



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ITAI VARDI,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2020-0084
	:	
PENNSYLVANIA DEPARTMENT	:	
OF ENVIRONMENTAL PROTECTION,	:	
Respondent	:	

INTRODUCTION

Itai Vardi (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Environmental Protection (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking Statements of Financial Interest (“SFIs”) for three officials. The Department provided redacted Code of Conduct statements, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Department is not required to take any further action.

FACTUAL BACKGROUND

On November 12, 2019, the Request was filed, seeking

[T]he Statement for Financial Interests filed for the year 2018 for the following PADEP employees:

1. Scott Lux
2. Steve Lencer
3. Geoff Bristow

On December 19, 2019, after taking an additional thirty days to respond, 65 P.S. § 67.902(b), the Department provided copies of the three SFIs¹, but redacted certain information pursuant to Section 708(b)(6) of the RTKL, including personal financial information. 65 P.S. § 67.708(b)(6)(i)(A).

On January 13, 2020, the Requester appealed to the OOR, challenging the Department's response as it applies to personal financial information and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On January 24, 2020, the Department submitted a position statement, arguing that the Department is obligated to redact personal financial information from Code of Conduct SFIs under the injunction issued by the Commonwealth Court in *Pa. Soc. Servs. Union, Local 688 of Serv. Employees Int'l Union v. Comm.*, 59 A.3d 1136, 1147 (Pa. Commw. Ct. 2012). The Department emphasized the distinction between SFIs created under the Governor's Code of Conduct and the Ethics Act and argued that both the RTKL and case law compel the redactions it made in this case. In support of this argument, the Department submitted the verification of Renata Moseley, a Human Resource Analyst covering the Department, who attests that the SFIs at issue were completed under the Code of Conduct and that only specific personal financial information was redacted.

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.*

¹ There are two types of Statements of Financial Interest possibly at issue in this appeal, one required by the Ethics Act, 65 P.S. § 67.114, and the other required by the Governor's Code of Conduct, 4 Pa. Code § 7.163(d). Each has its own set of requirements – some, but not all, of which are overlapping. To avoid confusion, this determination will refer to them as “Ethics Act SFIs” and “Code of Conduct SFIs,” respectively.

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 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, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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 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)).

1. Agencies must provide Ethics Act SFIs if they exist

The Request seeks “statements of financial interest” for three employees, which the Department interprets as seeking SFIs filed under the Governor’s Code of Conduct. As discussed below, “statements of financial interest” may refer to either Code of Conduct or Ethics Act SFIs. Although the record does not indicate that the named employees filed Ethics Act SFIs in addition to the Code of Conduct SFIs, the OOR reiterates that Ethics Act SFIs are explicitly public records and must be provided on request if they exist. *See* 65 P.S. § 67.114(e); 65 P.S. § 67.1112. Because the Requester does not raise this issue on appeal, however, it is waived. *Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

2. The Department may redact Code of Conduct SFIs

The primary question on appeal is whether the Department was permitted to redact monetary gains from the Code of Conduct SFIs provided to the Requester. The challenged redactions include one employee’s compensation as a soccer coach, another’s rental property income and the manner of the transfer of that rental property, and attachments showing the

creditors and investments of two employees. The Department argues that these figures are exempt from disclosure under Section 708(b)(6)(i)(A) of the RTKL, as well as per a court injunction.

Section 708(b)(6) exempts “[a] record containing all or part of a person’s ... home, cellular or personal telephone numbers ... personal financial information ... [and] employee number or other confidential personal identification number.” 65 P.S. § 67.708(b)(6)(i)(A). “Personal financial information” is further defined by the RTKL as “[a]n individual’s personal credit, charge or debt card information; bank account information; bank, credit or financial statements; account or PIN numbers and other information relating to an individual’s personal finances.” 65 P.S. § 67.102. Although the statute does not define what “other information relating to an individual’s personal finances” might mean, the Commonwealth Court has found that the financial sections of the SFIs issued under the Governor’s Code of Conduct contain personal financial information. *Pa. Soc. Servs. Union, Local 688 v. Commonwealth*, 59 A.3d 1136 (Pa. Commw. Ct. 2012).

Furthermore, in *Local 688*, the Union sought an injunction against the Commonwealth after the State Ethics Commission determined that the Union’s caseworkers were required to file Code of Conduct SFIs. *Id.* at 1140. The Commonwealth Court determined that requiring the caseworkers to fill out Code of Conduct SFIs did not violate the employees’ constitutional right to privacy, but that the information must be appropriately redacted. *Id.* at 1146. Accordingly, the Court enjoined the Commonwealth from releasing Code of Conduct SFIs pursuant to any RTKL request without first redacting personal financial information. *Id.* at 1148. Even if a record is ordinarily public under the RTKL, any record protected by a judicial order or decree is exempt from disclosure. 65 P.S. § 67.305(a)(3).

In response, the Requester argues that Section 708(b)(6) does not apply to yields from financial investment vehicles because Section 708(b)(6) does not “preclude the release of the

name, position, salary, actual compensation or other payments or expenses... of a public official or an agency employee.” 65 P.S. § 67.708(b)(6)(ii). The Requester also notes that the OOR has repeatedly held that Ethics Act SFIs are public records and exempt from redaction under Section 708(b)(6). *See, e.g., Warren v. Pa. Office of Admin.*, OOR Dkt. AP 2018-1734, 2018 PA O.O.R.D. LEXIS 1294; *Lodge v. Blakely Borough*, OOR Dkt. AP 2017-0973, 2017 PA O.O.R.D. LEXIS 780. Finally, the Requester argues that *Local 688* does not specify which segments of the Code of Conduct SFIs constitute “personal financial information” and that the Department’s redactions in this case would undermine the public policy purposes of disclosures under the Code of Conduct.

First, the OOR has generally interpreted Section 708(b)(6)(ii)’s exception to the general exemption of “personal financial information” as concerning payments related to a public employee’s employment. For example, in *Hoyer v. Downingtown Police Dep’t*, the OOR found that income from sources unrelated to an employee’s public employment could be redacted, even though an employee’s salary and benefits cannot be. OOR Dkt. AP 2018-1522, 2018 PA O.O.R.D. LEXIS 1188. Next, although Ethics Act SFIs cannot be redacted, Code of Conduct SFIs are separate records and are not subject to the statutory presumption of universal accessibility found in the Act. *See* 65 P.S. § 67.114(e); 65 P.S. § 67.1112 (providing that Ethics Act SFIs are public records and that the Act controls in any conflict of laws); *see generally Warren v. Pa. Office of Admin.*, OOR Dkt. AP 2018-1734, 2018 PA O.O.R.D. LEXIS 1294 (explaining the differences between the financial information contained in Ethics Act SFIs and Code of Conduct SFIs). Finally, although *Local 688* does not provide a full definition of “personal financial information” to be redacted, the Court does list a variety of items in which employees have a privacy interest,² and the Court has previously defined “personal financial information” as “money resources,

² This list encompasses all of the redacted information on the Code of Conduct SFIs provided by the Department.

income” that go to “the pecuniary affairs” of an individual. *Pa. Dep’t of Conserv. & Nat. Res. v. Office of Open Records*, 1 A.3d 929 (Pa. Commw. Ct. 2010). Therefore, the types and nature of investment interests, property interests and creditors redacted by the Department are personal financial information, exempt under Section 708(b)(6), and must be redacted pursuant to judicial injunction.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Department is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 12, 2020

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Itai Vardi (via email only);
Joseph Cigan, III, Esq. (via email only)

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