

May 12, 2022

Thomas P. Howell, Esq.
Deputy General Counsel
333 Market St., 17th Floor
Harrisburg, PA 17101

RE: Vehicle Code Advisory Opinion

Dear Attorney Howell:

The Office of Open Records (“OOR”) received your request for an advisory opinion on April 29, 2022. In that request, you specifically stated:

- 1. [T]he [Department of Transportation (“PennDOT” or “Department”)] requests the OOR issue an advisory opinion regarding whether the Department may, where it deems necessary or appropriate, publicly release those portions of bridge inspection reports in PennDOT’s possession that do not jeopardize safety or security without running afoul of *Lynx v. Pa. Dep’t of Transp.*].**

As you know, the Legislature included a mechanism within the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, permitting agencies to draw upon the expertise of the OOR when balancing certain statutory and regulatory provisions against the intent of the RTKL. Here, the Department is tasked with determining whether the OOR’s Final Determination in *Lynx v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2020-1622, 2020 PA O.O.R.D. LEXIS 2749, prohibits the Department from voluntarily releasing bridge inspection reports that serve a vital public interest. Foreseeing situations like this, the Legislature empowered the OOR to “[i]ssue advisory opinions to agencies and requesters” under Section 1310 of the RTKL. 65 P.S. § 67.1310(a)(2).

On May 2, 2022, the OOR granted your request, stating that it would issue an advisory opinion. For the reasons set forth below, the OOR concludes that its decision in *Lynx* does not prohibit the Department from exercising its discretion to release bridge inspection reports.

The Final Determination at issue, *Lynx v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2020-1622, 2020 PA O.O.R.D. LEXIS 2749, involved a RTKL request seeking inspection reports for an identified bridge. To withhold the inspection reports, the Department raised Section 3754 of the Vehicle Code, which provides that:

- a. GENERAL RULE.-- The department, in association with the Pennsylvania State Police, may conduct in-depth accident investigations and safety studies of the human, vehicle and environmental aspects of traffic accidents for the purpose of determining the causes of traffic accidents and the improvements which may

help prevent similar types of accidents or increase the overall safety of roadways and bridges.

b. CONFIDENTIALITY OF REPORTS.-- In-depth accident investigations and safety studies and information, records and reports used in their preparation shall not be discoverable nor admissible as evidence in any legal action or other proceeding, nor shall officers or employees or the agencies charged with the development, procurement or custody of in-depth accident investigations and safety study records and reports be required to give depositions or evidence pertaining to anything contained in such in-depth accident investigations or safety study records or reports in any legal action or other proceeding.

75 Pa.C.S. § 3754. The OOR relied upon Section 3754 of the Vehicle Code and the Commonwealth Court's decision in *Pa. Dep't of Transp. v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2020), to conclude that the bridge inspection reports were confidential and therefore, not subject to access under the RTKL. See 65 P.S. § 67.305(a)(3).

By its terms, Section 3754(b) applies only to the production of materials or persons for evidence and deposition and, until 2010, the OOR did not interpret this provision as a basis for exemption under the RTKL. However, in *Pa. Dep't of Transp. v. Office of Open Records*, the Commonwealth Court explained that Section 3754(b) creates an evidentiary privilege which is "narrow, but absolute"; therefore, the Court applied this privilege to RTKL requests by way of Section 305(a)(2) of the RTKL. 7 A.3d 329, 355 (Pa. Commw. Ct. 2010); 65 P.S. § 67.305(a)(2). This conclusion was drawn from the Pennsylvania Supreme Court's holding in *Pa. Dep't of Transp. v. Taylor*, wherein the Court found that the Vehicle Code vested an evidentiary privilege against discovery or testimony. 841 A.2d 108, 116 (Pa. 2004) ("The General Assembly obviously has determined that PennDOT can better serve its function, and better ensure the safety of Commonwealth roadways and the lives of its citizens, if the department is shielded from having its internal studies and work product in this area subject to collateral discovery and litigation."). Like other such privileges, the statute bars legal process such as subpoenas because a bar to mandatory testimony is meaningless if it does not also apply to an individual's records. See *Commonwealth v. Wilson*, 602 A.2d 1290, 1295 (Pa. 1992).

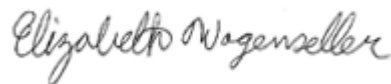
Notably, the OOR's decision in *Lynx* does not address the discretionary release of bridge inspection reports, nor does it conclude that any such disclosure would constitute a violation of the RTKL. Further, Section 3754 does not contain any explicit regulation against voluntary release. While the Vehicle Code generally makes it a "summary offense for any person to violate any of the provisions of this title," 75 Pa.C.S. § 6502(a), in the absence of a confidentiality provision prohibiting the release of the records, there is no support for concluding that an individual can "violate" 75 Pa.C.S. § 3754 by releasing records that they are not statutorily prohibited from disclosing. Compare, e.g., 75 Pa.C.S. § 6114(c) (making it a summary offense for any officer, employee, or agency of an agency to disclose records relating to the driving record of a person); 71 P.S. § 1691.8(g) (making it a criminal offense for an individual to disclose certain records under any circumstance).

The RTKL does not act as a confidentiality statute, as an agency may generally exercise its discretion to release otherwise exempt records unless such action would violate another law or court order.¹ See 65 P.S. § 67.506(c). Furthermore, while the Vehicle Code exists independently of the RTKL, based upon our review of Section 3754 and the relevant case law on which the decision in *Lynx* was grounded (*i.e.*, *Pa. Dep't of Transp. v. Office of Open Records* and, more generally, *Pa. Dep't of Transp. v. Taylor*), the OOR has found no explicit regulation, law or order against voluntary disclosure of otherwise protected bridge inspection reports that would bar the Department from authorizing release of such records.

For these reasons, it is the OOR's opinion that the Department's voluntary disclosure of bridge inspection reports, or portions thereof, would not run afoul of the Final Determination in *Lynx v. Pa. Dep't of Transp.* or its underlying precedent.

Thank you for contacting the OOR with your request.

Respectfully,

A handwritten signature in cursive script that reads "Elizabeth Wagenseller".

Elizabeth Wagenseller
Executive Director

¹ Importantly, the exercise of an agency's discretion in one instance does not require the agency to exercise its discretion in a later case. See *Coulter v. Pa. Bd. of Probation and Parole*, 48 A.3d 516 (Pa. Commw. Ct. 2012) (finding that "estoppel as a doctrine does not apply to RTKL requests because whether a document is a public document or exempt, that character does not change just because the agency releases some information contained in the document").



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

April 29, 2022

Elizabeth Wagenseller, Executive Director
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openrecords@pa.gov

Re: Request for Advisory Opinion

Dear Executive Director Wagenseller:

On October 1, 2020, the Office of Open Records (OOR) issued its determination in the matter of *Lynx v. Pennsylvania Dep't of Transp.*, AP 2020-1622. Therein, the OOR quoted and relied upon the Commonwealth Court's Opinion and Order in *Pa. Dep't of Transp. v. Office of Open Records*, 7 A.3d 329 (Pa. Cmwlth. 2010). In that matter, the Commonwealth Court held that "the scope of Section 3754(b)'s privilege is narrow, but it is an absolute evidentiary privilege. 7 A.3d 329, 355 (Pa. Commw. Ct. 2010). In enacting this privilege, the Legislature exhibited a strong intention that in-depth accident reports, safety studies, and their constituent materials remain confidential. Id. at 355." *Lynx*, citing *Pa. Dep't of Transp.*, 7 A.3d 329 at 355 (emphasis added).

While there is no realistic debate regarding the privilege afforded to accident reports, safety studies and their constituent reports, it remains unclear whether *Lynx* merely permits the Department of Transportation (Department) to maintain the confidentiality of such reports, or whether *Lynx* compels the Department to maintain the secrecy and confidentiality of such records.

In light of this lack of clarity, and the Department's desire to adhere to the law and the OOR's determinations while encouraging transparency and confidence in governmental operations, the Department respectfully request an advisory opinion under section 1310(a)(2) of the RTKL. Specifically, the Department requests the OOR issue an advisory opinion regarding whether the Department may, where it deems necessary or appropriate, publicly release those portions of bridge inspection reports in PennDOT's possession that do not jeopardize safety or security without running afoul of *Lynx*.

Respectfully,


Thomas P. Howell
Deputy General Counsel