



**IN THE MATTER OF**

**V.**

• • • • •

**Docket No: AP 2021-1808**

Marc Levy, a journalist for the Associated Press (collectively “Requester”), submitted a request (“Request”) to the Pennsylvania Department of Aging (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking copies of letters or memos sent by the Department to the Philadelphia Corporation for Aging regarding the results of a protective services quality assurance monitoring review from March 1, 2020 through June 30, 2021. The Department partially denied the Request, providing responsive records with redactions, asserting that the redacted information relates to a noncriminal investigative and includes internal, predecisional deliberations. 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 Department is not required to take any further action.

## **FACTUAL BACKGROUND**

On July 1, 2021, the Request was filed, seeking “copies of any and all letters or memos sent by the Department of Aging to inform the Philadelphia Corporation for Aging of the results of a protective services quality assurance monitoring review beginning March 1, 2020, through June 30, 2021.”

On July 1, 2021, the Department invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On August 6, 2021, the Department sought additional time to respond to the Request and the Requester agreed to the extension. On August 18, 2021, the Department partially denied the Request, arguing that some of the responsive records required redactions due to noncriminal investigative and internal, predecisional deliberative information contained within. 65 P.S. §§ 67.708(b)(10), (17).

On August 27, 2021, the Requester appealed to the OOR, challenging the redactions made within the May 10, 2021 and August 31, 2020, emails provided by the Department<sup>1</sup> 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).

On September 28, 2021 and September 30, 2021, the Department submitted a position statement reiterating its grounds for denial. The Department claims that the redactions contained within the May 10, 2021 and August 31, 2020, emails are proper, as they are related to a noncriminal investigation that was undertaken by the Department. In support of its position, the

---

<sup>1</sup> Because the Requester has indicated in his appeal that the only records at issue in this appeal are the redactions to the two specified emails, this Final Determination will only address the redactions contained within those emails referenced by the Requester.

Department submitted the affidavit of Denise Getgen, Protective Services Director for the Department.

### 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 a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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 Department argues that the redactions made to the May 10, 2021 and August 31, 2020, emails are proper because they contain findings, results, and disciplinary action that would have occurred as a result of the Department’s quality assurance monitoring of Philadelphia Corporation for Aging (“PCA”). 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,” “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation” and “[c]onstitute an unwarranted invasion of privacy.” 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A), (C). 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).

Regarding the authority to conduct noncriminal investigations, the Department relies on the Pennsylvania Administrative Code, which states, in part, that the Department is responsible for, “The monitoring of local protective services delivery for compliance with this chapter and approved area agency on aging protective services plans.” 6 Pa. Code § 15.11(a)(5). In support of the Department’s position that the redactions contained within the responsive records are necessary to exclude noncriminal investigative information, the Department provides the attestation of Ms. Getgen, who attests as follows:

In my capacity as the Protective Services Director, I am responsible for managing the Quality Assurance reviews and monitoring of Area Agencies on Aging (AAA) to assess their compliance with statutory and regulatory provisions. *See* 6 Pa. §15.11 (a)(5).

In my capacity as Protective Services Director, I am personally aware and knowledgeable of the Department of Aging’s Quality Assurance Monitoring Process (monitoring) to review AAA’s compliance with statutory and regulatory requirements for providing protective services to older adults who need them[.]

As Protective Services Director, I am aware and personally assist in preparing letters to report the results of a Quality Assurance monitoring of an AAA by the Department.

After a monitoring has been conducted by a Protective Services Caseworker of the Department, a letter is provided to the AAA to communicate and document the findings and results of the monitoring.

Additional letters may be issued to the same AAA to address any continued or additional issues because of the initial monitoring by the Department[.]

As Protective Services Director, I am personally familiar with the contents and redactions of the monitoring results letters dated August 31, 2020 and May 10, 2021 from Secretary Robert Torres to PCA President, Najja Orr. The letters were the result of the monitoring conducted by the Department.

In my capacity as Protective Services Director, I am personally familiar with the following regarding the letters provided:

The Department conducted an official Quality Assurance monitoring of PCA on May 29, 2020. This included an on-site<sup>2</sup> comprehensive review of protective services cases, interviews of AAA caseworkers and supervisors to assess the AAA's compliance with statutory and regulatory requirements for the delivery of protective services.

The Department's monitoring determines whether protective services are provided to older adults as intended and require by statute and regulations.

The August 31, 2020 letter's redactions contain the findings resulting from the May 29, 2020 monitoring of PCA conducted by the Department. The redacted information includes the findings, comments regarding the monitoring, and results of the monitoring conducted by the Department.

The May 10, 2021 letter's redactions contain the results of the initial findings, additional findings, and the results of the findings. The redacted information reveals the progress or results of the monitoring.

Both the August 31, 2020 letter and the May 10, 2021 letter are materials and correspondence that exist as a result of the Department's official monitoring process of PCA.

As Protective Services Director, based upon a good-faith search of the records of the Office, I hereby swear and affirm, under penalty of perjury, that the Office does not possess, maintain, or have custody or control over any additional records responsive to the instant [R]equest.

Under the RTKL, an attestation or statement made under 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 competent evidence that the Department 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)).

---

<sup>2</sup> The Department corrected the attestation provided to indicate that an on-site review was not conducted, and instead, only a virtual review was conducted.

The Commonwealth Court recently examined inspections conducted by the Department of Labor and Industry in *Pa. Dep't of L&I v. Darlington*, No. 1583 C.D. 2019, 2020 Pa. Commw. LEXIS 451, (Pa. Commw. Ct. 2020). In *Darlington*, the Court concluded that the language of the law, the fact that the Department was able to delegate “inspections” under the law, and the Department’s failure to demonstrate any public policy rationale for keeping the inspections confidential all tended to show that routine inspections under that law did not qualify as noncriminal investigations under Section 708(b)(17) of the RTKL. *Id.* at 876-878. However, the Court reaffirmed that investigations of infrastructure triggered by a complaint or involving a more far-ranging and detailed inquiry could still fall under Section 708(b)(17) of the RTKL. *See Id.* at 874; *Pa. Pub. Util. Comm’n v. Gilbert*, 40 A.3d 755, 758 n.5 (Pa. Cmwlth. 2012).

In the present case the Department has provided evidence that the Quality Assurance monitoring is a detailed examination and probe of the Area Agencies on Aging. Additionally, these investigations by the Department are a part of its legislatively granted authority pursuant to the Pennsylvania Administrative Code. The Department also provided a redaction log identifying the redacted information, which demonstrates that the redacted information would reveal the investigative progress and results of the Department’s investigation of PCA. Therefore, based on the evidence provided, the Department has met its burden of proving that the responsive records were properly redacted under Section 708(b)(17)(ii) of the RTKL. 65 P.S. § 67.708(b)(17)(ii).

The OOR notes that the RTKL is not a confidentiality statute meaning it allows but does not require an agency to withhold records. An agency generally has the discretion to release otherwise nonpublic records. See 65 P.S. § 67.506(c). Based on any number of factors, an agency may release otherwise nonpublic or deidentified records in the public interest. Such an approach can be used to build trust and confidence in the agency. However, regardless of how compelling

a request for information may be, the OOR is without authority to order the Township to exercise its discretion and release the records. *See Pa. Dep't of Pub. Welf. v. Froelich*, 29 A.3d 863 (Pa. Commw. Ct. 2011); *Loro v. Delaware Cnty.*, OOR Dkt. AP 2019-0779, 2019 PA O.O.R.D. LEXIS 590.

## CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Department 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 Commonwealth Court. 65 P.S. § 67.1301(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>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 18, 2021**

/s/ Ryan W. Liggitt

---

RYAN W. LIGGITT, ESQ.  
APPEALS OFFICER

Sent to: Marc Levy (via email only);  
Deborah Hargett-Robinson, Esq. (via email only);  
Leslee Frymyer, AORO (via email only)

---

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