



**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>ANDREA WALLING &amp; LUCKY SPOT,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No: AP 2022-2526</b>
	:	
<b>HANOVER BOROUGH,</b>	:	
<b>Respondent</b>	:	

**FACTUAL BACKGROUND**

On September 12, 2022, Andrea Walling and Lucky Spot (“Requester”) submitted a request (“Request”) to Hanover Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 et seq., seeking in relevant part, “[A] copy of the noise report from 9/8/2022 by code enforcement officer Chris Miller. . . .” On October 17, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Borough denied the Request arguing that the records are related to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17).

On November 4, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 22, 2022, the Borough submitted a position statement arguing that the records are exempt under the RTKL as records relating to a noncriminal investigation. 65 P.S. § 67.708(b)(17). In support of its position, the Borough submitted the affidavit of Christopher Miller,

the Chief Code Enforcement Officer for the Borough (“Miller Affidavit”). On November 23, 2022, the Requester submitted a position statement.

### **LEGAL ANALYSIS**

The Borough 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 Borough 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)).

The only record at issue on appeal is a “noise report from 9/8/2022”, which the Borough asserts relates to a noncriminal investigation under Section 708(b)(17). 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.” 65 P.S. § 67.708(b)(17). 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 Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). Additionally, the investigations must specifically involve an agency’s legislatively granted fact-finding powers. *See Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa.*

*Dep't of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). The Requester argues that the noncriminal investigative record exemption should not apply to the requested record, arguing that the investigation and enforcement of an ordinance does not constitute an official probe within the Borough's legislatively granted fact-finding authority, but instead is ancillary to the Borough's public assistance services.

The Borough argues that the Code Enforcement Officer is appointed and authorized by the Borough to engage in investigations of complaints of code violations, which includes noise violations. *See* Miller Affidavit, ¶¶ 2-7. Additionally, the Code Enforcement Officer, acting in his official duty, investigated the noise violation on September 8, 2022 and to date there has been no fine or other penalty assessed. *See* Miller Affidavit, ¶ 9.

In support of its argument, the Miller Affidavit states:

2. As part of my job I am responsible for enforcing those codes and ordinances that the Borough has adopted, including but not limited to: International Property Maintenance Code, Zoning Ordinance, Borough Fire Code, Building Code, including the PA Uniform Construction Code, and any ordinances of the Borough which specifically designate enforcement responsibilities to the Code Enforcement office.
3. As part of our enforcement authority, the Code Enforcement Officer is empowered under the law with the authority to conduct noncriminal investigations upon notice of a potential violation and to take enforcement action if deemed appropriate, up to and including issuing a citation and fine, or filing an action against a property owner.
4. When a complaint is received by our office, the first step is to determine whether there is a life safety issue, which is handled immediately. After that, complaints are responded to within 24-48 hours after receipt. A non-criminal investigation is begun, which may involve all or some of the following actions: a site visit to review the property, real or personal, at issue, interviews with the complainant and other area property owners, interview with the property and the tenant, if any, a review of codes involved, photos, running tests such as air or noise tests, or other fact finding actions. The officer documents all findings for the record.
5. Our office received complaints about 112 Broadway, Hanover, Pennsylvania, the by Requestor, on 12/06/21, 12/14/21, 02/01/22, 03/06/22, 03/14/22, 08/02/22 and 09/06/22. The complaints addressed noise from the property.

6. Upon receiving the first complaint, the Code Enforcement Office opened a noncriminal investigation in accordance with our usual procedure. This investigation has continued with each subsequent complaint, and our office has compiled a file that includes notes, records, and other materials that document the investigation being conducted by our office in response to the complaints received about the property owned by Requestor.
7. Hanover Borough adopted Ordinance 2327, the Hanover Borough Noise Control Ordinance, which went into effect on July 27, 2022. The ordinance provides that the Borough Police and/or the Code Enforcement Officer shall have the powers to enforce the ordinance,
8. As part of the ongoing noncriminal investigation, I performed a sound meter test in the vicinity of the property owned by Requestor and prepared a report documenting the results.
9. To date, our office's noncriminal investigation into all the complaints received for 112 Broadway, Hanover, Pennsylvania has not resulted in any fine or civil penalty being issued, nor has there been any agreement with the property owner regarding mitigation of any potential violation. The investigation is ongoing at this time.<sup>1</sup>

Here, through the Miller Affidavit, the Borough proved that it has the legislatively granted authority to enact ordinances, that the requested records relate to complaints about potential violations of the Borough's properly enacted ordinances, that the complaints required a Borough employee to conduct an inspection of the conditions complained of to determine if any violations occurred, and that the results of the inspection are documented in a report. The OOR has consistently held that municipalities are statutorily authorized to investigate violations of their ordinances. *See Colella v. Pocopson Twp.*, OOR Dkt. AP 2018-1472, 2018 PA O.O.R.D. LEXIS 1152 (finding that a township has the authority to conduct investigations pursuant to the Municipalities Planning Code); *Keating v. Jefferson Twp.*, OOR Dkt. AP 2018-1274, 2018 PA O.O.R.D. LEXIS 1000. Furthermore, the Miller Affidavit sets forth the investigative process the

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<sup>1</sup> Under the RTKL, a sworn affidavit or statement made under 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 Borough acted in bad faith, "the averments in [the attestation] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. 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)).

Code Enforcement Officer engaged in and clearly demonstrates that the Code Enforcement Officer engaged in a detailed examination and official probe into regarding a noncriminal matter. The Requester's argument that the investigation of a noise violation does not constitute an official probe within the Borough's legislatively granted fact-finding authority is without merit. *See Joel Wolff and Wolff Law, P.C. v. Scranton City*, OOR Dkt. AP 2022-1092, 2022 PA O.O.R.D. LEXIS 1812 (holding that a request for noise violation reports seeks noncriminal investigative records); *see also, Benner and Brad's Raw Chips, LLC v. Bedminster Twp.*, OOR Dkt. AP 2020-0847, 2020 PA O.O.R.D. LEXIS 2381 (holding that complaints and reports regarding odors emanating from an establishment relate to a noncriminal investigation and are exempt from public access); *Dennis Grim and the Golden Pheasant Sportsman Club v. Buffalo Township*, OOR Dkt. AP 2021-1231, 2021 PA O.O.R.D. LEXIS 1484.

Finally, when citing Section 708(b)(17), the Commonwealth Court has cautioned that "it [is] incumbent upon [an agency] to determine whether records exist[] that [do] not fall within the exception 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 records document "the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorized issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court." 65 P.S. § 67.708(b)(17)(vi)(A). Here, the Miller Affidavit states that there no fine or civil penalty has been issued and the investigation is still ongoing. Thus, based on the evidence provided, the responsive records fall do not within the exception to the noncriminal investigation exemption. *Id.*

Accordingly, based upon the evidence provided, including the Miller Affidavit and the language of the Request, the Borough proved, by a preponderance of the evidence, that the responsive records fall in the category of “investigative materials, notes, correspondence and reports . . . .” and are, therefore, exempt under Section 708(b)(17) of the RTKL. *See Delaware County v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012) (reiterating that “[a] preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry”). Therefore, the Borough has proven that the records are related to a noncriminal investigation and are exempt.

### CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Borough 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 Adams 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 7, 2022**

*/s/ Catherine R. Hecker*

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APPEALS OFFICER  
CATHERINE R. HECKER, ESQ.

Sent to: Justin Shickman, Esq. (via email only);  
Dorothy Felix, AORO (via email only);  
Ann Shultis, Esq. (via email only)

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<sup>2</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).