



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>STEPHEN GIBBONS,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2017-2065</b>
	:	
<b>PENNSYLVANIA STATE POLICE,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Stephen Gibbons (“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 an investigative report. The PSP denied the Request, arguing that the information was related 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 **denied**, and the PSP is not required to take any further action.

**FACTUAL BACKGROUND**

On September 18, 2017, the Request was filed, seeking a copy of a PSP Trooper’s investigative report in an identified case number. On October 25, 2017, after taking a thirty-day extension to respond, 65 P.S. § 67.902(b), the PSP denied the Request, arguing that the record was exempt from public disclosure because it was related to a criminal investigation. 65 P.S. § 67.708(b)(16). In support of this argument, the PSP submitted the verification of Lissa Ferguson,

the PSP's Deputy Agency Open Records Officer, who attested that the report was an incident report assembled by a PSP Trooper as the result of an investigation into a criminal incident.

On November 6, 2017, the Requester appealed to the OOR, arguing that he had been informed by the PSP previously that the incident in which trees were stolen from his father's property would not be investigated as a criminal offense because it was possible that his brother had taken them. 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 November 17, 2017, the PSP submitted the affidavit of William Rozier, the PSP's Agency Open Records Officer, who attested that the responsive record is an incident report compiled by a PSP Trooper while investigating a complaint of theft, and reflects the findings, conclusions, actions and observations of the investigating PSP Trooper. In his affidavit, Mr. Rozier argues that the incident report relates to a criminal investigation, 65 P.S. § 67.708(b)(16), and is confidential under the Criminal History Record Information Act ("CHRIA"), 18 Pa.C.S. §§ 9101 *et seq.*

### **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, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The PSP 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 places the burden of proof on the public body 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)).

The PSP argues that the incident report is exempt from public disclosure because it relates to a criminal investigation. *See* 65 P.S. § 67.708(b)(16). Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation, including: ... [c]omplaints of potential criminal conduct other than a private criminal complaint”; “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)(i)-(ii), (vi)(A). 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 this argument, the PSP submitted the affidavit of William Rozier, the PSP's Agency Open Records Officer, who attests that the incident report was assembled by a PSP Trooper investigating a complaint of theft, and reflects the investigating PSP Trooper's actions, observations, and notes. Finally, Mr. Rozier attests that the incident report does not include “any information contained in a police blotter.” 65 P.S. § 67.708(b)(16). Under the RTKL, a sworn affidavit or 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).

According to the Requester's unsworn statement, the incident in question involved the investigation of the theft of trees from a property. However, in the absence of any competent evidence that the PSP 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)). Based upon the evidence provided, the PSP has established that the reports are related to a criminal investigation conducted by the PSP. *See Hunsicker v. Pa. State Police*, 93 A.3d 911 (Pa. Commw. Ct. 2014) (finding that incident reports are considered investigative materials and the entire report is exempt). Therefore, the PSP has met its burden of proving that the records are exempt from disclosure under the RTKL.<sup>1</sup> *See* 65 P.S. § 67.708(a)(1).

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<sup>1</sup> Because the OOR concludes that the investigative report is exempt under Section 708(b)(16) of the RTKL, it need not address whether the report is also confidential under CHRIA.

## CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the PSP 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 6, 2017**

*/s/ Jordan Davis*

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APPEALS OFFICER  
JORDAN C. DAVIS

Sent to: Stephen Gibbons (via e-mail only);  
William Rozier (via e-mail only);  
Nolan Meeks, Esq. (via e-mail only)

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<sup>2</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).