

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Pennsylvania State Police,	:	
Petitioner	:	
	:	
v.	:	No. 2082 C.D. 2010
	:	SUBMITTED: April 21, 2011
Dina Zloczower,	:	
Respondent	:	

**BEFORE:**   **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge  
              **HONORABLE P. KEVIN BROBSON**, Judge  
              **HONORABLE ROCHELLE S. FRIEDMAN**, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: October 4, 2011**

Petitioner, Pennsylvania State Police (PSP), appeals from the order of the Office of Open Records (OOR), which granted in part and denied in part the appeal of Respondent, Dina Zloczower,<sup>1</sup> from PSP’s partial denial of her Right-to-Know Law<sup>2</sup> (RTKL) request. We affirm in part, and reverse in part.

Respondent submitted a RTKL request to the PSP seeking “any and all police records...referencing or relating to” six individuals, four of whom were

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<sup>1</sup> Respondent is an attorney employed by Cleary Gottlieb Steen & Hamilton LLP. Respondent failed to file a brief and has been precluded from further participation in this appeal.

<sup>2</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101 – 67.3104.

also known by nicknames or aliases. Reproduced Record (R.R.) at 6a – 7a. The request further stated that the records should include but not be limited to:

1. All records indicating any of the above individuals' contact with the Pennsylvania State Police and criminal justice system in Pennsylvania;
2. Police reports;
3. Dispatch logs;
4. Shift sheets;
5. Investigatory records;
6. Search warrants;
7. Charges which were withdrawn, dismissed or resulted in a conviction;
8. Arrest records;
9. Evidence recovery logs;
10. Inventory of evidence seized;
11. Computer files and emails;
12. Photographs, audio and video tapes
13. Handwritten notes;
14. Diaries;
15. Blood alcohol and drug test results;
16. Information pertaining to mental disability and suicide screening;
17. Medical or psychological treatment and/or evaluation either administered or recommended;
18. Any and all communications, correspondence or documents referencing or relating to the above individuals that were transmitted or received by the Pennsylvania State Police; and
19. All other records in your possession associated with the above individuals' contact with your law enforcement agency.

*Id.* at 7a. The PSP requested additional time to respond to the request. The PSP eventually denied the request, asserting that the records listed in paragraphs 1, 2, 5-10, 12, 13 and 15 were exempt from disclosure under Section 708(b)(16) of the

RTKL,<sup>3</sup> 65 P.S. § 67.708(b)(16), and that the Criminal History Record Information Act (CHRIA), 18 Pa. C.S. §§ 9101 - 9183, *as amended*, prohibited the PSP from disclosing investigative records.<sup>4</sup> The PSP also stated that the medical records

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<sup>3</sup> Section 708(b)(16) provides that the following records are exempt from disclosure:

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

- (i) Complaints of potential criminal conduct other than a private criminal complaint.
- (ii) Investigative materials, notes, correspondence, videos and reports.
- (iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.
- (iv) A record that includes information made confidential by law or court order.
- (v) Victim information, including any information that would jeopardize the safety of the victim.
- (vi) A record that, if disclosed, would do any of the following:
  - (A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.
  - (B) Deprive a person of the right to a fair trial or an impartial adjudication.
  - (C) Impair the ability to locate a defendant or codefendant.
  - (D) Hinder an agency's ability to secure an arrest, prosecution or conviction.
  - (E) Endanger the life or physical safety of an individual.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).

<sup>4</sup> On August 6, 2010, Respondent submitted a verbatim request to the PSP pursuant to CHRIA. R.R. at 74a. On August 16, 2010, the PSP Bureau of Records & Identification Right-to-Know Law Office responded to the CHRIA request by forwarding it to the PSP Central Repository for appropriate action. R.R. at 80a. It is unclear what documents, if any, Respondent obtained through the CHRIA request.

requested in paragraphs 16 and 17 were exempt from disclosure under Section 708(b)(5) of the RTKL,<sup>5</sup> 65 P.S. § 67.708(b)(5). The remaining requests, paragraphs 3, 4, 11, 14, 18 and 19, were denied under Section 703, 65 P.S. § 67.703 on the basis that the requests were insufficiently specific.

Respondent appealed the denial to the OOR. The PSP submitted the July 19, 2010 verification of Jonathan W. Leader, deputy agency open records officer, stating that paragraphs 3, 4, 11, 18 and 19 were not sufficiently specific as required by 65 P.S. § 67.703. R.R. at 15a. The PSP submitted the affidavit of Cynthia Fisher, agency open records officer, attesting that the PSP was unable to discern the records requested from the language of the request. R.R. at 63a, 65a. The PSP also submitted a letter from Assistant Counsel Kelly Neary which stated that the PSP could not search for the records with only the identifiers provided by the Respondent and that the PSP needed details such as incident dates or types of records to locate responsive records. R.R. 43a. Although asserting the conclusion that the requests were insufficiently specific, the assertions made in support of the conclusions actually amounted to an averment that finding some of the records would require an extensive manual search, and thus would be burdensome.

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<sup>5</sup> Section 708(b)(5) exempts from disclosure:

A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

The OOR issued a final determination, which granted in part and denied in part Respondent's request. The OOR concluded that records requested in paragraphs 2, 5, 6, 9, 10, 12, 13, and 15 are compiled and maintained only in conjunction with an underlying criminal investigation, and thus exempt from disclosure under Section 708(b)(16). However, the OOR found that the Fisher Affidavit did not support application of the criminal investigation exemption to records sought in paragraphs 1, 7, and 8. The OOR further determined that the records sought in paragraphs 16 and 17 were exempt from disclosure as personal medical records under Section 708(b)(5) of the RTKL, that paragraph 19 was insufficiently specific as the language "all other records" is overly broad and does not comport with Section 703 of the RTKL,<sup>6</sup> and that CHRIA does not prohibit the disclosure of the records sought in paragraphs 7 and 8. The OOR ordered the disclosure of filed charges (paragraph 7) and lists of arrests (paragraph 8). The OOR rejected PSP's assertion that the requests made in paragraphs 3, 11, and 18 were insufficiently specific because, although the PSP would be forced to go to great lengths to locate and produce the records, difficulty in locating records did not prevent compliance with the RTKL. The OOR ordered disclosure of e-mails (paragraph 11) and correspondence (paragraph 18). This appeal followed.

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<sup>6</sup> Section 703 provides in relevant part:

A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested and shall include the name and address to which the agency should address its response...

The PSP challenges the OOR's findings that the records sought in paragraphs 1, 3, 7, 8, 11, and 18 are subject to disclosure under the RTKL.<sup>7</sup> The PSP asserts that the OOR erred in failing to find that the entire request was insufficiently specific. The PSP argues that it properly denied access to the records sought in paragraph 1 because the records were exempt from disclosure under Section 708(b)(16) and CHRIA. Finally, the PSP argues that the OOR erred in concluding that the records sought in paragraphs 7 and 8 are not criminal investigative records or records protected by CHRIA.

The PSP first challenges the OOR's finding that it failed to assert insufficient specificity to the entire request in its initial response. *See* OOR Opinion at 4. The OOR relied upon *Signature Information Solutions, LLC v. Aston Township*, 995 A.2d 510 (Pa. Cmwlth. 2010), which held that section 1102(a) of the RTKL, 65 P.S. § 67.1102, does not permit an agency that has given a specific reason for a denial to assert a different reason on appeal. The court reasoned that if an agency could alter its position on appeal, then the requirements in Sections 903(2), 65 P.S. § 67.903(2) and 1101(a)(1), 65 P.S. § 67.1101(a)(1), of the RTKL would become a meaningless exercise.<sup>8</sup> *Signature Information Solutions*, 995 A.2d at 514.

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<sup>7</sup> In reviewing a final determination of the OOR, this Court “independently reviews the OOR’s orders and may substitute its own findings of facts for [those] of the agency. *Bowling v. Office of Open Records*, 990 A.2d 813, 818 (Pa. Cmwlth. 2010), *allocator granted* \_\_ Pa. \_\_, 15 A.3d 437 (2011).

<sup>8</sup> Section 903(2) requires that an agency include in its written denial of a request, *inter alia*, “[t]he specific reasons for the denial, including a citation of supporting legal authority.” Section 1101(a) requires, *inter alia*, that a requester who appeals a denial to Open Records “address any grounds stated by the agency for delaying or denying the request.”

The record reflects that the PSP's initial response of July 17, 2010, listed only paragraphs 3, 4, 11, 14, 18 and 19 under the heading "Remainder of Request is Insufficiently Specific." Therefore, insufficient specificity is preserved as a basis for appeal, only for those paragraphs.

The PSP asserts on appeal that paragraphs 1, 3, 11, and 18 are insufficiently specific and that it properly denied the requests. As noted above, this argument is waived as to paragraph 1, so we will address only paragraphs 3, 11, and 18. Section 703 requires that a requester identify or describe the requested record with sufficient specificity such that the agency can ascertain which record is being requested. This court has held that requests seeking "any and all" records are insufficiently specific to comport with the requirements of Section 703. *Pa. State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Cmwlth. 2010).

The OOR granted access to dispatch logs (paragraph 3), e-mails (paragraph 11), and correspondence (paragraph 18). Although the PSP has documented through affidavits that these requests are extremely burdensome, burdensomeness does not equate to insufficient specificity. Moreover, nothing in the RTKL creates an exemption for a request which is burdensome. We agree with the OOR that Zloczower has identified specific types of files that are subject to public disclosure among a laundry list of unspecific requests. As the RTKL does not exempt an agency from producing public records because the process would be burdensome, the PSP is directed to produce the records requested in paragraphs 3, 11, and 18 in accordance with the order of the OOR.

Next, the PSP argues that the records sought in paragraph 1 are exempt from disclosure under Section 708(b)(16) of the RTKL and subject to the restrictions of CHRIA. Paragraph 1 requests: "[a]ll records indicating any of the

above individuals' contact with the Pennsylvania State Police and criminal justice system in Pennsylvania.” Relying upon *Department of Health v. Office of Open Records*, 4 A.3d 803 (Pa. Cmwlth. 2010), the PSP asserts that the Fisher affidavit states that many of the records in the request are compiled and maintained only in conjunction with an underlying investigation and that the PSP is within its right to make a categorical denial when investigative records are involved.

We note that this request is very broad and that it clearly encompasses criminal investigative records exempt from disclosure under Section 708(b)(16), information which may not be disclosed pursuant to CHRIA, along with information that is not exempt from disclosure under either statute. The Fisher Affidavit at paragraph 11 (R.R. at 64a) lists ten items that are compiled and maintained only in conjunction with an underlying investigation. We conclude that these are investigative records exempt from disclosure pursuant to Section 708(b)(16) and CHRIA, the PSP is ordered to produce all other responsive documents which do not fall within these 10 categories.

PSP asserts that the requests in paragraph 7 for “[c]harges which were withdrawn, dismissed or resulted in a conviction” and in paragraph 8 for arrest records are exempt from disclosure as criminal investigative records or records protected by CHRIA. Criminal history record information is defined as:

Information collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom. The term does not include intelligence information, investigative information or treatment information, including medical



and psychological information, or information and records specified in section 9104 (relating to scope).

Section 9102 of CHRIA, 18 Pa. C.S. § 9102. Section 708(b)(16)(vi)(A) of the RTKL exempts from disclosure a record that, if disclosed, would “[r]eveal the institution, progress, or result of a criminal investigation, *except for the filing of criminal charges.*”

We conclude that the RTKL does not treat filed charges as investigative records exempt from disclosure. Filed charges are public records as they are filed with a court and, therefore, not subject to CHRIA. *See* 18 Pa. C.S. § 9104(a)(2).<sup>9</sup> Further, an agency may not restrict access to public records requested under the RTKL by asserting that the records are subject to disclosure only under CHRIA. The RTKL offers an alternative to CHRIA to obtain public records. It is the duty of the disclosing agency to produce the records in accordance with any limitations set by either statute. The PSP is ordered to disclose the requested records.

Paragraph 8 seeks the arrest records of the identified individuals. Neither the RTKL nor CHRIA protect press releases, police blotters or court dockets from disclosure. 65 P.S. § 67.708(b)(16); 18 Pa. C.S. § 9104(b). Section

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<sup>9</sup> Section 9104(a)(2) provides:

General rule. --Except for the provisions of Subchapter B (relating to completeness and accuracy), Subchapter D (relating to security) and Subchapter F (relating to individual right of access and review), nothing in this chapter shall be construed to apply to:

. . . .

(2) Any documents, records or indices prepared or maintained by or filed in any court of this Commonwealth, including but not limited to the minor judiciary.

18 Pa.C.S. § 9104(a)(2).

9104(b) provides that “[c]ourt dockets, police blotters and press releases and information contained therein shall, for the purposes of this chapter, be considered public records.” CHRIA defines police blotter as: “[a] chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses.” 18 Pa. C.S. § 9102. Section 708(b)(16) of the RTKL states that this “paragraph shall not apply to information contained in a police blotter as defined in 18 Pa. C.S. § 9102.” Thus, arrest records are public records subject to disclosure.<sup>10</sup>

PSP asserts that in granting access to the requests in paragraphs 7 and 8, the OOR spontaneously modified the request to “filed charges” and “lists of arrests.” Relying upon *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Cmwlth. 2010), the PSP argues that the OOR is not empowered to refashion a RTKL request. In that case, the requester sought “[a]ny and all records, files, or *manual(s)*, communication(s) of any kind, that explain, instruct, and or require officer(s) and Trooper(s) to follow when stopping a Motor Vehicle, pertaining to subsequent search(es) of that Vehicle, and the seizures of any property, reason(s) therefore [sic] taking property.” *Id.* (emphasis in original). The OOR determined that on appeal the requester had narrowed his request simply to the manual relating the procedures for vehicle stops. *Id.* at 516. The PSP appealed asserting that the OOR itself cannot unilaterally narrow the scope of a request. This court agreed. However, the court noted that a valid request may exist among

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<sup>10</sup> Section 9104(a)(1) of CHRIA provides that nothing in this chapter shall be construed to apply to police blotters that contain criminal history record information. Thus, the regulations regarding dissemination of criminal history record information found in Section 9121 are not applicable to the release of arrest records.

a laundry list of unspecific requests. This court held that although the first clause of the request, which began with “Any and all records, files, or manual(s), communication(s) of any kind...” was overbroad, the request for “manual(s)” relating to vehicle stops, searches and seizures was specific. *Id.* at 517.

We disagree with the PSP that the OOR improperly modified the request in paragraph 7 from “[c]harges which were withdrawn, dismissed or resulted in a conviction” to a request for “filed charges.” The OOR did not refashion the request but rather, limited the request to records that are subject to disclosure, as this court did in *Pennsylvania State Police v. Office of Open Records*. We also disagree that the OOR erred in ordering the disclosure of “lists of arrests.” Respondent requested “arrest records.” The Court cannot discern a difference between “arrest records” and “lists of arrest.”

The OOR’s decision is affirmed to the extent it ordered the disclosure of records requested in paragraphs 3, 7, 8 (arrest records), 11 (e-mails only), and 18 (correspondence only). The OOR’s decision is reversed to the extent that it ordered disclosure of all responsive records sought in paragraph 1. The PSP is ordered to produce all responsive records that do not fall within the ten categories of investigative records listed in paragraph 11 of the Fisher Affidavit.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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	:	
Dina Zloczower,	:	
Respondent	:	

**ORDER**

AND NOW, this 4th day of October, 2011, the order of the Office of Open Records is hereby AFFIRMED in part and REVERSED in part.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge