



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAMES DORSEY,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-1354
	:	
PENNSYLVANIA DEPARTMENT	:	
OF CORRECTIONS,	:	
Respondent	:	

INTRODUCTION

James Dorsey (“Requester”), an inmate at SCI-Fayette, submitted a request (“Request”) to the Pennsylvania Department of Corrections (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records regarding another inmate. The Department denied the Request, arguing that release of the requested records would threaten personal security. 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 Department is not required to take any further action.

FACTUAL BACKGROUND

On July 29, 2016, the Request was filed, seeking “a copy of [Lawrence Fisher’s] new sentence, and also what grounds he overturned his life sentence cc# 02674-03678-1995 we were

tried ‘jointly’ side by side.” On August 1, 2016, the Department denied the Request, arguing that disclosure of the records would threaten personal security. *See* 65 P.S. § 67.708(b)(1).

On August 16, 2016, the Requester filed an appeal with the OOR, challenging the denial and stating grounds for disclosure. 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. *See* 65 P.S. § 67.1101(c).

On August 22, 2016, the Department submitted a position statement, arguing that the requested records are exempt under the RTKL. In support of its position, the Department also submitted the affidavit of its Major of Security, Scott Bowman. On August 29 and September 7, 2016, the Requester submitted evidence, again asserting that he is entitled to the requested records because he and Mr. Fisher were tried jointly.¹

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

¹ The Requester’s submissions was received after the record closed; however to develop the record, the submissions were considered. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

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, neither of the parties requested a hearing; however, the OOR has the necessary, requisite 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 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)).

In the instant matter, the Department denied access to the requested records under Section 708(b)(1) of the RTKL, which exempts from public disclosure “[a] record the disclosure of which ... would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Delaware County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *16 (Pa. Commw. Ct. 2012) (“The RTKL must be narrowly construed to maximize access to government records”).

In the context of a correctional institution setting, a correctional facility need not demonstrate specific prior examples of physical harm to personal security in order to meet the agency’s burden of proof under 65 P.S. § 67.708(b)(1)(ii). *See, e.g., Mele v. Monroe County*, OOR Dkt. AP 2011-1230, 2011 PA O.O.R.D. LEXIS 1358; *Bernstein v. Pa. Dep't of Corr.*, OOR Dkt. AP 2011-1603, 2011 PA O.O.R.D. LEXIS 1295 (holding that prison inmate policy manuals are exempt from disclosure); *Burkhardt v. Pa. Dep't of Corr.*, OOR Dkt. AP 2013-0137, 2013 PA O.O.R.D. LEXIS 94 (holding that an inmate’s arrest warrant is exempt under Section

708(b)(1)(ii) of the RTKL). The OOR finds credible the professional opinion of individuals assessing the risks of security and will not substitute its judgment for that of those with far more familiarity with the issues involving personal security. *See Knauss v. Unionville-Chadds Ford Sch. Dist.*, OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238. In support of its position, the Department submitted the statement made under the penalty of perjury of Major Bowman, who attests, in part, as follows:

4. Inmates are not permitted to access records related to other inmates. Possession of such records would constitute contraband. *See* Inmate Handbook, p. 24. *See also* Department Policy DC-ADM 003, "Release of Information Policy," Section IV, subsection A.5 ("An inmate is prohibited from receiving inmate information pertaining to another inmate other than him/herself.")....
5. The requested records contain information describing the crime or crimes of the subject inmate as well as the reason for a new sentence to be issued to Mr. Fisher.
6. It is reasonably likely that if an inmate is aware of such information about another inmate, such information can be used to manipulate, harass, blackmail, or assault the subject inmate, thereby creating a substantial risk of physical harm to the subject inmate and any staff who intervene.
7. Information such as the records requested by Mr. Dorsey could be used by inmates or others to retaliate against inmates who have committed certain types of offenses, *e.g.*, sexual offenses.
8. These records could also be used by inmates or others to identify inmates with a propensity toward certain disruptive and dangerous behavior and to conspire to encourage that behavior (*i.e.* gambling, possession of controlled substances/contraband, possession of implements of escape, etc.).
9. Inmates or others with knowledge of the identities of particular inmates involved in certain offenses may use this information to jeopardize the security of an institution.
10. Even seemingly innocuous information pertaining to one inmate is reasonably likely to be used by other inmates to manipulate, coerce, threaten or harm other inmates and jeopardize prison security. Information such as what is requested here will allow inmates to retaliate against other inmates who were, for instance, convicted of behavior deemed unacceptable by the inmate

population (violent or sexual behavior), or to identify and collaborate with inmates who were previously involved in dangerous behavior (gambling, drugs and contraband, escape activity, etc.).

11. Similarly, the requested information in this case would identify actors involved in the inmate's underlying crime and/or criminal proceedings. Dissemination of this information would allow the requesting inmate or others, including inmate security threat groups (gangs), to retaliate against those involved in such crime or proceedings whom they deem to have acted in an undesirable manner against them, their family, friends or associates (*i.e.*, by identifying crime victims who are relatives or friends, indicating plea bargains for working with prosecutors, providing information to law enforcement, etc.).
12. If an inmate were to be found to be in possession of information pertaining to another inmate, such records would be immediately confiscated as contraband under the policies cited above.
13. For the foregoing reasons, the disclosure of the requested records is reasonably likely to result in a substantial and demonstrable risk of physical harm to other inmates and/or facility staff.

Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *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 Department acted in bad faith, "the averments in [the sworn 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)). Based upon the evidence provided, the Department has demonstrated that release of the requested records would be reasonably likely to subject inmates and Department staff to retaliatory harassment, threats and/or physical harm due to the sensitive information contained in the records. Accordingly the Department has met its burden of proving that the requested records are exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

To the extent the Requester argues that he is entitled to the requested records because the records are regarding the same case in which he was involved as a co-defendant, the identity of the requester is not relevant to the determination of the public status of a record. *See DiMartino v. Pa. State Police*, No. 340 C.D. 2011, 2011 Pa. Commw. Unpub. LEXIS 787 at *18-19 (Pa. Commw. Ct. 2011); *Wheelock v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009-0997, 2009 PA O.O.R.D. LEXIS 725 (stating that the only information available under the RTKL is a “public record” available to all citizens regardless of personal status or stake in the requested information).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, 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. 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 14, 2016

/s/ Magdalene C. Zeppos

APPEALS OFFICER
MAGDALENE C. ZEPPOS, ESQ.

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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