IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

THE MUNICIPALITY OF MT. LEBANON,

Petitioner,

v.

ELAINE GILLEN,

Respondent,

and

PENNSYLVANIA OFFICE OF OPEN RECORDS,

Interested Party.

DECISION UNDER 65 P.S. § 67.1302(a)

SA 15 - 000963

FILED BY:
JUDGE W. TERRENCE O'BRIEN

Copies sent to:

Ronald D. Barber, Esq.
4 Gateway Center Suite 2200
444 Liberty Avenue
Pittsburgh PA 15222

Daniel C. Garfinkel, Esq.
One Oxford Centre 20th Floor
301 Grant Street
Pittsburgh PA 15219

FILED
16 MAY 23 AM 11: 52
DEPT OF COURT RECORDS
CIVIL FAMILY DIVISION
ALLEGHENY COUNTY PA

DECISION UNDER 65 P.S. § 67.1302(a)

O'BRIEN, J.

I Procedural and factual history

Before the Court is the Municipality of Mt. Lebanon's Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records (OOR). A hearing was held before me on April 11, 2016, on this case and SA 16 – 236. [1] I reverse the OOR for reasons that follow.

I adopt the following procedural history, factual background and legal analysis from the Final Determination of the OOR dated November 29, 2015, regarding this case.

> Elaine Gillen ("Requester") submitted a request ("Request") to the Municipality of Mt. Lebanon ("Municipality") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.,* seeking e-mails pertaining to a deer management hunting program. The Municipality partially denied the Request, withholding from public disclosure certain e-mails that would threaten personal security and reveal the identities of donors. The Requester appealed to the [OOR"]. ...
>
> FACTUAL BACKGROUND
>
> On July 30, 2015, the Request was filed seeking "[a]ll communications to and/or from municipal staff and, all communications to and/or from the commission concerning Anthony DeNicola's archery program from June 18, 2015 to the present." ... On September 4, 2015, the Municipality partially

[1] A separate Decision is being rendered at SA 16 – 236.

granted the Request, providing 131 e-mails to the Requester. The Municipality denied access to certain e-mails that would identify the private properties being used for the archery hunt [or those volunteering their archery skills], arguing that public access of those records would result in a substantial and demonstrable risk to the personal security of the property owners [and the volunteering archers]. See 65 P.S.§ 67.708(b)(1). The Municipality also denied access to those e-mails stating that the e-mails would identify those individuals making a donation to an agency. See 65 P.S. § 67.708(b)(13).

On September 18, 2015, the Requester appealed to the OOR. ...

On September 30, 2015, the Municipality submitted a position statement, reiterating the same reasons for withholding the records from public disclosure. The Municipality also submitted the sworn affidavits of Stephen Feller, Manager and Open Records Officer for the Municipality, and Chief Aaron Lauth, Chief of Police for Mt. Lebanon. In its submission, the Municipality provides a discussion of the deer management techniques in the Municipality that was attempted last year, which was "trap and euthanize." The Pennsylvania Game Commission permitted a program wherein deer were lured into corrals resulting in the deer being entrapped and shot. This year, the Municipality awarded a contract to White Buffalo to institute an archery program to manage the deer population. The contractor would screen, train and manage archers for the hunt which is occurring on public and private properties. The contractor contacted the property owners and neighbors for permissions required under the Pennsylvania Game Commission's hunting and safety rules.

On October 1, 2015, the Requester submitted a position statement, stating that during public meetings, certain individuals indicated their support for the hunting program and the minutes reflect the names and addresses of these individuals.

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. Further, this important open-government law is designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions..

The Municipality is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a

local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. See 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. 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."

The Municipality states that certain e-mails were not produced that would identify the persons volunteering time as an archer or permitting the use of their property to conduct the archery program. The Municipality argues that the release of these e-mails would threaten personal security of these individuals. Section 708(b)(1)(ii) of the RTKL protects "a record, the disclosure of which ... would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1)(ii).

Under the RTKL, "reasonable likelihood" of "substantial and demonstrable risk" is necessary to trigger the personal security exception. The term, "substantial and demonstrable risk" is not defined in the RTKL. ... [See] *Lutz v. City of Philadelphia,* 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that "[m]ore than mere conjecture is needed" to establish that this exemption applies).

Chief Lauth explains that deer management in the Municipality has been "hotly debated and very contentious." He provided the OOR with the Commission's public website to view the community's comments at Commission meetings arguing against a lethal deer management program. Chief Lauth further explains that past deer management programs have also been controversial and resulted in numerous incidents, such as tampering with the bait, wedging sticks in corral doors to prevent deer from being caught and loud noises to scare deer away. With respect to this deer management program, Chief Lauth attests that the Municipality hired a third party to locate and test qualified hunters, determine the hunting locations and determine compliance with Game Commission rules. The Municipality made five of its public lands available and private property owners could also provide access to their land. The Municipality has chosen to keep the location of the private property

> confidential because of what it believes is a reasonable likelihood that property owners and those associated with the program may encounter problems such as those in previous years.

Pages 1-5; some citations and quotation marks omitted.

II Sufficiency of the Requester's Appeal to OOR

Mt. Lebanon first invokes 65 P.S. § 67.1101(a)(1), which requires that an appeal to the OOR

> shall state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for delaying or denying the request.

In support of its argument that I should dismiss the Requester's appeal based on her failure to comply with this section of the RTKL, Mt. Lebanon cites *Saunders v. Dep't of Corr.,* 48 A.3d 540 (Pa. Cmwlth. 2012); and *Padgett v. Pa. State Police,* 73 A.3d 644 (Pa. Cmwlth. 2013). These cases stand for the proposition that "when a requester fails to ... address an agency's grounds for denial, the OOR properly dismisses the appeal." *Padgett,* 73 A.3d at 647. See also *Dep't of Corr. v. Office of Open Records,* 18 A.3d 429, 434 (Pa. Cmwlth. 2011), which holds a requester's appeal to the OOR "must address any grounds stated by the agency ... for denying the request." There the Commonwealth Court held the OOR "should not have proceeded, as it did, to decide Requester's appeal in its deficient form." *Id.*

I must agree with Mt. Lebanon that *Padgett* and *Saunders* are controlling. The Requester's appeal to the OOR in the case at bar did not address the grounds stated by Mt. Lebanon for partially denying her request. By checking off the middle box of the first page of her appeal form, the Requester was simply using boilerplate language. This language neither "state[d] the grounds upon which requester [was asserting] that the

record is a public record" nor "address[ed] the grounds stated by the agency for ... denying the request." 65 P.S. § 67.1101(a)(1). Regarding the Personal Security exemption, the Requester, in the sheets attached to the form provided by the OOR, rather than addressing why the exemption was not applicable, argued, in effect, that withholding the names of those volunteering their archery skills or the use of their property would endanger pedestrians in Mt. Lebanon. **The appeal did not even attempt to address, by reference to the applicable RTKL section or otherwise, Mt. Lebanon's reliance on the Donation exemption.** Although the Requester argues dismissal of the appeal is not appropriate because the deficiency did not hinder the OOR's review, none of the above-cited three cases requires such hindrance as a prerequisite for dismissal. Assuming, *arguendo,* the requester properly preserved her appeal to the OOR, I will discuss the two exemptions upon which Mt. Lebanon relies for denying access to the records in question. [2]

III Personal Security exemption

Mt. Lebanon argues as follows regarding this exemption:

> Now, the second exemption implicated in this case is the risk of physical harm or personal security. Specifically requested documents in this case, in both cases constitute a record of disclosure that, quote, would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual and they are therefore exempt from disclosure under Section 708(b)(1)(2) of the Right to Know Law.
>
> The Commonwealth Court has recognized that the Right to Know Law includes in the disjunctive both the risk of physical harm and the risk of personal security, so they are separate considerations.
>
> The Office of Open Records has determined in another case that the personal security exception is designed to protect from harm,

[2] Prior to the hearing on April 11, 2016, I conducted an *in camera* review of the records. A brief description of the records is found at pages 8-10 of the hearing transcript.

danger, fear or anxiety.

The Affidavit of Police Chief Louth (*sic*) was submitted in each case. It is somewhat a different affidavit in each case, but they are very similar. They are Exhibits F and G to the respective petitions. He testified in the Affidavit that the disclosure of the e-mails at issue would cause a substantial and demonstrable risk of harassment, an invasion of privacy and personal security to the identities of the individuals disclosed in the e-mails.

There is a long and contentious history surrounding the hunting of deer in Mt. Lebanon.

THE COURT: These hunts are over now: right?

MR. GARFINKEL: That's correct, they are over for the season.

THE COURT: Are you saying if I order disclosure of the volunteers, whether it is their efforts or their land, that these people are going to be harassed or attacked or what?

MR. GARFINKEL: I think that's a possibility. I think if - -

THE COURT: If it is a possibility, is that enough?

MR. GARFINKEL: I think it's more than a possibility. We had specific instances of what has happened when people figure out where hunts, authorized hunts are taking place.

THE COURT: Is that during the time when hunts are in progress?

MR. GARFINKEL: That is during the time when hunts are in progress.

THE COURT: What does the passage of time do to your argument on the personal security exemption?

MR. GARFINKEL: I don't think it changes anything. As a practical matter, the hunt may happen again in the fall. If it does, these same people, their property would conceivably [be] used if they have offered it in the past and it was used in the past, so this problem would go forward into the next season.

Irrespective of that, I think these people could face harassment. My colleague over here, Mr. Barber, has presented the Court with signs,

and your Honor may have seen these signs where some individuals are pro-hunt and some are opposed to the hunt. I do think that there is a risk of harassment.

[The Requester] has apparently faced that own [*sic*] harassment. She asked for increased patrols at her house, so she is a perfect example of what could happen when this type of information becomes public. There is a reasonable risk here.

What has happened in the past also demonstrates the risk. Before the archery hunt there was the - - it was a trap situation where the deer were trapped and basically put in cages and euthanized. Individuals interfered with that program through - - they sprayed bait in the traps with urine, they wedged sticks to prevent doors from closing, used car horns to frighten deer. Again, this is all evidence of what Chief Lauth testified to in his Affidavit and is in fact become the case.

I think this risk of personal security is very real. You have hunters on the one hand going into the woods alone on private property, and I think there is a risk of them being harassed. And, in fact, we do have a trespass conviction with respect to such an event. That's attached as Exhibit H to the second petition.

So, in other words, Chief Louth's (*sic*) predictions were correct. First there was the past interference with the program with the hunters alone in the woods who one (*sic*) has in fact incurred trespassers, and somebody who was convicted of a trespass citation, although they were found not guilty of a hunting related charge.

THE COURT: Found not guilty of what?

MR. GARFINKEL: A hunting related charge. There were two charges, one for trespassing and one relating to interference of the home.

And [the Requester] expressed her own concerns. She asked for increased patrols. She sent an e-mail: I am getting harassed. There are a lot of hateful people commenting in newspapers. Again, that's exactly what can happen here.

While [the Requester] may have taken her position public, the people who submitted to the Municipality that they would offer their services for the property may not have had that same wish.

So Mt. Lebanon has established its burden by a preponderance of the evidence that, A, these e-mails show the individuals who donated property and their services. That clearly falls within the Right to Know

> exemption. And the second exemption is personal security, because if the individuals are identified, there is a serious risk to their personal security.
>
> Thank you.

Hearing transcript, pp. 28-33. I disagree with Mt. Lebanon on this issue.

In *Carey v. Pennsylvania Dep't of Corr.,* 61 A.3d 367, 372 (Pa. Cmwlth. 2013), the requester, a Pennsylvania state penitentiary inmate, sought records "which may indicate the identities of those who authorized the transfers" of him and other inmates to a Michigan prison. The Department of Corrections based its refusal to disclose the records on the Personal Security exemption. The Commonwealth Court held as follows:

> The Personal Security exception protects any record, the disclosure of which "would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual." Section 708(b)(1)(ii) of the RTKL, 65 P.S. § 67.708(b)(1)(ii). ...
>
> To establish this exception, an agency must show: (1) a "reasonable likelihood" of (2) "substantial and demonstrable risk" to an individual's security if the information sought is not protected. *Purcell.* We defined substantial and demonstrable as actual or real and apparent. *Id.* "More than mere conjecture is needed." *Id.* at 820 (citing *Lutz v. City of Philadelphia,* 6 A.3d 669, 676 (Pa. Cmwlth. 2010).
>
> Personal security issues are of particular concern in a prison setting. *Dep't of Corr. v. Gardner,* (Pa.Cmwlth., No. 631 C.D. 2011, filed April 27, 2012) (unreported) (quoting *Commonwealth v. Dugger,* 506 Pa. 537, 542, 486 A.2d 382, 384 (1985) that "[a] prison setting involves unique concerns and security risks" and upholding Personal Security exception as to training materials of identified DOC employee). Given the heightened risk associated with prisons, representations regarding perceived threats to individual DOC personnel posed by inmates are persuasive
>
> Requester seeks the identities of "the individuals or agencies who authorized" the transfers. With regard to this part of the Request, DOC met its burden of proof. In its affidavit, DOC specifically

> addressed records that reflect the names of staff who approved or authorized the transfers. DOC explains that many inmates, including Requester, did not want to be transferred. DOC further explained inmates may retaliate against DOC officials who nominated inmates for or authorized transfers. Disclosure of the identities of DOC officials, similar to disclosure of first names of corrections officers, poses a substantial and demonstrable risk to personal security under these circumstances. *Stein v. Office of Open Records,* (Pa.Cmwlth., No. 1236 C.D. 2009, filed May 19, 2010) (unreported) (corrections officers' first names protected for personal security reasons).

Id. at 373-74.

Mt. Lebanon has failed to meet its burden of establishing the Personal Security exemption. The potential danger inherent in telling state penitentiary inmates who authorized an undesired transfer is obvious. The incidents relied upon by Mt. Lebanon, on the other hand, are akin to acts of protest or civil disobedience. While Chief Lauth's concerns show commendable vigilance in the atmosphere of a hotly debated and divisive community issue, they constitute speculation. He points to no specific threat against any person involved in the deer culling program, including the commissioners who authorized it, whose identities are well known and whose home addresses are easily ascertained. Mt. Lebanon has failed to establish a "substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1)(ii).

IV Donation exemption

The RTKL exempts from disclosure records

> that would disclose the identity of an individual who lawfully makes a donation to an agency ... including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

65 P.S. § 67.708(b)(13). I agree that this exemption protects the records at issue. The

statute does not define "donation." To donate is "to make a gift of, especially: to contribute to a public or charitable cause." http://www.merriam-webster. com/dictionary. One of the dictionary examples of the use of the word is "He donates some of his free time to volunteer work." *Id.* Those who volunteered their archery skills or the use of their property made a contribution because Mt. Lebanon received something of value. What the volunteers offered had value because they contributed to a program the people's representatives in Mt. Lebanon deemed beneficial to its residents and those who use its roads. The OOR offered no analysis to support its conclusion that only conveyance of title to the properties involved would meet the definition of "donation" under section 708(b)(13). In enacting the RTKL, the legislature could have exempted records only pertaining to gifts of a certain type or size, but did not. The legislature apparently believed it was more important to encourage even small donations to an agency than to allow the public to know the identity of the donors. Even construing the Donation exemption narrowly, as I must, I nevertheless conclude that the records withheld are covered thereby.

BY THE COURT

O'Brien ,J.
5/23/16