



FINAL DETERMINATION

IN THE MATTER OF

**AMY MARCHIANO AND
THE REPUBLICAN HERALD,
Requester**

v.

**SCHUYLKILL COUNTY,
Respondent**

:
:
:
:
:
:
:
:
:
:
:

Docket No.: AP 2022-1021

INTRODUCTION

Amy Marchiano, a reporter for the Republican Herald (collectively “Requester”), submitted a request (“Request”) to Schuylkill County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of a report completed by the County’s law firm. The County denied the Request, arguing that the report was a record of a noncriminal 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 County is not required to take any further action.

FACTUAL BACKGROUND

On March 3, 2022, the Request was filed, seeking a copy of a report produced by Eckert Seamans Cherin & Mellott, LLC., regarding software usage by County employees.

On April 11, 2022, following a thirty-day extension, 65 P.S. § 67.902(b), the County denied the Request in full, arguing that the responsive report was exempt as a record relating to a noncriminal investigation. 65 P.S. § 67.708(b)(17).

On April 27, 2022, the Requester appealed to the OOR, challenging the denial and providing reasons for disclosure. The OOR invited the parties to supplement the record and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On May 9, 2022, the County submitted a position statement, explaining that it had retained the firm in question to produce a report as part of an investigation into County employees' potential misuse of third-party software to search individual data, and to determine what laws might have been implicated for disciplinary action. In support of this argument, the County submitted the affidavit of Lois Lebo, the County's Open Records Officer, who attests that the report was produced for the County's Human Resources Office as part of a noncriminal investigation.

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 sought a hearing.

The County 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 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)).

The only issue on appeal is whether the report sought by the Request is exempt from disclosure under Section 708(b)(17) of the RTKL. Section 708(b)(17) of the RTKL exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including

...[c]omplaints submitted to an agency... [and i]nvestigative materials, notes, correspondence and reports.” 65 P.S. §§ 67.708(b)(17)(i)-(ii). To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *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. An investigation constitutes an official probe only if the agency is acting within legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

In support of this argument, the County submitted the affidavit of Ms. Lebo, who attests that:

6) Upon receipt of the [R]equest, I consulted the Office of the County Solicitor and the Human Resources Office and was informed that this report is part of a noncriminal investigation.

7) The Human Resources Office is charged with conducting noncriminal investigations pertaining to alleged County Employee misconduct.

8) The Human Resources Office, the County Solicitor’s Office, Independent Legal Counsel, and a third party software vendor are continuing to investigate alleged misuse of third party software resulting in inappropriate data searched of individuals.

9) While the County’s Independent Legal Counsel did issue one legal opinion, as of the date of this affidavit, the noncriminal investigation is ongoing and no final conclusions have been made pertaining to the employment status of county personnel.

10) The investigation is undertaken pursuant to the County’s policy and procedures as they relate[] to disciplinary action.

11) As part of this investigation, investigatory materials, notes and conclusions were generated from interviews conducted with various witnesses, and that these

items are maintained as part of certain [C]ounty employees' personnel files and the noncriminal investigation file.

Under the RTKL, an attestation made under the 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 evidence that the County has acted in bad faith, "the averments in [the affidavit] 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)).

Here, the County has submitted evidence which demonstrates that the report sought is a legal analysis of the application of federal data protection statutes to the possible misuse of third-party data analysis by County employees. Furthermore, Ms. Lebo attests that these records are all investigative records, and the investigation was performed pursuant to the County's policy and procedures as they relate to disciplinary action.

The OOR has repeatedly held that agencies have the authority to conduct noncriminal investigations involving the conduct of its employees and officials. *See, e.g., Anderson v. Perry County*, OOR Dkt. AP 2019-0054, 2019 PA O.O.R.D. LEXIS 259 (holding that the agency had the authority to conduct a noncriminal investigation into the misappropriation of funds); *Needelman v. Spring-Ford Area Sch. Dist.*, OOR Dkt. AP 2018-1814, 2018 PA O.O.R.D. LEXIS 1526 (holding that the agency had the authority to conduct a noncriminal investigation into the conduct of a teacher). Furthermore, the OOR has previously found that reports related to the investigation conducted by the County in this appeal are exempt from disclosure pursuant to Section 708(b)(17). *See Marchalk v. Schuylkill County*, OOR Dkt. AP 2021-2953, 2022 PA O.O.R.D. LEXIS 167. Based upon the evidence provided, therefore, the County has proven that

the requested records are exempt from disclosure under Section 708(b)(17). *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the County 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 Schuylkill 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 27, 2022

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Amy Marchiano (via email only);
Glenn T. Roth, Esq. (via email only)

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