



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**DAYMON BIRCKETT,
Requester**

v.

**CITY OF PHILADELPHIA POLICE
DEPARTMENT,
Respondent**

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Docket No: AP 2022-2248

FACTUAL BACKGROUND

The Office of Open Records (“OOR”) received the above-captioned appeal under the Right-to-Know Law (“RTKL”), 65 P.S. § 67.101 *et seq.* Upon review of the file, the appeal is **denied in part and dismissed in part** for the reasons discussed below.

On September 26, 2022, Daymon Birckett (“Requester”), an inmate at SCI-Coal Township, filed an appeal with the OOR, asserting that he filed two requests (collectively “Requests”) with the City of Philadelphia Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Request 1: I would like to request the following items related to Detective William Sierra #9103 (1) The IAD officer complaint record: (2) the Police Board of Inquiry (PBI) Disciplinary Record information: (3) the concise officer History list of All IAD complaints & PBI cases: (4) All citizen’s complaints & misconduct against this officer.

Request 2: Requesting Any & All Reports Documents, Investigations, files, complaints, letters, writing in custody of PPD & Internal affairs, relating to Det

John Verrecchio #609 for the period from date of his appointment as a police officer to present. Said writing should include all internal affairs report, personnel files to the extent it has of Citizen Complaints, alleged misconduct. All complaints & misconduct relating to his conduct as a PPD officer.

The Requester contends the Requests were deemed denied pursuant to 65 P.S. § 67.901 and appealed to the OOR challenging the deemed denials 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 this appeal. 65 P.S. § 67.1101(c).

On October 6, 2022, the Department submitted a position statement indicating Request 1 should be dismissed as premature because the appeal was filed before the Department issued a timely response. The Department contends it responded to Request 2 on September 21, 2022 and reiterated its grounds for the denial of Request 2 in its submission. In support of its position, the Department submitted the affidavit of Police Officer Theresa Jones (“Officer Jones”) made pursuant to 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities. The Requester did not file a submission.

LEGAL ANALYSIS

The Department 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 Department 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*,

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

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)).

1. The appeal from Request 1 is premature

Section 901 of the RTKL states that “[t]he time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency.” 65 P.S. § 67.901; *see also Commonwealth v. Donahue*, 98 A.3d 1223 (Pa. 2014). Here, the Department indicated it received Request 1 “...via US Mail on September 30, 2022.” Officer Jones Statement ¶ 3.

Under the RTKL, a statement made under the penalty of perjury 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 competent evidence that the Department acted in bad faith, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep't of Envtl. 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)). Accepting Officer Jones’ statement as true, because the Department received Request 1 on September 30, 2022, it had until October 7, 2022 to respond to the Request. As the appeal was filed on September 26, 2022, the appeal regarding Request 1 is premature and must be dismissed.²

2. Records sought in Request 2 are exempt noncriminal investigatory records

The Department argues the records sought in Request 2 seek records exempt under the noncriminal investigation exemption of the RTKL pursuant to 65 P.S. § 67.708(b)(17). Request

² The Department noted that it planned to send a response to this Request on October 7, 2022; as the appeal period from any final response sent on October 7, 2022, has lapsed, the Requester is not prohibited from filing the same Request with the Department and, if necessary, filing an appeal with the OOR pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

2 seeks records regarding a specific Department employee and “[s]aid writing should include all internal affairs report, personnel files to the extent it has of Citizen Complaints, alleged misconduct.”

Section 708(b)(17) of the RTKL exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including ...[c]omplaints submitted to an agency...[and i]nvestigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(i)-(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. An official probe only applies to noncriminal investigations conducted by agencies acting with their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

Here, Request 2 seeks records regarding allegations of misconduct, Internal Affairs Bureau (“IAB”) materials, and complaints made against a specific Detective. Officer Jones confirms receipt of Request 2, states “...I am familiar with the...files...” and “[t]he request seeks investigative records generated in the course of non-criminal investigations into employee misconduct.” Officer Jones Statement ¶¶ 1, 3, 4-5. The Department explains in its submission that the Request, on its face seeks records that fall within this exemption which is corroborated by Officer Jones’ statement indicating the materials sought constitute records compiled by the Department in furtherance of internal non-criminal investigations of employee misconduct.

The OOR has held that the Department's IAB is responsible for investigations into allegations of Department employee misconduct pursuant to Philadelphia Charter § 5-200 which are noncriminal in nature. *See Washington v. Philadelphia Police Department*, OOR Dkt. AP 2022-0682, 2022 PA O.O.R.D. LEXIS 964; *Ali v. Philadelphia Police Department*, OOR Dkt. AP 2022-1230, 2022 PA O.O.R.D. LEXIS 1484. While the Officer Jones' statement is conclusory, the Department met its burden under the preponderance of evidence standard, that it is more likely than not, that the records in question are noncriminal investigatory materials based on the totality of the record. First, the request itself seeks 'complaints' and IAB records regarding allegations of wrongdoing by a Department Detective. The Department's IAB records are investigations that are noncriminal in nature. *See id.* Next, the Department provided the uncontested statement of Officer Jones who corroborates the fact that records in question constitute noncriminal investigative materials. There is no evidence to show the Department acted in bad faith and as stated above, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Thus, given the evidentiary standard, based on the very nature of the records sought, and accepting Officer Jones' statement as true, the Department has met its burden of proof to demonstrate it properly withheld records pursuant to 65 P.S. § 67.708(b)(17).³

CONCLUSION

For the foregoing reasons, the appeal is **denied in part**, and **dismissed in part** 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

³ The Department raised additional arguments to support the denial of Request 2. Having found the requested records exempt pursuant to 65 P.S. § 67.708(b)(17), the OOR will not address those additional arguments in this Final Determination.

to the Philadelphia 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 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: November 23, 2022

/s/ Lois Lara

APPEALS OFFICER
LOIS LARA

Sent to: Daymon Birckett, JJ2471 (via US Mail only);
Javier Soler, Esq. (via email only); and
Officer Theresa Jones, Assistant AORO (via email only)

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