



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

IN THE MATTER OF	:	
	:	
DYLAN PURCELL and	:	
<i>The Philadelphia Inquirer,</i>	:	
Complainant	:	
	:	
v.	:	Docket No.: AP 2010-0845
	:	
PENNSYLVANIA OFFICE OF	:	
ADMINISTRATION,	:	
Respondent	:	

**INTRODUCTION**

Dylan Purcell on behalf of *The Philadelphia Inquirer* (collectively, the “Requester”) filed a right-to-know request pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.*, with the Pennsylvania Office of Administration (the “OA”). The Requester sought a list of state employees and their salaries. The OA provided a .pdf copy of redacted records. The Requester filed a timely appeal with the Office of Open Records (“OOR”) challenging the format and redaction of birthdates. For the reasons set forth in this Final Determination, the appeal is **dismissed as moot in part and granted in part** and the OA is directed to provide the records sought.

## **FACTUAL BACKGROUND**

On July 23, 2010, the Requester sought a copy of a list of “all active state employees and their salary records.” (“Request”). He asked that the records be provided in any commonly used database format. After extending the deadline to respond, the OA provided .pdf copies of the requested records and provided only the year of birth, rather than the full birth date of the employee. The agency asserted that nondisclosure was permitted by section 708(b)(1)(ii). On September 2, 2010, in a post-denial note the OA further explained its denial of full birth dates asserting that they are protected by a Constitutional right of privacy, citing a preliminary injunction issued in *Pa. State Educ. Ass'n v. Dep't of Cmty. & Econ. Dev.*, 981 A.2d 383, 386 (Pa. Commw. Ct. 2009). On September 16, 2010 the Requester appealed to the OOR challenging the format in which the records were provided and redaction of birthdates. The Requester argues that similar requests for records from 2002 through 2008 were fulfilled and included complete birth dates.

On October 4, 2010 the OA responded to the appeal advising that it will exercise its discretion and provide the Requester with a copy of the records in Microsoft Access® Format. The OA asked that the appeal as to that issue be dismissed as moot. It acknowledges that in the past full dates of birth were provided, but maintained its position that redaction of the dates of birth is proper. In support of its position it provides four documents as follows:

1. Letter from Philadelphia District Attorney Lynne Abraham<sup>1</sup> (the “D.A.”):

The D.A.s comments regarding the disclosure of dates of birth include:

“While all District Attorney staff would fall under the law enforcement exception, we believe that other City employees are put at risk if the combined information sought here is made available to any member of the public. The City has already disclosed its employees' full name and detailed earnings information. When this information is combined with home addresses and date of birth, it provides precisely the type of information that can be used for identity theft purposes. Quite simply, this is the type of information that can provide criminals with the tools to get complete financial information (such as social security numbers and credit card numbers). For example, a common scam used by identity thieves is to file a "change-of-address" form with the United States Postal Service and divert all the victim's mail (including bank account statements, credit card bills and tax information) to a different location.”

The D.A. provides statistics regarding the crime of identity theft that are “staggering” as is the experience identity theft victims go through in restoring their credit records. In addition to identity theft, the D.A. provides other examples of harm that could befall City employees if their dates of birth and home addresses are released including domestic violence, retaliation for actions taken through their government work, such as the difficult decision agencies such as the Department of Human Services are required to make. The D.A. further argues:

“Quite simply, properly doing one's job as a City employee can lead to great anger by some members of the public. In fact, Pennsylvania specifically recognized this problem when it created a separate criminal offense for those who retaliate against public servants for this type of work. See 18 Pa.C.S.A Section 4702. For this reason, City employees should not need to also fear that their employer has made this crime easier by providing any member of the public with their home address... Because of these concerns, my belief is that the personal security

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<sup>1</sup> The OA notes that this letter was first provided in support of the City of Philadelphia’s position in *Purcell v. City of Philadelphia*, OOR Dkt. AP 2009-0263 (the OOR granted the appeal finding the redaction of full dates of birth improper and the matter is presently on appeal to the Philadelphia Court of Common Pleas).

exemption precludes disclosure of the home addresses and birthdates of City employees. Additionally, addresses and birthdates of District Attorney employees are not subject to disclosure by virtue of the law enforcement privilege.”

There are no actual instances of retaliation against City employees cited. To summarize, the City relies upon section 67.708(b)(1)(iii), RTKL case law (decided under the old law), alleged Constitutional protection of privacy specific to home addresses and dates of birth and provides examples it deems persuasive from other jurisdictions and the United States Freedom of Information Act.

2. Affidavit of Joseph E. Campana:

Mr. Campana is an identity theft, privacy and information security educator, consultant and investigator, Certified Information Privacy Professional (CIPP/G), Certified Identity Theft Risk Management Specialist, and author of Privacy MakeOver: The Essential Guide to Best Practices. He asserts that “disclosure of personally identifiable information such as dates of birth would result in it [sic] a substantial and demonstrable risk of the personal security of individuals because the risk of identity theft through disclosure would be substantially heightened.” He explains that “a person’s name, Social Security number and date of birth....together can be used by identity thieves to establish new financial accounts in the name of the identity theft victim and to commit a variety of other types of identity fraud.” He adds “[w]hile one cannot hold one’s name secret, one can often protect their Social Security number and date of birth. With a name and Social Security number in hand, thieves may turn to other sources to harvest the date of birth of their victim.” He asserts that “fraudulent accounts may go undetected by the victim for years after which there is financial reputational damage to the victim.” Mr.

Campana names other types of identity fraud possible such as “employment fraud, government identification fraud, government benefits fraud, housing and housing rental fraud, insurance fraud, medical identity theft and related medical fraud, and character identity where the imposter is arrested or commits crimes in the name of the victim.” He notes the statistical increase in identity theft.

Mr. Campana cites to several Federal privacy laws in support of categorizing dates of birth as personally identifiable information including the Identity Theft Assumption and Deterrence Act of 1998 (defines “means of identification” as “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual including any...name, Social Security number, date of birth...”); the Family Educational Rights and Privacy Act of 1974 (“FERPA”) (“other direct identifiers, such as the student’s date of birth, place of birth and mother’s maiden name”); the Health Insurance Portability and Accountability Act (“HIPPA”) of 1996 (protects personally identifiable health information as defined by Sec. 1171(6) of the social Security Act (42 U.S.C. 1320d(6)) (information that “identifies the individual or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual”); health Information Technology for Economic and Clinical Health Act (“HITECH”) (requires Department of Health and Human Services to issue regulations to provide notification to consumers in the event of breeches to unsecured personal health information.).

3. Affidavit of Erik Avakian:

Mr. Avakian is the Chief Information Security Officer for the Commonwealth of Pennsylvania. He holds numerous industry security certifications including Certified Information Systems Security Professional (CISSP), Certified Information Security Manager (CISM), and GIAC Security Essentials Certification(GSEC). He asserts that '[a] 2007 Office of Management and Budget (OMB) memorandum from the Executive Office of the President defines Personally Identifiable Information as "Information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc." Mr. Avakian notes that the National Institute of Standards and Technology (NIST) defines "Personally Identifiable Information [(PII)] and includes 'date of birth' as a component of PII defined as 'Information about an individual (e.g., date of birth, place of birth, race, religion, weight, activities, geographic indicators, employment information, medical information, education information, financial information).

Mr. Avakian argues that "divulging of a consolidated list containing date of birth information for each employee would likely result in a substantial and demonstrable risk to the personal security of individual employees by creating such a significant and predictable increase in the amount of social engineering, targeted, and well crafted phishing attacks (known as spear-phishing) against commonwealth employees...[as well as] identity theft and fraud..."). He hypothesizes that:

[S]omeone with this information can gather additional details about an individual and target them directly by calling or emailing the individual,

pretending to be a representative of the individual's company. The attacker could then verify the employee's name and date of birth, which will, in turn, help to gain the targeted employee's trust. Once a trust relationship has been established between the attacker and victim, the attacker is already down the path of gathering more information, including but not limited to, gaining financial, personal, or other sensitive information that the attacker would not have otherwise known. A successful attack is usually the result.

4. Management Directive 505.18 Amended.

This directive which applies to all department, boards, commissions, and councils under the Governor's jurisdiction and SAP agencies "establishes policy, responsibility, and procedure for the maintenance, access, and release of employee information." The Management Directive regarding Public Employee Information states as follows:

Pursuant to Section 614 of *The Administrative Code of 1929 (71 § 234)* public employee information pertaining to most commonwealth employees for the purpose of this directive consists of employee agency; last name; first name;...*birth year*;...."

(emphasis added).

### **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.*

The OA is a Commonwealth agency required to disclose public records. 65 P.S. §§67.102 and 301. Records in possession of a Commonwealth or local 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)(1) states: “[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 issues on appeal are limited to 1) whether the agency erred by providing the records in .pdf when they exist in the database format requested and 2) whether the agency erred by providing only the birth year rather than the complete date of birth.

**A. Format of production of record.**

During the course of this appeal the OA provided the record in Microsoft Access® format as requested, but redacted them. It asked the OOR to dismiss this part of

the appeal as moot. The OOR agrees with OA that the appeal, as it relate to format, is moot, leaving the propriety of the OA's redactions to be resolved.

## **B. Birth Dates**

On appeal, the OA argues that full dates of birth are protected by Section 708(b)(1)(ii), (b)(6) and a constitutional right of privacy. In its initial denial letter the OA asserts only Section 708(b)(b)(1)(ii). In its follow up response, prior to the appeal by the Requester, the agency asserts that a Constitutional right of privacy exists in one's full date of birth. An agency cannot "alter the reason given for a denial after the requester has taken an appeal based on the stated reason." *See Signature Solutions, LLC v. Aston Township*, 995 A.2d 510, 514 (Pa. Commw. 2010). In this case, the Requester was made aware of the agency's denial based upon 708(b)(1) and the constitutional right of privacy. However, the agency does not raise 708(b)(6) until after the Requester filed its appeal; therefore, the applicability of that provision will not be considered.

### **1. Constitutional Right to Privacy does not exist in dates of birth.**

Absent proof of the applicability of an exemption, dates of birth are public record. *See Purcell v. City of Philadelphia*, OOR Dkt. AP 2009-0263, 2009 PA O.O.R.D. LEXIS 641; *Parsons v. Port Authority of Pittsburgh*, OOR Dkt. AP 2009-008, 2009 PA O.O.R.D. LEXIS 252; *Lord v. City of Pittsburgh*, OOR Dkt. AP 2009-0775, 2009 PA O.O.R.D. LEXIS 90, 3-6 (PA O.O.R.D. 2009). No appellate court has issued a ruling to the contrary.

### **2. Section 708(b)(1) does not protect dates of birth.**

Section 708(b)(1) protects information the release of which “(ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” The OOR considered this section in prior appeals and noted the burden as follows: “The City alleges only that a threat “could” exist, which is insufficient to establish the personal security exception. The OOR’s decision in *Swartzwelder v. Butler County*, supra underscores the importance of the agency showing the connection between the release of the record to risk posed to personal security based upon specific facts. In *Swartzwelder*, the County submitted an affidavit that specified prior threats to the assistant district attorney to show a likelihood of risk and connected the release of the past vacation schedule to her security...As the City did not support facts demonstrating a reasonable likelihood or a substantial and demonstrable risk, as required by law, the City cannot protect the Mayor’s daily schedules under this exception, *Sheilds v. City of Philadelphia*, OOR Dkt. AP 2009-0787, 2009 PA O.O.R.D. LEXIS 114 (PA O.O.R.D. 2009)

The OA argues that a full date of birth is personal identification information and the release of that information will result in a risk of harm to the personal security of an individual a result of identity theft or other forms of fraud. However, dates of birth are not listed in the RTKL as personal identification information, and are not protected as such. See *Purcell v. City of Philadelphia*, supra; *Parsons v. Pittsburgh Port Authority*, OOR Dkt. AP 2009-0008; 2009 PA O.O.R.D. LEXIS 252.

The OA’s Affidavits set forth a string of fraudulent actions that one could attempt if one had access to an individual’s birth date in combination with other information such

as Social Security number, name, and address. The Legislative Journal published Bill Information for the Regular Session 2007-2008, Senate Bill 1. Included are discussions of the House of Representatives and Senate on various provisions of the proposed RTKL. The General Assembly specifically debated the issues of privacy, identity theft, domestic violence and stalking at length in considering the adoption of Senate Bill 1, which later became the amended RTKL, see page 2818 of the Legislative Journal – House (December 10, 2007) and page 1559 of the Legislative Journal –Senate (January 30, 2008). It was revisited again on February 6, 2008 (see pages 357-361 of the Legislative Journal – House). Identity theft was specifically mentioned as the subject of another, future legislative initiative (see Legislative Journal – House, February 6, 2008), but did not prevent adoption of the RTKL with no exclusion of dates of birth. *See also, Gribbon v. Dept. on Natural Resources*, OOR Dkt. 2009-0346 (discussing Legislative debate regarding release of dates of birth and identity theft issue).

The OA also relies on Management Directive 505.18, while acknowledging it is not controlling. The directive regarding what an agency should considered public employee information is based upon The Administrative Code of 1929. The Management Directive identifies only the *year* of birth as public information. However, Section 614 of *The Administrative Code of 1929 (71 § 234)* states as follows:

All administrative departments, boards, and commissions and the Attorney General shall on July 15 of each year, transmit to the Auditor General, the State Treasurer and Secretary of the Budget a complete list, and to the Legislative Data Processing Center a computer tape of such list, as of July 1 preceding, of the names of all persons, except day-laborers, entitled to receive compensation from the Commonwealth for services rendered in or to the department, board, or commission, as the case may be. Such list shall show for each such person the position occupied, *the date of birth*, county of residence, voting residence, the salary at which or other basis upon which

such person is entitled to be paid, the date of entry into the service of the Commonwealth, whether such person has been continuously employed by the Commonwealth since that date, and all periods of service and positions held as an employe [sic] of the Commonwealth, or such part of such information related to previous service and positions as the Governor may prescribe.

(emphasis added). The Management Directive does not supercede the RTKL and there is no evidence that Section 614 of The Administrative Code (which established a requirement that agencies provide information to certain state officers and is not a confidentiality law) limits public disclosure of the entire date of birth. The OOR finds this portion of the OA's argument unpersuasive.

The OOR previously considered the public status of dates of birth and specifically the issue of identity theft and fraud. *See Gribbon v. Dept. on Natural Resources*, OOR Dkt. 2009-0346; *Purcell v. City of Philadelphia*, *supra*. The holding and analysis of those final determinations are specifically adopted and incorporated herein. Absent the applicability of an exemption, dates of birth are public record.

The OA maintains the sought-after information in a commonly used database format, i.e. Microsoft Access®. It provided records in that format, as requested, rendering the Requester's appeal on that issue moot. The OOR finds that the OA improperly redacted dates of birth when it provided the requested information in Microsoft Access® format and directs the same records be provided without redaction.

## CONCLUSION

For the foregoing reasons, the appeal is **dismissed as moot in part and granted in part**. The OA agreed to and did provide some information in the format requested and the appeal as it relates to format is dismissed as moot. The OA is directed to provide

complete dates of birth in the same format previously provided - Microsoft Access® format. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Commonwealth Court. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1302. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED: October 29, 2010**



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**APPEALS OFFICER  
AUDREY BUGLIONE, ESQUIRE**

**Sent to: Dylan Purcell, Crystal Fox**