



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**ADRIAN JADIC,
Requester**

v.

**WYOMISSING BOROUGH,
Respondent**

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Docket No: AP 2024-1050

FACTUAL BACKGROUND

On April 1, 2024, Adrian Jadic (“Requester”) submitted a request (“Request”) to Wyomissing Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, stating:

Pursuant to the RTKL, I hereby request access to and copies of all records including, but not limited to, documents presented, submitted, consulted, or approved during any public meetings held in January and February 2024. This [R]equest encompasses all agendas, minutes, reports, and presentations, as well as any attachments, appendices or supplementary materials associated with the aforementioned documents. Kindly categorize the responsive documents according to the respective public meeting and/or dates at which they were discussed or referenced.

On April 8, 2024, the Borough partially denied such Request, asserting that some records are exempt pursuant to Section 708(b)(16) and (17), as records pertaining to criminal and noncriminal investigations. *See* 65 P.S. §§ 67.708(b)(16), (17). Specifically, the Borough identified the Zoning and Codes violation records as being exempt under these sections. The

Borough provided some responsive records to the Requester, and it notified the Requester that some plans are not able to be produced because they are protected by the Federal Copyright Law, but the Borough made those records available to the Requester for inspection upon his request.

On April 22, 2024, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The Requester objected to the withholding of the zoning and code enforcement records pursuant to Section 708(b)(17), but he did not object to the Borough’s position that the copyrighted material is available for inspection but not reproduction. The Requester also argued that the remaining requested records are of significant public interest, and the Borough should allow access to them in the interest of transparency and accountability. 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. *See* 65 P.S. § 67.1101(c).¹

On May 1, 2024, the Borough submitted a position statement, reiterating its reasons for denial. The Borough noted that the Requester did not contest the Borough’s position that the responsive plans at issue are subject to the Copyright Act, and, therefore, they may be inspected but not reproduced or copied. Furthermore, the Borough asserted that if the OOR finds that the records pertain to a criminal investigation pursuant to Section 708(b)(16), the matter shall be transferred to the Berks County District Attorney’s Office. The Borough stated that the remaining excluded responsive records pertain to a noncriminal investigation, and the Borough reviewed the required components to support an exemption under Section 708(b)(17).² In support of its

¹ On April 23, 2024, the Requester submitted correspondence noting that he is opposed to the Borough’s request for a thirty-day extension. On April 24, 2024, the Borough stated that it has not requested an extension and intends to submit its response by the established submission deadline.

² The Borough also raises Section 708(b)(10) and argues that, although the exempt reports were circulated to the Infrastructure Committee, that does not make them subject to disclosure pursuant to Section 708(b)(10) because the records are otherwise exempt under the RTKL. The OOR does not reach this argument, as Section 708(b)(17) does

position, the Borough submitted the affidavit of the Borough's Agency Open Records Officer ("AORO"), Melissa Miller ("Miller Affidavit"), and the Zoning and Code Enforcement Officer, Jeff Hogg ("Hogg Affidavit").³

On May 1, 2024, the Requester also submitted a position statement that is responsive to the Borough's submissions. The Requester argues that the Borough is misapplying RTKL exemptions, in that some of the requested records do not "disclose sensitive investigative details," but instead document the routine functioning of local government. Specifically, the Requester notes that the exemptions should be applied narrowly, and the Borough should disclose "meeting minutes, agendas, and reports." The Requester further states that previous case law does not support exemptions for documents that are not strictly internal. The Requester also discusses the importance of transparency, accountability and equity, and he states that the public interest requires disclosure of the responsive documents. Furthermore, the Requester states that making these records accessible levels the playing field so that individuals who are not well-resourced can monitor and challenge governmental decisions.

On May 13, 2024, the OOR issued correspondence to ask the Requester to clarify the outstanding issues on appeal and to confirm receipt of the documents identified in the Miller Affidavit as those that were provided to the Requester. On the same date, the OOR issued correspondence to ask the Borough to clarify which specific documents were not disclosed to the Requester, and to provide additional detail about the search conducted by the Borough.

On May 14, 2024, the Borough submitted an additional affidavit authored by Ms. Miller ("Miller Supplemental Affidavit") which detailed the search conducted by the Borough, identified

not require that the subject records remain internal to the agency, and 708(b)(10) involves internal, predecisional deliberations.

³ The Hogg Affidavit explains that Mr. Hogg is an employee of Kraft Municipal Group (Kraft Code Services), which provides Zoning and Enforcement Officer services for the Borough of Wyomissing.

all documents that were responsive to the Request, and noted that it withheld the Property Maintenance and Zoning Complaint sections of the Permit, Building Plan Review and Inspection Reports for December 2023 and January 2024, but provided the remaining sections of those Reports to the Requester. Miller Supplemental Affidavit ¶¶ 5-7. The Borough also reiterated that it withheld plans submitted at the Planning Commission meeting on February 5, 2024. Miller Supplemental Affidavit ¶ 8. The Miller Supplemental Affidavit clarifies that the remainder of the responsive records were provided to the Requester. Miller Supplemental Affidavit ¶¶ 9-10.

On May 14, 2024, the Requester submitted correspondence which confirmed that the Requester received the documents that the Miller Affidavit indicated were provided to him, and he does not contest the withholding of documents pursuant to the Copyright Act.⁴ He further clarifies that he is appealing the denial of the portion of his request seeking zoning and code enforcement records pursuant to Section 708(b)(17). Specifically, the Requester asserts that the Notices of Violations (NOVs) should be disclosed because they are a routine part of government operations. The Requester reiterates his prior arguments, draws comparisons with disclosure of police and fire reports, and expresses his belief that he should have been given a list of the documents that are being withheld pursuant to the Copyright Act and an affidavit from the Borough engineer. He also notes that he believes he should at least receive a list of the NOVs that are not being disclosed. On May 14, 2024, the Requester also submitted a separate document that is responsive to the Miller Supplemental Affidavit filed by the Borough.

⁴ Despite stating that he is not contesting the withholding of documents pursuant to the Copyright Act, the Requester did submit argument asserting that a broad application of the Copyright Act is problematic. He states that permits and simple sketches should not be withheld, but architectural plans may be appropriately withheld. The Requester notes that the Borough has not identified which specific documents have been withheld pursuant to Copyright Act protections, nor has it provided an affidavit from the Borough engineer. He also acknowledges that the Borough has made such copyrighted documents available for review, as opposed to reproduction, and this method generally strikes a reasonable balance between copyright concerns and public access. Because access to the copyrighted works has been provided, the OOR need not further address the Copyright Act.

On May 15, 2024, the OOR requested a two-week extension of the deadline for the Final Determination to be issued. On the same date, the Requester agreed to a modified extension to accommodate travel plans that will not allow the Requester to have access to the OOR portal. The Requester also discussed the policy implications of making NOVs available to the public so the public can ensure government is not selectively enforcing violations, thereby resulting in discrimination and harassment. Additionally, the Requester stated that violations should be publicly available to homebuyers. The Requester again asked the Borough to provide a list of the plans and drawings that are being withheld pursuant to the Copyright Act and asserted that once plans have been shown during public meetings, they should be considered to be in the public domain, and individuals who submit plans should be aware that the plans become public record and may be copied.

On May 16, 2024, the Requester confirmed the extension of the submission deadline until May 20, 2024, and the Final Determination deadline until June 14, 2024. The Requester also offered additional argument to support his position on appeal. The Requester attached two sample Notices of Violations, for a political sign exceeding the allowable size and for exterior maintenance issues. He also stated that the letters describing the violations are strictly administrative and personal information such as the name and address of the property owner could be redacted. The Requester also compares the requirement to disclose police blotter information with the ability to keep NOVs exempt from disclosure. The Requester reiterates that discrimination and selective enforcement are byproducts of a lack of transparency.

On May 17, 2024, the Borough submitted a supplemental position statement and a second supplemental affidavit of Melissa Miller (“Miller Second Supplemental Affidavit”), which reiterated the procedural history of the appeal and stated that the Borough notified the Requester

that the copyrighted materials cannot be reproduced but are available for his review. Ms. Miller noted that the plans have been available to the Requester, but the Requester did not arrange to review the plans, although they are still available for his review. Ms. Miller also directed the Requester to a publicly-available website for the Planning Commission agenda, which also lists the plan that was reviewed at the meeting identified in the Request.

On May 20, 2024, the Requester filed another position statement in response to the Borough's recent filings. He again states that the Miller Affidavit does meet the Borough's burden of proof and the Borough engineer should be required to submit an affidavit. The Requester submitted photographs from an Infrastructure Committee meeting showing an "Enforcement Activity Report" which shows routine enforcement activities and does not include any personally identifiable or sensitive information. The Requester states his belief that the Borough is refusing to release the reports because the reports contain sensitive information, which can easily be redacted. He again asks the OOR to direct the Borough to release the NOV's and the NOV report with redactions for personally identifiable information.

On May 21, 2024, the Borough submitted the affidavit of the engineer, Gregg Bogia ("Bogia Affidavit"), who prepared the land development plan discussed in the appeal. Mr. Bogia attests that he prepared the land development plan, which is protected by the Federal Copyright Act, and he never granted the Borough permission to reproduce the plan. Bogia Affidavit ¶¶ 3-6. The Borough also requested an extension of the submission deadline to May 23, 2024. The OOR granted the extension on the same day.

On May 23, 2024, the Requester filed two additional position statements reiterating his arguments. The Requester cited a case that clarifies that the "official probe" exemption only applies to noncriminal investigations conducted by agencies within their legislatively granted fact-

finding and investigative powers, and the exemption must be narrowly applied to avoid creating a broad shield against public access to governmental activities. The Requester further states that the Borough also misapplied Sections 708(b)(16) and (b)(17) because those exemptions should only be used to avoid the disclosure of sensitive investigative details, but not routine governance activities. The Requester asked the OOR to find that the evidence he has provided contradicts the Hogg Affidavit presented by the Borough. The Requester referred to a similar appeal that he filed with the OOR, *Jadic v. Wyomissing Borough*, OOR Dkt. AP 2021-0542 (consolidated), 2021 PA O.O.R.D. LEXIS 687,⁵ and the Requester asserts that the broad application of exemptions in that case has had “significant adverse effects.” The Requester also submitted an additional NOV. Lastly, the Requester noted that he received the Bogia Affidavit regarding the copyright protections of the plans at issue in the appeal, and he states that he is satisfied with the information he received. He further requests clarification regarding the conflict between the RTKL, the Copyright Act, and the Sunshine Act.⁶ The Requester also argues that the Copyright Act protections should not prohibit the copying of documents once they are displayed at a public meeting because the Sunshine Act provides for a citizen’s right to take photographs or videos at public meetings.⁷

⁵ In *Jadic v Wyomissing Borough*, the OOR found that the Borough of Wyomissing December 2020 Permit, Building Plan Review and Inspection Report is exempt pursuant to Section 708(b)(17) as a record pertaining to a noncriminal investigation.

⁶ The Requester references the Sunshine Act requirements and its applicability to this case. 65 Pa.C.S. § 701, *et. seq.* However, the OOR is without jurisdiction to determine whether the Sunshine Act has been violated. Section 715 of the Sunshine Act provides that the “Commonwealth Court shall have original jurisdiction of actions involving State agencies and the courts of common pleas shall have original jurisdiction of actions involving other agencies to render declaratory judgments or to enforce this chapter by injunction or other remedy deemed appropriate by the court.” 65 Pa.C.S. § 715.

⁷ The Requester asks the OOR to “provide a ruling or guidance” regarding whether documents shared at a public meeting should be deemed “copyright-free for the purpose of video recording stipulations of the Sunshine Act” and “[h]ow the Borough can insure compliance with both the RTKL and the Sunshine Act while protecting individuals from potential copyright infringement claims.” The OOR declines to make such a ruling, as caselaw makes an agency’s obligations with respect to the Copyright Act clear.

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 Borough argues that the withheld records are exempt, as they relate to a noncriminal investigation. 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 the noncriminal 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 factfinding and

investigative powers. *See 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.

Here, pursuant to its authority under the Borough Code, Pa.C.S.A. § 32A04, the Borough has adopted the International Property Maintenance Code. Borough of Wyomissing, Pa., Municipal Code, § 11.101. The Property Maintenance Code regulates maintenance of properties within the Borough. *Id.* Pursuant to the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10101 *et seq.*, the Borough has the authority to regulate the uses of property through zoning ordinances. Borough of Wyomissing, Pa., Municipal Code, § 27.101. The Zoning Ordinance is enforced by the appointed Zoning Officer. *Id.* at § 800.

Here, the Hogg Affidavit states:

2. Kraft Municipal Group serves as the Zoning and Code Enforcement Officers for the Borough of Wyomissing, Berks County, Pennsylvania.
3. Kraft Municipal Group has served as the Zoning and Code Enforcement Officers for the Borough of Wyomissing since January 4th, 2016.
4. Since May 1st, 2021, I have performed the majority of the Zoning and Code Enforcement services for the Borough of Wyomissing.
5. As Zoning and Code Enforcement Officers for the Borough of Wyomissing, Kraft Municipal Group is charged with enforcing the Ordinances of the Borough of Wyomissing including but not limited to the Zoning Ordinance and Property Maintenance Code.
6. Part of my duties in enforcing the Borough of Wyomissing Zoning Ordinance and Property Maintenance Code, is to respond to and investigate complaints, review applicable Ordinances, determine if a violation exists or not, issue notices of violations of said Ordinances, when founded, and prosecute failure to comply with notices in accordance with the ordinances, either by civil complaint or citations.
7. In addition, I prepare and submit a monthly report to the Infrastructure Committee of the Council of the Borough of Wyomissing of the complaints received and investigation status.
8. Specifically, the report numbers the complaint, notes receipt and basis for complaint, response, investigation into complaint, and what investigation

concluded, e.g., no violation, violation found with compliance achieved or notice of violation and citation issued.

9. The information set forth on the report is based on performance of an investigation that typically includes but is not limited to viewing the property, speaking with the owner as well as the complainant and/or neighbors, preparation of notes of what was observed or learned through the above and taking photographs of the subject property.
10. As prosecution of any founded or unresolved complaints are via either a civil complaint or summary non-traffic citation, the investigation thereof is part of a non-criminal investigation.
11. The information set forth in the report reveals the institution, progress or result of my investigation as Borough of Wyomissing Code Enforcement officer.

Further, the Miller Affidavit states:

8. The documents for the January 16, 2024 meeting included a report from the Borough's Code Enforcement Officials, Kraft Code Services, entitled "Borough of Wyomissing December 2023 Permit, Building Plan Review and Inspection Report."
9. The documents for the February 20, 2024 meeting included a report from Kraft Code Services entitled "Borough of Wyomissing January 2024 Permit, Building Plan Review and Inspection Report."
10. These reports included Property Maintenance and Zoning Complaints.
11. The Property Maintenance and Zoning Complaint portion of the reports set forth complaints received, notes of investigation, and status of an investigation of the Borough's Property Maintenance Code and Zoning Ordinance.
12. In discussing review of the documents with the Borough Solicitor, it was determined that the Kraft Municipal Group reports that were part of the Infrastructure Committee['s] records included a list of investigations and the status of each investigation.
13. The reports were determined to be exempted from production under the Right to Know Law as part of a non-criminal investigation or alternatively a criminal investigation.
14. I excluded the Property Maintenance and Zoning Complaint portion from the Reports from the January 16, 2024 and February 20, 2024 Infrastructure Committee documents that were provided to the Requester.

...

17. I provided Requester with responsive documents not exempt from production under the Right-to-Know Law from Borough Council, Planning Commission, Infrastructure Committee, Finance Committee, Economic Development Committee, Fire & Police Committee, Park & Shade Tree Commission, Personnel Committee, Recreation Board, and Refuse & Recycling Committee meetings in response to the Request.

Additionally, the Miller Supplemental Affidavit states:

5. In response to the request of Adrian Jadic, I performed a good faith search of all of the records in the Borough's possession, custody and control, and located a number of records responsive to the request, including the reports entitled "Borough of Wyomissing December 2023 Permit, Building Plan Review and Inspection Report" and "Borough of Wyomissing January 2024 Permit, Building Plan Review and Inspection Report", and plans submitted at the February 5, 2024 Planning Commission meeting.
6. The entirety of the December 2023 Permit, Building Plan Review and Inspection Report and the 2024 Permit, Building Plan Review and Inspection Report was not withheld from [R]equester.
7. As noted in Paragraph 14 in my affidavit dated May 1, 2024, only the Property Maintenance and Zoning Complaint portion of the reports were excluded from production.
8. In addition, I excluded from production the plans submitted at the February 5, 2024 Planning Commission meeting.
9. The remaining documents I located that were responsive to the request were provided to requester.
10. There are no additional records responsive to the request other than the plans and the portions of the December 2023 Permit, Building Plan Review and Inspection Report and January 2024 Permit, Building Plan Review and Inspection Report which were excluded from production and the documents provided to requester in response to his request.

Under the RTKL, an 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. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Borough has acted in bad faith, "the averments in the

[attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’t Prot.*, 103 A.3d 374, 5 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). The OOR routinely finds that municipalities are statutorily authorized to investigate violations of their ordinances. *See, e.g., Prickett v. Yardley Borough*, OOR Dkt. AP 2023-0774, 2023 PA O.O.R.D. LEXIS 1141; *Westrich v. Malvern Borough*, OOR Dkt. AP 2022-0605, 2022 PA O.O.R.D. LEXIS 1327.

As the Borough’s evidence establishes that the withheld reports are related to a noncriminal investigation conducted pursuant to statutory authority, the Borough has met its burden of proving that withheld portions of the responsive records are exempt from disclosure. *See* 65 P.S. § 67.708(a)(1). *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions). While the Requester argues that the remaining withheld records should be disclosed with redactions of exempt information, it is well-settled that an agency is not required to redact an otherwise exempt record. *Castillo v. Pa. State Police (Off. Of Open Recs.)*, 310 A.3d 831 (Pa. Commw. Ct. 2024) (holding that an agency is not required to redact a record if the record falls within an exemption under Section 708(b)). Therefore, the Borough is not required to produce the exempt records with redactions.

Finally, the Miller Supplemental Affidavit confirms that “[t]here are no additional records responsive to the request other than the plans and the portions of the December 2023 Permit, Building Plan Review and Inspection Report and January 2024 Permit, Building Plan Review and Inspection Report.” ¶ 10. To the extent that the Requester argues additional responsive records exist, the Borough is not required to create records that do not exist. 65 P.S. § 67.705.

CONCLUSION

For the foregoing reason, the Requester's 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 Berks 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 according to court rules as per Section 1303 of the RTKL, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated 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: June 14, 2024

/s/ Daneen L. Miller-Smith
Daneen L. Miller-Smith, Esq.
Appeals Officer

Sent via OOR portal to:
Adrian Jadic
Melissa Miller, AORO
Matthew Fessler, Esq.

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