



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SHANICQUA APONTE,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2019-2055
	:	
POTTSTOWN SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Shanicqua Aponte (“Requester”) submitted a request (“Request”) to the Pottstown School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to specific investigations. The District 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 District is not required to take any further action.

FACTUAL BACKGROUND

On September 25, 2019, the Request was filed, seeking “copies of all investigative complaints, findings and reports, into allegations of discrimination and retaliation by [the Requester] against McCoy Rodriguez Miller dating from 2015 to October 2019.” On October 29, 2019, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the District

denied the Request, arguing that the requested records relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17). The District further asserts that the Request cannot seek records after the date of the Request.

On October 30, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 12, 2019, the District submitted a position statement, reiterating its argument that the responsive records relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17). The District also states that the responsive records include the name of a minor student, 65 P.S. § 67.708(b)(30), and constitute student educational records protected from disclosure under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g. In support of its position, the District submitted the sworn affidavits of Maureen Jampo (“Ms. Jampo”), the District’s Business Administrator and Open Records Officer, and Dr. Deena Cellini (“Dr. Cellini”), the District’s Director of Human Resources and Compliance Officer. The District also provided a copy of Policy 103, Nondiscrimination in School and Classroom Practices (the

¹ In the appeal, the Requester granted the OOR an additional thirty days to issue a final determination. See 65 P.S. § 67.1101(b)(1). Also, the Requester does not appeal the District’s argument that the Request can only seek records up to the date of the Request. As a result, the Requester has waived any objections regarding the sufficiency of the District’s response regarding this portion of the Request. See *Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011). Regardless, the OOR has repeatedly held that because an agency cannot release records that do not exist at the time a RTKL request is submitted, a request is necessarily limited to records possessed by the agency prior to the submission of the RTKL request. See *Nolen v. Phila. Police Dep’t*, OOR Dkt. AP 2016-1174, 2016 PA O.O.R.D. LEXIS 1130; *Rittmeyer and the Tribune-Review v. Springdale Borough*, OOR Dkt. AP 2016-0426, 2016 PA O.O.R.D. LEXIS 516; *Terensky v. City of Monessen*, OOR Dkt. AP 2013-0772, 2013 PA O.O.R.D. LEXIS 349.

“Policy”). On the same day, the Requester made a submission, asserting that pursuant to the Policy, she is entitled to the requested records because she is the complainant.

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 District 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)).

In the instant matter, the District argues that the requested records are exempt in their entirety because they relate to a noncriminal investigation. Section 708(b)(17) of the RTKL 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 and reports” or a record that, if disclosed, would “[r]eveal the institution, progress or result of an agency investigation....” 65 P.S. §§ 67.708(b)(17)(i)-(ii); 65 P.S. § 67.708(b)(17)(vi)(A). 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 official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep't of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). The OOR has noted that "[n]ot all agency fact-finding constitutes a 'noncriminal investigation' subject to the protections of the RTKL." *Hopey v. Pa. Dep't of Corr.*, OOR Dkt. AP 2014-1739, 2014 PA O.O.R.D. LEXIS 1318; *see also Katz v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2014-1572, 2014 PA O.O.R.D. LEXIS 1338.

In support of its position that the District conducted a noncriminal investigation pursuant to its legislatively granted fact-finding and investigative powers, the District relies on the Pennsylvania Public School Code of 1949 ("Code"), which provides that school districts are authorized to "adopt and enforce reasonable rules and regulations as it may deem necessary, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers and other appointees or employes during the time they are engaged in their duties to the [D]istrict." 24 P.S. § 5-510. The Code further provides that schools "are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of this act." 24 P.S. § 2-211. The District also cites to the Policy, which outlines the procedure for reporting and investigating complaints.

The District states that it investigated complaints the District received about District employees. The District asserts that it conducted an investigation into these complaints, which included interviewing witnesses, reviewing records and communicating among various District personnel. The District subsequently prepared a report "detailing the substance of the complaint,

the steps taken to investigate the complaint, the evidence collected, and the recommended response.”²

In support of the District’s position, Dr. Cellini affirms, in part, as follows:

4. As the District’s Compliance Officer, I oversee investigations into complaints made by District students and third parties under the Policy.
5. I supervised the investigations into the complaints (each, a “Complaint”) against three District employees, “McCoy[,] Rodriguez[, and] Miller,” referenced in the appeal filed by Requester....
6. Upon receipt of each Complaint, and in accordance with the Policy, the District commenced an official investigation.
7. During the course of each investigation, multiple witnesses were interviewed and relevant documents were reviewed.
8. District staff and administrators exchanged emails regarding the Complaints and the investigations conducted in response.
9. Following a detailed review of the evidence collected for each Complaint, I prepared a report detailing the substance of the Complaint, the steps taken to investigate the Complaint, the evidence collected, and recommended response.
10. I provided copies of the reports of each Complaint to the complainant, pursuant to the Policy.
11. The documents generated in response to the Complaints are notes, correspondence, and reports of investigations, which include the names of at least one minor student and a grade report for a student.

Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support 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). Further, the Request, on its face, seeks complaints and reports that were created as a result of the Requester’s complaints, which generated a noncriminal investigation. *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider

² The reports were provided to the Requester.

uncontradicted statements in the appeal materials when determining whether an exemption applies).

The Requester, in turn, argues that because she is the complainant, she is entitled to the responsive records. However, the RTKL must be construed without regard to the identity of the requester. *See Slaby v. Northumberland County*, OOR Dkt. AP 2011-0331, 2011 PA O.O.R.D. LEXIS 257. 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). As the Commonwealth Court noted in *Schneller v. Phila. District Attorney's Office*, "[a] requester's identity as the subject of the record, or other relationship to the record offers no greater access because such considerations are irrelevant in the statutory scheme." 174 A.3d 1204 (Pa. Commw. Ct. 2017). Therefore, the Requester's identity is not relevant to the issue of whether the requested records are subject to public disclosure under the RTKL.

Based on the evidence presented, the District has established that it conducts noncriminal investigations as part of its legislatively granted authority and that investigations related to complaints submitted regarding three District employees were conducted pursuant to its authority. *See Mazzatesta v. Cent. Dauphin Sch. Dist.*, OOR Dkt. AP 2018-0813, 2018 PA O.O.R.D. LEXIS 773 (holding that an investigation related to the complaint lodged by the requester was conducted pursuant to the school district's authority under the Code); *Aliota v. Millcreek Twp. Sch. Dist.*, OOR Dkt. AP 2018-0168, 2018 PA O.O.R.D. LEXIS 349 (finding that pursuant to the Code, the school district had the authority to investigate retaliation allegations against the district superintendent involving a request that sought facially investigative materials). The District has further demonstrated that the responsive records include the complaints submitted, as well as witness interviews and email communications relating to the complaints and subsequent

investigations. Therefore, the District has met its burden of proving that the records responsive to the Request relate to a noncriminal investigation.³ See 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the District 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 Montgomery 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: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 30, 2019

/s/ Magdalene C. Zeppos

MAGDALENE C. ZEPPOS, ESQ.
APPEALS OFFICER

Sent to: Shaniqua Aponte (via email only);
Jennifer Hanlin, Esq. (via email only); and
Maureen Jampo, AORO (via email only)

³ Because the responsive records are exempt from disclosure under Section 708(b)(17) of the RTKL, the OOR need not reach the District'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.

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