pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
LAWRENCE PETERSON,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2016-1439**
	:	
CITY OF PHILADELPHIA POLICE	:	
DEPARTMENT,	:	
Respondent	:	

INTRODUCTION

Lawrence Peterson ("Requester"), an inmate at SCI-Smithfield, submitted a request ("Request") to the City of Philadelphia Police Department ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking attendance and injury records relating to two Department officers. The Department denied the Request, asserting that certain records contain individually identifiable health information, while other records do not exist. 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 June 29, 2016, the Request was filed, seeking:

1) [S]ick call out reports, injured on duty reports (IOD), time cards, attendance reports, overtime pay reports, suspension reports, employee

> status reports from 2004 – April of 2005 for police officers Judy Martinez and Mitchell McKeever. (ie January of 2004 – April of 2005)[.] These records are recorded on the Department's Daily Attendance Reports (DAR) System.
>
> 2) The DAR report for Mitchell McKeever and Judy Martinez from February 1 – March 1 of 2005 and the e-mails in regard [to] the two officers for the same dates[.]

On July 7, 2016, the Department invoked a thirty day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On August 1, 2016, the Department denied the Request, asserting that certain records do not exist in the Department's possession, custody or control. The Department further argues that records responsive to Item 1 of the Request are exempt from disclosure because the records would reveal an individual's health information, 65 P.S. § 67.708(b)(5); and are confidential pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. Parts 160 and 164, the Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.101 *et seq.*, and the Mental Health Procedures Act, 50 P.S. § 7103, *et seq*. Additionally, the Department argues that the records responsive to Item 1 of the Request contain personal identification information. *See* 65 P.S. § 67.708(b)(6). The Department denied Item 2 of the Request, asserting that no responsive records exist in its possession, custody or control. The Department also denied the Request on the basis that it was disruptive. 65 P.S. § 67.506(a)(1).

On August 18, 2016,[1] the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

[1] Pursuant to the "prison mailbox rule" outlined in *Commonwealth v. Jones*, a prisoner "bears the burden of proving that he or she in fact delivered the [appeal submission] within the appropriate time period." 700 A.2d 423, 426 (Pa. 1997). Here, the Requester's appeal is postmarked August 18 2016, and, therefore, that the appeal was filed on this date.

On September 6, 2016, the Department submitted a request for a one month extension of time to make a submission, in order to obtain an analysis from a Department handwriting expert in order to show that the instant Request is from an inmate other than the Requester. On September 7, 2016, the OOR denied the Department's request for a one month extension of time to make a submission, but granted the Department two additional days to make its submission.

On September 9, 2016, the Department submitted a position statement, reiterating its reasons for denial, along with the sworn affidavit of Lt. Edward Egenlauf, Open Records Officer for the Department. On September 16, 2016, at the request of the OOR, the Department submitted an additional position statement and sworn affidavit of Lt. Egenlauf. The Requester did not submit any additional information on appeal.

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 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 local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local 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)).)). "The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Request is not duplicative and burdensome

The Department argues that the Request is duplicative and burdensome as it seeks the same records previously requested by another inmate, who the City believes has filed the instant Request under the Requester's name. The Department further argues that, because it believes the Request was made by an individual other than the Requester, the Request was made by an anonymous requester. 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 Envtl. 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, although similar to requests filed by another individual, there is no evidence that this is a repeated Request filed by this Requester. Additionally, as the Request was submitted with the Requester's name, this cannot be an anonymous request. Because the Department has not established that this Requester sought the instant records on previous occasions, it has not demonstrated that the Request has placed an "unreasonable burden" on the Department, and Section 506(a) does not prevent the Requester from accessing the requested records.

2. The Department has demonstrated that certain records do not exist in the Department's possession, custody or control

The Department asserts that there are no sick call out reports, time cards, attendance reports, overtime pay reports, suspension reports or employee status reports responsive to Item 1 of the Request in the Department's possession, custody or control. In support of its argument, the Department submits the sworn affidavit of Lt. Edward Egenlauf, who attests that a search was conducted and no sick call out reports, time cards, attendance reports, overtime pay reports, suspension reports or employee status reports from 2004 to April of 2005 for Officers Judy Martinez and Mitchell McKeever exist. Lt. Egenlauf further attests that "Daily Attendance Reports ("DARs") are preserved for a full calendar year plus five years" and "[a]fter the retention time has elapsed, DARs are destroyed/purged. Accordingly, the information sought by [the Requester] in this portion of his [R]equest was destroyed/purged in 2011." Additionally, the Department states that no records responsive to Item 2 of the Request exist in the Department's possession, custody or control. In support, Lt. Egenlauf again attests that these records are beyond the Department's retention schedule.

Under the RTKL, a sworn affidavit or a statement made under the penalty of perjury may serve as sufficient evidentiary support 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 or that the requested records exist, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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 on the evidence provided, the Department has met its burden of proving that no records responsive to a portion of Item 1 of the Request exist in the Department's possession, custody or control. *See Fennell v. City of Phila. Police Dep't*, OOR Dkt. AP 2016-0423, 2016 PA O.O.R.D. LEXIS 506 (finding that attendance sheets, time cards and reports from February of 2005 until April of 2005 do not exist in the Department's possession, custody or control because they are beyond the Department's retention schedule).

3. Injured on duty reports are not subject to public access pursuant to Section 708(b)(5) of the RTKL

The Department also identifies the records responsive to Item 1 of the Request for "injured on duty reports" as: Form 82-5-30: medical care referral authorization; Form 82-S-58: on-duty injury form; and Form 75-628: heart and lung claim form. The Department argues that each of these records are exempt under Section 708(b)(5) of the RTKL, which exempts from disclosure:

> A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

65 P.S. § 67.708(b)(5).

In support of its position, Lt. Egenlauf attests to the following:

4. "Injured on duty reports (IOD) at issue in Item 1 of the Request contain an individual's medical history, disability status, and/or individually identifiable health information.

5. IOD reports contain forms that Mr. Robert Fennell has previously sought in various RTK[L] requests. Specifically, Mr. Fennell has previously sought the following worker's compensation and injured on duty forms which are exempt as medi[c]al records because they reflect an individual's medical history, disability status, and/or individually identifiable health information:

    a. Form 82-5-30, potentially at issue in Item 1, is an industrial medical care provider referral authorization form. This form is used when an officer is injured in the line of duty and contains accident/injury information in detail as well as previous emergency treatment by a hospital or doctor, if any. This form also has the payroll number and assignment of the officer.

    b. Form 82-S-58, potentially at issue in Item 1, is a form used when a police officer is injured on-duty. This form contains the occurrence of the injury, body parts injured, how the officer was injured, witness accounts of the occurrence of the injury, a description of the injury, and where the officer was injured.

    c. Form 75-628, potentially at issue in Item 1, is a heart and lung claim form. This form is used when an officer is injured on duty to ensure that officers injured on-duty meet the requirements of the Pennsylvania Heart and Lung Act. This form describes the injury of the officer, body parts injured, where the officer was injured, how the officer was injured, medical treatment received, and witness accounts of the injury.

Based on the evidence provided, the Department has demonstrated that the requested injured on duty reports contain individually identifiable health information. As a result, the Department has met its burden of proving that the requested reports are not subject to disclosure. *See* 65 P.S. § 67.708(a)(1); *see also Fennell v. City of Phila. Police Dep't*, OOR Dkt. AP 2016-

0423, 2016 PA O.O.R.D. LEXIS 506 (finding that injured on duty reports and Forms 82-5-30, 82-S-58 and 75-628 are exempt from disclosure under Section 708(b)(5) of the RTKL).

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 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. 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 23, 2016

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Lawrence Peterson, EK-2899;
Lt. Edward Egenlauf (via e-mail only);
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[2] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).