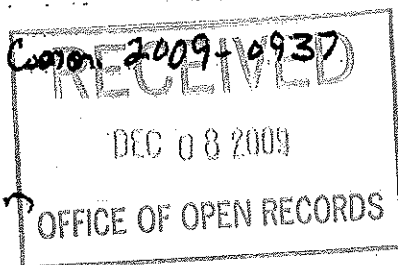


Pennsylvania Office of Open Record

Guy Marshall v. Pennsylvania Human Relations Commission



Petition for Reconsideration

I, Guy Marshall files this Petition for Reconsideration of the Final Determination of the Officer of Open Records issued in the above-captioned case on December 3, 2009, pursuant to 1 Pa. Code 35.241

I submits that the Appeals Officer's legal analysis findings is contrary with the New Right to Know Law and OOR Interim Guidelines.

The Appeals Officer fails to address, that the Requester asserts that PHRC's records are public records in his October 29, 2009 appeal.

The Appeals Officer erred by suggesting that requester argument only involves the PHRC being precluded from submitting an argument in support of its position, because its response to his request was untimely.

The Appeals Officer should have consider in the Requester Appeal letter two points; which he failed to follow. OOR's regulation to review all Advisory Opinions and Final Determinations.

previously issued by the Office, IVCC(4).

1. The PHRC failed to timely respond to the request to the Oct. 1, 2009 request pursuant to RTKL 901, thus the PHRC is in violation of the RTKL - The PHRC has 10-business days in which to respond. The PHRC exceed the time frame nor asked for an extension. Therefore, the Appeals Officer should have granted the requestor request.

In the Matter of Wiebe Jelsma v. McNett Twp. AP 2009-0273.

In the Matter of Christopher Smith v. Willistown Twp. AP 2009-0830

2. The Appeals Officer erred by considering exemptions raised by PHRC since it was not timely raised in response to the request on Oct 1, 2009, thus those are deemed public records when they responded on Oct 28, 2009, beyond time frame. Therefore, did not meet their burden pursuant to RTKL 708(a). In the Matter of Katherine Meehan v. Philadelphia Dept. of Licenses & Inspections AP 2009-0527

3. The Appeals Officer, if he did or did not should have reviewed OOR's own prior rulings on it if he did, failed to apply and differentiate this matter from others with the same issues. Although, the requestor provide a list of cases, that are on point, the requestor only makes known sum of its prior rulings.

cc: Terry Mutchler

Sam Mansfield

October 29, 2009

No. 200505472

Prior Appeal AP 2009-⁰⁸³4

Dear Office of Open Records

I am filing this appeal of the denial of my RTKL Request.

The reason why they are or portion of records, the information is purely factual that affects the general public. The records are public and non-public subjected to disclosure pursuant to RTKL 706. (Jan. 2009)

(In the Matter of HCR-MenorCare v. Pennsylvania Department of Health, Docket NO: AP 2009-0134

The FedEx Ground and FedEx Alert Line records are disclosable and not Exempt, which can be redacted.

The PHRC makes this untimely response to the Oct 1, 2009 request, therefore fail to make any exemptions under 708(17) RTKL that can now be raised in its Oct 28, 2009 response.

Therefore, cannot treat this as a new request but should immediately provide records.

The Oct 1, 2009 was made part of Prior Appeal as unsolicited information

Guy Mansfield

Chairperson
STEPHEN A. GLASSMAN
Vice Chairperson
RACHEL O. YIENGST
Secretary
DANIEL D. YUN
Assistant Secretary
REV. DR. JAMES EARL GARMON, SR.
Executive Director
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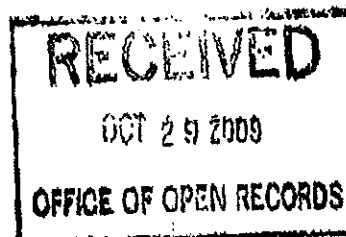


COMMONWEALTH OF PENNSYLVANIA
Human Relations Commission
301 Chestnut, Suite 300
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www.phrc.state.pa.us

October 28, 2009

Commissioners
ISMAEL ARCELAY
M. JOEL BOLSTEIN
J. WHITT MONDESIRE
S. KWELIN NAGGAR
GERALD S. ROBINSON
SYLVIA A. WATERS
DANIEL L. WOODALL, JR.

Guy Marshall
43 Onaida Drive
Gouldsboro, PA 18424



Re: Marshall v. FedEx Ground, Case No. 200505472

Dear Mr. Marshall:

I am writing as a follow-up to your September 21, 2009 request for case file information regarding the above-referenced matter. As you are aware the Commission, in correspondence dated September 24, 2009, advised you that it had interpreted your request as one made pursuant to the Pennsylvania Right To Know Law ("RTKL") and denied the request for the reasons stated in the letter (a copy of the September 24, 2009 correspondence is attached). My understanding is that on or about October 2, 2009 you filed an appeal from that denial with the Office of Open Records ("OOR") that is presently under review by that office.

In reviewing our file in this matter it appears that on or about October 1, 2009 you submitted a letter to the Commission in which you indicate a desire "...to amend my request or file a new a new [sic] request to address with specificity [sic] and Car's case law...." My reading of this letter is that you are again requesting documents that the Commission obtained during the course of our investigation of the complaint that you filed with us against FedEx. It is unclear to me if you anticipated a second response from the Commission based upon this submission or if you filed it in connection with your appeal in order to provide some additional basis for appeal.

In light of the above, and in order to insure that there is no confusion, the Commission will treat your October 1, 2009 letter as a new request. Having done so, the Commission must again decline to produce the documents that you seek. The grounds for our decision, which follow below, are the same as those previously stated to you in our September 24, 2009 correspondence.

The Commission's refusal to provide you with these records is based upon the fact that the Commission's investigatory case files are statutorily exempt from release 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 legal basis for this determination is set forth below.

As noted, the Commission again is treating your request as one made under the Pennsylvania Right To Know Law ("RTKL"). While the RTKL, as a general rule, provides that governmental records are presumed to be public records, Section 708 of the RTKL sets forth a number of categories of records which constitute exceptions from that general rule. The Commission specifically relies on exception number 17 (although other exemptions may also apply), which exempts:

(17) A record of an agency relating to a noncriminal 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:
 - (A) 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.
 - (B) Deprive a person of the right to an impartial adjudication.
 - (C) Constitute an unwarranted invasion of privacy.
 - (D) Hinder an agency's ability to secure an administrative or civil sanction.
 - (E) Endanger the life or physical safety of an individual.

The contents of the Commission's investigatory case file, which you have requested, constitute a "record of an agency relating to a noncriminal investigation." Section 7(f) of the Pennsylvania Human Relations Act ("PHRA") gives the Commission the power and the duty to, among other things, "investigate . . . complaints charging unlawful discriminatory practices." Section 9(b)1 of the PHRA mandates that "[a]fter the filing of any complaint, or whenever there is reason to believe that an unlawful discriminatory practice has been committed, the Commission shall make a prompt investigation in connection therewith." The records you have requested all relate to a noncriminal investigation, conducted under the above-cited statutory authority. They are, therefore, exempt from release under the RTKL.

More specifically, but not necessarily all inclusively, the following categories of case file records are exempt under these specific subsections of exemption 17:

- 1) The complaint falls under exemption 17(i).
- 2) Any investigative materials, notes, correspondence and reports contained in the file fall under exemption 17(ii).
- 3) Any statements from witnesses, given with a guarantee of confidentiality, fall under exemption 17(iii).
- 4) Information concerning any settlement proceedings or agreements, including the agreements (other than agreements which must be disclosed under the federal Fair Housing Act), themselves, falls under exemption 17(iv). See Section 9(c) of the PHRA for the statutory exemption.
- 5) Finally, the entire contents of the investigative file fall under exemption 17(vi). A release of any record, contained in one of the Commission's investigatory case files, would necessarily "[r]eveal the institution, progress or result of an agency investigation."

While the Commission is not required to release any records in an investigatory case file, under the RTKL, the Commission is willing to return copies of any records which you (or your client) provided to the Commission, or to provide an additional copy of any records which the Commission previously provided to you (or your client). If you are a Complainant, this includes a copy of the Respondent's Answer to your Complaint, if one has been filed.

The cost for providing these documents is fifteen cents per page released. It is anticipated that these records will be sent no later than 30 days from receipt of your request. If you are interested in receiving the return of your previously provided records, and/or an additional copy of records that the Commission previously provided to

Marshall v. FedEx Ground, Case No. 200505472

October 28, 2009

Page 3 of 3

you, please advise the Commission of this fact, in writing, by forwarding the request (please include the relevant Commission case number) to the following:

Arberdella White-Davis
Director of Compliance
Pennsylvania Human Relations Commission
Pennsylvania Place, Suite 300
301 Chestnut Street
Harrisburg, PA 17101-2702

If the Commission does not hear from you within the above-listed time frame we will assume you have decided not to request the materials mentioned.

You have a right to appeal this denial of information in writing to Terry Mutchler, Executive Director, Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120.

If you choose to file an appeal you must do so within 15 business days of the mailing date of the agency's response (Section 1101 of the RTKL). If you have further questions, please call Nancy L. Gippert, Right to Know Officer. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Respectfully,



Michael Hardiman
Chief Counsel

c: Nathan Byerly, OOR Appeals Officer (ltr. only)
Nancy Gippert, PHRC (ltr. only)



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF:

GUY MARSHALL
Complainant

v.

**PENNSYLVANIA HUMAN
RELATIONS COMMISSION**
Respondent

Docket No.: AP 2009-0937

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, pursuant to the Right-to-Know Law (the "RTKL"), 65 P.S. §67.101, *et. seq.*. The Commission 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 October 1, 2009, the Requester filed the Request with the Commission.¹ Specifically, he 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

On October 29, 2009, the Requester timely appealed the denial of the Request.

In support of the denial, the Commission stated that the Request sought 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

¹ This appeal is related to an appeal filed by the Requester and docketed at 2009-0834. The OOR denied that appeal on November 2, 2009.

provided to the Commission or additional copies of records the Commission previously provided to him.

In support of his appeal, the Requester argues that he is entitled to the records because they contain purely factual information. The Requester cites to *ManorCare v. Pennsylvania Department of Health*, OOR Dkt. AP 2009-0134. He contends that any nonpublic information can be redacted. The Requester also argues that the Commission is precluded from presenting any argument since its response to the October 1, 2009 Request was untimely. He reasons that the Commission should immediately provide the records. In a subsequent submission, the Requester also references a long list of cases that he states are on point with his appeal. The Requester provided no explanation for how these cases apply to his case.

Following the filing of the appeal, the OOR requested the Commission to indicate whether the records in requested in item 1 exist as aggregated data in records outside the investigative file(s) maintained by the Commission.

The Commission subsequently provided the OOR with the unsworn verification of Arberdella White-Davis, Director of the Compliance Division for the Commission.² She stated that any and all records obtained by the Commission related to the complaint filed by the Requester and would be maintained only as part of the Commissions investigative file related to the complaint he filed at case number 200505472. She also confirmed that the Commission does not have any investigative records or aggregated data related to the Requester's complaint in records or aggregated records that exist outside the Commissions investigative case file related to the complaint.

² The verification was made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

In a November 23, 2009 letter, the Requester states that there needs to be an investigation. He challenges the affidavit stating that investigative records do exist.

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).

The Requester argues that the Commission is precluded from submitting an argument in support of its position because its response to his Request was untimely. This is incorrect. An untimely response to a request does not automatically preclude an agency from presenting an argument to the OOR for why a record should be withheld under the RTKL.

In response to the appeal, the Commission states that the records requested from the investigation file 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 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 or to release redacted documents. Thus, the Commission met its burden by showing that § 708(b)(17) applies and properly withheld the records.

The Requester argues that the Final Determination in *ManorCare* entitles him to any factual information in the requested records. This is incorrect. The language cited by the Requester relates to the pre-decisional and deliberative exception, not investigative records. In *ManorCare*, the OOR determined that an agency denying access must prove that the records sought are truly pre-decisional and deliberative and not merely factual. As the OOR has consistently held, factual information contained within investigative records remains exempt under the RTKL. Additionally, the decision to release records or redacted records that are exempt under the RTKL is within the agency's discretion. See 65 P.S. § 67.506(c).

Finally, with respect to item 1, the Commission has met its burden of proof as required by law. Ms. White-Davis' Verification that the Commission does not have any records outside the investigative file is a sufficient legal basis for denying item 1. The OOR notes the Requester's objections to the Commission's Affidavit. However, the

Affidavit did not claim that no investigative records exist as the Requester alleges, it stated that no investigative or aggregated data records exist outside the investigative case file.

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.

FINAL DETERMINATION ISSUED AND MAILED November 30, 2009


NATHANAEL J. BYERLY, Esq.
APPEALS OFFICER

Sent to:
Guy Marshall
Michael Hardiman



VIA FIRST CLASS US MAIL

December 17, 2009

Mr. Guy Marshall
43 Oneida Drive
Goudsboro, PA 18424

RE: Petition for Reconsideration received December 3, 2009, OOR Dkt.
AP 2009-0937

Dear Mr. Marshall:

We are in receipt of your Petition for Reconsideration that is undated but that was received by this office on December 3, 2009 in connection with the Office of Open Records Final Determination in *Guy Marshall v. Pennsylvania Human Relations Comm'n*, OOR Dkt. AP 2009- 0937. We hereby deny your Petition.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Wilson", with a horizontal line extending to the right.

Corinna V. Wilson
Chief Counsel

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