



pennsylvania
OFFICE OF OPEN RECORDS
FINAL DETERMINATION

IN THE MATTER OF

**JERRY GELEFF,
Requester**

v.

**EXETER TOWNSHIP,
Respondent**

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Docket No: AP 2022-2244

FACTUAL BACKGROUND

On August 23, 2022, Jerry Geleff (“Requester”) submitted a request (“Request”) to Exeter Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, stating: “please supply the report by the law firm mentioned in the 8/22/22 Supervisors meeting that concerned a harassment claim against David Hughes. I believe the firm was MacMain, Connell, Leinhauser. The amount paid was about \$16,000. Thank you.”

On September 13, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Township denied the Request, arguing that the responsive record is protected by the attorney-work product privilege, is related to a noncriminal investigation, 65 P.S. § 67.708(b)(17), and is protected under the constitutional right to privacy.

On September 23, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ 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 October 5, 2022, the Township submitted a position statement reiterating its grounds for denial and its request for an *in camera* review. The Township claims that the appeal is insufficient pursuant to 65 P.S. § 67.1101 because the use of the appeal form’s boilerplate language did not address the Township’s denial under the constitutional right to privacy, and the appeal form fails to apprise the Township of the reason why the requested record was not privileged or why the requested record did not fall under the asserted exemption. The Township also argues the requested record is entirely protected under the attorney work-product and attorney-client privileges. The Township further states the requested record is exempt under the noncriminal investigation exemption of the RTKL. 65 P.S. § 67.708(b)(17). Additionally, the Township maintains that the requested record must be withheld under Section 708(b)(7)(vi), to the extent it contains written criticisms of Township employees and under the individual right to privacy under Article I, Section I of the Pennsylvania Constitution. In support of its position, the Township submitted the attestations, attestation made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities, of Matthew J. Connell, Esquire (“Attorney Connell”), counsel for the Township regarding allegations that Township Supervisor David Hughes violated Title VII of the Civil Rights Act, and Stephanie Windish (“Windish”), the Township’s Agency

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

Open Records Officer (“AORO”). Also, in support of its position, the Township submitted the Supervisors Meeting Minutes of April 11, 2022 and August 22, 2022.

On September 28, 2022, the Requester filed a submission claiming the report should be released because the employees sought to be protected are whistleblowers who are protected under the Occupational Safety and Health Administration (“OSHA”) guidelines. The Requester contends the public has a right to view the report regardless of what it says, questions the Township’s application of the attorney-client privilege to withhold the report alleging the Township knew the report would be shared with public officials and then the general public, and the Requester claims no one’s privacy or security can be harmed by releasing the report.

LEGAL ANALYSIS

The Township is a local agency subject to the RTKL. 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. As an agency subject to the RTKL, the Township is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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 Township sought an *in camera* review of the withheld record; however, the OOR has the necessary evidence before it to properly adjudicate the matter. Therefore, the request for *in camera* review is denied.

1. The appeal is sufficient

The Township moves for the dismissal of the appeal arguing it is deficient because it failed to identify flaws in the Township's Response as required by 65 P.S. § 67.1101(a). When filing the appeal, the Requester used the OOR's Standard Appeal Form, which states that "[b]y submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of any Federal or State law or regulation; and the request was sufficiently specific." The Township argues deficient appeals must be dismissed pursuant to the aforementioned statute. The Township argues that the OOR's appeal form does not in any way address the Requester's basis for appeal, especially concerning the constitutional right to privacy. However, the OOR has held the use of its standard appeal form that indicates, in pertinent part, "I am appealing the Agency's denial" is sufficient to meet the requirements of Section 1101(a) of the RTKL. *See Spicka and Education Voters of PA v. Commonwealth Charter Academy Cyber Charter School and Target Media, Inc.*, OOR Dkt. AP 2021-2799, 2022 PA O.O.R.D. LEXIS 420. Moreover, on September 28, 2022, the Requester filed a submission indicating "the people have the right to view that report" and the Township knew "full well the results would be shared with first, public officials, then the general public...". Therefore, the appeal is sufficient, and the OOR will reach the merits of the case.

2. The entire report falls within the noncriminal investigation exemption of the RTKL

The Township argues that the record in question is entirely exempt under the noncriminal investigation exemption of the RTKL pursuant to 65 P.S. § 67.708(b)(17). 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) and (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. Welfare 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.

In support of its position, the Township submits the Windish attestation, indicating:

1. I am the Open Records Officer for Exeter Township (“Township”).
2. I received and am familiar with the ... [R]equest ... filed by [Requester].
3. Upon receiving the [R]equest, I searched and/or directed that a search be conducted for the requested record and located the sole record at issue: an investigation report prepared by Attorney Matthew Connell into allegations that Supervisor Hughes violated Title VII of the Civil Rights Act.
4. Based on my search and inquiry, no other responsive records exist in the possession, custody or control of the Township.
5. I have reviewed the exhibits to the position and affirm that they are true and correct copies to the best of my knowledge, information and belief.
6. I have read the position statement submitted by J. Chadwick Schnee, Esq. on behalf of the Township in this matter and hereby affirm the factual content therein.

The Township also provided the Attorney Connell attestation, indicating:

2. On April 11, 2022, the Board of Supervisors (“Board”) of Exeter Township (“Township”) voted to retain a law firm of which I was a partner for the purposes of conducting an investigation into allegations that Supervisor David Hughes

violated federal antidiscrimination laws, specifically Title VII of the Civil Rights Act (“Complaint”)....

4. In accordance with this engagement, I conducted an investigation into the allegations surrounding the Complaint, which involved, among other things, interviewing 15 current or former public officials and employees between April 21, 2022 and July 27, 2022.
5. Following my interviews, I created a 43-page report on July 27, 2022 (“Investigation Report”) that I sent to Township Solicitor J. Chadwick Schnee, Esq.
9. The ... [Investigation Report] identifies the nature of the allegations concerning Supervisor Hughes.

Under the RTKL, a 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 competent evidence that the Township acted in bad faith, “the averments in [the attestations] 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)).

The Township argues that the requested report is related to a noncriminal investigation conducted by the Township, through counsel, and that the authority to conduct this investigation is derived from the Second Class Township Code, Title VII of the Civil Rights Act and the Pennsylvania Human Relations Act. As outlined in its position statement, the Township is an employer subject to both the Pennsylvania Human Relations Act (“PHRA”) that prohibits discrimination, 43 P.S. § 955(a), and Title VII of the Civil Rights Act, namely 29 CFR § 1604.11(f), that requires employers to investigate allegations of harassment and “take all steps necessary to prevent sexual harassment from occurring” and imposes liability upon employers that “know[] or should have known of the conduct and fail[] to take immediate and appropriate

corrective action.” See 29 CFR §§ 1604.11(d)-(e); *Faraquah v. City of Boca Raton*, 524 4.S. 775 (1998); *Philadelphia Hous. Auth. v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 956 A.2d 477 (Pa. Commw. Ct. 2008). The Township explains in its submission that as a Second Class Township, it is required to enact or adopt laws and govern, perform duties, and exercise powers imposed by laws, rules and regulations of any agency of the Commonwealth. 53 P.S. §§ 65607(1), (7) and 66506. As such, it was acting within its authority as a Second Class Township and as required by the PHRA and the Civil Rights Act, by addressing the sexual harassment allegation made against Township Supervisor Hughes.

As guided by the Commonwealth Court’s decision in *Department of Health*, we must determine whether the responsive records qualify as a noncriminal investigation that is exempt from public disclosure by determining whether “the [Township] is making a systematic and searching inquiry, a detailed examination, or an official probe” into operations and compliance with controlling laws and regulations. *Dep’t of Health*, 4 A.3d 811. Pursuant to its authority as a Second Class Township and as required by the PHRC and the Civil Rights Act, the Township by unanimous vote at the April 11, 2022 Supervisors Meeting, agreed to retain, upon the Solicitor’s review of a written agreement, Attorney Connell’s law firm to investigate harassment allegations against a Township Supervisor. Exhibit A; Attorney Connell Attestation ¶ 2.

As discussed above, the Township identified the sole responsive record to the Request. Windish Attestation ¶¶ 3-4. Attorney Connell and the Law Firm of MacMain, Connell and Leinhauser conducted an investigation regarding the allegation of sexual harassment by Supervisor Hughes, to include interviewing current and former public officials and employees between April 2022 and July 2022. Attorney Connell Attestation ¶¶ 2, 4. Attorney Connell conducted an investigation, interviews, and created a 43-page report that contained five sections including a

“Process of Investigation” and “Interview Summaries” section. Attorney Connell Attestation ¶¶ 4, 5, 8, 10, 11, 14. Further, Attorney Connell opined “[i]t is my opinion that releasing the Investigation Report would have a chilling effect on any future allegations of misconduct in the Township, as employees and officials would likely be less willing to raise workplace concerns if their name and other information will be released to the public.” Attorney Connell Attestation ¶ 20.

The OOR must consider uncontradicted statements in the appeal materials when determining whether an exemption applies. *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016). Here, the Requester does not challenge the Township’s authority to conduct the investigation and does not argue that report is not the result of the Township’s investigation. Instead, the Requester alleges the Township had no reasonable expectation of privilege, is withholding the report to protect the individuals regarding the allegations against a member of an elected board and the people have a right to view the report, no matter the content so the public can apply pressure to purge the appropriate party or official. These arguments are not relevant to this exemption. Based on the Windish and Attorney Connell attestations, the Township established the record in question, the 43-page report completed by Attorney Connell into the allegation of sexual harassment against Township Supervisor Hughes, is the result of the noncriminal investigation. Windish Attestation ¶ 3; Attorney Connell Attestation ¶¶ 2, 5. Based upon the uncontested evidence of the Township that it was authorized to investigate the civil allegation, through counsel, and the resulting report completed by counsel was the result of that noncriminal investigation. Thus, the Township has established the entire report falls within the plain language

of the noncriminal investigation exemption of the RTKL.² 65 P.S. §§ 67.708(b)(17)(ii) and (vi)(A); *See Mark and The Citizens' Voice v. Luzerne County*, OOR Dkt. AP 2019-0376, 2019 PA O.O.R.D. LEXIS 415.³

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 Berks 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 22, 2022

/s/ Lois Lara

APPEALS OFFICER
LOIS LARA

Sent via email to: Jerry Geleff
J. Chadwick Schnee, Esq.
Stephanie Windish, AORO

² Because the Township has demonstrated that the report is an exempt noncriminal investigative record, the OOR need not reach the Township's alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

³ The RTKL is not a confidentiality statute meaning it allows but does not require an agency to withhold records. An agency generally has the discretion to release otherwise nonpublic records either in part or in their entirety. *See* 65 P.S. § 67.506(c). However, that decision is solely within the discretion of the agency and is not subject to the OOR's legal review.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).