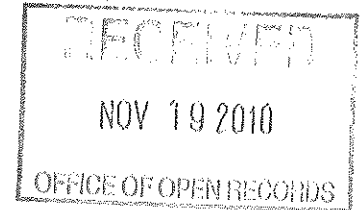


COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL



November 19, 2010

Terry Mutchler
Office of Open Records
400 North Street, 4th Floor
Harrisburg, PA 17120-0255

RE: Right-to-Know Appeal -- Docket # AP 2010-0810 Geoffrey Lincoln --
Office of Administration

Dear Ms. Mutchler:

Enclosed please find an original of the Commonwealth's Petition for Reconsideration for filing in the above-referenced case.

Please do not hesitate to contact me if you have any questions with regard to this matter.

Very truly yours;

Crystal Dawn Fox
Senior Counsel

Attachment

copy: Geoffrey Lincoln
Lucinda Glinn
Audrey Ellen Gaines

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

IN THE MATTER OF	:	
GEOFFREY LINCOLN,	:	
Complainant	:	
	:	Docket # AP 2010-0810
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
OFFICE OF ADMINISTRATION,	:	
Respondent	:	

PETITION FOR RECONSIDERATION

Pursuant to Section 35.241 of the General Rules of Administrative Practice and Procedure, 1 Pa.Code § 35.241, the Commonwealth of Pennsylvania Office of Administration (OA) respectfully petitions the Pennsylvania Office of Open Records (OOR) for reconsideration of its final determination entered in favor of Geoffrey Lincoln pursuant to the Right-to-Know Law (RTKL), 65 P.S. § 67.101, et seq., on the following grounds:

1. On November 9, 2010, the OOR rendered a final determination in the appeal of Mr. Lincoln from a partial denial of access to OA records. The Final Determination is attached as Exhibit1, and is incorporated here fully by reference.
2. Mr. Lincoln originally requested records of stipend payments made to Commonwealth employees on non-paid military leave for both 2001 and 2002, and a separate record of Commonwealth employees on non-paid military leave prior to September 11, 2001.
3. OA compiled and sent responsive documents with names redacted. During mediation, OA provided Mr. Lincoln the same documents with identifiers rather than names, allowing him to connect the two records.

4. This appeal ensued. In its Final Determination, the OOR ruled that OA, among other things, did not meet its burden to prove the application of statutory or regulatory protection (Exhibit 1, at 5-6).

ERROR ASSERTED

5. The OOR's ruling is based on an error of material fact, forwarded inadvertently by OA by virtue of a typographical error in citing to applicable law. OA cites to 10 U.S.C. § 130(b), which the OOR quite correctly identifies as a statute protecting only technical data of the United States Department of Defense. The true and correct citation should have been typed as 10 U.S.C. § 130b, the language of which follows:

§ 130b. Personnel in overseas, sensitive, or routinely deployable units:
nondisclosure of personally identifying information

(a) Exemption from disclosure. The Secretary of Defense and, with respect to the Coast Guard when it is not operating as a service in the Navy, the Secretary of Homeland Security may, notwithstanding section 552 of title 5, authorize to be withheld from disclosure to the public personally identifying information regarding--

(1) any member of the armed forces assigned to an overseas unit, a sensitive unit, or a routinely deployable unit; and (2) any employee of the Department of Defense or of the Coast Guard whose duty station is with any such unit.

(b) Exceptions.

(1) The authority in subsection (a) is subject to such exceptions as the President may direct.

(2) Subsection (a) does not authorize any official to withhold, or to authorize the withholding of, information from Congress.

(c) Definitions. In this section:

(1) The term "personally identifying information", with respect to any person, means the person's name, rank, duty address, and official title and information regarding the person's pay.

(2) The term "unit" means a military organization of the armed forces designated as a unit by competent authority.

(3) The term "overseas unit" means a unit that is located outside the United States and its territories.

(4) The term "sensitive unit" means a unit that is primarily involved in training for the conduct of, or conducting, special activities or classified missions, including--

(A) a unit involved in collecting, handling, disposing, or storing of classified information and materials;

(B) a unit engaged in training—

(i) special operations units;

(ii) security group commands weapons stations; or

(iii) communications stations; and

(C) any other unit that is designated as a sensitive unit by the Secretary of Defense or, in the case of the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Homeland Security.

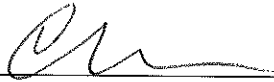
(5) The term "routinely deployable unit" means a unit that normally deploys from its permanent home station on a periodic or rotating basis to meet peacetime operational requirements that, or to participate in scheduled training exercises that, routinely require deployments outside the United States and its territories. Such term includes a unit that is alerted for deployment outside the United States and its territories during an actual execution of a contingency plan or in support of a crisis operation.

REQUEST FOR LEAVE TO SUPPLEMENT THE RECORD

6. OA requests leave to supplement the appeal record with a memorandum from the Office of the Secretary of Defense, dated February 16, 2001, instructing the withholding of names, ranks, duty addresses, official titles, and pay information based on the statute cited above, which is attached as Exhibit 2.
7. OA further requests leave to supplement the appeal record with the affidavit of Mr. Dennis Guise, the current Chief Counsel of the Pennsylvania Department of Military and Veteran's Affairs, explaining the current applicability of the policy announced in the February 16, 2001, memo, which is attached as Exhibit 3.

WHEREFORE, Petitioner Commonwealth of Pennsylvania Office of Administration urges the Office of Open Records to reconsider its November 9, 2010, Final Determination and deny the appeal of Geoffrey Lincoln in this matter.

Respectfully submitted for
The Commonwealth of Pennsylvania
Office of Administration:



CRYSTAL DAWN FOX
Senior Counsel
Attorney # 91383
COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATION
Legal Office
405 Finance Building
Harrisburg, PA 17120
Phone: 717-783-2590
Fax: 717-783-5455
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Date filed: November 19, 2010

Exhibit 1

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pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

GEOFFREY LINCOLN,
Complainant

v.

OFFICE OF ADMINISTRATION,
Respondent

Docket No. AP 2010-0810

INTRODUCTION

Geoffrey Lincoln (the "Requester") submitted a request to the Office of Administration ("Office") pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, ("RTKL"), seeking records of payments of stipends to state employees while on military leave. The Office denied access to names citing Section 708(b)(1)(ii), (b)(6) and a federal statute. The Requester timely appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is granted, and the Office is required to take further action as directed.

FACTUAL BACKGROUND

On July 9, 2010, the Requester submitted a right-to-know request to the Office seeking

- (1) A list of all monthly stipend payments made by the Commonwealth of Pennsylvania to military reserve and National Guard members who also work for the Commonwealth and were on non-paid military leaves of absence from their state job for both 2001 and 2002. The fields would be: Name, month, year, payment made.
- (2) Of [these individuals]...a separate list of state workers that were on non-paid military leave of absence from their state jobs prior to September 11, 2001.

(the "Request").

Audrey-Ellen Gaines, Open Records Officer (ORO), responded that it did not have a record with the specified data elements and compiled a responsive record from which the names

were withheld under Section 708(b)(1)(ii) and (b)(6) for personal information, and as it "may also be exempt [sic] under federal law, 10 U.S.C. §130(b) ("Response").

The Requester timely appealed arguing the names are not protected as they are names of public employees who received public funds while on active duty. He explains that there is no detailed information on military service requested to implicate federal law and that the names are needed to tie the identifier to the payment (the "Appeal"). He states that if full name is not permitted, he would accept a partial name, *e.g.*, first name and last name initial.

The Office supplemented the record with an affidavit of Dennis Guise, the Chief Counsel for the Department of Military & Veterans Affairs ("Affidavit"). Guise attests that providing names of service members "would allow the identification of service members, which itself could put the members in physical danger" and deployment associated absences from home and work would pose a risk to the service members and their families. He attests "someone who was trying to gather information about mobilizations and deployments could infer a substantial amount of information about the duty status of particular named employees and their units, which could pose a national security risk." The Office offered the compromise of providing an identification number for each stipend/payment, which was not accepted by the Requester, and asked for mediation.¹

The Requester argues that names of state employees who were in military service 8 to 9 years ago is historical information and does not pose a threat. He submits a notarized affidavit attesting that the information is not exempt and is public information based upon the law and that a showing is needed by the agency to show that any of the individuals who were paid the stipend are still on active duty or receive the stipend currently. He also attests that he possesses security clearance and has no intentions to use the information beyond showing the Office that others have received stipends when he, who holds a commission as an Army Major while a state employee, has not.

¹ The Office advised "insofar as you may not choose to direct this appeal to [mediation], that you grant us a hearing."

The appeal had been referred to mediation, agreed to by both parties, and mediated by another appeals officer. The mediation was unsuccessful. Accordingly, the parties agreed to extend the due date for a Final Determination to November 12, 2010.

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, the OOR has the necessary, requisite information and evidence before it, presented through sworn, written testimony, to properly adjudicate the matter.

The Office is a Commonwealth agency required to disclose public records. *See* 65 P.S. §67.301. Records in possession, custody or control 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)[t]he 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). The Office asserted the personal security exception, (b)(1)(ii) and personal identification information exception, (b)(6), and 10 U.S.C. §130 to support its redactions of the names from the records submitted to the Requester.

1. Names are not exempt as personal identification information.

Section 708(b)(6)(i)(A) protects specific identification information limited to:

a person's Social Security number; driver's license number; personal financial information; home, cellular or personal telephone numbers; personal e-mail addresses; employee number or other confidential personal identification number.

65 P.S. §67.708(b)(6)(i)(A). Names are not specifically exempt, and thus cannot be exempt under this exception. Further, subsection (ii) provides that "Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation *or other payments or expenses* ...of an agency employee." 65 P.S. §67.708(b)(6)(ii). The stipends paid by the Commonwealth to state employees based upon military service are payments to employees excluded from this exception such that names of employees receiving such payments are not protected.

2. Names are not exempt for personal security reasons.

Section 708(b)(1)(ii) protects from access "a record the disclosure of which...would be *reasonably likely* to result in a *substantial and demonstrable risk* ..[to] the personal security of an individual." (emphasis added). To show that this exception applies to protect names, the Office must show each of the elements required as to each name withheld. The Affidavit does not set forth sufficient facts to protect the names sought here. The Affidavit is conclusory and lacks facts to show how release of individual names of recipients for stipends paid in 2001 and 2002 to them while state employees poses a reasonable likelihood of a security risk to those individuals.

Names of, positions held and amounts paid to agency employees are public information by definition under Section 102 as "financial records." Financial record expressly includes "salary or other payments...to an employee of an agency, *including the name and title of the officer or employee.*" 65 P.S. §67.102 (emphasis supplied). There can be no dispute that stipends paid to state employees are "payments ...to an employee of an agency" and are thus financial records. The definition of "public record" expressly includes "financial records." Therefore, the names of employees paid the stipend cannot be withheld absent a showing that an exemption applies. Here, the Office failed to meet its burden of proof that release of the names of state employees being paid a stipend for being in the Reserves or National Guard 8-9 years ago poses a security risk.

The Office noted that the records include Department of Corrections' employees, but provided no details regarding this assertion. To the extent the list of state employees includes Corrections officers, the Office may redact their first names pursuant to the personal security exception in accordance with OOR decisions. *See Stein v. DOC*, OOR Dkt. AP 2009-0414, *aff'd by unreported opinion*, *Stein v. OOR*, Dkt. No. 1236 CD 2009, 2010 Pa. Commw. Unpub. LEXIS 313 (Pa. Commw. 2010), and *Rizzuto v. DOC*, OOR Dkt. AP 2010-0261.

3. The federal law cited, 10 U.S.C. §130(b) does not apply to names.

The Office also cited 10 U.S.C. §130(b), stating that it *may* apply to names of service members. The Office did not submit any facts to support its assertion of this statute and its language does not expressly protect names. Rather, the provision applies to "technical data" of the United States Department of Defense, defined as:

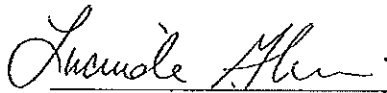
any blueprints, drawings, plans, instructions, computer software and documentation, or other technical information that can be used, or be adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment.

10 U.S.C. §130(e). The burden remains on the agency to prove the application of a statutory or regulatory protection as per *Jones v. OOR*, 993 A.2d 339 (Pa. Commw, 2010). The Office failed to establish that names are protected by this statute and did not cite others.

CONCLUSION

For the foregoing reasons, the appeal is granted and the Office is directed to disclose the names, with the remaining fields provided, to the Requester within thirty (30) days. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal or petition for review 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. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: November 9, 2010



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Geoffrey Lincoln; Crystal Fox for the Office of Administration

Exhibit 2



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950
FEB 16 2001



ADMINISTRATION &
MANAGEMENT

Ref: 01-CORR-010

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Withholding Personal Information of DoD Personnel

The Defense Authorization Act for FY 2000 granted the Secretary of Defense authority to withhold personal identifying information regarding personnel in overseas, sensitive, or routinely deployable units pursuant to the Freedom of Information Act (FOIA), Title 5 USC § 552(b)(3). This provision is codified at Title 10 of the United States Code at Section 130b.

This statute allows for the withholding of names, ranks, duty addresses, official titles, and pay information of DoD personnel (civilian and military) in overseas, sensitive, or routinely deployable units when this information is requested under the FOIA. Previously, such information was withheld under the FOIA (b)(6) exemption. Effective immediately, components should withhold the above described information by citing both the (b)(3) and (b)(6) exemptions. Although the statute does not address withholding telephone numbers and e-mail addresses, it is DoD policy in accordance with DoD 5400.7-R, section C3.2.1.6.2.2, to withhold the additional information of DoD personnel in these units under FOIA exemption (b)(6).

This policy does not preclude a DoD component's discretionary release of names and duty information of personnel in overseas, sensitive, or routinely deployable units who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons. Additionally, this does not change the way public affairs officials do business and the rules under which public affairs offices release information to the general public and the media. Public affairs offices should continue to release information in accordance with current Defense Department directives and regulations, Service regulations, Privacy Act restrictions and security classifications.

The point of contact for this policy is Mr. Jim Hogan, Directorate for Freedom of Information and Security Review, (703) 697-4026 or DSN 227-4026.

D. O. Cooke
Director

Exhibit 3

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

IN THE MATTER OF
GEOFFREY LINCOLN,

Complainant

v.

COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF ADMINISTRATION,

Respondent

Docket # AP 2010-0810

AFFIDAVIT

Before me, the undersigned notary public, this day, personally, appeared Dennis Guise to me known, who being duly sworn according to law, deposes and says the following:

1. I am the Chief Counsel for the Department of Military and Veterans Affairs, and in that capacity, I routinely work with the military personnel of the Pennsylvania National Guard, including its command structure and judge advocate (legal) staff.
2. In addition, I previously served as Staff Judge Advocate for the Pennsylvania Air National Guard prior to my military retirement, in the grade of Colonel, in January 2003. In that capacity, I was familiar with the policies and procedures of the Armed Forces, in general, and the Pennsylvania National Guard in particular, with regard to safeguarding personal information about military personnel who are ordered into active federal service (mobilized) in response to global contingencies.
3. I have reviewed the applicable provision of the FY 2000 Defense Authorization Act, now codified at 10 USC § 130b, which provides for withholding of names, ranks, duty addresses, official titles and pay information of military personnel in overseas, sensitive or routinely deployable units when such information is requested under the federal Freedom of Information Act (FOIA). I have also reviewed the implementing guidance from the Office of Secretary of Defense (OSD), dated February 16, 2001.
4. Based upon my working knowledge of the Pennsylvania National Guard and its policies, the guidance contained in federal law (10 USC § 130b) and the OSD Memorandum, remains in effect. The limited exception to DoD policy for information concerning senior personnel who frequently interact with the public, such as general officers, would not affect the overall policy for the vast majority of Pennsylvania National Guard personnel. As a general rule, in almost every case, the federal government would not release names, ranks, duty addresses, official titles and pay information of DoD personnel assigned overseas or in sensitive or routinely deployable units.

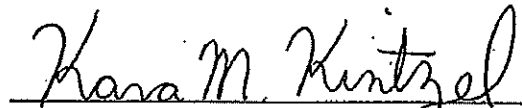
5. The Congress and the DoD have recognized the need to safeguard information about personnel who serve in overseas, sensitive or routinely deployable units. Since the September 2001 terrorist attacks, a majority of Pennsylvania National Guard personnel have deployed in support of global contingencies, and many have deployed on multiple occasions. The 193rd Special Operations Wing of the Pennsylvania Air National Guard, with which I am personally familiar having once served in the unit during my National Guard career, performs a unique special operations mission requiring routine and frequent deployments of its aircraft and personnel.

6. The foregoing information is true and correct to the best of my knowledge, information and belief.



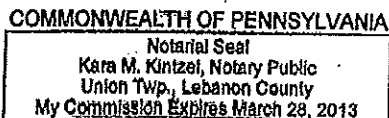
AFFIANT

Sworn to and subscribed before me on the
19th day of November, 2010



Notary Public

My Commission Expires: 3/28/2013



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

IN THE MATTER OF
GEOFFREY LINCOLN,
Complainant

v.

COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF ADMINISTRATION,
Respondent

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CERTIFICATE OF SERVICE

I, Crystal Dawn Fox, counsel for Petitioner Office of Administration, hereby certify that on this 19th day of November, 2010, I served a true and correct copy of the foregoing Petition for Reconsideration upon the following persons via electronic transmission as an e-mail attachment and, where specified via First Class Mail, postage pre-paid, addressed as follows:

Terry Mutchler
Office of Open Records
400 North St., 4th Floor
Harrisburg, PA 17120-0225
Tmutchler@state.pa.us

Lucinda Glinn
Office of Open Records
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lglinn@state.pa.us

Geoffrey Lincoln
glincoln@state.pa.us



CRYSTAL DAWN FOX
Senior Counsel
Attorney # 91383
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Legal Office
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Phone: 717-783-2590
Fax: 717-783-5455
e-mail: crfox@state.pa.us

Date filed: November 19, 2010



November 29, 2010

Crystal Dawn Fox
Senior Counsel
Office of General Counsel
Room 405 Finance Building
613 North Street
Harrisburg, PA 17120

RE: Petition for Reconsideration received November 19, 2010 OOR Dkt. AP 2010-0810

Dear Ms. Fox:

We are in receipt of your Request for Reconsideration received in connection with the office of Open Records Final Determination in *Geoffrey Lincoln v. Office of Administration*, OOR Dkt. AP 2010-0810. 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, Geoffrey Lincoln, may file a response in the nature of an answer within 15 days of the issuance of this order granting reconsideration on or by Tuesday, December 14, 2010.

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

Please contact me if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathanael J. Byerly", is written over a printed name and title. The signature is fluid and cursive.

Nathanael J. Byerly
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Geoffrey Lincoln