

COMMONWEALTH COURT OF PENNSYLVANIA

<p>SOUTHEAST PENNSYLVANIA TRANSPORTATION AUTHORITY,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>JULIANA REYES and THE PHILADELPHIA INQUIRER,</p> <p style="text-align: center;">Respondent</p>
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No. _____ C.D. 2022

**PETITION FOR REVIEW
(APPEAL FROM OFFICE OF OPEN RECORDS)**

I. Jurisdictional Statement.

1. This Court has jurisdiction to hear the instant appeal pursuant to Section 1301(a) of the Right to Know Law, 65 P.S. § 67.1301(a) (“RTKL”) and Section 763(a)(2) of the Judicial Code, 42 Pa.C.S. § 763(a)(2).

2. This Court’s standard of review of a final determination of the Office of Open Records (“OOR”) is *de novo* and the scope of the review is plenary. *Hunsicker v. Pennsylvania State Police*, 93 A.3d 911, 913 n. 7 (Pa. Commw. 2014).

II. Parties

3. Petitioner Southeastern Pennsylvania Transportation Authority (“SEPTA”) is a Commonwealth Agency for purposes of the Right to Know Law.

4. Respondent, Juliana Reyes (“Ms. Reyes”) is an adult individual and reporter for the Philadelphia Inquirer.

5. Respondent is a Requester for purposes of the RTKL.

III. Statement of Facts and Background

6. On September 29, 2021, Ms. Reyes requested, via e-mail,

[D]ocuments responsive to the [RTKL] request submitted on Feb. 4, 2021 by Debra Gardner-Lozada and ordered to be released by the [OOR] in a Final Determination dated May 3, 2021 and docketed [by] the [OOR] as AP 2021-0456.

- 1) *All unredacted [agreement] and release[] records for the following past employees:*
 - a. *Ronald Hopkins*
 - b. *Rohan Hepkins*
 - c. *Neil Patel*
 - d. *James Foley*
 - e. *Richard Hanratty*
 - f. *Vincent DeLuca*
- 2) *Records reflecting the reason for these agreements for those six former employees.*

7. On September 29, 2021, SEPTA's Open Records Officer, Neil Petersen, invoked the agency's right to a 30-day extension to respond to Ms. Reyes' request pursuant to § 902 of the RTKL.

9. On November 4, 2021, SEPTA provided the Requester with redacted copies of the Agreement and Release documents for Rohan Hepkins, Neil Patel, Ron Hopkins, Jim Foley, Rich Hanratty, and Vince DeLuca. SEPTA redacted those portions of the Agreement and Release documents which constitute information regarding discipline, demotion or discharge contained in a personnel file pursuant to § 708(b)(7)(viii) of the Right to Know Law. SEPTA did not redact any portion of the Agreement and Release documents reflecting the final action of the Agency.

10. On November 10, 2021, Ms. Reyes filed an appeal with the Office of Open Records.

11. On January 21, 2022, the Office of Open Records issued a Final Determination granting Ms. Reyes' appeal. A copy of the Final Determination is attached hereto as Exhibit "A".

12. In its position statement before the Office of Open Records, SEPTA argued that the unredacted Agreement and Release documents are exempt pursuant to § 708(b)(7)(viii) of the RTKL, which exempts from release “[i]nformation regarding discipline, demotion or discharge contained in a personnel file” but not “the final action of an agency that results in demotion or discharge.”

13. SEPTA argued that the Agreement and Release documents are tantamount to a termination letter and as such were properly redacted. The Commonwealth Court has previously held that an agency may redact references to prior discipline in a termination letter, while granting access to the name of the terminated employee and termination language, writing that “[t]hat part of the letter setting forth the employment termination must be furnished; however, the references to the exempt prior discipline are to be redacted.” Silver v. Borough of Wilkensburg, 58 A.3d 125, 130 (Pa. Commw. Ct. 2012).

14. In support of its position statement, SEPTA submitted the affidavit of its Senior Director of Compensation and HRIS, Dave Schweibenz, stating that the Agreement and Release documents are the functional equivalent of termination letters.

15. The Office of Open Records incorrectly concluded that SEPTA failed to provide sufficient evidence that § 708(b)(7)(viii) of the RTKL applies to the Agreement and Release documents because its affidavit submitted in support of its position statement was “conclusory”; the OOR did not elaborate on this statement.

16. The Office of Open Records wrote that settlement agreements are not subject to § 708(b)(7)(viii) when they call for the payment of money involving the disbursement of public funds, incorrectly concluding that the Agreement and Release documents are not functionally equivalent to termination letters.

17. The OOR's Final Determination incorrectly concluded that SEPTA is precluded under § 708(b)(7)(viii) of the RTKL from redacting information in an Agreement and Release related to allegations of disciplinary infractions which give rise to the separation from employment.

WHEREFORE, Petitioner, Southeastern Pennsylvania Transportation Authority, respectfully requests this Honorable Court review and reverse the incorrect determination of the Office of Open Records in its Final Determination AP 2021-2395.

Date: February 18, 2022

Respectfully submitted,

/s/ Mark E. Gottlieb
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CERTIFICATE OF SERVICE

I, Megan K. Shannon, do hereby certify that on this 18th day of February, 2022, I have served the foregoing Petition or Review of Southeastern Pennsylvania Transportation Authority by filing the petition electronically through the Court's PACFILE and upon the following as follows in satisfaction of Pa.R.A.P. 121:

Via e-mail and First Class Mail

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Exhibit “A”



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JULIANA REYES AND THE
PHILADELPHIA INQUIRER,
Requester**

v.

**SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Respondent**

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Docket No.: AP 2021-2395

INTRODUCTION

Juliana Reyes and the Philadelphia Inquirer (collectively “Requester”) submitted a request (“Request”) to the Southeastern Pennsylvania Transportation Authority (“Authority”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking release agreements for several employees. The Authority granted the Request in part but redacted information which relates to discipline, demotion, or discharge. The Requester appealed to the Office of Open Records (“OOR”). For the following reasons, the appeal is **granted**, and the Authority is required to take further action as directed.

FACTUAL BACKGROUND

On September 29, 2021, the Request was filed, seeking:

[D]ocuments responsive to the [RTKL] [r]equest submitted on Feb. 4, 2021 by Debra Gardner-Lozada and ordered to be released by the [OOR] in a Final Determination dated May 3, 2021 and docketed [by] the [OOR] as AP 2021-0456.

1) All unredacted [agreement] and release[] records for the following past employees:

- a. Ronald Hopkins
- b. Rohan Hepkins
- c. Neil Patel
- d. James Foley
- e. Richard Hanratty
- f. Vincent DeLuca

2. Records reflecting the reason for these agreements for those six former employees

On November 4, 2021, following a thirty-day extension, 65 P.S. § 67.902, the Authority granted the Request in part, but withheld responsive records as containing exempt personnel records under Section 708(b)(7) of the RTKL, 65 P.S. § 67.708(b)(7).

On November 10, 2021, the Requester appealed to the OOR, arguing that the responsive records had already been deemed public by a prior OOR order and that Section 708(b)(7) could not apply to the responsive records because they are financial records.¹² The OOR invited the parties to supplement the record and directed the Authority to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On December 7, 2021, the Authority submitted a position statement arguing that it had produced the same records which had been dismissed as moot upon production in *Gardner-Lozada v. Southeastern Pennsylvania Transportation Authority*, OOR Dkt. AP 2021-0456, 2021 PA O.O.R.D. LEXIS 716, and that the records were redacted pursuant to Section 708(b)(7)(viii) of the RTKL because they constitute records of discharge contained in a personnel file. 65 P.S. §

¹ Based on a review of the appeal and the Requester's appeal submission, the Requester does not raise any objections to or dispute the Authority's response to Item 2 of the Request. Therefore, any challenge to that portion of the Authority's response is waived. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

² In the appeal, the Requester granted the OOR additional time to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1).

67.708(b)(7)(viii). In support of this argument, the Authority submitted the verification of David Schweibenz, the Authority's Senior Director of Compensation and HRIS, who attests that the Agreement and Release Documents are termination letters.

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 Authority 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 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 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). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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 Authority denied access to portions of the responsive agreements pursuant to Section 708(b)(7) of the RTKL, which exempts from disclosure certain records “relating to an agency employee[,]” including “[w]ritten criticisms of an employee” and “[i]nformation regarding discipline, demotion or discharge contained in a personnel file.” 65 P.S. §§ 67.708(b)(7)(vi), (viii). In support of this argument, the Authority submitted the verification of Senior Director Schweibenz, who attests that:

3. The Agreement and Release Documents are the functional equivalent of termination letters.

4. These agreements explicitly call for their terms to be kept confidential.³

³ The RTKL does not permit an agency to withhold a record simply because it has promised confidentiality. It is well-settled that “[a] public entity may not enter into enforceable promises of confidentiality regarding public records.” *Tribune-Review Publ’g Co. v. Westmoreland County Hous. Auth.*, 833 A.2d 112, 120 (Pa. 2003). An agency “may not contract away the public’s right of access to public records because the purpose of access is to keep open the doors of government, to prohibit secrets, to scrutinize the actions of public officials and to make public officials accountable in their use of public funds.... A confidentiality clause contained in a settlement agreement that runs afoul of the RTKL violates public policy and is unenforceable.” *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644,

Under the RTKL, a 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, 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 Authority acted in bad faith, "the averments in [the statement] 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)). However, under the RTKL, "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL") (citations omitted); *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) ("Affidavits that are conclusory or merely parrot the exemption do not suffice") (citing *Scolforo, supra*).

Senior Director Schweibenz attests that the Agreements are the "functional equivalent of a termination letter[.]" but he does not actually attest to the content of the material redacted from the Agreements or explain how it relates to the exemption. This constitutes conclusory evidence on appeal, and the OOR has already held that in lieu of competent evidence that Section 708(b)(7)(viii) applies to these Agreements, they must be provided in full. *Gardner-Lozada*, 2021 PA O.O.R.D. LEXIS 716 ("Accordingly, the Authority has failed prove that [the Agreements] are

649 n.11 (Pa. Commw. Ct. 2006) (citing *Tribune-Review Publ'g Co.*). The parties do not claim that these settlement agreements have been sealed by a court, *see* 65 P.S. § 67.305(a)(3); therefore, the cited confidentiality provisions are not a sufficient basis to withhold otherwise public records.

subject to this exemption.”). Therefore, the Authority’s verification is not sufficient evidence to support the Authority’s redactions on appeal.

The Authority also argues that “[a]n Agreement and Release is equivalent to a termination letter in that it details an employee’s disciplinary history and states the final action taken.” The OOR has previously found that termination letters may be exempt under Section 708(b)(7)(viii) of the RTKL, and the Commonwealth Court has explicitly held that while the section of a termination letter memorializing termination must be provided, an agency may redact references to prior disciplinary history. *See Silver v. Borough of Wilkinsburg*, 58 A.3d 125, 130 (Pa. Commw. Ct. 2012); *e.g., Lehman v. Northampton County*, OOR Dkt. AP 2017-0098, 2017 PA O.O.R.D. LEXIS 421.

However, settlement agreements are not subject to Section 708(b)(7) when they “[fix] the personal or property rights of the parties or [call] for the payment of money involving the disbursement of public funds.” *See Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 648 (Pa. Commw. Ct. 2006). The RTKL does not permit the redaction of financial documents under Section 708(b)(7). *See* 65 P.S. § 67.708(c) (“The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17).”); *see also Rittmeyer v. Highlands Sch. Dist.*, OOR Dkt. AP 2021-0898. 2021 PA O.O.R.D. LEXIS 910. Therefore, as the Authority has not established that the responsive records contain exempt records of employee discipline or that the records are not expressly public settlement agreements, the appeal must be granted.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the Authority must provide the Requester with unredacted copies of the responsive Agreements 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 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: January 21, 2022

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Juliana Reyes (via email only);
 Mark Gottlieb, Esq (via email only)

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