



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
VANESSA RICCI AND PROBUS	:	
INVESTIGATIONS, INC.,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2023-0062
	:	
PENNSYLVANIA DEPARTMENT OF	:	
LABOR AND INDUSTRY,	:	
Respondent	:	

FACTUAL BACKGROUND

On December 29, 2022, Vanessa Ricci and Probus Investigations, Inc. (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Labor and Industry (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, stating:

We are requesting any and all reports including but not limited to photographs, subsequent reports, inspection reports, statements and any other documents relating to a manlift accident on 10/14/2021 at the location of 114 S. 15th Street, Philadelphia, PA. It is understood that a State Inspector was on site to conduct an accident investigation on 10/29/21 accompanied by Third-Party Elevator Maintenance Company Elevator Construction and Repair.

On January 3, 2023, the Department granted the Request in part and provided access to a website that contains nonconfidential information relating to elevator equipment within the

Commonwealth. The Department denied the Request in part, arguing that some of the responsive records implicated records of a noncriminal investigation by the Department which were exempt from disclosure under Section 708(b)(17) of the RTKL. 65 P.S. § 67.708(b)(17).

On January 9, 2023, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. 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).

Along with the appeal documents, the Requester submitted a position statement and argued that the State Inspector's post-accident inspection of the elevators would assist in determining if the operation of the lift equipment contributed to the accident.¹

On January 12, 2023, the Department requested additional time to make submissions. The Requester had no objections to this extension. The OOR granted the Department's request and allowed submissions until January 25, 2023.

On January 25, 2023, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the affidavit of Matthew W. Kegg, Director of the Bureau of Occupational and Industrial Safety ("BOIS").²

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

¹ The Requester's submissions were not made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

² The Kegg Attestation was made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). The preponderance of the evidence standard 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)).

Here, the Department argues that the responsive records pertaining to the investigation of the man lift accident are exempt from disclosure under Section 708(b)(17) of the RTKL. 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 “[i]nvestigative materials, notes, correspondence and reports” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order 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). Furthermore, an agency must show that the inspection is within the agency’s official duties, *Bagwell*, 131 A.3d at 659-60, while “surpass[ing] the [Department]’s routine performance of its duties,” *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Cmwlth. 2011). Routine inspections of elevators

and similar devices by the Department are not exempt under noncriminal investigations exception to the RTKL. *See Hall v. Pa. Dep't of Labor and Industry*, OOR Dkt. AP 2021-1102, 2021 PA O.O.R.D. LEXIS 1429.

Here, the Director of BOIS attests that he is familiar with the records maintained by the Department relating to the subject matter of the Request.³ Kegg Attestation ¶ 1, 2. The Director also attests that he has searched or caused to be searched the records responsive to the Request. Kegg Attestation ¶ 5. As a result of the search, the Director has identified that some of the potentially responsive records relate to the Department's investigation of a man lift accident at the location and on the date referred to in the Request. Kegg Attestation ¶ 6. The Department initiated the said investigation in response to an accident report filed with the Department. Kegg Attestation ¶ 8. As a result, the Department conducted an investigation, engaging in a site visit to the accident's location, interviewing pertinent witnesses related to the incident and the building owner, and conducting other investigative functions on the site of the accident. Kegg Attestation ¶ 8. The responsive records which the Department argues are exempt from disclosure include the accident report, notes from interviews with witnesses, notes, correspondence, photos, and reports. Kegg Attestation ¶ 9. The Director also attests that, if disclosed, the responsive records would reveal the institution, progress, or result of the Department's investigation. Kegg Attestation ¶ 9. Further, none of the potentially responsive records reflect the imposition of a fine or civil penalty, the suspension, modification, or revocation of a license, permit, registration, certification, or similar

³ Under the RTKL, a sworn 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 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)).

authorization issued by the Department. Kegg Attestation ¶ 10. The Department has no other responsive records in its custody, possession, or control. Kegg Attestation ¶ 6.

The Pennsylvania Construction Code Act (“Act”) provides that “[t]he Department shall maintain statewide administration and inspection authority over ski lifts, inclined passenger lifts and related devices and elevators, conveying systems and related equipment...” 35 P.S. § 7210.105(c)(1). Further, the Uniform Construction Code (“UCC”) states:

(a) An owner of an elevator or lifting device or an authorized agent shall submit an accident report to the Department if the elevator or lifting device is involved in an accident resulting in any of the following:

(1) Fatal injury or hospitalization to a person.

(2) Damage to the elevator or lifting device rendering it unsafe under § 403.84 (relating to unsafe building, structure or equipment).

(b) The owner or authorized representative shall submit the accident report on a Department-prescribed form, which must be received by the Department within 24 hours of the accident.

(c) The Department may order an investigation of the accident.

(d) An elevator or lifting device that was involved in a fatal accident may not return to operation until the Department provides approval.

(e) An elevator or lifting device involved in a nonfatal accident resulting from mechanical or electrical failure may not return to operation until the Department provides approval. This requirement does not apply to ski lifts.

34 Pa. Code § 405.11.

It is evident from the face of the Request that the Request is seeking records generated during and as a direct result of the Department’s investigation of an incident involving a man lift

accident.⁴ The Department demonstrated that it investigated this accident in accordance with its statutory authorization after the receipt of an accident report as dictated by the Act and the UCC. This investigation was outside of Department's routine inspections and generated records which, if made accessible to the public, would reveal the institution, progress, or result of the Department's investigation. The Department has also proven that the potentially responsive records do not contain information that the RTKL expressly removes from the exemptions under Section 708(b)(17), such as the imposition of a fine or civil penalty. *See* 65 P.S. § 67.708(b)(17)(vi)(i). Accordingly, the Department has proven that the records pertaining to the investigation of the man lift accident are exempt from public access under Section 708(b)(17) of the RTKL.

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. 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁴ The Requester's position statement indicates that the Request might have been seeking records from the first routine inspection after the accident. This statement is an apparent modification or explanation of the Request. The OOR has repeatedly held that a requester may not modify, explain or expand a request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Michak v. Pa. Dep't of Pub. Welfare*, 56 A.3d 925 (Pa. Commw. Ct. 2012) (holding that "where a requestor requests a specific type of record ... the requestor may not, on appeal argue that an agency must instead disclose a different record in response to the request").

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

FINAL DETERMINATION ISSUED AND MAILED: February 3, 2023

/s/ Berk V. Demiral

BERK V. DEMIRAL
APPEALS OFFICER

Sent via portal to: Vanessa Ricci
Wendy Willard
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