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11/5/09
 AP 2009-0834
 AP 2009-0937

Dear Terry Mutchler,
 Executive Director Petition For Reconsideration

I recently received a response to my RTKL Request. The PHRC and myself argued our respective positions and legal issues.

However, this office's Final Determination fails to address any legal argument pursuant section 706, but only addresses the Commonwealth Agency. Even more, the Final Determination ignores its own legal ruling in the Matter of HCR-MinorCare v. Pennsylvania Department of Health, AP 2009-0134, cited by Requestor.

I have another appeal that the appeal officer most likely raise the same issue and not address my argument.

I am seeking clarification on that issue of RTKL Section 706 as it pertains to my case and address 706 argument is wrong.

WOR Precedent Cordially
 cc: Governor Rendell *Ally Marshall*
 : Terry Mutchler



pennsylvania
OFFICE OF OPEN RECORDS

October 30, 2009

Guy Marshall
43 Oneida Drive
Gouldsboro, PA 18424

Michael Hardiman
Chief Counsel
Human Relations Commission
301 Chestnut Street, Suite 300
Harrisburg, PA 17101

~~RE. DOCKET # AP-2009-0937~~

Dear Mr. Marshall and Mr. Hardiman:

Thank you for writing to the Office of Open Records regarding the Right-to-Know law, 65 P.S. §§67.101, ("RTKL"). The OOR has received an appeal on October 30, 2009. This letter will explain our process and provide the Agency a copy of the appeal.

The OOR will assign an Appeals Officer to review the case. If all procedural requirements have been met the Appeals Officer will review the file, consult with agency counsel as appropriate, seek any necessary additional information and issue a Final Determination. The Appeals Officer may conduct a hearing, but that decision is non-appealable. If all procedural requirements have not been met the parties will receive a letter stating why the appeal has not been accepted and that no further action is needed.

If additional information is necessary to reach a Final Determination, the Appeals Officer will ask for it in writing with a deadline for submission. If either party would like to submit unsolicited information they must do so within **seven (7) business days from the date of this letter** and provide a copy to the opposing party. Agencies are reminded that the burden of proof rests with them in citing the exception, law, regulation, judicial order or privilege to deny a request.

The OOR has 30 calendar days to issue a Final Determination. If you would like more information, please see our Web site, <http://openrecords.state.pa.us>, where all Final Determinations will be posted.

Respectfully,

A handwritten signature in black ink, appearing to read "Terry Mutchler".

Terry Mutchler
Executive Director

Sec Case law

In the Matter of PALMIERA Miller v.
Newport Township DIST. AP 2009-0827

In the Matter of Morton Lazine v.
Rush Township Board of Supervisors AP 2009
- 0163

SEE 1 Pa Code 35.241

VIA 717-787-2500

fax 717-772-8284

I would like this office to
expidite this request ASAP



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF:

GUY MARSHALL
Complainant

v.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION
Respondent

Docket No.: AP 2009-0834

INTRODUCTION

Guy Marshall (the "Requester") filed a request (the "Request") for records with the Pennsylvania Human Relations Commission (the "Commission"). He sought records relating to the denial of a complaint. The Commission treated it as a request filed pursuant to the Right-to-Know Law (the "RTKL"), 65 P.S. §67.101, *et. seq.*. The Commission partially granted and partially denied the Request. The Citizen timely appealed to the Office of Open Records ("OOR").

For the reasons set forth in this Final Determination, the appeal is **denied** and the Commission is not required to release the records/information requested.

FACTUAL BACKGROUND

On September 21, 2009, the Requester filed the Request with the Commission. He sought copies of all documents and other information contained in his Commission

case file. Specifically, he requested the following:

Investigation files, case management printouts, charge processing documentation, and any other material and data as may be related to the processing of dual filing charge. Records that EEOC Investigator requested to review HRC factual findings in denying his complaint.

In a letter dated September 24, 2009, the Commission indicated that it interpreted the Request as one for records under the RTKL. In addition, the Commission interpreted the Request as one seeking the release of information it gathered during the course of statutorily mandated investigations that it may have engaged in that involves complaints filed against certain entities. The Commission noted that section 7 of the Pennsylvania Human Relations Act ("PHRA"), 43 P. S. § 951, *et seq.*, gives it the power and duty to investigate complaints of unlawful discriminatory practices. The PHRA mandates the Commission to make prompt investigations of such complaints. The Commission stated that the requested records in this appeal relate to such an investigation and are therefore exempt under 65 P.S. § 67.708(b)(17) as records relating to a noncriminal investigation. The Commission also stated that the records are exempt absent receipt of a validly issued and served subpoena for any case file material which is relevant to the action and not otherwise privileged. The Commission indicated that while it is not required under the RTKL to release the records, it is willing to provide the Requestor with return copies of any records he provided to the Commission or additional copies of records the Commission previously provided to him.

In a letter dated October 1, 2009, the Requestor expressed concern about violating the RTKL by filing repetitive requests. He then indicated that he

would like to amend his initial Request or "file a new request to address with specificity and OOP's case law." The Requester stated that he wanted all records submitted by FedEx Ground and FedEx Alert Line since those records are "public records" and can be redacted. He also requested:

1. Records of FedEx Ground -- number of handlers who were terminated from May 2005 -- October 2005 - and the racial/gender composition of those workers for absenteeism or being absent more than three days.
2. FedEx ground Alert Line records during the same time period aforementioned including scan records, attendance records, supervisor who took disciplinary action, oral and written record issued to Guy Marshall

The Requester filed a timely appeal with the OOR on October 2, 2009. On October 9, 2009, the Requester submitted unsolicited information to the OOR in which he indicated that his Request included the documents referenced in his October 1, 2009 letter. On October 27, 2009, the OOR confirmed with Counsel for the Commission that the Commission had received the October 1, 2009 letter. In a letter dated October 28, 2009, the Commission indicated that it was treating the October 1, 2009 letter as a new request for records and denied it. On October 29, 2009, the Requester appealed the denial of his October 1, 2009 request.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). The Commission is a Commonwealth agency subject to the RTKL. See 65 P.S. § 67.301.

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."

The RTKL provides further clarity in defining a "public record" 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.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions and it is not the role of the OOR to identify potential areas of exemption.

Specifically, § 708 in pertinent part states:

(a) Burden of proof. —

(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.

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).

In his October 1, 2009 letter, the Requestor is unclear whether he intended the letter to be a new request or an amendment to his September 21, 2009 request. The OOR determines that the October 1, 2009 letter is a new request and separate from the September 21, 2009 request at issue here. The OOR bases this on the following facts. First, the October 1, 2009 letter requests different records than those set forth in the September 21, 2009 Request. Second, the Requester filed the current appeal the day after he sent the October 1, 2009 letter, affording the Commission no opportunity to respond.

These facts together support the finding that the October 1, 2009 letter should be treated as a request separate from the current appeal.

In the September 21, 2009 Request at issue here, the Commission states that the records requested from the investigation file redacted portions of the complaint and related documents are exempted from public release under the plain language § 708(b)(17). The OOR agrees. Section 708(b)(17) states that a local or Commonwealth agency can withhold the following records:

"A record of an agency relating to a non-criminal investigation, including

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- (iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L.1559, No.169), known as the Whistleblower Law.
- (iv) A record that includes information made confidential by law.
- (v) Work papers underlying an audit.
- (vi) A record that, if disclosed, would do any of the following:
 - Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

See 65 P.S. §67.708 (emphasis added).

The plain language of § 708 exempts investigative materials, notes, correspondence, and reports. In addition, it exempts records that would reveal the institution, progress or result of an agency investigation. Here, the Request on its face seeks investigative records or records directly related to complaints/charges in a specific investigatory file which were relied upon by the Commission and EEOC in denying a claim. Such records are exempted under § 708. While the Commission exercised its

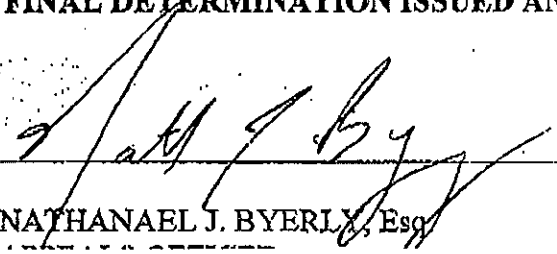
discretion under 65 P.S. § 67.506(c) in agreeing to release some requested records, the Commission still retains authority under the RTKL to withhold statutorily exempted records. Thus, the Commission met its burden by showing that § 708(b)(17) applies and properly withheld the records.

The OOR will not address in this appeal whether the records requested in the October 1, 2009 request are exempt under the RTKL.

CONCLUSION

For the foregoing reasons, this appeal is **denied**, and the Commission is not required to release the records requested. The parties are advised that this is a Final Determination and 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 November 2, 2009


NATHANAEL J. BYERLY, Esq.



VIA EMAIL AND FIRST CLASS US MAIL

November 16, 2009

Mr. Guy Marshall
43 Oneida Drive
Goudsboro, PA 18424

RE: Petition for Reconsideration dated November 5, 2009, OOR Dkt. AP
2009-0834

Dear Mr. Marshall:

We are in receipt of your Petition for Reconsideration dated November 5, 2009 in connection with the Office of Open Records Final Determination in *Guy Marshall v. Pennsylvania Human Relations Comm'n*, OOR Dkt. AP 2009- 0834. We hereby deny your Petition.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Wilson", with a long, sweeping line extending from the end of the signature towards the top right of the page.

Corinna V. Wilson
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Michael Hardiman, Chief Counsel, Human Relations Commission