



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>DANIEL GILLIAM,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2016-1651</b>
	:	
<b>PENNSYLVANIA BOARD OF</b>	:	
<b>PROBATION AND PAROLE,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Daniel Gilliam (“Requester”), an inmate at SCI-Benner Township, 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 parole records. The Board denied the Request, asserting that the records are confidential under the Board’s regulations. 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 any further action.

**FACTUAL BACKGROUND**

On August 4, 2016, the Request was filed, seeking “all [r]eports, [e]valuations, and [a]ssessments ... that were used in determining” the Requester’s parole eligibility, as well as a “[n]egative recommendation from the [p]rosecuting [a]ttorney.” On August 11, 2016, the Board

invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On September 12, 2016, the Board denied the Request for reports, evaluations and assessments, asserting, among other reasons, that the requested records are confidential pursuant to the Board's regulations. *See* 37 Pa. Code § 61.2. Additionally, the Board denied the Request for a negative recommendation from the prosecuting attorney, asserting that no responsive records exist, and provided the sworn affirmation of Janaki Theivakumaran, Open Records Officer for the Board, who attests to the nonexistence of the requested record.

On September 30, 2016, 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 Board to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On October 11, 2016, the Board submitted a position statement, reiterating its reasons for denial, along with the sworn affidavit of Ms. Theivakumaran. On October 24, 2016, the Requester submitted a position statement arguing that the Board improperly denied his Request.

### **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. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Board has stated that it seeks a hearing in the event that the OOR finds that it has not met its burden. The OOR has the requisite information and evidence before it to properly adjudicate the matter, and therefore denies the Board’s Request for a hearing.

The Board 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 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 *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. Parole reports, evaluations and assessments are confidential under Board regulations**

In support of its denial of the requested reports, evaluations and assessments, the Board, citing Title 37 of the Pennsylvania Code (“Code”), argues that the requested records are confidential and not subject to disclosure. Specifically, the Code, in pertinent part, states that:

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 reasonable times be open to public inspection in the office 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 *Britton v. Pa. Board of Probation and Parole*, OOR Dkt. AP 2015-0064, 2015 PA O.O.R.D. LEXIS 170; *Poindexter v. Pa. Board 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”).

In support of its position, the Board provides the sworn affidavit of Ms. Theivakumaran, who attests that responsive reports, evaluations and assessments exist in the Board’s possession, are related to the Requester being a probationer or parolee, and are records other than a statement of the reasons for actions by the Board granting or refusing a parole. Additionally, the Request, on its face, seeks records contained in the Requester’s parole file. Based on the evidence

submitted, the Board has demonstrated that the requested reports, evaluations and assessments are confidential under the Code, and are not subject to disclosure. *See* 65 P.S. § 67.305(a)(3).

**2. The Board has demonstrated that the requested negative recommendation does not exist in its possession, custody or control**

The Board asserts, and Ms. Theivakumaran attests, that no negative recommendation from the prosecuting attorney exists in the Board's possession, custody or control. Under the RTKL, 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 Board acted in bad faith or that the record exists, "the averments in [the affirmation] 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 on the evidence provided, the Board has demonstrated that the requested negative recommendation does not exist within its possession, custody or control.

**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 or petition for review 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.<sup>1</sup> This Final Determination shall be placed on the website at: <http://www.openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 7, 2016**

/s/ Kathleen A. Higgins

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APPEALS OFFICER  
KATHLEEN A. HIGGINS, ESQ.

Sent to: Daniel Gilliam, CU-1784;  
Janaki Theivakumaran (via e-mail only);  
John Talaber, Esq. (via e-mail only)

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