

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

NORTH YORK BOROUGH :
 Petitioner, :
 :
 :
 v. :
 :
 :
 DYLAN SEGELBAUM and :
 THE YORK DAILY RECORD, :
 Respondent. :

This certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Docket No: 2020-SU-002061

REPLY TO RESPONDENT’S ANSWER TO THE PETITION FOR REVIEW

AND NOW, comes North York Borough, Petitioner, and files this Reply to Respondent’s Answer to the Petition for Review filed pursuant to Pa. R.A.P. 1513 and 65 P.S. § 67.1302, by and through its undersigned counsel, of which the following is a statement:

- 1. – 7. No further response.
- 8. Investigations conducted by a public agency are generally exempt from disclosure. For example, materials used in criminal investigation are exempt under 65 P.s. 67.70(b)(16). Non-criminal investigations are exempt under 65 P.S. 67.70(b)(17). Audits that are investigative in nature follow similar exemptions from disclosure. For example, an audit conducted for the purpose of investigating a purchase of an interest in real property is exempt until the decision is made to proceed with the purchase. 65 P.S. §67.70(b)(22). If the agency conducting the audit decides to not proceed, the audit would remain exempt from disclosure, despite the record containing financial information and being labeled “audit.” Investigative audits stand in contrast to an audit that is required by the Borough Code at 8 Pa.C.S. § 1059.1, which is published annually,

is clearly created for the purpose of transparency in the governance of public funds and would not be exempt under the Right to Know Law. Here, however, the investigation in this matter was not conducted to determine the financial position of the Fire Company, nor was it conducted as a matter of routine. The Borough Council was provided information creating the concern that the Fire Chief was engaging in criminal activity. But-for the concern of criminal activity, the record in question would not exist. The forensic audit was created to investigate and was not a normal financial analysis. The audit does not relate to the overall financial performance of the Fire Company. To the contrary it examined only limited financial transactions related to the suspected theft of rental payments. Therefore, it does not meet the definition of a “financial record” that is subject to public disclosure.

9. – 10. No further response.

11. The Right to Know Law requires that local agencies, such as the Petitioner, shall provide “public records” in accordance with the Act. 65 P.S. § 67.302. “Public Record” is defined as “A record, *including a financial record*, of a Commonwealth or local agency that:

(1) *is not exempt under section 708*;

(2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or

(3) is not protected by a privilege.”

65 P.S. § 67.102 (*emphasis added*).

“Financial Record” is defined as “Any of the following:

(1) Any account, voucher or contract dealing with:

- (i) the receipt or disbursement of funds by an agency; or
 - (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.
- (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
- (3) A financial audit report. The term does not include work papers underlying an audit.”

Id.

Section 708 of the Right to Know Law then sets forth thirty (30) exceptions from disclosure at subsection (b). Subsection (c) of Section 708 then states that “The exceptions set forth in subsection (b) shall not apply to financial records, *except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17).*” 65 P.S. § 67.708 (emphasis added). Here, the exceptions set forth by the Borough were pursuant to Section 708(b)(16) and (17). The entirety of the record is protected by these exceptions, and as such, the entire record was withheld, rather than providing a completely redacted record.

Respondent asserts that because the record at issue is called an “audit,” it is not exempt from disclosure because audits are included in the definition of financial record. However, this is contrary to the plain definition of public record and caveat contained at Section 708(c). As noted above in the definition of “public record,” financial records may still be exempt pursuant to Section 708 of the Right to Know Law. *Supra*, 65 P.S. § 67.102. Financial records may also be redacted if they are protected by certain exceptions contained within Section 708. *Supra*, 65 P.S. § 67.708. The Borough has no obligation to disclose records that are not public records. *Supra*, 65 P.S. §

67.302. As such, while the record at issue is called an “audit,” the record remains exempt.

12. No further response.

13. The affidavits submitted in this matter, which have been accurately summarized by Respondent, indicate that the record at issue was created pursuant to the legislatively-granted investigative power of the Borough in order to present evidence of criminal wrong-doing to the District Attorney. This investigation was conducted by the Borough’s contracted accountant, for the purpose of determining if funds in the possession of the Liberty Fire Co. No. 1 (not the Borough) had been misappropriated, meaning that criminal activity had occurred. The investigation was initiated in order to provide evidence to the District Attorney, who could then utilize the evidence in to bring criminal charges as appropriate. As such, while the document certainly fits into the dictionary definition of “audit,” it is an investigative record, not a financial record as contemplated by the Right to Know Law’s definition of a public record because the contents are exempt under Section 708(b)(16) and (17).

The case cited by Respondent is distinguishable from the instant appeal because the records at issue in *Silver v. City of Pittsburgh* were not created for the purpose of aiding a criminal investigation. If the record requested here was similar to those in *Silver*, where the request was for overtime reports and correspondence that later became evidence in an investigation, then perhaps the Respondent’s characterization of the record at issue would be correct. However, the key distinction between the record at issue in this matter and the records at issue in *Silver* is that the record here did not contain evidence by happenstance. The audit report was created specifically for the purpose of providing evidence of criminal activities to the District Attorney’s office. As

such, simply because the Right to Know Law uses the term “audit” when it defines “financial record” as generally not being exempt from disclosure does not mean that every audit created by the Borough is public, and the forensic audit in this matter remains exempt as relating to a criminal investigation.

14. Section 503(d) of the Right to Know Law creates a two-step analysis for determining when cases should be heard by the OOR and when they should be heard by the appeals officer appointed by a District Attorney. First, jurisdiction is properly transferred from the OOR to the District Attorney’s Office when an appeal on its face involves records that relate to a criminal investigation (e.g., search warrants, witness statements, etc.). See, e.g., *Porter v. Allegheny County Sheriff’s Office*, OOR Dkt. AP 2014-1910; 2014 PA O.O.R.D. LEXIS 1444 (transferring an appeal where the request sought a search warrant, which was facially related to a criminal investigation). Second, when it is unclear whether the requested records relate to a criminal investigation, the local agency must provide some evidence showing how the records relate to a specific criminal investigation. While a low threshold for transferring a case is needed, an agency must provide more than a conclusory affidavit that merely repeats the language of Sections 503(d) and 708(b)(16). See *Bush v. Westtown-East Goshen Police Dep’t*, OOR Dkt. AP 2016-1869; 2016 PA O.O.R.D. LEXIS 1708 (finding that an affidavit demonstrated how the requested records related to a specific criminal investigation); *Burgess v. Willistown Twp. Police Dep’t*, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding that where a local agency made a preliminary showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal).

Here, the request expressly seeks records related to a criminal investigation, as it requested the forensic audit specifically. Even if the Court is not convinced that the appeal on its face involves a record relating to a criminal investigation, the affidavits and evidence in the record show that the appeal involves a record relating to a criminal investigation. As Respondent admits, a member of North York Borough Council approached the York County District Attorney's office in November of 2019 with concerns of criminal activity. In the interim, the Borough hired RKL to perform a forensic audit of the Fire Company. From the beginning, there is evidence that the Borough believed that something criminal was happening, and undertook an investigation pursuant to its powers under the Borough Code to determine if that was the case so that the evidence of said criminal activity could be provided to the District Attorney. As described above, but-for the Borough's suspicion of criminal activity, the record would not exist. It was created for the express purpose of turning over to the District Attorney's Office so that it had evidence of criminal misconduct, making the record facially related to a criminal investigation. The affidavit supplied by Richard Shank details the specific crime that was being investigated, and the affidavit supplied by Attorney Walter Tilley explains that the record was created for the purpose of providing it to the District Attorney, which further satisfies the threshold identified in the test set forth by *Bush* and *Burgess*. As such, the OOR did not have jurisdiction to hear the appeal, and this case should be remanded to the District Attorney for review of the record and a final determination.

15. The investigation relates to a specifically authorized power and obligation of Boroughs in Pennsylvania. The Record in this case is like the requested record in *Ralph Duquette v. Palmyra Area Sch. Dist.*, where the OOR found that the requested record was pertaining to an

investigation that related to a core duty of the School District, namely, investigations of harassment or discrimination pursuant to federal law and 43 P.S. §§ 951 et seq. Therefore, the record was exempt from disclosure because it related to a noncriminal investigation conducted pursuant to one of the School District's core duties. *Duquette v. Palmyra Area Sch. Dist.* OOR Docket No. AP 2017-0372.

Here, one of the Borough's core duties pursuant to the Borough Code is the safety of its residents. A power that the Borough has to ensure that it can adequately provide fire safety for its residents is to contribute to the purchase of fire engines and other apparatus, and to appropriate funds to fire companies for the construction, repair, and maintenance of buildings, among other things. 8 Pa. C.S. § 1202(35). Pursuant to the Borough Code, the Borough must also ensure that fire and emergency medical services are provided within the Borough "by the means and to the extent determined by the borough, including the appropriate financial and administrative assistance for these services." 8 Pa. C.S. § 1202(56). The legislature, when enacting this provision, anticipated that instances may arise in which the Borough may want to question the appropriateness of the financial activities of the fire company that it supports in order to carry out its obligation to the health and safety of its residents. In order to ascertain whether the fire chief was misappropriating funds and if so, the extent and nature of the funds being misappropriated, an investigation necessarily must be performed. The investigation could be characterized as non-criminal since the Borough would not be bringing criminal charges on its own behalf. As such, the investigation was within the purview of the Borough's legislatively granted fact-finding powers to provide for the health, safety and welfare of its citizens. The investigation could also be

characterized as a criminal investigation since the Borough's investigation was embodied in the record at issue which was always intended to be turned over to the District Attorney if improprieties were found. It is undisputed that improprieties were found and the forensic audit was then used as the evidence to support a criminal charge by the District Attorney. *See*, Affidavit of Walter A. Tilley, Esq.

The Borough conducted an official investigation into a potential misappropriation of Borough funds that required 1) inquiries into the financial activities of the Fire Chief, 2) an examination of evidence, including financial records and other documents, and 3) an official probe into Fire Chief's actions via witness interviews, together meeting the standards for a noncriminal investigation as set forth in *Sherry. Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 522-523. (Pa.Cmwlth. 2011). Thus, the Record is exempt pursuant to Section 708(b)(17) of the Right to Know Law in addition to Section 708(b)(16).

WHEREFORE, The Borough respectfully requests that this Court reverse the decision of the Office of Open Records and:

- a. Find that the OOR erred when it retained jurisdiction over the appeal and remand the proceedings to the District Attorney; and
- b. Find that the OOR erred when it determined the record did not relate to a non-criminal investigation and reverse the decision of the OOR, denying the appeal.

Respectfully submitted,

Date: November 5, 2020

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THE YORK DAILY RECORD,	:	
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CERTIFICATE OF SERVICE

AND NOW, this 5th day of November, 2020, I, Walter A. Tilley, III, Esquire of the law firm of Stock and Leader, attorneys for the Petitioner, hereby certify that I served the within Petitioner’s Notice of Appeal and Petition for Review this day **via electronic mail only** addressed as follows:

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STOCK AND LEADER

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