

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police, :
Petitioner :
v. : No. 740 C.D. 2009
Office of Open Records, : Submitted: June 23, 2010
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
JUDGE COHN JUBELIRER**

FILED: September 23, 2010

The Pennsylvania State Police (PSP) petitions this Court for review of a Final Determination by the Office of Open Records (OOR) to grant the appeal of Donald R. Gilliland (Requester) from the PSP's denial of his request for an incident report (Incident Report) under the Right-to-Know Law (RTKL).¹ PSP argues that the OOR erred in granting the appeal because the Incident Report is a criminal investigative record, which is wholly exempt from disclosure under the RTKL.

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101 – 67.3104.

On February 2, 2009, Requester, the managing editor of the Potter Leader-Enterprise newspaper, submitted a Right-To-Know Law Request (Request) seeking “[a] *complete* incident report (with victim’s name) for incident # F02-1005660 occurring on 18 Jan 09 in which [a specified individual] was charged with harassment. Copy of incomplete incident report is attached.” (Request, R.R. at 1a (emphasis in original).) Attached to the Request was a PSP Public Information Release Report (PIRR) for Incident Number F02-1005660 that listed an address, identified an accused individual, and stated:

[o]n the above date and time, the accused was involved in an argument with the victim. The relationship between victim and accused is domestic in nature and as such, the victim’s name will not be released. Accused slapped the victim across the face. Accused was charged with one count of harassment in district court, 55-3-01.

(PIRR, R.R. at 2a.) On February 3, 2009, the PSP’s Agency Open Records Officer (AORO) denied the Request on the basis of Section 708(b)(16) of the RTKL, 65 P.S. § 67.708(b)(16), which exempts agency records relating to criminal investigations. Requester appealed the denial to the OOR, which assigned the case to an appeals officer. The appeals officer sent a letter to the PSP stating that, because an incident report is equivalent to a police blotter and police blotters are excluded from the criminal investigative records exemption at Section 708(b)(16), the Incident Report was a public record. The appeals officer invited the PSP to provide him with any evidence the PSP might have that release of the name of the victim involved in the incident would “result in substantial and demonstrable risk of physical harm to or personal security of the victim.” (Letter from appeals officer to PSP AORO (March 16, 2009), R.R. at 10a.) The PSP responded, disputing that incident reports are the equivalent of police blotters. The PSP did

not provide evidence as to how disclosure of the victim's name might result in a risk of harm to or impairment of the security of the victim on the grounds that the Incident Report, as a criminal investigative record, is not a public record as defined by the RTKL and, as such, the PSP was not required to produce additional reasons why information in the Incident Report should be withheld. Along with this letter, the PSP submitted a RTKL Liaison Verification stating that the PSP does not maintain a police blotter and that PSP incident reports are used for reporting investigative actions.

On March 23, 2009, the OOR issued its Final Determination granting Requester's appeal and directing the PSP to release an unredacted copy of the Incident Report to Requester. The OOR reasoned that, while Section 708(b)(16) exempts criminal investigative records from the definition of public records, Section 708(b)(16) specifically provides that the exemption does not apply to police blotter information and that, pursuant to Commonwealth v. Mines, 680 A.2d 1227 (Pa. Cmwlth. 1996) and Tapco v. Township of Neville, 695 A.2d 460 (Pa. Cmwlth. 1997), incident reports are equivalent to police blotters. The OOR held that the Incident Report was, therefore, a public record and disclosable, but that investigative information within the police report could be redacted pursuant to Section 708(b)(16). The OOR concluded, however, that because the PSP bore the burden of showing that the victim's name was investigative information or that release of the victim's name would cause a risk of physical harm to or the impairment of the physical safety of the victim, but failed to produce any evidence

on these points, the PSP must release an unredacted copy of the Incident Report. The PSP appealed to this Court.²

In reviewing a final determination of the OOR, this Court “independently reviews the OOR’s orders and may substitute its own findings of fact for [those] of the agency.” Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Cmwlth. 2010) (en banc). With regard to what evidence this Court may consider in reviewing a decision of the OOR, this Court “is entitled to the broadest scope of review,” but should “consider the manner of proceeding most consistent with justice, fairness and expeditious resolution.” Id. at 820, 823. The RTKL does not prohibit this Court from considering evidence that was not before the OOR, including “an *in camera* review of the documents at issue.” Id. at 820. This Court issued an order, dated June 28, 2010, directing the PSP to supplement the record by

² In addition to briefs from the OOR and the PSP, this Court received *amicus curiae* briefs from: the Office of Victim Advocate; the Pennsylvania Coalition Against Domestic Violence; the Pennsylvania Attorney General and Pennsylvania District Attorneys Association; and then Philadelphia District Attorney Lynne Abraham. In addition, we note that Requester sought, *nunc pro tunc*, to intervene in this appeal on the grounds that the OOR should not have been named as a respondent pursuant to Rule 1513(a) of the Pennsylvania Rules of Appellate Procedure, which states that, “[i]n an appellate jurisdiction petition for review . . . all real parties in interest, and not the governmental unit, shall be named as respondents” if the governmental unit is disinterested. Pa. R.A.P. 1513(a). By order dated September 3, 2009, this court held that the OOR was not a disinterested party and denied Requester’s request to intervene, but accepted Requester’s brief as an *amicus* brief. Pennsylvania State Police v. Office of Open Records (Pa. Cmwlth. No. 740 C.D. 2009, filed Sept. 1, 2009). This order was issued prior to this Court’s decision in East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010), which held that the OOR does not have standing to participate as a party in petitions for review from its determinations.

submitting the Incident Report for in camera review by this Court.³ Pennsylvania State Police v. Office of Open Records (Pa. Cmwlth. No. 740 C.D. 2009, filed June 28, 2010).

Before this Court, the PSP argues that the OOR erred in holding that the Incident Report was a public record because police incident reports are not equivalent to police blotters under the RTKL and the Criminal History Records Information Act. The PSP asserts that the Incident Report is wholly exempt from disclosure under Section 708(b)(16)(ii) and (v) because it is a criminal investigative record, which contains investigative materials and victim information. For the reasons set forth in Pennsylvania State Police v. Office of Open Records, ___ A.2d ___, ___, slip op. at 5-12 (Pa. Cmwlth. No. 741 C.D. 2009, filed September 16, 2010) (en banc), we hold that the Incident Report is not a police blotter, but a criminal investigative report which contains investigative information and victim information. Having examined the Incident Report in camera, we note that it is not a chronological listing of arrests, that it contains notes of interviews with the alleged victim and alleged perpetrator, and that it contains

³ PSP argued in its brief that it could not disclose the Incident Report to the OOR because the OOR is not an agency to which information may be disclosed under Section 9106(c)(4) of the Criminal History Record Information Act, 18 Pa. C.S. § 9106(c)(4). Section 9106(c)(4) states:

(4) Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information 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. § 9106(c)(4) (emphasis added).

the alleged victim's name and address. Therefore, pursuant to Section 708(b)(16)(ii) and (v), the Incident Report is exempt from the definition of a public record under the RTKL and is not subject to disclosure. Accordingly, we reverse the Final Determination of the OOR.

RENÉE COHN JUBELIRER, Judge

Judge Brobson did not participate in the decision in this case.

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ORDER

NOW, September 23, 2010, the order of the Office of Open Records in the above-captioned matter is hereby **REVERSED**.

RENÉE COHN JUBELIRER, Judge

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OPINION NOT REPORTED

DISSENTING OPINION
 BY JUDGE PELLEGRINI

FILED: September 23, 2010

For the reasons set forth in my dissent in *Pennsylvania State Police v. Office of Open Records*, ___ A.2d ___, ___, No. 741 C.D. 2009 (Pa. Cmwlth. 2010, filed September 16, 2010), I again respectfully dissent.

DAN PELLEGRINI, JUDGE