



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**ANTHONY FELICIANO,
Requester**

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:

:

v.

: Docket No: AP 2019-0275

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**PHILADELPHIA DISTRICT
ATTORNEY’S OFFICE,
Respondent**

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INTRODUCTION

Anthony Feliciano (“Requester”), an inmate at SCI-Mahanoy, submitted a request (“Request”) to the Philadelphia District Attorney’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information related to a former Assistant District Attorney. The Office denied the Request, arguing that the Request seeks personnel records. 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** and **denied in part**, and the Office is required to take further action as directed.

FACTUAL BACKGROUND

On February 6, 2019, the Request was filed, seeking “[p]ersonnel and disciplinary files of Assistant District Attorney Andrew Notaristefano from 2014 to present.” On February 12, 2019, the Office denied the Request, arguing that the records are not public under the Pennsylvania Inspection of Employment Records Law (“IERL”), that the state constitutional right to privacy

attaches to the records, and that the records are exempt under Section 708(b)(7) of the RTKL. 43 P.S. §§ 1321-24; 65 P.S. §§ 67.708(b)(7)(vi), (viii).

On February 26, 2019, the Requester appealed to the OOR, arguing that he was still entitled to receive records of discipline. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).¹

On March 13, 2019, the Office submitted a position statement, arguing that the records at issue are contained within a personnel file as defined by the IERL, that access to personnel files is barred by the IERL, that the state constitutional right to privacy applies, that certain records could be redacted under Section 708(b)(6) of the RTKL, and that certain records comprise written criticisms of an employee which are exempt from disclosure under Section 708(b)(7) of the RTKL. In support of these arguments, the Office submitted the verification of Douglas Weck, Esq., the Office's Agency Open Records Officer, who attested that he had reviewed the personnel file, identified thirty-two pages of responsive records, and generated a privilege log. Attorney Weck also attested that Attorney Notaristefano had resigned from the Office on January 12, 2018, and that his personnel record contained no records of discipline. Finally, the Office submitted a privilege log, identifying the responsive records.

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,

¹ On March 13, 2019, the Office confirmed that it had provided a copy of the appeal filing to Attorney Notaristefano. To date, the OOR has not received any correspondence from Attorney Notaristefano.

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, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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. The IERL does not limit access to public records under the RTKL

The Office argues that the IERL protects personnel files generally and that such files are, therefore, exempt under the RTKL. *See* 65 P.S. § 67.102 (exempting from disclosure any record “exempt from being disclosed under any other Federal or State law”); 65 P.S. § 67.3101.1 (“[i]f the provisions of [the RTKL] regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply”). Section 1322 of the IERL provides that:

An employer shall, at reasonable times, upon request of an employee, permit that employee or an agent designated by the employee to inspect his or her own personnel files used to determine his or her own qualifications for employment, promotion, additional compensation, termination or disciplinary action.

43 P.S. § 1322. The OOR has held that the IERL does not prohibit access to otherwise public records under the RTKL. *See, e.g., Segelbaum v. York County*, OOR Dkt. AP 2016-1898, 2016 PA O.O.R.D. LEXIS 1693; *Johnston v. Northampton County*, OOR Dkt. AP 2012-1706, 2012 PA O.O.R.D. LEXIS 1421. The IERL provides for employees and their designated agents to access personnel files, but the language of the statute does not restrict access to personnel files made public by other statutes; as such, it does not conflict with the provisions of the RTKL.²

² It is also worth noting that Section 708(b)(7)(viii) restricts access to specific records contained in a personnel file; a subsection which would be rendered superfluous if another law already prohibited access to all records therein.

The Office cites two cases to support the argument that the IERL limits access. The first, *Bangor Area Educ. Ass'n v. Angle*, is a Commonwealth Court decision premised upon the wording of the RTKL's precursor statute, which the OOR has held is not applicable to the RTKL. 720 A.2d 198, 202 (Pa. Commw. Ct. 1998) (explaining that personnel files did not fit the definition of "public record" under the old law); *Johnston v. Northampton County*, OOR Dkt. AP 2012-1706, 2012 PA O.O.R.D. LEXIS 1421 ("[Bangor's] precedential value is limited because it was decided under the old RTKL, which [was] more restrictive in its definition of 'public record'...") The second case is *Thomas Jefferson Univ. Hosps., Inc. v. Pa. Dep't of Labor & Indus.*, a decision of the Pennsylvania Supreme Court which held that "former employees, who were not laid off with re-employment rights and who are not on a leave of absence, have no right to access their personnel files pursuant to the Act, regardless of how quickly following termination they request to do so." 162 A.3d 384, 394 (Pa. 2017) (emphasis added). This holding limits the type of parties who are eligible to access their own personnel records through the IERL but does not contain any limitation on records which may be accessed via the RTKL. Therefore, the IERL does not limit disclosure under the RTKL.

2. Certain records are exempt under Section 708(b)(7)

On appeal, the Office argues that the records identified as Bates No. 1-14 are exempt under Section 708(b)(7) of the RTKL. Section 708(b)(7) exempts from disclosure certain "records relating to an agency employee," including "[a] performance rating or review," "[w]ritten criticisms of an employee," "[g]rievance material," and "[i]nformation regarding discipline, demotion or discharge contained in a personnel file [... with the exception of] the final action of an agency that results in demotion or discharge." 65 P.S. §§ 67.708(b)(7)(vi)-(viii).

In support of its argument, the Office submitted the verification of Douglas Weck, Esq., the Office's Agency Open Records Officer, who attests that Items 1-14 consist of performance reviews and Attorney Notaristefano's letter of resignation. *See Jackson v. Butler Twp.*, OOR Dkt. AP 2018-1810, 2018 PA O.O.R.D. LEXIS 1456 (holding that a resignation letter is exempt under Section 708(b)(7)(viii)).

Under the RTKL, an affidavit made under 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 Office 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)). Based on the evidence provided, the Office has demonstrated that Items 1-14 in the provided privilege log are exempt under Section 708(b)(7).

3. Certain information is subject to redaction under Section 708(b)(6)

The Office argues that it should be permitted to redact the remaining records under Section 708(b)(6) of the RTKL. Section 708(b)(6) exempts personal information, including "[a] record containing all or part of a person's Social Security number ... home, cellular or personal telephone numbers; personal email addresses... employee number or other confidential personal identification number." 65 P.S. § 67.708(b)(6)(i)(A).

On appeal, the Office submitted a privilege log listing each responsive record contained within Attorney Notaristefano's personnel file and identifying personal information which should be redacted under Section 708(b)(6) of the RTKL. In support of the privilege log, the Office submitted the verification of Attorney Weck, who attests that he reviewed the file and accurately

described each record. Attorney Weck attests that the records contain payroll numbers, social security numbers and home phone numbers, all of which the OOR has found are exempt under Section 708(b)(6). *See Mellon v. City of Philadelphia*, OOR Dkt. AP 2015-1909, 2015 PA O.O.R.D. LEXIS 2102. (finding that payroll numbers constitute an “other confidential personal identification number” under Section 708(b)(6)). Therefore, the Office may redact this information from the responsive records.

4. Certain information is subject to redaction under the constitutional right to privacy

The Office next argues that the remaining records are exempt from disclosure because Attorney Notaristefano has a right to privacy in his personnel records under Pennsylvania’s Constitution. In *Pa. State Educ. Ass’n v. Commonwealth*, the Pennsylvania Supreme Court held that an individual possesses a right to privacy in certain types of personal information, including his or her home address. 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual’s interest in information privacy with the public’s interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id*; *see also Pa. State Univ. v. State Employees’ Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass’n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc.*, 713 A.2d 627,

630 (Pa. 1998) (plurality) (finding names, addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test). The Commonwealth Court has previously held that public employees have a right to privacy in their personnel files, but “[t]his right, however, is not absolute and must be balanced against competing restrictions...” *Bangor Area Educ. Ass’n*, 720 A.2d at 201.

The Office provided the OOR with a privilege log describing the withheld responsive records. The records the Office has not demonstrated fall within Section 708(b)(7) are:

1. The final report memorializing the employee’s final resignation date
2. The audit of accumulated leave at date of termination
3. Leave balance sheets for 2014-2018
4. Attendance Records for 2014-2018
5. The record of total years of service
6. The payroll master record

In *Pa. State Univ. v. State Emples. Ret. Bd.*, the Pennsylvania Supreme Court determined that the public interest in disbursement of government funds outweighed an employee’s negligible privacy interests in protecting records of his salary. 935 A.2d 530, 539-40 (Pa. 2007). The OOR has applied this rationale to records of attendance and leave usage, because such records document usage of public assets but reveal little about an individual employee’s private affairs. *See Campbell v. Boyertown Area Sch. Dist.*, OOR Dkt. AP 2016-1838, 2016 PA O.O.R.D. LEXIS 1730. Finally, the significant public interest in observing the final action of an agency which memorializes the discharge of an employee has been recognized by the legislature in Section 708(b)(7)(viii) of the RTKL, which makes such records public. *See PSEA*, 148 A.3d at 156, n.8 (“[T]hese provisions demonstrate that with respect to certain individuals, the legislature has, in essence, already performed a balancing test”). Therefore, although the Requester does not identify any specific public interest in these records, the records are traditionally public records in which there is little expectation of privacy and should be provided. *See also Butler Area Sch. Dist. v. PFUR*, 172 A.3d

1173, 1185 (Pa. Commw. Ct. 2017) (noting that information in which an employee has no expectation of privacy may not even require a balancing test).

However, the Office notes that the final report and payroll master record contain both Attorney Notaristefano's home address and date of birth. The courts have held that individuals have a strong interest in the privacy of their home addresses, and the OOR has previously concluded that a similar privacy interest exists with respect to dates of birth. *PSEA*, 148 A.3d at 156-57; *McKelvey v. Pa. Dep't of Health et al.*, OOR Dkt. AP 2017-1443, 2018 PA O.O.R.D. LEXIS 72; *see also Governor's Office of Admin. v. Purcell*, 35 A.3d 811, 812 (Pa. Commw. Ct. 2011) (finding that the disclosure of the month and date of birth violates the "personal security" exception under the RTKL). As noted, the Requester has articulated no specific public benefit for this information, and the general public interests identified above are not served by release of this information. Therefore, any public interest in disclosure does not outweigh Attorney Notaristefano's privacy interests and this information may be redacted pursuant to the constitutional right to privacy.³

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Office is required to provide the Requester with copies of Bates No. 15-32, subject to the identified redactions under Section 708(b)(6) of the RTKL and the constitutional right to privacy, 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 Philadelphia County Court

³ The Office further argues that it must be allowed to charge copying fees in accordance with the OOR's fee schedule. The facts of the case establish that the Office will be required to create and mail copies of the responsive records to the Requester. The RTKL favors a contemporaneous exchange of fees for records, but in no event is an agency required to send the records without receiving the fees at issue. *See Frame v. Menallen Twp.*, OOR Dkt. AP 2009-1072, 2010 PA O.O.R.D. LEXIS 155. Section 901 of the RTKL provides that "[a]ll applicable fees shall be paid in order to receive access to the records requested." 65 P.S. § 67.901.

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. 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: April 1, 2019

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Anthony Feliciano, KE-5739 (via US mail);
Douglas Weck, Esq. (via email only);

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