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IN RE: CITY OF PHILADELPHIA
POLICE DEPARTMENT

Appellant

v.

SAMANTHA MELAMED

Appellee

COURT OF COMMON PLEAS
PHILADELPHIA COURT
TRIAL DIVISION

No. 211002394

ORDER

AND NOW THIS ____ day of _____ 2023, upon consideration of the appeal filed by the City of Philadelphia Police Department (“PPD”) and any response hereto, it is ORDERED and DECREED that the Final Determination issued by the Pennsylvania Office of Open Records in the Matter of *Melamed and Philadelphia Inquirer v. City of Philadelphia Police Department, AP 2021-1426* dated October 1, 2021 is hereby REVERSED to the extent it orders PPD to publicly disclose nature of call in the responsive Computer Aided Dispatch (“CAD”) Report and MOOT to the extent it orders PPD to provide odometer readings, mileage information, and information regarding delays encountered by the vehicle in the responsive CAD Report.

BY THE COURT:

J.

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BRIEF OF APPELLANT CITY OF PHILADELPHIA POLICE DEPARTMENT

The City of Philadelphia (City) Police Department (PPD), through its undersigned counsel, respectfully submits this brief in support of the instant appeal.

I. MATTER BEFORE THE COURT

PPD appeals the October 1, 2021, Final Determination (Final Determination) of the Office of Open Records in *Melamed and Philadelphia Inquirer v. City of Philadelphia Police Department*, AP 2021-1426 partially granting Appellee Samantha Melamed's appeal of PPD's partial denial of her July 14, 2021, Right to Know Law request (Request) to the extent it seeks nature of call information, odometer readings, mileage information, and information regarding delays encountered by the vehicle in a computer aided dispatch (CAD) report generated in connection with a June 7, 2021, 911 call. For the reasons discussed below, PPD's appeal should be granted.

II. STATEMENT OF JURISDICTION

Jurisdiction is proper pursuant to 65 P.S. § 67.1302(a).

III. STATEMENT OF QUESTIONS INVOLVED

1. Should the OOR's Final Determination be mooted in relevant part where PPD has no responsive records to the extent the Request seeks odometer readings, mileage information, and information regarding delays encountered by the vehicle in the requested computer aided dispatch report?

Suggested Answer: Yes.

2. Should the OOR's Final Determination be reversed in relevant part where the public disclosure of nature of call information in the requested computer aided dispatch report is exempt from disclosure pursuant to Section 708(b)(18) of the RTKL as it would reveal records pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel?

Suggested Answer: Yes.

3. Should the OOR's Final Determination be reversed in relevant part where the public disclosure of nature of call information in the requested computer aided dispatch report is exempt from disclosure pursuant to Section 708(b)(16) of the RTKL as it would reveal records pertaining to criminal investigations?

Suggested Answer: Yes.

IV. BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 14, 2021, the PPD received Ms. Melamed's Request pursuant to the Pennsylvania Right-To-Know Law, 65 P.S. § 67.101 *et seq.*, (RTKL), seeking:

The time response log, computer-aided dispatch report, and any other documents generated in connection with any 911 call on June 7 at or around 6:58 p.m. requesting assistance at 523 Burnham Rd., Philadelphia PA 19119.

Reproduced Record ("R.R.") at BL001.

On July 22, 2021, PPD sent Ms. Melamed its Final Response denying her Request in part and granting it part. R.R. at BL002-BL007. PPD granted the Request to the extent that it sought the time response log of the incident described in the request. *Id.* PPD provided responsive records with dispatch date and time, on scene date and time, and location of the incident described in Ms. Melamed's Request. R.R. at BL006-BL007. The remainder of Ms. Melamed's Request was denied, and records were redacted to the extent that they contained information exempt from disclosure under the RTKL.

On July 23, 2021, PPD received notice that Ms. Melamed had appealed its Final Response to the Pennsylvania Office of Open Records ("OOR"). R.R. at BL008-BL027. On September 9, 2021, PPD submitted its position statement, including the affidavit of Lieutenant Barry Jacobs, the Open Records Officer for PPD. R.R. at BL033-BL047.

On October 1, 2021, the OOR issued its Final Determination. R.R. at BL048-BL055.

The OOR partly granted Ms. Melamed’s Request, erroneously holding that the PPD had withheld “time response log information,” and ordering the PPD to disclose:

any withheld time response log information, including any withheld meter information regarding the responding vehicle, the basic type of incident response which was called for by dispatch, and any travel or delay information contained within the CAD Report which would help the Requester ascertain how effectively the emergency response was conducted.

R.R. at BL044. The OOR correctly held that the PPD “is permitted to redact information directly related to the contents and basis of the 911 call and radio conversations with emergency responders which is unrelated to time response evaluation.” *Id.* On October 29, 2021, PPD filed the instant timely appeal of the OOR’s Final Determination.

On July 18, 2022, this Court granted a joint motion to stay this matter pending the General Assembly’s disposition HB 2524 which explicitly defined the term “time response logs” in the RTKL, which is the crux of the dispute in this appeal. Order, Docket at 7/18/2022. The stay was lifted after the General Assembly concluded its most recent term without passing HB 2524. Order, Docket at 12/2/2022.

V. STANDARD OF REVIEW

“[U]nder the RTKL the . . . courts [of the Commonwealth] are the ultimate finders of fact and . . . are to conduct full *de novo* reviews of appeals from decisions made by RTKL appeals officers [at the OOR].” *Bowling v. Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013). “[T]he scope of review [for appeals of OOR Final Determinations] must . . . be ‘broad’ or plenary; indeed, as the [Commonwealth’s] courts serve as fact-finders, it would also follow that these courts must be able to expand the record . . . as needed to fulfill their statutory function.” *Id.* at

476. Moreover, a court exercising appellate jurisdiction when reviewing an OOR Final Determination is “not limited to the rationale offered in the OOR’s written decision.” *Id.* at 460.

VI. SUMMARY OF THE ARGUMENT

The OOR’s October 1, 2021, Final Determination should be reversed to the extent it requires the PPD to disclose records that (i) do not exist; (ii) are exempt from disclosure under Section 708(b)(18) of the RTKL, as they pertain to audio recordings, telephone or radio transmissions received by emergency dispatch personnel; and (iii) are exempt from disclosure under Pennsylvania Right to Know Law Section 708(b)(16) as records of a criminal investigation.

VII. ARGUMENT

Under the RTKL, local agencies are required to provide “public records” in response to written requests. 65 P.S. § 67.302(a). A record in the possession of a Commonwealth agency or a local agency shall be presumed to be a “public record”. 65 P.S. § 67.305(a) (emphasis added). The term “public record” is defined under the RTKL as a “record” of a local agency that “(1) is not exempt under Section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.” 65 P.S. § 67.102. The burden of proving the existence of privilege rests on the party asserting it while the burden of proving the application of a 708 (b) exception lies with the local agency. *See* 65 P.S. § 7.708 (a). While the Pennsylvania Supreme Court has held that “the objective of the RTKL ‘is to empower citizens by affording them access to information concerning the activities of their government[,]’” in so holding, the Court further “recognize[d] a legislative intent to shield numerous categories and subcategories of documents from disclosure in order to protect,

inter alia, the Commonwealth’s security interests and individuals’ privacy rights.” *Levy v. Senate of Pa.*, 65 A.3d 361, 381-82 (Pa. 2013).

In this appeal, Ms. Melamed seeks records that: (i) do not exist; (ii) are exempt from disclosure under Section 708(b)(18) of the RTKL, as they pertain to audio recordings, telephone or radio transmissions received by emergency dispatch personnel; and (iii) are exempt from disclosure under Pennsylvania Right to Know Law Section 708(b)(16) as records of a criminal investigation.

A. PPD Has No Records Responsive to the Request to the Extent it Seeks Odometer Readings, Mileage Information, and Information Regarding Delays Encountered by the Vehicle in the Requested Computer Aided Dispatch Report

PPD has no records responsive to the Request to the extent it seeks odometer readings, mileage information, and information regarding delays encountered by the vehicle in the requested computer aided dispatch report. It is not a denial of access under the Act if the records are not within the City’s possession and the City has no legal obligation to obtain them. *Cf. Jenkins v. Pennsylvania Dep’t of State*, O.O.R. Dkt. AP 2009-0065 (Pa. O.O.R. April 2, 2009). The Commonwealth Court has repeatedly held that “an agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. 2011). The language included in these affidavits that “[i]t is understood that this does not mean that additional records do not exist under another spelling, another name, or another classification” has been expressly approved by the Commonwealth Court. As the Court explained, “[t]he misfiling or misclassification of records is always a possibility. An agency is only required, however, to search for and provide the records which are requested. . . . It was not required to sift through all of its records in order to determine

if something under a different spelling or classification might possibly relate to [the] request.”
Hodges at 1193.

Lt. Barry Jacobs, PPD’s Open Records Officer, attests that he has reviewed the CAD Report responsive to Ms. Melamed’s Request and it contains no odometer readings, mileage information, or other information regarding delays encountered by the emergency response vehicle. *Motion of Appellant City of Philadelphia Police Department to Supplement the Record*, Exhibit A, Aff. of Lt. Barry Jacobs, Open Records Officer, City of Phila. Police Department (Ex. A), ¶ 2 (Jan. 11, 2022). This testimony from Lt. Jacobs establishes that no odometer readings, mileage information, or information regarding delays encountered by the emergency response vehicle are contained in the responsive CAD Report.

Because PPD does not have records responsive to the Request to the extent it seeks odometer readings, mileage information, and information regarding delays encountered by the vehicle in the requested computer aided dispatch report, the OOR’s Final Determination regarding these portions of Appellee’s Request must be rendered moot.

B. Nature of Call Information in the Requested Computer Aided Dispatch Report is Exempt from Disclosure Pursuant to Section 708(b)(18) of the RTKL as it Would Reveal Records Pertaining to Audio Recordings, Telephone or Radio Transmissions Received by Emergency Dispatch Personnel

Section 708(b)(18)(i) of the RTKL exempts from disclosure “records 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). In *County of York v. Pennsylvania Office of Open Records*, the Commonwealth Court interpreted the “time response log” exception in this provision. 13 A.3d 594, (Pa. Commw. Ct. 2011). It held that in order evaluate “the efficiency of each county’s emergency response to various 911

calls,” time response logs “must contain the time of the request for service, the address or cross-street information, and when the responder arrived at the scene.” *Id.* at 602. The Court reasoned that:

Without the address or cross-street information, there would be no way of knowing exactly how far the emergency responders had to travel in response to any given call and, therefore, no way of determining whether or not those response times were deficient.

Id.

Indeed, this interpretation appears to be consistent with the legislative intent of the drafters of this exemption of the RTKL. On February 11, 2008, during a colloquy regarding House Amendment No. 05848, the bill that would become the RTKL, the following exchange occurred between Representative Fairchild and Representative King, who introduced the amendment:

Mr. FAIRCHILD. [...] I notice the amendment did not take out the time response logs information, and for legislative intent, I visualize the time response logs as *a log of when a call comes into a 911 center, when action is taken and when it is complete*. Is that your interpretation, or what is your definition or intent as far as a time response log?

Mr. KING. Mr. Speaker, I would say that is a fair interpretation of legislative intent.

Mr. FAIRCHILD. Thank you. Then just to solidify here, it is not the incident log itself, which has all the detailed information of a caller—the address, the telephone number, the date of birth, all that stuff?

Mr. KING. Mr. Speaker, that is correct.

See Cnty. of York v. Pennsylvania Off. of Open Recs., 13 A.3d 594, 601 (Pa. Commw. Ct. 2011) (citing House Legislative Journal, February 11, 2008)(emphasis added).

In the instant matter, PPD provided the “time response log” information described in *County of York*, namely dispatch date and time, on scene date and time, and location of the incident described in Ms. Melamed’s request. R.R. at BL006-BL007. PPD redacted all other information

from the responsive CAD Report in accordance with Section 708(b)(18) of the RTKL. As Lieutenant Jacobs attested, the redacted portions of the CAD report contained a synopsis of the information that a 911 caller gave to an emergency telecommunicator. R.R. BL039-BL040. This information plainly pertains “to audio recordings, telephone or radio transmissions received by emergency dispatch personnel” and is exempt under the RTKL. 65 P.S. § 67.708(b)(18). Further, as Lt. Barry Jacobs attests, CAD reports are created by using a computerized system that allows each telecommunicator who is talking on the telephone with an emergency caller, or talking on the radio system with a PPD officer, to type in small central concepts related to the response that the emergency telecommunicator received from the telephone call, or through talking on the radio with emergency responders. R.R. at BL039-040. The notes in CAD Report are typed in to allow the emergency telecommunicator to maintain a shorthand synopsis of the information that he or she received, and related actions he or she has taken. *Id.*

The CAD Report responsive to Ms. Melamed’s Request contains comments typed into the computerized system by the emergency telecommunicator as part of the 911 Center receipt of the telephone calls for that emergency, and radio communications made with emergency responders. *Id.* All typed comments in the CAD Report are comprised of information received from one of the callers or emergency responders, which is directly related to the calls or radio communications. *Id.*

Despite PPD providing a time response log as defined in *York County* and redacted in accordance with Section 708(b)(18) of the RTKL, the OOR incorrectly held that the PPD improperly withheld certain information that it considered to be time response log information. R.R. at BL054. Specifically, the OOR ordered PPD to disclose: (1) “the basic type of incident response which was called for by dispatch”; (2) “meter information regarding the responding

vehicle”; and (3) “any travel or delay information contained within the CAD Report which would help the Requester ascertain how effectively the emergency response was conducted.” *Id.*

In coming to this conclusion, the OOR relied on its own unwarranted expansion of the terms of Section 708(b)(18) in its previous decisions. *See Carter Walker and The LPN Media Group, Inc. v. Lancaster County District Attorney’s Office*, OOR Dkt. AP 2021-0448 (March 23, 2021). Without any basis in the language of the statute or the holding in *York County*, the OOR in *Carter Walker* held that the “nature of the call”, or basic type of incident giving rise to a 911 call, must be disclosed pursuant to the “time response log” language in Section 708(b)(18). *Id.* Similarly, the OOR has expanded the terms of 708(b)(18) to require disclosure of odometer readings and “information regarding delays encountered by the vehicle and the type of incident for which the dispatch was made must be provided.” *Sapp v. Phila. Fire Dep’t.*, OOR Dkt. AP 2021-1051 (September 13, 2021)¹.

The OOR’s expansion of the definition of time response log is contrary to basic principles of statutory construction, as it is unsupported by the plain language of the RTKL. “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.”¹ Pa.C.S. § 1921(a). “The best indication of legislative intent is the plain language of the statute.” *Commonwealth v. Humphrey*, 283 A.3d 275, 289 (Pa. 2022). Moreover, “it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.” *Commonwealth v. Small*, 238 A.3d 1267, 1284 (Pa. 2020). If the General Assembly had intended to include the nature of a 911 call in the information

¹ Notably, on March 10, 2022, this Court vacated the OOR’s holding in *Sapp v. Phila. Fire Dep’t.*, OOR Dkt. AP 2021-1051 (September 13, 2021). *City of Phila. Fire Dep’t v. Sapp*, October Term 2021 No. 211000638 (March 10, 2022).

excluded from the Section 708(b)(18) exemption, then it would have included this language in the statute. The OOR's addition of these terms to Section 708(b)(18) is therefore unwarranted.

Further, the OOR's expansion of the terms of Section 708(b)(18) is not supported by the Commonwealth Court in *York County*. In that case, the Commonwealth Court held that the disclosures necessary to allow the public to evaluate the efficiency of emergency responders is "the time of the request for service, the address or cross-street information, and when the responder arrived at the scene." 13 A.3d at 602. The OOR provides no good reason why the nature of the call is related to the response time of emergency responders or why its disclosure is necessary for the scrutiny of emergency responders.

The OOR's final decision orders the release of information that is related to a 911 call and is outside the scope of the Commonwealth Court's definition of a time response log. This information is therefore exempt from disclosure under Section 708(b)(18) of the RTKL, and the OOR's decision should be reversed to the extent it orders PPD to publicly disclose nature of call information in the responsive CAD Report.

C. Nature of Call Information in the Requested Computer Aided Dispatch Report is Exempt from Disclosure Pursuant to Section 708(b)(16) of the RTKL as it Would Reveal Records Pertaining to a Criminal Investigation

Section 708(b)(16) of the RTKL exempts a "record of an agency relating to or resulting in a criminal investigation" explicitly exempting from disclosure "investigative materials [. . .] and reports." 65 P.S. § 67.708(b)(16)(ii). As the Commonwealth Court has plainly stated, "[t]he types of records that we have held protected from RTKL disclosure under Section 708(b)(16) and CHRIA as investigative are records created to report on a criminal investigation or set forth or document evidence in a criminal investigation or steps carried out in a criminal investigation." *Pa. State Police v. Grove*, 119 A.3d 1102, 1108 (Pa. Commw. 2015); *Pa. State Police v. Off. of*

Open Records, 5 A.3d 473, 479 (Pa. Commw. 2010) (holding police incident reports to be exempt from disclosure pursuant to Section 708(b)(16)); *Mitchell v. Off. of Open Records*, 997 A.2d 1262, 1266 (Pa. Commw. 2010) (holding information pertaining to the execution of search warrant to be exempt from disclosure pursuant to Section 708(b)(16)). Importantly, the Section 708(b)(16) exemption does not require the filing of criminal charges or the prosecution of suspects. “The fact that an investigation does not result in the filing of criminal charges does not alter the fact that the records were compiled during what the [Pennsylvania State Police] deemed to be a criminal investigation.” *Zahradnik v. Pa. State Police*, OOR Dkt. AP 2011- 0906 (Pa. OOR Jul. 26, 2011).

As Lt. Jacobs attests, PPD conducted a criminal investigation into a potential criminal event at 523 Burnham Road on June 7, 2021, around 6:58 p.m. R.R. at BL039-040. As part of its investigation, PPD responded to the scene of the potential criminal event, collected information from witnesses regarding the potential criminal event, assessed the offender in the potential criminal event, and assessed the danger level for bystanders near the potential criminal event. *Id.* PPD corresponded with an emergency telecommunicator and described those investigatory findings so that the emergency telecommunicator could capture those criminal investigatory findings in the responsive CAD Report. *Id.* Finally, Lt. Jacobs attests, disclosing copies of the responsive CAD Report would reveal PPD’s criminal investigation into the potential criminal event at issue in the responsive CAD Report. *Id.*

As PPD publicly disclosing nature of call in the responsive CAD Report would reveal criminal investigatory information, the OOR’s Final Determination must be reversed.

VIII. CONCLUSION – RELIEF REQUESTED

For the foregoing reasons, the instant appeal should be granted and the OOR’s underlying Final Determination should be reversed to the extent it orders PPD to publicly disclose nature of call in the responsive Computer Aided Dispatch (“CAD”) Report and mooted to the extent it orders PPD to provide odometer readings, mileage information, and information regarding delays encountered by the vehicle in the responsive CAD Report.

Respectfully Submitted,

/s/ Russell T. Crotts
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Dated: January 11, 2023

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CERTIFICATE OF SERVICE

I, Russell Crotts, hereby certify that on January 11, 2023, a true and correct copy of the foregoing BRIEF OF APPELLANT CITY OF PHILADELPHIA IN SUPPORT OF APPEAL FROM DETERMINATION OF OFFICE OF OPEN RECORDS in the above-captioned matter was served upon the persons below via the Court’s ECF Filing System.

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Respectfully,

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