



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**TINA LOCURTO and  
THE YORK DISPATCH,  
Requester**

**v.**

**NORTH YORK BOROUGH,  
Respondent**

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**Docket No: AP 2021-0193**

### **INTRODUCTION**

Tina Locurto, a reporter for The York Dispatch (collectively “Requester”), 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 January 20, 2021, the Request was filed, seeking a “forensic audit report conducted by Jeremy Witmer of the company RKL LLC of the Liberty Fire Company commissioned by North York Borough.” On January 21, 2021, the Borough denied the Request, stating that the audit is exempt as related to criminal and noncriminal investigations. 65 P.S. §§ 67.708(b)(16)-(17).

On January 28, 2021, 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 February 17, 2021, 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 affidavits of Richard Shank, the Borough's council president, and Walter Tilley, III, Esq., Borough Solicitor.

### **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.

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. During an executive session, Borough Council advised its solicitor, Attorney Walter Tilley, of a potential criminal misappropriation of Fire Company funds. After receipt of the advice of the Borough's solicitor to investigate the matter in order to obtain evidence for a criminal investigation, the Borough contracted RKL, LLC to perform a forensic audit of the Fire Company. The responsive record details the steps that were taken in the investigation by RKL, 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, which include that a misappropriation occurred.

The investigation into the members' conduct was conducted pursuant to the Borough Code, 8 Pa.C.S. § 1202(35) and (56), which permits a Borough to appropriate funds to fire companies within the Borough and permits the Borough to ensure that the fire and emergency medical services have the appropriate financial administrative assistance for the services. The investigation was conducted in order to determine if Fire Company funds were being misused by the Fire Company of its members.

As a result of the investigation, the record was then transferred to the [DA's Office], which conducted its own investigation. The investigation resulted in charges being filed against the fire chief of the Fire Company.

Attorney Tilly explains in his attestation that he became aware of the possible misappropriation of funds by the Fire Company at an executive session and suggested the Borough Council to engage services of a forensic auditor, such as RKL, an accounting firm to perform the audit. He further attests:

I also advised the Council that, if there was criminal activity, in order for the District Attorney to prosecute the matter, the Borough would need to provide evidence of wrongdoing that would allow the District Attorney's office to take on the investigation and pursue criminal charges if appropriate. The accounting firm,

RKL, conducted the forensic audit and produced a report that is the record at issue in this appeal.

As part of the investigation, members of Borough Council met with the accountant to discuss the report at the accountant's office. The accountant explained that he found that there was evidence of wrongdoing. Then Borough Council decided that they wanted to forward ...the report to the District Attorney. Pursuant to the direction from Borough Council, I corresponded with the District Attorney, David Sunday, who advised that I should send the report to his office, which I did. The assigned investigator then asked for contact information of Borough Council members and Fire Company members. I learned that the investigator conducted interviews of these individuals.

Charges were filed against the fire chief of the Fire Company on September 30, 2020. On October 9, 2020, the fire chief turned himself in to the court in response to the charges. It is my understanding that the forensic audit report from RKL is in possession of the District Attorney and that he intends to use the report and its findings as evidence in the criminal case.

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.<sup>1</sup> 65 P.S. § 67.102; *see also Huegel v. Penn del 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

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<sup>1</sup> 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 March 26, 2021). 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.

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 district attorney'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).

In this matter, however, the Borough's evidence does not show that it conducted a criminal investigation. According to the Borough Council President and Borough Solicitor, the Borough initiated a forensic audit "investigation was conducted in order to determine if Fire Company funds were being misused by the Fire Company of its members." Although the Borough attests that the information was then provided to the district attorney'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.<sup>2</sup>

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.<sup>3</sup> *See also Segelbaum and The York Daily Record v. North York Borough*, OOR Dkt. AP 2020-1336, 2020 PA O.O.R.D. LEXIS 2550 (retaining jurisdiction of an appeal involving the same record as this matter based on the determination that the Borough did not conduct the criminal investigation; rather, it was provided to the District Attorney for any criminal investigations).

## **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 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

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<sup>2</sup> 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.>").

<sup>3</sup> 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).

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.

## 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.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: April 8, 2021**

/s/ Jill S. Wolfe

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent to: Tina Locurto (via email);  
Walter Tilley, III, Esq. (via email);  
Sarah Doyle, Esq (via email);  
Brittany Reed (via email)

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<sup>4</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).