



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:	
	:	
<b>BRIAN BEATTY,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No: AP 2019-2482</b>
	:	
<b>PENNSYLVANIA DEPARTMENT OF</b>	:	
<b>AGRICULTURE,</b>	:	
<b>Respondent</b>	:	
	:	
<b>and</b>	:	
	:	
<b>ADAM REVSON, ALYSSA FINE,</b>	:	
<b>AND ALBERT FINE</b>	:	
<b>Direct Interest Participants</b>	:	

### INTRODUCTION

Brian Beatty (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Agriculture (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information regarding the location of beehives and apiary permits for specified individuals. The Department partially denied the Request, arguing, among other things, that residential addresses are protected by the constitutional right to privacy. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the Department is not required to take any further action.

## FACTUAL BACKGROUND

On November 4, 2019, the Request was filed, seeking:

1. Registration address and location address and number of hives for the following people and entities: Alyssa Fine, Adam Revson, Adam Klein, Al Fine, Pittsburgh Honey, Fine Family Apiaries.
2. Apiary permits for Alyssa Fine, Adam Revson, Adam Klein, Al Fine, Pittsburgh Honey, Fine Family Apiaries.

On December 9, 2019, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the Department partially denied the Request, arguing that hive address locations were redacted from the records as residential addresses protected by the constitutional right to privacy. The Department also argued that disclosure of the addresses would create a reasonable likelihood of endangering the safety or physical security of a building, resource or facility, 65 P.S. § 67.708(b)(3); constitute or reveal a trade secret or confidential proprietary information, 65 P.S. § 67.708(b)(11); and identify the location of an endangered or threatened plant or animal species not already known to the general public, 65 P.S. § 67.708(b)(25).

On December 10, 2019, the Requester appealed to the OOR, challenging the redactions and stating grounds for disclosure. He also noted that the Department did not provide copies of apiary permits, although the record provided did indicate that Albert Fine was issued a Queen and Nucleus Selling Permit. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 18, 2019, Adam Revson, Alyssa Fine and Albert Fine requested to participate in this appeal pursuant to 65 P.S. § 67.1101(c). The parties assert they have a direct interest in this matter because they are the owners of records containing confidential or proprietary

information or trademarked records. In support of their requests to participate, Mr. Revson, Ms. Fine and Mr. Fine submitted their statements made under penalty of perjury.

Mr. Fine attests that he is the owner of an apiary and honey business, Pittsburgh Honey/The Fine Family Apiary, and his daughter and son-in-law, Alyssa Fine and Adam Revson, manage the day to day business.<sup>1</sup> He attests that the redacted addresses are residential addresses where hives are located and this information would allow competitors to observe their equipment and techniques and place their own hives nearby, thus devaluing the local honey they produce. Ms. Fine similarly attests that release of the locations would jeopardize production capacity, while Mr. Revson attests that the locations of the hives enable the apiary to differentiate their product from competitors and contain unique, highly specialized equipment. Based upon a review of their submissions, the parties' requests to participate are granted and, as a result, the argument and evidence submitted has been made part of the record.

On December 19, 2019, the Requester filed argument in opposition to statements made in the direct interest participants' filings.

On December 19, 2019, the Department submitted a position statement reiterating its grounds for denial and correcting an error in its final response to the Requester. First, the Department acknowledges that it failed to provide copies of apiary permits as requested in Item 2. The Department provided copies of three apiary permits responsive to Item 2 of the Request. Those permits were issued to Albert Fine or Albert J. Fine. The Department claims that no other

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<sup>1</sup> All direct interest participants attest that Brian Beatty is a pseudonym for John Yakim, a competitor who made the initial request at the behest of Michelle Wright, an associate of Mr. Yakim's and another competitor of Pittsburgh Honey. The RTKL must be interpreted and applied without regard to the Requester's identity beyond meeting the RTKL's requestor definition. See *Clinkscale v. Dep't of Pub. Welfare*, 101 A.3d 137, 141 (Pa. Commw. Ct. 2014). Furthermore, "[i]f the requester wishes to pursue the relief and remedies provided for in [the RTKL], the request for access to records must be a written request." 56 P.S. § 67.702. Here, the Requester is not anonymous and therefore, the identity of the Requester is not germane to the issue at hand.

records responsive to Item 2 exist. In support of its position, the Department submitted the affidavit of Karen Roccasecca, the State Apiarist.

On December 19, 2019, the Requester filed a response to the attestation provided by the Department and argument regarding the right to privacy of addresses.

On December 19, 2109, Mr. Revson submitted a supplemental statement and exhibits in response to the Requester's response.

### **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 parties

did not request *in camera* review, however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the 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)).

### **1. The Department provided responsive records during the appeal**

During the appeal, the Department provided records that are responsive to Item 2 of the Request. Specifically, the Department provided apiary licenses issued to Albert Fine. Ms. Roccasacca attests that the Department only has three licenses issued to Mr. Fine and does not have licenses issued to any of the other parties named in the Request. Under the RTKL, a sworn

affidavit or statement made under the penalty of perjury 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 evidence that the Department has acted in bad faith or that the records exist, “the averments in [the statement] 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)). As such, the appeal as to the records provided on appeal is dismissed as moot.

## **2. Residential addresses may be redacted pursuant to the constitutional right to privacy**

The Department redacted hive location addresses based upon the constitutional right to privacy, among other reasons. The Department argues that the redacted addresses are residential addresses, while the Requester asserts that the addresses are used for commercial/agricultural purposes and therefore, the right to privacy does not exist. Furthermore, he argues that honey bees do not have a right to privacy in their hive locations, and the property owner names have not been requested. Lastly, he asserts that the Pennsylvania Bee Law, 3 Pa.C.S. § 2105, requires registration of the exact location or locations of each apiary.

The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass’n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). However, the right to privacy does not inure to commercial entities. *See Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173, 1184-85 (Pa. Commw. Ct. 2017) (“The constitutional right to informational privacy only inures to individuals”). Therefore, the initial inquiry is whether the redacted addresses are in fact home addresses.

Mr. Fine attests that the Location IDs listed on the redacted record correspond with residential homes. He asserts that the Location IDs “enjoy no remuneration, have no affiliation with the Fine Family Apiary or Pittsburgh Honey, and no business is conducted at any of the locations.” He also asserts that the responsive record shows two addresses, Ridge Road and Berry Lane, which are locations known to the general public.

Ms. Fine attests that revealing the addresses would jeopardize the privacy of private landowners. She explains that one may “essentially ‘borrow’ land from other people in order to place your hives. These individual landowners ... certainly do not consent to the release of their private addresses, as this could encourage unwarranted visitors or perhaps competitors trespassing on their private property.” Mr. Revson states that “the individual residents of those private homes are guaranteed a right to privacy by the constitution of Pennsylvania.”

Lastly, the Direct Interest Participants provided statements of the property owners or occupants. Each statement identifies the Location ID and states that the owner or occupant objects “to the release of my home address as it would ... violate my right to privacy as afforded to me by the Constitution of the Commonwealth of Pennsylvania...” Each statement was made under penalty of perjury and each was marked, although no owner or occupant signed their name as a way to protect their identity. The OOR recognizes that these individuals signing their names to the documents would identify them; however, anonymous statements require particular scrutiny and may not be accepted as evidence.

Here, the sworn statements of the Direct Interest Participants make it clear that private landowners have permitted the Fine Family Apiary to place hives on their properties. Those private landowners do not receive any remuneration. Because the addresses are residential

addresses, rather than the addresses of commercial entities, the addresses implicate the balancing test.

To determine whether the constitutional right to privacy precludes disclosure of an individual's personal information, the OOR must apply the balancing test enunciated in *Denoncourt v. Pa. State Ethics Comm'n*, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), "weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure."

Although the Pennsylvania Supreme Court did not expressly define the types of "personal information" subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass'n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test).

Here, the Requester asserts that it is in the public's interest to disclose the locations of hives because honey bees do not have a right to privacy, the name of the property owner was not requested, the property is used for a commercial/agricultural purpose and the Bee Law requires the registration of hive locations. He argues that it is in the public's interest to disclose the location

of hives to prevent transportation of infected hives.<sup>2</sup> He continues that if a registrant of a hive utilizes their home address as the location, that should not be the Department's concern or protected by the RTKL. Lastly, he argues that if the OOR determines the address should be redacted, the township and county name should be provided.

The Direct Interest Participants and Department, in turn, argue that in this case, the redacted locations are home addresses of individuals who, without remuneration, are permitting the Fine Family Apiary to locate hives on their property. Mr. Revson acknowledges that the Bee Law requires the registration of those locations but argues that the RTKL provides for exemptions for situations such as this. The OOR notes that the Final Family Apiary's registration address is public record and was released in response to this Request.

While preventing the spread of a honeybee disease is a laudable public interest, and certainly within the Department's purview, the Requester has not propounded sufficient argument regarding the public interest in the locations of the hives at issue in this Request. *See Chester Hous. Auth. v. Polaha*, 173 A.3d 1240 (Pa. Commw. Ct. 2017) (finding names and home addresses to be subject to the constitutional right to privacy where disclosure of the personal information would not further the public interest). Here, the addresses are home addresses, not utilized for commercial purposes. The individuals permitting beekeepers on their lands have not consented to the public dissemination of their addresses. The Bee Law does not specifically address the applicability of the RTKL and, as the Commonwealth Court in *Pa. Liquor Control Bd. v. Beh*, stated, "the mere fact that the instant applicants and/or licensees provided this information to the PLCB in order to obtain a license or its renewal does not, *ipso facto*, act as a complete waiver of their constitutional right to privacy in all of this information." 215 A.3d 1046, 1056 (Pa. Commw.

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<sup>2</sup> All parties specifically identify American Foulbrood as a disease of particular concern.

2019). As in *Beh*, there is no evidence of record that any registration forms were provided to the third parties that explained that they were voluntarily relinquishing their right to privacy. Furthermore, the Requester speculates as to a general concern that infected hives, queen bees or nuclei may be sold; however, the Direct Interest Participants and Department have demonstrated that the Department takes particular steps to prevent such an infestation. The Bee Law provides for inspection of queen apiaries for diseases and provides the process by which owners and the Department may proceed if disease is found. *See* 3 Pa.C.S. §§2106-2116. In contrast, the Requester did not explain how release of the addresses would prevent an infestation, especially in light of the Department's ongoing efforts in that area. Accordingly, the Requester has not demonstrated a public interest that outweighs the privacy concerns, and as such, the addresses may be redacted.<sup>3</sup>

## CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot in part**, and the Department 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. 65 P.S. § 67.1303. 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>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>3</sup> Because the Direct Interest Participants and Department have demonstrated that the addresses are protected by the constitutional right to privacy, the OOR need not reach the Department's alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: January 9, 2020**

*/s/ Erin Burlew*

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