



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**SANDRA CHABOT,
Requester**

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v.

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Docket No: AP 2018-1920

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**PENNSYLVANIA DEPARTMENT OF
LABOR AND INDUSTRY,
Respondent**

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INTRODUCTION

Sandra Chabot (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Labor and Industry (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to “case #2016-01579” with the Department. The Department denied the Request, arguing that the records relate to a noncriminal investigation. 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 Department is not required to take any further action.

FACTUAL BACKGROUND

On October 10, 2018, the Request was filed, seeking:

... copies of public records pertaining to my case #2016-01579 with the... Department.... I would like copies of all paperwork that I submitted to the investigator, Tom Lloyd. I am requesting copies of all documentation of correspondence between Mr. Lloyd, and Newport Counseling Center’s owner, Elise Woodcock, or co-owner, Douglas Woodcock. I would like all written

correspondence and notes on telephone conversations. I am looking for all submitted documentation to support Mr. Lloyd's decision and Ms. Woodcock's claims. I am expressly requesting copies of all timesheets that were signed by myself that Ms. Woodcock submitted.

On October 12, 2018, the Department denied the Request, arguing that the requested records relate to a noncriminal investigation conducted by the Department. *See* 65 P.S. § 67.708(b)(17).

On October 25, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On November 5, 2018, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the attestation, made under penalty of perjury of Bryan Smolock, the Director of the Department's Bureau of Labor Law Compliance ("BLLC"). The Requester did not submit anything additional on appeal.

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 law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth 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)).

The Department denied access to the requested records pursuant to Section 708(b)(17) of the RTKL, which 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.” 65 P.S. §§ 67.708(b)(17)(i)-(ii). Section 708(b)(17) also exempts from disclosure:

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, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

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. *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 Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). Additionally, the investigations must specifically involve an agency’s legislatively granted fact-finding powers. *See Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

The Department’s Bureau of Labor Law Compliance (“BLLC”) is charged with administering the Wage Payment and Collection Law (“WPCL”), 43 P.S. §§ 260.1 *et seq.* Among other things, the Department is authorized to enforce and investigate violations of the WPCL. *See* 43 P.S. § 260.8. In addition, the Department is authorized “to enforce and administer the provisions of [the WPCL], to investigate any alleged violations of [the WPCL] and to institute prosecutions and actions as provided hereunder.” 43 P.S. § 260.8. Based upon the cited provisions

of the WPCL, the Department has established that investigating violations of the WPCL is part of its legislatively granted authority.

In support of withholding the responsive records, the Department provided the attestation of Mr. Smolock, who attests, in relevant part, as follows:

I am familiar with the records maintained by the BLLC, including to those pertaining to complaints filed under the WPCL [and] I am familiar with the subject matter of the present [R]equest.

BLLC receives and processes allegations of noncompliance with the WPCL. Individuals may submit allegations of noncompliance to BLLC by phone, mail, fax, or through its website. The purpose of the WPCL is to provide a statutory remedy when an employer breaches a contractual obligation to pay earned wages.

I conducted a thorough examination of the files in the possession, custody and control of the BLLC for records responsive to the [R]equest. The BLLC maintains records for file number 2016-01579. All records in the Department's possession, custody or control that Requester is now seeking constitute either complaints or other materials submitted by the parties, investigative materials or records that would reveal the institution, progress or result of an investigation.

None of the requested records that have been withheld pursuant to section 708(b)(17) reveal the imposition of a fine or civil penalty, the suspension, modification, or revocation of a license, permit, registration, certification, or similar authorization issued by an agency, or an executed settlement agreement.

Under the RTKL, an attestation 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).

While the Requester argues that she is entitled to access the records because she has not been afforded the opportunity to review the documents for authenticity, the reason for requesting a record is not relevant to determining a record's public status. *Advancement Project v. Pa. Dep't of Transp.*, 60 A.3d 891 (Pa. Commw. Ct. 2013).

Accordingly, based upon the evidence provided, the Department has met its burden of proving that the requested records are exempt from disclosure. *See* 65 P.S. § 67.708(a); *see Choi*

v. Pa. Dep't of Labor and Industry, OOR Dkt. AP 2018-1637, 2018 O.O.R.D. PA LEXIS 1276 (records of noncompliance with the PMWA and WPCL were properly withheld as relating to the BLLC's noncriminal investigation.); *see also Orlow v. Pa. Dep't of Health*, OOR Dkt. AP 2016-2095, 2017 PA O.O.R.D. LEXIS 219.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the Department 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 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 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: November 21, 2018

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Sandra Chabot (via email only);
Katherine Jones, Esq. (via email only);
Marian Bessler (via email only)

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