



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**SAMUEL LOUX,  
Requester**

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:

**v.**

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**Docket No.: AP 2016-1285**

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**PENNSYLVANIA BOARD OF  
PROBATION AND PAROLE,  
Respondent**

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### **INTRODUCTION**

Samuel Loux (“Requester”), an inmate at SCI-Mahanoy, submitted a request (“Request”) to the Pennsylvania Board of Probation and Parole (“Board”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a letter of negative recommendation from a District Attorney. The Board denied the Request, citing the Board’s confidentiality regulation. 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 Board is not required to take further action.

### **FACTUAL BACKGROUND**

On June 1, 2016, the Request was filed, seeking a letter of negative recommendation submitted to the Board by an unidentified District Attorney. On July 8, 2016, after extending its time to respond to the Request, 65 P.S. § 67.902(b), the Board denied the Request, stating that the record is confidential under 37 Pa. Code § 61.2.

On August 1, 2016, the Requester timely appealed to the OOR, arguing that the Board's confidentiality regulation should not apply in this case because he intends to use the record to withdraw a guilty plea and denial of the record would violate his right to due process under the United States Constitution.<sup>1</sup> The OOR invited both parties to supplement the record and directed the Board to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 8, 2016, the Board provided a position statement and the affidavit of Janaki Theivakumaran, the Agency Open Records Officer for the Board. In its position statement, the Board argues that the appeal should be denied pursuant to the Board's confidentiality regulation. In addition, the Board requested an evidentiary hearing be held. On August 15, 2016, the Requester submitted a position statement, arguing that the circumstances surrounding his plea bargain justify ordering production of the record.

### **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

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<sup>1</sup> The Requester's appeal was postmarked July 29, 2016, and, pursuant to the “prisoner mailbox rule,” is considered timely filed. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

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 Board sought a hearing; however, this request is denied because the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Board 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 to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). 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)).

In her affidavit, Ms. Theivakumaran states that a search was conducted and that a responsive record was located. However, upon review, it was determined that the record constitutes “records, reports and other written things, information, evaluations, and opinions” that “touch upon matters concerning parolees or probationers that are related to their being a probationer or parolee.” Ms. Theivakumaran further states that the identified record does not constitute a Board decision that involves “a brief statement of the reasons for actions by the Board granting or refusing a parole”; accordingly, the Board argues that the records are confidential under 37 Pa. Code § 61.2.

The Pennsylvania Code provides, in pertinent part:

Records, reports and other written things and information, evaluations, opinions and voice recordings in the Board's custody or possession touching on matters concerning a probationer or parolee are private, confidential and privileged; except that a brief statement of the reasons for actions by the Board granting or refusing a parole will at all reasonable times be open to public inspection in the offices of the Board.

37 Pa. Code § 61.2. This language is broad enough to exempt from disclosure “all of the contents of a parole file.” *See Poindexter v. Pa. Bd. of Probation and Parole*, OOR Dkt. AP 2011-0672, 2011 PA O.O.R.D. LEXIS 461; *see also Jones v. Office of Open Records*, 993 A.2d 339, 342 (Pa. Commw. Ct. 2010) (noting “the broad language of this regulation”); *Davis v. Pa. Bd. of Probation and Parole*, No. 944 C.D. 2015, 2016 Pa. Commw. Unpub. LEXIS 402 (Pa. Commw. Ct. 2016). Here, the Request specifically seeks a letter recommending that the Board deny the Requester parole. Therefore, the Request, on its face, seeks a record contained in the Requester’s parole file. As this record is expressly exempt under the Code, it is not subject to disclosure under the RTKL.<sup>2</sup> *See* 65 P.S. § 67.305(a)(3); *Coulter v. Pa. Bd. of Probation and*

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<sup>2</sup> The Requester does not challenge the applicability of the regulation; on appeal, the Requester suggests that he knows that the OOR is bound to deny his appeal, but believes this to be a necessary step to seeking relief in the federal courts.

*Parole*, OOR Dkt. AP 2011-1444, 2011 PA O.O.R.D. LEXIS 1114; *aff'd* 48 A.3d 516 (Pa. Commw. Ct. 2012).

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the Board 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 according to court rules 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>.

**FINAL DETERMINATION ISSUED AND MAILED: August 30, 2016**

*/s/ Jordan Davis*

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APPEALS OFFICER  
JORDAN C. DAVIS, ESQ.

Sent to: Samuel Loux, LR-6905;  
John Talaber, Esq. (via e-mail only);  
Janaki Theivakumaran (via e-mail only)

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