



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**ERICKA KIRKPATRICK,
Requester**

v.

**UPPER SAUCON TOWNSHIP,
Respondent**

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Docket No: AP 2019-2506

INTRODUCTION

Ericka Kirkpatrick (“Requester”) submitted a request (“Request”) to Upper Saucon Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information concerning incidents at a certain address. The Township denied the Request, arguing that the records related to noncriminal investigations. 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 Township is not required to take any further action.

FACTUAL BACKGROUND

On November 22, 2019, the Request was filed seeking:

1. Police report for incident on February 8th 2019 at [address omitted] and any body cam video. Issues surround ownership of horses located at the property with reference to Derbe Skip Eckhart horses.
2. Police report for incident at [address omitted] either on or around the 23rd -28th of July 2019. I believe the dates with the 23rd, Reference horses dispute with reference to Derbe Skip Eckhart horses.

On November 25, 2019, the Township denied the Request, stating that the records responsive to the Request relate to a noncriminal investigation, 65 P.S. §§ 67.708(b)(17)(i) and (ii).

On December 11, 2019, the Requester appealed to the OOR, challenging the Township's denial of access to the information and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 2, 2020, Township submitted a position statement contending the responsive incident reports relate to noncriminal investigations. *See* 65 P.S. §§ 67.708(b)(17). The Township also submitted a sworn affidavit from the Chief of Police, Thomas Nicoletti, in support of its position.

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 necessary information and evidence before it to properly adjudicate the matter.

The Township 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The responsive records relate to the Township's noncriminal investigations

The Township argues that four police incident reports¹ are exempt as records of a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure records related to a noncriminal investigation. 65 P.S. § 67.708(b)(17). 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 is only an official probe when conducted by agencies acting within their legislatively granted fact-finding or investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep't of Public Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

The Township submitted the affidavit of Chief Nicoletti, who attests that:

6. Upon receipt of the [R]equest, I conducted a thorough examination of the files in the possession, custody and control of the Agency for records responsive to the request underlying this appeal, specifically:

a. ...

iii) An Incident Report (US-19-00779) was located for a call received on February 9, 2019, at this location for a civil matter.

iv) Upon arrival at the location, an investigation was commenced by the Officer regarding the reported incident of potential horse theft and interviews were conducted with all the persons involved in the matter.

b. ...

i) Again, I searched the police call log for any calls received between July 23-28, 2019, for any type of incident... Three calls were received: July 25, 2019—Incident Report US-19-03867—for suspicious activity; July 28, 2019—Incident Report US-19-03903 for a disturbance/non-domestic; and

¹ Chief Nicoletti attests that the Request seeks police incident reports for a certain address on February 8, 2019; however, his search revealed that the incident report, US-19-00779, was for a call received on February 9, 2019 and is responsive to this Request. He further attests that the Request seeks incident reports for the same address between July 23-28, 2019 and that he located three incident reports, US-19-03867, US-19-03903 and US-19-03918.

a second call on July 28, 2019—Incident Report US-19-03918—for suspicious activity.

ii) As stated above, upon the Officer’s arrival at the location an investigation was commenced regarding the reported incident with all the individual’s present.

iii) Incident Report US-19-03867 contains investigative materials and notes consisting of the original complaint and a summary of the substance and results of the Officer’s investigation and relates solely to the investigation and conclusion by the Officer into the incident on July 25, 2019.

iv) Incident Report US-19-03903 contains investigative materials and notes consisting of the original complaint and a summary of the substance and relates solely to the investigation and determination by the Officer into the incident of July 28, 2019, at 10:21 AM.

v) Incident Report US-19-03918 contains investigative materials and notes consisting of the original complaint and a summary of the substance and relates solely to the investigation and determination by the Officer into the incident on July 28, 2019, at 10:59 PM.

...

8. The four (4) Incident Reports listed above are the only records created by or in the possession of the Upper Saucon Township Police Department concerning this appeal.

9. Pursuant to the job duties of an ... Officer, the Incident Reports listed above evidence ‘official probes’ and were completed by the individual Officers who responded to the calls and who conducted the investigations. These official probes are within the course and scope of the Officer’s duties which include, but are not limited to, investigating complaints, accidents and suspected crimes. Further, upon completion of the investigations, the Officer determines the appropriate course of action to be taken, if any.

10. As Chief of Police, I have reviewed all of the retrieved Incident Reports for specific content and accuracy and have determined none of the Incident Reports listed above contains any information concerning ‘the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization used by an agency or an executed settlement agreement.’

11...based upon my review of the records responsive to these requests, I concluded that all of the records responsive to the Request related to the Police Department’s non-criminal investigations conducted on the respective dates.

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 Township 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)).

Section 66905 of the Pennsylvania Second Class Township Code specifically conveys to police officers of Second Class Townships the authority granted to police officers under the laws of the Commonwealth. 53 P.S. § 66905. 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. As such, the Township is vested with the authority to investigate alleged breaches of the peace, and the Township has demonstrated that the records are exempt from disclosure under Section 708(b)(17) of the RTKL. *See Sherwood v. State College Police Dep’t*, OOR Dkt. AP 2019-1124, 2019 PA O.O.R.D. LEXIS 1059 (police incident report related to investigation of the death of an individual found exempt from disclosure under Section 708(b)(17) of the RTKL); *see also Narisi v. Buckingham Twp. Police Dep’t*, OOR Dkt. AP 2019-0489, 2019 PA O.O.R.D. LEXIS 564; *Miller v. Upper Providence Twp. Police Dep’t*, OOR Dkt. AP 2018-0497, 2018 PA O.O.R.D. LEXIS 571 (each holding investigative reports prepared as a result of a noncriminal investigation are exempt from disclosure). Accordingly, the Township may withhold the Reports pursuant to Section 708(b)(17) of the RTKL.

2. The body camera video does not exist in the Township's possession, custody or control

The Township states that Request sought body camera video for a February 8, 2019 incident; however, as stated above, the incident was discovered to have taken place on February 9, 2019. The Township states that it searched for the body cam video for February 9, 2019 and that it does not exist. Chief Nicoletti attests that “no body cam video is in the possession, custody or control of the Police Department.” Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *See Sherry, supra*. Based on the evidence provided, the Township has met its burden of proving that no body camera video exists in Township's possession, custody or control that is responsive to the Request.² *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Township 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 Lehigh 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>.

² The Township also stated that if the requested video existed, Act 22, removed audio and video recordings made by law enforcement agencies from access under the RTKL. *See* 42 Pa.C.S. § 67A01.

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

FINAL DETERMINATION ISSUED AND MAILED: January 14, 2020

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent via email to: Ericka Kirkpatrick;
 Roxann Steelman, Esq.;
 Chief Thomas Nicoletti