

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
SPECIAL DOCKET PROGRAM**

**Appeal of the City of Philadelphia
from a Decision of the Office of Open Records**

NOTICE OF APPEAL

The City of Philadelphia hereby appeals from a decision of the Office of Open Records, dated December 8, 2015, a copy of which is attached hereto. The following persons entered an appearance in the proceedings below:

Dated: January 5, 2016

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/s/ Jeffrey D. Cohen
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Assistant City Solicitor

Date: January 5, 2016

Exhibit A



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MICHAEL MELLON AND THE	:	
DEFENDER ASSOCIATION OF	:	
PHILADELPHIA,	:	
Requester	:	Docket No.: AP 2015-1909
	:	
v.	:	
	:	
CITY OF PHILADELPHIA,	:	
Respondent	:	

INTRODUCTION

Michael Mellon, Esq., on behalf of the Defender Association of Philadelphia (“Requester”), submitted a request (“Request”) to the City of Philadelphia, Law Department (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking data regarding pedestrian and vehicle stops and frisks. The City denied the Request, asserting that it seeks records related to criminal and noncriminal investigations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the City is required to take further action as directed.

FACTUAL BACKGROUND

On July 22, 2015, the Request was filed, seeking:

1. Aggregate data in a database from a database created for an audit in compliance with the consent decree in Mahari Bailey, et al., v. City of

Philadelphia, et al., C.A. 10-5952, covering a period from some time in 2011 until approximately December 31, 2013, which reflects the following types of data or data fields:

- Date of stop – the date the incident occurred
- Time of stop – the time the incident occurred including AM or PM
- District – district of assignment of the reporting officer
- Type of stop – *i.e.*, curfew, truant, vehicle, or pedestrian
- Location of occurrence – the street location where the incident occurred and whether it was inside or outside.*
- Number present – number of people present during incident
- Number investigated – number of people investigated
- Vehicle Stop Reason – choose one of the following: “Vehicle Matches Flash Info”, “Vehicle in Violation of Motor Vehicle Code Violation”, “Vehicle Involved in Criminal Activity”, or “Other”
- Vehicle Stop Reason description – specific facts and circumstances that existed to stop the vehicle
- Vehicle Frisked – whether the vehicle was frisked
- Vehicle frisk description – specific facts and circumstances that existed to create a fear that the person stopped may be armed with a weapon
- Vehicle searched – whether a vehicle was searched
- Vehicle search description – the probable cause and the exception to the general warrant requirement relied upon, such as, incident to arrest, weapon recovered from a frisk, consent, etc.
- Evidence/Contraband recovered – whether any evidence or contraband was recovered
- Evidence/Contraband description – a description of the evidence or contraband recovered
- Motor Vehicle Code Violation – the title of the vehicle code violation
- Motor Vehicle Code – the actual numerical designation of the motor vehicle code alleged to have been violation
- Motor Vehicle Code Violation Reason for stop – a description of the facts that gave rise to the motor vehicle code violation
- Traffic Citation issued – whether a traffic citation was issued
- Sex – male or female
- Age/Date of Birth – actual age of pedestrian, occupant, or operator, or DOB.
- Race – the race of the pedestrian, occupant, or operator (W – White; B – Black; A – Asian, Pacific islander; I – American Indian/Alaskan Native[[]])
- Latino – yes or no

- Pedestrian/Operator/Occupant Reason for stop – either “Individual Matches Flash Info”, “Individual Involved in Disturbance”, or “Other Reason for Stop”
 - Pedestrian/Operator/Occupant Description of reason for stop – specific facts and circumstances that existed to stop the pedestrian/operator/occupant
 - Individual Frisked – whether the pedestrian or occupant was frisked
 - Individual Frisk Description – specific facts and circumstances that existed to create a fear that the person stopped may be armed with a weapon
 - Individual Searched – whether the pedestrian or occupant was searched
 - Individual Search Description – the probable cause and the exception to the general warrant requirement relied upon, such as, incident to arrest, weapon recovered from a frisk, consent, etc.
 - Individual Arrested – whether the pedestrian or occupant was arrested
 - Individual Arrest Description – the specific facts and circumstances that existed to justify the probable cause to arrest
 - Officer that prepared the report – name the officer
 - Officer Badge and Payroll Number – the badge and payroll number of the officer [that] prepared the pedestrian/vehicle report
 - Officer District/Squad – the district number of the officer [that] prepared the pedestrian/vehicle report
 - Partner – name of the partner to the officer that prepared the pedestrian/vehicle report
 - Partner Badge and Payroll Number – the badge and payroll number of the partner to the officer that prepared the pedestrian/vehicle report
2. Aggregate data in a database from a database created for an audit in compliance with the consent decree in Mahari Bailey, et al., v. City of Philadelphia, et al., C.A. 10-5952, covering a period from approximately January 1, 2014 until the present which reflects the following types of data or data fields:
- Date of stop – the date the incident occurred
 - Time of stop – the time the incident occurred including AM or PM
 - District – district of assignment of the reporting officer
 - Type of stop – *i.e.*, curfew, truant, vehicle, or pedestrian
 - Location of occurrence – the street location where the incident occurred and whether it was inside or outside.*
 - Number present – number of people present during incident

- Number investigated – number of people investigated by police during the incident
- Vehicle Stop Reason – choose one of the following: “Vehicle Matches Flash Info”, “Vehicle in Violation of Motor Vehicle Code Violation”, “Vehicle Involved in Criminal Activity”, or “Other”
- Vehicle Stop Reason description – specific facts and circumstances that existed to stop the vehicle
- Vehicle Frisked – whether the vehicle was frisked
- Vehicle frisk description – specific facts and circumstances that existed to create a fear that the person stopped may be armed with a weapon
- Vehicle searched – whether a vehicle was searched
- Vehicle search description – the probable cause and the exception to the general warrant requirement relied upon, such as, incident to arrest, weapon recovered from a frisk, consent, etc.
- Evidence/Contraband recovered – whether any evidence or contraband was recovered
- Evidence/Contraband description – a description of the evidence or contraband recovered
- Motor Vehicle Code Violation – the title of the vehicle code violation
- Motor Vehicle Code – the actual numerical designation of the motor vehicle code alleged to have been violation
- Motor Vehicle Code Violation Reason for stop – a description of the facts that gave rise to the motor vehicle code violation
- Traffic Citation issued – whether a traffic citation was issued
- Sex – male or female
- Age – actual age of pedestrian, occupant, or operator
- Race – the race of the pedestrian, occupant, or operator (W – White; B – Black; A – Asian, Pacific islander; I – American Indian/Alaskan Native[])
- Latino – yes or no
- Pedestrian/Operator/Occupant Reason for stop – either “Individual Matches Flash Info”, “Individual Involved in Disturbance”, or “Other Reason for Stop”
- Pedestrian/Operator/Occupant Description of reason for stop – specific facts and circumstances that existed to stop the pedestrian/operator/occupant
- Individual Frisked – whether the pedestrian or occupant was frisked
- Individual Frisk Description – specific facts and circumstances that existed to create a fear that the person stopped may be armed with a weapon
- Individual Searched – whether the pedestrian or occupant was searched

- Individual Search Description – the probable cause and the exception to the general warrant requirement relied upon, such as, incident to arrest, weapon recovered from a frisk, consent, etc.
- Individual Arrested – whether the pedestrian or occupant was arrested
- Individual Arrest Description – the specific facts and circumstances that existed to justify the probable cause to arrest
- Officer that prepared the report – name the officer that prepared the pedestrian/vehicle report
- Officer Badge and Payroll Number – the badge and payroll number of the officer [that] prepared the pedestrian/vehicle report
- Officer District/Squad – the district number of the officer [that] prepared the pedestrian/vehicle report
- Partner – name of the partner to the officer that prepared the pedestrian/vehicle report
- Partner Badge and Payroll Number – the badge and payroll number of the partner to the officer that prepared the pedestrian/vehicle report

The Request further states that it:

... does not call for production of underlying incident reports from which the aggregate data was extracted. Nor does it seek the identity of individuals stopped or any data that would identify civilian participants who were subject to a frisk and/or a stop. Rather it requests aggregate data regarding stop and frisk activity conducted by the [Philadelphia Police] Department and its individual officers that was captured in various audits conducted for Bailey, with all identifiers that might be used to trace the identity of stopped individuals expunged or redacted from the data.

On July 29, 2015, the City invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On September 4, 2015, the City denied the Request, asserting that responsive records relate to criminal investigations, 65 P.S. § 67.708(b)(16), as well as noncriminal investigations, 65 P.S. § 67.708(b)(17), and, therefore, are exempt from disclosure under the RTKL. The City also argues that the requested information is confidential under the Criminal History Records Information Act (“CHRIA”), 18 Pa.C.S. §§ 9101 *et seq.* Additionally, the City further denied the Request as seeking records of the City’s Law Department in connection with

its representation of clients, *see* Pa.R.P.C. 1.6(a), as well as asserting that the Request does not seek “aggregated data” under Section 102 the RTKL.

On September 16, 2015, the Requester appealed to the OOR, challenging the denial and asserting grounds for disclosure. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c). On October 28, 2015, the City submitted a position statement, reiterating its reasons for denial, along with the sworn affidavit of Craig Straw, Chief Deputy Solicitor for the City’s Law Department, who attests that he represents the Philadelphia Police Department in its ongoing duties and obligations to the Court in the matter of *Bailey et al. v. City of Philadelphia et al.*, C.A. No. 10-5952 (E.D. Pa.), and that the litigation is ongoing. The City also submits the sworn affidavit of Kevin Thomas, the Director of Research and Analysis for the City’s Police Department, who attests that the Requester does not seek aggregated data. On November 3, 2015, the Requester submitted a Reply Memorandum rebutting the City’s arguments.

The Requester agreed to extend the date for the issuance of a final order in this matter until December 8, 2015. *See* 65 P.S. § 67.1101(b)(1).

1. The Request is not duplicative and burdensome

In its response, the City argues that the Request is duplicative and burdensome as it seeks the same data as a previous request. Section 506(a) of the RTKL provides that “[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.” 65 P.S. § 67.506(a). “Under this section ... an agency must demonstrate that (1) ‘the requester has made repeated requests for th[e] same record[(s)]’ and (2) ‘the repeated requests have placed an unreasonable burden on the agency.’” *Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa.

Commw. Ct. 2011); *see also Slate v. Pa. Dep't of Env'tl. Prot.*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 (“A repeated request alone is not enough to satisfy § 506(a)(1)”). Repeated requests for the same records, although phrased differently, may be denied as disruptive. *See Cohen v. Pa. Dep't. of Labor & Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 (“Slight differences in phraseology do not preclude application of [Section 506(a)]”).

In *Mezzacappa v. West Easton Borough*, the OOR held that a request must be repeated more than once to constitute a “repeated request” for purposes of 65 P.S. § 67.506(a). OOR Dkt. AP 2012-0992, 2012 PA O.O.R.D. LEXIS 967 (“Because the Borough has only established that that the Requester has made one repeated request, rather than multiple ‘repeated requests,’ the OOR finds that the Request was not disruptive”). The OOR’s final order in *Mezzacappa* was subsequently upheld by both the Northampton County Court of Common Pleas and the Commonwealth Court. *Borough of West Easton v. Mezzacappa*, No. C-48-CV-2012-7973 (North. Com. P1. Jan. 9, 2013) (“[A] request is not disruptive when a requester [seeks] the same records only twice”), *aff'd* 74 A.3d 417 (Pa. Commw. Ct. 2013).

Here, the Requester has submitted a copy of a previous request seeking the same data. Because the Requester has sought the instant records on only one previous occasion and the City has not submitted any evidence to demonstrate that the requests have placed an “unreasonable burden” on the City, Section 506(a) does not prevent the Requester from accessing the requested records.

2. The Request seeks aggregated data

The City argues that the Request does not seek aggregated data, but instead seeks “row level data,” as well as records related to criminal and noncriminal investigations. Aggregated

data is defined under the RTKL as “[a] tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories.” 65 P.S. § 67.102. The RTKL also provides that the exemptions for criminal investigative records, 65 P.S. § 67.708(b)(16), and noncriminal investigative records, 65 P.S. § 67.708(b)(17), do not apply to aggregated data maintained or received by an agency. *See* 65 P.S. § 67.708(d).

In support of its position, the City submits the affidavit of Kevin Thomas, Director of Research and Analysis for the Philadelphia Police Department, who attests that the data sought was collected from criminal investigative reports created by Philadelphia Police Department personnel and that the Request seeks a row-level audit data set that does not meet the criteria for aggregated data under the RTKL. Mr. Thomas further attests that row-level data consists of rows of a database that contain data specific and/or unique to that particular database row, while aggregated data is used for statistical reporting and analysis. Both Mr. Thomas and Craig Straw, Esq., Chief Deputy Solicitor for the City’s Law Department’s Civil Rights Unit, attest that data is entered into a database regarding pedestrians and vehicle stops and frisks, pursuant to a Consent Decree entered into by the City in United States District Court.

Here, the Request does not seek any information or records that will identify individuals. Rather, the Request specifically seeks data in categories related to stops and frisks that is currently maintained by the City’s Police Department. As a result, the data “relates to broad classes, groups or categories” and “it is not possible to distinguish the properties of individuals within those classes, groups or categories.” Because the Request seeks aggregated data, exemptions under the RTKL for investigative records cannot apply, and therefore, those exemptions are not applicable to the data at issue. Furthermore, nothing in the City’s position

statement or case law can be read for the proposition that “aggregated data” does not also include “row-level data.”

3. Aggregated data is not exempt from disclosure as investigative information under CHRIA

The City argues that disclosure of the requested data would be a violation of CHRIA, 18 Pa.C.S. §§ 9101 *et seq.* CHRIA prohibits the public dissemination of “investigative information.” 18 Pa.C.S. § 9106. “Investigative information” is “[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.” 18 Pa.C.S. § 9102.

In support of the City’s argument that CHRIA prohibits disclosure of the requested data, Mr. Thomas attests that “each and every row of data in the Audit data set contains data gleaned from a criminal investigation of a particular individual on a particular occasion.” Here, while the data may have been extracted from criminal records, the City has not submitted evidence to show that the data was “assembled as a result of the performance of any inquiry ... into a criminal incident or an allegation of criminal wrongdoing. Therefore, the aggregated data, by itself, is not “investigative information.” “The mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under ... CHRIA.” *Pa. State Police v. Grove*, 119 A.3d 1102 (Pa. Commw. Ct. 2015) (holding that Mobile Video Recordings, in their entirety, are not automatically investigative material under CHRIA). Therefore, the data requested, which does not identify any individual or a specific “criminal incident” or “allegation of criminal wrongdoing,” is not investigative material under CHRIA.

4. The City has not demonstrated that the requested data is exempt from disclosure as records that are confidential

The City argues that the requested records constitute data maintained by the City's Law Department in connection with the representation of clients. Specifically, citing *City of Pittsburgh v. Silver*, the City argues that the OOR does not have the authority to compel the Law Department to disclosure records maintained in connection with its representation of clients. 50 A.3d 296 (Pa. Commw. Ct. 2012). Additionally, the City argues that disclosure of the requested data by the Law Department would violate its duty of confidentiality under Pa. R.P.C. 1.6.

In *Silver*, the Commonwealth Court held that "because our Supreme Court has sole jurisdiction over the practice of law, the RTKL could not confer upon a hearing officer or the OOR the authority to compel disclosure of information in an attorney's case file." 50 A.3d at 301. In *Office of Open Records v. Center Township*, however, the Commonwealth Court clarified *Silver*, stating:

the OOR's involvement in the RTKL process does not implicate, much less infringe upon, the Supreme Court's exclusive authority to govern the conduct of attorneys practicing law in this Commonwealth. Accordingly, we conclude that when the OOR exercises subject matter jurisdiction and determines whether a request is covered by the attorney-client privilege, the work product doctrine, or the ethics-based rule of confidentiality, the OOR does not infringe upon the Supreme Court's authority under Article V, Section 10(c). Pursuant to *Silver*, it is error for the OOR to order disclosure of documents that contravene the ethics-based rule of confidentiality. However, *Silver* does not preclude the OOR from deciding, in the first instance, whether any of the privileges enunciated in the RTKL or the ethics-based rule of confidentiality in Pa. R.P.C 1.6 are applicable.

95 A.3d 354, 365 (Pa. Commw. Ct. 2014).

Here, the City provided the sworn affidavit of Craig Straw, Esq., Chief Deputy Solicitor for the City's Law Department's Civil Rights Unit, who attests that he represents and advises the City's Police Department regarding its duty to compile a database of information taken from

criminal investigative reports for pedestrian or vehicle stops. Attorney Straw further attests that the litigation giving rise to the database is ongoing, and that the City's Police Department periodically sends the data to the Law Department for review and that the Law Department has a duty to maintain the confidentiality of the data pursuant to Pa. R.P.C. 1.6(a), as well as a duty to adhere to the confidentiality provision of the Consent Decree and the Court's Order to keep information regarding the identity of persons stopped or frisked confidential. Additionally, Mr. Thomas attests that his Research and Analysis Unit is tasked with pulling project data into an audit database to comply with the Consent Decree

This matter is unlike *Silver*, where the request sought correspondence, contained in the file of an assistant City solicitor, regarding the negotiation of a settlement of pending litigation over an individual's death. Here, the data requested was compiled and created after a Court-approved Consent Decree was entered into by the City. Additionally, the City Police Department's Research and Analysis Unit pulls project data into an audit database to comply with the Consent Decree. While the Law Department may review the data,¹ there is no evidence to establish that the litigation is ongoing in this matter, but rather, the City has only established that pursuant to the Consent Decree, it has ongoing reporting obligations for stops and frisks. *See Kearney v. Worcester Twp.*, OOR Dkt. AP 2014-1564, 2014 PA O.O.R.D. LEXIS 1385 (holding that the ethics-based rule of confidentiality did not apply because the records were not in a solicitor's file related to pending litigation); *Callari v. Philadelphia Parking Authority*, OOR Dkt. AP 2014-0226, 2014 PA O.O.R.D. LEXIS 267 (holding that records reflecting contract negotiation were contained in an attorney's case file, but, as there was no pending litigation, *Silver* did not apply). Additionally, although the City argues that requested data must be kept confidential pursuant to the Court-approved Consent Decree, it has not provided any evidence to

¹ It is unclear what this review may entail.

establish that any confidentiality provisions exist. Rather, the Consent Decree provides only that “[a]ll filings will redact personal information ... and the parties agree to keep information regarding the identities of persons stopped or frisked confidential.”² Therefore, the City has not established that the requested aggregated data is exempt from disclosure.

5. The City may redact employee payroll numbers

The City asserts and Mr. Thomas attests that data collected for the audit data contains the payroll numbers of City Police Department employees.³ Section 708(b)(6) exempts from disclosure, “[a] record containing all or part of a person’s ... employee number.” 65 P.S. § 67.708(b)(6)(i)(A). Therefore, the City may redact employee payroll numbers under Section 708(b)(6) of the RTKL.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part** and, subject to the redaction of employee payroll numbers, the City is required to provide all responsive records to the Requester within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing of this Final Determination, any party may appeal to the Philadelphia County Court of Common Pleas. 65 P.S. § 67.1302(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.pa.gov>.

² The Request states that “it [does not] seek the identity of individuals stopped or any data that would identify civilian participants who were subject to a frisk and/or a stop.” Further, it states that “all identifiers that might be used to trace the identity of stopped individuals [should be] expunged or redacted from the data.”

³ While the City did not raise this exemption in its original response, it is not precluded from raising new grounds for denial on appeal. See *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

FINAL DETERMINATION ISSUED AND MAILED: December 8, 2015



APPEALS OFFICER
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Sent to: Michael Mellon, Esq. (via e-mail only);
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