



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**ERNEST SCHLEGEL,
Requester**

v.

**CITY OF READING,
Respondent**

:
:
:
:
:
:
:
:
:
:
:
:

Docket No: AP 2022-2459

FACTUAL BACKGROUND

On October 10, 2022, Ernest Schlegel (“Requester”) submitted a request (“Request”) to the City of Reading (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “[a]ny and all written materials, including, without limitation, all complaints, replies to complaint, correspondence, including electronic communications, and all other writings in any way related to the complaint by Jamar Kelly that led to the removal of [the Requester] from the Board of the Redevelopment Authority [(“Board”)] of the City of Reading.”

As the Requester did not receive the City’s response within five business days of the Request, on October 24, 2022, the Requester filed an appeal with the Office of Open Records (“OOR”) claiming that the Request was deemed denied. *See* 65 P.S. § 67.901. 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. 65 P.S. § 67.1101(c).

On October 31, 2022, the City submitted a position statement arguing that, to the extent that the Request is sufficiently specific, it facially seeks records related to a noncriminal investigation, 65 P.S. § 67.708(17), and implicates records that reflect internal predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), and records that are protected by the attorney-client privilege. The City also asserts the Request is insufficiently specific, 65 P.S. § 67.703, in that the Request seeks “any and all materials ... without limitations” and it does not identify recipients or authors of the requested documents. In support of its position, the City submitted the attestation, made under the penalty of perjury pursuant to 18 Pa.C.S. § 4904, of Frederick Lachat, III, Esq.

The Requester did not submit any additional information on appeal.

LEGAL ANALYSIS

The City is a local agency subject to the RTKL. 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. As an agency subject to the RTKL, the City is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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)).

Although the City alludes that the Request is insufficiently specific, at the same time, the City argues the Request, on its face, seeks records related to the noncriminal investigation into the allegation that the Requester used a racial slur in an email. The City asserts that the investigation was conducted, following the filing of a grievance, under the City’s authority to appoint and

remove members of the Board. The City cites *Pa. Liquor Ctrl. Bd. v. Perretta*, 2019 Pa. Commw. Unpub. LEXIS 628 (Pa. Commw. Ct. 2019), and the Urban Redevelopment Law, 35 P.S. §§ 1701 – 1719.2, to support of its argument.

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[i]nvestigative materials, notes, correspondence and reports,” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation” and “[c]onstitute an unwarranted invasion of privacy.” 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See 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; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

Regarding the authority to conduct noncriminal investigations, the City relies on statutory provisions in the Urban Redevelopment Law, 35 P.S. §§ 1705 and 1703(f). Section 1703(f) of the Urban Redevelopment Law defines the “Governing Body” as, “[i]n the case of a city, the city council or other legislative body thereof, and in the case of a county, the board of county commissioners or other legislative body thereof.” 35 P.S. § 1703(f). Section 1705 of the Urban Redevelopment Law, provides the following:

Upon certification of a resolution declaring the need for an Authority to operate in a municipality or county, the governing body shall appoint, as members of the Authority, five citizens who, except in the case of cities of the third class, shall be residents of the municipality or county in which the Authority is to operate. In the case of a city of the third class, a majority of the members of the Authority shall be residents of the city, and the remainder may be nonresidents who own and operate businesses in the city in which the Authority is to operate.

35 P.S. § 1705. Further, Section 1709 of Urban Redevelopment Law sets forth numerous powers and responsibilities of the Authority and, in turn, the Board, including the general power to “constitute a public body, corporate and politic, exercising public powers of the Commonwealth as an agency thereof, which powers shall include all powers necessary or appropriate to carry out and effectuate the purposes and provisions of this act, including the following powers in addition to those herein otherwise granted....” 35 P.S. § 1709. Finally, the City’s Home Rule Charter, Sec. 210, provides:

Council shall have the power, by ordinance, to make or cause to be made, *investigations*, audits, or studies *of the City and the conduct of any City department, office or agency*, and, for this purpose may retain professional and technical assistance, subpoena witnesses, administer oaths, take testimony, require the production of evidence, and provide funds for such investigation, audit, or study.

The subjects of such investigation, audit, or study shall be specifically stated in the authorizing ordinance.¹

The City presents the attestation of Attorney Lachat in support of its argument, which states, the following:

2. As City Solicitor I serve as an attorney to the City of Reading Administration and the City Council.

3. To the best of my ability I have collected and reviewed the records identified as responsive to the [R]equest. **All** of them involve the City’s official inquiry into, and an official examination of, a complaint of racial discrimination made against the Request[e]r. The Complainant, an African American man, Jamar Kelly, turned over a hostile email sent to him in which the Request[e]r used a racial slur. Ultimately this email sent by the Request[e]r to the Complainant led to the Request[e]r’s official removal from the Board of Directors of the City of Reading Redevelopment Authority.

4. During the inquiry, various City officials inquired as to the legally and policy appropriate action needed to be taken as a response to this email. A specially scheduled hearing was held in which the [Requester] was given an opportunity to speak and defend himself. After which, the City Council voted unanimously to remove him from the Board of Directors of the Reading Redevelopment Authority.

¹See https://codelibrary.amlegal.com/codes/readingpa/latest/reading_pa/0-0-0-195 (last accessed November 7, 2022). (Emphasis added).

5. This inquiry and removal was conducted pursuant to the City Council's legislated duties and authority under the City of Reading's Home Rule Charter and Urban Redevelopment Law....

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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).

Here, the City's has established that it conducts noncriminal investigations as part of its legislatively granted authority pursuant to the Urban Redevelopment Law and the City's Home Rule Charter. The evidence also demonstrates that the City's Solicitor reviewed the records identified as responsive and that all records were related to the investigation of the complaint alleging racial discriminatory actions on the part of the Requester, an Authority Board member. Accordingly, the City has demonstrated that it has the legislatively granted authority to conduct noncriminal investigations and such an investigation took place related to complaint submitted to the District and the DA's Office. *See* 65 P.S. § 67.708(b)(17)(ii); *see also Perretta v. Pa. Liquor Control Bd.*, No. 1470 C.D. 2018, 2019 Pa. Commw. Unpub. LEXIS 628 (Pa. Commw. Ct. 2019); *Haring v. Central Bucks Sch. Dist.*, OOR Dkt. AP 2020-0340, 2020 PA O.O.R.D. LEXIS 1851 (holding that records related to the school district's investigation of bullying allegations related to the girls' lacrosse program was conducted pursuant to its legislatively granted authority); *Davies v. Leechburg Area Sch. Dist.*, OOR Dkt. AP 2016-1110, 2016 PA O.O.R.D. LEXIS 1335 (holding that pursuant to the Public School Code, the school district had the duty and authority to investigate allegations of hazing concerning the boys' basketball program). Further, the City's evidence demonstrates that the responsive records were created as a result of the described investigation into alleged discriminatory conduct by a City official and were used as part of its internal noncriminal investigation into whether the language used in the subject email violated City

policies, in order to determine the attendant discipline. *Wickard v. Pine Richland Sch. Dist.*, OOR Dkt. AP 2021-1287, 2021 PA O.O.R.D. LEXIS 1792 (holding that the requested discrimination complaint form was facially exempt under Section 708(b)(17)(i) of the RTKL); *Needelman v. Spring-Ford Area Sch. Dist.*, OOR Dkt. AP 2018-1814, 2018 PA O.O.R.D. LEXIS 1526 (holding that the agency had the authority to conduct a noncriminal investigation into the conduct of a teacher). Furthermore, the Request expressly seeks any and all categories of records that “*in any way related to the complaint by Jamar Kelly that led to the removal of [the Requester] from the Board of the Redevelopment Authority [(“Board”)] of the City of Reading.*” (Emphasis added). *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal materials when determining whether an exemption applies). Accordingly, the City has proven that the records responsive to the Request are exempt from disclosure under Section 708(b)(17)(ii) of the RTKL. *See* 65 P.S. § 67.708(a); 65 P.S. § 67.708(b)(17)(ii).²

CONCLUSION

For the foregoing reasons, the appeal is **denied**, 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 Berks 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. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a

² Because we have determined that the records are exempt from disclosure under 65 P.S. § 67.708(b)(17), we need not address the City’s alternative claims of exemption under Sections 703 or 708(b)(10) of the RTKL, or the attorney-client privilege.

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: November 23, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG

Sent via email to: Ernest Schlegel; Igor Litvinov, Esq.; Frederick Lachat, III, Esq.

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