



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**LOUIS AGRE,
Complainant**

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:

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v.

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Docket No.: AP 2009-607

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**CITY OF PHILADELPHIA
Respondent**

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:

INTRODUCTION

Mr. Louis Agre (the “Citizen”), on behalf of the International Union of Operating Engineers Local 542 filed a right-to-know request (the “Request”) with the City of Philadelphia (the “City”) seeking copies of certified payroll records of a third-party contractor pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (the “RTKL”). The City partially granted the request but denied access to home addresses and dates of birth by redacting them from the records provided. The Citizen filed a timely appeal with the Office of Open Records (“OOR”), seeking only home addresses on appeal.

For the reasons set forth in this Final Determination, the Citizen’s appeal is **granted**, and the City is directed to release the requested home addresses.

FACTUAL BACKGROUND

On June 10, 2009, the Citizen filed the Request for certified payrolls submitted by Alchem Environmental Services, Inc., a private, third-party contractor for the City. The City responded on June 17, 2009 granting the request except as it related to home addresses and dates of birth, and invoked a thirty-day extension for legal review regarding that information. On July 7, 2009, the City denied the request for home addresses and dates of birth and the Citizen appealed redaction of home addresses.

The City stated in its denial letter that the information is exempt pursuant to section 67.708(b)(1)(ii) of the RTKL (the personal security exemption) and also stated that redaction was necessary to ensure privacy, citing the Pennsylvania Constitution and Pennsylvania case law which predates the current RTKL including *Tribune-Review Publ'g Co. v. Bodack*, 961 A.2d 110 (2008), *Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 12*, 713 A.2d 627 (1998), *Rowland v. Pa. Assn. of School Retirees*, 885 A.2d 621,629 (Pa. Cmmw.2005), *Times Pub Co., Inc. v. Michel*, 633 A.2d 1233 (Pa. Cmmw. 1993). The City quotes *Tribune-Review* for the proposition that a balancing of interests must occur before home addresses may be released, but does not cite any provision of the RTKL requiring this balancing test or giving the OOR the discretion to perform it in the instant case. Finally, the City argues that the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. §552 is persuasive in that it applies a balancing test.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for Commonwealth and local agencies, 65 P.S. §67.503(a). The City is a local agency subject to the RTKL and

required to disclose public records, 65 P.S. §67.302. Section 102 of the RTKL, defines the term “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. § 67.302

A “public record” is defined as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege,” 65 P.S. §67.102.

Section 67.708 of the RTKL clearly states that the burden of proof with regard to 67.708(b) exceptions rests with the public body to demonstrate that the record is exempt. Section 67.708 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.” 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. West 2004). *See also Commonwealth v. Williams*, 615 A.2d 716 (Pa. 1992).

The OOR has issued multiple Final Determinations addressing whether home addresses and/or certified payrolls constitute public records under the RTKL or may otherwise properly be withheld: *Green v. Pocono Mountain School District*, OOR Dkt. AP 2009-0103 (rejecting arguments that Section 708(b)(1)(ii), (b)(6), and State or United

States Constitution support redaction of third party contractors names, home addresses, and tax exemptions in request for certified payrolls); *Green v. Bethlehem Area School District*, OOR Dkt. AP 2009-0061 (discussing whether application of Section 708(b)(6) or the State Constitution protects private employee home addresses and determining that neither support redaction); *Gribbin v. Pennsylvania Dept. of Conservation and Natural Resources*, OOR Dkt AP 2009-341 (home addresses of private employees of third party contractors are not exempt under 708(b)); *Malley/Leet (Sheet Metal Workers) v. Office of the Budget*, OOR Dkt AP 2009-327 (names of private employees of third party contractor are not exempt under 708(b)(6)). See also, *Greater Pennsylvania Regional Council of Carpenters v. Pocono Mountain School District*, OOR Dkt. AP 2009-0166; *Pry v. Indiana University of Pennsylvania*, OOR Dkt. AP 2009-0119; *Pry v. Butler County Community College*, OOR Dkt. AP 2009-0070; *Campbell v. Berwick*; OOR Dkt. AP 2009-221; *Campbell v. Souderton Area School District*, OOR Dkt. AP 2009-269; *Campbell v. William Penn School District*, OOR Dkt. AP 2009-0475; *Purcell v. City of Philadelphia*, OOR Dkt. AP 2009-0263; *Agre v. DGS*, OOR Dkt. AP 2009-0371.

Because these Final Determinations address the same issues with regard to redaction of names and/or home addresses from payroll records, the analysis within them is specifically adopted and incorporated by reference as if fully set forth herein as are their holdings that certain information cannot be redacted. Nevertheless, the OOR will consider the specific arguments made by the City in favor of withholding home addresses.

1. The Personal Security Exemption Requires Submission of Proof

The City argues that under 65 P.S. §67.708(b)(1)(ii) of the Act, a request for a record that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual" may be denied and that providing home addresses of contractor employees puts them at risk for crimes including identity theft, and therefore is reasonably likely to result in a substantial and demonstrable risk to the personal security of these individuals.

To the extent an individual claims the release of such information would result in the risk of or actual substantial or demonstrable harm, the agency should and must demonstrate that harm on an individual basis under the RTKL. Here, the City presented no such evidence and has therefore not met the burden of proof, see *Purcell v. City of Philadelphia*, OOR Dkt. AP 2009-0263

2. The Pennsylvania Constitution does not Protect Home Addresses

The City asserts that the names and home addresses of the third-party contractors are protected from disclosure by the Pennsylvania Constitution, Article I, section 8. A constitutional right to privacy has not been established in appellate case law as firmly and solely rooted in the Pennsylvania Constitution.

Article I, Section 8 of the Pennsylvania Constitution, *Security from Searches and Seizures* states:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant. PA. CONST., Art. I, §8.

In performing the constitutional analysis of Article I, Section 8, and assessing whether it contained a constitutional right to privacy in a home address, the Supreme

Court expressly held that home address information does not deserve protection under a “right to privacy.” *See Com. v. Duncan*, 817 A.2d 455 (Pa. 2003). The highest Court was reviewing that case in the criminal context on challenge of a suppression hearing when a defendant asserted that requesting such information from his bank via subpoena was a violation of his constitutional right to privacy. The Court held that no right to privacy exists in one’s home address information, agreeing with the Superior Court’s reasoning that “there is a fundamental difference between the type of information that is subject to a constitutionally protected right to privacy and a person's identification information, *i.e.*, one's name and address.”

Further, the Supreme Court reasoned that “a person's name and address do not, by themselves, reveal anything concerning his “personal affairs, opinions, habits or associations.” Such innocuous information does not provide or complete a “virtual current biography.” *Id.* at 466. The Court stated

In any event, appellant's claim independently fails because we agree with the Commonwealth that any subjective expectation of privacy that appellant may have had in the name and address information is not an expectation which society would be willing to recognize as objectively reasonable in light of the realities of our modern age. Whether registering to vote, applying for a driver's license, applying for a job, opening a bank account, paying taxes, etc., it is all but impossible to live in our current society without repeated disclosure of one's name and address, both privately and publicly. There is nothing nefarious in such disclosures. An individual's name and address, by themselves, reveal nothing about one's personal, private affairs. Names and addresses are generally available in telephone directories, property rolls, voter rolls, and other publications open to public inspection.

Id. at 466.

The City did not cite *Duncan* in its response to the Citizen, relying instead upon the earlier *Sapp Roofing* case. It is the view of the OOR that *Duncan* controls. However, we will address *Sapp Roofing* as the City cited it in support of redaction.

Sapp Roofing opinion is a plurality opinion of the Pennsylvania Supreme Court. As such, it is not dispositive here. Subsequent majority opinions on the issue have not found a privacy interest in home addresses. In *Pennsylvania State University v. State Employees' Retirement Board*, 935 A.2d 530 (2007), four of the six justices participating in the consideration and decision of the case clearly declined to adopt an express, stand alone right to privacy in home addresses, choosing instead to adhere to the Old RTKL personal security and reputation exception analysis. *Id.* at 538.

The *Penn State* Court's language could not be clearer:

“Appellants also attempt to raise their rights to privacy as a bar to disclosure. The [RTKL] accounts for the individual's right to privacy by excluding from the definition of “public record” “any record, document, material, exhibit, pleading, report, memorandum or other paper...which would operate to the prejudice or impairment of a person's reputation or personal security.” 65 P.S. § 66.1. For some time, Pennsylvania courts have interpreted this reputation or personal security exception as creating a right of privacy exception to the [RTKA's] general disclosure rule. See *Goppelt v. City of Philadelphia Revenue Dept.*, 841 A.2d 599, 603-604 (Pa. Commw. 2004) (citing *Cypress Media, Inc. v. Hazleton Area School District*, 708 A.2d 866,870 (Pa. Commw. 1998)). Thus while Appellants invite this Court to separate our right to privacy analysis from our personal security analysis, it is clear that no such division is warranted. The appropriate question is whether the records requested would potentially impair the reputation or personal security of another, and whether that potential impairment outweighs the public interest in the dissemination of the records at issue. *Sapp Roofing*, 713 A.2d at 629.

The *Penn State* Court acknowledged that it used the Old RTKL analysis under the reputation and personal security exception in *Sapp Roofing*. The Court does not even distinguish its earlier decision as having identified a Constitutional right of privacy.

The OOR has issued previous decisions analyzing Pennsylvania jurisprudence as it relates to an alleged privacy right in home addresses. As we said in *Green v. Bethlehem Area School District*:

The Agency cannot establish that the Constitution shields home addresses; the source of the right to privacy to which the Court refers in the RTKL context is unclear. In our review of relevant case law on “personal information”, it is clear that Pennsylvania courts have declined to recognize a privacy right that is distinct from, and unformed by, demonstrable personal security risks. *See, e.g., PSU v. SERB; Cypress Media, Inc. v. Hazleton Area Sch. Dist.*, 708 A.2d 866 (Pa. Commw. 1998); *Hartman v. DCNR*, 892 A.2d 897 (Pa. Commw. 2005). In *PSU*, when presented the opportunity, the Supreme Court declined to uphold the *Sapp* plurality’s constitutional construction finding a home addresses are protected by the Constitution. The Supreme Court instead held that the privacy right was not separate from the reputation and personal security exception of the then-right-to-know law, amended in 2008, (the “Old Law”). *Id.* (citing *Goppelt v. City of Philadelphia Revenue Dept.*, 841 A.2d 599, 603 (Pa. Commw. 2004) (holding home addresses on property records are public under the Old Law).

Specifically the Court rejected the invitation to separate their “right to privacy analysis from our personal security exception analysis, [as] it is clear that no such division is warranted.” *Id.* at 258, 935 A.2d at 538. The Supreme Court never cited Article I, §8 of the Constitution, and, in addition, advised that the right to privacy was part of an evolution of the personal security exception. *Id.* The RTKL limits application of the personal security exception to only those situations in which the agency shows disclosure is “reasonably likely to result in a substantial and demonstrable risk” to personal security, 65 P.S. §67.708(b)(1)(ii), rather than the “potential impairment” showing under the Old Law. The OOR is not in a position to untangle these interwoven concepts and decide that the Supreme Court intended to create a separate and stand-alone constitutional right where no absolute declaration is made. Because the Supreme Court did not uphold *Sapp Roofing’s* rationale and construe a constitutional right to privacy separate from the exceptions embedded in the case law interpreting the Old Law, which are restricted by the new RTKL, the OOR cannot read *PSU v. SERB* to protect home addresses under the Constitution.

...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). Legislators vociferously challenged language protecting

only the home addresses of law enforcement officers and judges and the RTKL was nevertheless approved in its current form. 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 or home addresses, except for law enforcement officers and judges.

Unless or until the Supreme Court finds a right to privacy at the constitutional level, such that it would supersede the clear statutory protections as circumscribed within the RTKL, the OOR will not so interpret it and will await the appellate courts' reasoned judgment.

3. Balancing Privacy Interests against Public Interest in Disclosure

The City cited case law in its response to the Citizen in support of a balancing test to determine whether the records requested would potentially impair the reputation or personal security of another, and whether that potential impairment outweighs the public interest in the dissemination of the records at issue, *Tribune-Review Publ'g Co. v. Bodack*, 961 A.2d 110 (2008). No provision of the RTKL or any case law was cited requiring such a balancing test or granting the OOR the discretion or authority to perform it. Unlike the federal FOIA, the RTKL does not require an agency, or the OOR, to conduct a balancing test. While the Legislature could have expressly created a balancing test within the plain language of the RTKL, it declined to do so. Accordingly, the OOR will not create a balancing test without a legislative or appellate judicial mandate. The OOR recognizes the serious concerns that third-party contractors and others may have regarding release of their home address. However, as stated, the law requires that the agency carries the burden of proof and, in the instant matter, the City failed to meet its burden of proof. As this Office has stated repeatedly, until such time that an appellate court directs otherwise, or the Legislature chooses to amend the RTKL to exclude home

addresses of third-party contractors, home addresses are available, subject to any applicable exceptions in the law.

CONCLUSION

For the foregoing reasons, the Citizens appeal is **granted**. The City is directed to provide copies of the requested records 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 to the Philadelphia Court of Common Pleas 65 P.S. §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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED August 17, 2009



APPEALS OFFICER
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Sent to: Louis Agre; Christopher R. DiFusco, Deputy City Solicitor