



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JOHN MILLER,
Requester**

v.

**PENNSYLVANIA STATE POLICE,
Respondent**

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Docket No: AP 2022-1176

On April 5, 2022, John Miller (“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.*, stating:

Subject: Right to Know Law request related to attempts to stand on the 1st amendment and 4th amendment and violations thereof. Location Atglen PA, 3/14/2022 - 3/30/2022[.]

Incident report by Trooper Kochka in 3/14/2022 emergency stop of vehicle on the corner of Highland and Lenover [R]oad in late afternoon.

I am requesting the following information:

1. Any communication through dispatch, text, phone conversation or other means, as to the nature of a “suspicious vehicle” and the probable cause statement for the detainment. (I don’t think one will exist)
2. Any video recording (officer worn camera, dash camera)
3. Any documentation regarding the incident, and subsequent communication relative to the identity, of the individual (myself), to any entity, organization. Such as School Administrator, School Principal. School Board Member, or any public, servant or private citizen or any state, county, or federal agency). This would be inclusive of any documentation related to the incident and the relay

of the identity of the driver within the following date range:[] from 3/14 - 3/30. Any communication would be phone calls (personal or department device), emails, text communications.

4. The names, ranks, direct supervisors name, verification of MOPTC certification through providing appropriate accreditation, serial #, or other verification for a citizen to confirm the officer(s) were legitimate officers or not.
5. I am requesting the names of all individuals, badge numbers and their direct reports who were involved in the emergency stop.
6. I am requesting a copy of any incident report beginning with the reporting party and documented statements by the reporting party.

On a separate matter: dated 3/21/2022 Officer Kochka, McIntosh?, and other un-uniformed officer on scene, time range (from time of communicating with any school board member or public employee up to current relative to my name (John Miller or reference to) continuing communication up to 3/28

Trooper Kochka, and I believe, officer McIntosh, demanded that I leave a public school board meeting or be charged with defiant trespass. I am requesting the following information from that encounter.

7. Any communication between any Troop J or Pennsylvania State Troopers and any individual on the Octorara School Board, or any public servant capacity serving Octorara School District. This would be vi[a], text, phone recording, email regardless if on personal property that identifies the criminal actions to validate a lawful trespass demand. Any communication via text, email, phone call (personal or department devise). This would be inclusive of any photographic or video communication.
8. Any camera footage (body camera, dash camera, etc) that would have captured the interaction between Trooper Kochka, Trooper McIntosh and other un-uniformed officer representing law enforcement.
9. Copy of Probable Cause Affidavit that John Miller committed a crime, a crime was in progress or a crime occur[r]ed to be demanded to leave public property and that if I didn't leave property, I would be arrested for defiant trespass.
10. Copy of evidence that I was "asked" to leave the property, and the lawful basis to call Troopers to have me removed by the reporting party, or documented by PSP. I will require a copy of the reporting party's statement to Troopers which they acted upon to threaten and intimidate, coerce and put me in duress, to leave the property.
11. I am requesting the names of all individuals who interacted with me on 3/21/2022 at Octorara School entrance.
12. I am also inquiring to the process/policy for a State Trooper to affect a private person[s]'s arrest. Copy of policy whereby a citizen can file a claim for dereliction of duty.
13. Copie[s] of any communication received by RobertSmithPA@protonmail, where they were sent, and any communication related to the subject matters

- contained in those emails, the email sender, and association to actions, discussions, communication about John Miller from 3/14 - 3/28.
14. Evidence or law, that Trooper's claims a citizen must obtain permission of the School Board to advocate on behalf of parents/clients within the school district. I couldn't find this law.
 15. Please also provide the name of contact for internal investigations department and appropriate documents to request an investigation.
 16. All communication regarding the topic of Octorara School, RobertSMithPA@protonmail.com and identity of RobertSMithPA@protonmail.com subsequent to the RTKL response sent to RobertSmithPA@protonmail.com dated 3/30/2022 (PSP/RTKL No 2022-0293)
 17. Please provide confirmation or read receipt, or reply to all individuals named in the To: Area, contained in the RTKL Response:
From: Sassa, David M. <dsassa@chesco.org>
Sent: Tuesday, February 22, 2022, 10:52
cc: Goggin, Thomas J; Dougherty, Robert J.
Subject: RE: School District Complaint

This document also serves as a notice to preserve all existing and future records, regarding communication about John Miller, and RobertSmithPA@protonmail.com

On May 12, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the PSP partially denied the Request. The PSP provided information responsive to Item 5, records responsive to Item 12 and directed the Requester to its publicly available website for the contact information sought in Item 15. The PSP denied Item 2, seeking video, citing to Act 22 of 2017, regarding the proper procedure to access dash camera videos. The PSP also asserted that records responsive to portions of Items 1 and 3, and Items 5-6, and 10 are exempt noncriminal investigative records, contain personal identification information and are exempt 911 records, 65 P.S. §§ 67.708(b)(6), (17)-(18). Finally, the PSP asserted that no records responsive to portions of portions of Items 1, 3 and Items 4, 7-9, 11, 13-14, 16-17 exist in its possession custody or control.

On May 13, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ The Requester does not challenge the sufficiency of records or information that was provided. 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. 65 P.S. § 67.1101(c).

On May 25, 2022, the PSP submitted a position statement reiterating its grounds for denial. In support of its position, the PSP submitted the affidavit of William Rozier, the PSP’s Open Records Officer. The PSP also relies upon the statement made under the penalty of perjury of Rachel Zeltmann, the PSP’s Deputy Open Records Officer, provided with its final response.

1. The OOR does not have jurisdiction concerning a portion of Item 2

The PSP denied the portion of Item 2 of the Request seeking dash camera footage arguing that the RTKL does not apply to audio or video recordings made by a law enforcement agency, and the Request was not made in compliance with 42 Pa.C.S. §§ 67A03-67A05.

Act 22 of 2017, 42 Pa.C.S. §§ 67A02-67A03, removed audio and video recordings made by law enforcement agencies from access under the RTKL and created a separate, exclusive means of access. To obtain such recordings, a requester must follow the procedures set forth in Act 22 and submit a written request to the open records officer for the law enforcement agency that possesses the record. 42 Pa.C.S. § 67A02. A “[l]aw enforcement agency” includes “an agency that employs a law enforcement officer.” 42 Pa.C.S. § 67A01. A “law enforcement officer” is defined to include an “officer of ... the Commonwealth ... who is empowered by law to conduct investigations [and] make arrests [.]” *Id.*

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

Here, Item 2 of the Request was made pursuant to the RTKL; however, the Requester seeks audio and video recordings made by the PSP, which employs law enforcement officers and, thus, is a law enforcement agency as defined by Act 22. Accordingly, Item 2 of the Request should have been submitted pursuant to Act 22, and the OOR lacks jurisdiction to consider the appeal as to this Item.²

2. The PSP demonstrated that records responsive to certain Items do not exist within its possession, custody or control

The PSP argues that records responsive to a portion of Item 2 and Item 8 do not exist because the PSP does not utilize body camera equipment. In support, Mr. Rozier attests:

13. [I]n response to the request for...officer worn camera,” in item 2...and item...8... PSP does not utilize body cameras.

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). In the absence of any evidence that the PSP has acted in bad faith or that the records exist, “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)). Accordingly, based on the evidence presented, the PSP demonstrated that it does not utilize body camera equipment and, thus, records responsive to Items 2 and 8 do not exist within its possession, custody or control. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

² If a request under Act 22 of 2017 is denied, the requester may petition the local court of common pleas for judicial review. 42 Pa.C.S. § 67A06. Act 22 of 2017 has very different appeal procedures from the RTKL, with strict time constraints. The OOR has created a summary of the requirements and procedures to appeal under Act 22, which can be found at <https://www.openrecords.pa.gov/RTKL/PoliceRecordings.cfm>.

The PSP also asserts that no records responsive to the portion of Item 1 seeking “[a]ny communication through...text...[and] the probable cause statement for the detainment;” the portion of Item 3 seeking “emails, text communications,” and Items 4, 7, 8, 11, 13, 14, 15 and 17 exist in its possession custody or control. Mr. Rozier affirms that Troop J-Avondale was contacted and they conducted a comprehensive search for records without no results. Further, PSP troopers are not MPOETC certified. Accordingly, based on the evidence presented, the PSP demonstrated that it does not possess records responsive to portions of Items 1, 2 and 3, and Items 4, 7, 8, 11, 13, 14, 15, and 17.

3. The PSP has demonstrated that some records are exempt under the RTKL

a. Some records are exempt noncriminal investigative records

Mr. Rozier affirms that General Offense Report Nos. PA 2022-316117 and PA 2022-351661 and PSP Hard Call Hardcopy reports pertaining to PSP incident numbers CP 2022-316117 and CP 2022-351661 are responsive to

...the request for “[a]ny communication through dispatch” as to the nature of a “suspicious vehicle” in item 1, the request for “Any documentation regarding the incident, and subsequent communication relative to the identity, of the individual (myself), to any entity, organization. Such as School Administrator, School Principal. School Board Member, or any public servant or private citizen or any state, county, or federal agency). This would be inclusive of any documentation related to the incident and the relay of the identity of the driver within the following date range:. from 3/14 - 3/30,” in item 3, the request for “their direct reports,” in item 5, and items 6 and 10....

The PSP asserts that these records are exempt noncriminal investigative records. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[c]omplaints submitted to an agency, [i]nvestigative materials, notes, correspondence and reports” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17)(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 an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t 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. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

Mr. Rozier affirms that he examined the reports and determined they were created to document the result of actions taken by troopers during the course of a noncriminal investigation. Furthermore, the Requester specifically seeks an incident report related to a vehicle stop and records related to an incident at a school board meeting.

The OOR has previously found that PSP Call Hardcopy Reports may be exempt from disclosure under Section 708(b)(17) of the RTKL if the PSP “establish[es] that the report was created in response to a request for [] assistance and contains notes and other information related to the incident and PSP's response thereto[.]” *See Garland v. Pa. State Police*, OOR Dkt. AP 2017-1469, 2017 PA O.O.R.D. LEXIS 1257. Although the OOR does not require detailed evidence regarding these investigations, failure to link a PSP Call Hardcopy Report to an investigation will compel the OOR to grant access to the record. *See Luu v. Pa. State Police*, OOR Dkt. AP 2017-1700, 2017 PA O.O.R.D. LEXIS 1643; *Grove v. Pa. State Police*, OOR Dkt. AP 2020-0116, 2020 PA O.O.R.D. LEXIS 539. Here, the PSP’s final response and appeal submission included

evidence that the responsive reports were created by PSP Troopers in response to complaints received by the PSP, and contain the notes and actions taken by the Troopers in furtherance of the PSP's investigations. Furthermore, the Requester specifically seeks records related to a vehicle stop and an incident at a school board meeting. *See 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). Therefore, the PSP has demonstrated that the responsive hardcopy reports are exempt under Section 708(b)(17) of the RTKL. See 65 P.S. § 67.708(a)(1).

Similar to the hardcopy reports, the remaining General Offense Reports (formerly general assignment reports) are also exempt from disclosure under the RTKL. Those reports, according to PSP, documented investigations into complaints in which Troopers determined that no criminal activity had occurred. According to Mr. Rozier, these reports were created to document the result of actions taken by Troopers throughout the course of their non-criminal investigation.” Ms. Zeltmann, upon her review, also determined that the reports at issue were created to document the results of actions taken by Troopers throughout the course of their non-criminal investigations. Accordingly, the PSP has demonstrated, by a preponderance of the evidence, that PSP General Offense Reports Nos. PA 2021-32738, PA 2020-1768502, PA 2020-1770895, PA 2020-1531659, PA 2020- 1456767, PA 2020-1476213, PA 2020-1128188, PA 2020- 1095145 and PA 2019-1672220 relate to a noncriminal investigation and are exempt from access under the RTKL. See 65 P.S. § 67.708(a)(1); *see also, e.g., Mayer v. Pa. State Police*, OOR Dkt. AP 2021-0003, 2021 PA O.O.R.D. LEXIS 352; *Cobb v. Pa. State Police*, OOR Dkt. AP 2016-2044, 2017 PA O.O.R.D. LEXIS 40 (each finding the PSP's General Offense Report is exempt from disclosure because it relates to a noncriminal investigation).

b. Some records are exempt emergency dispatch records

Finally, in response to the portion of Item 1 seeking “[a]ny communication through...phone conversation” as to the nature of a “suspicious vehicle,” and the portion of Item 3 seeking “[a]ny communication would be phone calls,” the PSP asserts that the responsive records are exempt from public disclosure as “records or parts of records ... pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.” 65 P.S. § 67.708(b)(18)(i). Mr. Rozier affirms:

In response to the request for “[a]ny communication through” “phone conversation” as to the nature of a “suspicious vehicle” in item 1 and “[a]ny communication would be phone calls” in item 3, is denied. The request is exempt from public disclosure as 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 pursuant to RTKL section 67.708[(b)](18)(i).

As previously discussed, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. In the absence of any competent evidence that the PSP acted in bad faith, “the averments in [the statement] should be accepted as true.” *McGowan*, 103 A.3d at 382-83. However, an agency cannot rely on conclusory statements to sustain its burden of proof. *See Scolforo*, 65 A.3d 1095 at 1103 (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *see also Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d at 659 (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*).

Here, although the attestation submitted by the PSP merely parrots the language of Section 708(b)(18) of the RTKL and is, therefore, a conclusory statement, the language of the Request itself indicates that it seeks emergency dispatch records, indeed, Item 1 specifically references dispatch records. *See Fennell*, 149 A.3d 101 (holding that the OOR must consider uncontradicted

statements in the appeal filing when construing exemptions).

For the foregoing reasons, the appeal is **denied**, and the PSP is not required to take any additional 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 7, 2022

/s/ Erin Burlew

APPEALS OFFICER
ERIN BURLEW, ESQ.

Sent via email to: Joseph Miller; Andrew Lovette, Esq.; William Rozier

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