pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JONATHAN STALLARD,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2024-0443**
	:	
SUGARCREEK BOROUGH,	:	
Respondent	:	

FACTUAL BACKGROUND

On January 15, 2024,[1] Jonathan Stallard ("Requester") submitted a request ("Request") to Sugarcreek Borough ("Borough") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

> [1] Borough of Sugarcreek Police Department Training Materials
>
> [2] Text Messages, Emails, and Phone Call Logs sent and received by Officer Travis Corbett between 12/25/23 and 01/10/24
>
> [3] Text Messages, Emails, and Phone Call Logs sent and received by Mayor Matthew Carlson between 12/25/23 and 01/10/24
>
> [4] Officer Travis Corbett's Personnel Records including salary, his job application, complaints, disciplinary actions.

On February 14, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Borough partially denied the Request, stating that the responsive records are exempt as records pertaining to criminal and noncriminal investigations, containing personal identification

[1] The Request is dated January 10, 2024, but it was not received by the Borough until January 15, 2024.

information, and as information regarding discipline, demotion or discharge. 65 P.S. §§ 67.708(b)(16), (b)(17), (b)(6), and (b)(7). Additionally, the Borough stated some of the requested records do not exist within the Borough's possession, custody or control. The Borough provided some responsive information; specifically, the Borough informed the Requester of Officer Corbett's salary. In response to Item 1, the Borough argued that no training materials exist in the Borough's possession, custody or control. In response to Item 2, the Borough noted that Officer Corbett does not have a work cellular telephone, and he does not use his personal cellular telephone for work-related matters. Therefore, no work-related text messages or telephone call logs exist in the Borough's possession, custody or control. The Borough also argues that Officer's Corbett's emails are exempt because they pertain to criminal and noncriminal investigations under the RTKL. 65 P.S. §§ 67.708(b)(16), (b)(17). In response to Item 3, the Borough stated that Mayor Carlson does not have a work-related cellular telephone or email account; and therefore, no text messages, emails or telephone call logs exist in the Borough's possession, custody or control for Mayor Carlson. In response to Item 4, the Borough argues that Officer's Corbett's job application is exempt pursuant to Section 708(b)(6), which makes personal identification information exempt from disclosure, and disciplinary records are denied pursuant to Section 708(b)(7), which makes records regarding discipline, demotion or discharge exempt from disclosure. 65 P.S. §§ 67.708(b)(6)(i)(A), (7).

On February 15, 2024, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.[2] The Requester appealed the denial of training materials, Officer Corbett's emails, Mayor Carlson's emails and Officer Corbett's job application. The Requester expressed his disbelief that training materials do not exist, and that every email sent by Officer Corbett pertains to a criminal or noncriminal investigation. The Requester

[2] The Requester granted the OOR a thirty-day 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 thirty days of receipt of the appeal filed under subsection (a).").

also states that if Mayor Carlson used a personal or work device to transact public business, that record constitutes a public record and is not exempt simply because the Mayor did not use a public device. Lastly, the Requester notes that the Borough can provide Officer's Corbett's job application, redacted of personal identification information. 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).

The original deadline for submission in this matter was March 7, 2024. On April 5, 2024, the OOR issued correspondence to confirm that the Borough did not submit any evidence or documentation in this appeal and inquired whether the Borough intended to submit any evidence.

On April 8, 2024, the Borough submitted correspondence stating that the Borough had not received notice of the appeal until it received the April 5, 2024, correspondence from the OOR.[3] The Borough further notified the OOR that the Agency Open Records Officer ("AORO") of record has not been employed by the Borough for many years, and the email address associated with the former AORO is invalid. The Borough provided the OOR with updated AORO information, noted the Borough's intent to participate in the appeal, and requested an extended submission deadline.

On April 15, 2024, the OOR asked the Borough to provide an affidavit or attestation regarding the dates the Borough received the Request, responded to the Request, and received notice of the appeal so that the OOR could verify that the appeal was appropriately filed. On April 16, 2024, the Borough submitted sworn affidavits authored by the current AORO, Joseph Sporer ("Sporer Affidavit"), and the Police Chief, Robert Wenner ("Wenner Affidavit"), verifying the dates the Borough responded to the Request and received notice of the appeal, as requested by the OOR.

Thereafter, on April 16, 2024, the OOR confirmed the appeal had been appropriately filed and that the Borough now had access to the OOR portal, and it granted the Borough's submission

[3] The Borough also faxed an identical letter to the OOR on April 6, 2024, which was a Saturday.

extension request.

On April 17, 2024, the Borough confirmed receipt of the above information, and on April 18, 2024, the Borough submitted a statement in support of its position ("Response to Appeal"). In response to the request for training materials, the Borough argues that no training materials exist in the Borough's possession, custody or control. The Borough argues that it reasonably interpreted the Request for "training materials" to seek documents that are "used to train police officers that are created or generated by the [Borough], and such materials do not exist." The Borough further explains that Borough police officers receive outside training through the Municipal Police Officer Training and Education Commission ("MPOTEC"), and the Borough does not maintain those training materials. The Borough further noted that Borough police officers receive internal training relative to firearms, TASERs, and use of force, and the internal instructors refer to MPOTEC materials, which may be copyrighted, and other materials provided by Axon Company, which are copyrighted. The Borough further states that no training materials are created or generated by the Borough. In response to the request for Officer Corbett's emails, the Borough stated that Officer's Corbett's email account is used only for work-related communication concerning criminal and noncriminal investigations, and no emails sent and received by Officer Corbett fall outside of those exemptions. 65 P.S. §§ 65.708(b)(16), (b)(17). In response to the request for Mayor Carlson's emails, the Borough stated that Mayor Carlson did not send or receive any emails in connection with the transaction of public business over the requested timeframe, and therefore, such records do not exist. Lastly, the Borough states that Officer's Corbett's job application is not a public record and would reveal personal identification information. 65 P.S. § 67.708(b)(6).

On April 19, 2024, the OOR requested the Borough support the factual statements in its position statement with a sworn or unsworn statement from a person with actual knowledge. The OOR also asked the Borough to specifically verify that all training materials are copyrighted.

On April 21, 2024, in support of its position, the Borough submitted an additional sworn affidavit authored by Chief Wenner ("Wenner Affidavit II"). The Wenner Affidavit II states that Chief Wenner determined that the training materials are copyrighted and are not subject to release pursuant to Section 708(b)(11), which makes records that reveal trade secrets or confidential proprietary information exempt. 65 P.S. § 67.708(b)(11).

On April 22, 2024, the OOR confirmed that the Wenner Affidavit II responded to the copyright issue identified in the OOR's April 19, 2024 correspondence, but it failed to include sworn or unsworn statements concerning the other three parts of the Request. The OOR granted the Borough an additional day to supplement the record with responsive information.

On April 23, 2024, the Borough submitted an additional sworn affidavit authored by Chief Wenner ("Wenner Affidavit III"). The Wenner Affidavit III asserts that all of the requested emails sent and received by Officer Corbett are exempt because they pertain to criminal and noncriminal investigations. 65 P.S. §§ 67.708(b)(16), (b)(17). Chief Wenner also verified that Mayor Carlson did not send or receive any emails in connection with the transaction of public business in the specified time period; therefore, such records do not exist. Lastly, the Wenner Affidavit III states that Officer Corbett's job application is not a public record. 65 P.S. § 67.708(b)(6).

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). 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)). Likewise, "[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Borough's interpretation of Item One of Request is not reasonable

The Borough argues that it reasonably interpreted the Request for "training materials" to seek documents that are "used to train police officers that are created or generated by the [Borough], and such materials do not exist." The Borough further explains that Borough police officers receive outside training through the Municipal Police Officer Training and Education Commission ("MPOTEC") and inside training using materials provided by Axon Company. The Borough further states that no training materials are created or generated by the Borough.

An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012). The OOR determines the reasonableness of the agency's interpretation from the text and context of the request alone, as neither the OOR nor the Requester are permitted to alter the request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (stating that "a requester may not modify the original request as the denial, if any, is premised upon the original request as written").

Nothing in the Request limits the request for training materials to materials that are created or generated by the Borough. Based on a plain reading of the Request language, the Borough

has unreasonably interpreted the Request as seeking only training materials that are created or generated by the Borough. Therefore, because the responsive records have not been identified, and the Borough responded to the Request as seeking only materials created or generated by the Borough, instead of all training materials used by the Borough to train police officers, the OOR is unable to determine that any responsive records may be withheld in full.

2. The Copyright Act precludes the reproduction of copyrighted works without the consent of the copyright holder, but the Borough must permit the Requester to inspect the copyrighted materials

The Borough further explained that Borough police officers receive outside training through the Municipal Police Officer Training and Education Commission ("MPOTEC"), and the Borough does not maintain those training materials. The Borough further notes that Borough police officers receive internal training relative to firearms, TASERs, and use of force. The internal instructors refer to MPOTEC materials and other materials provided by Axon Company, which are copyrighted. The Borough further states that no training materials are created or generated by the Borough.

The Borough argues that Item 1 requests training materials for Borough police officers, but the training materials are copyrighted, and the Borough implies that the copyrighted materials are therefore exempt from disclosure. The Copyright Act precludes the reproduction of any copyrighted works without the consent of the copyright holder. *See* 17 U.S.C. §§ 106, 501. In *Ali v. Phila. City Planning Commission*, the Commonwealth Court held that the Copyright Act does not "exempt [] materials from disclosure under the RTKL;" instead, it "limits the level of access to a public record only with respect to duplication, not inspection." 125 A.3d 92, 101-05 (Pa. Commw. Ct. 2015).

In the instant matter, the Borough's position statement claims the training materials are copyrighted and therefore exempt from disclosure. Additionally, the Wenner Affidavit II provides, as follows:

> … I have researched and determined from both sources, as well as a specific review of the documentation, that the MPOTEC training materials and the Axon Company

> training materials referenced in the Response to Appeal are, in fact, confidential proprietary documents that are copyrighted and not subject to release in accordance with Section 708(b)(11) of the RTKL (65 P.S. § 67.708(b)(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 Borough 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)).

The Borough has established that the MPOTEC training materials and the Axon Company training materials are protected by copyright. Therefore, they are not subject to reproduction or copying by the Borough. *See Dickerson*, supra; *see also Bowser v. Pa. Dep't of Corr.*, OOR Dkt. AP 2013- 0271, 2013 PA O.O.R.D. LEXIS 146 (the ACA standards are protected by copyright); *see also Pelino v. Pa. Dep't of Corr.*, OOR Dkt. AP 2022-2712, 2023 PA O.O.R.D. LEXIS 202. However, the Borough did not meet its burden of proving that the copyrighted materials should not be made available for inspection by the Requester. Therefore, the copyrighted training materials are public records and must be made available for inspection to the Requester. *See* 65 P.S. §§ 67.305, 708(a).

3. The Borough did not prove that the training materials are exempt under Section 708(b)(11) of the RTKL

In addition to the copyright limitations stated above, the Borough states that it has withheld training materials pursuant to Section 708(b)(11) of the RTKL, which exempts from disclosure "[a] record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11). These terms are defined in Section 102 of the RTKL as follows:

> "Confidential proprietary information." Commercial or financial information received by an agency:
>
> > (1) which is privileged or confidential; *and*
> > (2) the disclosure of which would cause substantial harm to the competitive position of the [entity] that submitted the information.
>
> "Trade secret." Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:
>
> > (1) derives independent economic value, actual or potential, from not being generally known to and not being readably ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; *and*
> > (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102 (emphasis added). An agency must establish that both elements of either of these two-part tests are met for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is "confidential," the OOR considers "the efforts the parties undertook to maintain their secrecy." *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev'd in part, Pa. Dep't of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). "In determining whether disclosure of confidential information will cause 'substantial harm to the competitive position' of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released." *Id*.

Pennsylvania courts confer "trade secret" status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Smith v. Pa. Dep't of Envtl. Prot.*, 161 A.3d 1049, 1064 (Pa. Commw. Ct. 2017). The most

important indicia for determining whether information constitutes a trade secret are "substantial secrecy and competitive value to the owner." *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 136 (Pa. Commw. Ct. 2019), *aff'd in part*, 255 A.3d 385 (Pa. 2021) (citing *West Chester Univ. of Pa. v. Schackner (Bravo)*, 124 A.3d 382 (Pa. Commw. Ct. 2015)).

In this instance, although the Wenner Affidavit II cites to Section 708(b)(11) for authority to exempt the training materials from disclosure, the Borough does not provide any legal argument in support of this position, and it does not establish how either of the above-mentioned two-part tests are satisfied. Therefore, the Borough did not demonstrate that the training materials are confidential proprietary information or trade secrets, and the training materials must be provided to the Requester for inspection.

4. The Borough did not prove that a job application for a Borough employee is exempt under the RTKL

a. The Borough has failed to prove that a job application is exempt pursuant to Section 708(b)(6)

The Borough argues that Officer Corbett's job application is not a public record, and if released, it would impermissibly reveal personal identification information that is protected by the RTKL. The Wenner Affidavit III states, in relevant part, as follows:

> [6](h) In his fourth ground for appeal, [the Requester] challenges the [Borough's] response to his request for Officer Travis Corbett's job application, which the [Borough] denied in accordance with Section 67.708(b)(6) because it would result in the release of personal identification information; however, [the Requester] appeals on the basis that the document can be redacted.
>
> [6](i) [The Borough] asserts that Officer Travis Corbett's job application is a personnel record that would reveal personal identification information on behalf of the officer, and this is not a public record for purposes of the RTKL.

The RTKL defines a "record" as: "[i]nformation…that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction,

business or activity of the agency." 65 P.S. § 67.102. The hiring and firing of public employees is an activity and a transaction of the Borough linked to the expenditure of public funds in the form of salaries and benefits as well as the official duties performed by these individuals. The OOR has found that the job applications of agency employees are public records under the plain language and intent of the RTKL. *See Monaghan v. Jersey Shore Area Sch. Dist.*, OOR Dkt. AP 2023-2602, 2023 PA O.O.R.D. LEXIS ____; *Davis v. Luzerne County*, OOR Dkt. AO 2023-1768, 2023 PA O.O.R.D. LEXIS 2234.[4] The Borough provided no additional evidence to sustain its burden of proving that the application of an individual hired by the Borough is exempt from disclosure under the RTKL. Accordingly, the application must be provided to the Requester.

b. The Borough may redact information pursuant to Section 708(b)(6)

The Borough alleges that a Borough Police Department employee's job application is exempt pursuant to Section 708(b)(6). As stated above, the RTKL considers a job application to be an accessible public record, and the Borough did not submit sufficient evidence to support application of this exemption to justify withholding the requested job application in its entirety. However, the Requester argues that "the Borough should have no problem redacting any personal identification information while still providing the remainder of the [job application]." The OOR agrees with the Requester. *See* 65 P.S. § 706 (the RTKL requires that an agency "shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access" and "[t]he agency may not deny access to the record if the information which is not subject to access is able to be redacted").

[4] The RTKL anticipates that employment records are accessible, except for certain records set forth in Section 708(b)(7). *See* 65 P.S. § 67.708(b)(7) (excluding from access only the "application of an individual who is *not* hired by the agency.") (emphasis added). Here, the Borough does not raise Section 708(b)(7) on appeal, and the Borough therefore does not overcome its burden of proof to justify exemption of a job application under Section 708(b)(7). No other provision of Section 708(b)(7) of the RTKL expressly exempts from disclosure the employment applications of candidates hired by an agency simply because the applications are contained within the individuals' employment files. *See* 65 P.S. § 67.708(b)(7).

Section 708(b)(6)(i)(A) of the RTKL expressly exempts personal identification information, including "[a] record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal email addresses, employee number or other confidential personal identification number." 65 P.S. § 67.708(b)(6)(i)(A). Additionally, Section 708(b)(6)(i)(C) exempts: "[t]he home address of a law enforcement officer or judge." 65 P.S. § 67.708(b)(6)(i)(C).

Therefore, the Borough may redact the information expressly exempt by Section 708(b)(6)(i)(A) (exempts "[a] record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number"), and Section 708(b)(6)(i)(C) (exempts the home address of a law enforcement officer). 65 P.S. § 67.708(b)(6)(i)(A), and (C). *See also* 65 P.S. § 67.706 (requiring agency to provide access to public information, but permitting redaction of non-public information contained within a document); *Del. County. v. Shaefer*, 45 A.3d 1149, 1153 (Pa. Commw. Ct. 2012) ("the Personal Identification Exception provides a subset list of specific items of personal identification information which the legislature concluded should be granted a blanket exemption, with no need for 'proof' otherwise required under the current RTKL").

c. Constitutional Right to Privacy

Although the Borough did not assert or argue that the constitutional right to privacy applies to the responsive records, the OOR may raise the issue *sua sponte*. *See Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017). The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 158-59 (Pa. 2016) ("PSEA"). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL,

the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pa. State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

Even though the Pennsylvania Supreme Court did not expressly define the types of "personal information" subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass'n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test). The Commonwealth Court has also previously held that public employees have a right to privacy in their personnel files, but "[t]his right, however, is not absolute and must be balanced against competing restrictions…." *Bangor Area Educ. Ass'n.*, 720 A.2d 198, 201(Pa. Commw. Ct. 1998)[5]; s*ee also West Shore Sch. Dist. v. Homick*, 353 A.2d 93, 95 (Pa. Commw. Ct.1976) (noting same).

In this instance, job applications of agency employees have been generally accessible to the public under the RTKL, subject to certain redactions. *See Hoyer v. Pa. Office of Admin.*, OOR Dkt. No. AP 2020-1375, 2020 PA O.O.R.D. LEXIS 2474; *see also* 65 P.S. § 67.708(b)(7)(iv). Indeed, an individual's public employment is generally a matter of public record. *See, e.g.*, 65 P.S. §

[5] We note that *Bangor* was decided under the RTKL's precursor statute, the Right to Know Act, Act of June 21, 1957, P.L. 390, as amended,65 P.S. §§ 66.1-66.9 (repealed). As such, the OOR has limited *Bangor's* application as the definition of what constitutes a public record in the former Right-to-Know Act changed under the current RTKL. *Johnston v. Northampton County*, OOR Dkt. AP 2012-1706, 2012 PA O.O.R.D. LEXIS 1421. ("[*Bangor's*] precedential value is limited because it was decided under the old RTKL, which [was] more restrictive in its definition of 'public record'...").

67.708(b)(6)(ii) ("Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee"). Certainly, the educational and occupational qualifications held by a public employee are of important interest to the public.[6] On the other hand, the OOR cannot perceive any public interest in disclosure of personal identification information, not otherwise exempted above, of successful applicants that might be included in an employee's application or resume, including dates of birth and employment references. *See Fitzgerald v. Luzerne County*, OOR Dkt. No. AP 2022-2520, 2023 PA O.O.R.D. LEXIS 75; *Feliciano v. Phila. District Atty's Office*, OOR Dkt. AP 2019-0275, 2019 PA O.O.R.D. LEXIS 286; *see also e.g., Purcell v. Bucks Cnty. Water and Sewer Auth.*, AP 2021-0327, 2021 PA O.O.R.D. LEXIS 727; *Porter v. Abington Twp.*, OOR Dkt. AP 2017-2223, 2018 PA O.O.R.D. LEXIS 431; *Lehman v. Northampton Cnty.*, OOR Dkt. AP 2017-0098, 2017 PA O.O.R.D. LEXIS 421; *Noll v. Tioga Borough*, OOR Dkt. AP 2022-1653, 2022 PA O.O.R.D. LEXIS 1981. We discern no need, based on the record before us, to come to a different result in this case.

Therefore, the Borough is required to provide a copy of the job application for Officer Corbett as specified in the Request. However, insofar as the responsive record contains home addresses, employment references, or other personal identification information, the Borough may redact that information before providing the records. *See PSEA*, *supra.*, *Pa. State Univ.*, 935 A.2d 530 (Pa. 2077).

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[6] When conducting the necessary balancing test to determine whether certain information may be constitutionally protected, our Courts have indicated that "certain of the exceptions in the... RTKL reflect that the General Assembly has already performed the necessary *PSEA* balancing test." *Reese, supra.* citing *PSEA, supra.* In this respect, as mentioned above, the RTKL contains a personnel records exemption that clearly exempts from disclosure specifically identified employment-related records. However, as noted previously, there is nothing in Section 708(b)(7) which outright exempts the disclosure of an agency employee's resume or employment application from public access. To the contrary, the RTKL only exempts employment applications of unsuccessful applicants for an employment position. Thus, given the language of Section 708(b)(7)(iv), one could reasonably infer that the legislature intended that agency employee applications be subject to public disclosure, with certain exceptions as noted herein.

5. The Borough proved that some of Officer Corbett's emails are exempt pursuant to Section 708 (b)(17) of the RTKL

The Borough asserts, among other things, that Officer Corbett maintains a work email account in which "all communications are work-related concerning criminal and non-criminal investigatory records, including, without limitation, victim statements, case files, numerous investigatory documents transmitted by other law enforcement agencies, and information from victims and witnesses." Wenner Affidavit III ¶ 6(c). Furthermore, the Borough states that "[u]pon investigation, no emails sent and received by Officer Travis Corbett on his work-related email account fall outside the exceptions cited above." Wenner Affidavit III ¶ 6(d).

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "complaints," "[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)(i); 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). To hold otherwise would "craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure." *Id*. at 259.

The OOR has recognized that police departments are empowered to enforce the laws of the Commonwealth or otherwise perform the functions as to "any … event that occurs within [its]

primary jurisdiction and which reasonably requires action on the part of the police in order to preserve, protect or defend persons or property or otherwise maintain the peace and dignity of this Commonwealth." 42 Pa.C.S. § 8952. Further, the OOR has found that this statutory authority grants police departments the ability to conduct noncriminal investigations. *See e.g., Kay v Bristol Twp. Police Dep't*, OOR Dkt. AP 2023-1655, 2023 PA O.O.R.D. LEXIS 1795 (finding that investigation of a civil noise complaint was noncriminal).

The Requester has expressed doubt that *all* emails sent and received by Officer Corbett pertain to criminal and noncriminal investigations. However, the Requester has not provided evidence that sufficiently contradicts the statements offered by the Borough in the attestation it submitted. Accordingly, the Borough has met its burden of proving that the responsive emails that relate to a Borough investigation, that are otherwise not criminal in nature, are exempt from disclosure.

6. The appeal is transferred in part

The Borough also asserts that some records responsive to Item 2 (emails sent and received by Officer Travis Corbett between 12/25/23 and 01/10/24) in its possession are exempt from disclosure under Section 708(b)(16) of the RTKL. *See* 65 P.S. § 67.708(b)(16). The Borough's police department is a local law enforcement agency. The OOR does not have jurisdiction to hear appeals related to criminal investigative records held by local law enforcement agencies. *See* 65 P.S. § 67.503(d)(2). Instead, appeals involving records alleged to be criminal investigative records held by a local law enforcement agency are to be heard by an appeals officer designated by the local district attorney. *See id*.

Here, the Borough submitted evidence demonstrating that certain requested records could relate to a criminal investigation. The Wenner Affidavit III explains that "Officer Travis Corbett maintains a work email account …in which all communications are work-related concerning criminal and noncriminal investigatory records, …" and that "no emails sent and received by Officer Travis

Corbett on his work-related email account fall outside the exceptions cited above." Wenner Affidavit III ¶ 6(c), (d).

Accordingly, as it relates to the remaining emails responsive to the Request, the appeal is hereby transferred to the Appeals Officer for the Venango County District Attorney's Office ("Office") to determine whether any of these emails are subject to disclosure.[7] A copy of this final order and the appeal filed by the Requester will be sent to Appeals Officer for the Office.

7. The Borough failed to prove that additional records do not exist within the Borough's possession, custody or control

The Borough argues that it does not have additional responsive records in its possession, custody or control. Specifically, the Borough asserts that some training materials do not exist. The Borough also asserts that it does not have any responsive emails for Mayor Carlson in its possession, custody or control during the specified time period.

In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. The RTKL does not define the term "good faith effort." However, in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court stated:

> As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under...the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with

[7] The Commonwealth Court has noted that the OOR has the authority to transfer an appeal to "where [a requester] should have initially appealed." *See Phila. Dist. Attorney's Office v. Williams*, 204 A.3d 1062, *4 n.5 (Pa. Commw. Ct. 2019) ("… [A]lthough the onus for appealing from an RTKL denial to the proper appeals officer is on the requester, the OOR did not violate the law or any procedure in redirecting the appeal in this case").

knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

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). Here, as discussed above, the Borough did not reasonably interpret the Request and limited its response regarding training materials "to mean documents that are used to train police officers that are created or generated by the [Borough], and such documents do not exist." *See* Response to Appeal ¶ 3. However, we have granted access, as set forth above, to other training materials.

In response to Item 3 of the Request for Mayor Carlson's text messages, emails and phone call logs, the Borough initially responded by informing the Requester that Mayor Carlson does not have a work-related cellular telephone or email account. Thereafter, on appeal, the Requester noted that emails that are sent or received in connection with the transaction of public business are a public record regardless of whether they are created or stored on a public or private computer, mobile device, or email account. In response to a request for additional information by the OOR, and in support of the Borough's assertion that it does not have any additional responsive records in its possession, custody, or control in response to Item 3 of the Request for Mayor Carlson's emails, the Wenner Affidavit III states:

> [6](f) In his third ground for appeal, Stallard challenges the Borough's response to his request for emails sent and received by Mayor Matthew Carlson between December 25, 2023, and January 10, 2024, to which the Borough indicated no such records exist.
>
> [6](g) Upon investigation, Mayor Matthew Carlson did not send or receive any emails between December 25, 2023, and January 10, 2024, in

> connection with the transaction of public business, and, therefore, no such records exist.

An agency must show, through detailed evidence, submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011). Additionally, "[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). Here, the Borough does not meet its burden of proving that it conducted a good faith search and thereafter determined that no responsive records exist. Specifically, the Borough did not include information regarding whether its search included all of the email addresses used by Mayor Carlson, nor did the Borough state that it consulted Mayor Carlson and requested that he perform a search for responsive records.

There is nothing in the record to substantiate the claim that the requested records do not currently exist. The Borough failed to provide sufficient evidence in support of its claim that responsive records do not exist in its possession, custody or control. Therefore, based upon the evidence submitted, the OOR concludes that the Borough has not met its burden of proving that additional records responsive to Items 1 and 3 of the Request do not exist within its possession, custody, or control. *Hodges*, at 1192 (Pa. Commw. Ct. 2011). Therefore, the records must be provided to the Requester.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part**, **denied in part**, and **transferred in part**. The Borough is required to provide the responsive job application, redacted in accordance with the above, to the Requester within thirty days. The Borough is also required to provide any training

materials that are not copyrighted and Mayor Carlson's emails to the Requester within thirty days. The Borough is required to make copyrighted training materials available to the Requester for inspection within thirty days. 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 Venango 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.[8] 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 website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: April 25, 2024

/s/ Daneen L. Miller-Smith

_____
DANEEN L. MILLER-SMITH
APPEALS OFFICER

Sent to:
Jonathan Stallard (by OOR portal)
Joseph Sporer, AORO (by OOR portal)
Brian Spaid, Esquire (by OOR portal)
Shawn White, District Attorney (by First Class Mail)

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