pennsylvania
OFFICE OF OPEN RECORDS

DETERMINATION UPON RECONSIDERATION

IN THE MATTER OF	:	
	:	
SARA GANIM and	:	
THE CENTRE DAILY TIMES**,**	:	
Complainant	:	
	:	**Docket No. AP 2010-0723**
v.	:	
	:	
PENNSYLVANIA STATE POLICE,	:	
Respondent	:	

INTRODUCTION

Sara Ganim, a reporter for *The Centre Daily Times,* (collectively the "Requester") submitted a request to the Pennsylvania State Police ("PSP") seeking various employment records pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq*., ("RTKL"). PSP denied access under Section 708(b)(7) and (b)(17). The Requester appealed to the Office of Open Records ("OOR"). The OOR issued a final determination on September 3, 2010, partially granting and partially denying the appeal (the "**Final Determination"**), OOR Dkt. AP 2010-0723. PSP filed a Petition for Reconsideration on September 20, 2010, asking the OOR to reconsider its Final Determination, alleging that the Final Determination contained errors of fact and law (the "**Petition for Reconsideration**").

Specifically, PSP requests that the OOR reverse its determination and deny the appeal in its entirety. The OOR **affirms in part** and **reverses in part** its **September 3, 2010 Final Determination**.

FACTUAL BACKGROUND

On June 22, 2010, the Requester submitted a right-to-know request for the following:

(1) a 1992 letter of termination for Leigh A. Barrows;

(2) a letter from the police commissioner re-instating Barrows;

(3) the recommendation of Director of the Bureau [with regard to Barrows];

(4) Barrows' written appeal challenging her 1992 dismissal;

(5) records of a BPR investigation from Clearfield County; and

(6) to know whether Barrows was disciplined for allegedly damaging a state police vehicle (the "Request").

After invoking an extension, PSP timely denied the Request, stating that: certain records were previously determined to be non-public by the OOR in *Ganim v. PSP*, OOR Dkt. AP 2010-0317, 2010 Pa. O.O.R.D. LEXIS 317 ("*Ganim I*"); responsive records are exempt as personnel records under 65 P.S. §67.708(b)(7); the exemption for noncriminal investigative records pursuant to 65 P.S. § 67.708(b)(17) applies "insofar as [the Request] can be construed to seek any information regarding 'administrative action' taken against Trooper Barrows"; and that Item 6 of the Request sought answers to questions rather than records ("Denial"). In support of the Denial, PSP supplied its prior denials dated December 21, 2009, which included all the "public portions" of Barrows' personnel file, marked PSP/RTKL 0001-00088, and the Verification of Jay Leader substantiating the redactions of personal identification information and records listed as protected by (b)(7), and dated March 31, 2010, including the evidence submitted in *Ganim I*.

The Requester appealed. The Requester provided additional documentation stating that Barrows was terminated in 1992, while the PSP provided a position statement and two affidavits in addition to those incorporated by its Denial: one from PSP Human Resource Analyst Michael

Stephens ("Stephens Affidavit") and the other from PSP Deputy Open Records Officer Jay Leader ("Leader Affidavit"). Stephens attested he is responsible for the official personnel files and assisted with the different requests submitted by Requester regarding Barrows. He advised that in January 2010, 88 pages from Barrows' personnel file were submitted to the Requester, and of the 111 page personnel file, the only responsive record is a single page letter regarding reinstatement signed by the PSP personnel director. The Stephens Affidavit is limited to the "personnel file" dating back to 1990. Leader attests that the recommendation of the director of the Bureau and her appeal challenging her [1992] dismissal are not within the possession custody or control of PSP. The OOR issued the Final Determination based upon this evidence of record.

PSP sought reconsideration on September 20, 2010. The OOR granted the Petition for Reconsideration on October 1st, and the Requester filed a response by October 15th. PSP requested a hearing on the reconsideration, which the OOR denied. PSP also requested to submit additional evidence, including an affidavit of Debra Facciola relating to "final action." The OOR did not consider supplemental evidence and renders this decision based upon the same evidence as was before the Appeals Officer who issued the Final Determination.

LEGAL ANALYSIS

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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." 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal.

The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id*. 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*. Here, neither party requested a hearing before the original Appeals Officer, and based upon the record, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter and reconsiders it based upon the initial record.

The OOR has adopted the reconsideration provisions of Pennsylvania's General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.241, and entertains the Petition for Reconsideration by this authority. The OOR hereby upholds its determination to the extent it denied the appeal, and upheld PSP's initial Denials. PSP asserted that Item 6 constitutes a question; the OOR agrees and incorporates by reference the analysis in the Final Determination, pp. 7-8 here. Likewise, with regard to Item 5, previously adequately addressed in *Ganim I* and the Final Determination, the OOR incorporates its prior determinations by reference and upholds PSP's denial of the BPR investigation records.

PSP alleges that with regard to OOR's grant of the appeal to Items 1 through 4, that the OOR committed error of fact and law. The OOR granted reconsideration to assess whether any error was committed. The OOR finds that as to Item 1, the Final Determination properly granted access and directed disclosure based upon Section 708(b)(7)(viii), and reconsiders its holdings as to the remainder based upon the evidence presented as follows.

1. Item 1 is properly disclosed.

Upon reconsideration, the OOR concludes that a letter of termination or dismissal constitutes "final action" of an agency, regardless of reinstatement because an action was taken and was "final" at that time. The action to dismiss was "final," much like the determination in this case was "final" but can be reconsidered and an agency retains the prerogative to change its decision without undermining the finality of its prior action. This construction is reasonable and in accordance with the Statutory Construction Act, 1 Pa. C.S. §§1501 *et seq*., and the principles embodied therein. PSP's construction of the term "final" renders it incapable of finality because if subject to change or reconsideration, no decision would be final and, with regard to discipline of employees, accessible to the public.

The OOR upholds its ruling as to Item 1 issued as a matter of legal interpretation.

2. Letter of re-instatement sought in Item 2.

PSP argues that the letter of reinstatement is a record relating to discipline, demotion or discharge, and thus exempt. An agency bears the burden of proving the applicability of any cited exemptions "by a preponderance of the evidence." 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

There is no dispute that a letter signed by the personnel director regarding reinstatement existed within the personnel file. [Stephens Affidavit.] There is no dispute among the parties that Barrows was the subject of discipline, dismissed, and then reinstated. Stephens attested that no other record responsive to the Request exists in the personnel file. PSP thus established that

the reinstatement letter thus is a record regarding discipline, demotion or discharge, and is exempt under Section 708(b)(7)(viii).

Given the facts of record, the entirety of the personnel file was disclosed to the Requester previously, with the exception of 23 pages of the personnel file and redactions from 88 pages as those records were protected under Section 708(b)(7). No additional facts are needed and Counsel made the legal argument demonstrating that the record at issue is protected.

3. Letter of recommendation and of Barrows' appeal.

Items 3 and 4 of the Request seek a recommendation from the Director of the PSP's Bureau of Training and Education referenced in the 1992 letter and Barrows' written appeal of her dismissal. The Leader Affidavit attests that no such written records exist in the possession or control of PSP, which is sufficient evidence of non-existence. *See Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. 2010). Thus, PSP met its burden of proof as to Items 3 and 4, and the OOR reverses its Final Determination as to these items.

CONCLUSION

For the foregoing reasons, the September 3, 2010, Final Determination is **affirmed in part** and **reversed in part** and the PSP is required to provide responsive records to Item 1, *i.e.*, the dismissal/discharge letter, within thirty (30) calendar days. The OOR upholds its Final Determination as to Items 5 and 6, and reverses it as to Items 2, 3 and 4, upholding PSP's denial as to those records.

This Final Determination is binding on all parties. Within thirty (30) 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: http://openrecords.state.pa.us.

FINAL DETERMINATION ISSUED AND MAILED: October 20, 2010

_____

LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Sara Ganim for *Centre Daily Times*; R.H. Hawn, Esq. for PSP

RECEIVED
SEP 20 2010
OFFICE OF OPEN RECORDS

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

September 18, 2010

Via Electronic Transmission and First Class U.S. Mail

Terry Mutchler
Nathanael J. Byerly
Office of Open Records
400 North Street, 4th Floor
Harrisburg, Pennsylvania 17120-0225

Re: PETITION FOR RECONSIDERATION
Ganim & The Centre Daily Times v. Pennsylvania State Police,
OOR Docket N° AP 2010-0723

Dear Ms. Mutchler and Mr. Byerly:

I respectfully submit the original and two copies of a Pennsylvania State Police petition for reconsideration of the September 3rd final determination rendered by your office in this matter.

Sincerely yours,

R. H. HAWN, JR.
Assistant Counsel to the
Pennsylvania State Police
Governor's Office of General Counsel
717.346.0339 | rhawn@state.pa.us

Attachment
cc. Sara Ganim (w/ encl.)
Jay Leader (w/ encl.)

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

In the matter of Sara Ganim and The Centre Daily Times; *Petitioners,*	:	
	:	OOR Docket N° AP 2010-0723
v.	:	
Pennsylvania State Police; *Respondent.*	:	

PETITION FOR RECONSIDERATION

Pursuant to Section 35.241 of the General Rules of Administrative Practice and Procedure, 1 Pa.Code § 35.241, the Pennsylvania State Police ("PSP" or "Department") petitions the Pennsylvania Office of Open Records ("OOR") for reconsideration of its final determination entered in favor of Sara Ganim and The Centre Daily Times (collectively, "CDT") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104, on the following grounds.

1. On September 3, 2010, OOR rendered a final determination in this CDT appeal from the Department's denial of a June 22, 2010 RTKL request ("June request") for access to PSP personnel records pertaining to Trooper Leigh A. Barrows ("Barrows"), a seventeen-year PSP veteran and respected criminal investigator. The final determination is attached as Exhibit 1 and incorporated fully, by reference.

2. In addition to the June request, CDT submitted RTKL requests to PSP on November 10, 2009 ("November request") and February 22, 2010 ("February

request") encompassing the same PSP personnel records. Expressed in increasingly specific terms, each of the three successive CDT requests targeted investigative and disciplinary personnel records relating to Barrows (generally, "Barrows records").

3. In response to the November request, PSP disclosed to CDT all Barrows personnel records that are publicly accessible under RTKL, subject to the redaction of non-public information pursuant to RTKL section 67.706.

4. The June request sought access to records described by CDT as:

- *"the letter of termination of then-cadet Leigh A. Barrows in 1992;"*
- *"the letter from the police commissioner to reinstate her;"*
- *"the recommendation of the director of the bureau . . . and [Barrows'] appeal . . ., challenging her [1992] dismissal in writing;"*
- *"the BPR investigation from Clearfield County."*

Several "exhibits" accompanied the June request, including a June 13, 1992 letter from a PSP personnel director notifying Barrows of her termination as a PSP cadet ("Barrows termination letter"). PSP denied the June request, among other reasons, because the described records are exempt from public disclosure under RTKL.

5. This appeal ensued, the second filed by CDT with OOR during this continuing controversy. (The first appeal was denied. *See Ganim & The Centre Daily Times v. Pennsylvania State Police,* OOR AP 2010-0317.) This second appeal resulted, CDT contends, because it provided the Department with *"proof that PSP fired a trooper in 1992 for lying, and requested copies of that firing from her personnel record. PSP repeatedly denied it ever happened, even after I attached proof."* 081010 CDT Appeal to OOR.

6. CDT's characterization notwithstanding, this appeal results from CDT misinterpretation of the facts, misunderstanding of the law and, apparently, mistrust of the Department. In all events, PSP lawfully denied CDT's June request for all the reasons articulated on the Department's behalf in the letter dated August 18, 2010 ("PSP position statement"), which accompanied the PSP submissions to OOR. The PSP position statement is attached as Exhibit 2 and fully incorporated, by reference.

7. Yet, in its final determination of this second CDT appeal, OOR ruled the Department wrongly withheld all but the *"BPR investigation"* records from CDT and directed PSP disclosure. Exhibit 1, at 8.

ERRORS ASSERTED

8. As revealed by the following italicized quotations taken from its September 3rd determination, OOR's ruling is based on errors of material fact and law, the correction of which are essential to a just adjudication of this appeal:

I.

The OOR invited both parties to supplement the record and both parties did so. The Requester provided additional documentation stating that Barrows was terminated in 1992, while the PSP provided a position statement and two affidavits: one from PSP Human Resource Analyst Michael Stephens ("Stephens Affidavit") and the other from PSP Deputy Open Records Officer Jay Leader ("Leader Affidavit"). Exhibit 1, at 2 (emphasis added).

> Actually, PSP provided OOR with three affidavits, one verification, the complete PSP response to each of the CDT requests for Barrows records, together the publicly-accessible personnel records previously disclosed to CDT (PSP/RTKL.000001- PSP/RTKL.000088) and a *Vaughn* index of ten responsive, non-public records withheld by PSP, which describes each

withheld record by type, date, author, recipient, subject matter and specifies the legal bases for each record's non-disclosure.

II.

[T]he facts are undisputed. Exhibit 1, at 3.

This statement is patently false. In one of numerous examples, PSP expressly disputed CDT's characterization of *"the letter of termination of then-cadet Leigh A. Barrows in 1992"* as a public record. Citing *Konias v. Dravosburg Borough*, OOR N° 2009-1062 and *Hoyer v. Lebanon County* [II], OOR N° 2009-0985, PSP explained in its position statement:

> Although the 1992 letter enclosed with the CDT request appears to reflect an employee termination, it does not involve a final action resulting in discharge, because it was superseded by a subsequent reinstatement of the employee. 081810 Stephens Affidavit; ¶¶ 6-7. 042010 Leader Affidavit; ¶¶ 10-12. OOR has already determined from the Leader affidavit that PSP has provided sufficient evidence "that a disciplinary act resulting in termination . . . never occurred." *Ganim v. Pennsylvania State Police*, OOR N° AP 2010-0317, at 5. See *Hoyer v. Lebanon County* [I], OOR N° 2009-0615 (affidavit submitted by agency is sufficient to establish non-existence of responsive records).

Exhibit 2, at 2. The evidentiary support for the PSP denial is replete with examples of material facts that cannot be reasonably construed as "undisputed."

III.

[T]he 1992 letter of termination for Barrows . . . were previously addressed by the OOR in Ganim v. PSP, OOR Dkt. AP 2010-0317, 2010 PA O.O.R.D. LEXIS 317. *In that decision, the OOR relied on a notarized affidavit from Mr. Leader affirming under penalty of perjury that the Requester's previous request[:]*

> *assumed facts ("the disciplinary act that resulted in Barrows being fired in 1992") that did not exist and referred to events ("the BPR investigation in 2005 that resulted in 'administrative action' taken against her") that had never occurred.* ***On the other hand, the request could have been construed to encompass certain 1992 PSP disciplinary records and 2005***

PSP noncriminal investigation records that were not publicly available under the RTKL.

In that Final Determination, the OOR found that "the PSP had sufficient evidence . . . that ***a disciplinary act resulting in termination*** *and an investigation resulting in administrative action* ***never occurred,*** *" and held that the exemption under 65 P.S. § 67.708(b)(7) applied.* Exhibit 1, at 3-4 (emphasis added).

OOR's first statement is factually inaccurate. Thus, contextually, this entire passage in the OOR determination is misleading. OOR did not previously address the 1992 Barrows letter, because the letter itself was never previously at issue. Instead, the February CDT request sought *"the disciplinary act* [*sic*] *that resulted in Barrows being fired in 1992."* As quoted by OOR in its own determination, Mr. Leader's April 20th affidavit acknowledged that the request could be "construed to encompass certain 1992 PSP disciplinary records . . . that were not publicly available under the RTKL." Yet, inexplicably, OOR concluded from the Leader affidavit *"that a disciplinary act resulting in termination . . . never occurred."* Clearly, this is not what Mr. Leader averred.

IV.

In direct contradiction to the sworn affidavit provided by Mr. Leader, *Requester, in the present appeal, provided a copy of a July 13, 1992 letter dismissing Barrows as a PSP cadet, as well as other documentation indicating that Barrows was terminated on that date.* Exhibit 1, at 4 (emphasis added).

CDT's disclosure of the 1992 Barrows termination letter did not contradict Mr. Leader's April 20th affidavit. It contradicted the conclusion OOR incorrectly drew from his affidavit. *See* section III, above.

V.

After receiving the materials submitted by Requester, PSP acknowledges that the 1992 letter "appears to reflect an employee termination," but alleged that "it does not involve a final action resulting in discharge[] because it was superseded by a subsequent reinstatement of the employee." ***The OOR disagrees with the PSP's argument.*** Exhibit 1, at 4 (emphasis added).

OOR mischaracterizes as "argument" what PSP has proven, circumstantially, as fact: the 1992 Barrows termination letter does not reflect a final action taken by PSP that resulted in Barrows' discharge. Nor could it, because

evidence presented by both parties establishes Barrows' subsequent reinstatement on appeal. *See, e.g.*, Attachment 1 to June request ("Through the appeal process, the Commissioner of the Pennsylvania State Police . . . ordered that [Barrows] be reinstated[.]"). *See also*, Stephens August 18, 2010 affidavit and PSP Vaughn index describing a June 1993 single-page letter signed by the PSP personnel director regarding Barrow's reinstatement. Actually, OOR is ignoring facts, not disagreeing with argument.

VI.

Under the PSP's logic, the letter terminating Barrows did not reflect a "final action" subject to public access because Barrows was ultimately reinstated. In other words, the status of the letter as a "public record" under the RTKL changed due to the PSP's subsequent reinstatement of Barrows. The RTKL, however, places no such temporal limitation on defining what documents constitute "public records." Exhibit 1, at 5 (emphasis added).

OOR confuses a contextual fact for a temporal limitation. In any event, the definition of a public record is neither temporally, nor contextually limited. OOR's determination is grounded on the sands of the same false assumption underpinning CDT's requests. Contrary to the assumption, an agency record is not necessarily distinguishable by its content as evidencing a final action resulting in an employee's demotion or discharge. The term "final action" isn't defined under RTKL. Nor, apparently, is it defined elsewhere in Pennsylvania statutory or common law. In all events, the content of the Barrows termination letter, alone, is not, and cannot be dispositive of a "final action" under Section 67.708(b)(7)(viii).

VII.

[N]either party requested a hearing . . . and the ***OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.*** Exhibit 1, at 3 (emphasis added).

In addition to many facts, the record of this appeal contains false information, baseless conjecture and scurrilous statements that hint of zealotry. Relying on this record without the benefit of a hearing, OOR has concluded that PSP failed to meet its evidentiary burden in proving the withheld records to be exempt from disclosure under RTKL. Disturbingly, OOR has also unjustly insinuated that the Department's affiants, Jay Leader and Michael Stephens, were untruthful:

- *[T]he OOR relied on a notarized affidavit from Mr. Leader affirming under penalty of perjury . . . . In direct contradiction to the sworn affidavit provided by Mr. Leader, [CDT] provided a copy of a July 13, 1992 letter dismissing Barrows as a PSP cadet, as well as other documentation indicating that Barrows was terminated on that date.* Exhibit 1, at 4.

- *Inexplicably, the Stephens Affidavit averred under penalty of perjury that PSP did not possess anything "even remotely responsive" to, among other requested records, the 1992 letter within "the 111 pages comprising the personnel records maintained."* Exhibit 1, at 4, n.1

Should it continue to stand by this determination in these circumstances, OOR discredits itself by its abuse of authority.

REQUEST FOR HEARING

9. PSP requests a hearing pursuant to RTKL section 1102(a)(2) for the purpose of presenting the testimony of its affiants and/or other witnesses in further support of the CDT request denial. 65 P.S. § 1102(a)(2). *See Department of Health v. Office of Open Records,* N° 1097 C.D. 2009, slip op. at 20 n.12 (Pa. Commw. Ct., September 9, 2010) (OOR should convene a hearing before rendering a final determination, if further evidence is needed) (dictum).

REQUEST FOR LEAVE TO SUPPLEMENT THE RECORD

10. PSP requests leave to supplement the appeal record with the affidavit of Debra J. Facciolo, a Human Resource Analyst presently serving in the PSP Bureau of Human Resources as the Director of the Human Resource Management Division. In her affidavit, which is attached as Exhibit 3 and fully incorporated, by

reference, Ms. Facciolo explains PSP interpretation of a "final action," as applied in context of personnel disciplinary action.

WHEREFORE, Petitioner Pennsylvania State Police urges the Office of Open Records to reconsider its September 3, 2010 final determination in this matter and deny the appeal of Sara Ganim and The Centre Daily Times in this matter.

For the Pennsylvania State Police:

R. H. HAWN, JR. (PA 38457)
Assistant Counsel to the Pennsylvania State Police
Governor's Office of General Counsel
717.346.0339 (direct) | 717.772.2883 (fax) rhawn@state.pa.us

Dated: September 18, 2010

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

In the matter of Sara Ganim and The Centre Daily Times; *Petitioners,*	:	
	:	OOR Docket N° AP 2010-0723
v.	:	
Pennsylvania State Police; *Respondent.*	:	

CERTIFICATE OF SERVICE

I, R. H. Hawn, Jr., counsel for Petitioner Pennsylvania State Police, hereby certify that on this 18th day of September, 2010, I served a true and correct copy of the foregoing *Petition for Reconsideration* upon the following persons via electronic transmission as an email attachment and via First Class U.S. Mail, postage pre-paid, addressed as follows:

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EXHIBIT 1

pennsylvania
OFFICE OF OPEN RECORDS

PA. STATE POLICE
OFFICE OF CHIEF COUNSEL
2010 SEP -7 AM 10:03

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SARA GANIM and	:	
***THE CENTRE DAILY TIMES*,**	:	
Complainant	:	
	:	**Docket No.: AP 2010-0723**
v.	:	
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PENNSYLVANIA STATE POLICE,	:	
Respondent	:	

INTRODUCTION

Sara Ganim, a reporter for *The Centre Daily Times,* (collectively, the "Requester") submitted a request (the "Request") to the Pennsylvania State Police ("PSP") seeking various employment records pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"). The PSP denied the Request, alleging that responsive records are exempt as personnel records and records related to a noncriminal 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 not required to take further action.

FACTUAL BACKGROUND

On June 22, 2010, the Request was filed seeking 1) a 1992 letter of termination for Leigh A. Barrows; 2) a letter from the police commissioner re-instating Barrows; 3)

"the recommendation of director of the bureau;" 4) Barrows' written appeal challenging her dismissal; 5) records "of a BPR investigation from Clearfield County;" and 6) to know whether Barrows was disciplined for allegedly damaging a state police vehicle. Within five business days, the PSP invoked a thirty-day extension to respond to the Request. On July 29, 2010, the PSP denied the Request, stating that 1) certain records were previously determined to be non-public by the OOR in *Ganim v. PSP*, OOR Dkt. AP 2010-0317, 2010 PA O.O.R.D. LEXIS 317; 2) responsive records are exempt as personnel records under 65 P.S. § 67.708(b)(7); 3) the exemption for noncriminal investigative records pursuant to 65 P.S. § 67.708(b)(17) applies; 4) item 6 of the Request sought answers to questions rather than records; and 5) certain records may be protected from public access under the Criminal History Record Information Act, 18 Pa.C.S. §§ 9101-9183 ("CHRIA").

The Requester appealed to the OOR on August 9, 2010. The OOR invited both parties to supplement the record and both parties did so. The Requester provided additional documentation stating that Barrows was terminated in 1992, while the PSP provided a position statement and two affidavits: one from PSP Human Resource Analyst Michael Stephens ("Stephens Affidavit") and the other from PSP Deputy Open Records Officer Jay Leader ("Leader Affidavit").

LEGAL ANALYSIS

"The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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." 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing, the facts are undisputed, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The PSP is a Commonwealth agency 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. 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 clearly 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). Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

As background, the 1992 letter of termination for Barrows and records "of a BPR investigation" were previously addressed by the OOR in *Ganim v. PSP*, OOR Dkt. AP

2010-0317, 2010 PA O.O.R.D. LEXIS 317. In that decision, the OOR relied on a notarized affidavit from Mr. Leader affirming under penalty of perjury that the Requester's previous request

> assumed facts ("the disciplinary act that resulted in Barrows being fired in 1992") that did not exist and referred to events ("the BPR investigation in 2005 that resulted in 'administrative action' taken against her") that had never occurred. On the other hand, the request could have been construed to encompass certain 1992 PSP disciplinary records and 2005 PSP noncriminal investigation records that were not publicly available under the RTKL.

In that Final Determination, the OOR found that "the PSP sufficient evidence ... that a disciplinary act resulting in termination and an investigation resulting in administrative action never occurred," and held that the exemption under 65 P.S. § 67.708(b)(7) applied. In direct contradiction to the sworn affidavit provided by Mr. Leader, Requester, in the present appeal, provided a copy of a July 13, 1992 letter dismissing Barrows as a PSP cadet, as well as other documentation indicating that Barrows was terminated on that date. Because the evidence provided by Requester in the present appeal establishes that Barrows was terminated by PSP in 1992, an evaluation as to whether any exemptions preclude public access applies will follow.

1. The 1992 letter discharging Barrows

After receiving the materials submitted by Requester, PSP acknowledges that the 1992 letter "appears to reflect an employee termination," but alleged that "it does not involve a final action resulting in discharge[] because it was superseded by a subsequent reinstatement of the employee."[1] The OOR disagrees with the PSP's argument. The

[1] Inexplicably, the Stephens Affidavit affirmed under penalty of perjury that PSP did not possess anything "even remotely responsive" to, among other requested records, the 1992 letter within "the 111 pages comprising the personnel records maintained." In the event that PSP does not possess responsive records, it should have indicated as such in its initial denial letter. *See Signature Information Solutions, LLC v.*

RTKL provides that, while certain personnel records are exempt, this exemption "shall not apply to the final action of an agency that results in demotion or discharge." *See* 65 P.S. § 67.708(b)(7)(viii). Under the PSP's logic, the letter terminating Barrows did not reflect a "final action" subject to public access because Barrows was ultimately reinstated. In other words, the status of the letter as a "public record" under the RTKL changed due to the PSP's subsequent reinstatement of Barrows. The RTKL, however, places no such temporal limitation on defining what documents constitute "public records." *See* 65 P.S. § 67.102; *see generally East Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. Ct. 2010) (holding that materials were "public records" based on content, rather than possession); *SWB Yankees LLC v. Wintermantel*, 2010 Pa. Commw. LEXIS 396 (same).

The OOR holds that the 1992 letter terminating Barrows was improperly withheld by the PSP as exempt under 65 P.S. § 67.708(b)(7), and is a public record specifically excepted from the exemption pursuant to 65 P.S. § 67.708(b)(7)(viii).

2. The police commissioner letter, recommendation and Barrows' appeal

Items 2, 3 and 4 of the Request seek a letter reinstating Barrows, a recommendation from the Director of the PSP's Bureau of Training and Education referenced in the 1992 letter and Barrows' written appeal of her dismissal. The RTKL provides that certain specific records "relating to an agency employee" may be withheld as exempt under 65 P.S. § 67.708(b)(7). Based on the underlying purpose of the RTKL,

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Aston Twp., 995 A.2d 510, 514 (Pa. Cmwlth. Ct. 2010) ("It is not fair or just to a requester to allow an agency to alter the reason given for a denial after the requester has taken an appeal based on the stated reason"). Even if this affidavit were considered, it does not address whether responsive records exist within the PSP's "possession, custody or control" as required by 65 P.S. § 67.901. For the same reasons, the OOR will not consider PSP's newfound argument that the letter is also exempt under 65 P.S. § 67.708(b)(17).

however, "exemptions from disclosure must be narrowly construed." *See Bowling*, 990 A.2d at 824.

In the present appeal, the PSP asserted a number of exemptions under 65 P.S. § 67.708(b)(7) applied to the requested records, specifically 1) 65 P.S. § 67.708(b)(7)(ii) (exempting performance ratings and reviews); 2) 65 P.S. § 67.708(b)(7)(vi) ("[w]ritten criticisms of an employee"); 3) 65 P.S. § 67.708(b)(7)(vii) ("[g]rievance material"); and 4) 65 P.S. § 67.708(b)(7)(viii) ("[i]nformation regarding discipline, demotion or discharge contained in a personnel file"). Upon being asked to provide evidence in support of these exemptions by the OOR, the PSP affirmed in the Stephens Affidavit that the recommendation from the director involved "the reinstatement of Cadet Barrows," but provided no additional factual or legal support for withholding either the police commission letter or the recommendation.

As the OOR has previously acknowledged, subsections within 65 P.S. § 67.708(b) only apply to records specifically mentioned therein and do not protect a broad class of generic "personnel records." *See Konias v. Dravosburg Borough*, OOR Dkt. AP 2009-1062, 2009 PA O.O.R.D. LEXIS 711. In order for the exemption under 65 P.S. § 67.708(b)(7)(viii) to apply, an agency must establish that 1) the record contains information that involves either "discipline, demotion or discharge" and 2) that the record is "contained in a personnel file."

Based on the brief description offered by the PSP, the recommendation, although contained within Barrows' personnel file, involves the "reinstatement" of Barrows rather than "discipline, demotion or discharge," and is therefore not exempt from public access under 65 P.S. § 67.708(b). *See generally Bowling*, 990 A.2d at 824. While item 4 of the

Request appears to facially involve information regarding Barrows' discharge, the PSP failed to offer any evidence that such information is or would be contained within Barrows' personnel file.

PSP offered no evidentiary support for denying access to the police commissioner letter and failed to overcome the presumption that it is a "public record." *See* 65 P.S. § 67.305; *see also Witmer v. Shamokin Area School District*, OOR Dkt. AP 2010-0109, PA O.O.R.D. LEXIS 145 (granting appeal based on the agency's failure to meet its burden of proof). As a result, items 2, 3 and 4 of the Request were improperly withheld as exempt under the RTKL.

3. BPR investigation records

The OOR previously determined that BPR investigation records are exempt in *Ganim v. PSP*, OOR Dkt. AP 2010-0317, 2010 PA O.O.R.D. LEXIS 317, the legal analysis of which is incorporated herein by reference. Accordingly, the PSP properly withheld the BPR investigation records under 65 P.S. § 67.708(b)(17).

4. Item 6 did not sufficiently seek records under the RTKL

As the OOR has repeatedly held, a request must seek records, rather than answers to questions in order to comply with the requirements of 65 P.S. § 67.703. *See Meztli v. Slippery Rock Borough*, OOR Dkt. AP 2009-1006, PA O.O.R.D. LEXIS 776; *Shaner v. Dept. of Agric.*, OOR Dkt. AP 2009-0678, 2009 PA O.O.R.D. LEXIS 113; *Weller v. PBPP*, OOR Dkt. AP 2009-0242, 2009 PA O.O.R.D. LEXIS 52. In the present case, the Request stated "I would like to know if Barrows had permanent action taken against her when she [allegedly] damaged a state police vehicle while running radar near a snow

bank at the Punxsutawney barracks, where she worked from 2001 to 2003." The OOR finds that item 6 of the Request did not seek records.

Finally, the OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records listed in the Request. Absent an agency's provision of a factual and/or legal basis for the denial of access, however, the OOR will order the disclosure of responsive records.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and the PSP is required to provide responsive records within thirty (30) calendar days. This Final Determination is binding on all parties. Within thirty (30) 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: http://openrecords.state.pa.us.

FINAL DETERMINATION ISSUED AND MAILED: September 3, 2010

APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Sara Ganim; R.H. Hawn, Esq.

EXHIBIT 2

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

August 18, 2010 ***Via Electronic Transmission Only***

J. Chadwick Schnee
Office of Open Records
400 North Street, 4th Floor
Harrisburg, Pennsylvania 17120-0225

Re: *Ganim & The Centre Daily Times v. Pennsylvania State Police*, OOR AP 2010-0723
Appeal to the Office of Open Records ("OOR") from a denial of PSP/RTKL Request N° 2010-0297 under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104

Dear Mr. Schnee:

I am responding on behalf of my client, the Pennsylvania State Police ("Department" or "PSP"), to your letter of August 11th letter regarding this appeal. At issue is the Department's denial of a June 22nd RTKL request by Sara Ganim and the Centre Daily Times (together, "CDT") for access to manifestly non-public PSP investigative and disciplinary records involving Trooper Leigh A. Barrows. Please accept this correspondence as my formal entry of appearance in the matter and kindly direct your future communications in this regard to my attention.

Your letter seeks legal and factual support for my client's denial of the June 22nd CDT request. To that end, I enclose the affidavits of Michael D. Stephens and Jay Leader, whose averments refute certain false assumptions underpinning this CDT appeal, which I discuss in detail, below [Enclosures 1 & 2]. I also enclose the entire July 29th final response to that request (PSP/RTKL Request N° 2010-0297), which fully incorporated, by reference, PSP final responses to two prior CDT requests for the same records (PSP/RTKL Requests N° 2009-0497 & N° 2010-0079) [Enclosure 3], as well as the PSP response to, and the OOR final determination of a prior, related CDT appeal (OOR AP 2010-0317) [Enclosures 4 & 5]. Together, this correspondence and its enclosures set forth all PSP factual and legal bases for denying to the June 22nd CDT request.

The June 22nd CDT request sought access to records, which Ms. Ganim described as:

- *"the letter of termination of then-cadet Leigh A. Barrows in 1992;"*
- *"the letter from the police commissioner to reinstate her;"*
- *"the recommendation of the director of the bureau . . . and [Barrows'] appeal . . ., challenging her [1992] dismissal in writing;" and*
- *"the BPR investigation from Clearfield County."*

Numerous "exhibits" accompanied the request. Referring to those enclosures in the appeal at hand,

Ms. Gamin states: *"I attached [] copies of proof that PSP fired a trooper in 1992 for lying, and requested copies of that firing from her personnel record. PSP repeatedly denied it ever happened, even after I attached proof."* 081010 CDT Appeal to OOR. This contention is fraught with false assumptions regarding the Department, a veteran PSP trooper and RTKL, itself. Firstly, CDT falsely assumes the PSP Barrows personnel file contains records of a purported "firing in 1992." Secondly, CDT falsely assumes the denials of its RTKL requests for non-public records necessarily constitute denials of certain facts. Thirdly, CDT falsely assumes its RTKL requests and appeals accurately characterize records and events. Fourthly, CDT falsely assumes its mischaracterization of records and events its RTKL requests and appeals requires PSP to disclose records that are expressly exempt from public disclosure under RTKL.

In direct response to your August 11th letter, I submit the following additional legal and factual support for my client's denial of the June 22nd CDT requests:

A. "[T]he letter of termination of then-cadet Leigh A. Barrows in 1992."

PSP denied this request, because it sought access to a record patently involving employee discipline. An agency record bearing information regarding discipline, demotion or discharge is exempt from public disclosure under RTKL section 67.708(b)(7)(viii), unless the record involves a final action taken by the agency that resulted in employee demotion or discharge. *Konias v. Dravosburg Borough*, OOR N° 2009-1062 and *Hoyer v. Lebanon County,* OOR N° 2009-0985. Although the 1992 letter enclosed with the CDT request appears to reflect an employee termination, it does not involve a final action resulting in discharge, because it was superseded by a subsequent reinstatement of the employee. 081810 Stephens Affidavit; ¶¶ 6-7. 042010 Leader Affidavit; ¶¶ 10-12. OOR has already determined from the Leader affidavit that PSP has provided sufficient evidence "that a disciplinary act resulting in termination . . . never occurred." *Ganim v. Pennsylvania State Police*, OOR N° AP 2010-0317, at 5. See *Hoyer v. Lebanon County,* OOR N° 2009-0615 (affidavit submitted by agency is sufficient to establish non-existence of responsive records).

In all events, the PSP Barrows personnel file does not contain any record fitting the CDT description, above. 081810 Stephens Affidavit; ¶ 7. Of course, section 67.708(b)(7)(viii) exempts all other PSP records regarding the 1992 Barrows disciplinary action. Those records are also exempt from disclosure under section 67.708(b)(7)(vi) and section 67.708(b)(7)(vii), because they constitute both written criticisms of an agency employee and grievance material. 042010 Leader Affidavit; ¶ 14 & Affidavit Exhibit 4. See *Rech v. Borough of Penndel,* OOR N° 2009-0034 (RTKL exempts agency employee discipline records from public disclosure) and *Katz & Intelligencer Journal v. Manheim Central School District,* OOR N° 2010-0067 (same). Furthermore, the records relate to a non-criminal investigation, because they pertain to an administrative inquiry and are, therefore, exempt from public disclosure under RTKL section 67.708(b)(17). 042010 Leader Affidavit; ¶ 11. Finally, under RTKL, a non-public agency record is exempt from disclosure, despite the record's appearance in the public forum. *Wykoff v. Pennsylvania State Police*, OOR N° 2009-0353.

B. *"[T]he letter from the police commissioner to reinstate [Barrows]."*

Only one PSP record, a June 1993 single-page letter signed by the PSP personnel director regarding the reinstatement of Cadet Barrows, bears any similarity to the foregoing description. 081810 Stephens Affidavit; ¶¶ 6-7. PSP denied this request, because it sought access to a record patently involving employee discipline, yet as described, could not be construed as "the final action of an agency that results in demotion or discharge.". 65 P.S. § 67.708(b)(7)(viii). Accordingly, for all pertinent reasons expressed in paragraph A, the entirety of which is incorporated here, by reference, the record is exempt from public disclosure.

C. *"[T]he recommendation of the director of the bureau . . . and [Barrows'] appeal . . ., challenging her [1992] dismissal in writing."*

PSP denied this request, on its face, because it sought access to records patently involving employee discipline, yet as described, could not be construed as "the final action of an agency that results in demotion or discharge." 65 P.S. § 67.708(b)(7)(viii). Accordingly, for all pertinent reasons expressed in paragraph A, the entirety of which is incorporated here, by reference, these records are exempt from public disclosure. In any event, the Department does not possess records fitting these descriptions, which are presumed to have been purged in accordance with PSP records retention policies. 081810 Leader Affidavit; ¶¶ 6-7 . See 65 P.S. § 67.507 (RTKL does not modify, rescind or supersede agency records retention policies).

D. *"[T]he BPR investigation from Clearfield County."*

This request seeks access to records previously sought by CDT pursuant to PSP/RTKL Request N° 2010-0079. At that time, CDT described the records as the *"BPR investigation in 2005 that resulted in 'administrative action' taken against [Barrows]."* Then, as now, PSP denied this CDT request, because it manifestly encompassed:

1. A record relating to or resulting in a non-criminal investigation, because it pertains to an administrative inquiry and is, therefore, exempt from public disclosure under RTKL section 67.708(b)(17);

2. A record containing investigative materials, because it pertains to an administrative inquiry and is, therefore, exempt from public disclosure under RTKL section 67.708(b)(17)(ii); and

3. A record that, if disclosed, would reveal the institution, progress, and result of an administrative inquiry and is, therefore, exempt from public disclosure under RTKL section 67.708(b)(17)(vi)(A).

In its final determination of OOR AP 2010-0317, at 5, OOR ruled: *"The request for records of the 'BPR investigation in 2005 that resulted in administrative action taken against [Barrows],' on its face, seeks investigative records and could be properly denied under section 708(b)(17)."* Consequently, CDT is barred by the doctrine of collateral estoppel from obtaining OOR's reconsideration of an issue that OOR previously decided against it.

This doctrine is firmly rooted in Pennsylvania common law. See *Balent v. City of Wilkes-Barre,* 669 A.2d 309, 313 (Pa. 1995) dictum (citations omitted). Its elements are well-established:

> Under the principle of collateral estoppel or issue preclusion "[w]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." ... The judgment in the prior action operates as estoppel in the second action, however, only as to those issues that (1) are identical (2) were actually litigated (3) were essential to the judgment and (4) were material to the adjudication.

Kohut v. Workmen's Comp. Appeal Board, 621 A.2d 1101, 1103 (Pa. Commw. Ct. 1993) (citations omitted). All four conditions are met in the appeal at hand. Accordingly, OOR is prohibited, as a matter of law, from reconsidering CDT's right of access to these records.

E. "[R]ecords related to a damaged state police vehicle that Barrows allegedly damaged."

Your August 11th letter refers to a purported CDT request for "records related to a damaged state police vehicle that Barrows allegedly damaged." Actually, CDT made no such request. Rather, Ms. Ganim remarked: *"I would like to know if Barrows had permanent action taken against her when she damage a state police vehicle while running radar near a snow bank at the Punxsutaney barracks, where she worked from 2001 to 2003."* As if to justify the remark, Ms. Ganim further stated: *"Barrows denied having damaged the vehicle, but pieces of the car were later found in the snow bank."* In its July 29th final response, PSP correctly observed:

> To the extent that your closing reference to the snow-banked PSP cruiser can be construed as a question, OOR has repeatedly determined that RTKL section 67.703 requires agencies to disclose public records, not to answer questions posed in RTKL requests. *DiPerna v. Churchill Borough,* OOR No. AP 2009-0112 and *Cohen v. Pennsylvania Department of Labor and Industry,* OOR No. AP 2009-0099.

I trust this correspondence and its enclosures provide more than sufficient legal and factual support for my client's denial of the June 22nd CDT request.

Respectfully yours,

R. H. HAWN, JR.
Assistant Counsel to the
Pennsylvania State Police
Governor's Office of General Counsel
717.346.0339 | rhawn@state.pa.us

Enclosures (5)
cc. Sara Ganim (w/ encls.)
Jay Leader (w/ encls.)

EXHIBIT 3

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE POLICE
BUREAU OF HUMAN RESOURCES

AFFIDAVIT OF
DEBRA J. FACCIOLO
HUMAN RESOURCE MANAGEMENT DIVISION
BUREAU OF HUMAN RESOURCES

Commonwealth of Pennsylvania :
:
:
County of Dauphin :

BEFORE ME, the undersigned authority, personally appeared the affiant, Debra J. Facciolo, on this 17th day of September, 2010, who having been duly sworn on her oath by me, stated the following:

1. My name is Debra J. Facciolo. Being over eighteen years of age, I am fully competent to execute this affidavit, which avers as true and correct only the facts known to me personally or upon my information and belief.

2. I am a Human Resource Analyst for the Pennsylvania State Police ("PSP" or "Department"), presently serving as the Director of the Human Resource Management Division. In this capacity, I am authorized to make this statement on behalf of the Department and its Commissioner, Frank E. Pawlowski, in the interests of the Commonwealth of Pennsylvania and its citizens.

3. I am familiar with the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104, respectful of the objectives embodied by RTKL and personally committed to their realization.

4. I have prepared this affidavit in further response to the RTKL appeal of Sara Ganim and The Centre Daily Times (collectively, "CDT"), which is now before the Office of Open Records, docketed as OOR AP 2010-0723.

5. In my capacity as Director of the Human Resource Management Division, I am primarily responsible for overseeing the management of the Department's personnel records for all current and separated members and civilian employees.

6. The Department manages its personnel records pursuant to PSP Administrative Regulation (AR) 4-8 *Personnel Information*, in accordance with the following Commonwealth authorities:

- Management Directive (MD) 505.18 *Maintenance, Access and Release of Personnel Information*;
- Manual 505.4 *Personnel Records Retention and Disposition Schedule*; and
- Various program-related management directives such as MD 540.7 *Employee Performance Review*), as well as OA-IT bulletins concerning the retention of electronic records.

The content of official personnel files (OPF) maintained by Commonwealth agencies, including the Department, is strictly regulated by MD 505.18, which is attached as Exhibit A and incorporated fully, by reference.

7. Section 7(a)(1) of MD 505.18 identifies nineteen categories of records permanently maintained in an OPF, including *"employee notifications regarding appointment, promotion, demotion, . . . dismissal, suspension."* Exhibit A, at page 10 of 17. However, Section 7(a)(1) is qualified by the following language:

> *NOTE: If a personnel action is amended, only information concerning the amended action is maintained in the OPF. The original personnel action and any rescinded personnel actions are to be removed from an employee's OPF and employee information maintained separately in accordance with the General Records Retention and Disposal Schedule.*

Exhibit A, at page 12 of 17. Thus, effectively, this qualification treats rescinded personnel actions as if they never occurred.

8. I am familiar with RTKL section 67.708(b)(7), which exempts several categories of agency personnel records from public disclosure. I am also familiar with the exemption set forth in subparagraph (viii) of this section, which states: *"Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge."* 65 P.S. § 67.708(b)(7)(viii).

9. The term "final action" is not defined under RTKL. Furthermore, to my knowledge, there is no Pennsylvania statutory or regulatory definition of "final action" that is generally applied in matters of personnel management. Nonetheless, PSP applies a common-sense interpretation of "final action," which accounts for the qualifying language of MD 505.18 section 7(a)(1).

10. For purposes of giving effect to RTKL section 67.708(b)(7)(viii), it can be said, as to matters involving employee discipline, that a PSP "final action" is the adjudication of misconduct against an employee that results in either demotion or dismissal, unless the adjudication is appealed, in which case then only if the adjudication is affirmed or the appeal is withdrawn.

11. Earlier this year, while reviewing the contents of the OPF regarding Trooper Barrows in relation to a prior CDT RTKL request, I discovered two records of particular relevance to this matter. One is identified as PSP/RTKL.000096 on the PSP *Vaughn* index and further described as correspondence dated July 13, 1992 from Personnel Director W. Dowling to Cadet L. A. Barrows. The 1992 record is clearly a notification of employee termination. The other record is identified on the *Vaughn* index as PSP/RTKL.000095 and further described as correspondence dated June 16, 1993 from Personnel Director W. Dowling. The information in the 1993 record obviously pertains to employee discipline and discharge.

12. I determined the presence of both records in the OPF to contravene Section 7(a)(1) of MD 505.18. Although the 1992 record involves the termination of a PSP employee, it does not reflect a final action, because the employee was reinstated following her appeal of the termination. In this regard, therefore, the Department's final action was not the 1992 termination, but the 1993 reinstatement. To comply with Section 7(a)(1), therefore, it was necessary to remove the 1992 record from the OPF. Under the circumstances, however, the errant inclusion of the 1992 record as part of the OPF still had to be noted on the Vaughn index.

FURTHER AFFIANT SAYETH NOT, UNDER PENALTY OF PERJURY.

Debra J. Facciolo

Debra J. Facciolo
Bureau of Human Resources
Pennsylvania State Police

SUBSCRIBED AND SWORN TO BEFORE ME on this 17th day of September, 2010, to certify which witness my hand and seal.

Vickie A. Bucher

Notary Public in and for the
Commonwealth of Pennsylvania

My Commission expires:

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
VICKIE A. BUCHER, Notary Public
Susquehanna Twp., Dauphin County
My Commission Expires June 25, 2011

Brawley, Maryanne

From: Byerly, Nathanael
Sent: Tuesday, September 21, 2010 12:36 PM
To: Brawley, Maryanne
Subject: FW: [OORAP20100723 (Ganim v. PSP)] PSP Petition for Reconsideration

Sensitivity: Confidential

From: Hawn, Robert H Jr
Sent: Saturday, September 18, 2010 3:42 PM
To: Mutchler, Terry; Byerly, Nathanael
Cc: Watson, Cindy; 'sganim@centredaily.com'; Leader, Jay
Subject: [OORAP20100723 (Ganim v. PSP)] PSP Petition for Reconsideration
Sensitivity: Confidential

20100918OORFD120100918OORFD1
0723(RHHvNJB).p0723(PSPPetReco.

– RHH

R. H. HAWN, JR. (PA 38457)
Assistant Counsel to the Pennsylvania State Police
The Governor's Office of General Counsel
1800 Elmerton Avenue, Harrisburg, Pennsylvania 17110
717.346.0339/direct | 717.772.2883/fax | 610.246.2479/cell
www.psp.state.pa.us | www.ogc.state.pa.us

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pennsylvania
OFFICE OF OPEN RECORDS

October 1, 2010

R.H. Hawn, Jr., Esquire
Office of Chief Counsel
Pennsylvania State Police
1800 Elmerton Ave.
Harrisburg, PA 17110

RE: Petition for Reconsideration received September 20, 2010, OOR Dkt. AP 2010-0723

Dear Mr. Hawn:

We are in receipt of your Request for Reconsideration received in connection with the office of Open Records Final Determination in *Sara Ganim and the Centre Daily Times v. Pennsylvania State Police*, OOR Dkt. AP 2010-0723. We hereby grant your Request.

We note here that in the absence of applicable Office of Open Records interim regulations regarding petitions for reconsideration, this office will follow the procedures set forth in Pennsylvania General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241.

We also note that the Requester, Sara Ganim, may file a response in the nature of an answer within 15 days of the issuance of this order granting reconsideration or by Tuesday, October 16, 2010.

This office will issue a determination responsive to this Petition for Reconsideration by October 20, 2010.

Please contact me if you have any further questions.

Sincerely,

Nathanael J. Byerly
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Sara Ganim

Commonwealth Keystone Building | 400 North Street, 4th Floor
Harrisburg, Pennsylvania 17120-0225
(717)346-9903 | (717) 425-5343 (Fax)
http://openrecords.state.pa.us

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SARA GANIM and	:	
THE CENTRE DAILY TIMES**,**	:	
Complainant	:	
	:	**Docket No.: AP 2010-0723**
v.	:	
	:	
PENNSYLVANIA STATE POLICE,	:	
Respondent	:	

INTRODUCTION

Sara Ganim, a reporter for *The Centre Daily Times,* (collectively, the "Requester") submitted a request (the "Request") to the Pennsylvania State Police ("PSP") seeking various employment records pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq*., ("RTKL"). The PSP denied the Request, alleging that responsive records are exempt as personnel records and records related to a noncriminal 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 not required to take further action.

FACTUAL BACKGROUND

On June 22, 2010, the Request was filed seeking 1) a 1992 letter of termination for Leigh A. Barrows; 2) a letter from the police commissioner re-instating Barrows; 3)

"the recommendation of director of the bureau;" 4) Barrows' written appeal challenging her dismissal; 5) records "of a BPR investigation from Clearfield County;" and 6) to know whether Barrows was disciplined for allegedly damaging a state police vehicle. Within five business days, the PSP invoked a thirty-day extension to respond to the Request. On July 29, 2010, the PSP denied the Request, stating that 1) certain records were previously determined to be non-public by the OOR in *Ganim v. PSP*, OOR Dkt. AP 2010-0317, 2010 PA O.O.R.D. LEXIS 317; 2) responsive records are exempt as personnel records under 65 P.S. § 67.708(b)(7); 3) the exemption for noncriminal investigative records pursuant to 65 P.S. § 67.708(b)(17) applies; 4) item 6 of the Request sought answers to questions rather than records; and 5) certain records may be protected from public access under the Criminal History Record Information Act, 18 Pa.C.S. §§ 9101-9183 ("CHRIA").

The Requester appealed to the OOR on August 9, 2010. The OOR invited both parties to supplement the record and both parties did so. The Requester provided additional documentation stating that Barrows was terminated in 1992, while the PSP provided a position statement and two affidavits: one from PSP Human Resource Analyst Michael Stephens ("Stephens Affidavit") and the other from PSP Deputy Open Records Officer Jay Leader ("Leader Affidavit").

LEGAL ANALYSIS

"The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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." 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id*. 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*. Here, neither party requested a hearing, the facts are undisputed, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The PSP is a Commonwealth agency 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. 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 clearly 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). Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

As background, the 1992 letter of termination for Barrows and records "of a BPR investigation" were previously addressed by the OOR in *Ganim v. PSP*, OOR Dkt. AP

2010-0317, 2010 PA O.O.R.D. LEXIS 317. In that decision, the OOR relied on a notarized affidavit from Mr. Leader affirming under penalty of perjury that the Requester's previous request

> assumed facts ("the disciplinary act that resulted in Barrows being fired in 1992") that did not exist and referred to events ("the BPR investigation in 2005 that resulted in 'administrative action' taken against her") that had never occurred. On the other hand, the request could have been construed to encompass certain 1992 PSP disciplinary records and 2005 PSP noncriminal investigation records that were not publicly available under the RTKL.

In that Final Determination, the OOR found that "the PSP sufficient evidence … that a disciplinary act resulting in termination and an investigation resulting in administrative action never occurred," and held that the exemption under 65 P.S. § 67.708(b)(7) applied. In direct contradiction to the sworn affidavit provided by Mr. Leader, Requester, in the present appeal, provided a copy of a July 13, 1992 letter dismissing Barrows as a PSP cadet, as well as other documentation indicating that Barrows was terminated on that date. Because the evidence provided by Requester in the present appeal establishes that Barrows was terminated by PSP in 1992, an evaluation as to whether any exemptions preclude public access applies will follow.

1. The 1992 letter discharging Barrows

After receiving the materials submitted by Requester, PSP acknowledges that the 1992 letter "appears to reflect an employee termination," but alleged that "it does not involve a final action resulting in discharge[] because it was superseded by a subsequent reinstatement of the employee."[1] The OOR disagrees with the PSP's argument. The

[1] Inexplicably, the Stephens Affidavit affirmed under penalty of perjury that PSP did not possess anything "even remotely responsive" to, among other requested records, the 1992 letter within "the 111 pages comprising the personnel records maintained." In the event that PSP does not possess responsive records, it should have indicated as such in its initial denial letter. *See Signature Information Solutions, LLC v.*

RTKL provides that, while certain personnel records are exempt, this exemption "shall not apply to the final action of an agency that results in demotion or discharge." *See* 65 P.S. § 67.708(b)(7)(viii). Under the PSP's logic, the letter terminating Barrows did not reflect a "final action" subject to public access because Barrows was ultimately reinstated. In other words, the status of the letter as a "public record" under the RTKL changed due to the PSP's subsequent reinstatement of Barrows. The RTKL, however, places no such temporal limitation on defining what documents constitute "public records." *See* 65 P.S. § 67.102; *see generally East Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. Ct. 2010) (holding that materials were "public records" based on content, rather than possession); *SWB Yankees LLC v. Wintermantel*, 2010 Pa. Commw. LEXIS 396 (same).

The OOR holds that the 1992 letter terminating Barrows was improperly withheld by the PSP as exempt under 65 P.S. § 67.708(b)(7), and is a public record specifically excepted from the exemption pursuant to 65 P.S. § 67.708(b)(7)(viii).

2. The police commissioner letter, recommendation and Barrows' appeal

Items 2, 3 and 4 of the Request seek a letter reinstating Barrows, a recommendation from the Director of the PSP's Bureau of Training and Education referenced in the 1992 letter and Barrows' written appeal of her dismissal. The RTKL provides that certain specific records "relating to an agency employee" may be withheld as exempt under 65 P.S. § 67.708(b)(7). Based on the underlying purpose of the RTKL,

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Aston Twp., 995 A.2d 510, 514 (Pa. Cmwlth. Ct. 2010) ("It is not fair or just to a requester to allow an agency to alter the reason given for a denial after the requester has taken an appeal based on the stated reason"). Even if this affidavit were considered, it does not address whether responsive records exist within the PSP's "possession, custody or control" as required by 65 P.S. § 67.901. For the same reasons, the OOR will not consider PSP's newfound argument that the letter is also exempt under 65 P.S. § 67.708(b)(17).

however, "exemptions from disclosure must be narrowly construed." *See Bowling*, 990 A.2d at 824.

In the present appeal, the PSP asserted a number of exemptions under 65 P.S. § 67.708(b)(7) applied to the requested records, specifically 1) 65 P.S. § 67.708(b)(7)(ii) (exempting performance ratings and reviews); 2) 65 P.S. § 67.708(b)(7)(vi) ("[w]ritten criticisms of an employee"); 3) 65 P.S. § 67.708(b)(7)(vii) ("[g]rievance material"); and 4) 65 P.S. § 67.708(b)(7)(viii) ("[i]nformation regarding discipline, demotion or discharge contained in a personnel file"). Upon being asked to provide evidence in support of these exemptions by the OOR, the PSP affirmed in the Stephens Affidavit that the recommendation from the director involved "the reinstatement of Cadet Barrows," but provided no additional factual or legal support for withholding either the police commission letter or the recommendation.

As the OOR has previously acknowledged, subsections within 65 P.S. § 67.708(b) only apply to records specifically mentioned therein and do not protect a broad class of generic "personnel records." *See Konias v. Dravosburg Borough*, OOR Dkt. AP 2009-1062, 2009 PA O.O.R.D. LEXIS 711. In order for the exemption under 65 P.S. § 67.708(b)(7)(viii) to apply, an agency must establish that 1) the record contains information that involves either "discipline, demotion or discharge" and 2) that the record is "contained in a personnel file."

Based on the brief description offered by the PSP, the recommendation, although contained within Barrows' personnel file, involves the "reinstatement" of Barrows rather than "discipline, demotion or discharge," and is therefore not exempt from public access under 65 P.S. § 67.708(b). *See generally Bowling*, 990 A.2d at 824. While item 4 of the

Request appears to facially involve information regarding Barrows' discharge, the PSP failed to offer any evidence that such information is or would be contained within Barrows' personnel file.

PSP offered no evidentiary support for denying access to the police commissioner letter and failed to overcome the presumption that it is a "public record." *See* 65 P.S. § 67.305; *see also Witmer v. Shamokin Area School District*, OOR Dkt. AP 2010-0109, PA O.O.R.D. LEXIS 145 (granting appeal based on the agency's failure to meet its burden of proof). As a result, items 2, 3 and 4 of the Request were improperly withheld as exempt under the RTKL.

3. BPR investigation records

The OOR previously determined that BPR investigation records are exempt in *Ganim v. PSP*, OOR Dkt. AP 2010-0317, 2010 PA O.O.R.D. LEXIS 317, the legal analysis of which is incorporated herein by reference. Accordingly, the PSP properly withheld the BPR investigation records under 65 P.S. § 67.708(b)(17).

4. Item 6 did not sufficiently seek records under the RTKL

As the OOR has repeatedly held, a request must seek records, rather than answers to questions in order to comply with the requirements of 65 P.S. § 67.703. *See Meztli v. Slippery Rock Borough*, OOR Dkt. AP 2009-1006, PA O.O.R.D. LEXIS 776; *Shaner v. Dept. of Agric.*, OOR Dkt. AP 2009-0678, 2009 PA O.O.R.D. LEXIS 113; *Weller v. PBPP*, OOR Dkt. AP 2009-0242, 2009 PA O.O.R.D. LEXIS 52. In the present case, the Request stated "I would like to know if Barrows had permanent action taken against her when she [allegedly] damaged a state police vehicle while running radar near a snow

bank at the Punxsutawney barracks, where she worked from 2001 to 2003." The OOR finds that item 6 of the Request did not seek records.

Finally, the OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records listed in the Request. Absent an agency's provision of a factual and/or legal basis for the denial of access, however, the OOR will order the disclosure of responsive records.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and the PSP is required to provide responsive records within thirty (30) calendar days. This Final Determination is binding on all parties. Within thirty (30) 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: http://openrecords.state.pa.us.

FINAL DETERMINATION ISSUED AND MAILED: September 3, 2010

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APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Sara Ganim; R.H. Hawn, Esq.