

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police,	:	
Petitioner	:	
	:	
v.	:	No. 1383 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
BY JUDGE COHN JUBELIRER**

FILED: September 23, 2010

The Pennsylvania State Police (PSP) petitions this Court for review of the Final Determination by the Office of Open Records (OOR) to grant in part and deny in part the appeal of Justin McLaughlin (Requester) from the PSP's denial of his request for certain incident reports under the Right-to-Know Law (RTKL).¹ PSP argues that the OOR erred to the extent that it granted the appeal because the incident reports are criminal investigative records, which are wholly exempted from disclosure under the RTKL.

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

On April 14, 2009, Requester submitted a Right-to-Know Law Request (Request) seeking “[a]ccess to and a copy of[:] 1) [a]ny and all records on the Connellsville High School Stadium fire in 2004[; and] 2) [a]ny and all records on a fire in South Connellsville, Pennsylvania involving a mobile home on Dushane Avenue in 2004.” (Request, R.R. at 1a.) On April 16, 2009, the PSP’s Agency Open Records Officer (AORO) sent two responses to Requester. The first stated that the PSP did “not possess or maintain any records regarding the Connellsville High School Stadium fire that occurred in 2004,” and suggested that Requester contact the Connellsville Borough Police Department regarding that incident. (Letter from AORO to Requester (April 16, 2009) at 1, R.R. at 4a.) The second response stated that the AORO needed up to an additional 30 days to process the Request because “[o]ne or more of the requested records must be retrieved from a remote storage location” and the Request was “undergoing necessary legal review to determine whether any of the requested records are public records under [the] RTKL.” (Letter from AORO to Requester (April 16, 2009) at 1, R.R. at 15a.) On May 8, 2009, the AORO denied the Request pursuant to Section 708(b)(16)(ii), (v) and (vi) of the RTKL, 65 P.S. § 67.708(b)(16)(ii), (v), (vi), which exempts agency records that: include criminal investigative materials; reveal the institution, progress, or result of a criminal investigation; or contain crime victim information. The AORO also rejected the Request based on Section 6308 of the Juvenile Act, 42 Pa. C.S. § 6308,² and Section 9106(c)(4) of the Criminal History Record

² Section 6308 provides that “[l]aw enforcement records and files concerning a child” are not generally available to the public except under certain circumstances where the child has been adjudicated delinquent or certain other specific circumstances. 42 Pa. C.S. § 6308.

Information Act (CHRIA), 18 Pa. C.S. § 9106(c)(4).³ Requester appealed the denial to the OOR, which assigned the case to an appeals officer.

The appeals officer sent a letter to the AORO requesting more specific information as to why the records pertaining to the 2004 mobile home fire on Dushane Avenue in South Connellsville were exempt from disclosure. (Letter from appeals officer to AORO (May 29, 2009) at 1, R.R. at 18a.) In response, the PSP replied with an index of 18 documents (the Records) relating to the mobile home fire and an affidavit (Affidavit) from the AORO which stated:

a. The Records are either components of, or attachments to a PSP incident report, which is the Department's principle criminal investigative record. I support this assertion by attaching to this affidavit, as Exhibit 2, a pertinent provision of the Department's internal operations manual; OM 7-2, Chapter 7, *Incident Report/Incident Report – Part II* (2/10/2009) The Records were compiled in 2004, pursuant to the iteration of this regulation in effect at the time.

b. By its content, each Record manifestly pertains to a criminal investigation of an incendiary fire (*i.e.*, arson) conducted by PSP troopers, led by TPR. T. J. Maher. Thus, each Record is entirely exempt from public disclosure under 65 P.S. § 6708(b)(16)(ii), either as a criminal investigative report, as correspondence regarding a criminal investigation, or as other investigative material.

c. Consequently, by their content, the disclosure of these Records, individually and collectively, would reveal the institution, progress and result of this incendiary fire investigation. None of them, however, expressly pertains to the filing of criminal charges.

³ Section 9106(c)(4) provides that investigative information may only be disseminated to “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).

Accordingly, each Record is also entirely exempt from public disclosure under 65 P.S. § 67.708(b)(16)(vi)(A).

(Affidavit at 2-3, R.R. at 24a-25a.) The Affidavit also provided rationale as to why the Records would be exempt under Section 9106(c)(4) of the CHRIA and Section 6308 of the Juvenile Act.⁴ In response, on June 15, 2009, the appeals officer asked Requester whether he desired to maintain his appeal of the AORO's denial of his request. Requester responded that, *inter alia*, the PSP could not withhold documents merely because they contained some exempt information and, per the OOR's prior decision in Gilliland v. Pennsylvania State Police, AP 2009-0073 (March 23, 2009) (Gilliland I), incident reports are not exempt from disclosure under the RTKL. Requester also argued that the statements made in the Affidavit were conclusory and did not show that the Records were exempt from disclosure. The appeals officer invited the PSP to submit any counterargument or further evidence. The PSP acknowledged that, insofar as the Records might contain information prohibited from disclosure under Section 6308 of the Juvenile Act, such information could be redacted. However, the PSP argued that Section 708(b)(16) of the RTKL exempted the Records in their entirety from the RTKL's definition of public record.

On June 18, 2009, the OOR issued its Final Determination, in which it granted Requester's appeal in part and denied it in part. Relevantly, the OOR,

⁴ In a cover letter attached to the Affidavit, the PSP acknowledged that it had previously disclosed the victims' names in a Public Information Release Report, which the PSP attached to the Affidavit as Exhibit 3. (Letter from PSP to appeals officer (June 5, 2009) at 1, R.R. at 21a.) Therefore, the PSP stated that it was no longer arguing that the Records were non-disclosable because they contained victim information. (Letter from PSP to appeals officer (June 5, 2009) at 1, R.R. at 21a.)

relying on its decision in Gilliland v. Pennsylvania State Police, AP 2009-0076 (March 23, 2009) (Gilliland II), held that the PSP's incident reports are police blotters and, therefore, public records. The OOR directed the PSP to release the incident reports it had identified among the Records, but to redact any juvenile information or criminal investigative information contained therein. The PSP now appeals to this Court.⁵

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 submitting the incident reports for in camera review by this Court.⁶ Pennsylvania State Police v. Office of Open Records (Pa. Cmwlth. No. 1383 C.D. 2009, filed June 28, 2010).

⁵ In addition to briefs from the OOR and the PSP, this Court received an *amicus curiae* brief from then Philadelphia District Attorney Lynne Abraham.

⁶ PSP argued in its brief that it could not disclose the incident reports to the OOR because the OOR is not an agency to which information may be disclosed under Section 9106(c)(4) of the CHRIA.

Before this Court, the PSP argues that the OOR erred in holding that the incident reports were public records because police incident reports are not equivalent to police blotters under the RTKL and the CHRIA. The PSP asserts that the incident reports are wholly exempt from disclosure under Section 708(b)(16)(ii) and (vi)(A) because they are criminal investigative records, which contain investigative materials and information revealing the institution, progress, or result of a criminal investigation. We note that, in rejecting this argument, the OOR relied on its decision in Gilliland II. This Court reversed that decision in Pennsylvania State Police v. Office of Open Records, ___ A.2d ___ (Pa. Cmwlth. No. 741 C.D. 2009, filed September 16, 2010) (en banc) (PSP). For the reasons set forth in PSP, ___ A.2d at ___, slip op. at 5-14, we hold that the incident reports involved in this case are not police blotters, but are criminal investigative reports that contain criminal investigative information and, as such, are not subject to redaction. Having examined the incident reports in camera, we note that they: are not chronological listings of arrests; contain notes of interviews with the alleged victim, alleged perpetrator, and witnesses; and contain a narrative of the trooper's observation of the crime scene. Therefore, pursuant to Section 708(b)(16)(ii), the incident reports are exempt from the definition of a public record under the RTKL and are not subject to disclosure.⁷ Accordingly, we reverse the Final Determination of the OOR insofar as it granted, in part, Requester's appeal.

RENÉE COHN JUBELIRER, Judge

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

⁷ Due to our holding on this issue, we do not reach the issue of whether the incident reports in this case are exempt from disclosure under Section 708(b)(16)(vi)(A) of the RTKL.

