



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

**CARL PRINE on behalf of  
*Pittsburgh Tribune-Review*, Complainants**

v.

**PENNSYLVANIA STATE POLICE,  
Respondent**

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**Docket No. AP 2010-0550**

## INTRODUCTION

Carl Prine, on behalf of *Pittsburgh Tribune-Review* (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 27, 2010, the Requester submitted a right-to-know request seeking, in pertinent part “any and all Supplemental Employment requests by PSP employees, approved or disapproved, by PSP from Jan. 1, 2005 to the present, to include the desk memorandum attachments, agency notifications and stipulations” (the “Request”).

After timely invoking a thirty-day extension, Jay Leader, Deputy Open Records Officer (ORO), denied access to the Request under the noncriminal investigative exception, Section

708(b)(17) and the predecisional deliberative exception at (b)(10) (“Denial”). PSP also 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. To the extent the Request seeks 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 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”). Meade attests that the process for approval of supplementary employment is outlined in its Administrative Regulation 4-17, 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 advises the “investigatory process” begins with the Supplementary Employment Request (“SER”), form STD-355, which triggers a noncriminal investigation under Section 708(b)(17) that begins with the Section Supervisor, Division Director, Troop Commander in the Bureau of Human Resources, Office of Chief Counsel and Deputy Commissioner of Administration and Professional Responsibility. She attests that all information pertaining to a SER is related to the investigation and all records related to an SER reflect predecisional deliberations of PSP, including the evaluation, recommendations and consideration for the SER. (Meade Affidavit).

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 is reasonably likely to result in a substantial and demonstrable risk of harm to troopers and his or her co-workers. She attests the risk is significant when the trooper works from his or her home and advises that seemingly innocuous bits of information can be culled by a person to achieve a criminal objective. Examples in which law enforcement officers had been the subject of intimidation or violence were provided. 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. She attests law enforcement officers are at greater risk of harm when engaged in supplementary employment. (McNeal Affidavit).

The Requester timely appealed arguing that PSP released the SER for Trooper Edward Joyner due to his part-time work for Ben Roethlisberger, with SSNs and partial home addresses redacted, so disclosure of SERs cannot pose a security risk. The Requester argues that *DCNR, et al v. OOR*, No. 1165 CD 2009 (Pa. Commw. 2010) is inapplicable because forms supplied relate to approval for public state employees to engage in supplemental employment. Further, Section 708(b)(6) specifies that nothing in the exemptions “shall preclude the release of the name...[and] employment-related contract or agreement and length of service of a public official or an agency employee.” The Requester notes that the affidavits are lacking in that they contend that reviewing standard forms are investigative or deliberative acts and concedes that any notes regarding the decisions are not sought as they may be protected. The Requester argues that examples offered in the McNeal Affidavit pertain to troopers not moonlighting as security guards, are inapplicable and PSP did not meet its burden.

The Requester argues that release of the SERs is important for monitoring PSP's review of these applications to assure there are no conflicts or concerns with hours spent away from PSP duties. As a supplement to the Appeal, the Requester submitted a copy of AR 4-17, labeled "Department Directive" pertaining to supplementary employment to show the purpose of the SER forms requested in the bureaucracy and emphasizes it seeks only the forms and attached stipulations. The Requester cites the directive to show that PSP consistently refers to the records as forms, all of which are factual information in nature.

PSP supplemented the record with argument from its counsel, an affidavit of Debra Facciolo, Director of the Bureau of Human Resources ("Facciolo Affidavit"), and an affidavit of Bruce Edwards, President of the Pennsylvania State Troopers' Association ("Association Affidavit") submitted in *Scolforo v. PSP*, OOR Dkt. AP 2010-0481, which involved a request for similar records, to substantiate application of the personal security and personal identification information exceptions. PSP advises that release of Trooper Joyner's SER does not relinquish its ability to withhold others due to discretion to disclose records under Section 506(c) of the RTKL.

Edwards attests that officers are exposed to adversarial conditions daily and targeted as members of PSP; he cites examples in which troopers had been surveilled then attacked. He advises that troopers in an off-duty status, as in supplementary employment, are not in as great a state of awareness and are more susceptible to attack. The Association Affidavit also states that the Social Security number and home address of law enforcement are protected by Section 708(b)(6), and that a home address may be the address of supplemental employment.

Facciolo attests to the basis for approval under AR 4-17 and the Management Directive and states SERs are purely for internal evaluation. She attests that SER forms are deemed confidential in the directives out of respect for privacy, such that their disclosure would be an unwarranted violation of privacy. PSP submitted copies of the directives and a blank SER form.

## 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<sup>1</sup> 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).

PSP asserts that the SER forms and attachments 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, and the exceptions are to be narrowly construed. *Bowling, supra* at 824.

Under the RTKL, an appeals officer must “review all information filed relating to the request.” 65 P.S. §67.1102(a)(2) and *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

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<sup>1</sup> PSP never asserted that the SER records are exempt under another law like a State regulation in its Denial and did not argue that the “directives” constitute a regulatory exemption. Thus, PSP waived such arguments as per *Signature Information Solutions v. OOR*, 1311 CD 2009 (Pa. Commw. 2010). From review of their contents, these directives pertain to employment practices of the agency(ies) and are akin to an employee manual not regulations that may supersede the presumption of openness embedded in the RTKL. *Accord* 4 Pa. Code §1.1 (management directive system was developed to provide statements of policy and procedure for those under the Governor’s jurisdiction); *Petsinger v. Dept. L & I*, 988 A.2d 748 (Pa. Commw. 2010).

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. Supplemental Employment Requests are not exempt 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 supplemental employment records are exempt requires a presumption 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, any review by an agency to assess compliance with its internal policies would be protected.

Construing the noncriminal investigative exception narrowly per *Bowling*, the submissions of public forms, review and decisions upon those forms amongst agency personnel do not constitute protected investigative records. Rather, they are routine forms that are customarily reviewed. The AR 4-17 and blank SER forms on their face do not reveal information “investigative” in nature. The forms require only factual information and do not appear to include space for investigative notes. PSP did not submit proof to substantiate that any “investigation” was undertaken other than supervisory review of the submitted SERs. As SERs are not investigative in nature, the records cannot be protected on this basis.

## **2. Supplemental Employment Records are not exempt under Section 708(b)(10).**

PSP asserts that completed SERs forms 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 specifically excluded deliberative notes from the Request, and to the extent that the part regarding approval may have any deliberations, they can be redacted. PSP failed to meet its burden of proving these elements apply to shield the SERs and attachments. The decision-making as it relates to the forms is not recorded on the SER or attachments.

The Facciolo and Meade Affidavits do not substantiate that the forms contain deliberative information that qualifies for protection. 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 on the forms are final decisions by an agency which are not meant to be shielded by the predecisional deliberative exception because the rationale for the decision is not reflected. Third, PSP did not demonstrate that the decision-making process upon applications for supplemental employment is “deliberative” in character. Thus, these records cannot be shielded by (b)(10) in their entirety. To the extent that the SER form contains deliberative comments by supervisors, they may be redacted.

### **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 SER forms cannot be redacted such that the public information is disclosed. In the case of Trooper Joyner, PSP redacted the SER records and disclosed them to the press, including the Requester, with only part of the home address and SSN redacted. PSP’s choice to disclose the redacted Trooper Joyner’s SER in its discretion under Section 506(c) does not undermine the applicability of any of its claimed exceptions, but does indicate that the records are capable of redaction.

PSP submitted the Association Affidavit and McNeal Affidavit to substantiate 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 on the Agency Notification. The supervisor is to set forth the reason for any disapproval there.

Section 708(b)(6) lists the information to be protected, including a 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 excepted from disclosure. Therefore, the home addresses of any PSP troopers, are exempt under (b)(6). However, the SERs requested are not limited to “law enforcement officers” and not all employees of PSP qualify as such. Administrative staff, for example, does not qualify, and based upon the job duties, and whether security is a primary function among them, the addresses of such staff are not exempt under (b)(6). The OOR notes that completed forms do not constitute “personal financial information” under Section 708(b)(6).

PSP argues that 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 support, PSP submitted an affidavit of Captain McNeal and the Association’s President. Neither of these affidavits contains sufficient facts to show that an actual threat of harm exists from the release of supplemental employment information. The affidavits are largely speculative and cite to examples in which certain officers were followed or targeted and attacked without the requested information in order to show that the provision of the information would lead to similar attacks.

To the extent that 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 SER forms and attachments.

PSP also argued 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 or explain how knowledge of a PSP employee's supplemental employment, particularly of a non-law enforcement officer, would pose a risk to covert operations. From review of the forms, the information does not appear to compromise covert operations. The OOR finds that PSP may redact from the SERs any information that would compromise a covert operation as relates to the PSP location and hours worked, but 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 is required to disclose the SERs and attachments within thirty (30) days and may redact the home addresses of law enforcement officers, the SSNs of employees, and CHRIA protected material. Deliberative comments from supervisors are protected by (b)(10), and any such comments may also be redacted.

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 15, 2010**

A handwritten signature in cursive script, appearing to read "Lucinda Glinn".

**LUCINDA GLINN, ESQ.**  
**APPEALS OFFICER**

Sent to: Carl Prine for Pittsburgh Tribune-Review; R.H. Hawn, Jr./ Keli M. Neary, Esq. for PSP