



**pennsylvania**  
OFFICE OF OPEN RECORDS

**AMENDED FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>ANDREW MCGILL AND <i>THE</i></b>	:	
<b><i>MORNING CALL,</i></b>	:	
<b>Complainant</b>	:	
	:	<b>Docket No.: AP 2010-1216</b>
<b>v.</b>	:	
	:	
<b>BANGOR BOROUGH,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Andrew McGill, a reporter for *The Morning Call*, (the “Requester”) submitted a request (the “Request”) to Bangor Borough (“Borough”) seeking correspondence pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The Borough denied the Request, citing the exemption for personnel records, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is granted and the Borough is required to take further action as set forth herein.

**FACTUAL BACKGROUND**

On December 8, 2010, the Request was filed, seeking “[a]ny correspondence, including but not limited to letters and e-mails, between Mayor John Brown and Chief Glenn Kerrigan, since Mayor Brown took office.” On December 10, 2010, the Borough

denied the Request, stating that 1) “[i]nformation is confidential personnel information which requires written release of Chief;” 2) the records are exempt under 65 P.S. § 67.708(b)(7)(viii); and 3) the “Request is being denied under Section 903.”

On December 23, 2010, the Requester appealed to the OOR. The OOR invited both parties to supplement the record. On January 7, 2011, the Borough provided a copy of the Commonwealth Court’s decision in *Lutz v. City of Philadelphia*, 6 A.3d 669 (Pa. Commw. Ct. 2010) and stated that “[n]o additional facts are being submitted therefore no Affidavit is included with this letter.” After the record closed, the Borough also provided a copy of the Commonwealth Court’s recent decision in *In re Silberstein*, No. 814 C.D. 2010, 2011 Pa. Commw. LEXIS 9 (Pa. Commw. Ct. Jan. 6, 2011) without any explanation of how or whether it applies to the present appeal. As it was submitted after the record closed, the OOR does not consider it here.

### **LEGAL ANALYSIS**

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* 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.* Here,

neither party requested a hearing, the facts are undisputed, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Borough 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. 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 clearly 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). Preponderance of the evidence has been defined as “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

Under the RTKL, certain specific “records relating to an agency employee,” such as a “[g]rievance material, including documents related to discrimination or sexual harassment,” are exempt. *See* 65 P.S. § 67.708(b)(7)(vii). Based on the underlying purpose of the RTKL, however, “exemptions from disclosure must be narrowly construed.” *Bowling*, 990 A.2d at 824. As the OOR has previously acknowledged, subsections within 65 P.S. § 67.708(b) only apply to records specifically mentioned therein and do not protect a broad class of generic “personnel records.” *See Konias v. Dravosburg Borough*, OOR Dkt. AP 2009-1062, 2009 PA O.O.R.D. LEXIS 711.

In order for this exemption to apply, an agency must affirmatively provide evidentiary support that the requested records constitute “grievance material.” *See* 65 P.S. § 67.708(a)(1) (“The burden of proving that a record of a ... local agency is exempt from public access shall be on the ... local agency ... by a preponderance of the evidence”). In the present appeal, the Borough alleged that all responsive records are “confidential personnel information” exempt under 65 P.S. § 67.708(b)(7)(vii), but specifically choose not to provide any evidentiary support for these assertions. Instead, the Borough provided copies of seemingly-inapplicable Commonwealth Court decisions without any explanation of how these decisions affect the release of the specific records at issue in this appeal.

In *Lutz*, for example, the Commonwealth Court determined that the Fraternal Order of Police, Lodge No. 5 “failed to demonstrate the ‘clear right to relief’ necessary for a preliminary injunction” related to a RTKL request to police grievance arbitration awards and reversed a Philadelphia Court of Common Pleas decision granting the union’s request for an injunction. 6 A.3d at 671. The Request at issue in the present appeal seeks correspondence between the Borough’s Mayor and its Chief of Police. As the Borough failed to provide any factual clarification or legal reasoning explaining how *Lutz* applies to the present appeal, the OOR finds that this case does not apply.

Based on the Borough’s failure to provide any evidentiary basis in support of an exemption under the RTKL, the OOR finds that the Borough did not meet its burden under the RTKL. *See* 65 P.S. § 67.305; 65 P.S. § 67.708(a)(1).

## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Borough is required to provide all responsive correspondence with thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Northampton 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: January 21, 2011



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APPEALS OFFICER  
J. CHADWICK SCHNEE, ESQ.

Sent to: Andrew McGill; Linda Paynter

February 7, 2011

Andrew McGill  
The Morning Call  
101 North 6th Street  
Allentown, PA 18101

Linda Paynter (via facsimile only)  
Open Records Officer  
Bangor Borough  
197 Pennsylvania Avenue  
Bangor, PA 18013-1922

RE: *McGill v. Bangor Borough*, OOR Dkt. AP 2010-1216

Dear Parties:

Enclosed please find an Amended Final Determination in the above matter correcting the applicable appellate court. The only change to the Final Determination is replacing "Lehigh County" with "Northampton County" in the Conclusion section.

This change does not affect the time frame for appeal of the Final Determination.

Very truly yours,



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Appeals Officer  
J. Chadwick Schnee, Esq.  
[jschnee@state.pa.us](mailto:jschnee@state.pa.us)



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