



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

:

**DYLAN SEGELBAUM and
THE YORK DAILY RECORD,
Requester**

:

:

:

:

v.

: Docket No: AP 2020-1336

:

**NORTH YORK BOROUGH,
Respondent**

:

:

INTRODUCTION

Dylan Segelbaum (“Requester”), a reporter for the York Daily Record, submitted a request (“Request”) to North York Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the forensic audit of a fire department. The Borough denied the Request, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Borough is required to take further action as directed.

FACTUAL BACKGROUND

On July 30, 2020, the Request was filed, seeking “[a] copy of the most recent forensic audit of the North York Borough Liberty Vol. Fire Co. No. 1.” On August 6, 2020, the Borough denied the Request, stating that the audit is exempt as related to a noncriminal investigation. 65 P.S. § 67.708(b)(17).

On August 10, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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).

On August 26, 2020, the Borough submitted a position statement, explaining that the responsive record is a report recording the investigation into potential misappropriation of funds provided to the fire company, including witness interviews, pursuant to a specific legislative enactment, and that the review had uncovered potential criminal activity and been provided to the York County District Attorney's Office ("DA's Office") for further review. The Borough argued that the record is exempt both as a record of a criminal and noncriminal investigation, 65 P.S. §§ 67.708(b)(16); (17), and submitted the sworn affidavit of Richard Shank, the Borough's council president, who attests as to the accuracy of the position statement.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and

relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Borough is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 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)).

1. The Borough has not established that it conducted a criminal investigation

On appeal, the Borough also argues that the responsive audit report is exempt under Section 708(b)(16) of the RTKL. 65 P.S. § 67.708(b)(16). In support of this argument, the Borough submitted the verification of Borough Council President Shank, who attests that:

The entirety of the record responsive to [the Request] is a report of findings in an investigation into potential misappropriation of Borough funds. The responsive record details the steps that were taken in the investigation by the forensic accounting firm contracted by the Borough to conduct the investigation into potential misappropriation, such as the records that were reviewed and the witnesses that were interviewed. The record review was completed and witness interviews were taken as part of an official probe into the conduct of certain members of the Fire Company. It also contains the accounting firm's conclusions.

[...] The investigation was conducted in order to determine if Borough funds were being misused by the Fire Company or its members in consideration of whether the Borough would be able to continue appropriating funds to the Fire Company, and whether or not additional controls were needed to ensure that there was no misappropriation.

As a result of the investigation, the record was then transferred to the [DA's Office], which, to the best of my understanding, is reviewing the matter and may conduct its own investigation. The investigation did not result in the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization or a settlement agreement.

Under the RTKL, an 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 evidence that the Borough has acted in bad faith, "the averments in [the verification] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. 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)).

Municipal governments, such as the Borough, are generally local law enforcement agencies for the purposes of Section 708(b)(16) of the RTKL.¹ 65 P.S. § 67.102; *see also Huegel v. Pennndel Borough*, OOR Dkt. AP 2019-2312, 2019 PA O.O.R.D. LEXIS 2069; *Bolton v. York County District Attorney's Office*, OOR Dkt. AP 2017-1324, 2017 PA O.O.R.D. LEXIS 1167. 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, where the agency either submits evidence demonstrating that a criminal investigation occurred or, based on the appeal documents or the language of the request itself, there is no dispute between the parties regarding the existence of a criminal investigation, such appeals are to be heard by an appeals officer designated by the DA's Office. *See id.*; *Wisor v. City of DuBois*, OOR Dkt. AP 2019-1351, 2019 PA O.O.R.D. LEXIS 1209 (holding that the OOR lacked jurisdiction over the portion of a request seeking "any and all" records relating to criminal charges, arrests and law enforcement intervention); *see also Steinheiser v. Falls Twp.*, OOR Dkt. AP 2015-0323, 2015 PA O.O.R.D. LEXIS 378 (holding that where the plain language of a RTKL request sought a police report and there was evidence of a criminal investigation, the criminal investigative exemption applied).

Here, however, the Borough's evidence does not show that it conducted a criminal investigation. According to the Borough Council President's attestation, the Borough initiated a forensic audit "to determine if Borough funds were being misused by the Fire Company or its members in consideration of whether the Borough would be able to continue appropriating funds to the Fire Company, and whether or not additional controls were needed to ensure that there was

¹ According to the Borough's website, "North York Borough contracts with the Northern York County Regional Police Department ... to provide police protection to the Borough. North York Borough disbanded its Police Department in 1973." *See* <https://www.northyorkborough.com/emergency.html>, last accessed Sept. 10, 2020. For the reasons below, the OOR does not need to determine whether this contract changes the Borough's status as a local law enforcement agency.

no misappropriation.” Although the Borough attests that the information was then provided to the DA’s Office, the Borough’s purpose in creating the record was the proper governance of public funds.

In *Silver v. City of Pittsburgh*, the OOR held that:

The withheld records are related to a criminal investigation only in the sense that they have been obtained by the FBI as evidence during their investigation. The fact that a record becomes evidence in a criminal investigation – especially a nominally public record dealing with the expenditure of public funds – does not transform that record into one exempt from disclosure pursuant to Section 708(b)(16). The investigation at issue is not being conducted by the City, and as such, the records at issue were not created or compiled by the City in relation to a criminal investigation.²

OOR Dkt. AP 2013-1395, 2013 PA O.O.R.D. LEXIS 886. The criminal investigative exemption exempts records of the criminal investigations undertaken by the Borough, but it does not exempt documents of the Borough just because they may be the subject of criminal investigations by other agencies. *See Hockheimer v. City of Harrisburg*, OOR Dkt. AP 2015-1852, 2015 PA O.O.R.D. LEXIS 1654. Therefore, because the Borough has not demonstrated that the audit was undertaken for the purposes of a criminal investigation, Section 708(b)(16) does not apply, and the OOR retains jurisdiction over this appeal.³

2. The Borough may not withhold the audit report under Section (b)(17) of the RTKL

The Request seeks the audit report generated by the Borough’s most recent forensic audit into a fire department, which the Borough denied under Section 708(b)(17) of the RTKL. 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL provides that records “relating to a noncriminal

² As with the records in *Silver*, the responsive audit report is a “financial record” under the RTKL, and therefore subject to more stringent requirements for redaction. 65 P.S. § 67.102 (A “Financial Record” includes “(3) A financial audit report. The term does not include work papers underlying an audit.”).

³ Furthermore, to the extent that Section 708(b)(16) did apply, the Borough would still be required to produce the audit, but with the investigative material redacted. *See Levy v. Senate of Pa.*, 94 A.3d 436, 448 (Pa. Commw. Ct. 2014).

investigation” are exempt from disclosure, including “investigative materials, notes, correspondence and reports,” 65 P.S. § 67.708(b)(17)(ii), and records that “if disclosed would... reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license....” 65 P.S. § 67.708(b)(17)(vi). 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).

However, in *Pa. Dep’t of Pub. Welfare v. Chawaga*, the Commonwealth Court held that “importantly, the RTKL specifically exempts the work papers underlying an audit without exempting the actual audit. [...] By including the work papers within the exemption, but not the resulting audit, we can presume that the General Assembly did not intend to exempt the actual [] audit report under principles of statutory construction.” 91 A.3d 257, 259 (Pa. Commw. Ct. 2014) (internal citations omitted); *see also Governor’s Office of Admin. v. Purcell*, 35 A.3d 811, 816 (Pa. Commw. Ct. 2011) (“[S]pecific inclusion of some items of the same class is presumed to exclude all other items of the same class.”) As a result, while the papers underlying a financial audit may be exempt from disclosure under Section 708(b)(17), the actual results of the audit are not. *Mollick v. Methacton Sch. Dist.*, OOR Dkt. AP 2019-0514, 2019 PA O.O.R.D. LEXIS 423. Therefore, the Borough cannot withhold the audit report und Section 708(b)(17) of the RTKL.⁴

⁴ Although the RTKL does not define “audit report”, the parties do not dispute that the responsive record—a report prepared by a forensic accounting firm detailing their investigations into how money was spent—constitutes the result of an audit.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Borough is required to provide responsive records 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 York 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. 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 party.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 16, 2020

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS, ESQ.

Sent to: Dylan Segelbaum (via email);
Brittany Reed (via email);
Sarah Doyle, Esq (via email)

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