

security and public safety. *See* 65 P.S. §§ 67.708(b)(1)(ii)-(2). The Department further argued that some of the records would disclose an individual's medical information, 65 P.S. § 67.708(b)(5), and other records relate to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17).

On August 31, 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 September 6, 2016, the Department submitted a position statement reiterating its grounds for denial. The Department claims that public disclosure of the requested records would threaten the personal security of inmates and Department staff. In support of its position, the Department submitted the declaration made under the penalty of perjury of Harold Kertes ("Chief Kertes"), Chief of Investigations for the Department's Office of Special Investigations and Intelligence ("OSII").

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, the parties did not request a hearing; however, the OOR has the requisite 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 records are exempt from disclosure because their release would threaten the personal security of inmates and Department staff. Section 708(b)(1)(ii) of the RTKL 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. *Del. 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).

In the context of a correctional institution setting, a correctional facility need not demonstrate specific prior examples of physical harm to personal security to meet the agency’s burden of proof under 65 P.S. § 67.708(b)(1)(ii). *See, e.g., 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); *Rizzuto v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2010-0916, 2010 PA O.O.R.D. LEXIS 900 (holding that records of prison staff observations, opinions, and impressions of inmates and inmates’ behavior are exempt from disclosure). 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 denial of the Request, the Department submits the declaration of Chief Kertes, who attests that he has been employed by the Department for twenty (20) years, fifteen (15) of which he has served with OSII where he is now second in command behind Director James C. Barnacle. Chief Kertes' responsibilities with the Department include assisting with the "supervision of criminal and noncriminal investigations pertaining to allegations of staff and inmate misconduct within the Department." Chief Kertes affirms that he is aware with the Request at issue. Chief Kertes attests that "...the disclosure of the requested investigation records is likely to result in a substantial and demonstrable risk of physical harm to the inmates, officers and others present in correctional settings."

In further support of the Department's position, Chief Kertes attests as follows:

12. The Department's [PREA] Policy asserts that '[e]very report, complaint, or allegation of sexual abuse *and* sexual harassment, including third party and anonymous reports, shall be investigated promptly, thoroughly, and objectively.' (Emphasis in original)

13. Following the receipt of a complaint containing allegations of sexual assault against an inmate, Department staff is assigned to investigate the matter raised.

14. Depending upon the alleged accusations, the matter may be referred to [the Pennsylvania State Police] for investigation....

17. Public disclosure of investigational records is reasonably likely to result in retaliation by inmates and staff whose alleged misbehavior is described in a complaint. Such individuals would be reasonably likely to identify, harass, threaten or retaliate against the inmate or other person who filed the complaint in order to coerce the inmate or complainant to withdraw the complaint or change their testimony....

23. ...public access to investigation records would allow inmates and staff, whose alleged misbehavior is described in the complaint and whose conduct is being investigated, to retaliate against the allegedly aggrieved inmate, witnesses,

complainant or others to cause the withdrawal of the complaint, destruction of evidence, recantation of testimony or refusal to cooperate with investigators, which would interfere with the Department's ability to investigate the matter and secure appropriate sanctions or pursue criminal charges....

25. Public disclosure of investigation records would result in danger to the life or physical safety of the alleged aggrieved inmate, complainant, witnesses, or others in the correctional institutions.

26. Violent attacks are always a real danger in the prison context and violent retaliation will result in disclosure of investigational records which describe which individuals provided information related to the investigation.

27. Inmates that are the object of the complainant's allegations (or those allied with such inmates and staff, by virtue of friendship, familial relationship, intimate relationship or gang membership) will retaliate against individuals that provide information, which they determine to be unfavorable, to investigators.

28. In certain situations, the object of the allegations may be retaliated against because of the nature of the allegations (*i.e.* sexual abuse, threats of violence or physical assault).

29. If public disclosure of investigation records is established, inmate investigation procedures will no longer be effectively utilized.

30. Inmates in many cases would rather suffer through abusive, dangerous or otherwise adverse conditions, rather than file a complaint that will result in public exposure of personal or sensitive information.

31. A prison system that does not possess a safe and confidential means for inmates to submit complaints or for those complaints to be investigated will be unable to detect and address dangerous conditions or behavior.

32. Abusive behavior will persist and grow and trust between inmates and staff will erode.

33. The result will be a more dangerous facility for inmates and staff alike....

36. ...if an inmate alleges a PREA violation, the Department would utilize [an] Extraordinary Occurrence Report prior to the underlying investigation.

37. Extraordinary occurrences are occurrences that have a significant impact, or potential for significant impact, upon the public, staff, inmates, the operation of the Department, etc.

38. Extraordinary occurrences range in character from events involving small numbers of individuals (such as incidents of violence or sexual assault) to matters affecting large scale operations, such as a lock-down of an institution....

40. The contents of the requested record reflects [sic] the items that the Department's leadership determined are important to review and evaluate after an extraordinary occurrence for the effective management of the Department's operations.

41. The requested record contains a detailed description of the extraordinary occurrence; a report by each staff member involved in the extraordinary occurrence; the appropriate investigation and/or other responses to the occurrence, including, if any, the issuance of any disciplinary action.

42. ...the Extraordinary Occurrence Report constitutes an investigation, or investigational report, into a significant occurrence within the Department that needs to be kept confidential in order to provide a safe and secure correctional environment.

43. Public disclosure of the Extraordinary Occurrence Report and the information contained therein would result in grave security issues at correctional institutions.

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 statement] 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 demonstrated that disclosure of the requested records regarding the Department's PREA investigation would be reasonably likely to threaten the personal security of inmates and staff. *See Sanders v. Pa. Dep't of Corr.*, OOR Dkt. AP 2016-0678, 2016 PA O.O.R.D. LEXIS 747 (holding that OSII investigative records regarding a sexual assault complaint are exempt from access under Section 708(b)(1)(ii) of the RTKL); *Brooks v. Pa. Dep't of Corr.*, OOR Dkt. AP

2015-0512, 2015 PA O.O.R.D. LEXIS 496. Therefore, the Department has met its burden of proving that these records are exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

On appeal, Requester argues that the records relating to criminal conduct are “public knowledge and recorded in the courthouse,” and that he is entitled to his own PREA investigation. 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, 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>.

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

FINAL DETERMINATION ISSUED AND MAILED: September 28, 2016

/s/ Kelly C. Isenberg

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