



FINAL DETERMINATION

IN THE MATTER OF

**JANET WYLIE,
Requester**

v.

**CARLISLE BOROUGH,
Respondent**

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Docket No: AP 2021-1392

INTRODUCTION

Janet Wylie (“Requester”) submitted a request (“Request”) to Carlisle Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a police report. The Borough denied the Request, arguing, among other things, that the police report relates to a noncriminal investigation. 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 any further action.

FACTUAL BACKGROUND

On June 28, 2021, the Request was filed, stating as follows:

Following up on our telephone call just now, the Carlisle police report we are seeking is #2021061543. It concerns the law enforcement response to a 911 call on June 24....”

On the same day, the Borough denied the Request, arguing that the police report reflects exempt medical information, 65 P.S. § 67.708(b)(5).

On July 19, 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. 65 P.S. § 67.1101(c).

On July 26, 2021, the Borough submitted a position statement, reiterating the argument above and further arguing that the police report relates to a noncriminal investigation and is, therefore, exempt from disclosure in its entirety. 65 P.S. § 67.708(b)(17). In support of its position, the Borough submits the attestation, made under the penalty of perjury, of Stephen Latshaw, a Lieutenant with the Borough Police Department. The Requester did not submit any additional information during the appeal.

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 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 denied the Request, arguing that the police report relates to a noncriminal investigation. 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL exempts from disclosure a “record of an agency relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and *reports*.” 65 P.S. § 67.708(b)(17)(ii) (emphasis added). 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. *Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Furthermore, the inquiry, examination, or probe must be “conducted as party of an agency’s official duties.” *Id.* at 814; *see Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). The investigation must also involve an agency’s legislatively granted fact-finding 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.

In support of its argument, the Borough provides the attestation of Lt. Latshaw, who attests, in relevant part, as follows:

Two Police Officers of the Borough ... Police Department performed investigations resulting in police report No. CAR2021-06-1543 (the “police report”). They were dispatched for purposes of a death investigation. Due to observations made as a result of their investigation, nothing was observed to lead them to believe there was any suspicious activity surrounding the individual’s death.

Therefore, even though the investigation began as a possible criminal investigation, as evidence and circumstances were revealed, it transitioned into a noncriminal investigation.

The investigation included observations and interviews and resulted in findings and conclusions that became part of an official report identified by the police report number ... above. The report and its accompanying materials are the result of a systematic inquiry, detailed examination, and official probe detailing a call for service that was conducted as part of the Borough ... Police Department’s official duties.

The police report and its contents are not public records because the report was created and retained pursuant to a Police Department noncriminal investigation. The investigation was initiated by a law enforcement agency which is granted authority under the laws of the Commonwealth, and which conducts official probes as part of its official duties under the guidance of the Police Department general orders, policies and procedures.

The Borough ... Police Department is an entity that investigates complaints and incidents and is required to conduct a course of systematic or searching inquiries

and detailed examinations of complaints and incidents received or initiated by our agency.

Under the RTKL, a statement made under the penalty of perjury is 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). In the absence of any competent evidence that the Borough acted in bad faith, "the averments in [the attestation] 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)).

The OOR has previously held that municipal police departments have the legislatively granted authority to conduct noncriminal investigations. *See, e.g., Stief v. Ephrata Borough*, OOR Dkt. AP 2021-0125, 2021 PA O.O.R.D. LEXIS 505 (confirming that borough police departments have the authority to conduct noncriminal investigations as contemplated in Section 708(b)(17) of the RTKL); *Narisi v. Buckingham Twp. Police Dep't*, OOR Dkt. AP 2019-0489, 2019 PA O.O.R.D. LEXIS 564. In addition, Lt. Latshaw affirms that the responsive police report was generated as a result of a death investigation by two Borough police officers and contains the officers' observations, interview information, and conclusions and findings related to the death. Accordingly, the Borough has proven that the police report is exempt from disclosure under Section 708(b)(17). *See* 65 P.S. § 67.708(a)(1); *Kinard v. Millcreek Twp. Police Dep't*, OOR Dkt. AP 2021-0100, 2021 PA O.O.R.D. LEXIS 460 (finding a police report associated with the investigation of an individual's death to be exempt under Section 708(b)(17)).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Borough is not required to 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 Cumberland 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: 2 August 2021

/s/ Joshua T. Young

JOSHUA T. YOUNG
DEPUTY CHIEF COUNSEL

Sent to: Janet Wylie (via email only);
Keith Brenneman, Esq. (via email only);
Joyce Stone, AORO (via email only)

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