pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SHAWN WIESEN,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2022-2573**
	:	
ABINGTON TOWNSHIP,	:	
Respondent	:	

FACTUAL BACKGROUND

On October 19, 2022, Shawn Wiesen ("Requester") submitted a request ("Request") to Abington Township ("Township") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking a specified police incident report.[1]

On October 26, 2022, the Township denied the Request, arguing that the responsive record is exempt from disclosure under the RTKL as relating to a criminal investigation, 65 P.S. § 67.708(b)(16), or as relating to a noncriminal investigation of the Township, 65 P.S. § 67.708(b)(17), and that the responsive record is also protected by the Criminal History Record Information Act ("CHRIA"), 18 Pa.C.S. §§ 9101-9106.

[1] The Request specifies, among other information, the date, time, and location of the incident.

On November 9, 2022, the Requester[2] appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 16, 2022, the Requester provided a position statement in support of the appeal, as well as a copy of House Bill 2525 ("HB 2525"). HB2525 amends CHIRA to provide that, generally, a victim or a victim's representative is entitled to receive investigative material.

On November 28, 2022,[3] the Township submitted a position statement reiterating its grounds for denial.

On November 29, 2022,[4] in support of its position, the Township submitted the sworn affidavit of its Open Records Officer and Assistant Township Manager, Tara Wehmeyer ("Wehmeyer Affidavit").

LEGAL ANALYSIS

The Township 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 Township 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

[2] The appeal was filed by E. Douglas DiSandro, Esq. and DiSandro & Malloy, PC on behalf of the Requester.

[3] The submission period in this matter closed on November 22, 2022. Having received no submission from the Township, the OOR extended the submission period for both parties until November 28, 2022. *See* 65 P.S. § 67.1102(a)(1) (vesting appeals officers with the discretion to establish a schedule for the parties to submit evidence and argument).

[4] On November 28, 2022, the Township requested an extension of time until November 29, 2022 to provide an affidavit in support of its position. On November 29, 2022, the OOR granted the Township's request. *See* 65 P.S. § 67.1102(b)(3) ("In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

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)).

In this instance, the Township argues that it located the requested report[5] but that the report is exempt from disclosure under the RTKL as relating to a criminal investigation, 65 P.S. § 67.708(b)(16), or as relating to a noncriminal investigation of the Township, 65 P.S. § 67.708(b)(17). Specifically, the Township argues that the "record is a police incident report, documenting a[n]…incident involving [the Requester,]" and that "[t]he incident report contains narrative documentation of the investigation that took place as a result of a report to the police, including police observations and action taken."

The Requester does not dispute that the [R]equest concerns investigative material but argues that the responsive report should be released to the Requester pursuant HB 2525.

1. The identity of the Requester is irrelevant under the RTKL

The Requester argues that the responsive report should be released to the Requester pursuant HB 2525.

The Township argues that:

> HB 2525…was signed in the House and Senate on October 26, 2022, presented to the Governor on October 27, 2022, and was signed into law on November 3, 2022 as Act 134 of 2022 (the "Act"). This bill had not been signed by either [legislative chamber] as of the Township's receipt of the [R]equest, and had not been signed into law as of the Township's response. In addition, the law does not take effect until 180 days following its passage. Thus, these amendments to [CHRIA] are not controlling in this matter and will not govern the disclosure of records until such time as they take effect, on May 2, 2023. In addition, regardless of the effective date of the Act, Section 708(b)(17) of the RTKL permits an Agency to withhold non-criminal investigative records in response to a [RTKL] request. Although these records will be subject to disclosure to certain persons in the future, they are not and will not become public records under the RTKL. Requests for such records must be submitted using the procedure provided for under the Act, which includes

[5] *See* Wehmeyer Affidavit, ¶¶ 6-10.

> a certification that the person requesting the records is entitled to receive them. The RTKL provides for disclosure of public records to any citizen[] and is not the proper vehicle to obtain a record that is only accessible to a discrete number of people.

Here, the Request was filed pursuant to the RTKL and, under the RTKL, "the status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b)."[6] *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*). The analysis of whether a record is a public document under the RTKL is whether the record should be open to the public at-large. *See, e.g., Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Commw. Ct. 2012) ("home plans" of parolee requester are not accessible to her under the RTKL though she is subject of records; to be accessible under the RTKL, the identity of the requester is irrelevant). Therefore, the RTKL must be interpreted and applied without regard to the Requester's identity beyond meeting the RTKL's requester definition. *See Clinkscale v. Dep't of Pub. Welfare*, 101 A.3d 137, 141 (Pa. Commw. Ct. 2014). In this instance, the Requester seeks a police report of an incident involving a dog bite during which, the Requester argues, she sustained injuries. Notwithstanding, the RTKL must be construed without regard to the identity of the Requester or the Requester's intentions.

2. The Township demonstrated that the responsive record is exempt from disclosure as a record related to a noncriminal investigation of the Township

The Township argues the requested report is exempt from disclosure under the RTKL as relating to a noncriminal investigation of the Township, 65 P.S. § 67.708(b)(17).

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "complaints" and "[i]nvestigative materials, notes,

[6] 65 P.S. § 67.301(b).

correspondence and reports." 65 P.S. §§ 67.708(b)(17)(i)-(ii). 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). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would "craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure." *Id*. at 259.

In support of the Township's position, the Wehmeyer Affidavit, in pertinent part, states:

> 11. …After reviewing the record, the Township determined that the record is exempt as a criminal investigative record, based on possible violations of the Dog Law. However, the Township also recognized that even if the matter was not considered criminal, the police report would still be exempt from disclosure as a noncriminal investigative record…
>
> 15. …The responsive incident report concerns an investigation that was initiated after the Township Police Department received a report that there was an incident involving a dog bite.
>
> 16. The Pennsylvania Dog Law establishes a dog owner's responsibilities related to dog ownership, including responsibility for maintaining control of their dog in a public area. Violations of the Pennsylvania Dog law may result in both criminal and civil liability.
>
> 17. The Township [p]olice responded to the call, observed the scene, interviewed involved persons, examined for injuries, and filed the corresponding police incident report.
>
> 18. As a result of the report to the [Township Police] Department, an investigation was undertaken that included the production of notes and generated the record at issue, a police report. The responsive report was created in connection with and as a result of the…investigation.

19. The incident report contains narrative documentation of the investigation that took place including police observations and actions, notes of what occurred, and the result of the police involvement.

20. This was a matter in which the officer responded to gather information concerning the health, safety and well-being of a citizen who sustained a dog bite.

21. The police officer also gathered information that would be relied upon in determining whether this incident involved violations of the Pennsylvania Dog Law.

22. The Township, by and through its Police Department, acted within the Township's official duties to investigate a person's injuries and gather relevant information after receiving a report of a dog bite, in addition to investigating a potential violation of state law or local ordinance(s).

23. The duties performed by the [Township] Police Department are within the scope of the [Township's] authority. *See* 42 Pa. C.S. § 8952….

See Wehmeyer Affidavit, ¶¶ 15-23.

Under the RTKL, a sworn affidavit or 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 evidence that the Township acted in bad faith, "the averments in [the affidavit] 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)).

Municipal police departments, such as the Township's Police Department, are empowered to enforce the laws of the Commonwealth or otherwise perform the functions as to "any … event that occurs within his primary jurisdiction and which reasonably requires action on the part of the police in order to preserve, protect or defend persons or property or to otherwise maintain the peace and dignity of this Commonwealth." 42 Pa.C.S. § 8952. The OOR has found that this statutory

authority grants municipal police departments the ability to conduct noncriminal investigations. *See Subhash v. Horsham Twp. Police Dep't*, OOR Dkt. AP 2019-2421, 2020 PA O.O.R.D. LEXIS 306 (finding that dispatch notes in an incident report relate to a local police department's noncriminal investigation); *see also Alasevich v. Horsham Twp. Police Dep't*, 2019- 2054, 2020 PA O.O.R.D. LEXIS 72. Further, the Wehmeyer Affidavit demonstrates that the Township's Police Department "responded to [a] call[,]" "gathered information[,]" and created a narrative report, containing "police observations and actions, notes of what occurred, and the result of the police involvement." *See* Wehmeyer Affidavit ¶¶ 17, 19-20.

Accordingly, based on the evidence presented, the Township demonstrated that the responsive police report is exempt from disclosure under the RTKL because it relates to a noncriminal investigation conducted by the Township Police Department in accordance with the Township's statutorily granted authority, 65 P.S. § 67.708(b)(17). *See Johnson v. Pa. State Police*, OOR Dkt. AP 2022-1868, 2022 PA O.O.R.D. LEXIS 2302; *Delaney v. Upper St. Clair Twp. Police Dep't*, OOR Dkt. AP 2022-2089, 2022 PA O.O.R.D. LEXIS 2266.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Township 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 Montgomery 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.[7] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: December 6, 2022

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO

Sent via email to: Shawn Wiesen, Esq.
Nicole Feight, Esq.
Tara Wehmeyer

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