

FACTUAL BACKGROUND

On December 17, 2009 the Requester submitted a right-to-know request to PennDOT seeking the accident history and the name of the insurance carrier for Clyde Edward Alexander. (the “Request”). On December 23, 2009 PennDOT replied that the Request was denied as the records were only available pursuant to 75 Pa. C.S. § 6114 and 67 Pa. Code § 95.2(c) and were subject to the limitations of the federal Driver’s Privacy Protection Act, 18 U.S.C. § 2721-2725. On January 5, 2010 the Requester appealed the denial to the OOR. In support of her position she stated that she had received a court order allowing her access to the records thus she was entitled to access pursuant to 67 Pa. Code 95.2 which permits access to the type of records requested by “persons authorized by court order.” Further she asserted that her request was not for personal information which was exempt by the DPPA because section 2725 of the DPPA expressly excludes “information on vehicular accidents, driving violations, and driver’s status” from the term personal information. She added that she already possessed all of Mr. Alexander’s personal information and that he had been deceased since December 1985.

On January 12, 2010, Jeffrey M. Spotts, Esquire, PennDOT Assistant Counsel, responded to the appeal by advising that although it had no duty to do so because the records were exempt from access, PennDOT program personnel conducted a search for the requested records and discovered that the records did not exist. PennDOT provided the sworn statement of Diana J. Henning, its License Control Division Manager of the Bureau of Driver Licensing attesting to the following:

Subsequent to filing of the appeal, I searched [PennDOT’s] driver licensing and motor vehicle systems and files for any and all records related to Mr. Clyde Edward Alexander. As a result of this search, I have determined that the requested records do not exist.

Henning Affidavit, ¶ 3.

On January 13, 2010 the Requester provided what appears to be a court order directing PennDOT to release the records related to Mr. Alexander to her. The Order page itself is unsigned but is accompanied by a half page with a judicial signature following what appears to be a directive for the Requester's counsel to submit the appropriate filing fee.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). PennDOT is a Commonwealth agency subject to the RTKL. *See* 65 P.S. § 67.301. Records of a Commonwealth or local agency are subject to public disclosure unless (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 states that agencies bear the burden of proving the applicability of any exceptions. 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).

PennDOT has provided sufficient evidence through the sworn affidavit of Ms. Henning that the records do not exist. An agency cannot provide a record that does not exist. *See* 65 P.S. § 67.705, *Austin v. Dept. of State* OOR Dkt. AP 2009-0303. Therefore, the appeal is denied.

CONCLUSION

For the foregoing reasons, this appeal is **denied** and PennDOT is not required to take any further action. 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. §67.1301.

FINAL DETERMINATION ISSUED AND MAILED: February 4, 2010



APPEALS OFFICER
AUDREY BUGLIONE, Esq.

Sent to: Jeffrey Spotts, Esquire, Renee Miller