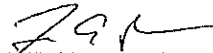


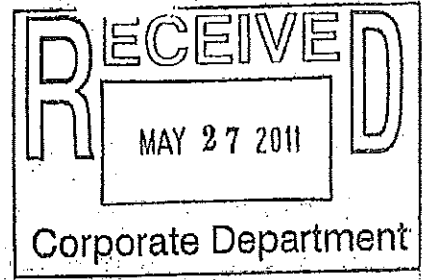
for Review Pursuant to 65 P.S. §67.1302 is attached as Exhibit 2.

OFFIT KURMAN

By: 
Mark E. Gottlieb
Frederick A. Pettit

GREEN, SILVERSTEIN & GROFF, LLC
Joshua D. Groff

Date: June 23, 2011



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

DAVID CROCKETT,
Complainant

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Respondent

Docket No. AP 2011-0543

INTRODUCTION

David Crockett ("Requester") submitted a request ("Request") to the Southeastern Pennsylvania Transportation Authority ("SEPTA") pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"), seeking maintenance records of specified rail cars. SEPTA did not respond, and the Request was deemed denied. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is granted and SEPTA is required to take further action as directed.

FACTUAL BACKGROUND

On April 10, 2011, the Request was filed, seeking:

[T]o inspect all of SEPTA's rolling stock maintenance, repair and inspection records of rail cars per the attached list. My request is the physical inspection of ALL the records noting your records retention schedule states that these records are held for 15 years i [sic] expect to inspect all records back to April 11th of 1996.

As SEPTA did not respond within five business days of receiving the Request, the Request was deemed denied. *See* 65 P.S. § 67.901.

On May 2, 2011, the Requester appealed to the OOR, alleging that “‘Maintenance Records’ are not listed as an exception under the ‘RTKL’ and ... these type[s] of records have already been ruled public.” The OOR invited both parties to supplement the record, specifically stating that facts must be supported by affidavit of a person with knowledge. On May 9, 2011, the Requester provided further argument, along with three attached exhibits. On May 11, 2011, SEPTA provided an unsworn position statement, arguing that the requested documents were exempt from disclosure on three grounds. First of all, SEPTA argues that the Request is onerous, disruptive, and places an undue burden on the SEPTA. Secondly, SEPTA argues that maintenance records “are not created in connection with a transaction, business or activity of SEPTA” and thus are not records under the RTKL. Finally, SEPTA argues that the maintenance records are exempt under Section 708(b)(3) because their disclosure poses a safety threat.

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. Ct. 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.

For purposes of the RTKL, SEPTA is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302; *see SEPTA v. City of Philadelphia*, No. 2445 C.D. 2009, 2011 Pa. Commw. LEXIS 169 at *8 n.6 (Pa. Commw. Ct. April 13, 2011) (noting that SEPTA is not a Commonwealth agency “in every conceivable circumstance”). Records in possession of a 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(a). 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).

1. SEPTA did not establish that the Request was disruptive

Under the RTKL, an agency may deny access to a record “if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.” 65 P.S. § 67.506(a)(1). The OOR has recognized that, in order for this exemption to apply, 1) the request must be “repeated” and 2) the repeated request must place “an unreasonable burden on the agency.” *See Slate v. DEP*, OOR Dkt. AP 2009-1143, 2010 PA

O.O.R.D. LEXIS 97 (“A repeated request alone is not enough to satisfy § 506(a)(1)”). The OOR has held that repeated requests for the same records, although phrased differently, may be denied as disruptive. *See Cohen v. Dept. of Labor & Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 (“Slight differences in phraseology do not preclude application of [Section 506(a)]”).

Here, SEPTA does not allege that the Requester has made repeated requests for the same maintenance records. Instead, the Requester has made multiple requests to SEPTA for different records. Because SEPTA did not establish that the Request seeks the same records as those previously sought by the Requester, SEPTA did not establish that the Request was “repeated.” Consequently, the OOR finds that the Request was not disruptive.

2. Maintenance records are considered “records” under the RTKL

The RTKL defines “record” as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

65 P.S. § 67.102. The OOR has previously considered maintenance records as “records” under the RTKL. *See Cap v. Lehigh & Northampton Trans. Auth.*, OOR Dkt. AP 2010-0263, 2010 PA O.O.R.D. LEXIS 289; *Sasso v. City of Philadelphia*, OOR Dkt. AP 2009-0014, 2009 PA LEXIS O.O.R.D. LEXIS 257.

In the present matter, SEPTA argues that maintenance is “not really part of the ‘business of SEPTA’ per se.” However, SEPTA does not rebut the proposition that it conducts maintenance on its rail cars. In fact, maintenance of those rail cars is necessary if SEPTA is to

continue operating those rail cars. Therefore, maintenance records of rail cars are created in connection with a transaction or activity of SEPTA, and thus are records under the RTKL.

3. The records are not exempt under Section 708(b)(3) of the RTKL

Section 708(b)(3) of the RTKL exempts:

A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system

Using Section 708(b)(3), SEPTA argues that disclosure of its maintenance records will create a reasonable likelihood of endangering the safety or physical security of its commuter rail cars:

One need not go any further than the recent information obtained from the Pakistan compound of Osama Bin Laden, which turned up evidence of contemplated terrorist plots upon United States urban railroad systems. The Federal government has even determined that certain critical infrastructure information or protected systems are exempt from disclosure under the Freedom of Information Act. (Title 6, USC §§ 131 et seq.) The maintenance records of SEPTA's commuter rail fleet most certainly contains a multitude of just such critical information in a trains' braking, signal, propulsion, ventilation and emergency systems. Accordingly, these records need to be protected from public scrutiny.

Under the RTKL, a sworn affidavit may serve as sufficient evidence. *See Sherry v. Radnor Twp. Sch. Dist.*, No. 265 C.D. 2010, 2011 Pa. Commw. LEXIS 156 at *13-15 (Pa. Commw. Ct. Apr. 4, 2011); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Further, when asserting an exemption under the RTKL, an agency must set forth in its affidavit sufficient evidentiary detail as to how a specific exemption applies to the records requested. *See Coyle v. Lebanon County*, OOR Dkt. 2010-1099, 2010 PA O.O.R.D. LEXIS 989.

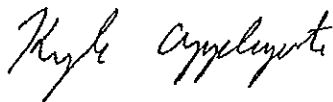
In the present case, SEPTA has failed to submit an affidavit establishing that there is a reasonable likelihood that disclosure of the requested records will endanger the safety of commuter rail cars. SEPTA presents no evidentiary basis at all for its claims that the requested

records are exempt under Section 708(b)(3), despite being advised in writing of the requirement to support its assertions with evidentiary submissions. Further, SEPTA has been involved in prior appeals before the OOR and knows it must support statements of fact with sworn affidavits. *See, e.g., Iverson v. SEPTA*, OOR Dkt. AP 2011-0008, 2011 PA O.O.R.D. LEXIS 61; *Weber v. SEPTA*, OOR Dkt. AP 2009-0479, PA O.O.R.D. LEXIS 215. Therefore, because SEPTA failed to present an evidentiary basis for withholding the requested records under Section 708(b)(3), SEPTA has failed to meet its burden. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and SEPTA is required to provide all responsive records within 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 Philadelphia County Court of Common Pleas. 65 P.S. § 67.1302(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: May 24, 2011



APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: David Crockett; C. Neil Petersen, Esq.