

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

BOROUGH OF JENKINTOWN : NO. 2021-01137
: :
vs. : :
: :
EDWARD TITTERTON :

DECISION

This matter is before the Court on a Petition for Review under the Right-to-Know Law (RTK Law), 65 P.S. § 67.101-.3104, filed by the Borough of Jenkintown (“the Borough”) from a Final Determination of the Office of Open Records (OOR) dated December 29, 2020, OOR Docket No. AP 2020-2202. That Final Determination required the Borough to comply, with limited exceptions, with a records request submitted by Edward Titterton. An evidentiary hearing on the Borough’s Petition was held on June 28, 2021, by videoconference. Pursuant to section 1302(a) of the RTK Law, 65 P.S. § 67.1302(a), the Court now makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. In the first quarter of 2020, the Borough, through its Borough Council, engaged the services of WR Smeal Consulting (“Smeal”) to prepare a report (“the Report”) on the operations and management of the Jenkintown Police Department for use by the Borough Council and Mayor.

2. The purpose of the Report was to allow the Borough Council and Mayor to better understand the operations and management of the Police Department and its budget and to assist the Borough Council and Mayor in preparing the Police Department budget and in hiring a new Police Chief in view of the incumbent Chief’s upcoming retirement.

3. In the course of preparing the Report, Smeal interviewed members of the Police Department, including its officers, command staff, Police Chief, and nonunion staff, and also interviewed the Mayor, the Borough Manager, and other Borough staff. Smeal also reviewed the facilities of the Police Department.

4. Edward Titterton is a police officer in the Jenkintown Police Department. As such, he was one of the persons interviewed by Smeal for the Report.

5. There are approximately fourteen police officers, including the Chief, one lieutenant, one detective, and one clerk.

6. Smeal's Report was approximately 70 pages in length. It was provided only to the Mayor and members of the Borough Council and to no one else.

7. The Report's findings included criticism of individual police officers. Even though the officers were identified by rank rather than by name, the small size of the police force would enable someone knowledgeable about the force to infer the identities of the individual officers.

8. On September 3, 2020, Mr. Titterton filed a request for the Report pursuant to the RTK Law.

9. On October 9, 2020, following a 30-day extension to respond, *see* RTK Law § 902(b), 65 P.S. § 67.902(b), the Borough sent Mr. Titterton a letter denying the request, asserting that the Report was exempt from disclosure under section 708(b)(10)(i)(B) of the RTK Law, which exempts "[t]he strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation," 65 P.S. § 67.708(b)(10)(i)(B). No other basis for withholding the Report was asserted in the letter.

10. On October 28, 2020, Mr. Titterton appealed the Borough's denial to the OOR.

11. In the Borough's Response to the appeal, it did not assert section 708(b)(10)(i)(B) as a basis for withholding the Report. Rather, its sole basis asserted on the appeal was section 708(b)(10)(i)(A), which exempts from disclosure "[t]he internal, predecisional deliberations of an agency." 65 P.S. § 67.708(b)(10)(i)(A).

12. The Borough also submitted to the OOR an "Attestation" of George Locke, the Borough Manager.

13. On December 29, 2020, following a 30-day extension, *see* RTK Law § 1101(b)(1), 65 P.S. § 67.1101(b)(1), the OOR issued its Final Determination. The OOR concluded that the recommendations and opinions in the Report could be withheld under section 708(b)(10)(i)(A) but that the factual information and data in the Report are not exempt under that provision. The OOR therefore directed that the Borough provide the factual information and data from the Report but could redact the recommendations and opinions.

14. On January 28, 2021, the Borough filed a Petition for Review with this Court. The Petition asserted exemptions under several paragraphs of section 708(b) other than the exemption that the Borough had asserted before the OOR. Specifically, the Borough placed principal reliance on section 708(b)(17), exempting a "record of an agency relating to a noncriminal investigation." 65 P.S. § 67.708(b)(17).

15. Mr. Titterton did not file a petition for review from the Final Determination of the OOR.

16. At the hearing on the Petition, the Court permitted the Borough to present the testimony of Mr. Locke. No other evidence beyond the record of proceedings before the OOR was offered.

17. The Borough did not present evidence sufficient to show that disclosure of the Report would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity.

18. The Borough did not present evidence sufficient to show that disclosure of the Report would create a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility, or information storage system.

19. The Borough did not present evidence sufficient to show that the Report contains the medical, psychiatric or psychological history or disability status of any individual.

20. The Borough did not present evidence sufficient to show that the Report contains the home address of a law enforcement officer or other personal identification information.

21. The Borough did not present evidence sufficient to show that the Report contains information pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings.

Conclusions of Law

A. General Conclusions Under Right-to-Know Law

1. The Borough is a “local agency” subject to the RTK Law. RTK Law § 102, 65 P.S. § 67.102.

2. The Smeal Report is a “record” of the Borough under the RTK Law. *Id.*

3. As a record of a local agency, the Report is presumed to be a public record that must be produced upon request. The Borough has the burden of proving by a preponderance of the evidence that the Report is exempt from disclosure. RTK Law §§ 302(a), 305(a), 708(a)(1), 65 P.S. §§ 67.302(a), .305(a), .708(a)(1).

4. In order to effectuate the policy of public access under the RTK Law, exemptions under section 708(b) should be narrowly construed. *See, e.g., Hous. Auth. v. Van Osdol*, 40 A.3d 209, 215 (Pa. Cmwlth. 2012).

5. If a record contains both information that is exempted from disclosure and information that is not exempted, the record must be produced but the agency may redact the information that is exempted. RTK Law § 706, 65 P.S. § 67.706.

6. On review of a final determination of the OOR, the Court has discretion to permit the agency to offer additional evidence and to assert additional grounds for exemption.

B. Section 708(b)(7)

7. Section 708(b)(7) of the RTK Law exempts from disclosure certain “records relating to an agency employee,” including a “performance rating or review” and “[w]ritten criticisms of an employee.” 65 P.S. § 67.708(b)(7)(ii) & (vi).

8. Under this provision, portions of the Smeal Report that constitute performance reviews or written criticisms of individual members of the Police Department or other Borough employees are exempt from disclosure.

9. In the absence of any showing that such exempt information is not severable from the remainder of the Report, this exemption does not support the withholding of the Report as a whole but does permit the Borough to redact such performance reviews and written criticisms before producing the Report.

10. Except for such performance reviews and written criticisms, the Borough has failed to show that the Report contains information within the scope of this exemption.

C. Section 708(b)(17)

11. A noncriminal “investigation” under section 708(b)(17) “means a systematic or searching inquiry, a detailed examination, or an official probe.” *Dep’t of Health v. OOR*, 4 A.3d 803, 811 (Pa. Cmwlth. 2010). In order to qualify as the record of a “systematic or searching inquiry” or a “detailed examination,” a report must be part of “comprehensive, repeated” and “regular and repeated” reviews, rather than “a one-time inquiry.” *Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Cmwlth. 2014). In order to qualify as the record of an “official probe,” a report must be conducted pursuant to an agency’s “legislatively granted fact-finding or investigative powers” rather simply “ancillary” to the agency’s services. *Id.*¹

12. The Smeal Report reflects “a one-time inquiry” and is thus not a record of a “systematic or searching inquiry” or a “detailed examination.”

13. The Borough Council and the Mayor of the Borough are granted legislative authority over the appointment and regulation of the Police Department, but are not granted specific legislative power to conduct “fact-finding or investigat[ion]” of the police in carrying out that authority. *See* Borough Code §§ 1121, 1123.1, 8 Pa. C.S. §§ 1121, 1123.1.² Therefore, the Smeal Report does not qualify as the record of an “official probe.”

¹ One court has summarized these requirements as follows:

For the investigator’s materials to be exempt from disclosure under the “noncriminal investigation” exemption, appellate authority requires that: (1) the investigation be part of the Commission’s official duties as established by [its] enabling legislation . . . and (2) the investigation be a systematic and recurrent examination, rather than a one-time inquiry.

Lackawanna Cty. Gov’t Study Comm’n v. Scranton Times, L.P., No. 14 CV 4427, 2014 WL 12862635, at *2 (C.C.P. Lackawanna Nov. 14, 2014) (quotation marks omitted), *aff’d*, No. 1938 C.D. 2014, 2015 WL 7357925 (Pa. Cmwlth. Nov. 20, 2015) (unreported memorandum opinion).

² Nothing herein is intended to suggest that the Borough Council was not lawfully authorized to engage Smeal to conduct its study — an issue that is not before the Court. The Court’s conclusion is only that the Borough Council does not have the specific “legislatively granted fact-finding or investigative

14. Also relevant to the application of the “noncriminal investigation” exemption is the public-policy concern that a report may “contain unsubstantiated statements or allegations about an . . . employee . . . [that] would be problematic, because the . . . employee . . . would not be provided the opportunity to respond to the materials,” and the disclosure of such information would discourage employees from cooperating with an investigator. *Pa. PUC v. Gilbert*, 40 A.3d 755, 761 (Pa. Cmwlth. 2012) (citing *Dep’t of Health v. ORR*, 4 A.3d 803, 811-12 (Pa. Cmwlth. 2010)). In the present case, however, the Court has already concluded that the Borough may redact portions of the Smeal Report that constitute performance reviews or written criticisms of individual members of the Police Department. *See supra*, Conclusions Nos. 7-10. Such redactions will satisfy any public-policy concerns under section 708(b)(17).

15. For the foregoing reasons, the Report may not be withheld on the basis of the “noncriminal investigation” exemption in section 708(b)(17).

D. Section 708(b)(10)(i)

16. Section 708(b)(10)(i) exempts from disclosure:

[a] record that reflects:

(A) The 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, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

65 P.S. § 67.708(b)(10)(i).

powers” sufficient to satisfy the requirement of an “official probe.” *Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Cmwlth. 2014).

17. As set forth above, the OOR determined, pursuant to this exemption, that the Borough may redact from the Report Smeal's recommendations and opinions. Mr. Titterton has not appealed from this portion of the OOR's Final Determination. Accordingly, the Court has no basis to review this portion of the Final Determination.

18. Except for Smeal's recommendations and opinions, the Report is not exempt from disclosure under section 708(b)(10)(i). Under clause (A), the Report reflects the findings of a private outside consultant and therefore does not reflect "internal" deliberations of an agency or deliberations between agencies. To the extent that clause (B) may apply, it would exempt, at most, the recommendations and opinions in the Report, which the OOR has permitted the Borough to redact. The Borough has failed to show that the recommendations and opinions are not severable from the remainder of the Report.

E. Other Exemptions Cited by the Borough

19. Section 708(b)(2) of the RTK Law exempts "[a] record maintained by an agency in connection with . . . law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity . . ." 65 P.S. § 67.708(b)(2). Because the Borough failed to make a factual showing that disclosure of the Report would jeopardize or threaten public safety or preparedness or public protection activity, this exemption does not apply.

20. Section 708(b)(3) of the RTK Law exempts "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system . . ." 65 P.S. § 67.708(b)(3). Because the Borough failed to make a factual showing that disclosure of the Report would likely create such a danger, this exemption does not apply.

21. Section 708(b)(5) of the RTK Law exempts “[a] record of an individual’s medical, psychiatric or psychological history or disability status” 65 P.S. § 67.708(b)(5). Because the Borough failed to make a factual showing that the Report contains such information, this exemption does not apply.

22. Section 708(b)(6) of the RTK Law exempts specified “personal identification information,” including “[t]he home address of a law enforcement officer.” 65 P.S. § 67.708(b)(6). Because the Borough failed to make a factual showing that the Report contains such information, this exemption does not apply.

23. Section 708(b)(8) of the RTK Law exempts “[a] record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings.” 65 P.S. § 67.708(b)(8). Because the Borough failed to make a factual showing that any information in the Report falls within the scope of this exemption, the exemption does not apply. Even if the exemption were to apply, the exempt information would already be protected by the OOR’s determination that the Borough may redact recommendations and opinions.

24. The Borough did not establish that the Report is exempt under any other provision of section 708(b) or other applicable law.

An appropriate Order follows.

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ORDER

AND NOW, this 30th day of July, 2021, on the basis of the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that the Final Determination of the Office of Open Records is **AFFIRMED IN PART** and **REVERSED IN PART**. Within thirty (30) days of the entry of this Order, the Borough of Jenkintown shall provide to Edward Titterton the Report of WR Smeal Consulting, except that the Borough may redact the following portions of the Report:

- (a) performance reviews or written criticisms of individual members of the Police Department or other Borough employees; and
- (b) recommendations and opinions of WR Smeal Consulting.

BY THE COURT:



JEFFREY S. SALTZ, J.

efiled on 7/30/21
copy emailed on 7/30/21 to:
Michael Jorgensen, Court Administration – Civil Division