pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DENNIS LAPIC AND	:	
HESLET HOUSE B&B,	:	
Requester	:	
	:	**Docket No: AP 2022-2555**
v.	:	
	:	
PENNSYLVANIA DEPARTMENT OF	:	
REVENUE,	:	
Respondent	:	

FACTUAL BACKGROUND

On November 3, 2022, Dennis Lapic and Heslet House, LLC, ("Requester") submitted a request ("Request") to the Pennsylvania Department of Revenue ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking a list of:

> 1[.] [T]hose people, companies, or entities that remitted the PA 6% sales tax for the year 2021 for Beaver County[.]
>
> 2[.] The amount remitted by each, for Beaver County.

On November 7, 2022, the Department denied the Request, arguing that the information requested is confidential taxpayer information not subject to the RTKL.[1] More specifically, the Department argued that Pennsylvania law prohibits the release of any information reported on a

[1] The letter from the Department is dated October 7, 2022; however, the letter references the date of the request, i.e., November 3, 2022, and the Requester's appeal denotes the response date was November 7, 2022. Thus, October 7, 2022 appears to be a typographical error.

return pursuant to 72 P.S. §§ 731 and 7274, and as a result the records are not presumed to be "public record" in accordance with 65 P.S. § 67.305.

On November 8, 2022, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.[2] 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). In support of the appeal, the Requester submitted a position statement on November 14, 2022.

On November 17, 2022, the Department submitted a position statement reiterating its grounds for denial. The Department claims that the records requested are exempt from disclosure pursuant to state law. In support of its position, the Department submitted attestations made subject to the penalties of unsworn falsification of authorities, 18 Pa.C.S. § 4904, of Joshua Kunkel, the Department's Deputy Agency Open Records Officer, and Shane Sanders, the Department's Director of Research.

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 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. 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.*

[2] 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).").

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 Department argues that the responsive records are confidential under the Fiscal Code, which states, in part:

> Any information gained by any administrative department, board, or commission, as a result of any returns, investigations, hearings or verifications required or authorized under the statutes of the Commonwealth imposing taxes or bonus for State purposes, or providing for the collection of the same, shall be confidential except for official purposes...

72 P.S. § 731. Additionally, the Tax Reform Code of 1971 makes certain information pertaining to sales taxes, personal income taxes and corporate net income taxes confidential. *See* 72 P.S. § 7274 ("Any information gained by the [D]epartment as a result of any return, examination, investigation, hearing or verification ... shall be confidential, except for official purposes and except in accordance with proper judicial order or as otherwise provided by law...."); 72 P.S. § 7353(f) ("It shall be unlawful for any officer, agency or employee of the Commonwealth to divulge or make known in any manner whatever, not provided by law, except for official purposes, to any person, the amount or source of income, profits, losses, expenditures or any particular thereof set forth or disclosed in any return ... to be seen or examined by any person except as provided by law...."); 72 P.S. § 7408(b) ("Any information gained by the [D]epartment, as a result of any returns, investigations, or verifications required to be made by this article, shall be confidential, except for official purposes....").

The Department argues that any information obtained by the Department as a result of any return, examination, investigation, hearing or verification, shall be confidential in accordance with 72 P.S. § 7274. The Department further argues that this confidentiality provision in the Fiscal Code establishes the nonpublic nature of "any information gained" by the Department as the result

of "any return." In support of this argument, the Department provides the attestation of Joshua Kunkel, the Deputy Agency Open Records Officer for the Department, who attests as follows:

> I am aware of and have reviewed the request[,] dated November 3, 2022 ("Request"), submitted by Dennis Lapic[.]
>
> I worked with the Department's Bureau of Research to conduct a thorough search to identify records that may be responsive to the request.
>
> The Department determined that there were responsive records to the Request.
>
> The Department determined that the records were obtained from confidential tax information gained as a result of sales tax returns required or authorized under the statutes of the Commonwealth imposing taxes or providing for the collection of the same.
>
> Therefore, the Department also determined that the documents should be withheld pursuant to the confidentiality sections of the Fiscal and Tax Reform Codes. 72 P.S. §§ 731 and 7274.

Kunkel Attestation, ¶¶ 3, 5-8.

The Department also provides the attestation of Shane Sanders, the Director of the Bureau of Research for the Department, who additionally attests that:

> Any and all potentially responsive records that may possibly exist would necessarily come from records that were obtained from confidential tax information gained as a result of sales tax returns required or authorized under the statutes of the Commonwealth imposing taxes or providing for the collection of the same.

Sanders Attestation, ¶ 7.

In support of this appeal, the Requester submits a position statement and argues that a balancing test should be performed. The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may

release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.,* 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act). However, the constitutional right to privacy is not at issue, but rather, a statutory enactment that makes information confidential.

Under the RTKL, an attestation 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 attestations] 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)).

The Department has shown that the requested records would necessarily result from "any returns, investigations, hearings or verifications...." 72 P.S. § 731. Accordingly, the Department has met its burden of proving that the responsive records are confidential under the Fiscal Code and are therefore not subject to access under the RTKL. *See* 65 P.S. § 67.306 ("Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree"); *Bouchard v. Pa. Dep't of Rev.*, OOR Dkt. 2020-0799, 2020 PA O.O.R.D. LEXIS 1326; *Macdonald-Matthes v. Pa. Dep't of Rev.*, OOR Dkt. 2014-1647, 2015,2014 PA O.O.R.D. LEXIS 106; *Hite v. Pa. Dep't of Rev.*, OOR Dkt. AP 2014-1945, 2015 PA O.O.R.D. LEXIS 38.

The Requester outlines that the records requested will be used to determine lost revenue for the Department; however, the balancing test relied upon by the Requester is only utilized when a record is presumed to be a public record and not subject to the exclusions listed in Section 305

(a) of the RTKL. Specifically, the presumption shall not apply if, "…the record is exempt from disclosure under any other Federal or State law or regulation…" 65 P.S. § 67.305 (a)(3). The Department has met its burden of proof, i.e., the records requested are "expressly exempt from disclosure" pursuant to the Fiscal Code. Thus, the balancing test relied upon by the Requester is not a determinative factor in this case.

CONCLUSION

For the foregoing reasons, the 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 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 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] 65 P.S. § 67.1303. This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: November 28, 2022

/s/ Bandy L. Jarosz

APPEALS OFFICER
BANDY L. JAROSZ, ESQ.

Sent to: Dennis Lapic (via portal)
Lora Kulick (via portal)
Christina Dunn (via portal)

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