pennsylvania
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

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| **IN THE MATTER OF** | : | |
| | : | |
| **TED EVGENIADIS AND LOWER SUSQUEHANNA RIVERKEEPER ASSOCIATION,** | : | |
| **Requester** | : | |
| | : | |
| **v.** | : | **Docket No: AP 2024-0506** |
| | : | |
| **PENNSYLVANIA FISH AND BOAT COMMISSION,** | : | |
| **Respondent** | : | |

## FACTUAL BACKGROUND

On February 8, 2024, Ted Evgeniadis and the Lower Susquehanna Riverkeeper Association (collectively "Requester") submitted a request ("Request") to the Pennsylvania Fish and Boat Commission ("Commission" or "PFBC") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

> Lower Susquehanna Riverkeeper Association is requesting inspection reports, data collection results and communications relating to the fish kill incident reported on the Susquehanna River at the discharge channel at Brunner Island on the morning of January 24th.
>
> PFBC On Scene Response & Inspection report-related:
> Any communications, including emails, written correspondence, notes from telephone calls, etc[.], between Talen Energy & PFBC in response to or relating to the fish kill event on January 24, 2024.

> Any communications, including emails, written correspondence, notes from telephone calls, etc[.], between PADEP[1] & PFBC in response to or relating to the fish kill event on January 24, 2024.
>
> Any communications, including emails, written correspondence, notes from telephone calls, etc[.], between PFBC, Talen Energy & PADEP in response to or relating to the fish kill event on January 24, 2024.
>
> Any reports submitted by PFBC to DEP and/or Talen Energy in response to the event including inspection reports, incident summary reports and investigation reports. Any differing internal reports held by PFBC including inspection reports, incident summary reports, and investigation reports.
>
> Any attachments to inspection reports and any corresponding evidence related which can include: Water/Fish Sampling – any other data collection attachments, including cover letters, lab records, any reports or documents submitted
>
> Enforcement-related[:]
>
> Any communications, including emails, written correspondence, notes from telephone calls, etc[.], between PFBC, PADEP and/or Talen Energy in response to or relating to any notices of violation issued by either PFBC or PADEP
>
> Any reports submitted by PFBC to DEP or Talen Energy in response to any NOVs filed by any agency

On February 20, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Commission denied the Request, asserting the responsive records are exempt from public access because the records pertain to criminal and noncriminal investigations. 65 P.S. §§ 67.708(b)(16), (b)(17).

On February 22, 2024, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.[2] Specifically, the Requester states that the Commission did not meet its burden of proving that the responsive records are exempt, nor did it include a sworn or unsworn statement to support its claim. Additionally, the Requester states his belief that it is unlikely that all of the responsive records fall within the stated exemption, and he suggests that some records could be produced with redactions. The Requester also argues that

[1] Pennsylvania Department of Environmental Protection.

[2] The Requester granted the OOR a thirty-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within thirty days of receipt of the appeal filed under subsection (a).").

public policy weighs in favor of releasing the requested records. The Requester also explains the mission of the Requester organization and the reasons why the Requester wants the requested records.[3] The OOR invited both parties to supplement the record and directed the Commission to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 5, 2024, the Commission submitted a position statement reiterating its grounds for denial. In support of its position, the Commission submitted an attestation made subject to the penalties of unsworn falsification to authorities, 18 Pa.C.S. § 4904, authored by Clyde Warner ("Warner Attestation"), the Commission's Director of the Bureau of Law Enforcement ("BLE"). The Warner Attestation explains that Mr. Warner conducted a thorough good faith search for records responsive to the Request, and he identified a responsive record entitled Commission Bureau of Law Enforcement Investigation Report ("Report"). The Report contains information assembled as part of an inquiry concerning a criminal incident or allegation of criminal wrongdoing. Mr. Warner further attests that all requested records are either components of or attachments to the Report, which is part of an open and ongoing criminal and civil investigation.

## LEGAL ANALYSIS

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).

The Commission is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt

[3] Under the RTKL, whether the document is accessible is based only on "whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b) [of the RTKL]." *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*).

under the RTKL or other law or protected by a privilege, judicial order or decree. See 65 P.S. § 67.305. As an agency subject to the RTKL, the Commission is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 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)).

The Commission has identified records responsive to the Request that it argues are exempt criminal investigative records. 65 P.S. § 67.708(b)(16). Section 708(b)(16) of the RTKL exempts from disclosure records of an agency "relating to or resulting in a criminal investigation, including "[c]omplaints of potential criminal conduct other than a private criminal complaint," "[i]nvestigative materials, notes, correspondence, videos and reports" and "[a] record that, if disclosed, would … [r]eveal the institution, progress or result of a criminal investigation, except the filing of criminal charges." 65 P.S. §§ 67.708(b)(16)(i)-(ii); 65 P.S. § 67.708(b)(16)(vi)(A).

In order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a criminal matter. *See Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010).

In support of the Commission's position, the Warner Attestation indicates, in relevant part, the following:

> 4. I identified and retrieved the following responsive Commission records: a Commission Bureau of Law Enforcement Investigation Report (OCA No 067-01-24) (hereinafter "the Report").
>
> 5. The Report contains information assembled as a result of the performance of an inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing by a Commission Waterways Conservation Officer pursuant to his duties under the Pennsylvania Fish and Boat Code. 30

Pa.C.S. §§ 101, *et seq.*

6. Any responsive records are either components of or attachments to the Report, which is the Commission's principal criminal investigative record.

7. The Report is a collection of information regarding an open and ongoing investigation that may result in criminal or civil charges or penalties.

8. The Report was generated because of an open and ongoing criminal and civil investigation into a possible environmental crime or incident in York County.

9. Commission records relating to criminal and noncriminal investigations are not disclosed under the Right to Know Law and the Commission has not authorized the release of the contents of this ongoing investigation to non-involved, non-criminal justice agencies or persons.

Under the RTKL, a sworn affidavit or attestation is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Commission acted in bad faith, "the averments in [the attestation] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The Request seeks information related to a fish kill incident on a specific date. The Commission attests that the BLE oversees law enforcement for the Commission. The Warner Attestation specifically notes that Mr. Warner is familiar with the Commission's investigation projects, which includes fish kill incidents. Warner Attestation ¶¶ 1-2. Mr. Warner also attests that the requested records are supporting documentation for the Report, which was "generated because of an open and ongoing criminal and civil investigation into a possible environmental crime or incident in York County." Warner Attestation ¶¶ 6-8. Therefore, the Commission met its burden of proof to show the requested records are exempt under the criminal investigation

section of the RTKL. 65 P.S. § 67.708(b)(16).

The Requester argues the Commission should provide responsive records with exempt material redacted; however, "where a record falls within an exemption under Section 708(b), it is not a public record as defined by the RTKL and an agency is not required to redact the record." *Pa. State Police v. Office of Open Records*, 5 A.3d 473, 481 (Pa. Commw. Ct. 2010). As the records identified by the Commission are criminal investigative records, the Commission does not need to redact the responsive records. Therefore, based on the evidence provided, the records identified by the Commission as responsive to the Request are criminal investigative records and, thus, are exempt from disclosure under Section 708(b)(16) of the RTKL. *See* 65 P.S. § 67.708(a); 65 P.S. § 67.708(b)(16).[4]

## CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Commission 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 according to court rules as per 65 P.S. § 67.1303, but 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.[5] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

**FINAL DETERMINATION ISSUED AND MAILED**: **April 23, 2024**

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[4] Since the requested records are exempt under 65 P.S. § 67.708(b)(16), the OOR will not address the Commission's additional arguments.

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

*/s/ Daneen L. Miller-Smith*
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