

**CITY OF PHILADELPHIA LAW DEPARTMENT
MARCEL S. PRATT, CITY SOLICITOR**

By: Jill Freeman, Deputy City Solicitor
Attorney I.D. No. 85642
1515 Arch Street, 17th Floor
Philadelphia, PA 19102-1595
PHONE: (215) 683-5457
FAX: (215) 683-5069

CITY OF PHILADELPHIA	:	
	:	COURT OF COMMON PLEAS
Appellant	:	PHILADELPHIA COUNTY
	:	
v.	:	
	:	
PUBLIC INTEREST LEGAL FOUNDATION	:	
	:	
Appellee	:	May Term, 2018
	:	No.

NOTICE OF APPEAL

Appellant City of Philadelphia hereby appeals from the decision of the Office of Open Records dated on April 6, 2018. A copy of the decision is attached as “Exhibit A.”

/s/
Jill I. Freeman, Esq.
Open Records Officer & Deputy City Solicitor
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
(215) 683-5457 (phone)

Dated: May 2, 2018

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
SPECIAL DOCKET PROGRAM**

**Appeal of the City of Philadelphia
from a Decision of the Office of Open Records**

NOTICE OF APPEAL

The City of Philadelphia hereby appeals from a decision of the Office of Open Records, dated April 6, 2018, a copy of which is attached hereto. The following persons entered an appearance in the proceedings below:

Dated: May 2, 2018

/s/

Jill I. Freeman, Esq.
Open Records Officer & Deputy City Solicitor
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
(215) 683-5457 (phone)
(215) 683-5069 (fax)

Logan Churchwell
Noel Johnson, Esq.
Public Interest Legal Foundation
32 E. Washington Street, Ste 1675
Indianapolis, IN 46204
njohnson@publicinterestlegal.org
lchurchwell@publicinterestlegal.org

Jill Wolfe, Esq.
Appeals Officer
Office of Open Records
Commonwealth Keystone Building
333 Market St., 16th Floor
Harrisburg, PA 17101-2234
jwolfe@pa.gov

Exhibit A



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PUBLIC INTEREST LEGAL	:	
FOUNDATION,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2018-0256
	:	
CITY OF PHILADELPHIA, OFFICE OF	:	
CITY COMMISSIONERS,	:	
Respondent	:	

INTRODUCTION

Logan Churchwell, on behalf of the Public Interest Legal Foundation (“Requester”), submitted a request (“Request”) to the City of Philadelphia, Office of City Commissioners (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of voter irregularities. The City partially denied the Request because, among other reasons, they reflect the internal, predecisional deliberations of the City and relate to its noncriminal investigations. 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 City is required to take further action as directed.

FACTUAL BACKGROUND

On December 4, 2017, the Request was filed seeking:

1. *Any and all emails or other written correspondence from August 1, 2017 to present (including file attachments/enclosures) sent to the Commission*

regarding a publicly disclosed ‘review’ of voters flagged for citizenship defects carried out between the Pennsylvania Department of State and PennDot and any other records/communications related to non-U.S. citizens being discovered or reported on voter rolls;

2. Any and all emails or other written correspondence from August 1, 2017 to present (including file attachments/enclosures) sent from the Commission regarding a publicly disclosed ‘review’ of voters flagged for citizenship defects carried out between the Pennsylvania Department of State and PennDot and any other records/communications related to non-U.S. citizens being discovered or reported on voter rolls;

3. Any and all emails or other written correspondence from August 1, 2017 to present (including file attachments/enclosures) sent between the Commission regarding a publicly disclosed ‘review’ of voters flagged for citizenship defects carried out between the Pennsylvania Department of State and PennDot and any other records/communications related to non-U.S. citizens being discovered or reported on voter rolls.¹

On December 11, 2017, the City invoked a thirty day extension during which to respond. *See* 65 P.S. § 67.902(b). On January 4, 2018, the Requester agreed to allow the City an additional two weeks to respond to the Request and on, January 22, 2018, the Requester agreed to allow the City an additional day to respond to the Request. *See* 65 P.S. § 67.902(b)(2). On January 23, 2018, the City partially denied the Request, claiming that it redacted and withheld records related to its criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17), reflecting internal, predecisional deliberations of the City, 65 P.S. § 67.708(b)(10), personal notes of a City Commissioner, 65 P.S. § 67.708(b)(12), as well as protecting personal identifying information, 65 P.S. § 67.708(b)(6).

On February 12, 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

¹ In responding to the Request, the City separated portions of the Request into Items 1(a), 1(b), 2(a), 2(b), 3(a), 3(b). The OOR italicized portions of the Request above to reflect the City’s identification of Items 1(a), 2(a) and 3(a), the remainder are Items 1(b), 2(b) and 3(b) of the Request.

the City to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On March 2, 2018, the City submitted a position statement reiterating its grounds for denial, as well as arguing that the withheld records are protected as draft documents, 65 P.S. § 67.708(b)(9).² In support of its position, the City submitted the affidavits, made under the penalty of perjury, from Seth Bluestein, Chief Deputy Commissioner and Chief Integrity Officer for the Office of City Commissioners, and Lisa Deeley, City Commissioner and Chairwoman for the Office of City Commissioners. Also on March 2, 2018, the Requester submitted a position statement arguing that the City has not met its burden of proof to withhold the responsive records. On March 8, 2018, the OOR directed the City to submit a privilege log identifying the withheld records. On March 16, 2018, the City submitted its privilege log identifying e-mails and attachments withheld pursuant to the asserted exemptions.

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

² The City is permitted to raise this additional reason for denying access to records on appeal to the OOR. *See Levy v. Senate of Pa.*, 65A.3d 361 (Pa. 2013).

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; and the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The City 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)). “The 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. Sufficient appeal under Section 1101 of the RTKL

As an initial matter, the City argues that the appeal should be dismissed because the Requester failed to address the City’s grounds for denial. Section 1101(a)(1) of the RTKL requires that the “appeal shall state the grounds upon which the requester asserts that the record is a public record ... and shall address the grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1). In *Pa. Dep’t of Corr. v. Office of Open Records*, the Commonwealth Court held that it is “statutorily required that the requester specify in [an] appeal to the [OOR] the particular defects in an agency’s stated reasons for denying a RTKL request.” 18 A.3d 429 (Pa. Commw. Ct. 2011).

In the present case, the Requester’s appeal lists each of the City’s reasons for denying access to, or redacting, records and states that the City has failed to meet its burden of proof to do so. In fact, the Requester cites to Section 102 of RTKL and states that the records are subject to disclosure. (Section 102 defines “public record”), as well as stating that the City has not met the burden of proof as required in Section 708(a)(1) of the RTKL. This language is sufficient to meet the requirements of Section 1101(a)(1), *see, e.g., Barnett v. Pa. Dep’t of Pub. Welf.*, 71 A.3d 399 (Pa. Commw. Ct. 2013) (holding that a “[r]equester’s statement in his OOR Appeal that the records are public records that ‘do not qualify for any exemptions under [S]ection 708, are not protected by privilege, and are not exempted under and Federal or State law or regulation,’ is sufficient under these circumstances.”). Based on the foregoing, the Requester’s appeal has sufficiently addressed the City’s grounds for denial.

2. The Requester does not challenge the City's denial of personal identifying information

During the course of the appeal, the Requester submitted correspondence to the OOR indicating that he was no longer challenging the City's redaction of personal identifying information from the responsive records. Therefore, the Requester narrowed his appeal, withdrawing any challenge to redacting personal identifying information. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

3. The City does not have possession, custody or control of records responsive to Items 1(a), 2(a) and 3(a) of the Request

The City states that no records responsive to Items 1(a), 2(a) or 3(a) of the Request³ exist in its possession, custody or control. Mr. Bluestein explains that he conducted or asked others to conduct a search for records responsive to the Request. He confirms that because all meetings and communications between the City, in particular the Commissioner, were conducted via telephone or in-person in Harrisburg, no e-mails or other written correspondence from August 1, 2017 regarding a publicly disclosed review of voters flagged for citizenship defects exists.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *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 City acted in bad faith or that the records exist, "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 City has met its burden of proving

³ Items 1(a), 2(a) and 3(a) are the portions of the Request italicized in the Factual Background section.

that no records responsive to Items 1(a), 2(a) and 3(a) of the Request exist in the City's possession, custody or control. *See Hodges*, 29 A.3d at 1192.

4. The City has not established that the withheld records are draft documents

The City denied access to certain e-mails and drafts of testimony and statements pursuant to Section 708(b)(9) of the RTKL.⁴ Section 708(b)(9) exempts from disclosure “[t]he draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.” 65 P.S. § 67.708(b)(9). Mr. Bluestein attests that “emails which had earlier drafts of Commissioner Schmidt’s final testimony before the Pennsylvania House State Government Committee were withheld as records were not final versions of his testimony. Earlier drafts of Commissioner Schmidt’s testimony are records created for his personal use in reviewing and revising his testimony to arrive at the final draft of his testimony.” Here, the City has not provided any factual basis for its assertion that e-mails are drafts “of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.” Rather, the records are drafts of testimony which are not exempt from disclosure. Therefore, the City has not met its burden of proving that e-mails are exempt pursuant to Section 708(b)(9) of the RTKL.

5. The City failed to establish that the records reflect the internal, predecisional deliberations of the City

The City claims that certain records reflect the City’s internal, predecisional deliberations. Section 708(b)(10)(i)(A) exempts from public disclosure a record that reflects:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, ... or course of

⁴ The privilege log indicates that e-mails withheld pursuant to Section 708(b)(9) have also been withheld under other Sections of the RTKL, such as Sections 708(b)(10), 708(b)(12) or 708(b)(17).

action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). In order for this exemption to apply, three elements must be satisfied: 1) “The records must ... be ‘internal’ to a governmental agency,” *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 379 (Pa. Commw. Ct. 2013); 2) the deliberations reflected must be predecisional, i.e., before a decision on an action; and 3) the contents must be deliberative in character, i.e., pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

To establish that records are deliberative, an agency must show that the information relates to the deliberation of a particular decision. *McGowan*, 103 A.3d at 378-88. The term “deliberation” is generally defined as “[t]he act of carefully considering issues and options before making a decision or taking some action...” BLACK’S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep’t of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, *aff’d* No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014).

The privilege log demonstrates that certain responsive records withheld under Section 708(b)(10)(i)(A) involve documents exchanged among City employees or officials. As a result, the City has established that these records are internal to the City. The City must also establish that the withheld records are predecisional and deliberative in nature. In order for a record to be deliberative in character, it must make recommendations or express opinions on legal or policy matters and not be purely factual in nature. Furthermore, an agency must “submit evidence of specific facts showing how the information relates to a deliberation of a particular decision.” *Carey*, 61 A.3d at 397. In *McGowan*, the Pennsylvania Department of Environmental Protection (“Department”) submitted affidavits detailing the withheld information related to the Department’s

internal deliberations, including draft documents to contemplate a future course of agency action.
103 A.3d 374.

In the instant matter, Mr. Bluestein attests that it is Commissioner Schmidt's practice to email the most recent draft of his testimony to members of his office to print and/or assist with the editing process. In the *Office of the Governor v. Scolforo*, the Governor's Office redacted certain information from the Governor's calendar, arguing that the information reflected an agency's internal, predecisional deliberations. The Court found the affidavit to be conclusory, stating:

It is not enough to include in the [a]ffidavit a list of subjects to which internal deliberations have related. The [a]ffidavit must be specific enough to permit the OOR or this Court to ascertain how disclosure of entries would reflect the internal deliberations on those subjects. Because the [a]ffidavit is not detailed but rather conclusory, it is not sufficient....

65 A.3d 1095, 1104 (Pa. Commw. Ct. 2013). The evidence submitted in support of withholding the above records is akin to the affidavits in *Scolforo* because they merely list the subjects involved in the deliberations and do not detail the manner in which the withheld e-mails relate to the City's future course of action.⁵

6. The City has established that certain records are personal notes and working papers

The City denied access to the same records are exempt pursuant to Section 708(b)(12) of the RTKL. Section 708(b)(12) provides:

Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

65 P.S. § 67.708(b)(12). This exemption protects "notes and working papers created by a ... public official or employee regarding agency-related business, but not for an official function." *Escalera*

⁵ The privilege log indicates that e-mails withheld pursuant to Section 708(b)(10) have also been withheld under another exemption raised by the City, such as Sections 708(b)(12) or 708(b)(17) of the RTKL.

v. Adams County, OOR Dkt. AP 2011-0184, 2011 PA O.O.R.D. LEXIS 176. The records must be for the specific employee's own personal use and not distributed outside of his or her office, *Glunk v. Pa. Dep't of State*, 102 A.2d 605 (Pa. Commw. Ct. 2014), and must be used to carry out the employee's official duties. *Pa. Dep't of Labor & Indus. v. Tabor*, 2016 Pa. Commw. Unpub. LEXIS 251 (Pa. Commw. Ct. 2016).

In *City of Philadelphia v. Philadelphia Inquirer*, the Commonwealth Court expanded the exemption, finding that the term "personal," as used in Section 708(b)(12), does not mean that a record has to involve a public official's personal affairs; rather, the Court found that "personal" covers those documents necessary for that official to carry out his personal public responsibilities. 52 A.3d 456, 461 (Pa. Commw. Ct. 2012). The Court stated:

The purpose of the calendars as set forth by the affidavits personal to the Mayor and City Council Members are used for scheduling their daily activities and fall within the 'notes and working papers' exception. Under this provision, a public official is not the only person required to prepare or see the calendar because the exception specifically includes within the definition of working papers 'papers prepared by or for the public official.' 'Personal' within this definition does not mean that it has to involve a public official's personal affairs — a message slip that his wife called — because those types of documents are not covered by the RTKL, *Easton Area School District v. Baxter*, 35 A.3d 1259 (Pa. Cmwlth. 2012); it covers those documents necessary for that official that are 'personal' to that official in carrying out *his public responsibilities*. This is illustrated by defining 'routing slips' as 'working papers,' even those routing slips transmitting documents that may have an official purpose. Much like a calendar, a routing slip may have the subject of the documents transmitted and who is going to receive them, which is similar to a calendar notation of the subject of a meeting and who is going to attend. Moreover, by definition, the routing slip is "personal" to the official even though it is routing public documents. Also akin to a calendar, a telephone message may indicate with whom a person had a 'phone meeting' — a constituent or the Governor or an *Inquirer* reporter — yet, by definition, are not considered personal to the official even though in answering those phone calls, the official is carrying out his public office. Just like a telephone message slip and a routing slip, calendars serve a similar purpose and are "other materials" that fall within the notes and working papers exclusion.

Id. (emphasis added).

Here, Mr. Bluestein states that the e-mails and earlier drafts of Commissioner Schmidt's final testimony were created for his personal use in reviewing and revising his testimony and do not have an official purpose. He attests:

When Commissioner Schmidt drafted his October 25, 2017 testimony he went through an extensive process in which he continually edited his prepared remarks and it was his practice to email the most recent draft of his testimony to members of his office to print, and/or assist with the editing process. The editing and printing of earlier drafts of Commissioner Schmidt's testimony was personal in carrying out his public office.

He further explains:

For example, as Chief Deputy Commissioner for Commissioner Schmidt, I work closely with Commissioner Schmidt and contributed to the editing of his testimony. Michelle Montalvo is Commissioner Schmidt's communications coordinator and accordingly, she would have been heavily involved in editing earlier drafts of Commissioner Schmidt's testimony.

Commissioner Deeley attests that, "[i]n October 2017[,] I was invited by the Pennsylvania State House Government Committee to either testify or provide a written statement to the Pennsylvania House State Government Committee's investigation into voting by non-US citizens." She contests that she was unable to testify in-person and opted to provide a written statement to the Committee. She explains,

Because I was not involved in Commissioner Schmidt's investigation and was not familiar with the issue, I reached out to others for research material to read before drafting my statement.

Any material I received had no official purpose other than as material prepared and sent to me for the sole purpose of my personal use in drafting the statement I provided to the Pennsylvania State House Government Committee.

In this matter, the City submitted a privilege log identifying the withheld e-mails and drafts of testimony detailing what is contained within each record. Based upon the evidence submitted by the City and reviewing the privilege log, the City has proven that the attached drafts of testimony and statements were prepared for or by the Commissioner for that

Commissioner's own use to carry out his or her personal public responsibilities, and were not distributed outside the City Commissioners' office. Therefore, these records are exempt under Section 708(b)(12) of the RTKL. *See Kerr v. North Huntingdon Twp.*, OOR Dkt. AP 2014-1080, 2014 PA O.O.R.D. LEXIS 1031.

However, the City has not demonstrated how certain withheld records are exempt under Section 708(b)(12) because the records are not documents "necessary for that official that are 'personal' to that official in carrying out his public responsibilities." *Philadelphia Inquirer*, 52 A.3d at 461. Additionally, some records either came from someone outside the office or were shared with someone outside the office. *Glunk*, 102 A.2d 605. Although the City argues that the e-mails identified in the privilege log are akin to message slips of Commissioners Schmidt or Deeley, it has not provided sufficient evidence to indicate that these e-mails do not contain information beyond merely forwarding the attachments. As such, the City has failed to meet its burden of proving that the following e-mails (not the attached documents) are message slips under Section 708(b)(12):

Aug. 1 E-mail

Dec. 4 E-mail

Oct. 16, 2, 23, 23a, 23c, 24, 24b, 24c, 25, 31, 5a, 5b, 5d E-mails

Sept. 8, 10, 11, 12, 19, 19a, 19b, 19c, 19d, 19e, 19f, 19g, 19h, 19i, 19j, 19k, 19l, 20, 20a, 20e, 20f, 20g, 20h, 20j, 20k, 20m, 20r, 21, 21a, 21b, 21c, 21d, 21e, 22a, 22b, 22c, 25a E-mails

Also, the following attachments to e-mails are not exempt under Section 708(b)(12):

Oct. 2 Attachment: City Commissioner Al Schmidt Report to City Commissioners Voting Irregularities in Philadelphia County, 2012 Primary Election (July 2012)

Oct. 24a Attachment: Research material sent to Lisa Deeley for her personal use in drafting her official written testimony

Oct. 24b and Oct. 24c Attachments: background material/research forwarded to Lisa Deeley for her personal use in drafting her official written testimony

Oct. 25 Attachment: Testimony of Al Schmidt October 25, 2017; non citizen cancellation letters; non citizen twitter graphic

Oct. 31 Attachment: Letter from non citizen registered to vote

Oct. 5b Attachment: Al Schmidt Press Statement ‘Voting in Philadelphia by Non-US Citizens’

Oct. 5d Attachment: Al Schmidt September 21 Press Statement

Sept. 12 Attachment: City Commissioner Al Schmidt Report to City Commissioners Voting Irregularities in Philadelphia County, 2012 Primary Election (July 2012)

Sept. 19f, 20j and 20k Attachments: Al Schmidt’s Press Statement Voting in Philadelphia by Non-US citizens

Sept. 20 Attachment: Non Citizens Original graphic

Sept. 20a Attachment: Non Citizens Original graphic.

Sept. 20o Attachment: 9.20.17 PA DOS Voter List Improvement

Sept 20q Attachment: 9.20.17 PA DOS Voter List Improvement

Sept. 20r Attachment: 9.20.17 PA DOS Voter List Improvement

Sept. 21c and 21d Attachments: Al Schmidt’s Sept. 21 Press statement “Schmidt Calls on PA Department of State to Release Non-citizen Data Matching Results”

Therefore, the City has not met its burden of proving that the above identified e-mails and attachments are exempt from disclosure under Section 708(b)(12). *See* 65 P.S. § 67.708(a).

7. The City has established that certain records relate to its noncriminal investigations

Finally, the City argues that certain e-mails and attachments are exempt as it directly relates to a noncriminal investigation undertaken by Commissioner Schmidt of voter irregularities.

Section 708(b)(17) of the RTKL exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including:”

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- (iii) A record that includes the identity of a confidential source...
- (iv) A record that includes information made confidential by law.
- (v) Work papers underlying an audit.
- (vi) A record that, if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of an agency investigation...
 - (B) Deprive a person of the right to an impartial adjudication.
 - (C) Constitute an unwarranted invasion of privacy.
 - (D) Hinder an agency’s ability to secure an administrative or civil sanction.
 - (E) Endanger the life or physical safety of an individual.

65 P.S. §§ 67.708(b)(17)(i)-(vi). 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 City states that the Election Code vests the Office of the Philadelphia City Commissioners with the authority to investigate voter irregularities. Pursuant to the Election Code, county board of elections shall include the following duties:

To investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney. 25 P.S. § 2642(i).⁶

In addition, Mr. Bluestein attests that:

7. The Pennsylvania Election Code authorizes county board of elections to investigate voting irregularities. 25 P.S. § 2642(a). The Pennsylvania Election Code further authorizes the [Office of City Commissioners] to, among other things, issue regulations, issue subpoenas, summon witnesses, schedule hearings for many matters relating to the administration and conduct of elections in their respective counties. 25 P.S. § 2644(a).

8. The authority applies to each Commissioner in his or her individual capacity and to the [Office of City Commissioners] as one office.

As such, the City has demonstrated that under the Election Code it has the legislatively granted authority to investigate voter irregularities within the City.

Further, the City states that an investigation was performed by Commissioner Schmidt upon taking office. Mr. Bluestein explains:

9. Commissioner Schmidt was first elected as a City Commissioner in 2011 and pursuant to the [Office of City Commissioners]'s authority under the Election Code, immediately began a civil investigation into voting irregularities in Philadelphia. His first report, 'Voting Irregularities in Philadelphia County, 2012 Primary Election' was released in the summer of 2012 discussed seven distinct types of voting irregularities, including voting by non-US citizens.

10. Since 2012, Commissioner Schmidt's office continued to investigate voting irregularities by reviewing voting and election results, voter registration forms and data from the database which contains voter information. The [Office of City Commissioners] investigates each election after the election. It was only through an analysis of several years' worth of data collected after each individual election investigation that Commissioner Schmidt was able to determine the case of voting by non-US citizens.

11. In the Summer of 2017, Commissioner Schmidt reached out via telephone to the Pennsylvania Department of State to share his investigation and findings concerning the issue of voting by non-US Citizens, and met with the [Department] multiple times. The finding included how non-US Citizens registered to vote.

12. In July 2017, the [Department] initiated its own investigation into the issue and invited Commissioner Schmidt to develop possible solutions for the issue....

⁶ The City mistakenly cites to Section 2642(a), rather than Section 2642(i).

13. In September 2017, Commissioner Schmidt released a Press Statement concerning Voting in Philadelphia by Non-US Citizens. According to the press statement, non-US Citizens registered to vote were registered through PennDOT. After the September 2017 Press Statement, Commissioner Schmidt was no longer involved with the [Department's] investigation into the issue.

14. Also in September 2017, Commissioner Schmidt was invited by the Pennsylvania House State Government Committee to testify before the Pennsylvania House State Government Committee, which he did on October 25, 2017. Commissioner Schmidt was invited to testify as part of the larger investigation into voting by Non-US Citizens.

Records withheld under Section 708(b)(17) that have not already been exempt pursuant to the above asserted exemptions, include six September 8, 10, 11 e-mails and attachments relating to the investigation of voter irregularities including, spreadsheets and information of individuals unlawfully registered to vote. The following e-mails and attachments are subject to public disclosure are identified in the privilege log as: August 1, December 4, October 16, October 24a e-mail and attachment, October 24b e-mail, October 24c attachment, September 12a e-mail, September 20r e-mail and attachment, September 25a e-mail. Based on the evidence, the City has met its burden of withholding the September 8, 10 and 11 e-mails and attachments as related to the City's noncriminal investigation.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the City is required to provide copies of the records listed in Section 6 and 7 of this Final Determination within thirty days to the Requester. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Philadelphia 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. 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.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 6, 2018

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Logan Churchwell, Esq. (via e-mail only);
Noel Johnson, Esq. (via e-mail only);
Jill Freeman, Esq. (via e-mail only)

⁷ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).