Received 08/06/2015 Supreme Court Middle District

Received 10/29/2014 Commonwealth Court of Pennsylvania
Filed 08/06/2015 Supreme Court Middle District
595 MAL 2015

Filed 10/29/2014 Commonwealth Court of Pennsylvania
1146 CD 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1146 CD 2014

Michelle Grove,

Petitioner

v.

Pennsylvania State Police,

Respondent

Reproduced Record

Appeal from the Final Determination of the Pennsylvania Office of Open Records
Docket No. AP 2014-0178
Dated, issued and mailed June 17, 2014

JAMES D. SCHULTZ
General Counsel

SCOTT R. FORD
Chief Counsel
Pennsylvania State Police

CHRISTOPHER L. HERRINGTON
Assistant Counsel
Pennsylvania State Police
1800 Elmerton Avenue
Harrisburg, PA 17110
(717) 783-5568

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4/1/14

2014-078

Giannone Hurley, Christine A

From: State College Photographer <statecollegephotographer@gmail.com>
Sent: Monday, March 24, 2014 8:29 PM
To: SP, PSP RIGHT TO KNOW
Subject: Public Records Request

Hello,

I would like to acquire a copy of the police report and any video/audio taken by the officers at Crash Sr 144 Potters Mills Incident #G07-1359421 (might be Go7-1359421). One of the officers was PA State Trooper Scott Thomas, Rockview Station. The first officer to respond left before we talked to him, so I do not know his name. He talked to the other man involved in the accident, so I need any video/audio from him of that conversation. The officer I named said that the other officer was in an accident after he left. What do I need to do to get a copy of these items?
Michelle

Pennsylvania State Police
Bureau of Records & Identification
RIGHT-TO-KNOW OFFICE
1800 Elmerton Avenue
Harrisburg, PA 17110

Mailing Date: April 1, 2014

Michelle
statecollegephotographer@gmail.com

SENT VIA ELECTRONIC TRANSMISSION ONLY

PSP/RTKL Request N° 2014-0178

Dear Requester:

On March 25, 2014, the Pennsylvania State Police (PSP) received your request for information pursuant to the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. §§ 67.101-3104, wherein you requested a copy of incident report number G07-1359421 and any video/audio taken by the officers at the scene. Under the RTKL, a written response to your request is due on or before April 1, 2014.

This is an interim response, not a final response, to your request. Under the provisions RTKL section § 67.902(b)(2), you are hereby notified that your request is being reviewed and the PSP will require up to an additional 30 days, i.e., until May 1, 2014, in which to respond to your request. Should your request be granted, the total for the estimated or actual fees owed, if any, will be included in our subsequent response. The reason for requiring additional time for a final response is checked below:

- ☐ Compliance with your request may require the redaction of certain information that is not subject to access under RTKL.
- ☐ Your request requires retrieval of one or more records that are stored at a remote location.
- ☐ A response by the mailing date of this letter could not be accomplished due to bona fide staffing limitations. In particular, _____.
- ☐ Your request is under legal review, which is necessary to determine whether a requested record is a "public record" for purposes of the RTKL.
- ☐ Your compliance with the following agency policies is required for access to the record(s): _____

- You must pay the applicable fees authorized by the RTKL.

X The extent or nature of the request precludes a response within the required time period.

Should you have any questions regarding this letter, please contact the undersigned.

Sincerely yours,

William A. Rozier, J.D.
Pennsylvania State Police
Agency Open Records Officer
Bureau of Records and Identification
Right to Know Law/Subpoena Unit
1800 Elmerton Ave.
Harrisburg, PA 17110
Office: 717.425.5743 Fax: 717.525.5795
wrozier@pa.gov

Enclosure: Request 2014-0178

Pennsylvania State Police
Bureau of Records & Identification
RIGHT-TO-KNOW OFFICE
1800 Elmerton Avenue
Harrisburg, PA 17110

Mailing Date: May 1, 2014

Michelle
statecollegephotographer@gmail.com

SENT VIA ELECTRONIC TRANSMISSION ONLY

PSP/RTKL Request N° 2014-0178

Dear Michelle:

On March 25, 2014, the Pennsylvania State Police (PSP) received your request for information pursuant to the Pennsylvania Right-to-Know Law (RTKL), 65 PA. STAT. ANN. §§ 67.101 – 67.3104, wherein you stated:

> I would like to acquire a copy of the police report and any video/audio taken by the officers at Crash Sr 144 Potters Mills Incident #G07-1359421 (might be Go7-1359421). One of the officers was PA State Trooper Scott Thomas, Rockview Station. The first officer to respond left before we talked to him, so I do not know his name. He talked to the other man involved in the accident, so I need any video/audio from him of that conversation. The officer I named said that the other officer was in an accident after he left. What do I need to get a copy of these items?

A copy of your request is enclosed. By electronic response dated April 1, 2014, you were notified in accordance with RTKL section 67.902(b) and 1 PA. CONS. STAT. § 1908 that PSP required an additional thirty days to prepare this final response to your request.

Your request is granted in part and denied in part. Your request is granted insofar as the responsive two-page Public Information Release Report (marked for identification as PSP/RTK000001-PSP/RTK000002) and is enclosed with this letter.

However, the remainder of your request is respectfully denied because the record you seek is not available to the public. The Right-To-Know Law (RTKL) only requires Commonwealth agencies to provide documents that are public records. Tit. 65, § 67.301. It is well settled that the Pennsylvania State Police (PSP) is a Commonwealth agency within the meaning of the RTKL. *See Id.* § 67.101; *Dekok v. PSP*, OOR Dkt. AP 2011-0086 at 4. A document is not a public record if: (1) it is specifically exempted from disclosure in section 67.708 of the RTKL; (2) it is not

otherwise exempt under other federal or state law; or (3) it is protected by a privilege. Tit. 65, § 67.102 (defining "Public Record").

Under the first limitation on the "public records" definition, PSP Crash Report G04-1359421 is exempt from public disclosure. Section 67.708(b)(16) limits records of criminal investigations from disclosure under the RTKL. More specifically, these include:

i) Complaints of potential criminal conduct other than a private criminal complaint[;]

ii) Investigative materials, notes, correspondence, videos and reports[;] . . .

v) Victim information, including any information that would jeopardize the safety of the victim; [and] . . .

vi) A record that, if disclosed, would do any of the following:

a) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

65 PA. STAT. ANN. § 67.708(b)(16).

Following the second classification that limits the definition of public records, the Criminal History Record Information Act (CHRIA), 18 PA. CONS. STAT. § 9101 – 9183, prohibits PSP from disseminating its investigative information to any persons or entities, other than to criminal justice agents and agencies. 18 PA. CONS. STAT. § 9106(c)(4). "Investigative Information" is defined under CHRIA as "[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing . . . ." *Id.* § 9102. Therefore, PSP is barred by statute from disclosing the requested records. A verification to this assertion accompanies this letter.

Furthermore, the Pennsylvania Vehicle Code strictly regulates dissemination of police crash reports and all related investigative materials. The Vehicle Code only authorizes disclosure of the crash report, under specific conditions, to persons involved in a crash, to their attorneys or insurers, and to government agencies. 75 PA. CONS. STAT. § 3751(b)(1). Title 67 PA. CODE section 95.2(e)(3) mandates that "accident reports" relating to reports by police shall be provided only to the following entities/persons:

(A) Federal Government, including branches of military service, Commonwealth agencies and officials of political subdivisions and agencies of other States and nations and their political subdivisions[;]

(B) Persons who are determined by the Department to be involved in accident prevention or highway safety research programs[;]

(C) Persons involved in the accident, their attorney, or insurer if they furnish proof that the accident report is missing or lost, and therefore, unavailable from the reporting police department[;]

(D) Persons authorized by court order.

67 PA. CODE § 95.2(e)(3)(i).

Should you believe that you qualify as one of the individuals for which the Vehicle Code authorizes access to the requested reports, you may submit a request through the PSP website: www.psp.state.pa.us. The applicable processing fee is $22^{00}. Please note, however, that qualification as an individual identified in 67 Pa. Code § 95.2(e) only entitles you to receive a copy of the crash report itself.

Please note also that section 3754(b) of the Vehicle Code asserts that reports of in-depth PSP vehicle accident investigations are confidential. 75 PA. CONS. STAT. § 3754. This has been reinforced with OOR determinations. *See, e.g. Aris v. Dep't of Transp.*, Dkt. AP 2009-0808 at 6.

Lastly, in response to your request for "any video/audio taken by the officers," the responsive *video/audio recordings* are exempt from public disclosure under RTKL section 67.708(b)(18)(i) as a "record or part of a record, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings." A supporting verification to this effect accompanies this letter.

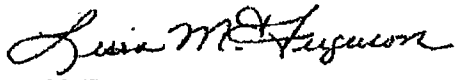
To the extent your request seeks or may be construed to seek PSP records involving covert law enforcement investigations, including intelligence gathering and analysis, PSP can neither confirm, nor deny the existence of such records without risk of compromising investigations and imperiling individuals. UNDER NO CIRCUMSTANCES, therefore, should this response to your request be interpreted as indicating otherwise. In all events, should such records exist, they are entirely exempt from public disclosure under the provisions of RTKL and CHRIA.

You have a right to appeal this response by submitting an appeal in writing to, Terry Mutchler, Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. The appeal form is available at www.dced.state.pa.us/public/oor/appealformgeneral.pdf. Should you choose to file an appeal, you must do so within 15 business days of the mailing date of this response and send to the OOR:

1) this response;
2) your request; and

3) the reason why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Sincerely yours,



Lissa M. Ferguson
Deputy Agency Open Records Officer
Pennsylvania State Police
Bureau of Records & Identification
Right-to-Know Office
1800 Elmerton Avenue
Harrisburg, Pennsylvania 17110
1.877.785.7771 (Main); 717.525.5795 (Fax)

Enclosures: PSP/RTKL Request N° 2014-0178
Granted "public record", PSP/RTK000001-PSP/RTK000002
Ferguson Verification

SP 1-518TX

Pennsylvania Law Enforcement
Crash - Public Information Release Report

Crash Involves:

- ○ DUI
- ○ Fatality
- ○ Hit and Run
- ○ Commercial Vehicle
- ○ State Police Vehicle
- ○ Local Police Vehicle
- ◉ Other
- ○ Work Zone
- ○ ATV
- ○ Snowmobile
- ○ Commonwealth Vehicle
- ○ Local Gov Vehicle

Agency Information:

AGENCY	INVESTIGATOR
PA STATE POLICE - ROCKVIEW	THOMAS, SCOTT

Summary Information:

INCIDENT NUMBER	CRASH DATE	CRASH TIME
G07-1359421	03/22/2014	13:42 hrs.

COUNTY	MUNICIPALITY
CENTRE	POTTER TWP

ROUTE #	SEGMENT #	STREET	STREET ENDING
0144		OLD FORT	ROAD

Location: ON OLD FORT RD 689 FEET SOUTH OF WAY LN

EMS Agency	Medical Facility
NONE	NONE

People Involved:

UNIT #	PERSON	FIRST NAME	MI	LAST NAME	SUFFIX	AGE	Gender

CITY	STATE	SAFETY EQUIPMENT

EMS Transport	Injury Severity

Vehicles Involved:

UNIT #	YEAR	MAKE	MODEL
001	2000	ACURA	INTEGRA

Driver Charged	Primary Violation
YES	PAVC3324 VEHICLE ENTERING/CROSSING ROAD

UNIT #	YEAR	MAKE	MODEL
002	2009	DODGE	RAM 3500

Driver Charged	Primary Violation
YES	VC4581

Crash Synopsis:

Unit #1 pulled out in front of Unit #2 from a driveway. Unit #2 could not get stopped and struck Unit #1 from behind.

On 03/22/14 on scene at 1412hrs I spoke to the driver of Unit #1 (Delgenis) stated that she was headed south on Sr 144 and was traveling slowly looking for an address. She realized she had gone past her destination so she pulled over to the right berm into a driveway. after traffic behind her passed by she stated that she looked down Sr 144 saw no traffic then backed onto the road. she stated that she saw Unit #2 just before he hit her . I asked Delgenis if she had her seat belt on and she said yes.

On 03/22/14 on scene at 1425hrs I spoke to the Driver of Unit #2 (KAUFFMAN) He stated that as he was driving North on SR 144 he saw Unit #1 sitting in a driveway off the West berm facing him. Just as he was approaching her she pulled across the South bound lane into his lane causing him to spike his brakes and swerve to the right but he still struck her in the left passenger's rear. I asked Kauffman if he had his seat belt on and he said

no.

On 3/22/14 on scene at 1435hrs I spoke to the Passenger of Unit #2 Samuel Swarey 5897 Brush Valley rd. Rebersburg, Pa. 16872 814-349-2221. Swarey stated that Unit #1 pulled out in front of them at the last second. I asked Swarey if he had his seat belt on He said no.

I interviewed three neighbors but nobody witnessed the crash.

Due to the long sight distance from the driveway and the short distance of the skid marks. I believe the driver of Unit #1 to be at fault.

Due to the evidence on scene the driver of Unit #1 was charged with VC3324 Vehicle entering or crossing roadway.

The driver of Unit #2 was cited for VC 4581 Restraint Systems due to his statements.

PENNSYLVANIA STATE POLICE
BUREAU OF RECORDS & IDENTIFICATION
RIGHT-TO-KNOW OFFICE

VERIFICATION OF
LISSA M. FERGUSON
DEPUTY AGENCY OPEN RECORDS OFFICER

I, Lissa M. Ferguson, Deputy Agency Open Records Officer of the Pennsylvania State Police (PSP or Department), am authorized to prepare this verification in response to PSP/RTK Request N° 2014-0178. Accordingly, on this 1st day of May, 2014, I verify the following facts to be true and correct, to the best of my knowledge or information and belief:

1. I am familiar with PSP/RTK Request N° 2014-0178, a copy of which accompanies this verification.

2. Utilizing the information contained in the request, I searched all Department databases to which I have access for evidence of any PSP records that may respond to the request. As a result of my searches, I located one responsive record designated G07-1359421, PSP Crash Report.

3. I am personally familiar with PSP Crash Report G07-1359421 and its attachments, which all relate to an investigation conducted by Trooper Scott Thomas.

4. PSP Crash Report G04-1359421 and its attachments are exempt from disclosure under the RTKL for the following reasons:

    a. Section 3754(b) of the Vehicle Code asserts that reports of in-depth PSP vehicle accident investigations are confidential;

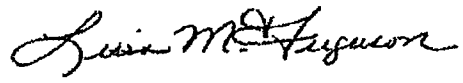
    b. PSP Crash Report a G04-1359421 is exempt from public disclosure as criminal investigative records under RTKL section 67.708(b)(16); and

c. The Criminal History Record Information Act (CHRIA), 18 PA. CONS. STAT. § 9101 – 9183, prohibits PSP from disseminating its investigative information to any persons or entities, other than to criminal justice agents and agencies.

5. Accordingly, I withheld this record from disclosure and provided the requestor with the Public Information Release Report pertaining to the incident.

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

I understand that false statements made in this verification are subject to penalties of 18 PA. CONS. STAT. § 4904, relating to unsworn falsification to authorities.



Lissa M. Ferguson
Deputy Agency Open Records Officer
Pennsylvania State Police

pennsylvania
OFFICE OF OPEN RECORDS

May 23, 2014

Via E-Mail only:

Michelle Grove
P O Box 253
Spring Mills, PA 16875
statecollegephotographer@gmail.com
michelle@redheadedninja.com

Via E-Mail only:

William Rozier
Agency Open Records Officer
PA State Police
1800 Elmerton Avenue
Harrisburg, PA 17110
RA-psprighttoknow@pa.gov

RE: OFFICIAL NOTICE OF APPEAL - DOCKET # AP 2014-0828

Dear Parties:

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.* ("RTKL") on May 22, 2014. The process to follow in submitting information to the OOR is attached. A binding Final Determination will be issued in 30 calendar days as set forth in the RTKL.

The Supreme Court of Pennsylvania has held that an agency is permitted to assert exemptions on appeal, even if the agency did not assert them when the request was originally denied. *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013). Accordingly, the agency may supplement its response within the time frame set forth below.

You may submit information and legal argument to support your position by 5:00 p.m. seven (7) business days from the date on this letter. Please include the docket number above on all submissions.

The law requires that your position must be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and Final Determinations of the OOR. **Statements of fact must be supported by an affidavit made under penalty of perjury by a person with actual knowledge.** An affidavit is required to demonstrate nonexistence of records. Blank sample affidavits are available on our website.

The agency has the burden of proving that records are not subject to public access. Any written information you provide to OOR must be provided to all parties.

Agency Must Notify Third Parties: If records contain personal information of an employee of the agency; contain confidential, proprietary or trademarked records of a person or business entity; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice to the OOR within 7 business days.**

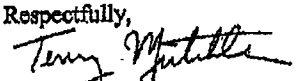
Such notice must be made by 1) providing a copy of all documents included with this letter; and 2) advising **that interested persons may request to participate in this appeal** (*see 65* P.S. § 67.1101(c)).

The Commonwealth Court has held that "the burden [is] on third-party contractors ... to prove by a preponderance of the evidence that the [requested] records are exempt." *See Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011). **Failure to participate in an appeal before the OOR may be construed as a waiver of objections regarding release of the requested records.**

Law Enforcement Records of Local Agencies: District Attorneys are required to appoint appeals officers to hear appeals regarding access to criminal investigative records in possession of a local agency. If records were denied in part upon that basis, requester may consider filing a concurrent appeal with the District Attorney of the County where the agency is located if the records were denied, in part, because they are criminal investigative records of a local agency.

If you have questions, contact the assigned Appeals Officer in writing and copy the other party.

Respectfully,



Terry Mutchler
Executive Director

Enclosures:
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

REQUEST TO PARTICIPATE AS DIRECT INTEREST PARTY

Please accept this as a Request to participate as a 3rd party with a direct interest in a currently pending appeal before the Office of Open Records pursuant to 65 P.S. § 67.1101(c). I hereby make the following statements under penalty of perjury as more fully set forth in 18 Pa.C.S. § 4904.

Today's date: _____

OOR Docket No: _____-_____

Name of Direct Interest Participant Information: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____/_____

E-mail _____

Date you received actual notice of the appeal: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____/_____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____/_____

E-mail _____

Record at issue: _____

Statement of Direct Interest:

I have a direct interest in the record(s) at issue as:

- ☐ employee of the agency
- ☐ containing confidential or proprietary information or trademarked records
- ☐ contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

Explain how the information you will submit in this appeal is probative to the final determination in support of the Requester's or Agency's position (attach additional pages if necessary) _____

_____

☐ I have attached a copy of my position statement to be included in the Office's final determination.

Respectfully submitted, _____ (must be signed)

Please submit this form the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

pennsylvania
OFFICE OF OPEN RECORDS

APPEALS OFFICER:	**Joshua T. Young, Esquire**
CONTACT INFORMATION:	**Commonwealth of Pennsylvania Office of Open Records Commonwealth Keystone Building 400 North Street, 4th Floor Harrisburg, PA 17120-0225**
PHONE:	**(717) 346-9903**
FACSIMILE:	**(717) 425-5343**
E-MAIL:	**joshyoung@pa.gov**
Preferred method of contact and submission of information:	**EMAIL**

Please direct submissions and correspondence related to this appeal to the above Appeals Officer. Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR.

The OOR website, http://openrecords.state.pa.us, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.

pennsylvania
OFFICE OF OPEN RECORDS

RECEIVED

MAY 22 2014

OFFICE OF OPEN RECORDS

RIGHT TO KNOW LAW APPEAL
DENIAL OR PARTIAL DENIAL

Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
Fax: (717) 425-5343 E-mail: openrecords@pa.gov

Today's date: 5-22-2014

Requester's name: Michelle Grove
Address/City/State/Zip: PO #253, Spring Mills, PA 16875
Request submitted by: ☐ Fax ☐ Mail ☒ E-mail ☐ In-Person (Please check one):
Date of Right to Know request: 3-24-2014 Date of Agency Response: 5-1-2014
Telephone and fax number: 814/470-1132 E-mail: state.college.photographer@gmail.com

Name and address of Agency: PSP RTK, 1800 Elmerton Ave, Harrisburg, PA 17110
E-mail Address of Agency: Re-pspright-to-know@pa.gov Fax of Agency: 717-525-5795
Name and title of person who denied my request: Lisa M. Ferguson, Deputy Agency Open Records Officer

I submitted a request for records to the agency named above. The agency either denied or partially denied my request. I am appealing that denial to the Office of Open Records (OOR), and I am providing the following information:

I was denied access to the following records (attach additional pages if necessary):
Audio / Video of officers who responded.

The agency's denial of my request is flawed and the requested records are public records because (check all that apply) (**REQUIRED**):

☐ the records document the receipt or use of agency funds.
☒ the records are in the possession, custody or control of the agency and are not protected by any exemptions under Section 708 of the Right-to-Know Law, are not protected by privilege, and are not exempted under any Federal or State law or regulation.
☒ Other Audio and Video are public records
(attach additional pages if necessary)

☒ I have attached a copy of my request for records. (**REQUIRED**)
☒ I have attached a copy of all responses from the agency regarding my request. (**REQUIRED**)
☒ I have attached any letters or notices extending the agency's time to respond to my request.
☒ I hereby agree to permit the OOR an additional thirty (30) days to issue a final order in this appeal.

Respectfully Submitted, [signature] (must be signed)

You should provide the agency with a copy of this form and any documents you submit to the OOR.

Henry, Faith

From:	statecollegephotographer@gmail.com on behalf of Redheaded Ninja <michelle@redheadedninja.com>
Sent:	Thursday, May 22, 2014 2:58 PM
To:	DC, OpenRecords
Subject:	RTK Appeal
Attachments:	RTK Law Appeal.pdf; PSP FINAL RESPONSE 2014-0178.pdf; 201404010849.pdf; 20140325RTK14-0178request.pdf

All documents are attached. To be clear, I am looking for any audio/video related to this accident. That includes dash cams and body recorders. Please call with any questions: 814-470-1132

Michelle Grove

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 30, 2014 *Sent Only Via Electronic Transmission*

Joshua T. Young, Esquire
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: *Michelle Grove v. Pennsylvania State Police*
AP 2014-0828 (PSP/RTKL 2014-0178)
Right-to-Know Law ("RTKL"), 65 PA. STAT. ANN. §§ 67.101-67.3104

Dear Appeals Officer Young:

I am responding on behalf of my client, the Pennsylvania State Police ("PSP"), to the May 22, 2014 appeal that Ms. Michelle Grove filed regarding the denial of her RTKL request (PSP/RTK No. 2014-0178, now the subject of OOR Appeal No. 2014-0828). Please accept this correspondence as my formal entry of appearance in the matter and kindly direct your future communications to me.

On March 25, 2014, Ms. Grove submitted a RTKL request to the PSP. The requester sought "a copy of the police report and any video/audio taken by the officers at Crash Sr 144 Potters Mills Incident #G07-1359421 . . . ." By letter dated April 1, 2014, Ms. Grove was notified in accordance with RTKL section 67.902(b) and 1 PA. CONS. STAT. section 1908 that PSP required an additional thirty (30) days to prepare the final response to her request. PSP's final response was sent on May 1, 2014, granting her request as to the public information release report of the incident, but denying the request under the records of criminal investigations and records of emergency dispatch exceptions of the RTKL, the Criminal History Records Information Act, and section 3754(b) of the Pennsylvania Vehicle Code. 65 PA. STAT. ANN. §§ 67.708(b)(16), (18)(i); 18 PA. CONS. STAT. §§ 9101-9183, *et seq.*; 75 PA. CONS. STAT. § 3754(b).

Ms. Grove appealed to the OOR on May 22, 2014 and has limited the issue on appeal to "Audio/Video of officers who responded." For the below reasons, PSP continues to rely on the positions set forth in its final response and respectfully requests that Ms. Grove's appeal be denied.

Argument

The Right-To-Know Law (RTKL) only requires Commonwealth agencies to provide documents that are public records. 65 PA. STAT. ANN. § 67.301 (2010). It is well settled that the Pennsylvania State Police (PSP) is a Commonwealth agency within the meaning of the RTKL. *See*

OFFICE OF CHIEF COUNSEL | PENNSYLVANIA STATE POLICE
1800 ELMERTON AVENUE | HARRISBURG, PA 17110
Ph: 717.783.5568 | Fx: 717.772.2883 | www.psp.state.pa.us

Pennsylvania
State Police

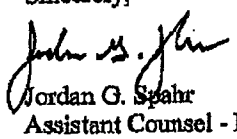
Id. § 67.101; *Dekok v. PSP*, Dkt. AP 2011-0086 at 4. A document is not a public record if: (1) it is specifically exempted from disclosure in section 67.708 of the RTKL; (2) it is not otherwise exempt under other federal or state law; or (3) it is protected by a privilege. Tit. 65, § 67.102 (defining "Public Record").

Section 708(b)(16) of the RTKL, or the records of criminal investigations exception, specifically bars from disclosure "record[s] of an agency relating to or resulting in a criminal investigation, including . . . [i]nvestigative materials, notes, correspondence, videos, and reports." *Id.* § 67.708(b)(16)(ii).

The case on point for this matter, *Keller v. Pa. State Police*, held that mobile vehicle recorders (MVR) are barred from disclosure under the records of criminal investigations exception. *Keller v. Pa. State Police*, Dkt. AP 2014-0241. The requester sought video footage, in electronic form, from a traffic citation dated in October 2013. *Id.* The OOR reasoned that, since a summary traffic citation is nonetheless a crime enumerated in Title 18, it falls within the "video" definition of the RTKL exception. *Id.* (citing *Otto v. Pa. State Police*, Dkt. AP 2013-2323). As such, the MVR is a non-disclosable record under section 708(b)(16) of the RTKL.

In conclusion, based upon the RTKL, case law, and the facts contained within the "Ferguson Verification," the Pennsylvania State Police respectfully requests that you deny Ms. Grove's appeal. If you have any doubt as to the merits of this case, PSP respectfully requests that you convene a hearing in this matter. Should you determine a hearing to be unnecessary, I thank you in advance for your thoughtful deliberations.

Sincerely,



Jordan G. Spahr
Assistant Counsel - Pennsylvania State Police
Governor's Office of General Counsel
717.346.1718 / jorspahr@pa.gov

cc. Michelle Grove (w/ encl.) (*sent only via electronic transmission*)
William A. Rozier (w/ encl.) (*sent only via electronic transmission*)

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
MICHELLE GROVE,	:	
Complainant	:	
v.	:	**Docket No.: AP 2014-0828**
PENNSYLVANIA STATE POLICE,	:	
Respondent	:	

INTRODUCTION

Michelle Grove (the "Requester") submitted a request ("Request") to the Pennsylvania State Police (the "PSP") pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"), seeking the police report and audio/video recordings taken by officers at the scene of an incident in Potters Mills, Pennsylvania. The PSP partially denied the Request, arguing that 911 recordings are not subject to disclosure. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted** and the PSP is required to take further action as directed herein.

FACTUAL BACKGROUND

On March 24, 2014, the Request was filed, seeking "[a] copy of the police report and any video/audio taken by the officers at Crash Sr 144 Potters Mill Incident #G07-1359421 (might be Go7-1359421)." On May 1, 2014, after extending its deadline to respond pursuant to 65 P.S. § 67.902, the PSP partially denied the Request, arguing that the audio/video recordings are exempt

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).

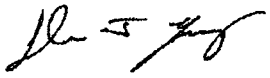
To the extent the PSP argues in its unsworn position statement that the audio/video recordings are exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16), the OOR notes that

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)

Received 10/29/2014 Commonwealth Court of Pennsylvania

Filed 10/29/2014 Commonwealth Court of Pennsylvania
1146 CD 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA COURT OF PENNSYLVANIA

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

PROOF OF SERVICE

I hereby certify that this 29th day of October, 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:	10/29/2014
Address:	PO Box 253 Spring Mills, PA 16875
Phone:	--
Pro Se:	Respondent Grove, Michelle

/s/ Christopher Lee Herrington

(Signature of Person Serving)

Person Serving:	Herrington, Christopher Lee
Attorney Registration No:	082796
Law Firm:	Pennsylvania State Police
Address:	PA State Police Ogc 1800 Elmerton Ave Harrisburg, PA 17110
Representing:	Petitioner Pennsylvania State Police