



FINAL DETERMINATION

IN THE MATTER OF

**KRYSTEN LLOYD,
Requester**

v.

**PENNSYLVANIA GAME COMMISSION,
Respondent**

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Docket No: AP 2020-1964

INTRODUCTION

Krysten Lloyd (“Requester”), a representative of Nationwide Insurance, submitted a request (“Request”) to the Pennsylvania Game Commission (“Commission”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking reports regarding a hunting incident. The Commission denied the Request, arguing, among other things, that the report(s) relate(s) to a criminal or 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 Commission is not required to take any further action.

FACTUAL BACKGROUND

On September 10, 2020, the Request was filed, seeking any reports “regarding a hunting incident that happened on 10/29/2019 in Mount Pleasant Hills PA.”¹ On September 17, 2020, the

¹ The Request also identifies the individual insured by Nationwide Insurance, as well as the individual who was shot during the incident.

Commission denied the Request, arguing that the requested incident report relates to a criminal or noncriminal investigation, 65 P.S. §§ 67.708(b)(16)-(17).

On September 30, 2020, 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 Commission to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 8, 2020, the Commission submitted a position statement reiterating its grounds for denial and further arguing that the report is protected by the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S. §§ 9101 *et seq.* The Commission also submitted an affidavit, made under the penalty of perjury, from Richard Danley, State Game Warden and Law Enforcement Supervisor for the Southcentral Region of the Commission, who, in addition to making his own assertions, attests to the veracity of the factual statements made in the Commission’s position statement. The Requester did not submit any additional information during the appeal.

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” 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 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.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Commission 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 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 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)(1). 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 *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

As a preliminary matter, the Requester asserts in a statement attached to her appeal form that she is “requesting specific documents related to this incident to assist Nationwide with the investigation. Please provide any statements from the parties involved, photographs and diagrams.” However, to the extent these items exist independently of the incident report, they were not explicitly sought in the Request. As noted by the Commission, “[o]nce a RTKL request is submitted, the requester may not expand or modify the request on appeal.” *McKelvey v. Office of Atty. Gen.*, 172 A.3d 122, 125 (Pa. Commw. Ct. 2017) (citing *Smith Butz, LLC v. Pa. Dep’t of Env’tl. Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016)). Therefore, the OOR must consider the Request as written, and will not address the availability of records other than the report(s) originally sought in the Request.

The Commission denied access to the requested incident report pursuant to Section 708(b)(16) of the RTKL, which exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation, including: ... investigative materials, notes, correspondence and reports” and “[a] record that, if disclosed, would ... reveal the institution, progress, or result of a criminal investigation....” 65 P.S. §§ 67.708(b)(16)(ii), (vi)(A) (emphasis added). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or official probe” was conducted regarding a criminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010).

In support of its position, the Commission provides the affidavit of Mr. Danley, who attests as follows:

It is the statutory duty of the [Commission] to protect, manage, and preserve the game and wildlife of the Commonwealth and to enforce the laws of the Commonwealth relating to game and wildlife. The Pennsylvania Game and Wildlife Code authorizes [Wildlife Conservation Officers (“WCOs”)] to enforce the game and wildlife laws and to arrest any person who has violated any provision of the Game and Wildlife Code. Convictions for violations of the Game and Wildlife Code carry criminal penalties, including the imposition of fines, costs, and/or imprisonment.

The [Commission] generates, maintains, and receives various records in furtherance of its criminal investigative duties, including incident reports. The requested incident report was generated and maintained by the [Commission] in regard to a report of a hunter related shooting in West Perry Township, Snyder County, Pennsylvania.

I reviewed the request for records, dated September 10, 2020; the [Commission]’s response, dated September 17, 2020; and, the Memorandum of Law, dated October 9, 2020.² I find Ms. Liskey’s statements in response to the [R]equest and in the appeal to be accurate.

Furthermore, the Commission states, in its verified position statement, that “[t]he record consists of information assembled as a result of the performance of [the Commission]’s official inquiry and was created only as part of [the Commission]’s investigation of a crime” and “contains investigative material, including: facts relating to the criminal episode; and, generally, facts concerning [the] incident and its compliance with applicable law and the involvement of [Commission] State Game Warden’s in the investigation into the alleged violations.” Finally, the Commission affirms that “this record, which was authored or received by sworn law enforcement personnel, is used in furtherance of the investigation and in any subsequent criminal prosecution and/or administrative proceedings brought under the Game and Wildlife Code.”³

² Mr. Danley’s reference to a Memorandum of Law dated October 9, 2020 appears to be a typographical error as the Commission’s submission is dated and was submitted on October 8, 2020.

³ Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Commission acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The OOR has previously held that the Commission and its WCOs conduct criminal investigations. *Shearer v. Pa. Game Comm'n*, OOR Dkt. AP 2020-0547, 2020 PA O.O.R.D. LEXIS 2187; *Higgins v. Pa. Game Comm'n*, OOR Dkt. AP 2016-0731, 2016 PA O.O.R.D. LEXIS 734; *see also* 34 Pa.C.S. § 322. Additionally, Mr. Danley attests that the requested incident report was generated as a result of an allegation of a hunter-related shooting in Snyder County, Pennsylvania. Therefore, based upon the evidence provided, and because the Request expressly seeks an incident report concerning an alleged criminal incident, the Commission has proven that the report is exempt from disclosure under Section 708(b)(16). 65 P.S. § 67.708(a)(1); *see also Pa. Game Comm'n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Commission 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. 65 P.S. § 67.1303. 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: 28 October 2020

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: Krysten Lloyd (via email only);
Melissa Liskey, AORO (via email only)