



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**DINA ZLOCZOWER,  
Complainant**

**v.**

**PENNSYLVANIA STATE POLICE,  
Respondent**

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**Docket No. AP 2010-0722**

## **INTRODUCTION**

Dina Zloczower (the “Requester”) filed a right-to-know request with Pennsylvania State Police (“PSP”), pursuant to the Right-to-Know Law, 65 P.S. §§67.101, *et seq.*, (“RTKL”) seeking all police records related to identified persons. PSP denied access under the Criminal History Records Information Act, 18 Pa. C.S. §§9101 *et seq.* (“CHRIA”), criminal investigative and medical records exceptions and insufficient specificity. 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 action as directed.

## **FACTUAL BACKGROUND**

On June 10<sup>th</sup>, the Requester submitted a request seeking any and all police records ...referencing or relating to ...Donald Fell, Donald Fell, Sr., Deborah Fell (or Folland or Haydt or McDonald or Pecco) (nee Kotzer), Teri Fell, Ellery Wilcox and Christopher Eike” including but not limited to:

- (1) all records indicating any of the above individuals’ contact with [PSP] and criminal justice system in Pennsylvania;
- (2) police reports;

- (3) dispatch logs;
- (4) shift sheets;
- (5) investigatory records;
- (6) search warrants;
- (7) charges which were withdrawn, dismissed or resulted in a conviction;
- (8) arrest records;
- (9) evidence of recovery logs;
- (10) inventory of evidence seized;
- (11) computer files and e-mails;
- (12) photographs, audio and video tapes;
- (13) handwritten notes;
- (14) diaries;
- (15) blood alcohol and drug test results;
- (16) information pertaining to mental disability and suicide screening;
- (17) medical or psychological treatment and/or evaluation [] administered or recommended;
- (18) any and all communications, correspondence or documents...relating to above individuals that were transmitted to or received by [PSP]; and
- (19) all other records in your possession associated with the above individuals' contact with your law enforcement agency"

(the "Request").

After invoking a thirty-day extension, Jonathan Leader, Deputy Open Records Officer (ORO), timely denied access asserting that records sought in Paragraphs 1, 2, 5-10, 12, 13, and 15 are exempt under the criminal investigative exception, Section 708(b)(16) and as criminal history records under CHRIA, and exempted the medical records sought in Paragraphs 16-17 under (b)(5), and denied the remainder as insufficiently specific (the "Denial"). PSP included a verification of Leader that he cannot determine whether any public records are sought by Paragraphs 3, 4, 11, 14, 18 and 19 of the Request because it requires analysis of potentially every record at PSP, analysis that would require hundreds of man hours.

The Requester timely appealed, arguing PSP did not satisfy its obligations because only limited material may be available under CHRIA and CHRIA does not protect “court dockets, police blotters, or press releases” from disclosure. She argues the Request meets specificity requirements because it is limited to specific types of records and the subjects of the records are identified (“Appeal”).

PSP supplemented the record with an affidavit of Cynthia Fisher substantiating the asserted exceptions and the inability to discern the records requested from the language of the Request (“Affidavit”) and a letter from Assistant Counsel Keli Neary explaining PSP’s defenses. In the letter, counsel explains that the Request in its entirety is insufficiently specific because PSP cannot search for the records with only the identifiers provided by the Requester, and would need details, like incident date or type of evidence, to find responsive records. Counsel advises that the Requester submitted the CHRIA form with the requisite information enabling it to perform research and provide responsive records.

Fisher attests that from the information supplied by the Requester, “PSP cannot determine whether any public records are encompassed by this request without analyzing the content of every potentially responsive record presently maintained by PSP. Given the breadth of this request, that would conceivably be every record in the Department’s possession.” She attests that many of the requested records are compiled as part of an investigation and exempt on that basis. Regarding “charges” and “arrests,” Fisher attests the information is maintained in a name-search database, but is not permitted to be disclosed under CHRIA. Fisher attests that PSP does not possess in its custody or control any “shift sheets” or “diaries” and that it does not have records called “dispatch logs.” She explains that if “dispatch logs” are generally equivalent to PSP’s Communications Reports, that the Requester did not supply sufficient information to enable PSP to respond.

## LEGAL ANALYSIS

The RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). 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.

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. *Id.* Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it, presented through sworn, written testimony, to properly adjudicate the matter.

PSP is a Commonwealth agency subject to the RTKL and required to disclose public records. *See* 65 P.S. §67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. §67.708(b). PSP asserted CHRIA, the criminal investigative exception at (b)(16), the medical records exception at (b)(5) and insufficient specificity.

PSP argued on appeal that the entire Request fails to meet specificity requirements because it cannot search its records for many of the requested records by name and dates of birth alone. However, PSP did not assert insufficient specificity to the entire Request in its initial response. The Commonwealth Court held in *Signature v. Aston Tp.*, 995 A.2d 510 (Pa. Commw. 2010), that agencies are limited to the bases for denial set forth in the original response to the right-to-know

request. Accordingly, the OOR cannot consider the alleged insufficient specificity to the Request except as to Paragraphs 3, 4, 11, 14, 18 and 19 as set forth in the Denial.

PSP also cannot be compelled to disclose records that do not exist. PSP supplied sufficient evidence to demonstrate that the records sought in Paragraphs 4, and 14 do not exist based upon the terms used and descriptor by the Requester. Accordingly, PSP has no obligation to produce them.

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: (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(a). 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.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001). Each of the exceptions PSP asserted are addressed substantively as to each paragraph in turn.

**1. Criminal investigative exception, (b)(16).**

PSP asserts that the records sought in Paragraphs 1, 2, 5-10, 12, 13 and 15 are exempt as records "relating to or resulting in a criminal investigation" under Section 708(b)(16). The Affidavit from Fisher establishes that the records sought in Paragraphs 2, 5, 6, 9, 10, 12, 13, and 15 are only compiled and maintained in conjunction with an underlying criminal investigation. Thus, these records are exempt on that basis. However, the Affidavit does not support the criminal investigative character of records sought in Paragraphs 1, 7 and 8, so they cannot be protected. As PSP asserted no other exception with respect to Paragraph 1, those records must be disclosed. With regard to the charges and arrest records sought, PSP argues they are protected by CHRIA.

## 2. CHRIA.

PSP asserted CHRIA with regard to the arrest and charges records sought in Paragraphs 7-8. There is no dispute that the records sought are held by a criminal justice agency. CHRIA protects “investigative information” and “treatment information” from disclosure, with the exception of records specified under Section 9104 as “public.” Section 9106(c)(4) provides that

investigative information and treatment information shall not be disseminated to any department, agency or individual unless [it] is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, *modus operandi*, genetic typing, voice print or other identifying characteristic.

18 Pa. C.S. § 9016(c)(4) (emphasis supplied). “Investigative information” is defined as “information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include *modus operandi* information.” 18 Pa. C.S. § 9102. “Treatment information” is defined as “[i]nformation concerning medical, psychiatric, psychological or other rehabilitative treatment provided, suggested or prescribed for any individual charged with or convicted of a crime.” *Id.* These types of information are expressly protected from disclosure, and thus exempt as a matter of law.

The Requester argues that CHRIA does not protect a number of records, including press releases, police blotters, and court dockets. 18 Pa. C.S. §9104(b). Section 9102 defines “police blotter” as “A chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses.” 18 Pa. C.S. §9102. The information set forth in Section 9104(b), including the listing of arrests, is public and cannot be withheld under CHRIA.

PSP acknowledged that it can locate responsive records as the database permits searches by name. However, it argues the information can only be obtained through CHRIA. The OOR holds that the RTKL offers an alternative to CHRIA to obtain public records not protected from

disclosure by CHRIA. The charges filed against any of the named individuals are not exempt under (b)(16), *see* 65 P.S. §67.708(b)(16)(vi)(A), and charges filed are public. Thus, to the extent that such information sought in Paragraphs 7 and 8 exists as a list of arrests as set forth in 18 Pa. C.S. § 9104(b) and/or the filing of criminal charges, it must be disclosed to the Requester.

### **3. Medical records exception, Section 708(b)(5).**

The records sought in Paragraphs 16 and 17 of the Request specifically seek medical information expressly protected by Section 708(b)(5). PSP's Affidavit supports the exemption of those records from disclosure, and PSP properly withholds the records sought in Paragraphs 16 and 17 based upon the exception.

### **4. Insufficient specificity, Section 703.**

PSP argues that Paragraphs 3, 11, 18, and 19 are insufficiently specific. Section 703 provides that a request "should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested..." 65 P.S. §67.703. With regard to the 4 remaining paragraphs, the OOR finds that the request for dispatch logs, also known as "Communications Memos," pertaining to the named individuals is sufficiently specific for PSP to discern what records are sought. Likewise, with regard to Paragraph 11, the request for "e-mails" identifies a specific type of record, and is thus sufficiently specific to enable a response. In *PSP v. OOR (George)*, 995 A.2d 515 (Pa. Commw. 2010), the Commonwealth Court held that while a request for "any and all records, files... or communications" was insufficiently specific, the part seeking manuals was sufficiently descriptive to enable PSP to respond. The OOR finds that the term "e-mails" in Paragraph 11 and "correspondence" in Paragraph 18 are sufficient to enable PSP to respond to those parts of the Request, regardless of the effort expended in compiling responsive records.

PSP does not demonstrate that it cannot assess what records are responsive. Rather, PSP argues that it does not organize or maintain its records in a manner that would permit it to locate responsive records without a manual review of each type of records, *e.g.*, dispatch logs/ Communication Memos. The OOR sympathizes with the plight faced by agencies receiving work-intensive requests, such as voluminous requests, but that is not a proper ground for withholding public records. As the Commonwealth Court stated in *Bowling, supra*, “we appreciate the enormity of the task before [the agency]. Nevertheless, the General Assembly’s enactment of the new law evidences its commitment to providing greater access to the Commonwealth’s public records.” 990 A.2d 813, 826 (Pa. Commw. 2010). Thus, the OOR must order release of the dispatch logs in Paragraph 3, the e-mails (not all computer files) in Paragraph 11, and the correspondence in Paragraph 18.

The OOR agrees with PSP that Paragraph 19 was properly denied as insufficiently specific as *George* holds the language “all [other] records” is overly broad and does not comport with Section 703.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part and denied in part**. PSP is directed to provide responsive records to the Request at Paragraphs 1, 3, 7 (filed charges), 8 (lists of arrests), 11 (e-mails only), 18 (correspondence only) to the Requester within thirty (30) days.

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: September 3, 2010**



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**LUCINDA GLINN, ESQ.  
APPEALS OFFICER**

Sent to: Dina Zloczower, Esq.; Keli Neary, Esq. for PSP