



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
RICHARD KOWALCZYK,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2022-0367
	:	
PORTAGE BOROUGH,	:	
Respondent	:	

INTRODUCTION

Richard Kowalczyk (“Requester”) submitted a request (“Request”) to Portage Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of an incident report (“the Report”) related to a non-emergency call he had made to the police. The Borough denied the Request, arguing that the Report is related to a criminal investigation, and 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 Borough is not required to take any further action.

FACTUAL BACKGROUND

On January 12, 2022, the Request was filed, seeking a copy of the Report generated in response to the non-emergency call the Requester made on December 6, 2021, complaining about

his neighbor's wind chimes. The next day, the Borough denied the Request, arguing that the Report is related to a criminal investigation, *see* 65 P.S. § 67.708(b)(16).

On February 4, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester argues that the Report is unlikely to be related to a criminal investigation, as it was merely a noise complaint. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On February 7, 2022, the Requester reiterated his position that the Report was not related to a criminal matter. On February 24, 2022, the Borough submitted a position statement, arguing that, if the Report were deemed noncriminal, it would be exempt as a record related to a noncriminal investigation, *see* 65 P.S. § 67.708(b)(17). In support of its position, the Borough submitted the statement, made under the penalty of perjury, of Robert Koban, the Borough's Open Records Officer. The next day, the Requester argued that he was seeking information that would not necessarily be contained in the Report. On March 2, 2022, the Borough submitted the supplemental attestation of Mr. Koban.

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 LLC 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. 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 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 public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. 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. 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)).

As a threshold matter, the OOR has no jurisdiction over appeals related to criminal investigative records held by local agencies. *See* 65 P.S. § 503(d); *Phila. Dist. Attorney’s Office*

v. Stover, 176 A.3d 1024 (Pa. Commw. Ct. 2017) (holding that the OOR has jurisdiction to determine whether it actually has jurisdiction over the matter) (citation omitted). Instead, the OOR will transfer appeals where the request facially seeks records related to a criminal investigation or where there is evidence of a criminal investigation to the appeals officer designated by the local district attorney. *See id.*; *see, e.g., Steinheiser v. Falls Twp.*, OOR Dkt. AP 2015-0323, 2015 PA O.O.R.D. LEXIS 378 (holding that where the plain language of a request sought a police report and there was evidence of a criminal investigation, the criminal investigative exemption applied).

This, however, is not the case in the present matter. On a number of previous occasions, the OOR has found that a borough conducts a noncriminal investigation when its police respond to a noise complaint. *See Abramson v. Lwr. Merion Twp.*, OOR Dkt. AP 2019-1267, 2019 PA O.O.R.D. LEXIS 1483 (finding that records related to the investigation of a noise complaint were related to a noncriminal investigation); *Hill v. Pa. State Police*, OOR Dkt. AP 2015-0658, 2015 PA O.O.R.D. LEXIS 599 (finding that incident reports related to the investigation of a noise complaint were related to a noncriminal investigation); *see also Pa. Game Comm'n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions). Accordingly, the OOR retains jurisdiction.

The Borough argues that the Report is exempt from disclosure as a record relating to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts records of an agency “relating to a noncriminal investigation,” including “complaints 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 an agency investigation, except the

imposition of a fine or civil penalty....” 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. Welf. 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.

The Borough Code provides that borough police officers have “powers and abilities as are granted to police officers under the laws of this Commonwealth....” 8 Pa.C.S. § 1121. Similarly, Section 8952 of Title 42 grants municipal police officers the authority to enforce the laws of the Commonwealth and “preserve, protect or defend persons ... or to otherwise maintain the peace and dignity of this Commonwealth.” 42 Pa.C.S. § 8952.

Here, Mr. Koban attests that, upon consultation with Police Chief Shaun Gregory, he confirmed the Borough Police Department conducted an investigation into a noise complaint in response to a call from the Requester on the date indicated, in accordance with Department protocol. Koban Aff. ¶¶ 1-4. In his supplemental attestation, Mr. Koban affirms there no fines or civil penalties were imposed as a result.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 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)). Accordingly, the Borough has met its burden of proving that the Report is related to a noncriminal investigation and the exception to the exemption does not apply. *See* 65 P.S. § 67.708(a).

The Requester argues that he seeks information that would not necessarily be contained in the Report. However, the Request was expressly limited to the Report, and a requester may not modify or expand upon a request on appeal. *See McKelvey v. Office of the Attorney Gen.*, 172 A.2d 122, 127 (Pa. Commw. Ct. 2016); *Smith Butz, LLC v. Dep’t of Env’tl. Protection*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016). Therefore, the OOR’s review on appeal is confined to the Request as originally written, and any modification or explanation of the Request on appeal will not be considered. However, nothing in this Final Determination prevents the Requester from filing another request with the Borough, specifying what he seeks.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Borough is not required to take any further action. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Cambria 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 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.¹ This Final Determination shall be placed on the website at:
<http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 10, 2022

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent via email to: Richard Kowalczyk and Robert Koban

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