority, the Township of Windsor and the Township of York entered into a Charter Agreement that established the Department. This Charter Agreement created the York Area Regional Police Commission, which, according to the Charter Agreement, “is the governing body of the York Area Regional Police Department.” Under the Charter Agreement, the Commission “shall be responsible for the operation, management, and administration of the Regional Department and have the functions, powers and duties prescribed by this Agreement,” including the “supervision and direction of all of the police activities....”

Regarding the investigation at issue, Chief Damon attests, in relevant part:

4. The [Request] seeks documents related to a citizen complaint that [the Requester] filed with the Department alleging that Corporal Miller engaged in “unprofessional behavior, abuse of authority and violation of departmental policy” (the “Complaint”).
5. York Area Regional Police Department General Order 16-02-11 “Officer Commendations or Complaints” authorizes the Department to investigate and dispose of “Citizen Complaints.”
6. General Order 16-02-11 was approved by the York Area Regional Police Commission in its official capacity as the legislative agency of the Department.
7. In accordance with General Order 16-02-11, the Department did investigate each and every fact and element of the Complaint....
8. The investigation of the Complaint was a searching inquiry/official probe of a noncriminal matter.
9. As a result of the departmental investigation, it was determined that there were no violations of departmental policy as alleged in the Complaint and the allegations set forth in the Complaint were unfounded.
10. The investigation of Corporal Miller’s actions related to the Complaint did not result in a demotion or discharge of Corporal Miller.

11. The investigation did not result in the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization or a settlement agreement.

The OOR has held that a borough derives “legislatively granted fact-finding powers” to investigate the conduct of its police officers from the Borough Code, which states that a borough’s council “may appoint police officers” and “may remove, suspend or reduce in rank any police officer” pursuant to the provisions of the Police Tenure Act. *See Gettysburg Times v. Borough of Gettysburg*, OOR Dkt. AP 2016-0642, 2016 PA O.O.R.D. LEXIS 1128 (citing 8 Pa.C.S. §§ 1121(a)(1)-(2)); *see also* 53 P.S. § 812 (pertaining to the removal of police officers under the Police Tenure Act). In the present matter, the Department was formed as a result of a Charter Agreement between York Township, a township of the first class, and Windsor Township, a township of the second class. Both the First Class Township Code and the Second Class Township Code give boards of supervisors/commissioners the authority to appoint police officers. *See* 53 P.S. § 56401; 53 P.S. § 66902. Additionally, the First Class Township Code states that “[t]he chief of police and policemen shall obey the orders of the board of township commissioners or such other person or committee as may be designated by ordinance or resolution of the board for such purposes.” 53 P.S. § 56405. Meanwhile, the Second Class Township Code provides the same authority to remove, suspend, or reduce in rank a police officer as the Borough Code. *Compare* 53 P.S. § 66912, *with* 8 Pa.C.S. § 1121(a)(2). Therefore, both the First and Second Class Township Codes provide the same legislatively granted fact-finding powers to investigate police conduct as the Borough Code does.

Here, the Charter Agreement states that the Department and the Commission “shall not be governed by any Borough, City or Township Code other than as stated herein”; however, the Charter Agreement also grants the Commission the authority to operate, manage, and administer

the Department, powers consistent with the First and Second Class Township Codes. As a result, the Commission had the authority to enact General Order 16-02-11, and the Department has the authority to conduct noncriminal investigations into the conduct of its police officers. *Gettysburg Times*, OOR Dkt. AP 2016-0642, 2016 PA O.O.R.D. LEXIS 1128. Chief Damon attests that the Department conducted an investigation after a complaint was filed by the Requester, and the Request seeks records regarding this investigation. As a result, the Department has met its burden of proving that it conducted noncriminal investigations as contemplated by Section 708(b)(17), and that the records relate to this noncriminal investigation. Consequently, the Department 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 [exemption] 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). Here, the Chief Damon attests that the investigation did not result in demotion or discharge, or the imposition of a fine or penalty. Therefore, the Request does not seek records that are subject to public access.

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the Department 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 York 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 12, 2016

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Shane Ralston (via e-mail only);
Steven Hovis, Esq. (via e-mail only)

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