



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**EMILEE ALEXANDER,
Requester**

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:

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v.

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Docket No: AP 2021-2869

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**MIDDLETOWN TOWNSHIP POLICE
DEPARTMENT,
Respondent**

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INTRODUCTION

Emilee Alexander (“Requester”) submitted a request (“Request”) to the Middletown Township Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of an incident report. The Department denied the Request, arguing that is exempt from disclosure under the RTKL as relating 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 Department is not required to take any further action.

FACTUAL BACKGROUND

On December 10, 2021, the Request was filed, stating “[r]egarding my 8[-]year[-]old being assaulted.”

On December 13, 2021, the Department denied the Request, arguing that the “incident report and its components are not public records because it was received, created, and retained pursuant to [Department noncriminal] investigations.” *See* 65 P.S. § 67.708(b)(17).

On that same day, 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 Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 16, 2021, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted an exemption log and the attestation, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of its Open Records Officer, Lt. Kenneth Mellus.

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 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 this instance, the Department argues that the responsive incident report and its components are exempt from disclosure as records related to noncriminal investigations. 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation.” *Id.* 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 factfinding and investigative powers. *See 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.

Here, through the attestation of Lt. Mellus, the Department argues that it identified an incident report as responsive to the Request, that the incident report was prepared as part of a noncriminal investigation, and that the Department was acting within its legislatively granted authority when conducting the investigation.

First, Lt. Mellus attests that, upon receipt of the Request, he conducted good faith search of the Department’s files and inquired with relevant Department personnel. *See* Mellus attestation, pp. 1-2, ¶¶ 3-5. In pertinent part, Lt. Mellus attests that he “searched [the Department’s] Records Management System for the requested police incident report and found one identified as 44-21-013813.” *See* Mellus attestation, p. 1, ¶3. Lt. Mellus also attests that the identified incident report was created following a “[noncriminal] juvenile investigation” conducted by the Department. *See* Mellus attestation, p. 2.

With regard to the Department’s investigation, Lt. Mellus attests that the Department “is an entity that investigates complaints/incidents and is required to conduct a course of systematic or searching inquiries and detailed examinations of complaints/incidents received or initiated by [the Department].” Lt. Mellus further attests that the Department is granted the authority to

conduct investigations pursuant to both state law and the Middletown Township Code of Ordinances. Specifically, Lt. Mellus attests:

Section 8952 of Title 42 grants municipal police officers the power to enforce the laws of the Commonwealth or otherwise perform the functions as to “any other event that occurs within his/her primary jurisdiction and which reasonably requires action on the part of the police in order to preserve, protect or defend persons or property to otherwise maintain the peace and dignity of this Commonwealth.” 42 Pa. C.S. 8952. As such the Department is vested with the power to investigate alleged breaches of the peace.¹

Under the Middletown Township Code of Ordinances, 92-13 Chapter 81-109 Duties of Police Officer B[:] “Shall conduct preliminary investigations at the scene of crimes or accidents and gather evidence, administer first aid, locate and interview witnesses, make proper arrests and submit proper reports.”

Finally, Lt. Mellus attests that, pursuant to the Department’s Policies and Procedures, “[a]ny call for service, criminal complaint, crash report (reportable or non-reportable) and [noncriminal] report whether received from the dispatch center, in person or any officer[-]initiated activity, that fall within these categories shall be documented in the Department’s records management system.”²

Under the RTKL, a sworn affidavit 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 affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103

¹ The OOR has found that this statutory authority grants municipal police departments the ability to conduct noncriminal investigations. *See Subhash v. Horsham Twp. Police Dep’t*, OOR Dkt. AP 2019-2421, 2020 PA O.O.R.D. LEXIS 306 (finding that dispatch notes in an incident report relate to a local police department’s noncriminal investigation); *see also Alasevich v. Horsham Twp. Police Dep’t*, 2019-2054, 2020 PA O.O.R.D. LEXIS 72.

² Lt. Mellus attests that this information is contained in the Department’s “Policies and Procedures, Chapter 3, Section 3.4.1.2 Reports Required for Every Incident Reported.”

(Pa. Commw. Ct. 2013)). The Requester did not submit evidence challenging the attestation provided by the Department.³

Accordingly, based upon the evidence provided, the Department demonstrated that it has the statutory authority to conduct noncriminal investigations and that the incident report sought in the Request relates to a noncriminal investigation of the Department. As such, the responsive record is exempt from disclosure under the RTKL. *See* 65 P.S. § 67.708(b)(17); *see also* *Zebrowski v. Upper St. Clair Police Dep't*, OOR Dkt. AP 2021-2116, 2021 PA O.O.R.D. LEXIS 2500; *Andracki v. Town of McCandless*, OOR Dkt. AP 2020-0925, 2020 PA O.O.R.D. LEXIS 1827; *Narisi v. Buckingham Twp. Police Dep't*, OOR Dkt. AP 2019-0489, 2019 PA O.O.R.D. LEXIS 564; *Miller v. Upper Providence Twp. Police Dep't*, OOR Dkt. AP 2018-0497, 2018 PA O.O.R.D. LEXIS 571 (each holding investigative reports prepared as a result of a noncriminal investigation are exempt from disclosure).

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 Bucks 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

³ Under the RTKL, the determination of whether a record is a public record hinges on whether the record falls within an exemption that allows that it not be disclosed. “The status or relationship of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b) [of the RTKL].” *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*). Therefore, even where a parent requests records relating to a child, the OOR is constrained to determine whether an exemption applies.

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: January 14, 2022

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO, ESQ.

Sent to: Emilee Alexander (via email only);
Lt. Ken Mellus (via email only)

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