



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**CLIFFORD BIDLINGMAIER,
Requester**

v.

**JENKINTOWN BOROUGH,
Respondent**

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Docket No.: AP 2021-2605

INTRODUCTION

Clifford Bidlingmaier, Esq. (“Requester”) submitted a request (“Request”) to Jenkintown Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records submitted to the Borough related to a proposed fire ordinance. The Borough partially granted the Request, but denied an incident report and proposal as related to noncriminal investigations or as internal, predecisional, deliberative material, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Borough is required to take further action as directed.

FACTUAL BACKGROUND

On November 4, 2021, the Request was filed, seeking:

Any and all documents submitted by Chief Lynch to Borough Council and/or Borough Manager from 1/1/21 until 9/23/21, regarding the Jenkintown Borough Fire Company, the Pioneer Fire Company and/or the Independent Fire Company.

The Borough did not respond within five business days and on November 12, 2021, the Request was deemed denied. 65 P.S. § 67.901. However, on November 15, 2021, the Borough submitted a response, providing a copy of Ordinance 2019-4, showing comments and suggested revisions by Fire Chief Lynch, but denied a copy of an incident report from September 15, 2021, and a policy proposal which Fire Chief Lynch had also submitted, arguing that the incident report was the result of a noncriminal investigation, 65 P.S. § 67.708(b)(17), and arguing that the policy proposal is an internal, predecisional, and deliberative document, 65 P.S. § 67.708(b)(10)(i)(A).

On November 29, 2021, the Requester appealed to the OOR, challenging the partial denial and providing reasons for disclosure. The OOR invited the parties to supplement the record and directed the Borough to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On December 17, 2021, the Requester submitted a position statement arguing that the policy proposal could not be exempt because it had been submitted for public proposal, and that it was only an individual proposal presented to the Borough and not a deliberation within the Borough. The Requester further argued that the incident report was not exempt because there was no public policy rationale for withholding it and the report is not properly investigative.

The same day, the Borough submitted a position statement arguing that the incident report is an investigative document because it was a mandatory investigative report issued under the Borough's ordinance and involved witness testimony, and that the policy proposal is a predecisional and deliberative document because it was submitted prior to a decision and contains the advice of the Fire Chief to the Borough in the event that the Borough accepts his proposal. The

Borough further argued that the Requester's submission misconstrued the requirements for an internal, predecisional, deliberative document.¹

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 to be 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 to respond within five business

¹ The Borough submitted several counterarguments and, in the alternative, sought additional time to respond to the Requester's submission. However, the OOR determined that the record was sufficient to issue a Final Determination, and that the Borough had submitted evidence and argument responsive to each of the Requester's arguments.

days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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)).

1. The responsive incident report relates to a noncriminal investigation

The Request seeks, in part, an incident report submitted to the Borough Council by Fire Chief Lynch. The Borough argues that this incident report is the product of a noncriminal investigation and is exempt from production. Section 708(b)(17) exempts from disclosure records of an agency “relating to a noncriminal investigation.” 65 P.S. § 67.708(b)(17). 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. Additionally, Section 708(b)(17) exempts complaints made to an agency, but only when those complaints relate to a subject that the agency actually investigated. *Brown v. Office of Inspector Gen.*, 178 A.3d 975 (Pa. Commw. Ct. 2017) (“*Stein* does not stand for the proposition that a complaint is exempt from disclosure under Section 708(b)(17)(i) of the Right-to-Know Law where that complaint does not lead to an investigation.”).

In support of this argument, the Borough submitted the affidavit of Borough Manager Locke, who attests that:

10. [The Borough] has an Ordinance [...] [that] establishes a Borough Fire Department and a Borough Fire Chief and sets forth the duties and responsibilities of that position. [...]

11. The Fire Chief has the power and the duty to take control or command at all fire activities, incidents, or emergency scenes in which the Fire Department is called to respond.

12. The Fire Chief also has the power and the authority to enforce all rules and regulations including any standard operating guidelines when in control or command.

13. The Fire Chief further has the power and authority to make or assist in investigations relating to fire scenes and keep a record thereof.

14. Further, and as set forth in the Ordinance, “all members of the Jenkintown Borough Fire Department, including those engaged in fire police duties, serving the inhabitants of the [Borough], shall be considered ‘employees’ of the Borough for purposes of ... the Pennsylvania Workers’ Compensation Act ... while actively engaged in the following duties: [enumerated fire response activities, including all responses and all transit on Fire Department apparatus].”

15. The incident report that was withheld was prepared by the Fire Chief in his capacity as Fire chief and discusses concerns and issues with regard to compliance with applicable rules and regulations and orders at various fire incidents/emergencies on September 15, 2021, when the Jenkintown Fire Department was called into service.

16. The incident report also states that it was prepared following the Fire [C]hief's interviews with various individuals to gather the facts (and further identifies the individuals interviewed).

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the exemption of records. *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 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 (Pa. Commw. Ct. 2013)).

Here, the Borough has submitted evidence that the Fire Chief conducted an investigation into events occurring on September 15, 2021, pursuant to the authority in Ordinance 2019-4, which establishes the Fire Chief as the head of the Borough's fire services and empowers the Fire Chief to enforce all rules and regulations pertaining to officers and volunteers at the Fire Departments, including discipline. *See, e.g., Spiker v. Pa. Dep't of Transp.*, OOR Dkt. AP 2016-1254, 2016 PA O.O.R.D. LEXIS 1162 (observing that the power to investigate possible breaches of law is inherent in the authority to enforce such laws). During that investigation, the Fire Chief interviewed witnesses to determine whether any breach of conduct occurred during the September 15, 2021 response. *See Dep't of Health*, 4 A.3d at 810-11; *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 and establishing that interviewing witnesses demonstrates that an investigation took place). Therefore, the Borough

has established that the Fire Chief conducted a noncriminal investigation into the conduct of the firefighters under his command on September 15, 2021, and was authorized by law to do so.

In response, the Requester argues that no public policy considerations support withholding the report in this case, that the report was not investigative, and that the Requester features in the report. Under the RTKL, the fact that the Requester has a personal interest in the record is irrelevant, and the Requester's assertion alone is not sufficient to rebut the Borough's evidence that the report is investigative in nature. *Clinkscale v. Pa. Dep't of Pub. Welfare*, 101 A.3d 137, 141 (Pa. Commw. Ct. 2014) (the RTKL must be applied without regard to the Requester's identity); *Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (unsworn testimony may not be used as evidence). Furthermore, the same public policy considerations raised in *Department of Health* appear to apply here; especially that the Fire Chief must be allowed to interview fire officials and volunteers and record their answers without fear of their identification. 4 A.3d at 811 ("requiring the Department to disclose [] notes, witness statements, and other materials related to the Inspections and Surveys could lead to [witnesses] being less likely to cooperate and provide relevant information out of fear of retaliation or embarrassment."). Therefore, the Borough has demonstrated that the responsive incident report is exempt under Section 708(b)(17) of the RTKL.

2. The responsive proposal must be provided under Section 708(b)(10)(ii)

The Borough withheld a policy proposal submitted to the Borough Council by Fire Chief Lynch, arguing that it constitutes an internal, predecisional and deliberative communication. Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure records reflecting:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative

proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

In support of this argument, Borough Manager Locke attests that:

20. The proposal is two pages in length and describes the proposed course of action that the Borough and Council should take if the Borough/Council were to accept the Fire Chief's policy proposal.

21. The policy proposal also contains a graph/chart describing the potential results if the policy proposal were to be enacted.

22. The policy proposal, if implemented by the Borough, would require public action necessitating ordinance revisions that, in turn, would further necessitate public discussion at committee level, full board level, and public advertising.

23. The policy proposal, if implemented, would also likely necessitate action by both existing fire houses that comprise the Borough Fire Department.

24. The policy proposal, while shared with the Borough Council, has not been acted upon.

[...]

27. Should action be taken with regard to the policy proposal, such action would be in a public setting and likely include discussion and consideration at a Fire Commission meeting, a Public Safety Committee meeting, and at a Borough Council regular meeting.

As previously noted, a verification may suffice to demonstrate that an exemption applies. *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Here, the Borough has submitted evidence showing that the record was produced by a Borough official and presented to the Borough council

without external review, thereby establishing that the recommendation is internal. The attestation also demonstrates that the Borough has not yet come to a decision on the recommendation, and that the purpose of the document is deliberative. Contrary to the Requester's arguments, a recommendation made by an agency employee and submitted to other agency officials may be deliberative. *See, e.g., Glunk v. Dep't of State*, 102 A.3d 605 (Pa. Commw. Ct. 2014).

However, the OOR must also consider Section 708(b)(10)(ii) of the RTKL, which provides that: "[a] record that is not otherwise exempt from access under [the RTKL] and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 [relating to open meetings] shall be a public record." 65 P.S. § 67.708(b)(10)(ii). Accordingly, two requirements must be met for such a record to be subject to public disclosure: 1) it must be presented to a quorum of the Borough Council; and 2) it must be presented for the Borough Council's deliberation. *Hale v. Borough of Gettysburg*, OOR Dkt. AP 2016-0642, 2016 PA O.O.R.D. LEXIS 1128. Section 708(b)(10)(ii) may apply to a record submitted to the full quorum even if the record is not presented at a public meeting. *Esposito v. Pennridge Sch. Dist.*, OOR Dkt. AP 2019-1521, 2019 PA O.O.R.D. LEXIS 1532. Instead, the OOR has found that any record presented to a quorum for the purpose of making a decision is subject to production. *Longo v. Phoenixville Area Sch. Dist.*, OOR Dkt. AP 2020-0504, 2020 PA O.O.R.D. LEXIS 1361.

Here, the Borough's evidence and argument demonstrate that the responsive proposal was independently submitted via Dropbox prior to a public meeting of the Borough and was provided by the Fire Chief on his own accord. The proposal was not read at the Borough's public meeting nor were copies disseminated there. However, the record was received by the Borough and undoubtedly presented to the Borough for the purposes of deliberation. The OOR has previously held that the exception to the exemption at Section 708(b)(10) becomes operative when the record,

intended for deliberation, is received and considered by the quorum, and not merely when deliberation at a public meeting actually occurs. *See, e.g., Esposito*, 2019 PA O.O.R.D. LEXIS 1532 (email to school board from superintendent asking if more interviews should be conducted qualifies); *Longo*, 2020 PA O.O.R.D. LEXIS 1361 (the fact that deliberative emails were not presented at a public meeting was immaterial, and the agency bore the burden of showing that Section 708(b)(10)(ii) does not apply); *but see Schnee v. Haverford Twp.*, OOR Dkt. AP 2021-2530, 2021 PA O.O.R.D. LEXIS 2631 (emails to Board members seeking opinions on how to handle public meetings during the pandemic were not subject to the exception because there was no evidence that a quorum of Board members discussed the question). Here, the record shows that the Fire Chief uploaded his suggestions with the intention that the whole Borough Council consider them. Additionally, there is no evidence that a quorum has not received this document. As such, the document was provided to a quorum for deliberation and must be provided under Section 708(b)(10)(ii) of the RTKL.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the Borough is required to provide the Requester with a copy of the responsive suggestion submitted by the Fire Chief within thirty days. 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 Montgomery 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. 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.² This Final Determination shall be placed on the OOR website at:
<http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 14, 2022

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Clifford Bidlingmaier, Esq. (via email);
Patrick Hitchens, Esq. (via email)

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).