



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
AMERICAN CIVIL LIBERTIES UNION	:	
OF PENNSYLVANIA,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2017-0593
	:	
PENNSYLVANIA STATE POLICE,	:	
Respondent	:	

INTRODUCTION

Andrew Christy, on behalf of the American Civil Liberties Union of Pennsylvania (“Requester”), submitted a request (“Request”) to the Pennsylvania State Police (“PSP”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking PSP’s social media policy. PSP denied the Request in part, arguing that the disclosure of redacted information would threaten public safety. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the PSP is required to take further action as directed.

FACTUAL BACKGROUND

On March 8, 2017, the Request was filed, seeking “a copy in digital format, of [PSP’s] complete, un-redacted AR 6-9 regulation, which establishes policies and procedures for PSP personnel when using social media monitoring software.” On March 13, 2017, PSP issued a

response, granting access to a heavily-redacted nine-page document entitled “AR 6-9 Real-Time Open-Source-Based Investigation and Research.” PSP explained that they had redacted information from the document that would be reasonably likely to threaten public safety or preparedness. *See* 65 P.S. § 67.708(b)(2).

On April 3, 2017, the Requester appealed to the OOR, arguing that PSP had not demonstrated a sufficient basis for redaction under Section 708(b)(2). The OOR invited both parties to supplement the record and directed PSP to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On April 6, 2017, the OOR approved a briefing schedule. On April 21, 2017, PSP filed their primary brief, arguing that knowledge of the tactics and techniques used by PSP when gathering information would permit various parties to more easily evade police scrutiny. In support of this argument, PSP submitted the affidavit of Major Douglas Burig, PSP’s Director of Criminal Investigation. In his affidavit, Major Burig explains how each redacted section could jeopardize an investigation if the information was widely known.

On May 5, 2017, the Requester submitted a reply brief, challenging Major Burig’s descriptions of the purposes of each section and suggesting why Section 708(b)(2) might be inapplicable to each redaction. In addition, the Requester asked the OOR to conduct an *in camera* review of the policy.

On May 10, 2017, PSP filed its reply brief, arguing that the Requester’s submission was insufficient to challenge Major Burig’s expertise and that PSP had satisfied its burden of proof under Section 708(b)(2).

On May 23, 2017, after consultation with the parties, the OOR ordered that the unredacted policy be provided for *in camera* review. On June 2, 2017, the OOR received the *in camera* records, and the OOR performed an *in camera* review of the records.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law 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. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

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” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. 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.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the OOR conducted an *in camera* review of the records; as a result, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

PSP is a Commonwealth agency subject to the RTKL that is required to disclose public records. 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL 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)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The record at issue is PSP Policy AR 6-9, Real-Time Open-Source-Based Investigations And Research, which Major Burig describes as intended to “establish policies and procedures for PSP Troopers when they use open sources for valid law enforcement purposes.” Specifically, the policy describes best practices, authorization procedures, purposes and limitations for PSP Troopers when using internet resources—including, but not limited to, sites commonly described as ‘social media’ sites—in a professional capacity.

PSP argues that the majority of the policy is exempt from disclosure under Section 708(b)(2) of the RTKL. Section 708(b)(2) of the RTKL exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity

that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, the PSP must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

The record is, on its face, related to PSP’s law enforcement duties, as it concerns procedures for PSP to use while gathering information online. PSP argues that the disclosure of the record would be reasonably likely to threaten public safety because knowledge of the restrictions and techniques under which PSP Troopers work could permit third parties to more easily evade PSP’s online efforts and hinder PSP’s attempts to investigate criminal matters or perform background checks. In support of this argument, PSP submitted the affidavit of Major Burig, who attested that, based on his 22 years of experience, the various redactions were necessary in order to avoid any threat to the public. Although Major Burig’s rationale varies from section to section, the essential thread of his argument is that a third party with possession of these materials could use them to avoid PSP’s scrutiny online, gauge which platforms of discussion PSP commonly uses, and craft strategies to render PSP unable to effectively monitor their sources.

The OOR conducted an *in camera* review of the materials, and concludes that there is no material in Policy AR 6-9 that is reasonably likely to jeopardize public safety. As a general matter, the authorizations and prohibitions contained in each section are generalized, permitting PSP to use various open-source tools whenever it suspects criminal activity. The processes

described throughout are strictly internal and administrative in nature, providing third parties with no opportunity to intercept or alter any Trooper's request or clearance to conduct any investigation. Where the policy does touch upon interaction with outside parties, it merely prohibits PSP Troopers from breaking applicable laws in furtherance of their investigations. Each section will be separately addressed below.¹

9.02 – Definitions

This section consists of definitions of terms used throughout the Policy, marked A through L. PSP argues that items A-D and G should be redacted because they would provide insight into how PSP conducts investigations, and thereby show the sources and methods PSP would use in conducting an online investigation. The redacted terms, however, are broad, and the definitions for each are extremely general. One unredacted definition that seems reasonably representative of the redacted material, for example, defines "Page" as "[t]he specific portion of a real-time open-source site where content is displayed and managed by an individual or individuals with administrator rights." Most of the definitions in this section are commonly-used terms; where the definitions are use-specific, they reveal only that PSP utilizes certain highly-trafficked web services. As these definitions are common knowledge, the disclosure of the terms would not threaten public safety.

9.03 – Utilization Of Real-Time Open Sources As An Investigative Tool

This section is entirely redacted, and describes how investigating PSP Troopers are to use open sources during an investigation. PSP argues that this section contains information concerning when Troopers are allowed or prohibited from using open sources, and therefore would permit third parties with nefarious motives to avoid PSP surveillance. The text of the

¹ None of the Section titles are redacted, and no redacted information is included or described with specificity in the analysis below. The description of each section is based upon Major Burig's affidavit and the OOR's general impression of each section.

prohibitions and authorizations within this section, however, is broad, in contrast with the narrow scope of the prohibitions, and the prohibitions are based upon known law.

9.04 – Authorization To Access Real-Time Open Sources And/Or Real-Time Open Source Networks

This section is also entirely redacted, and describes when a PSP Trooper must gain a supervisor's approval before undertaking a specific kind of investigation. PSP argues that disclosure of this section this will alert criminals to the fact that a specific method of information-gathering is occasionally used, and provide them with information regarding how to avoid it. The specific method of information-gathering, however, is widespread public knowledge, and the factors that authorize its use appear to apply to any possible situation PSP wishes to investigate. Likewise, the prohibitions articulated in this section are sufficiently vague and limited so that no individual outside of PSP could manipulate them to the detriment of public safety.

9.05 – Authorization Procedures For The Use Of Online Aliases And Online Undercover Activity

This section is also entirely redacted, and provides operational details and procedures related to online aliases. PSP argues that this will allow third parties to evade online undercover activities. The majority of the section, however, relates to PSP internal procedures that cannot possibly be utilized by third parties in any negative way. The single prohibition on PSP activity discussed within this section is narrow, and there is no evidence that knowledge of the prohibition will threaten public safety.

9.06 – Deconfliction

This section is also entirely redacted, and contains information regarding how to end an open-source investigation. PSP argues that it would reveal how such investigations are carried out. The entire paragraph, however, discusses internal administrative procedures. There is no detail in this section that could be manipulated by third parties, nor any information that would allow a third party to jeopardize an investigation.

9.07 – Utilizing Real-Time Open-Source Monitoring Tools

This section is also entirely redacted, and it describes when open-source monitoring tools may be used. PSP argues that disclosure of this information will give third parties an advantage by revealing when open-source monitoring may take place. This section, however, is so general that there is no apparent situation in which PSP would be unable to utilize these tools; therefore, there is no situation in which a third party could maneuver to prevent the use of these tools.

9.08 – Source Reliability And Content

This section is also entirely redacted, and relates to the procedures used to verify information obtained. PSP again argues that this will give third parties an advantage in countering PSP information-gathering. This paragraph, however, imposes no apparent limitations on the PSP that could be exploited. Thus, PSP has not demonstrated how disclosure of this information would threaten public safety.

9.09 – Documentation And Retention

This section is mostly unredacted, with the exception of a single paragraph at the end describing retention procedures. PSP argues that the redacted procedures would give third parties examples of how future investigations might be conducted. There is not, however, any obvious way that future investigations could be sabotaged with this information. Like the

sections described above, the contents of this section are general in nature, and there is no indication that disclosure of the information would threaten public safety.

9.10 – Utilization Of Real-Time Open Sources For Employment Background Investigations

This section is entirely redacted, and describes how PSP may use open-source search techniques to do background investigations prior to hiring a candidate for a position, including what searches may be conducted and what data shall not be collected. PSP argues that knowledge of this section would allow a candidate to hide certain information that would otherwise benefit PSP, leading to the employment of unqualified Troopers or other positions. The authorization contained within this section, however, encompasses every kind of search and collection not prohibited by law. The section itself provides almost no information that the title does not.

Although the OOR respects Major Burig's expertise in matters of law enforcement, the threats outlined in PSP's affidavit simply do not match the text of the policy. PSP argues that disclosure of this document would permit a third party to circumvent PSP's investigative prerogatives, but most of the regulation consists of internal, administrative guidance and the substantive authorizations and prohibitions do very little to limit PSP's activities. In prior cases where the OOR has relied upon the rationale that a document would permit a third party to circumvent procedures to the detriment of the public, the dangers to the public have been clear. In *Irwin v. Pa. State Police*, for example, the OOR found that Section 708(b)(2) applied to a policy regulating the use and handling of firearms; a third party with knowledge of that policy would know when and how PSP Troopers are likely to draw and fire, and might use that knowledge to attack first. OOR Dkt. AP 2016-1634, 2016 PA O.O.R.D. LEXIS 1485.

Meanwhile, in *Thompson v. Pa. State Police*, the OOR found that Section 708(b)(2) applied to a policy regulating vehicular stops, because that policy detailed how a PSP Trooper could set up a traffic stop to ensure that Trooper's safety, and a third party with knowledge of that policy could instead exploit those tactics to endanger the officer in an encounter. OOR Dkt. AP 2015-0423, 2015 PA O.O.R.D. LEXIS 441.

On the other hand, in *Wishnefsky v. Dep't of Corrections*, the OOR rejected the argument that release of a table of contents listing certain drug testing procedures would permit prisoners to circumvent them, because general knowledge that a procedure is used does not, in itself, provide a third party the ability to circumvent it. OOR Dkt. AP 2015-0100, 2015 PA O.O.R.D. LEXIS 183. This appeal is similar to *Wishnefsky*; although the policy is more detailed than a table of contents, the information contained within would not allow a third party to anticipate when or how an online investigation is taking place. Unlike *Irwin* or *Thompson*, the policy does not contain such detail that disclosure of the information would threaten the safety of PSP Troopers or the public.

Because none of the redactions of PSP Policy AR 6-9 contain information that a third party could plausibly use in a way adverse to PSP's interests, the OOR finds that the Policy is not reasonably likely to jeopardize public safety.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the PSP is required to provide the Requester with unredacted copies of all responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal 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 as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 7, 2017

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Andrew Christy (via regular mail);
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² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).