



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**JASON ULLMAN,  
Requester**

**v.**

**PENNSYLVANIA STATE POLICE,  
Respondent**

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**Docket No.: AP 2021-0806**

### **INTRODUCTION**

Jason Ullman, Esq. (“Requester”) submitted a request (“Request”) to the Pennsylvania State Police (“PSP”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to two identified individuals. The PSP denied the Request, asserting that certain records do not exist and other records relate to a criminal investigation. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the PSP is required to take further action as directed.

### **FACTUAL BACKGROUND**

On February 19, 2021, the Request was filed, seeking “all records ... that contain, reference, or mention ... Anthony Bullock [and] Joseph McAlister....” The Request also provided the dates of birth for the two names individuals. On February 26, 2021, the PSP invoked a thirty-day extension during which to respond to the Request. *See* 65 P.S. § 67.902. On March 29, 2021,

the PSP partially denied the Request, stating that it does not possess any responsive records with respect to Anthony Bullock (“Mr. Bullock”) and asserting the responsive records regarding Joseph McAlister (“Mr. McAlister”) relate to a criminal investigation, 65 P.S. § 67.708(b)(16), and are confidential under the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S. §§ 9101-9183. In support, the PSP also included the sworn verification of Rachel Zeltmann (“Ms. Zeltmann”), the PSP’s Deputy Open Records Officer.

On April 19, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> Specifically, the Requester contends that the PSP failed to prove that no records exist with respect to Mr. Bullock and that blotter information regarding Mr. McAlister is subject to public access. The OOR invited both parties to supplement the record and directed the PSP to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On May 10, 2021, the Requester submitted a sworn position statement, arguing that the PSP did not conduct a thorough search for responsive records. The Requester also maintains that police blotters and incident logs “must be disclosed.” On the same day, the PSP submitted its position statement reiterating its grounds for denial. In support, the PSP provided the sworn verification of William Rozier (“Mr. Rozier”), the PSP’s Open Records Officer.

## **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

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<sup>1</sup> In the appeal, the Requester granted the OOR an additional thirty days to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1).

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.* Here, the Requester sought a hearing and an *in camera* review of the responsive records. However, those requests are respectfully denied.

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 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

### **1. The PSP has proven that certain records relate to a criminal investigation**

The PSP argues that the records it has in its possession relating to Mr. McAlister are exempt from public disclosure because they relate to a criminal investigation. Specifically, the PSP maintains that it located two incident reports regarding Mr. McAlister that were “assembled as a result of an investigation into a criminal incident or an allegation of criminal wrongdoing and contain[] investigative information.” Section 708(b)(16) of the RTKL exempts from disclosure “[i]nvestigative materials, notes, correspondence, videos and reports[,]” as well as “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).

In support of the PSP’s argument, Ms. Zeltmann verifies that upon conducting a search, the PSP located “two responsive records: PSP Incident Report Nos. R01-321681 and R01-321682.” Ms. Zeltmann further verifies that both incident reports were “assembled by Troopers as a result of an investigation into a criminal incident or an alleged criminal wrongdoing.” Ms. Zeltmann verifies that she “personally examined these incident reports and found them to be manifestly related to a criminal investigation” and, based on their content, their disclosure would reveal the institution, progress or result of a criminal investigation. Ms. Zeltmann further verifies that the reports “reflect the findings and conclusions, as well as the actions, observations and notes of investigating troopers,” and do not “comprise[] original records of entry, a chronology of arrests, the identification of arrested individuals, the specification of criminal charges or any other

‘information in a police blotter as defined in 18 Pa.C.S § 9102.’” Mr. Rozier provided a similar verification.

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. *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 PSP acted in bad faith, “the averments in [the statements] 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)). Further, the OOR has consistently held that criminal investigative reports and files are exempt under Section 708(b)(16) of the RTKL. *See Teoli v. Pa. State Police*, OOR Dkt. AP 2020-2069, 2020 PA O.O.R.D. 3020 (determining that the burglary investigation report is exempt from public disclosure because it relates to a criminal investigation); *Roselli v. Pa. State Police*, OOR Dkt. AP 2020-0347, 2020 PA O.O.R.D. LEXIS 1895 (determining that a Homicide Investigation Report is exempt from public disclosure because it relates to a criminal investigation); *see also Pa. State Police v. Office of Open Records*, 5 A.3d 473, 477 (Pa. Commw. Ct. 2010) (concluding that an incident report regarding a criminal matter “is wholly exempt from disclosure because it is a criminal investigative record, which contains investigative materials and victim information”). Accordingly, the PSP has proven that both incident reports are exempt from public access because they relate to a criminal investigation.<sup>2</sup> *See* 65 P.S. § 67.708(a)(1).

## **2. The PSP has failed to prove that additional responsive records do not exist**

The PSP argues that there are no records pertaining to Mr. Bullock within the PSP’s possession, custody or control. In support, Mr. Rozier verifies that he “searched all [PSP]

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<sup>2</sup> Because we have determined that the records are exempt from disclosure under Section 708(b)(16) of the RTKL, we need not address the PSP’s claims that the records are also exempt under CHRIA.

databases to which [PSP's RTK Office] has access for evidence of any PSP records that may respond to the [R]equest." Additionally, Ms. Zeltmann verifies that the PSP "conducted a diligent search of [its] records based on the information provided...." The PSP thus contends that based on the searches conducted, it does not possess any records relating to Mr. Bullock.

The Requester, in turn, asserts that the PSP "has not carried its burden of proving it conducted a legally appropriate search of all of its records." In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort," in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

*Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

In this instance, Ms. Zeltmann and Mr. Rozier both verify that a search was conducted by the PSP RTK Office of “all Department databases to which it has access ....” However, the PSP’s evidence does not provide any details regarding the search, such as, for example, any search terms used. In addition, no evidence has been presented to demonstrate that any paper records were searched or whether other offices within the PSP, other than the PSP RTK office, were contacted for the purposes of searching records. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search has been conducted by an agency when it “contact[ed] the Bureau most likely to possess responsive records,... explain[ing] why that Bureau is most likely to possess those records.” *Moore v. Pa. Dep’t of Corr.*, No. 1638 C.D. 2017, 2017 Pa. Commw. Unpub. LEXIS 704 (finding that the agency’s evidence lacked sufficient detail “[t]o support [its] conclusion that ‘no responsive records exist within the [agency’s] custody, possession or control...”).

As pointed out by the Requester, certain records are excepted from the Section 708(b)(16) exemption, such as a record documenting the “filing of criminal charges,” and “police blotter information as defined in 18 Pa. C.S. § 9102.” *See* 65 P.S. § 67.708(b)(16)(vi). Moreover, financial information and aggregated data that is contained in the responsive record may be subject to disclosure under Sections 708(c) and (d) of the RTKL. *See* 65 P.S. §§ 67.708(c), (d). The evidence presented by the PSP does not demonstrate that, other than the “databases” to which the RTK office has access, a search was conducted that may uncover other responsive public records.

Accordingly, the PSP has not proven that a good faith search was conducted and that additional responsive records do not exist within its possession, custody or control that may be subject to disclosure in full or in redacted form.<sup>3</sup> *See Hodges*, 29 A.3d at 1192; 65 P.S. § 67.708(a); *Ullman v. Pa. State Police*, OOR Dkt. AP 2021-0749, 2021 PA O.O.R.D. LEXIS 1022.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the PSP is required to conduct a good faith search and provide any additional responsive public records within thirty days. 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.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: June 22, 2021**

*/s/ Magdalene C. Zeppos-Brown*

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<sup>3</sup> The OOR is mindful that an agency "shall not be required to create a record which does not currently exist...." 65 P.S. § 67.705. However, agencies have the burden of proving that a record does not exist, *Hodges*, 29 A.3d at 1192, and the PSP has not met its burden of proof.

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