pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MARIANNE INFANTE,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2023-0047**
	:	
MONTGOMERY COUNTY	:	
INTERMEDIATE UNIT 23,	:	
Respondent	:	

FACTUAL BACKGROUND

On December 23, 2022, Marianne Infante ("Requester") submitted a request ("Request") to the Montgomery County Intermediate Unit 23 ("MCIU") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking "[t]he notes take[n]…[on] [December 16, 2022] by Brianna Conaway during the accommodation meeting in H[uman] R[esources] from about 11:00 to 11:40 that was attended by Jack Hurd."[1]

On January 3, 2023,[2] the MCIU denied the Request, arguing that the responsive records are exempt from disclosure as records regarding employees' medical and/or disability status, 65

[1] The Request was dated December 13, 2022; however, the transmission email provided by the Requester as part of the appeal is dated December 23, 2022. Additionally, on appeal, the MCIU provided evidence that it received the Request on December 23, 2022. *See* Hurd Affidavit, ¶ 3.
[2] The OOR notes that December 26, 2022 and January 2, 2023 were holidays. Thus, the MCIU provided a timely response within five business days, as required by Section 902 of the RTKL. *See* 65 P.S. § 67.902.

P.S. § 67.708(b)(5), and are also protected from disclosure by the state constitutional right to privacy.

On January 9, 2023, the Requester 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 MCIU to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 19, 2023, the MCIU submitted a position statement reiterating its grounds for denial. Additionally, the MCIU argues that the responsive records are exempt from disclosure pursuant to Section 708(b)(12) of the RTKL as "notes and working papers prepared by . . . [an] agency employee used solely for that [ ] employee's personal use . . . that do not have an official purpose[,]" 65 P.S. § 67.708(b)(12). In support of its position, the MCIU submitted the sworn affidavits, made under the penalty of perjury,[3] of its Director of Human Resources, Jack Hurd ("Hurd Affidavit"), and of a Personnel Coordinator within its Human Resources Department, Brianna Conaway ("Conaway Affidavit").

On that same day, the Requester submitted a statement in support of the appeal.

LEGAL ANALYSIS

The MCIU 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 MCIU 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

[3] *See* 18 Pa.C.S. 4902.

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 MCIU argues that the responsive records are exempt from disclosure pursuant to Section 708(b)(12) of the RTKL because the records are notes taken by a MCIU staff member during a meeting, so that the notes "could be used as a working tool to subsequently refer to when preparing and issuing formal correspondence following the meeting[,]" and because the notes "did not serve any official purpose[;]" but rather, the notes were only "utilized for [the staff member's] own personal purposes in carrying out her role as Personnel Coordinator." *See* 65 P.S. § 67.708(b)(12).

The Requester argues that, as a meeting attendee, "the [meeting] summary sent to [her by the MCIU] did not match [her] notes[,]" and that she requested the responsive records "to better understand" a subsequent decision made by the MCIU concerning an Americans with Disabilities Act ("ADA") accommodation request.

Section 708(b)(12) of the RTKL exempts from disclosure "[n]otes and working papers prepared by or for a public official of agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose." 65 P.S. § 67.708(b)(12). The records must be for the specific employee's own personal use, not distributed outside of their office, and must be used to carry out the employee's official duties. *See Glunk v. Pa. Dep't of State*, 102 A.2d 605 (Pa. Commw. Ct. 2014); *Pa. Dep't of Labor & Indus. v. Tabor*, 2016 Pa. Commw. Ct. Unpub. LEXIS 251 (Pa. Commw. Ct. 2016).[4] The Commonwealth Court has held that:

[4] An unreported opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414.

> "Personal" within this definition does not mean that it has to involve a public official's personal affairs—a message slip that his wife called—because those types of documents are not covered by the RTKL; it covers those documents necessary for that official that are "personal" to that official in carrying out his public responsibilities.

Smith ex rel. Smith Butz, LLC v. Pa. Dep't of Envtl. Prot., 161 A.3d 1049, 1066-67 (Pa. Commw. Ct. 2017).

In support of the MCIU's position, the Conaway Affidavit, in part, states:

1. I am a Personnel Coordinator within the Human Resources Department of the [MCIU]….

4. …[The Requester] is a current employee of the MCIU….

5. The Request sought notes that I took during an ADA accommodations meeting held on December 16, 2022.

6. The December 16, 2022 meeting was a closed, private meeting attended by myself, [the Requester], Jack Hurd (the MCIU's Director of Human Resources), two administrators within the MCIU, and a support person for [the Requester].

7. As a Personnel Coordinator, notes that I take during meetings regarding employees, including [the] notes I took during the December 16, 2022 meeting, are not shared with any member of the public or any employee of the MCIU outside [of] the Human Resources Department.

8. The notes l took during the December 16, 2022 meeting were intended as a working tool to subsequently refer to when preparing and issuing formal correspondence following the meeting.

9. My notes themselves served no official purpose, but rather were utilized for my own personal purposes in carrying out my duties as Personnel Coordinator for the MCIU.

10. Even if the notes themselves served an official purpose, which they do not, I would be concerned about sharing them due to the sensitive and confidential nature of the subject matter of the meeting topics.

11. For this additional reason, my notes would never be shared with the general public or with other MCIU employees who do not work in the Human Resources [D]epartment.

See Conaway Attestation, ¶¶ 1, 4-11.

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 MCIU acted in bad faith, "the averments in [the statement] 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)).

Here, the Conaway Affidavit shows that Brianna Conaway is an employee of the MCIU's Human Resources Department who takes notes during work-related meetings. The Conaway Affidavit also shows that the notes made during the meeting identified in the Request were made by Brianna Conaway, that the notes are personal, that the notes are not used for any official MCUI purpose, and that the notes are not distributed outside of the MCIU's Human Resources Department. Finally, the Conaway Affidavit shows that the notes were used to carry out Brianna Conaway's official duties as MCIU's Personnel Coordinator. Accordingly, based on the evidence presented, the MCIU demonstrated that the responsive records are exempt from disclosure under Section 708(b)(12) of the RTKL.[5] *See* 65 P.S. § 67.708(b)(12); *see also Myer v. West Chester Area Sch. Dist.*, OOR Dkt. AP 2022-0305, 2022 PA O.O.R.D. LEXIS 613; *Dailey v. Stroudsburg Area Sch. Dist.*, OOR Dkt. AP 2022-1058, 2022 PA O.O.R.D. LEXIS 1612.

Additionally, the OOR notes that, under the RTKL, the determination of whether a record is a public record hinges on whether the record falls within an exemption that allows it not to be

[5] Because the MCIU demonstrated that the responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(12), the OOR need not reach the MCIU's alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

disclosed. "The status or relationship 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) [of the RTKL]."[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*).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the MCIU 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: February 3, 2023

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO

Sent via email to: Marianne Infante
Alicia S. Luke, Esq.
Sandra Edling

[6] The OOR also notes that the RTKL is not a confidentiality statute, meaning it allows but does not require an agency to withhold records, and an agency, generally, has the discretion to release otherwise nonpublic information. *See* 65 P.S. § 67.506(c).
[7] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).