



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

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:

MARGOT SPIKER,
Requester

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:

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v.

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Docket No.: AP 2016-1254

PENNSYLVANIA DEPARTMENT OF
TRANSPORTATION,
Respondent

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INTRODUCTION

Margot Spiker (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Transportation (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a report concerning the investigation and mitigation of J-bar deterioration in Pennsylvania bridge structures. The Department denied the Request, citing, among other reasons, an exemption for records related to a noncriminal investigation. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Department is not required to take any further action.

FACTUAL BACKGROUND

On July 12, 2016, the Request was filed, seeking a report on the “Investigation of Cause and Mitigation of J-Bars Deterioration in Bridge Structures in Pennsylvania” that was

“[p]repared under ECMS Agreement E00974, Workorder 12 by Modjeski and Masters, Inc.” On July 19, 2016, the Department denied the Request, stating, among other reasons, that the records related to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17).

On July 25, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 4, 2016, the Department provided a position statement, along with a notarized affidavit from an Assistant Chief Bridge Engineer of the Department’s Bureau of Project Delivery, who affirms, in relevant part:

5. Under the Department’s enabling legislation, which provides the Department with authority over all state highways and bridges, including implicit investigatory powers, the Department has established a Bridge Unit with representatives assigned to each of the Department’s Engineering Districts and responsible for the management and administration of the designs of local and Department bridges. Additionally, a Bridge Quality Assurance Division, now referred to as the Bridge Design and Technology Division, is responsible for the coordination of Pennsylvania’s bridge design and construction program....

7. Reinforced concrete bridge substructures, such as piers, bents, cantilevered abutments, cantilevered wingwalls, stub abutments, and cantilevered retaining walls, have vertical reinforcing steel that extends from the footings (spread footings or pile caps) into the vertical components (stem walls, pier walls, columns, etc.). As such, these bars are structural elements of bridge infrastructure. These bars are often referred to as “J-bars.”

8. In the present matter, the Department observed deterioration (i.e. corrosion) and necking (or in other words, a reduction in cross-sectional area) of J-bars and became concerned that the deterioration could affect structures and the ability of structures to safely carry traffic weight loadings.

9. As a result of the Department’s discovery, the Department hired a contractor, Modjeski and Masters, Inc., to undertake a systematic review of the deterioration and necking of J-bars at the interface of the footing and stem walls and between the pier column and footing to aid the Department in fully understanding the nature and scope of the problem to prepare its course of action relative bridge rehabilitation and replacement projects. That contractor was at all times performing under a contract with confidentiality language.

10. As a part of the contractor's systematic review of J-bars, the contractor was required to research and correspond with other transportation agencies that have utilized, observed, or studied J-bars; review, test, and inspect identified bridges in Pennsylvania that contain J-bars; and prepare an official report that contains notes, correspondence, data, and photographs gathered during the investigation.

11. The subject report of the appeal assesses the nature and magnitude of the J-bar deterioration problem based upon observations from bridges in Pennsylvania, provides practical recommendations to ensure safety on existing bridges, and offers design and construction provisions to eliminate or limit J-bar deterioration on future bridges (the "Report").

12. This Report is considerably different from standard bridge inspection reports. Standard bridge inspection reports are industry standard reports prepared every two years pursuant to federal guidelines established by the FHWA following an engineering survey of the subject bridge. The standard bridge inspection reports highlight visual findings of deterioration of various bridge components, whereas this Report examines J-bars, which are structural components inside of a bridge and are not typically visible.

13. The Report, prepared by a contractor for the Department, investigates the use of J-bars in bridges in Pennsylvania and is multifaceted. The Report assesses the nature and magnitude of the J-bar deterioration problem based upon observations from bridges in Pennsylvania, includes data about J-bars in bridges in Pennsylvania, provides practical recommendations to ensure safety on existing bridges, and offers design and construction provisions to eliminate or limit J-bar deterioration on future bridges.

14. The Department's actions were and continue to be based upon the Report, which reflects the findings of an investigation, and Department employees rely on the findings of this Report in their decision-making process when rehabilitating, replacing, or building bridges in Pennsylvania. There are still J-bars in Department bridges and Department employees continue to rely on the findings of the Report when making decisions.

On August 16, 2016, the Requester made an additional submission.

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, 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.” 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.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. 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.” *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)).

The Department contends that the records at issue are protected from disclosure because they are related to a noncriminal investigation. 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL provides that records “relating to a noncriminal investigation” are protected from disclosure, including “investigative materials, notes, correspondence and reports,” 65 P.S. § 67.708(b)(17)(ii), and records that “if disclosed would ... (vi) reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license...” 65 P.S. § 67.708(b)(17)(vi). 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 noncriminal matter. *See Department of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

In the present case, the Department is statutorily empowered to construct, improve, maintain and repair the Commonwealth’s system of roadways. 36 P.S. § 670-401. This necessarily includes the implied power to investigate the Commonwealth’s system of roadways for any defects. In addition, the Department has provided a notarized affidavit from an Assistant Chief Bridge Engineer of the Department’s Bureau of Project Delivery, who affirms that it contracted with Modjeski and Masters, Inc. in order to investigate the Commonwealth’s bridges “to aid the Department in fully understanding the nature and scope of the problem to prepare its

course of action relative bridge rehabilitation and replacement projects.” Accordingly, based on the evidence provided, the Department has established the requested record is not subject to public access. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, Requester’s appeal is **denied**, and the Department 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 as per Section 1303 of the RTKL. However, 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 18, 2016

/s/ J. Chadwick Schnee, Esq.

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¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).