



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>PETA FOUNDATION,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2016-1371</b>
	:	
<b>PENNSYLVANIA GAME</b>	:	
<b>COMMISSION,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Kate Parnin, on behalf of the PETA Foundation (“Requester”), submitted a request (“Request”) to the Pennsylvania Game Commission (“Commission”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records pertaining to correspondence sent to the Commission. The Commission denied the Request, stating that the records are related to noncriminal and criminal investigations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Commission is not required to take any further action.

**FACTUAL BACKGROUND**

On July 19, 2016, the Request was filed, seeking:

Any and all records related to PETA’s July 14, 2016 letter concerning Tim Leopard aka Team Ghost Riders and Wild Thang Productions.... This request specifically

includes, but is not limited to, any and all notes, emails, text messages, and other correspondence.<sup>1</sup>

On August 3, 2016, after extending its time to respond to the Request by thirty days, *see* 65 P.S. § 67.902(b), the Commission denied the Request, stating that the requested records are related to criminal and noncriminal investigations. *See* 65 P.S. §§ 67.708(b)(16)-(17). Specifically, the Commission stated that “[t]o the extent the ... Commission generated or received records in furtherance of its criminal and non-criminal investigative responsibilities, such records fall within the exemptions set forth in the RTKL.”

On August 18, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Commission to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 29, 2016, the Commission submitted a position statement, along with the affidavit made under penalty of perjury, of Chad Eyler, Wildlife Conservation Officer (“WCO”) and Chief of the Special Permits Enforcement Division for the Commission.

### **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).

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<sup>1</sup> The Requester’s July 14, 2016 correspondence asked the Commission to prohibit the public performance of “Cowboy Monkey Rodeo.”

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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, the Commission requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter. As a result, the Commission’s request is denied.

The Commission 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 clearly 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). 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 Request seeks records relating to a complaint about the “Cowboy Monkey Rodeo.” The Commission claims that the requested records relate to criminal and noncriminal investigations conducted by the Commission. *See* 65 P.S. §§ 67.708(b)(16)-(17). Section 708(b)(16) of the RTKL exempts from disclosure a “record of an agency relating to or resulting in a criminal investigation, including ... [i]nvestigative materials, notes, correspondence, videos and reports” and “[a] record that, if disclosed, would ... [r]evele the institution, progress or result of a criminal investigation....” 65 P.S. §§ 67.708(b)(16)(ii), (vi)(A).

The Game and Wildlife Code authorizes the Commission to “issue permits for the establishment and operation of menageries.”<sup>2</sup> 34 Pa.C.S. § 2964(a). Furthermore, the Code states that, among other unlawful acts, it is unlawful to “[k]eep any wild bird or wild animal in captivity for public exhibition, or to have any wild bird or wild animal in custody or control for such purpose, without first securing a permit issued by the [C]ommission.” 34 Pa.C.S. § 2964(c)(1). “A violation of this section relating to permits or regulations adopted thereunder is a summary offense of the second degree.” 34 Pa.C.S. § 2964(d)(1). In addition, the Commission’s director “may, for any violation of this section, revoke or suspend any permit and order the disposal of any wildlife held in the menagerie.” 34 Pa.C.S. § 2964(e).

WCO Eyler attests, in relevant part:

The [Commission] generates various records relating to special permit compliance and enforcement. For example, investigative materials, notes, reports, and correspondence are routinely created, transmitted, and retained by WCOs charged with enforcement. The notes, reports, and correspondence outline the WCO’s investigative activities into potential violations of law, including witness

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<sup>2</sup> A “menagerie” is defined as “[a]ny place where one or more wild birds or wild animals, or one or more birds or animals which have similar characteristics and appearance to birds or animals wild by nature, are kept in captivity for the evident purpose of exhibition with or without charge.” 34 Pa.C.S. § 2961.

encounters, evidence collection, and officer observations. These records, by their very nature, reveal whether an investigation was commenced, its progress, and the result.

In the present matter, the [Commission] received a written complaint from PETA of possible violations of law. The [Commission] undertook a formal investigation into the matters about which [PETA] complained. Mr. Tim Lepard, Team Ghost Riders, Wild Thang Productions (collectively, “Lepard”), and their activities and conduct within the Commonwealth of Pennsylvania, were also the subject of the [Commission’s] official inquiry. The investigation was undertaken in response to PETA’s complaint.

As Chief of the Special Permits Enforcement Division, I am the agency’s custodian of the records responsive to the [Request]. Here, a record of the complaint, dispatch logs, and correspondence were either received or generated by the [Commission]. I reviewed these records which relate to an official [Commission] investigation. These records and their content consist of information assembled as a result of the performance of the [Commission’s] official inquiry into potential violations of law. These records contain investigative material, including facts relating to the nature and conduct of Lepard, and to the involvement and mental impressions of [Commission] WCOs in the investigation into the alleged violations of law. These records, authored or received by sworn law enforcement personnel, are used in furtherance of the investigation and in any subsequent criminal prosecution and/or administrative proceedings brought under the Game and Wildlife Code. The records at hand do not pertain to the filing of criminal charges. These records, if disclosed, would surely reveal the institution, progress, or result of the investigation.

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Commission acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The OOR has previously held that the Commission and its WCOs conduct criminal investigations. *See Higgins v. Pa. Game Comm’n*, OOR Dkt. AP 2016-0731, 2016 PA O.O.R.D. LEXIS 734; *Saunders v. Pa. Game Comm’n*, OOR Dkt. AP 2015-1903, 2015 PA O.O.R.D.

LEXIS 1640. Further, “[r]ecords generated during the Commission’s response to a complaint of potential criminal activity are records related to a criminal investigation and are exempt under the RTKL.” *Shanholtz v. Pa. Game Comm’n*, OOR Dkt. AP 2016-1077, 2016 PA O.O.R.D. LEXIS 964.

WCO Eyler attests that an investigation was conducted by the Commission’s Special Permits Enforcement Division, which is the Commission’s law enforcement division, and that the Commission possesses “a record of the complaint, dispatch logs, and correspondence” pertaining to this investigation. Based on the evidence provided, the Commission has met its burden of proving that these records relate to a criminal investigation and are exempt from public disclosure under Section 708(b)(16) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **denied**, and the Commission is not required to take any further action. 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>3</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: September 26, 2016**

/s/ Kyle Applegate

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