

1. A copy of the 2015 [SOT¹] Assessment Board's Summary of Interview, conducted upon Jimmy Lindsey
2. A copy of the 2015 Psychology Report conducted on Lindsey
3. A copy of [SOT] Program's Summary Report of Progress Report of regarding [sic] Jimmy Lindsey[.]

On September 21, 2016, the Department denied the Request, claiming that disclosure of the requested records would threaten personal security and public safety. *See* 65 P.S. §§ 67.708(b)(1)(ii)-(2). The Department further argued that the records contain personally identifying mental health information, 65 P.S. § 67.708(b)(5), and relate to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17).

On October 7, 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 October 12, 2016, the Department submitted a position statement reiterating its grounds for denial and also arguing that the appeal is legally insufficient under Section 1101 of the RTKL. 65 P.S. § 67.1101(a)(1). In support of its position, the Department submitted the declaration of Lucas Malishchak ("Mr. Malishchak"), the Mental Health Program Manager in the Department's Psychology Office. The Requester did not provide anything further 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

¹ Although the treatment program for the correctional facility is referenced as "SOP" by the Requester in the Request and his appeal submission, the section of the Department Policy cited by the Department reveals that the official name for the program is "Sexual Offenders Treatment Program," which the Department refers to as "SOT." In order to prevent confusion, the OOR will also reference the program as SOT.

“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 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 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 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)).

1. The appeal is sufficient under Section 1101(a)(1) of the RTKL

As a threshold matter, the Department argues that the instant appeal should be dismissed because the Requester failed to comply with Section 1101(a) of the RTKL, which requires appeals to “state the grounds upon which the requester asserts that the record is a public record ... and address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1); *see also Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request”). Pursuant to this section, the Commonwealth Court has held that a requester must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access.” *Saunders v. Pa. Dep’t of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012); *see also ACLU of Pa. v. City of Pittsburgh*, 116 A.3d 1189 (Pa. Commw. Ct. 2015) (holding that an appeal did not sufficient address an agency’s grounds by “argu[ing] that the RTKL places the burden of proof upon the [agency] and that the [agency] has provided no . . . information in support of its assertion that” the records were exempt).

Although the Requester did not use the standard RTKL appeal form, a review of his appeal letter reveals that the Requester lists the RTKL exemptions asserted by the Department and argues, among other things, that the personal security and public safety exemptions “do not apply here” because the records he is seeking only involve him. (Emphasis in original).

The presumption under the RTKL is that records in possession of a Commonwealth agency are public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree and the Commonwealth agency is required to disclose public records. See 65 P.S. §§ 67.302, 67.305. Even though the Requester does not specifically address each reason for denial raised by the Department, the Commonwealth Court has held that a general statement that records are public and not subject to an exemption is sufficient to meet the requirements of Section 1101(a)(1). See *Barnett v. Pa. Dep’t of Pub. Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Therefore, the appeal meets the requirements of Section 1101(a)(1).

2. The Department has demonstrated that the disclosure of the records requested in Items 1 and 3 of the Request would be reasonably likely to threaten personal security

The Department claims that the records requested in Items 1 and 3 are exempt from disclosure because their release would threaten the personal security of inmates and Department staff. The Department argues that disclosure of the SOT progress summary would violate personal security because the summary contains victim information, the number of sexual offenses the Requester has committed, as well as mental health and substance abuse information, among other things. The Department also claims that the requested records contain subjective comments by correctional facility staff that may have resulted in an adverse action against the inmate.

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., Harris v. City of Phila. Prison System*, OOR Dkt. AP 2015-1167, 2015 PA O.O.R.D. LEXIS 1028 (holding that prison inmate visitor logs are exempt from disclosure based upon the evidence provided); *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); *Rizzuto v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2010-0916, 2010 PA O.O.R.D. LEXIS 900 (records of prison staff observations, opinions, and impressions of inmates and inmates’ behavior exempt from disclosure); *Chance v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-0539, 2011 PA O.O.R.D. LEXIS 726; *Viney v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2009-0666, 2009 PA O.O.R.D. LEXIS 125; *Lancaster Newspapers, Inc. v. Lancaster County*, OOR Dkt. AP 2011-0407, 2011 PA O.O.R.D. LEXIS 652; *Blom v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2010-1075, 2010 PA O.O.R.D. LEXIS 888. 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, the Department submitted the declaration, made subject to the penalty of perjury, of Mr. Malishchak, who attests that he is aware of the request at issue. In his capacity as a Corrections Evaluation Supervisor, with the title of Mental Health Program Manager, in the Department's Psychology Office, Mr. Malishchak is responsible for the oversight of mental health and psychiatric services delivered to inmates. Mr. Malishchak attests that the SOT Assessment Board's summary of an inmate interview contains, among other things, "...the reasons put forth by the inmate as [to] why he/she should be paroled" and "subjective components by the Board" regarding various topics relating to the SOT program including the inmate's acceptance of sexual offender treatment, mental stability, his risk to re-offend, and the victim's input. With respect to the SOT progress summary, Mr. Malishchak attests that the information reported in the summary includes:

9. ...level of intensity, index of non-sexual violence, prior non-sexual violence, prior sex offenses...convictions for non-contact sex offenses, any unrelated victims, ...stranger victims, and any mail [sic] victims.

10. ...substance abuse history...evidence of deviant sexual interests, history of mental illness, evidence of attitudes supportive of sexual offending...indication of ongoing involvement in deviant sexual behavior....

12. ...inmate's risk factors with comments by the evaluator.

In further support of the Department's position, Mr. Malishchak attests as follows:

15. ...disclosure [of the requested records] would reveal the inmate's progress in his sexual offender treatment.

16. Disclosure of the attached records could subject the inmate to harm, possibly physically by other inmates, and possibly emotionally if other inmates or staff were to learn about the confidential information described above.

17. If the public could obtain sensitive information about sex offenders that are held in the state prison that could pose a reasonable likelihood of endangering the safety of our Institutions.

18. Disclosure of these records could result in staff being less likely to record sensitive information or prevent staff from being candid because of the fear that an inmate will see their subjective remarks.

19. If staff fails to accurately report information it could lead to less than candid recommendations to the Parole Board, which ultimately could place society's security in [a] worse situation if an inmate was paroled when he or she should not have been.

Mr. Malishchak further attests that comments made in the interview summary that would negatively impact the inmate's chance for parole, if disclosed, would create a substantial likelihood that the board member's personal security would be at risk. Under the RTKL, a declaration 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 declaration] 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)). Upon review of the evidence, the Department has met its burden of proving that disclosure of the requested records "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal safety of an individual," including Department staff and inmates, because of the potential for retaliation against staff members, inmates, or the Requester, given the information contained in the requested records and the prison's unique setting. *See* 65 P.S. § 67.708(a)(1).

3. The Department has established that the psychological report responsive to Item 2 of the Request contains individually identifiable mental health information

Item 2 of the Request seeks a “copy of the 2015 Psychology Report conducted on [Requester].” Section 708(b)(5) of the RTKL 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).

Mr. Malishchak attests that disclosure of the requested report “...would result in privileged communications between the inmate and mental health staff member [] be[ing] released []...” and “...would reveal mental health information...to include diagnosis, prescriptions, and treatment....” Mr. Malishchak further attests that:

8. The psychology report involves a mental health staff member’s interview of the inmate, a discussion with the instructor of the SOT program regarding the inmate’s progression or recession, and the inmate’s background to include: demographics, mental health history, the progress summary in sex offender treatment, criminal history....

Here, the Request specifically seeks a report documenting psychological counseling and psychiatric evaluations, which is expressly exempt under Section 708(b)(5) of the RTKL. Therefore, the appeal as to Item 2 of the Request is denied. *See also Blom v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2010-1075, 2010 PA O.O.R.D. LEXIS 888 (finding mental health information likely to be used by inmates to exploit other inmates to the detriment of institutional security exempt under Section 708(b)(1)).

On appeal, the Requester argues that none of the exemptions asserted by the Department apply to the Request because “the requestor [sic] is seeking information on himself.” However, 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 7, 2016

/s/ Kelly C. Isenberg

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

