



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**CHARLES HOYER,
Requester**

v.

**LEBANON CITY,
Respondent**

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Docket No: AP 2021-2316

INTRODUCTION

Charles Hoyer (“Requester”), an inmate at SCI-Laurel Highlands, submitted a request (“Request”) to Lebanon City (“City”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, seeking the resignation letter of Jonathan C. Hess. The City denied the request, arguing that the Request is a repeated request for information. 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 City is not required to take any further action.

FACTUAL BACKGROUND

On October 8, 2021, the Request was filed, which reads:

I would like a copy of the resignation letter for Jonathan C. Hess. I have written previously requesting a copy of this document and you refuse to provide it. When a request says ‘all documents regarding changes in employment status’, it means ALL, not the last one you have. If I do not get this copy, I am prepared to file an appeal, and if need be, take this to Commonwealth Court.

On October 15, 2021, the County denied the Request pursuant to Section 506(a)(1) of the RTKL, arguing that the Request is a repeated request for information.

On November 1, 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 County notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 4, 2021, the City submitted a position statement, arguing that the resignation letter is an exempt employee record under Section 708(b)(7)(viii) of the RTKL. 65 P.S. § 67.708(b)(7)(viii). In support of its argument, the City submits the affidavit, made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities, of Cheryl Gibson, the City's Open Records Officer.

On November 19, 2021, the Requester submitted a position statement, arguing that the City is raising new grounds for denying the Request, and, accordingly, the OOR should not consider these new grounds for denial. The Requester also reiterates his reasons for disclosure.

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 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)).

In the instant matter, the City states that the resignation letter of Jonathan C. Hess is in Mr. Hess’s personnel file and it pertains to Mr. Hess’s discharge from employment. The City asserts that the resignation letter is exempt from public access under Section 708(b)(7) of the RTKL,

which exempts from disclosure certain records relating to an agency employee, including “[i]nformation regarding discipline, demotion or discharge contained in a personnel file.” 65 P.S. § 67.708(b)(7)(viii). However, the exemption “shall not apply to the final action of an agency that results in demotion or discharge.” *Id.*

In support of its position, the City relies on the affidavit of Ms. Gibson, who affirms, in part, as follows:

4. Upon receipt of the [R]equest at issue in this appeal, I conducted a thorough examination of files in the possession, custody and control of the [City] for records responsive to the [R]equest underlying this appeal.
5. After conducting a good faith search of the [City’s] files, I identified all records within the [City’s] possession, custody or control that are responsive to the [R]equest.
6. The resignation letter of Mr. Jonathan Hess is the only responsive record and is the subject of this appeal.
7. The resignation letter for Jonathan Hess dated April 1, 2021[,] addressed to Mayor Capello (“Resignation Letter”) is contained in Mr. Hess’[s] personnel file.
8. At the time the Resignation Letter was received by the City, Mr. Hess was employed by the City.
9. The Resignation Letter include the representation that Mr. Hess is unable to continue employment as a Support Services Lieutenant with the City Police Department.
10. On April 9, 2021, in response to the Resignation Letter, Mayor Capello accepted Mr. Hess’[s] letter of resignation, effective April 17, 2021.
11. Mayor Capello’s acceptance of Hess’[s] resignation served as the final action terminating his employment.
12. Consequently, the Resignation Letter related to Mr. Hess’[s] discharge.
13. Requester was previously provided with a copy of the April 9, 2021[,] letter from Mayor Capello accepting the resignation.

Under the RTKL, a sworn affidavit or 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 515-21 (Pa. Commw. Ct. 2011); *Morre v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

While the RTKL does not define the term "discharge," under its common meaning, "discharge" means "[a]ny method by which legal duty is extinguished." BLACK'S LAW DICTIONARY 561 (10th ed. 2014); *see also Jackson and the Standard-speaker v. Butler Twp.*, OOR Dkt. AP 2018-1810, 2018 PA O.O.R.D. LEXIS 1456 (concluding that a resignation letter was exempt from disclosure under Section 708(b)(7)). Therefore, Jonathan Hess's employment obligations were discharged when Mayor Capello accepted his resignation on April 9, 2021. Because the City has demonstrated that the resignation letter is also contained in Jonathan Hess's personnel file, it has proven that the letter is exempt from disclosure under Section 708(b)(7)(viii) of the RTKL. *See Bush v. Boggs Twp.*, OOR Dkt. AP 2019-0666, 2019 PA O.O.R.D. LEXIS 654 (finding that a resignation letter contained in a former employee's personnel file was exempt from public access).

The Requester argues that the City did not assert this reason for denial when it originally denied the Request, as such, this reason for denial should not be considered on appeal. The RTKL provides that "the denial shall be issued in writing, and shall include: [...] The specific reasons for the denial, including citation of supporting legal authority." *See* 65 P.S. § 67.903(2). Though this was originally interpreted to bar agencies from asserting any new grounds for denial on appeal, the Pennsylvania Supreme Court held in *Levy v. Senate of Pa.* that there is no *per se* statutory bar to raising additional grounds for denial on appeal. 65 A.3d 361, 380-383 (Pa. 2013). Accordingly, the City is permitted to assert this new reason for denial on appeal to the OOR in light of *Levy*.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the City 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 or petition for review to the Lebanon 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 according to court rules 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 website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 23, 2021

/s/ Kerianne Baker

APPEALS OFFICER
KERIANNE BAKER, ESQ.

Sent to: Charles Hoyer (via US mail only);
Tricia Springer, Esq. (via email only);
Cheryl Gibson (via email only)

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