



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAN MURPHY on behalf of the	:	
<i>PATRIOT-NEWS,</i>	:	
Complainant	:	
	:	Docket No.: AP 2010-1037
v.	:	
	:	
PENNSYLVANIA TURNPIKE	:	
COMMISSION,	:	
Respondent	:	

INTRODUCTION

Jan Murphy, a reporter for the *Patriot-News*, (the “Requester”) submitted a request (the “Request”) to the Pennsylvania Turnpike Commission (“Commission”) seeking records related to E-ZPass usage for Commission employees pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The Commission denied the Request, stating that a portion of the Request sought answers to questions. The Commission also cited a statute alleged to prevent access to responsive records. 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 Commission is required to take further action as set forth herein.

FACTUAL BACKGROUND

On October 21, 2010, the Request was filed, seeking

information in Excel format that details employee usage of Pennsylvania Turnpike since January 3, 2010. I would like to know how many employees there are and how many have E-ZPass transponders assigned to them. Of these employees with commission-provided transponders, I am requesting their names, their positions with the commission, and a record of their usage of the turnpike including identifying the interchanges where they enter and exit the turnpike and the times and dates of travel.

On October 22, 2010, the Commission denied the Request, stating that the Request sought answers to questions related to the number of Commission employees and the number of Commission employees with “E-ZPass transponders assigned to them.” With respect to the remainder of the Request, the Commission alleged that responsive records are statutorily exempt under 74 Pa.C.S. § 8117.

On November 1, 2010, the Requester appealed to the OOR, alleging that

Section 8117(d) was designed to protect information submitted by members of the public and was not intended as a means to shield public employee benefits. The plain language of section 8117(d) applies to “account holder information” i.e. information submitted by members of the public who pay for EZ pass service and are required to submit certain information in order to use the service. The public employees are not “account holders” under 8117(d) because they are not paying to use the EZ pass service and they have no “account” on which any funds will be due.... Moreover, section 8117(b)(5) governs liability for failure to pay required tolls; this is not applicable to public employees using the system free of charge. This section does not govern the requested records because there is no possibility that liability will be imposed; the public employees cannot violate section 8117(b)(5) for failure to pay because they do not pay... [T]he language of section 8117 does not provide an all-encompassing umbrella over any records related to EZ pass usage.

The OOR invited both parties to supplement the record. On November 9, 2010, the Commission provided a position statement, a verification signed under penalty of perjury from its Manager of Customer Service Operations and a blank “private account application” for obtaining an E-ZPass. In its materials, the Commission states that its employees

apply for and maintain electronic toll collection accounts (known as E-ZPass accounts) in their individual names... [T]o open these accounts, the employees are required to provide personal financial information, are personally responsible for paying tolls at non-[Commission] toll agencies, and are required to provide an account deposit to cover the cost of these tolls. As

account holders, [Commision] employees subsequently receive an E-Z Pass account number unique for each one of them. Thus the [Commision] employees are in fact “account holders” and do have “accounts” for which they have in fact submitted personal financial information.

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 and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Commission 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) 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).

The RTKL provides that records that are exempt under other statutory law cannot be considered “public records.” *See* 65 P.S. § 67.102; *see also* 65 P.S. § 67.305(a)(3). In the present case, the Commission alleged that 74 Pa.C.S. § 8117 protects responsive records from public access. In order to establish that a statutory exemption applies, an agency must provide sufficient evidentiary support demonstrating how the exemption applies to the specific requested records. *See DOT v. Office of Open Records*, No. 2259 C.D. 2009, 2010 Pa. Commw. LEXIS 575 at **15-16 (Pa. Commw. Nov. 1, 2010).

1. The Commission did not establish that any records are exempt under Section 8117(b)

Under a section related to the imposition of liability upon turnpike users that fail to pay tolls, the statute provides that

Notwithstanding any other provision of law, videotapes, photographs, microphotographs, other recorded images, written records, reports or facsimiles *prepared pursuant to this section* shall be for the exclusive use of the commission, its authorized agents, its employees and law enforcement officials for the purpose of discharging duties under this section and the regulations of the commission. The information shall not be deemed a public record under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

74 Pa.C.S. § 8117(b)(5) (emphasis added). This provision does not protect responsive records from public access because the text of 74 Pa.C.S. § 8117(b), titled “Imposition of Liability,” outlines specific requirements that only apply “[i]f a violation is committed as

evidenced by a violation enforcement system.” *See* 1 Pa.C.S. § 1924 (“The headings prefixed to titles, parts, articles, chapters, sections and other divisions of a statute ... may be used to aid in the construction thereof”). The Pennsylvania Rules of Statutory Construction provide that “statutes or parts of statutes are in *pari materia* when they relate to the same persons or things” and should be construed together as one statute. *See* 1 Pa.C.S. § 1932. This specific provision is limited only to information “prepared” when a “violation is committed.” *See* 74 Pa.C.S. § 8117(b); 74 Pa.C.S. § 8117(b)(5). In the present case, the Commission has neither asserted nor demonstrated that responsive records were “prepared” in relation to a violation. As a result, the OOR finds that the Commission did not meet its burden of showing that the responsive records fall within the statutory exemption under 74 Pa.C.S. § 8117(b)(5). *See DOT, supra* at *16.

2. The Commission demonstrated that records listing the names of employees with E-ZPass transponders are protected under Section 8117(d), but did not establish that records containing other information are statutorily exempt

The Commission also cited 74 Pa.C.S. § 8117(d) for the proposition that responsive records are statutorily exempt. This statutory section provides as follows:

(d) PRIVACY OF ELECTRONIC TOLL COLLECTION ACCOUNT HOLDER INFORMATION.--

(1) Except as set forth under paragraph (2), notwithstanding any other provision of law, all of the following apply to information kept by the commission, its authorized agents or its employees which is related to the account of an electronic toll collection system account holder:

(i) The information shall be for the exclusive use of the commission, its authorized agents, its employees and law enforcement officials for the purpose of discharging their duties pursuant to this section and the regulations of the commission. This subparagraph includes names,

addresses, account numbers, account balances, personal financial information, vehicle movement records and other information *compiled from transactions with the account holders.*

(ii) The information shall not be deemed a public record under the Right-to-Know Law, nor shall it be discoverable by court order or otherwise or be offered in evidence in any action or proceeding which is not directly related to the discharge of duties under this section, the regulations of the commission or a violation of an account holder agreement.

74 Pa.C.S. § 8117(d)(1) (emphasis added).

In the present case, the Commission provided a verification signed under penalty of perjury from its Manager of Customer Service Operations affirming that the Commission's employees apply for individual E-ZPass accounts and

are required to complete the "Private Account Application" in their individual names ..., are required to provide their personal financial information [regarding personal credit card or checking accounts], are required to provide their license plate information for their own private vehicles, are personally responsible for paying the tolls at non-[Commission] toll agencies, and provide a \$35.00 account deposit [to cover the cost of non-[Commission] tolls].

The Commission also attached a blank Private Account Application, which includes areas for an individual's name, address and other information.

The Request seeks, among other things, the names, "positions with the [C]ommission," and "a record of ... usage of the turnpike" for all Commission employees who have been issued E-ZPass transponders. Under 74 Pa.C.S. § 8117(d)(1)(i), names and "vehicle movement records" are not subject to public access as long as such information is "compiled from transactions with the account holders." As the Private Account Application specifically asks for the names of all applicants, the OOR finds that

the names of Commission employees with E-ZPass transponders are “compiled from transactions with the account holders,” and, accordingly, are statutorily exempt pursuant to 74 Pa.C.S. § 8117(d)(1)(i) and may be redacted.

The Commission, however, provided no allegation or evidence related to whether the Request for “a record of [Commission employee] usage of the turnpike including identifying the interchanges where [employees] enter and exit the turnpike and the times and dates of travel” constitutes a request for statutorily-exempt “vehicle movement records” or information specifically listed in 74 Pa.C.S. § 8117(d)(1)(i). Similarly, the Commission failed to provide evidence that the positions of employees with Commission-provided E-ZPass are exempt under 74 Pa.C.S. § 8117(d)(1)(i). As a result, the OOR finds that the Commission failed to meet its burden of establishing that the exemption under 74 Pa.C.S. § 8117(d) applies to the specific records sought here. *See DOT, supra* at *16; *see also Bowling*, 990 A.2d at 824 (“[E]xemptions from disclosure must be narrowly construed”); 1 Pa.C.S. § 1924 (“Exceptions expressed in a statute shall be construed to exclude all others”).

3. The remainder of the Request did not seek records pursuant to the RTKL

The remainder of the Request asked “how many employees there are and how many have E-ZPass transponders assigned to them.” The OOR has previously held that 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. Consequently, the OOR finds that the remainder of the Request did not properly seek records and instead asked questions.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and the Commission is required to provide responsive records listing the positions of all Commission employees with an E-ZPass transponder and responsive records detailing Commission employee usage of the Pennsylvania Turnpike, subject to redactions pursuant to 74 Pa.C.S. § 8117(d)(1)(i) and 65 P.S. § 67.708(b)(6), with thirty (30) 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: December 1, 2010



APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Jan Murphy; Albert Peters, Esq.