



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
ROBERT MCCRACKEN,	:
Requester	:
	:
v.	: Docket No: AP 2016-1436
	:
PENNSYLVANIA DEPARTMENT OF	:
CORRECTIONS,	:
Respondent	:

INTRODUCTION

Robert McCracken (“Requester”), an inmate at SCI-Forest, 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 the Security Threat Group Management Unit procedures. The Department denied the Request, stating that disclosure of 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 August 8, 2016, the Request was filed, seeking “all policies and procedures pertaining to the security threat group management unit” On August 10, 2016, the Department denied the Request, claiming that that disclosure of records would threaten personal security, 65 P.S. § 67.708(b)(1). On August 24, 2016, the Requester appealed to 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 30, 2016, the Department submitted a position statement identifying the responsive record as Section 4 of Department Policy 6.5.1, Security Level 5 Housing Units Procedures Manual (“STGMU Procedures”). The Department reiterated its denial that disclosure of this record would be reasonably likely to threaten personal security. 65 P.S. § 67.708(b)(1). In support of its position, the Department submitted the affidavit of Chad Grassmyer, the Department’s Facility Security Coordinator.

On September 12, 2016, the Requester submitted his position statement arguing, among other things, that the release of the STGMU Procedures is not a security risk and that the Department cannot rely on Section 708(b)(1) of the RTKL. Furthermore, the Requester indicates that he is being released into general population; thus, any security argument relating to the STGMU Procedures does not apply to him.

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, neither party 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)(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)).

The Department argues that the requested STGMU Procedures are exempt from public access under Section 708(b)(1)(ii) of the RTKL, which exempts from disclosure a record that “would be reasonably likely to result in a 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 (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).

The OOR has previously held that the STGMU Procedures are exempt from disclosure because their release would be reasonably likely to threaten personal security. *See Booze v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2016-0793, 2016 PA O.O.R.D. LEXIS 799; *Gaither v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2015-1311, 2015 PA O.O.R.D. LEXIS 1163; *Moctezuma v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1013, 2014 PA O.O.R.D. LEXIS 802; *Booze v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1189, 2014 PA O.O.R.D. LEXIS 968. Here, Mr. Grassmyer attests to various threats if the STGMU Procedures were disclosed, including that “knowledge of the STGMU phases would allow inmates to manipulate the phases to their advantage to be released into general population which is reasonably likely to result in a substantial risk of physical harm

to officers and/or other inmates.” Under the RTKL, an affidavit or 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 affidavit] 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)).

The Requester argues that he is already being released into general population and that the Department’s argument is inapplicable to him. However, the identity of the Requester is not relevant to the determination of the public status of the record. *See DiMartino v. Pa. State Police*, No. 340 C.D. 2011, 2011 Pa. Commw. Unpub. LEXIS 787, at * 18-9 (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). As such, the fact that the Requester is being released into the general population does not affect the public or nonpublic nature of the record. Based on the evidence provided, therefore, the Department has demonstrated that disclosure of the STGMU Procedures “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). Accordingly, the Department has met its burden of proving that the requested record is exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 19, 2016

/s/ Jill S. Wolfe, Esq.

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Robert McCracken, LG-8344;
Chase Defelice, Esq. (via e-mail only);
Andrew Filkosky (via e-mail only)

¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).