



IN THE MATTER OF

**JENNIFER SWIFT AND THE
INNOCENCE PROJECT,
Requester**

v.

**CITY OF PHILADELPHIA POLICE
DEPARTMENT,
Respondent**

[illegible]

Docket No: AP 2021-0700

Jennifer Swift, on behalf of The Innocence Project (collectively “Requester”), submitted a request (“Request”) to the City of Philadelphia Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to a death and subsequent arrest. The Department denied the Request, arguing that the records relate to criminal and noncriminal investigations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part** and **transferred in part**, and the Department is required to take additional action as directed.

On March 9, 2021, the Request was filed, seeking:

[Item 1] ...a copy of any and all records, including but limited to police reports, booking reports, laboratory reports, autopsy reports, examiner notes, photographs, video or audio recordings, property clerk invoices, records pertaining to possible

evidence storage locations, log entries, chain of custody documents and /or any certificates of destruction, investigative materials, files documents, notes, and memoranda, currently in your possession whether in active files, archives, or other storage and whether digital or hard copy form pertaining to the investigation of the death of Marlene Burak, and subsequent arrest of Emmanuel Lybrand aka David Vanderhost, David Hall. The incident took place on August 14, 1973 in Philadelphia. Mr. Lybrand's date of birth is 7/29/1943.

[Item 2] Officer personnel records of any officers or detectives involved in this case, including but not limited to: Officer George Minner (Shield #2816), Officer Michael Ebner (Shield #9407), Det. James Curley (Shield #891).

On March 16, 2021, the Department denied the Request, arguing that the records are exempt as records relating to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17). The Department also withheld records stating that personnel records are exempt pursuant to 65 P.S. § 67.708(b)(7) and that records contain personal identifying information exempt pursuant to 65 P.S. § 67.708(b)(6).

On April 5, 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 Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c). The Department did not make a submission in this matter.

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

The Department is local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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 Department has not established the records responsive to Item 1 relate to a noncriminal investigation; however, the OOR transfers this portion of the appeal to the extent the records relate to a criminal investigation

In the Department's response to the Request, it cited both Section "708(b)(16) criminal investigative records" and Section "708(b)(17) noncriminal investigative records" to deny access to various records related to the "investigation of the death of Marlene Burak, and subsequent arrest ..." Section 708(b)(16) of the RTKL exempts from disclosure "[a] record of an agency relating to or resulting in a criminal investigation, including: investigative materials, notes, correspondence and reports..." 65 P.S. § 67.708(b)(16)(ii).

Meanwhile, 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...." 65 P.S. § 67.708(b)(17)(ii). 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 factfinding 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.

Under the RTKL, a sworn affidavit is generally competent evidence to sustain an agency's burden of proof. *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). However,

unsworn statements may not be relied upon as competent evidence records under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City’s counsel is a legal brief, it cannot be ... evidence at all”). Because the Department failed to provide any factual or legal support for denying access to responsive records pursuant to Section 708(b)(17) of the RTKL, the Department did not meet its burden of proof under the RTKL. *See* 65 P.S. § 67.305.

However, the OOR lacks jurisdiction to consider whether a record of a local law enforcement agency is subject to public access where the agency claims that the records are withheld under Section 708(b)(16) and 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. *See* 65 P.S. § 67.503(d)(2); *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); *Burgess v. Willistown Twp. Police Dep’t*, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding that where a local agency made a preliminary showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal). Because the plain language of Item 1 of the Request seeks records of an investigation into the death of an individual and subsequent arrest, the OOR lacks jurisdiction to consider the records sought in Item 1 withheld by a local law enforcement agency and claimed to be exempt under Section 708(b)(16). Accordingly, the appeal as to records withheld as relating to a criminal investigation responsive to

Item 1 is transferred to the Appeals Officer for the Philadelphia District Attorney's Office. A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Philadelphia District Attorney's Office.

2. The Department has not met its burden to withhold records pursuant to Section 708(b)(7) of the RTKL

The Department stated that Item 2 of the Request seeking "Officer personnel records" exempt under Section 708(b)(7) of the RTKL. The Department stated in its response that the records requested are exempt from disclosure pursuant to Section 708(b)(7) of the RTKL. Section 708(b)(7) exempts the following records relating to agency employees:

- (i) A letter of reference or recommendation pertaining to the character or qualification of an identifiable individual; unless it was prepared in relation to the appointment of an individual to fill a vacancy in an elected office or an appointed office requiring Senate confirmation.
- (ii) A performance rating or review.
- (iii) The result of a civil service or similar test administered by a Commonwealth agency, legislative agency or judicial agency. The result of a civil service or similar test administered by a local agency shall not be disclosed if restricted by a collective bargaining agreement. Only test scores of individuals who obtained passing score on a test administered by a local agency may be disclosed.
- (iv) The employment application of an individual who is not hired by the agency.
- (v) Workplace support services program information.
- (vi) Written criticisms of an employee.
- (vii) Grievance material, including documents related to discrimination or sexual harassment.
- (viii) Information regarding discipline, demotion, or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.
- (ix) An academic transcript.

65 P.S. § 67.708(b)(7).

Subsections within 65 P.S. § 67.708(b)(7) only apply to records specifically mentioned therein, and do not protect a broad class of generic “personnel records.” *See Maciejewski v. Southern Colombia Sch. Dist.*, OOR Dkt. AP 2019-1095, 2019 PA O.O.R.D. LEXIS 1062; *Krug v. Bloomsburg Univ. of Pa.*, OOR Dkt. AP 2018-1600, 2018 PA O.O.R.D. LEXIS 1442; *Pontius v. Butler County Area Vocational Technical Sch.*, OOR Dkt. AP 2011-1393, 2011 PA O.O.R.D. LEXIS 1096.

In this matter, the Department has failed to provide any evidence regarding what records exist, other than stating that the Request seeks personnel records which are exempt under Section 708(b)(7). The Department states in its unsworn response to the Request that personnel files of employees are exempt. However, the location of a record within a personnel file is only relevant to Section 708(b)(7)(viii) and any record in a personnel file that is the “final action of an agency that results in demotion and discharge” is subject to public access. *See* 65 P.S. § 67.708(b)(7)(viii). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Pa. State Police v. Grove*, 161 A.3d 877, 992 (Pa. 2017) (“Consistent with the RTKL’s goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed”) (citing *Davis*, 122 A.3d at 1191). Therefore, due to the fact that unsworn statements are not considered evidence under the RTKL, the Department has failed to establish that the withheld records are exempt from public disclosure under Section 708(b)(7) of the RTKL.

3. The Department may redact information listed in Section 708(b)(6) of the RTKL

The Department’s response stated that certain information contained within the records is exempt pursuant to Section 708(b)(6) of the RTKL. Under the RTKL, the following personal identification information is exempt from disclosure:

(A) 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.

(B) A spouse's name; marital status, beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.

65 P.S. § 67.708(b)(6). The Department may redact only that personal identifying information identified in Section 708(b)(6) of the RTKL.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, and transferred in part**, and the Department is required to provide the Requester with records responsive to Item 2 subject to redaction within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Philadelphia 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 4, 2021

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Jennifer Swift (via email only);
Charity Brady, Esq. (via email only);
Lieutenant Barry Jacobs (via email only);
Appeals Officer, Philadelphia District Attorney's Office

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).