

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police,

Petitioners,

v.

Michelle Grove,

Respondent.

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No. _____ C.D. _____

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JUL 15 2014

**PETITION FOR REVIEW
IN THE NATURE OF AN APPEAL**

OFFICE OF OPEN RECORDS

Jurisdictional Statement

1. For purposes of the Right to Know Law (RTKL), the Petitioner is a Commonwealth agency, 65 P.S. § 67.102. Therefore, this Court has appellate jurisdiction over this petition for review pursuant to section 1301(a) of the Right to Know Law (RTKL), 65 P.S. § 67.1301(a); and section 763(a)(2) of the Judicial Code, 42 Pa. C.S. § 763(a).

The Parties

2. The Petitioner is the Pennsylvania State Police (PSP), a Commonwealth agency as defined in the RTKL. 65 P.S. § 67.102 (defining "Commonwealth agency").
3. The Respondent is Ms. Michelle Grove, a resident of Pennsylvania. She submitted the underlying RTKL request to PSP, detailed *infra* in paragraph 9.

Determination to be Reviewed

4. The Office of Open Records (OOR) issued the original Final Determination that ordered PSP to fulfill Ms. Grove's request on June 17, 2014.

5. OOR Appeals Officer Joshua T. Young, Esquire, issued the OOR's Final Determination.
6. As set forth in the conclusion of the OOR's Final Determination:

For the foregoing reasons, the Requester's appeal is **granted** and the PSP is required to provide copies of all responsive records within 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 Commonwealth Court of Pennsylvania, 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 Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

Michelle Grove v. Pa. State Police, OOR Dkt. AP 2014-0828; see Encl. (1)

Background

7. Under the RTKL, Commonwealth agencies are only required to provide documents and materials that are defined as public records, 65 P.S. §§ 67.301(a).
8. A record is not public in nature if it is (1) specifically exempt from disclosure under section 708 of the RTKL; (2) barred from disclosure under any other applicable Federal or State law; or (3) the document is privileged. *Id.* § 67.102 (defining "public record").
9. On March 25, 2014, the PSP agency open records officer (AORO) received a RTKL request from Ms. Grove requesting "a copy of the police report and any video/audio taken by the officers at Crash Sr144 Potters Mills Incident #G07-135942I"
10. On May 1, 2014, PSP timely issued its written final response to Ms. Grove's request. Although PSP granted a Public Information Release Report that is responsive to the incident referenced, Ms. Grove was denied access to the PSP Crash Report and any video/audio recordings.
11. In making these denials, PSP's AORO cited and relied upon the exemptions set forth in 65 P.S. § 67.708(b)(16) (involving records of criminal investigations), 65 P.S. § 67.708(b)(18)(i)

(pertaining to records received by emergency dispatch personnel), and 67 PA. CODE § 95.2(e) (relating to police reports of traffic accidents).

12. Ms. Grove filed an administrative appeal with the OOR on May 22, 2014, when she contested the denial her request for audio/visual recordings, clarifying that she sought information from “dash cams and body recorders.”

13. The OOR issued its Final Determination on June 17, 2014. As stated therein, the OOR held that PSP did not meet its burden of proving that the cited exemptions qualified for non-disclosure of mobile vehicle recording equipment. As such, the PSP was ordered to provide the information.

Petitioner’s Objections to the OOR’s Final Determination

14. **Objections to the OOR’s conclusions of law.** As stated, this is an appeal from a Final Determination of the OOR. PSP asserts that the OOR’s Final Determination is incorrect as a matter of law. The record that requester seeks, the mobile vehicle recording of a PSP response to a traffic accident, is criminal investigative material as defined in 18 Pa. C.S. §§ 9101-9183, *et seq.* Also, the OOR’s ruling in this matter contravenes its prior holdings that MVRs are non-disclosable as criminal investigative material. *See Keller v. Pa. State Police*, Dkt. AP 2014-0241 (citing *Otto v. Pa. State Police*, Dkt. AP 2013-2323).

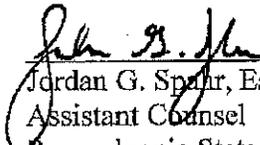
15. **Objections to the OOR’s findings of fact.** There are no findings of fact to which PSP objects.

Relief Sought

The PSP respectfully requests that the Court reverse the Final Determination of the OOR opinion 2014-0828 and hold that PSP correctly withheld the responsive record from the Requester.

Date:

July 10, 2014



Jordan G. Spahr, Esq.
Assistant Counsel
Pennsylvania State Police
1800 Elmerton Avenue
Harrisburg, PA 17110
Phone: 717-783-5568
Attorney ID No. 314245

M. E. ...

MISS ...

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police :
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 Petitioners, :
 :
 v. : No. _____ C.D. _____
 :
 Michelle Grove :
 :
 Respondents. :

CERTIFICATE OF SERVICE

I hereby certify that I served the Certificate of Service in this matter upon the persons and in the manner indicated below, which service satisfies the requirements of the Pa.R.A.P.:

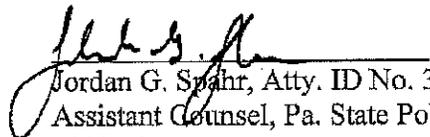
Service by first class mail, postage prepaid, and addressed as follows:

Michelle Grove
P.O. Box 253
Spring Mills, PA 16875

Terry Mutchler, Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Date: July 10, 2014


Jordan G. Spahr, Atty. ID No. 314245
Assistant Counsel, Pa. State Police
1800 Elmerton Avenue
Harrisburg, PA 17110
Phone: 717-783-5568

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Handwritten text, possibly a date or number.

from public disclosure under Section 708(b)(18)(i) of the RTKL. The PSP included a verification signed under penalty of perjury from its Deputy Agency Open Records Officer, who affirms that, with respect to the audio/video recordings:

the responsive *audio/video recordings* are exempt from public disclosure under RTKL section 67.708(b)(18)(i) as a record of part of a record, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.

On May 22, 2014, the Requester appealed to the OOR, challenging the partial denial of the Request as it related to the audio/video recordings and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the PSP to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On May 30, 2014, the PSP submitted a position statement, which, by reference, incorporated the statement made under penalty of perjury of Lissa Ferguson, PSP's Deputy Open Records Officer.¹ The PSP also alleged in an unsworn statement that the recordings are exempt as criminal investigative records under 65 P.S. 67.708(b)(16).² On the same day, the Requester submitted materials in support of her Request, including a position statement and two photographs of the incident scene.

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. 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,

¹ Ms. Ferguson's affidavit was provided to the Requester simultaneously with the PSP's final response to the Request.

² Although the PSP raised this additional reason for denying access for the first time on appeal to the OOR, it is permitted to do so in light of *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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 decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. 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 necessary, requisite information and evidence before it to properly adjudicate the matter.

The PSP 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 to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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 “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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

On appeal, the PSP asserts that the requested records are protected under Section 708(b)(18)(i) of the RTKL, which exempts from public disclosure “[r]ecords or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.” 65 P.S. § 67.708(b)(18)(i).

In support of its position, the PSP submitted the statement made under penalty of perjury of Lissa Ferguson, Deputy Agency Open Records Officer, which provides that:

[T]he responsive *audio/video recordings* are exempt from public disclosure under RTKL section 67.708(b)(18)(i) as a record of part of a record, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.

However, the OOR has held that conclusory affidavits or statements made under penalty of perjury are insufficient to meet an agency’s burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Marshall v. Neshaminy School District*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency’s conclusory affidavit was insufficient). Here, the PSP’s conclusory statement fails to prove that the requested recordings were “received by emergency dispatch personnel” as required by Section 708(b)(18)(i).

To the extent the PSP argues in its unsworn position statement that the audio/video recordings are exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16), the OOR notes that

an unsworn statement may not be relied upon as competent evidence to withhold records under the RTKL. See *Housing Authority of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) ("Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all"). Based upon the evidence provided, the PSP has not met its burden of proving that the requested records are exempt from disclosure under 65 P.S. § 67.708(b)(16) or 65 P.S. § 67.708(b)(18)(i). See 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted** and the PSP is required to provide copies of all responsive records within 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 Commonwealth Court of Pennsylvania. 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 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: June 17, 2014



APPEALS OFFICER
JOSHUA T. YOUNG, ESQ.

Sent to: Michelle Grove (via e-mail only);
William Rozier (via e-mail only);
Jordan Spahr, Esq. (via e-mail only)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

: AP 2014-0828
:
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PROOF OF SERVICE

I hereby certify that this 10th day of July, 2014, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Grove, Michelle
Service Method: First Class Mail
Service Date: 7/10/2014
Address: PO Box 253
Spring Mills, PA 16875
Phone: --
Pro Se: Respondent Grove, Michelle

Served: Grove, Michelle
Service Method: First Class Mail
Service Date: 7/10/2014
Address: PO Box 253
Spring Mills, PA 16875
Phone: --
Pro Se: Respondent Grove, Michelle

Served: Office of Attorney General
Service Method: First Class Mail
Service Date: 7/10/2014
Address: 16th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: --
Representing: Respondent Office of Attorney General

Served: Office of Open Records
Service Method: First Class Mail
Service Date: 7/10/2014
Address: Office of Open Records
Commonwealth Keystone Building, 400 North Street, Plaza Level
Harrisburg, PA 171200225
Phone: 717-346-9903

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Office of Open Records
Service Method: First Class Mail
Service Date: 7/10/2014
Address: Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120
Phone: --
Representing: Respondent Office of Open Records

Served: Office of Open Records
Service Method: First Class Mail
Service Date: 7/10/2014
Address: Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120
Phone: --
Representing: Respondent Office of Open Records

/s/ Jordan G. Spahr

(Signature of Person Serving)

Person Serving: Spahr, Jordan G.
Attorney Registration No: 314245
Law Firm:
Address: PA State Police
1800 Elmerton Ave
Harrisburg, PA 17110
Representing: Petitioner Pennsylvania State Police