



FINAL DETERMINATION

IN THE MATTER OF

CARMEN SANTUCCI,
Requester

v.

UPLAND BOROUGH,
Respondent

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Docket No: AP 2022-1263

INTRODUCTION

Carmen Santucci (“Requester”) submitted a request (“Request”) to Upland Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records. When the Borough failed to respond, the Request was deemed denied 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, denied in part** and **dismissed as moot in part**, and the Borough is not required to take any further action at this time.

FACTUAL BACKGROUND

On May 16, 2022, the Request was filed, seeking:

1. Provide all records, both physical and electronic, regarding ALL code enforcement actions involving Carmen Santucci and/or his property commonly known as 515 West 24th Street, Upland, Pennsylvania [the “Property”].
2. Provide all legally and lawfully promulgated records that the Borough of Upland relied on that evidence, “LO § 134 §§ 1 (Lead) – Unpaved Parking Areas; Declaration of Nuisance, parking on unpaved areas” (as cited by the

Court), applies to Carmen Santucci's private property commonly known as 515 West 24th Street, Upland, Pennsylvania.

3. Provide all legally and lawfully promulgated records, contracts, performance contracts, covenants, and/or agreements, between Carmen Santucci and the Borough of Upland, that evidence Carmen Santucci having a known duty or legal responsibility to perform any obligations with the Borough of Upland.
4. Provide all legally and lawfully promulgated records that the Borough of Upland relied on that evidence Rich Slifer, and/or the Borough of Upland, and/or the Commonwealth of Pennsylvania, had legal Standing to access the Pennsylvania Court system's dispute resolution process, for the actions that IT filed against Carmen Santucci, known as Citations R2629367-6 and R3295860-1.
5. Provide all legally and lawfully promulgated records that the Borough of Upland relied on that evidence Code Enforcement Officer Rich Slifer's legal authority to issue Summary Offenses against Carmen Santucci and/or his property commonly known as 515 West 24th Street, Upland, Pennsylvania.
6. Provide the legally and lawfully promulgated records that the Borough of Upland relied on that evidence Carmen Santucci is an Inhabitant, Member, Resident, Citizen, or Person of the Borough of Upland municipal corporation.
7. Provide all legally and lawfully promulgated records that the Borough of Upland relied on, that evidence their ownership, interest, or rights, in the property commonly known as 515 West 24th Street, Upland, Pennsylvania.
8. Provide a record of all contracts, agreements, and/or employment agreements between Rich Slifer and the Borough of Upland.
9. Provide a record of ALL Rich Slifer's compensation and/or income from the Borough of Upland, including but not limited to salary, bonuses, and incentives, as Code Enforcement Officer for the Borough of Upland.
10. Provide a record of Rich Slifer's job description and duties as a Code Enforcement Officer for the Borough of Upland.
11. Provide a record of all bonds and/or insurance policies that the Borough of Upland has secured, to cover any damages caused by Rich Slifer in his official role as Code Enforcement Officer for the Borough of Upland.

Because the Borough failed to respond to the Request within five business days, the Request was deemed denied on May 23, 2022. *See* 65 P.S. § 67.901.

On May 25, 2022, the Requester appealed to the OOR, challenging the deemed denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On June 7, 2022, the Borough submitted a position statement addressing each of the Items in the Request. The Borough argues that Items 1 and 2 relate to a criminal or noncriminal investigation, 65 P.S. § 67.708(b)(16) and (17). The Borough granted and provided records responsive to Items 7 and 11, and argues that the records sought in Items 3-6 and 8-10 do not exist. In support of its position that Items 3-6 and 8-10 do not exist, the Borough submitted the attestation of Michael Ciach, Open Records Officer for the Borough.

On June 13, 2022, the OOR contacted the parties asking the Borough to provide additional evidence regarding Items 1 and 2 and how they relate to either a criminal or noncriminal investigation. In response, the Borough provided additional background information including the Magisterial District Judge (MDJ) court sheets showing the Requester guilty for the parking of motor vehicles on an unpaved surface area.

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 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)).

1. Records responsive to Items 7 and 11 of the Request have been provided.

Item 7 seeks records that the Borough relied on that evidence their ownership in the Property and Item 11 seeks bond and/or insurance policies of the Borough. During the pendency of the appeal, the Borough provided records responsive to Items 7 and 11. *See* attached to Borough's June 7, 2022 submission. The first attachment, relating to Item 7, shows information related to the Property (i.e., the site location, the owner, the current owner, the mortgage company, the owner history, the current year assessment value, and the county tax information). The second attachment, relating to Item 11, shows the "Public Entity General Liability Coverage" for the Borough.

Here, the Borough has established that responsive records with respect to Items 7 and 11 were provided to the Requester. The Requester has not challenged the sufficiency of these records or requested that the OOR reopen the evidentiary record as to the records. Therefore, based on the evidence provided, including the records responsive to Items 7 and 11 of the Request, the Borough has met its burden of proving that it has provided records responsive to Items 7 and 11 of the Request. *See Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). Accordingly, the appeal of Items 7 and 11 is dismissed as moot in part.

2. The Borough met its burden that responsive records do not exist for Items 3-6 but failed to meet its burden that Items 8-10 do not exist.

In support of its position that Items 3-6 and 8-10 do not exist, the Borough submitted the attestation of Mr. Ciach.¹ Mr. Ciach attests as follows:

2. In my capacity as the Open Records Officer, I am familiar with the records of the Agency.
3. Upon receipt of the request, I conducted a thorough examination of files in the possession, custody and control of the Agency for records responsive to the request underlying this appeal. Specifically, I have searched all personnel and

¹ The attestation specifically addresses Items 3-6 and 8-10.

payroll records of the Borough and have determined that the specific records requested are not in my possession, custody, or control. The Borough is not obligated to “create” a record to satisfy a requester where one does not exist.

4. Additionally, I have inquired with relevant Agency personnel and, if applicable, relevant third-party contractors as to whether the requested records exist, in their possession. Specifically I contacted the Borough Treasurer and the Council Finance Chairperson who both responded that such employment contracts, defined salary, and job description and duties of code Enforcement Officer do not exist.
5. Based upon the above-described search of the Agency’s files and inquiries with relevant Agency personnel, I have made the determination that the records requested are not within the Agency’s possession, custody or control.

Under the RTKL, a sworn affidavit or statement 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 Borough has acted in bad faith or that the records exist, “the averments in [the attestation] 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)).

Item 3 seeks records between the Requester and the Borough that establish that the Requester has a duty or legal responsibility to the Borough. Item 4 seeks evidence that the Borough has to access the Pennsylvania Court system for actions it filed against the Requester. Item 5 seeks the Borough’s legal authority to issue a summary offense. Item 6 seeks records establishing that the Requester is an “inhabitant, member, resident, citizen, or person” of the Borough. Based on a clear reading of Items 3-6 of the Request and the evidence submitted, including Mr. Ciach’s attestation that he conducted a thorough examination of the files in the possession, custody, and control of the Borough and that he contacted relevant Borough personnel, the Borough met its

burden by a preponderance of the evidence² of proving that the responsive records to Items 3-6 do not exist in the possession, custody, or control of the Borough. *Hodges*, 29 A.3d at 1192.

Items 8-10 seek information regarding Rich Slifer, Code Enforcement Officer for the Borough. This information includes any contracts, agreements, employment agreements, compensation, income (including any salary, bonuses, and incentives), job description and duties as a Code Enforcement Officer. Although the Borough presented evidence that these types of records do not exist, it defies logic that such information does not exist and that the Borough would not maintain this type of information from a Borough employee. Surely, a Borough Code Enforcement Officer would have some sort of contractual arrangement that includes compensation/a salary and a job description. As such, without further explanation, the OOR finds it incredulous that these types of records do not exist and will order disclosure of Items 8-10 of the Request. Therefore, the Borough has not met its burden of proof that it does not possess the records sought in Items 8-10 of the Request. *Hodges*, 29 A.3d at 1192.

3. The Borough did not establish that the records in Items 1 and 2 relate to a criminal and noncriminal investigation.

The Borough argues that the Requester seeks certain records in Items 1 and 2 of the Request that are related to criminal and non-criminal investigations. Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation, including: ...”[i]nvestigative materials, notes, correspondence, videos and reports...and [a] record that, if disclosed, would ... [r]eveal the institution, progress or result of a criminal investigation, except for the filing of criminal charges.” 65 P.S. §§ 67.708(b)(16)(ii), (iv). While the OOR has no jurisdiction over records that are related to a criminal investigation, a local agency claiming

² “A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry.” *Delaware Cnty. v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012).

that records are exempt under Section 708(b)(16) does not automatically divest the OOR of jurisdiction over an appeal. Accordingly, the threshold question is whether the OOR has jurisdiction to hear this appeal as it pertains to these records. The issue of subject matter jurisdiction may be raised by the parties or the OOR, *sua sponte*. See *Weber v. Wyoming Valley Sch. Dist.*, 668 A.2d 1218 (Pa. Commw. Ct. 1995) (Secretary of Education permitted to raise issues of subject matter jurisdiction in an administrative proceeding under the Public School Code, *sua sponte*).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. § 67.503(a). Section 503(d) creates a two-step analysis for determining when cases should be heard by the OOR and when they should be heard by the appeals officer appointed by a District Attorney. First, jurisdiction is properly transferred from the OOR to the District Attorney's Office when an appeal on its face involves records that relate to a criminal investigation (e.g., search warrants, witness statements, etc.). See, e.g., *Porter v. Allegheny County Sheriff's Office*, OOR Dkt. AP 2014-1910, 2014 PA O.O.R.D. LEXIS 1444 (transferring an appeal where the request sought a search warrant, which was facially related to a criminal investigation).

Second, when it is unclear whether the requested records relate to a criminal investigation, the local agency must provide some evidence showing how the records relate to a specific criminal investigation. While a low threshold for transferring a case is needed, an agency must provide more than a conclusory affidavit that merely repeats the language of Sections 503(d) and 708(b)(16). See *Bush v. Westtown-East Goshen Police Dep't*, OOR Dkt. AP 2016-1869, 2016 PA O.O.R.D. LEXIS 1708 (finding that an affidavit demonstrated how the requested records related to a specific criminal investigation); *Burgess v. Willistown Twp. Police Dep't*, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding that where a local agency made a preliminary

showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal).

Meanwhile, Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[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.” 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(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 factfinding and investigative powers. *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

Here, the Borough merely asserts that Items 1 and 2 of the Request are exempt from public access under Section 708(b)(16) and (17) of the RTKL. Mr. Ciach’s attestation does not address how the records responsive to Items 1 and 2 relate to a noncriminal or criminal investigation. On June 13, 2022, the OOR contacted the Borough asking the Borough to provide “additional evidence regarding Items 1 and 2 and how they relate to either a criminal or non-criminal investigation.” In response, the Borough submitted the MDJ docket number for the Requester but did not submit any additional evidence or attestation identifying the responsive records or describing how they relate to a noncriminal or criminal investigation. As such, the Borough failed to meet its burden of proving that records responsive to Items 1 and 2 are exempt from disclosure.

See Carey v. Pa. Dep't of Corr., 61 A.3d 367, 375-76 (Pa. Commw. Ct. 2013) (explaining that an affidavit in the RTKL context must (1) include detailed information describing the nature of the records sought and (2) connect the nature of the various records to the reasonable likelihood that disclosing them would violate an exemption).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the Borough is required to provide records responsive to Items 1 and 2 and 8-10 to the Requester 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 Delaware 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 OOR is not a proper party to any appeal and should not be named as a party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 22 June 2022

/s/ Lyle Hartranft
Lyle Hartranft, Esq.
Appeals Officer

Sent to via email: Carmen Santucci; Michael Ciach, AORO; John Wills, Esq.

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