

3. If not included in the above, The actual contract that an individual must sign which obligates them to a certain standard of conduct as a Confidential Informant.

4. Any Departmental rules, regulations or written procedures governing the conduct for removal of an individual from being a Confidential Informant and his removal from being a Confidential Informant.

Request of Larry Adams, September 22, 2011, at 1.

By letter dated October 5, 2011, the OAG denied the request. Robert A. Mulle, Chief Deputy Attorney General and Right to Know Officer, explained the reasons for the denial:

To the extent documents exist as records of this agency concerning procedures related to Confidential Informants, all such documents are subject to exemption under the RTKL, 65 P.S. §67.101 et seq. These materials are not ‘public records’ because they are protected by privilege and therefore are exempt from disclosure under the provisions of §67.305(a)(2), as more fully explained below.

Pursuant to Section 708(b)(1) records that ‘would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual’ and section 708(b)(2) which states ‘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 . . .’ are exempt from disclosure. 65 P.S. §§67.708(b)(1)(ii) and (b)(2).

Additionally, pursuant to Section 708(b)(10)(i)(A) a record reflecting ‘the internal, predecisional deliberations of an agency . . . or predecisional deliberations between agency members, employees or officials . . . including predecisional deliberations relating to a . . . contemplated

or proposed policy or course of action. . . or other documents used in the predecisional deliberations' are protected from disclosure. 65 P.S. §67.708(b)(10)(i)(A). Policies, rules, regulations, materials or other procedural aspects utilized by our investigating agents are strictly internal to this agency pertaining to proposed strategies, and are deliberative in character in that recommendations on a course of action are developed and employed as a result of such procedure and policies.

Moreover, section 708(b)(16) exempts 'a record of an agency relating to or resulting in a criminal investigation, including . . . investigative materials, notes, correspondence, videos and reports . . . and 'a record that, if disclosed, would . . . hinder an agency's ability to secure an arrest, prosecution or conviction . . . and endanger the life or physical safety of an individual.' §67.708(b)(16)(ii), (vi)(D) and (E).

Letter from Robert A. Mulle, October 5, 2011, at 1-2.

Adams appealed the denial to the OAG Right to Know Appeals Office. In a letter dated October 27, 2011, the OAG Right to Know Appeals Officer denied the appeal on the basis of the personal security and public safety exemptions of Sections 708(b)(1)(ii) and (b)(2) of the Right to Know Law (Law)¹, 65 P.S. §67.708(b)(1)(ii) and (b)(2). In addition, the Appeals Officer determined that the records were exempt under Sections 708(b)(10)(i)(A), 708(b)(16)(ii), 708(b)(16)(vi)(D), and (E) of the Law, 65 P.S. §§67.708(b)(10)(i)(A), 67.708(b)(16)(ii), 67.708(b)(16)(vi)(D) and (E).²

¹ Act of February 14, 2008, P.L. 6.

² Under Section 708(b)(10)(i)(A) of the Law, 65 P.S. §67.708(b)(10)(i)(A), the following records are exempt from the Law:

[T]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members,

(Footnote continued on next page...)

Before this Court, Adams contends that the OAG unilaterally interpreted the Law in such a way to violate his constitutional rights, including his right to confront witnesses and his right to due process.³

The OAG bears the burden of proving by a preponderance of the evidence that the disclosure of the records “would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity . .

(continued...)

employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

The following records are exempt under Section 708(b)(16)(ii), (vi)(D) and (E), 65 P.S. §67.708(b)(16)(ii), (vi)(D) and (E):

(16) A record of an agency relating to or resulting in a criminal investigation, including:

.....

(ii) Investigative materials, notes, correspondence, videos and reports.

.....

(vi) A record that, if disclosed, would do any of the following:

.....

(D) Hinder an agency’s ability to secure an arrest, prosecution or conviction.

(E) Endanger the life or physical safety of an individual.

³ A reviewing court in its appellate jurisdiction independently reviews the OOR’s orders and may substitute its own findings of fact for that of the agency. Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Cmwlth. 2010), *petition for allowance of appeal granted*, 609 Pa. 265, 15 A.3d 427 (2011). In reviewing a final determination of the OOR, a decision of the reviewing court shall contain findings and conclusions based on the evidence as a whole. Section 1301(a) of the Law, 65 P.S. §67.1301(a).

. . .” 65 P.S. §67.708(b)(2). A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to “a more likely than not” inquiry. Jaeger v. Bureau of Workers’ Compensation Fee Review Hearing Office (American Casualty of Reading c/o CNA), 24 A.3d 1097 (Pa. Cmwlth. 2011). However, this Court recently decided similar issues in Adams v. Pennsylvania State Police, ___ A.3d ___ (Pa. Cmwlth. No. 2305 C.D. 2011, filed August 31, 2012). In State Police, Larry Adams⁴ requested access to Pennsylvania State Police (Police) policies regarding the use of confidential informants. The Pennsylvania State Police Bureau of Records & Identification Right-to-Know Office denied the request. Adams appealed to the Office of Open Records (OOR) which denied Adams’s appeal. This Court affirmed on the basis that the requested records were exempt from disclosure under the public safety exemption of the Law.⁵

The records Adams requested here are similar, or for the most part identical, to the ones he requested from the State Police. Therefore, this Court affirms the decision of the Right-to-Know Appeals Office based on this Court’s

⁴ This is the same Larry Adams who made the request here.

⁵ Section 708(b)(2) of the Law, 65 P.S. §67.708(b)(2), provides:
(b) Exceptions.—Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

. . . .

(2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.

determination in State Police that the records related to policies concerning confidential informants are exempt from disclosure for reasons of public safety.⁶

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

⁶ This Court notes that the OAG could have provided affidavits or other evidentiary support for its position.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Larry Adams,		:
	Petitioner	:
		:
v.		:
		:
Attorney General,		:
	Respondent	:
		No. 2513 C.D. 2011

ORDER

AND NOW, this 7th day of September, 2012, the order of the Office of Attorney General Right-to-Know Office in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge