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AUG 04 2014

COMMONWEALTH COURT OF PENNSYLVANIA
DOCKETING STATEMENT
PETITION FOR REVIEW

OFFICE OF OPEN RECORDS

Counsel for Petitioner(s) must complete this form and file it with the Chief Clerk of the Commonwealth Court within 10 days of the date of the Notice of Docketing.

Failure to timely file a docketing statement, with required attachments and certificate of service, may result in dismissal of the petition for review.

Attach additional sheets if needed.

Case Caption: MICHELLE GROVE v. PA STATE POLICE

Commonwealth Court Docket No.: 1146 CD 2014

Required Attachments:

(1) Attach a copy of all decisions and opinions, if any, and all pertinent orders in this case (including, for example, the decision of the Workers Compensation Judge, or similar decision).

(2) Attach a **Statement of Issues** of no more than *two pages* in length, containing a summary sufficient to explain the case, (*See Order of September 15, 1999, 29 Pa. Bull. 5064, 210 Pa. Code §69.501*) and indicating the relief requested.

(3) Attach a **certificate of service** indicating service of the docketing statement, statement of issues, and all attachments on all other parties.

A. Appealability of Order

(1) Is the order appealed a final order? Yes No

(2) If not a final order, pursuant to what Rule of Appellate Procedure is this order being appealed, e.g., Pa. R.A.P. 311, 313, 341(c)? _____

Please explain: _____

B. Are there any related cases, including cross-appeals, pending in this court or any other federal or state court or agency? Yes No

If yes, please list below the court or agency, caption and docket number(s):

C. Have there been any previous efforts to settle this matter? _____ Yes No

If yes, please explain: _____

D. Are you aware of any conflict of interest that may exist with respect to any party, lawyer, or issue in this case that may suggest the need for recusal by any judge of this court?
_____ Yes No

If yes, please explain: _____

Signature Jordan G. Spahr Date 31 July 2014

Name (Printed) JORDAN G. SPAHR

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Counsel for (Name of Party) PA. STATE POLICE

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>.

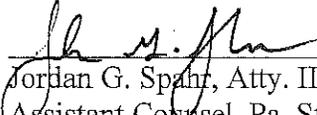
FINAL DETERMINATION ISSUED AND MAILED: June 17, 2014



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)

Therefore, Petitioner respectfully requests that the Court reverse the Office of Open Records and hold that the information sought is not disclosable under the Right-to-Know Law, 65 P.S. § 67.101-67.3104, *et. seq.*


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July 31, 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police, :
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 Petitioner :
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 :
 v. : 1146 C.D. 2014
 :
 :
 Michelle Grove, :
 :
 :
 Respondent. :

Proof of Service

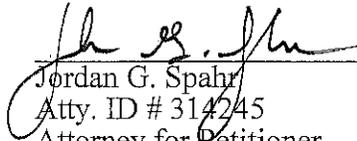
I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by first class mail addressed as follows:

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

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