



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**FRANK COLUCCI,  
Requester**

**v.**

**ROSS TOWNSHIP,  
Respondent**

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**Docket No: AP 2021-1121**

### **INTRODUCTION**

Frank Colucci (“Requester”) submitted a request (“Request”) to Ross Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a consultant’s report. The Township denied the Request, arguing that the report is related to a noncriminal investigation, 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 Township is required to take further action as directed.

### **FACTUAL BACKGROUND**

On May 26, 2021, the Request was filed, seeking “an unedited copy of the recently completed report that was done on the Ross Township Police Department by an outside consulting company.” On May 27, 2021, the Township denied the Request, arguing that the report is related to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17).

On June 8, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On June 14, 2021, the Requester submitted a position statement, arguing that as a taxpayer, he should be entitled to see the report. On June 17, 2021, the Township submitted a position statement reiterating its grounds for denial and the affidavit of Adam Ravenstahl, its Open Records Officer.

### 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.

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<sup>1</sup> The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

The Township 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 Township argues that the responsive report is exempt from disclosure because it is related to a noncriminal investigation. 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 criminal or noncriminal matter. *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). In *Chawaga v. Pa. Dep’t of Public Welfare*, the Commonwealth Court held that a performance audit was not part of the Department’s legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department’s public assistance services. 91 A.3d 257, 259 (Pa. Commw. Ct. 2014). The Court noted that “[a] contrary determination of an ‘official probe’ would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure.” *Id.*

In this matter, the Township’s investigative authority is derived from Section 1-511 of its Code of Ordinances, which provides that the “Board of Commissioners of the Township of Ross does hereby adopt the ‘Ross Township Police Department Manual of Policies, Rules and Regulations.’” <https://ecode360.com/31075178>. Section 1-511 also provides that a “violation of the policies and procedures can formulate the basis of disciplinary action” against any officer. Further, the Pennsylvania First Class Township Code (“Township Code”) states that the Township chief of police and police officers “shall obey the orders of the board of township commissioners....” 53 P.S. § 56405. Pursuant to the Township Code, townships of the first class thus have legislatively granted fact-finding powers to investigate police conduct. *See Riedel v. Ross Twp.*, OOR Dkt. AP 2020-1941, 2020 PA O.O.R.D. LEXIS 3073; *Weir v. Spring Garden Twp.*, OOR Dkt. AP 2018-0120, 2018 PA O.O.R.D. LEXIS 297.

In *Gettysburg Times v. Gettysburg Borough*, the OOR found that portions of records regarding a use-of-force incident were related to a noncriminal investigation. OOR Dkt. AP 2016-0642, 2016 PA O.O.R.D. LEXIS 1128 (“*Gettysburg*”). The Borough retained outside counsel, Attorney Stotler, and a consultant, Mr. McNeilly, “to collect evidence regarding the police

officer's actions, review the compliance of the police officer and supervisors with Police Department policy, and evaluate the appropriateness of the officer's and supervisors' conduct ("Police Officer Conduct Review")." Acknowledging that not all fact-gathering constitutes an investigation, *see Chawaga*, 91 A.3d at 259, the OOR nevertheless concluded that the inquiry was more a review of a specific incident than the performance audit at issue in *Chawaga*. The OOR based its decision on the fact that the Police Officer Conduct Review involved the review of the police officer's actions, interviews of witnesses, and a review of the officer's and police department's compliance with internal policies and best practices with respect to the incident. Further, the OOR concluded that the names of witnesses to be interviewed as set forth in the scope of work document were related to the noncriminal investigation.

However, the OOR also concluded that the portion of a report entitled, "Police Department Policy Review," which included a global review of police department policies and compliance with best practices and a recommendation of internal policies, are not records of a noncriminal investigation. The OOR noted:

Here, like in *Chawaga*, the Borough's review of the effectiveness of internal Police Department policies is ancillary to the overall function and operation of the Borough and is more akin to a performance audit of Police Department operations. The Police Department Policy Review is not investigatory in nature and is not subject to withholding under the noncriminal investigation exemption. These documents exist for purposes independent of the investigation, are not investigative in nature, and do not contain any investigatory material.

*Id.* at 14-15 (*citing Levy v. Senate of Pa.*, 94 A.3d 436, 448 (Pa. Commw. Ct. 2014) ("To the extent the documents reference and arguably 'relate to' a criminal investigation, the records themselves do not contain any investigatory material"); *see also Gettysburg Times v. Gettysburg Borough*, OOR Dkt. AP 2016-1154, 2016 PA O.O.R.D. LEXIS 1490 (finding that a subsequent report

monitoring the Borough's progress in implementing the recommendations made by Attorney Stotler and Mr. McNeilly was not related to a noncriminal investigation).

Here, Mr. Ravenstahl attests:

4. On or about January 5, 2021, the [Township], through its Board of Commissioners, retained a consulting firm, W.R. Smeal Police Management Consultants (the "Consultant"), experienced in analysis of police department management, to conduct a noncriminal investigation into the [Township's] Police Department.
5. Specifically, the [Township] retained the Consultant to investigate and report to the [Township] regarding the potential reasons for (1) the ongoing conflict between the Police Department and the [Township], and perceived conflict between the Police Department and the public; (2) the cause of the [Township's] perception of low morale among the Police Department Officers; and (3) to determine whether there were any violations of [Township] policies and procedures using the low morale and ongoing conflict described above.
6. The Consultant conducted investigatory interviews over seven (7) days in January and February, 2021.
7. On March 8, 2021, the Consultant provided the [Township] an initial report detailing the Consultant's findings and recommendations, and a revised report on or about April 9, 2021.
8. The Consultant conducted a systematic, searching inquiry, which included a detailed examination of the root causes of ongoing problems in the Police Department. This investigation was officially directed by the [Township's] Board of Commissioners pursuant to its official duties.

While Mr. Ravenstahl concludes that this was a systematic, searching noncriminal investigation undertaken pursuant to legislatively delegated authority, he acknowledges that the reasons for the report were to investigate actual or perceived conflict between the Department, the Township, and the public, and the cause of low morale in the Police Department. Further, while one of the stated purposes of the investigation was to determine whether there were any violations of policies, the Township presents no evidence that the investigation uncovered any specific violation(s) or was undertaken in response to any particular incident, unlike the Police Office Conduct Review in

*Gettysburg*. Cf. *Katz v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2015-0749, 2015 PA O.O.R.D. LEXIS 872 (acknowledging that investigating complaints and allegations of improper staff conduct falls within an agency’s official duties). Rather, Mr. Ravenstahl references ongoing conflict and perceptions of conflict and low morale. Like the Police Department Policy Review in *Gettysburg*, the instant investigations are ancillary to the function of the Township and its Police Department and are akin to a performance audit of Police Department operations. The evidence presented by the Township is not sufficient to meet its burden of proving that the report is related to a noncriminal investigation. See 65 P.S. § 67.708(a)(1); *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (“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.”) (citation omitted). As such, the report is subject to public access.

### CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted**, and the Township is required to produce a copy of the report 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 Allegheny 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>2</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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

/s/ Blake Eilers

Blake Eilers, Esq.  
Appeals Officer

Sent to: Frank Colucci (via email);  
PJ Murray, Esq. (via email);  
Adam Ravenstahl, AORO (via email)