



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

MARK SCOLFORO on behalf of
The Associated Press, Complainants

v.

PENNSYLVANIA STATE POLICE,
Respondent

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Docket No. AP 2010-0481

INTRODUCTION

Mark Scolforo, on behalf of *The Associated Press* (the “Requester”) submitted a request to the Pennsylvania State Police (“PSP”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”), seeking requests for supplemental employment and related records. PSP denied access under Section 708(b)(17), (b)(10), (b)(1)(ii) and (b)(6). The Requester timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part**, and PSP is required to take further action as directed.

FACTUAL BACKGROUND

On April 19, 2010, the Requester submitted a right-to-know request seeking

- (1) Requests made by current [PSP] employees seeking permission to engage in outside employment since Jan. 1, 2005;
- (2) The response by agency officials to those requests since Jan. 1, 2005;
- (3) Any policies, procedures, guidelines or other departmental records that outline the conditions under which such outside work is currently allowed;
- (4) Any records the department has produced that describe the types of outside work that employees have engaged in, and any departmental correspondence that relates to having employees engage in outside work, any studies of outside work by employees or similar documents;

(5) Records of any agency final action regarding outside work that resulted in demotion or discharge.

(the “Request”). The Requester asked for access as opposed to copies.

After timely invoking a thirty-day extension, Jay Leader, Deputy Open Records Officer (ORO), granted access to the policies sought in Part 3 and advised that no responsive records exist in response to Part 5. PSP denied the remainder of the Request under the noncriminal investigative exception, Section 708(b)(17) and the predecisional deliberative exception at (b)(10) (“Denial”). In the alternative, PSP noted that redaction is required under the personal identification information in (b)(6) and personal security exception, (b)(1)(ii) for the employee home addresses, the location of the supplemental employment, the usual work start and end times and all other information other than: employee name, title, work address, job description, date of request and start/end dates, agency approval or disapproval, stipulations as to the supplemental employment and any rescissions/terminations of the agency approval. With regard to any records involving covert law enforcement investigations, PSP states it cannot reveal the existence of such records and that any such existing records are entirely exempt under the Criminal History Record Information Act (“CHRIA”).

PSP included supporting affidavits of its ORO (“ORO Affidavit”) and Brooke Meade, Labor Relations and Safety Section Bureau of Human Resources (“Meade Affidavit”) and of Captain Janet McNeal, Director of Operational Records Division (“McNeal Affidavit”). The ORO attests that there are no records of any agency final actions as described in Part 5 and no “studies of outside work by employees or similar documents” sought in Part 4, and that PSP has conducted no studies of outside work performed by employees, ORO Affidavit, ¶7.

Meade attests that the process for approval of supplementary employment is outlined in its directives, and the Management Directive 515.18. She attests that PSP is required to investigate each request for supplementary employment to assure compliance with policy. Meade Affidavit, ¶5. She

advises the “investigatory process” begins with the Supplementary Employment Request (“SER”) which triggers a noncriminal investigation under Section 708(b)(17). She attests that all information pertaining to a Request for Supplementary Employment is related to the investigation. *Id.* at ¶7. She also attests that all records related to a SER reflect predecisional deliberations of PSP, including the evaluation, recommendations and consideration for the SER. *Id.* at ¶10.

Captain McNeal, a trooper for over 25 years, testifies as to the reasonable likelihood of harm to law enforcement officers’ personal security in the release of the SERs and related records. She attests that a number of troopers engage in supplementary employment and that they may be forbidden from carrying weapons, leaving them vulnerable. She attests that advance knowledge of the work schedule and location of any off-duty trooper would be reasonably likely to result in a substantial and demonstrable risk of harm to troopers and his or her co-workers. McNeal Affidavit, ¶7. She attests the risk is significant when the trooper works from his or her home. *Id.* at ¶7a. She advises that seemingly innocuous bits of information can be culled by a person to achieve a criminal objective. In support, she offers examples in which law enforcement officers had been the subject of intimidation or violence. *Id.* at ¶9. McNeal quotes PSP Administrative Regulation 4-17 and Management Directive 515.18, stating that “all information concerning an individual’s supplementary employment be maintained in a locked confidential file within the Bureau of Personnel” and separated from the personnel folder. *Id.* at ¶10. She attests law enforcement officers are at greater risk of harm when engaged in supplementary employment. *Id.* at ¶11.

The Requester timely appealed arguing that the records are not investigative in nature, and only records, such as correspondence deliberating a SER can qualify as “deliberative.” The Requester argues the SERs and the agency’s decision on the SERs cannot be protected. As to the personal security exception, the Requester notes the McNeal Affidavit is speculative. The Requester objects to PSP creating a list for disclosure as opposed to redacting the actual records.

The Pennsylvania State Troopers' Association ("Association") requested to participate on behalf of its members as an entity with a direct interest as per Section 1101(c) of the RTKL. The OOR granted the request and the Association submitted a brief and affidavit of Bruce Edwards, President of the Association ("Association Affidavit"), to substantiate application of the personal security and personal identification information exceptions. To accommodate, the Requester agreed to extend the Final Determination date to July 15th.

Edwards attests that officers are exposed to adversarial conditions daily and are targeted as members of PSP; he also cites examples in which troopers had been surveilled and then attacked. The Association argues that troopers in an off-duty status, as at supplementary employment, are not in as great a state of awareness and are more susceptible to attack. The Association argues that the Social Security number and home address of law enforcement are protected by Section 708(b)(6), and that the home address may be the address of supplemental employment. The Association argues that the information regarding the employment relationship with a private employer, address, title and position and number of hours of work also constitute "personal financial information," which relates solely to personal finances and must be exempt and that redaction is not possible given the content of a SER.

PSP counsel entered their appearance but did not supplement the record.

LEGAL ANALYSIS

The RTKL is "designed to promote access to official government information in order to ... scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Commw. 2010). The RTKL authorizes the OOR to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). PSP is a Commonwealth agency subject to the RTKL that is required to disclose public records. *See* 65 P.S. §67.301. A record in possession of a Commonwealth agency is

presumed to be public unless it is exempt under the RTKL or other law or protected by a privilege, judicial order or decree. 65 P.S. §67.305. PSP has asserted a number of RTKL exceptions for which it bears the burden of proof by a preponderance of the evidence, meaning “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001); 65 P.S. §67.708(a).

The ORO Affidavit establishes that there are no responsive records to No. 5 and part of No. 4. The affidavit is sufficient evidence of their non-existence. PSP asserts that the SERs, PSP’s responses to/decisions upon the SERs and correspondence relating to the SERs are protected by Section 708(b)(17), the noncriminal investigative exception, (b)(10), the predecisional deliberative exception, and must be redacted under the personal security exception at (b)(1)(ii) and personal identification exception at (b)(6). Under Section 708(a), PSP bears the burden of proving the application of each exception. Each exception is addressed in turn.

Under the RTKL, 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 but 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.” 65 P.S. §67.1102(a)(2). Here, the relevant facts are not in dispute, neither party requested a hearing and the OOR has the requisite evidence before it, presented through sworn written testimony, to assess the exceptions and properly adjudicate the matter.

1. PSP cannot shield Supplemental Employment Records under Section 708(b)(17).

PSP argues that each SER and PSP approval or disapproval is exempt from disclosure under Section 708(b)(17) as records “relating to a noncriminal investigation.” The exception protects records relating to complaints like investigative materials, notes, correspondence and reports. 65 P.S. §67.708(b)(17). PSP’s conclusion that the supplemental employment records

are exempt relies upon the OOR accepting its premise that submission of a request for supplemental employment triggers an investigation, and as such is similar to a complaint that triggers an investigation. The OOR consistently holds that not every inquiry, inspection, or activity conducted by an agency rises to the level of a noncriminal investigation contemplated in Section 708(b)(17). *See, e.g., Shafer v. Dept. of L&I*, OOR Dkt. AP 2009-0890, 2009 Pa. O.O.R.D. LEXIS 768. Were the OOR to interpret this exception as broadly as PSP does here, then all reviews by an agency to assess compliance with its internal policies would be protected.

The Commonwealth Court held that RTKL exceptions “must be narrowly construed.” *Bowling, supra* at 824. Construing the noncriminal investigative exception properly, submissions of public forms and decisions by agency personnel acting upon the SER do not constitute protected investigative records; they are routine reviews. PSP did not submit proof to substantiate that any “investigation” was undertaken other than the review of the submitted SERs. The SERs are not investigative in nature, nor are PSP’s responses, and the ORO attested that no studies of outside work are conducted by PSP. Therefore, the records are not protected on this basis.

2. PSP cannot shield Supplemental Employment Records under Section 708(b)(10).

PSP also asserted that the SER, response, and any correspondence or other documents related to supplemental employment are protected by the predecisional deliberative exception. Pursuant to Section 708(b)(10)(i)(A), a record reflecting the “internal, predecisional deliberations of an agency... or predecisional deliberations between agency members, employees or officials...including predecisional deliberations relating to a ...contemplated or proposed policy or course of action...or other documents used in the predecisional deliberations” are protected from disclosure. 65 P.S. §67.708(b)(10)(i)(A).

The OOR holds that an agency must show three elements to substantiate this exception: (1) deliberations reflected are “internal” to the agency; (2) the deliberations reflected are predecisional,

i.e., before a decision on an action; and (3) the contents are deliberative in character, *i.e.*, pertaining to proposed action/policy-making. The Requester conceded that to the extent email correspondence or internal memoranda among supervisors exist, they qualify for exemption and permitted these portions to be withheld. *See* Appeal, p. 2. However, PSP failed to meet its burden of proving these three elements apply to shield the SERs or corresponding agency responses.

PSP submitted only the Meade Affidavit in support of this exception which does not contain sufficient facts to substantiate its application. First, the SERs submitted by PSP employees are forms completed by employees in their capacity as individuals, not as agents of PSP, and so are not records reflecting the agency's deliberations. Second, the agency responses are final decisions by an agency which are not meant to be shielded by the predecisional deliberative exception. Third, PSP did not demonstrate that the decision-making process upon applications for supplemental employment is "deliberative" in character. Thus, these records are not shielded by (b)(10).

3. The Supplemental Employment Records may be redacted.

Section 706 of the RTKL requires the non-public parts of a record be redacted and the remaining public parts of any requested record to be disclosed, explaining "the agency may not deny access to the record if the information which is not subject to access is able to be redacted." 65 P.S. §67.706. PSP failed to establish that the SERs and responses cannot be redacted such that the public information is disclosed, and indeed argues that these records can be disclosed with all personal identification and personal security information redacted. The issue to be addressed is which information constitutes "personal identification information" protected by Section 708(b)(6), and which constitutes a risk to personal security if released, as per (b)(1)(ii).

There is no dispute that the SER includes the following sections to be completed:

1. Employee Name- Social Security No.

2. Mailing Address (home address)
3. Present Payroll Title/Agency/Bureau work site
4. Job duties (PSP)
5. Questions regarding details of duties
6. Days worked, start and stop time at PSP
7. Name of Company/organization
8. Address of Company/organization
9. Type of business
10. Title of position for which you apply, date of application, date to begin work
11. Duties of Position applied for
12. Questions specific to type of position applied for
13. Days worked, No. hours per week, approximate start and stop times
14. Signature/date

The SER includes space for endorsements/recommendations of supervisors. The supervisor is to set forth the reason for any disapproval.

Section 708(b)(6) lists the information protected, including Social Security number (SSN) and personal financial information. Therefore, SSNs may be redacted from all SERs and responses. Further, in subsection (C), home addresses of “law enforcement officers” are specifically exempt from disclosure. Therefore, the home addresses of any PSP troopers, such as those who are members of the Association, will be exempt under (b)(6). However, the SERs requested are not limited to “law enforcement officers” and not all employees of PSP qualify as such officers. Administrative staff, for example, do not qualify, and based upon job duties, and whether security is a primary function among them, the addresses of such staff are not exempt under (b)(6).

The Association also argues that records relating to supplemental employment are protected as “personal financial information.” The OOR does not find this argument persuasive because the type of information to be completed on the SER does not include “financial” information such as the amount of wages or salary for the supplementary position. Section 708(b)(6) only protects the SSNs and home addresses of law enforcement officers from disclosure.

The Association also argued that the information on the SER is exempt under the personal security exception, which protects “a record the disclosure of which: ... would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. §67.708(b)(1)(ii). In particular, PSP and the Association object to the disclosure of the location of the supplemental employment, and the hours of the approximate stop and end times. In support, PSP submitted an affidavit of Captain McNeal and the Association submitted an affidavit of its President. Neither of these affidavits contains sufficient facts to show that an actual threat of harm exists from the release of supplemental employment information. In the examples, certain officers were followed or targeted and attacked without any correlation that information similar to that requested here played any part in the attacks. As a result, the affidavits are largely speculative citing to examples unrelated to supplemental employment or to any alleged perpetrator’s knowledge of the supplemental employment information sought here. The affidavits fail to show that the release of the information would lead to any similar attacks.

The OOR concludes that PSP failed to meet its burden of demonstrating that disclosure of supplemental employment information is reasonably likely to result in the harm described. To the extent that the location of supplemental employment is the same as the PSP law enforcement officer’s home address, that location/address may be redacted as per Section 708(b)(6)(C). PSP

did not establish that release of the location of the supplemental employment or hours worked is reasonably likely to lead to a substantial and demonstrable risk to personal security. Accordingly, that information cannot be redacted from the SERs or agency responses.

PSP argues that the start and stop times and other supplemental employment information could compromise covert operations, and therefore must be protected under CHRIA. PSP did not submit sufficient facts in that regard, claiming that to do so would pose a risk to the covert operations. The OOR finds that PSP may redact from the SERs any information that would compromise a covert operation as it relates to the PSP location and hours worked. PSP did not explain how knowledge of a PSP employee's supplemental employment, particularly of a non-law enforcement officer, would pose a risk to covert operations. Therefore, as to non-law enforcement officers, this exemption cannot be applied.

CONCLUSION

For the foregoing reasons, the Requester's Appeal is **granted in part and denied in part**. PSP demonstrated that records sought in Part 5 and studies sought in Part 4 do not exist. With regard to Parts 1, 2 and remainder of Part 4, PSP is required to disclose to the Requester, within thirty (30) days, the SERs, responses/decisions on same, and any records related to outside work, and may redact the home addresses of law enforcement officers and the SSNs of its employees. PSP is not required to disclose correspondence and internal memoranda among supervisors, if any, in response to Part 4.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal or petition for review to the Commonwealth Court. 65 P.S. §67.1301(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 website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: July 14, 2010

A handwritten signature in cursive script that reads "Lucinda Glinn".

LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Mark Scolforo for the *Associated Press*; R.H.Hawn/Keli M. Neary, for PSP
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