pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
NICK DEVLIN & CBS PHILADELPHIA,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2023-1746**
	:	
KUTZTOWN UNIVERSITY,	:	
Respondent	:	

FACTUAL BACKGROUND

On July 25, 2023, Nick Devlin and CBS Philadelphia (collectively "Requester") submitted a request ("Request") to Kutztown University ("University") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking "copies of any complaints submitted to the dean of students, the athletic director, or human resources department [of the University] regarding volleyball coach Allison Keeney, who has been employed at the university since 2022. In addition, if any complaints were filed, I'd also like copies of the corresponding responses issued by the university."

On July 27, 2023, the University denied the Request, arguing that responsive records are exempt from public disclosure as records relating to an agency employee and as noncriminal investigative records. *See* 65 P.S. §§ 67.708(b)(7) & (b)(17). On July 27, 2023, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for

disclosure.[1] The OOR invited both parties to supplement the record and directed the University to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 1, 2023, the University provided a submission arguing that the appeal is deficient under Section 1101 and requesting additional time to provide an additional submission in the appeal. On August 1, 2023, the OOR issued a response stating that the appeal is sufficient[2] and granting the University's request for additional time to submit evidence.

On August 25, 2023, the University submitted a position statement reiterating its grounds for denial. The University claims that the responsive records are exempt as containing written criticisms of employees which are protected under Section 708(b)(7)(vi) and as records of an agency relating to a noncriminal investigation exempt under Section 708(b)(17). *See* 65 P.S. §§ 67.708(b)(7) & (b)(17). In support of its position, the University submitted the attestations of Renee Hellert, the Athletic Director for the University ("Hellert Attestation"), and Jacqueline Fox, Esq., the Open Records Officer for the University ("Fox Attestation").

On October 3, 2023 and in response to the OOR's inquiry related to whether the University searched for and discovered any responses issued by the University relating to complaints submitted regarding Allison Keeney, the University submitted a supplemental position statement and the supplemental attestation of Jacqueline Fox ("Supplemental Fox Attestation").

LEGAL ANALYSIS

The University 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

[1] The Requester granted the OOR an 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).").

[2] The Requester used the OOR standard appeal form. Upon review of the Requester's appeal filings, the OOR determined that the appeal meets the requirements of Section 1101. *See Auerbach v City of Phila. Law Dept*., OOR AP Dkt. 2023-0404, 2023 PA O.O.R.D. LEXIS 763 (noting that the statement in the OOR's standard appeal form is sufficient to meet the requirements of Section 1101(a)).

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 University 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 University argues that the responsive records are exempt as noncriminal investigative records. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "(i) complaints... [and] (ii) [i]nvestigative materials, notes, correspondence and reports...." 65 P.S. §§ 67.708(b)(17)(i), (ii). 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).

In support of its position, the University submitted the Hellert Attestation which states that complaints made to the athletic department automatically trigger a noncriminal investigation into the complaint "consistent with the NCAA rules and regulations, including NCAA Bylaws Article 11 (Conduct and Employment of Athletics Personnel)." *See* Hellert Attestation ¶¶ 3-4. The

University also states that in its search for responsive records it discovered complaints, investigatory materials, and responses to the complaints that were drafted by the University and shared with the complainants. *See* Fox Attestation ¶¶ 3-6; Supplemental Fox Attestation ¶¶ 4-10. The University attests that the responsive records, if disclosed, would reveal the progress or result of the University's efforts to investigate the complaints received. *See* Fox Attestation ¶¶ 8-9.

The University is part of the State System of Higher Education and is a "state-affiliated entity" as defined by the RTKL. 65 P.S. § 67.102. As a member of Pennsylvania's State System of Higher Education and pursuant to its enabling legislation, Act 188, it "may exercise all powers necessary or convenient for carrying out" its purposes and duties as a Commonwealth higher education institution. 24 P.S. §§ 20-2002-A(a), 20-2003-A(a & b) ("The system is hereby granted and shall have and may exercise all the powers necessary or convenient for the carrying out of the [purpose to provide high quality education at the lowest possible cost to students]"). Thus, the University's authority under Act 188, by necessary implication, includes the power to investigate activities or conduct of employees and students that could interfere with the provision of its education services. Investigation of complaints submitted against faculty, staff, and coaches falls within the parameters of such broad legislative powers. *See Shumsky v. Slippery Rock Univ. of Pa*, OOR Dkt. AP 2020-0304, 2021 PA O.O.R.D. LEXIS 701 (holding that a university has the authority to investigate allegations of hazing); *Williams v. Pa. State Sys. Higher Educ*., OOR Dkt. AP 2020-0304, 2020 PA O.O.R.D. LEXIS 1421 (finding that a PASSHE university has the authority to investigate a student death); *Smith v. Slippery Rock Univ. of Pa.*, OOR Dkt. AP 2017-2122, 2018 PA O.O.R.D. LEXIS 38, (finding that a university within PASSHE has authority to investigate harassment claims made against a faculty member). Based on the evidence provided, the University has demonstrated that "a systematic or searching inquiry, a detailed examination,

or an official probe" was conducted regarding a noncriminal matter, and that the records responsive to the Request relate to that noncriminal investigation and may be withheld. *Pa. Dep't of Health*, 4 A.3d at 810-11.[3]

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the University 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.[4] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: October 11, 2023

/s/ *Catherine R. Hecker*

CATHERINE R. HECKER, ESQ.
APPEALS OFFICER

Sent via email to: Nick Devlin
Jacqueline Fox, Esq.
Natalie Einsig, Esq.

[3] Given the determination that the records responsive to the Request are exempt as noncriminal investigative records, the OOR need not reach the issue of whether the University proved these records are also exempt as records relating to an agency employee under Section 708(b)(7). *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927 (where an appeal is denied on other grounds, the OOR need not address the issue of the appropriateness of fees initially raised by the Requester).
[4] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).