



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:	
	:	
<b>STEVEN DREYER,</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. AP 2009-0450</b>
	:	
<b>PENNSYLVANIA DEPARTMENT</b>	:	
<b>OF ENVIRONMENTAL PROTECTION,</b>	:	
<b>Respondent</b>	:	

## INTRODUCTION

Mr. Steven Dreyer (“the Citizen”) submitted several individual requests to the Department of Environmental Protection (“the DEP”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The requested records each relate to an alleged blasting near the Citizen’s home. For efficiency and with the permission of both the Citizen and the DEP, the Citizen’s multiple requests were consolidated into one appeal.

For the reasons set forth in this Final Determination, the appeal is **denied**.

## FACTUAL BACKGROUND

The Citizen submitted five individual right-to-know requests to the DEP over a several day period. The requests all sought records related to an alleged blasting near the Citizen’s home at 345 West Blaine Street as follows:

1. April 10, 2009: Request for a copy of the report filed by Darrell Zavislak from his August 27, 2003 investigation at 345 West Blaine Street, McAdoo, PA. 18237;
2. April 10, 2009: Request for:
  - a. a copy of the Power Point Presentation sent to the Pottsville District Mining Office entitled ‘Marks Blew Up Our Home And Lied About It’; and
  - b. a copy of the report filed from investigating this evidence that led the Pottsville District Mining Office to conclude that ‘undocumented basting [sic] could not be confirmed’;
3. April 12, 2009: Request for the document of the testimony of Charles Sube recorded during the interviews conducted by either Richard Parsons, Richard Lamkie or Dennis Whitaker, Esq. regarding the blasting on West Blaine Street;
4. April 12, 2009: Request for the document of the testimony of William Mingo Sr. recorded during the interviews conducted by either Richard Parsons, Richard Lamkie or Dennis Whitaker, Esq. regarding blasting on West Blaine Street;
5. April 12, 2009: Request for the document of the testimony of Rod Sergent recorded during the interviews conducted by either Richard Parsons, Richard Lamkie or Dennis Whitaker, Esq. regarding blasting on West Blaine Street; and

(“Requests”). After extending the date for a response by thirty days, Mr. Thomas Callaghan, P.G., District Mining Manager, responded on behalf of the DEP and denied each request pursuant to 65 P.S. § 67.708(b)(17)(ii) and (vi)(A) considering them requests for noncriminal investigation records. The DEP also considered the requests repeat requests made since 2003 and denied the requests based upon 65 P.S. §67.506(a). In addition to the denial as stated above, the DEP also denied requests 3, 4, and 5 as lacking specificity pursuant to 65 P.S. § 67.704 and citing *Associated Builders & Contrs, Inc. v. Department of General Services*, 747 A.2d 962, 966 (Pa. Cmwlth. 2000); *Palmer v. Pennsylvania State Police*, 928 A.2d 1165 (Pa. Cmwlth. 2007); *Nanayakkara v. Casella*, 681 A.2d 857 (Pa. Cmwlth. 1996); *McMullan v. Wolgemuth*, 453 Pa.

147, 156 n.5, 308 A.2d 888 n.5 (1973). The DEP properly advised the Citizen of his right to appeal.

The Citizen timely appealed each denial to the OOR. In each of his appeals he stated, “I have made this request before.” He provided a brief background outlining the reason he wanted the requested records, his prior attempts to get access to the records and his beliefs as to the true reason that the DEP was denying the records summarized as follows:

On January 31, 2003, Marks Contracting, LTD set off two separate blasts that rocked my home causing severe damage. I was home that morning and while still in shock after what had just happened I started to shoot a random video with my home camcorder. Not far into the investigation conducted by the Pottsville District Mining Office of the PA DEP I began to feel something was wrong with the investigation. . . . [T]he DEP denied blasting took place. . . I purchased software that enabled me to transform the video into individual digital images. . . It was unmistakable that this construction company was removing explosive fuses from the ground; DEP was wrong.

The Citizen also accused the DEP of denying access to the records in an attempt to “suppress this evidence as part of their corrupt investigation . . .” and asked the OOR to “investigate the record and the true motive for this denial.” The Citizen clarified that he wanted the report by Darrel Zavislak because it involved “an investigation conducted . . . to determine if our claims that Marks Contracting, LTD conducted a second blast that damaged my home on January 31, 2003.” As to the records involving the testimony recorded during interviews, the Citizen stated that the DEP’s denial contains “conflicting fraudulent statements.” He argued that the DEP’s refusal to release the interview records is because they have no records despite claiming “that they have this testimony.” The Citizen contended that the DEP was “perverting the RTKL in order to protect the lies told to this family during this investigation.” The Citizen responded to the DEP’s denial based upon the requests being repeat requests stating: “The only unreasonable burden placed upon the PA DEP has been the inability to cover up their persistent

lies and corrupt investigations; they have themselves to blame for this and not my family.” The Citizen asks for clarification of the denials and that an “amended denial be sent in the form of an affidavit signed by Thomas Callaghan, P.G.”

The OOR asked and obtained the Citizen’s and the DEP’s approval to consolidate the multiple appeals into one docket. Due to the extensive nature of the requests the OOR asked the Citizen for permission to extend the date for issuance of the Final Determination. The Citizen, who is the sole holder of the right to grant an extension under the RTKL, agreed and the date for issuance was scheduled for July 22, 2009.

On June 26, 2009, after review of the record, the OOR asked the parties to provide supplemental information in support of their positions and provided a spreadsheet asking specifically for certain information regarding each request. The Citizen was asked to clarify his request in response to the DEP’s assertion that the request was non-specific. He was also asked to clarify whether request 2b was part of the appeal because the appeal referenced only the denial of the PowerPoint presentation and not the denial of the report regarding the presentation. The Citizen did not respond to the OOR’s inquiry. On July 15, 2009 the OOR e-mailed the Citizen asking whether he had received the OOR’s correspondences and requests for information. The Citizen replied confirming receipt of all prior communication and added that he had “nothing further to add. I did not answer each Email because I did not want to waste your time with unnecessary communications. I am satisfied with the way this appeal is progressing; thank you.”

The DEP provided an extensive response on July 8, 2009 by submitting a letter providing the DEP’s position regarding the background surrounding the requests and appeals, clarification of the denial based upon the noncriminal investigation exemption, and supporting information as to its claims that the requests should be denied as repeat requests and/or lack specificity. The

DEP attached copies of the Citizen's many related requests dating back to 2003 as well as the DEP's responses and other relevant correspondence between the parties. In addition, the DEP attached an Agency Affirmation of Investigative Records and Provision of Responsive Records signed by Thomas Callaghan, P.G. Finally, the DEP provided an electronic copy of the PowerPoint presentation that was the subject of request number 2a. It explained that the DEP "misunderstood the nature of the request for the Power Point materials, and believed it to be asking for investigative materials that might have been associated with the Power Point CD, as [the Citizen] had made a request of this nature on 03-18-2007." The DEP also explained that the CD was in the DEP files that were not part of the investigative records that are being withheld. The DEP did not address request 2b.

Background per the DEP: The DEP states that the Citizen's wife filed a damage complaint with the DEP in early 2003 regarding blasting by Marks Contracting near her home. The DEP conducted an investigation as a result of that complaint and generated a report on November 5, 2003 signed by Mr. Richard Parsons. The DEP provided all records regarding that damage complaint investigation to the Dreyers, including the November 5, 2003 report. *See* Affirmation of Thomas Callaghan, ¶ 4. The DEP contends that it also conducted a "separate noncriminal investigation by its Bureau of Investigations ("BOI") as a result of the complaint generated by the [Citizen's family]. This investigation's purpose was not as a damage complaint investigation, but rather was for the purpose of determining "if undocumented blasting took place on several occasions not reported by Marks Contracting, or if other records could be located." Although undocumented blasting "could not be confirmed" the DEP "charged Marks Contracting with over 300 summary violations of the Commonwealth's blasting laws" and was "ultimately successful in its pursuit of the actions against Marks. . ." Despite that success, the

DEP advised that it “does not have the authority to order a person responsible for blasting damage to make financial restitution for the damages, and its authority is limited to enforcement of the law and penalizing the violator, which the [DEP] did in this matter.”

Noncriminal Investigation Records Claim: The DEP contends that several times in the past it provided the Parson’s report in response to the Citizen’s requests for information regarding the damage complaint. The DEP asserts that the Zavislak Report and any witness interview records are distinguishable from the Parson’s report and supporting records and are exempt as noncriminal investigative records because they would be part of the separate BOI investigation. *See Callaghan Affirmation*, ¶ 7, 9. The DEP cited § 708(b)(17)(ii) and (vi)(A) as well as *Pastore v. Insurance Department*, 558 A.2d 909 (Pa. Cmwlth. 1989), *D’Alfonso v. Pa. Securities Comm’n*, OOR Dkt. AP 2009-0366 (issued June 5, 2009) and *Creenan v. DEP*, OOR Dkt. AP 2009-0345 (issued June 1, 2009). The DEP refused to confirm or deny which neighbors or witnesses were interviewed citing confidentiality reasons. *See Callaghan Affirmation*, ¶ 7. It did confirm that it had conducted interviews. In addition, the DEP stated that Mr. Zavislak “did not generate a separate report regarding the blasting activities in the vicinity of [the Citizen’s] home.” *Id.* The DEP also asserted that disclosure of the records would “reveal the institution, progress, or result of a noncriminal investigation into the blasting activities by Marks Contracting. *Id.* at ¶ 9. The DEP then raised, for the first time, Section 708(b)(17)(iii) which exempts records that include the “identity of a confidential source” and Section 708(b)(17)(vi)(C) which exempts records “that, if disclosed would . . . [c]onstitute an unwarranted invasion of privacy.” The DEP provided no factual support for these assertions.

Repeat Request Claim: The DEP argued that it also properly denied the requests as repeat requests because “since 2003 [the Citizen] has made scores of request to the [DEP] regarding the

general subject matter of his request to the [DEP], as well as this specific request.” It added that “the [DEP] has responded to [the Citizen] numerous times on the general subject matter as well as on this specific request topic” and cited Section 506(a). The DEP provided copies of correspondence, as well as prior requests and prior denials, dated between October 15, 2003 and May 2, 2007. The DEP argued that the Citizen’s “persistence in seeking access to the same records satisfy the Section 506(a) conditions to demonstrate the burden [the Citizen’s] actions place upon this agency.” Further, the DEP noted that the Citizen “has continued his abusive tone against the DEP throughout reams of correspondence over the past six years, multiple scores of letters and attachments comprising many hundreds of pages of argumentative screed, either sent or cc’d to hosts of recipients including the Governor, the Department Secretary, the Attorney General, district attorneys, various United States and Pennsylvania legislators, the F.B.I., the Insurance Department, news organizations, and many more parties” and that he “must not be allowed to continue making RTKL requests for the same information over and over again.”

The Request Lacks Specificity Claim: The DEP explained that it denied the requests to the extent they lacked specificity because they were overbroad in that they contained “extraneous information” beyond the specific numbered requests. The DEP cites Section 703 and various cases as mentioned above in support of its denial.

Other Matters Raised: Finally, the DEP stated that the Citizen “misunderstand[s] the nature and extent of the RTKL by imploring the OOR to ‘investigate this record and the true motive for this denial.’” The DEP asserted that it is not required to respond in this manner and “nothing in the RTKL gives authority for the OOR to address [the Citizen’s] overriding concerns of corruption and his desire for ‘true motives.’”

## LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The DEP qualifies as a Commonwealth agency subject to the RTKL and its obligations of mandatory disclosure. *See* 65 P.S. §67.102, §67.301.

Records of a Commonwealth agency are presumed to be “public” unless: (1) the record is exempt under Section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §§67.102 and 305. Accordingly, the records sought in the Request are presumed by law to be public unless the DEP asserts one of these three grounds for withholding the record.

The agency bears the burden of proving the application of its cited exception to the information at issue by a preponderance of the evidence. 65 P.S. §67.708(a). To prove by “preponderance of the evidence” means to prove by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001).

1. **The Requested Records in Request 1, 3, 4, and 5 are Exempt as Noncriminal Investigation Records:**

The OOR finds persuasive the DEP’s argument and evidence in favor of applying section 708(b)(17) whose provisions exempt from disclosure a “record of an agency relating to a noncriminal investigation, including . . . [i]nvestigative materials, notes, correspondence and reports . . . [and] a record that if disclosed, would . . . [r]eveal the institution, progress or result of an agency investigation. . . .” The Citizen’s requests specifically and repeatedly ask for “investigative” records. He asks for a report from an “*investigation*” conducted by Mr. Zavislak and testimony of witness interviewed by “DEP *investigators*.” In the materials in support of his

appeal the Citizen continues to refer to the records as records which are part of the DEP's "corrupt *investigation* into illegal blasting" done by Marks Contracting, LTD. Regarding the request for the Zavislak Report the Citizen states that "[a]fter Mr. Zavislak completed his interview and *investigation* I was left with the impression that he believed our claims." He admits that he wants the records to prove his theories regarding the "corruption, fraud and conspiracy to obstruct justice in connection with this *investigation*." Throughout his appeals regarding the witness testimony he refers to the records as necessary and critical components of a "thorough *investigation*" by the "DEP *investigators*." He argues that the interview records he seeks do not exist but that DEP is refusing to identify the witness or produce the records in order to "protect the lies told to this family during this *investigation*."

However, the Citizen's reference to the records as investigative records, does not, alone, render the records exempt under section 708(b)(17). The agency bears the burden of proof. The OOR finds that the DEP meets its burden. The DEP provided competent evidence in the form of the Callaghan Affirmation that the requested records relate to DEP investigations concerning blasting near the Citizen's home and that disclosure would reveal the "institution, progress or result of an agency investigation." Therefore, the DEP has satisfied its burden of proving that the records request in request 1, 3, 4, and 5 are the subject of an investigation and properly exempt pursuant to Section 708(b)(17)(ii) and (vi)(A) of the RTKL. Because the records are exempt under the aforementioned provisions, the OOR makes no determination as to whether the other provisions as cited by the DEP apply.

**2. Request 2a is Dismissed as Moot; Appeal of Request 2b is Waived.**

The DEP provided the PowerPoint presentation as requested by the Citizen. The OOR notes that the Citizen requested a CD of the PowerPoint and that the DEP provided only an electronic version, not a CD. However, the DEP acknowledged the Citizen's requested format and offered to

provide the Citizen the record on CD if the Citizen desired. The Citizen did not object to the manner in which the request was filled. Therefore, the request is considered granted and the appeal as to Request 2a is dismissed as moot.

As to request 2b, the OOR finds that the Citizen has waived his right to the appeal of the denial of this record. The Citizen requested “a copy of the report filed from investigating [the Citizen's PowerPoint CD] that led the Pottsville District Mining Office to conclude that ‘undocumented basting [sic] could not be confirmed.’” The Citizen's appeal addressed only the denial of the PowerPoint presentation and did not address the denial of the report. When asked to clarify whether he intended to appeal the denial of request 2b, the Citizen was silent. The OOR has no choice but to find that request 2b was not subject to the appeal as it cannot raise issues *sua sponte* that were not raised on appeal.

**3. The Citizen’s Request is Sufficiently Specific.**

Because the records are exempt from disclosure as records of a noncriminal investigation, as discussed above, we need not address the issue of whether the records requested in request 1, 3, 4, and 5 are exempt as non-specific. However, the OOR finds it necessary to do so. Section 703 requires only that the records are identified with “sufficient specificity to enable the agency to ascertain which records are being requested. . .” The DEP argues that the requests were not specific simply because the Citizen chose to include background information as to the reason for his request and his beliefs regarding the DEP. The OOR finds the DEP's assertions disingenuous. The requests were all very specific and clearly separated from the extraneous information. The portion that encompassed the actual request itself was pointedly identified by the requester with the following statement preceding the request: “Under the Right-to-Know law that was established on January 1, 2009 I am requesting the following:” The Citizen then numbered the request and identified the record requested with particularity. Therefore, there was no basis to claim that the requests were not specific.

**4. The Citizen's Request is Not Repetitive and Disruptive.**

Although the Citizen's appeal is denied for other reasons, the OOR also finds it necessary to address the DEP's contention that the Citizen's request is repetitive and disruptive. Pursuant to Section 506 of the RTKL an "agency may deny a request if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency." (emphasis added). A requester is defined as someone who "requests a record pursuant to [the current RTKL]." §67.102. The DEP asserts that the Citizen has sought the same records in multiple requests from 2003 through 2007. The OOR does not find requests made under the former RTKL and now made again under the new RTKL repeat requests. Amendments to the former RTKL potentially make available records that previously may have been exempt. Therefore, the OOR cannot find that one request for a record made under the new RTKL that had been previously requested and denied under the former RTKL a repeat request.

The OOR also notes that the Citizen asks the OOR to "investigate the DEP's motive" and the DEP asks the OOR to address the Citizen's tone and insinuations. The OOR recognizes that there has been a long history of tension between the parties and empathizes with the Citizen's desire to access records regarding blasting near his home. However, the OOR has no authority to "investigate" an agency's motives for denial. The OOR's only authority is to determine whether a denial is proper. In addition, in rendering this determination the OOR did not consider the Citizen's reason for requesting the record, as the reason for the request, or the potential use of the record, has no bearing on the status of the record under the RTKL. Further, the OOR also recognizes that the DEP has spent countless hours responding to the Citizen in the past and has grown weary of the Citizen's zealous pursuit of information and accusations about the DEP to numerous entities. However, just as the OOR has no authority to investigate the DEP's

motivations, it has no authority or interest in monitoring the Citizen's actions outside the scope of the RTKL. That said, the Citizen is cautioned that subsequent requests for the records that are the subject of this appeal could be deemed disruptive and repeat requests under the RTKL.

### **CONCLUSION**

For the foregoing reasons, the Citizen's appeal is **denied**. The DEP is not required to take any further action. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: July 20, 2009**



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**AUDREY BUGLIONE, ESQ.**  
APPEALS OFFICER

Sent to: Stephen Dreyer (Complainant) and Craig Lambeth, Esquire (DEP)