



FINAL DETERMINATION

IN THE MATTER OF

**THERESA SCHIFANO,
Requester**

v.

**PENNSYLVANIA OFFICE OF
ADMINISTRATION,
Respondent**

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**Docket No: AP 2021-1986
(Consolidated)**

INTRODUCTION

Theresa Schifano (“Requester”) submitted a request (“Request”) to the Pennsylvania Office of Administration (“Office” or “OA”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records regarding an investigation. The Office denied the Request, arguing that the records are related 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 Office is not required to take any further action.

FACTUAL BACKGROUND

On August 4, 2021, the Request was filed, seeking: “records relating to the internal investigation held in Westmoreland County PENNDOT by Lauren Hoag OA from September 29, 2020 through December 2020 or later not sure the ending date.” On September 7, 2021, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Office denied the Request,

arguing that the requested records are exempt from disclosure as records related to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17).

On September 20, 2021, the Requester appealed to the OOR,¹ challenging the denial and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 22, 2021 and October 18, 2021, the Requester submitted position statements, reiterating her desire to obtain the requested records, while also questioning the investigation results for which she seeks records. Further, on October 18, 2021, the Requester indicated that “[she is] not asking for any personal records or any records at all[,]...[and that she] wanted the results of the investigation only.” On October 8, 2021,³ the Office submitted a position statement, reiterating its reason for denial, while also arguing that the requested records are exempt from public disclosure as the internal, predecisional deliberations of the Office, 65 P.S. § 67.708(b)(10)(i)(A), and as records relating to agency employees, 65 P.S. § 67.708(b)(7). The Office further argues that the requested records contain personal identification information, 65 P.S. § 67.708(b)(6), as well as information protected by the constitutional right to privacy. The Office also provided copies of Management Directive, 410.10 – Guidelines for Investigating and Resolving Internal Discrimination Complaints, and Executive Order, 2016-4 - Equal Employment Opportunity. Along with its position statement, the Office submitted the attestations of Wha Lee

¹ The Requester submitted two appeals to the OOR involving the same Request and response. The appeals were docketed at OOR Dkt. AP 2021-1986 and OOR Dkt. AP 2021-1987. Because the appeals involve the same Request and response, on September 29, 2021, the Office’s Motion to Consolidate was granted and the appeals consolidated at OOR Dkt. AP 2021-1986. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals office shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

² The Requester provided the OOR with additional time to issue a Final Determination in this matter.

³ On September 29, 2021, the OOR granted the Office’s request for additional time, until October 8, 2021 to submit legal argument and evidence. *See* 65 P.S. § 67.1102(b)(3).

Strohecker, Open Records Officer for the Office, and Jacqueline Jackson-DeGarcia, Director of the Equal Employment Opportunity Office for the Office.

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 Office 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 Office argues that the requested records are exempt from disclosure as records 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...[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 any agency investigation[.]” 65 P.S. § 67.708(b)(17)(i)-(ii), (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.

In support of the Office’s position, Ms. Strohecker attests that she conducted a good faith search and identified all responsive records within the Office’s possession, custody or control. Ms. Strohecker further attests that the responsive records are comprised of the investigation file of the Office’s investigation into employee conduct, including a complaint of alleged discrimination, and contain investigative materials, notes, witness statements, correspondence, and reports related to the investigation.

Additionally, Ms. Jackson-DeGarcia attests, in pertinent part, as follows:

2. I currently serve as the Director of the Equal Employment Opportunity (“EEO”) Office for ... OA....

3. In my capacity as Director of the OA EEO, I plan, direct, and coordinate an enterprise-wide EEO program and its related activities by overseeing the Bureau of EEO Investigations and Bureau of EEO Policy and Appeals. In that capacity, I oversee internal investigations of allegations of discrimination and advise EEO Office employees and investigators as necessary or requested.

4. If and when applicable to myself and/or the OA EEO Office, I am responsible for providing responsive documents in my possession or the EEO’s possession to the OA Agency Open Records Officer (“AORO”) in response to requests filed with OA pursuant to the ... RTKL...

5. I am familiar with the RTKL Request OA received on August 4, 2021 from [the Requester]....

8. I identified the applicable case file and several emails which I deemed responsive to the Request, and which consist of the EEO Office’s investigative file as well as records that relate to an investigation undertaken by EEO Office.

9. In accordance with the instruction from the AORO and pursuant to the RTKL, I notified the AORO that I had identified potentially responsive records. Due to the records’ confidential nature, I sent the records to OA’s Office of Chief Counsel for its legal review, which I understand have been shared with the AORO.

10. It is my understanding the OA denied the Request pursuant to Section 708(b)(17) of the RTKL, which exempts records related to a noncriminal investigation.

11. Executive Order 2016-04, Equal Employment Opportunity, orders the Secretary of Administration to implement equal employment opportunity programs through the EEOO, which includes, but is not limited to, investigating complaints of discrimination as part of the OA's official duties.

12. The OA, EEOO is housed organizationally within the OA. Pursuant to a reorganization by the OA, the OA, EEOO Bureau of Investigations ("BEEOI") is a subset of the EEOO which was created to specifically handle and oversee internal investigations of allegations of discrimination raised by employees under the Governor's jurisdiction.

13. Management Directive 410.10, Amended, Guidelines for Investigating and Resolving Internal Discrimination Complaints, states that the OA, EEOO handles internal complaints of discriminatory conduct.

14. When an EEOO investigator opens a case, the EEOO creates an investigation case file that contains, but is not limited to, investigative materials, notes, correspondence, witness statements, interview recordings, and reports.

15. Management Directive 410.10, Amended, Guidelines for Investigating and Resolving Internal Discrimination Complaints, states that the OA, EEOO handles internal complaints of alleged discriminatory conduct. This Management Directive thus establishes that this function is one of OA's official duties.

16. Investigations carried out by the OA, EEOO, and BEEOI specifically, consist of systematic and searching inquiries into any allegation of discrimination raised by a Commonwealth employee. Investigations begin immediately upon the receipt of a complaint, which triggers OA, EEOO staff and investigators to begin their inquiry into the alleged conduct. These investigations involve witness interviews, statements, and the collection of documents and other materials, including personal financial information, if relevant to the investigation, which are utilized to arrive at the conclusion as to whether or not discriminatory conduct occurred.

17. Information related to the internal EEOO investigations, its procedures and outcomes is held in strict confidence and is not disclosed to the public. Records kept and maintained in the investigative case file are not used for any other purpose but to investigate an internal complaint of alleged discrimination. If it were not held in strict confidence, the integrity of the reporting and complaint process would be threatened by outside scrutiny, and the EEOO would run the risk of losing the confidential and candid nature of the investigative process....

26. I have read and reviewed OA's Appeal Response; and the factual averments, as asserted in the Appeal Response, are true and correct to the best of my knowledge and belief.

Under the RTKL, a sworn attestation 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 Office has acted in bad faith, "the averments in [the attestations] 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)). Here, as there is no dispute that an employee complaint was filed and that the Office, as part of its duties to investigate internal complaints, did conduct an investigation regarding this matter, the Office has demonstrated that "a systematic or searching inquiry, a detailed examination, or an official probe" regarding an employee discrimination complaint was conducted as part of its "official duties." *See Pa. Dep't of Health, supra*. Additionally, the Request itself seeks "records relating to the internal investigation," and the Requester herself acknowledges that a complaint was filed, and an investigation conducted, and that she "want[s] to see how all those depositions were given and why nothing has been done by OA and Management..." regarding complaints and "harassment and [a] hostile work environment." *See Pa. Game Comm'n v. Fennell*, 148 A.3d 101 (Pa. Commw. Ct. 2016) (explaining that the OOR must consider uncontradicted statements contained in the appeal as evidence). Further, both Ms. Jackson-DeGarcia and Ms. Strohecker attest to the contents of the investigative file and there is nothing in the record to indicate that the Office has withheld records reflecting "the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an

executed settlement agreement unless the agreement is determined confidential by a court.” *See* 65 P.S. § 67.708(b)(17)(vi)(A); *Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069 (Pa. Commw. Ct. 2021) (finding that an agency must determine whether records exist that fall within the exception to the noncriminal investigation exemption). Therefore, in this instance, based on the evidence provided, the Office has proven that the withheld investigative file, which includes complaints, investigative materials, notes, correspondence, witness statements, interview recordings, and reports, is exempt from public access pursuant to Section 708(b)(17) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Office 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 according to court rules 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 16, 2021

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS
DEPUTY CHIEF COUNSEL

Sent to: Theresa Schifano (via email only);
Wha Lee Strohecker (via email only);
Angela N. Rainey, Esq. (via email only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).