



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**DAVID BERGER AND NORRIS  
MCLAUGHLIN, PA,  
Requester**

**v.**

**ALLENTOWN CITY,  
Respondent**

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**Docket No: AP 2021-0785**

### **INTRODUCTION**

David Berger and Norris McLaughlin, PA (collectively “Requester”) submitted a request (“Request”) to Allentown City (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking correspondence regarding identified individuals or entities. The City denied the Request, arguing records are noncriminal investigative records. 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** and **denied in part**, and the City is required to take additional action as directed.

### **FACTUAL BACKGROUND**

On February 24, 2021, the Request was filed, seeking “[c]opies of any and all correspondences received by the [City] from North Penn Legal Services, Tina Ralls Esquire, and/or any third party with regards to Joseph Clark, Sr., Joseph Clark, Jr., CDC Developers, Inc.,

Sage Home Investment Corporation, and Lehigh Landholdings, Inc., and Lehigh Land Developers, LLC.”

On April 1, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the City denied the Request, arguing the three responsive records are exempt noncriminal investigative records. 65 P.S. § 67.708(b)(17). The City identified two emails from Attorney Ralls to Tatiana Tooley and one letter from Attorney Ralls to Mayor Ray O’Connell as the responsive records.

On April 14, 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 City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 23, 2021, the City submitted a position statement reiterating its grounds for denial. The City claims that the emails identified as responsive records are exempt noncriminal investigate records and that the Request failed to address the grounds for denial of the letter; in the alternative, the City also argues that the letter is also exempt noncriminal investigative material. 65 P.S. §§ 67.708(b)(17)(i)-(ii), (vi)(A). In support of its position, the City submitted the affidavits of Karen Lore, Executive Secretary for Mayor Ray O’Connell, and Tatiana Tooley, the Neighborhood & Human Relations Officer within the Department of Community and Economic Development for the City.

## **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, the Requester requested a hearing or *in camera* review of the records.

The City 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 appeal addressed all grounds for denial**

The City asserts that the Requester limited his appeal to the emails only because he failed to address the City's grounds for denial of access to the letter. The City notes that the Requester argued that emails "are 'public records' under section 305(a) of the RTKL as the record in question in in the possession of the City of Allentown Human Relations Commission" but did not address the letter. In *Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011), the Commonwealth Court held: "it is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency's stated reasons for denying a RTKL request...the provision merely places a burden on a requester to identify flaws in an agency's decision denying a request." A requester must state why each of the agency's reasons denying a request is incorrect. Here, the Requester did address the City's grounds for denial in that the Requester did address Section 708(b)(17) of the RTKL, which is the section cited by the City in support of withholding all three records.

### **2. The City has demonstrated that some records are noncriminal investigative records**

The City asserts that all three records are exempt noncriminal investigative records. 65 P.S. § 67.7.80(b)(17). Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "[c]omplaints submitted to an agency," "[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)(i)-(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. 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.

The City explains that as a home rule municipality, it is empowered to adopt ordinances as necessary. 53 Pa.C.S. § 2964(6). The City established the Human Relations Commission (“Commission”) in accordance with this power and the Commission is vested with the authority to initiate, receive, investigate or pass upon complaints charging unlawful discriminatory practices in violation of City ordinances prohibiting discrimination. Allentown Codified Ordinances, Part 1 – Administrative Code – Title 11, Authorities, Boards and Commissions, § 181.07(B)(3)(available at <https://www.allentownpa.gov/Government/Codified-Ordinances>). Section 181.08 permits any individual claiming to be aggrieved to file a “verified complaint in writing” containing certain information.

Ms. Tooley affirms that while neither of the emails she received were a verified complaint in writing, when a complaint is received that is not a verified complaint in writing as described in 181.08 of the Ordinance, the practice of the Commission is to have her and an assigned investigator review and investigate the complaint to determine whether there is enough basis to docket it as a verified complaint in writing. If there is not, the complaint and investigatory records are filed in

storage. She affirms that the emails were complaints regarding rental properties and were not in the form of a verified complaint in writing and therefore they were not sent to the respondent.

The City argues that it is not for the OOR to decide if a complaint is filed as an informal complaint or as a verified complaint in writing, nor is it the OOR's role to enforce local ordinances.

Under the RTKL, a sworn affidavit or statement made under the 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the City has 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)).

Whether or not the emails at issue are verified complaints in writing or informal complaints is irrelevant to the analysis at hand. The issue is whether they are complaints that would reveal the institution, progress or result of a noncriminal investigation, undertaken in accordance with the agency's legislatively granted investigatory and fact-finding powers. Here, the City has demonstrated that the Commission, as a part of the City, has legislatively granted powers to investigate complaints of discriminatory practices. Furthermore, Ms. Tooley affirms that she and an investigator investigated whether the complaints amounted to verified complaints in writing that would need further investigation. Although the emails did not amount to verified complaints that required additional investigation, an investigation into the emails did occur. As such, the emails are exempt noncriminal investigatory materials that may be withheld.

However, the City has not demonstrated that the letter is a noncriminal investigatory record. While Ms. Lore affirms that she identified it as a complaint and forwarded it to the City's

Community and Economical Development Department and Building Standards & Safety Department, the City has not demonstrated that either of the departments undertook any sort of investigation pursuant to their legislatively granted authority. Instead, the City merely provides references to the authority for those departments to investigate and address complaints regarding rental properties, while Ms. Lore affirms they are the departments that would perform those investigations. Unlike the emails, here, Ms. Lore performed no investigation into the complaint, but rather forwarded the letter to the departments that would perform the investigation. Furthermore, the Mayor's Office is not empowered to investigate these complaints.

As stated above, an attestation is generally competent evidence to sustain an agency's burden of proof under the RTKL. *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, an agency cannot rely on conclusory statements to sustain its burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *see also Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency's conclusory affidavit was insufficient). Because the City has not met its burden of proving the letter is exempt, the letter may not be withheld.

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the City is required to provide the letter 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 Lehigh 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.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: May 11, 2021**

*/s/ Erin Burlew*

---

ERIN BURLEW, ESQ.  
APPEALS OFFICER

Sent to: David Berger, Esq. (via email only);  
Sarah Rotz, Esq. (via email only)

---

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