



FINAL DETERMINATION

IN THE MATTER OF

**MATTHEW MONTEIRO,
Requester**

v.

**EPHRATA BOROUGH,
Respondent**

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Docket No: AP 2021-0150

INTRODUCTION

Matthew Monteiro (“Requester”) submitted a request (“Request”) to Ephrata Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking two police reports. 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 **denied**, and the Borough is not required to take further action.

FACTUAL BACKGROUND

On January 4, 2021, the Request was filed, seeking reports # 2020-14633 and # 2020-14627. On January 8, 2021, the Borough denied the Request, asserting that the reports are related to criminal and noncriminal investigations. *See* 65 P.S. §§ 67.708(b)(16)-(17).¹

¹ The Borough provided the Requester with the contact information for the appeals officer appointed by the District Attorney of Lancaster County.

On January 25, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² 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 February 2, 2021, the Borough submitted a position statement and the affidavit of Lt. Christopher McKim, the Borough Police Department’s Open Records Specialist. The Borough also submitted the portion of the Police Department’s policy relating to investigations.

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

² Ephrata Police Department was listed as the agency on the request form, but the Borough of Ephrata responded to the Request. The Requester also submitted a request for the same records and “any other reports with my name in the report for the month of December 2020.” As the request was made on the same day as the Request by a Steph Monteiro Crockett, who lives at the same address as the Requester, and the appeal did not include a separate Department response, the OOR did not docket this request as a separate appeal.

to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

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)).

The Borough argues the reports are related to noncriminal investigations. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[i]nvestigative materials, notes, correspondence and reports” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order for this

exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welf. 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.

Lt. McKim attests:

The Ephrata Police Department conducted two investigations that are responsive to [the Request]. The records associated with those investigations are police reports numbered: 2020-14627 and 2020-14633. The responsive records are both reports from official police investigations.

The first (2020-14627) was dispatched as Trespassing, which is a crime. Therefore, that investigation began as a criminal investigation, and then, as evidence and circumstances were revealed, transitioned into a noncriminal investigation. It was reclassified as “Suspicious Activity,” which does not connote a crime.

Investigation report 2020-14633 was dispatched as a “Check on the Welfare,” which is noncriminal in nature. The final classification was similar; “Other Public Service I Welfare Check;” which is also a noncriminal investigation.

Both types of investigations may include findings, actions, observations, conclusions, and investigative material obtained throughout the investigation - in this case, the official reports. The reports and their accompanying materials are the result of a systematic inquiry, detailed examination, and official probe detailing calls for service that were conducted as part of the Ephrata Police Department’s official duties.

The incident reports and their components are not public records because they were received, created, and retained pursuant to a Department noncriminal investigation. The investigations were initiated by a law enforcement agency who is granted authority under the laws of the Commonwealth, and has been confirmed and continued in Ephrata Borough, which conducts official probes as part of its official

duties under the guidance of the Department regulations, policy, and procedures manual.

The Ephrata Police Department is an entity that investigates complaints/incidents and is required to conduct a course of systematic or searching inquiries and detailed examinations of complaints/incidents received or initiated by our agency.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Borough acted in bad faith, “the averments in [the affidavit] 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)). Accordingly, the Borough has demonstrated that the Police Department conducted two investigations and that records requested are reports related to those investigations. As such, the Borough met its burden of proving that the requested records are related to noncriminal investigations. *See, e.g., Robbins v. Sayre Borough Police Dep’t*, OOR Dkt. AP 2017-1750, 2017 PA O.O.R.D. LEXIS 1500 (local police departments conduct noncriminal investigations as part of the their legislatively granted fact-finding powers, and incident reports prepared in relation to these noncriminal investigations are exempt under Section 708(b)(17) of the RTKL).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Borough is not required 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 Lancaster 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 a party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 22, 2021

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to: Matthew Monteiro (via email);
Stephanie Fasnacht, AORO (via email)

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