



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

BURTON STEIN, ESQUIRE	:	
Complainant	:	
	:	
v.	:	Docket No. AP 2009-0161
	:	
PLYMOUTH TOWNSHIP	:	
Respondent	:	

INTRODUCTION

Burton Stein, Esquire submitted a request to Plymouth Township (“Plymouth”) for records related to commencement of zoning enforcement proceedings pursuant to the Right to Know Law, 65 P.S. §§67.101 *et seq.* (“RTKL”). Plymouth granted the request in part and denied it in part, providing copies of zoning Enforcement Notices and denying access to the identity of individuals who communicated with Plymouth regarding Mr. Stein’s property as exempt pursuant to section 67.708(b)(17) and the “informer’s privilege.” Mr. Stein timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **denied**, and Plymouth is not required to provide anything further.

FACTUAL BACKGROUND

On February 23, 2009, Mr. Stein submitted a right-to-know request to Plymouth seeking:

“Any and all records relating in any way to the commencement of the enforcement proceedings against 111 and 113 W. Germantown Pike by the Township in 2007, including but not limited to electronic mail, written correspondence, memoranda, notes, recording and phone records, and including materials that identify any individual or entity who communicated with the Township regarding the use of those properties.”

Ms. Karen B. Weiss, Township Manager and Open Records Officer responded on behalf of Plymouth granting the request in part and denying it in part. She enclosed copies of Zoning Enforcement Notices dated April 26 and September 11, 2007 and confirmed that Mr. Stein already had notes of testimony and exhibits related to the zoning cases, now on appeal before the Zoning Hearing Board. She denied the request for the identity of individuals who communicated with Plymouth, citing the informer’s privilege and denied the remainder of the request, including names, as exempt pursuant to 65 P.S. §67.708(b)(17) (relating to records of noncriminal investigations of an agency).

Mr. Stein timely appealed to the OOR. He only appeals denial of access to the names of any complainants and apparently relies upon an email received from the OOR to support his appeal. The email provides the definition of “record” from the RTKL and states, “records related to a complaint are public record, subject to exceptions” and that “a zoning complaint would fit this definition, although may be subject to redaction...”

Herbert F. Rubenstein, Esquire responded to the appeal on behalf of Plymouth. He argues that the informer’s privilege protects the identity of those who furnish information of violations of the law. He further argues that the information is exempt under the RTKL 67.708(b)(17) as Plymouth conducted an investigation to determine whether or not violations of the Zoning Ordinance were ongoing.

Upon further inquiry, Mr. Rubenstein provided information regarding zoning enforcement actions, particularly how they are commenced and statutory authority. Pursuant to

53 P.S. § 10616, enforcement proceedings are commenced by sending an Enforcement Notice to the record owner of a parcel on which a violation has occurred.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). Plymouth is a local agency subject to the RTKL.

The RTKL defines a “record” as follows: “Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data processed or image-processed document.”

Records in possession of a local agency are presumed to be “public” unless: (1) the record is exempt under Section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law, regulation or judicial order or decree, 65 P.S. §67.305. Section 67.708 of the RTKL clearly states that the burden of proof rests with the public body to demonstrate that the record is exempt. In pertinent part, section 67.708 states:

“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.”

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, 615 A.2d 716 (PA. 1992).

Mr. Stein relies upon an email from the OOR in response to a general question he posed. What resulted is a product of different understandings with regard to what constitutes a “complaint.” When Mr. Stein asked the OOR whether or not zoning complaints are public record, the word “complaint” was interpreted to mean “the original or initial pleading by which an action is commenced under codes or Rules of Civil Procedure” (*Black’s Law Dictionary*, Fifth Edition). It is now apparent that in zoning nomenclature, the Enforcement Notice is the document that officially commences an action, 53 P.S. § 10616, and not a complaint.

Section 67.708(b)(17) of the RTKL exempts the following from disclosure:

“(17) 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, including individuals subject to the act of December 12, 1986 (P.L.1559, No.169), known as the Whistleblower Law....

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court...”

Mr. Stein argues that section 67.708(b)(17) does not prevent disclosure of the names of the complainants. Although complaints are exempt, he argues that names are not specifically exempt in section 67.708(b)(6)(i)(A).

The OOR previously ruled that section 67.708(b)(17) protects written complaints, such as those which form the basis of an Enforcement Notice, and records related to a noncriminal investigations, Jerome J. Litz v. Glen Rock Borough, OOR Docket No. AP 2009-0090. There, the requester sought information related to action taken on his own written complaints and copies of complaints made against him related to his properties. The OOR held that the information is

exempt. In this case, Plymouth has demonstrated that it conducted an investigation, determined there was a zoning violation and issued Enforcement Notices as required by 53 P.S. § 10616. It provided copies of the Enforcement Notices to Mr. Stein and denied access to investigative materials. The only aspect of the denial that Mr. Stein appeals is access to the name of any persons who communicated with Plymouth about his property. As set forth above, complaints are exempt from disclosure. Therefore, any information in the complaint, including the complainant's name would also be exempt because the record itself is exempt.

We do not find it necessary to reach the issue of whether or not the informer's privilege applies in this case as the information requested by Mr. Stein is exempt pursuant to the clear language of the RTKL.

CONCLUSION

For the foregoing reasons, this appeal is **denied** and Plymouth is not required to do anything further.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either 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 according to court rules. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED ON: April 3, 2009



APPEALS OFFICER

DENA LEFKOWITZ, Esq.