

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Ryan Bagwell, | : |
| Petitioner | : |
| | : |
| v. | : No. 1008 C.D. 2014 |
| | : Submitted: October 31, 2014 |
| Commonwealth of Pennsylvania, | : |
| Office of Attorney General, | : |
| Respondent | : |

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
 PRESIDENT JUDGE PELLEGRINI FILED: November 20, 2014

Ryan Bagwell (Requestor) petitions this Court for review of the final determination of the Office of the Attorney General’s Right-to-Know Law Appeals Officer’s (Appeals Officer) determinations finding that certain records were exempt from disclosure under Section 708(b) of the Right-to-Know Law (RTKL)¹ and other laws that prevent disclosure of investigative materials.

Requestor filed a RTKL request with the Office of Attorney General (OAG) which consisted of nine separately numbered paragraphs relating to

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §67.708(b).

communications between the OAG and the Special Investigative Counsel for Pennsylvania State University (Louis Freeh and the Freeh Group). The OAG's Open Records Officer (ORO), with the exception of one document, denied Requestor's request. Although stating that his request was repetitive of prior requests for records that he had made in the past 13 months, the OAG referenced and reiterated its previous responses in which it had stated that his requests for certain records were provided; that he had been informed that certain records did not exist; that his requests were not sufficiently specific to identify records; and that certain documents could not be disclosed because they were protected under the Investigating Grand Jury Act, 42 Pa. C.S. §§4541-4553, and/or as records pertaining to a criminal investigation (*see* 65 P.S. §67.708(b)(16)), and/or as records pertaining to the deliberative process of the OAG (*see* 65 P.S. §67.708(b)(10)). No appeal was taken from that denial.

Requestor then filed an appeal to the OAG's RTKL Appeals Officer,² who acts in the stead of the Office of Open Records to hear appeals from open records' requests made to the OAG, only as to the first of his original nine requests, namely, his request for:

all letters, emails, memos, reports, transcripts, audio recordings and video recordings that were sent or received by OAG employees including, but not limited to, Frank Fina, Linda Kelly, Joe McGettigan, and Randy Feathers, between November 1, 2011 and December 31,

² Section 503(d)(1) of the RTKL, 65 P.S. §67.503(d)(1), provides that "[t]he Attorney General, State Treasurer and Auditor General shall each designate an appeals officer to hear appeals under Chapter 11."

2012, and were sent from or to the following individuals: Louis Freeh, an employee of The Freeh Group; Omar Y. McNeil, an employee of The Freeh Group; Thomas Cloud, an employee of The Freeh Group; Gregory Pavv, an employee of The Freeh Group; any other employee of The Freeh Group.

The Appeals Officer stayed the appeal because the OAG was reconstructing computer records as part of its review of the Gerald Sandusky investigation which might disclose additional communications subject to the request. As a result of this review, certain additional records were discovered, and by supplemental responses, the ORO provided to Requestor additional records, but other records were not disclosed because those records were purportedly exempt under investigative exceptions contained in 65 P.S. §67.708(b)(16) which exempts “record[s] of an agency relating to or resulting in a criminal investigation” and then lists types of records included within the exemption as well as the Criminal History Record Information Act (CHRIA), 18 Pa. C.S. §§9101-9183.

The Appeals Officer denied the appeal because after personally “examin[ing] each of the withheld emails,” the Appeals Officer held that the records sought were exempt because they constituted: (1) Complaints of potential criminal conduct (65 P.S. §67.708(b)(16)(i)); (2) Investigative materials, notes, and correspondence (65 P.S. §67.708(b)(16)(ii)); (3) Records made confidential by law or court order (65 P.S. §67.708(b)(16)(iv)); (4) Victim information (65 P.S. §67.708(b)(16)(v)); and (5) Revelation of the Institution, Progress, or Result of a Criminal Investigation (65 P.S. §67.708(b)(16)(vi)). Requestor then filed this appeal.

Requestor contends that there is no evidence present to support the Appeals Officer's determination that responsive records were not public records pursuant to the Criminal Investigation Exception because there is no supporting affidavits, and all the ORO or Appeals Officer provided were only bare conclusions as to why they were exempt and did not provide any explanation as to why they fell within the cited exceptions.

The OAG has the burden of establishing by a preponderance of the evidence that records are exempt from disclosure under Section 708(a) of the RTKL, 65 P.S. §67.708(a). *Mitchell v. Office of Open Records*, 997 A.2d 1262, 1264 (Pa. Cmwlth. 2010). However, the administrative framework of the RTKL does not require that this be accomplished through sworn testimony or other more formalistic means. An agency may meet its burden through an unsworn attestation or a sworn affidavit. *See Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 908-09 (Pa. Cmwlth. 2010).

In this case, the Appeals Officer reviewed the requested records and made an independent determination that the records were investigative materials, and there was no sworn or unsworn affidavit concerning why the documents fell within the exception or a description of the records that would allow us to make a determination that they fell within the proffered exceptions. All we have are the conclusions that they fell within this provision merely by stating conclusions such as "investigative report", "hiring practices" or "victimization." While the ORO and Appeals Officer may have had a sufficient basis to arrive at those conclusions

to deny the request under the proffered investigative exceptions based on her independent *in camera* review of the materials, conclusory statements themselves are not sufficient to justify an exemption of public records. *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013). The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions. *See Carey v. Pennsylvania Department of Corrections*, 61 A.3d 367, 373-80 (Pa. Cmwlth. 2013).

We acknowledge that agencies may have difficulty in some instances in “being specific enough” in describing documents without disclosing investigative information requiring *in camera* review by the Appeals Officer. In those instances, when an appeal is taken, documents reviewed *in camera* should be included in the record and filed under seal with this Court so that we can undertake adequate appellate review. Recognizing that this Court may have difficulty in conducting appellate review of this appeal, the OAG, in its brief, stated that it does not oppose filing the documents under seal for us to review the Appeals Officer’s determination that they fell within the investigative exceptions.³

³ Requestor contends that a special master be appointed because the Appeals Officer did not set a schedule for both parties to submit additional evidence and argument subsequent to the filing of the appeal and refused to provide copies of important information to him, which he has failed to identify, that was filed by the ORO. Neither reason is grounds to appoint a special master. Requestor also contends that the ORO did not identify the withheld records in previous requests that were referred to in this request that would enable the Appeals Officer to determine if the claimed exemptions apply. No claim is made that they were not reviewed by the Appeals Officer *in camera*. Given that all records were denied because they fell within this investigative exception, this contention is meritless.

Accordingly, we direct the OAG to file the disputed records under seal within 30 days of this order.⁴



DAN PELLEGRINI, President Judge

Judge Cohn Jubelirer did not participate in the decision of this case.

⁴ Requestor also seeks court costs and attorney fees pursuant to Section 1304(a) of the RTKL, 65 P.S. §67.1304(a), which provides that a court may award costs of litigation if the agency acts in bad faith under the provisions of the RTKL. Nothing indicates that the legal challenge was frivolous. However, there is nothing in the record to suggest that the ORO or the Appeals Officer acted in bad faith or that they lacked a reasonable basis in believing that the records which were not disclosed to Requestor were protected under 65 P.S. §67.708(b).

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 :
Commonwealth of Pennsylvania, :
Office of Attorney General, :
Respondent :

ORDER

AND NOW, this 20th day of November, 2014, it is hereby Ordered that the Office of Attorney General is directed to file the disputed records under seal within thirty (30) days of this order.



DAN PELLEGRINI, President Judge

Certified from the Record

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and Order Exit