

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ROBERT FENNELL ,	:	
Requester	:	
	:	
V.	:	Docket No: AP 2023-0056
	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS,	:	
Respondent	:	

FACTUAL BACKGROUND

On December 19, 2022, Robert Fennell ("Requester"), an inmate at SCI-Camp Hill, 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 a copy of the document showing which correctional officer ("by name") conducted a bar and window check at SCI-Mahanoy from August 20, 2022, through August 30, 2022, which cells were checked, and a blank copy of the bar and window checklist, as well as a copy of the duties of a CO2.

As the Requester contended that he did not receive the Department's response within five business days of the Request, on January 6, 2023,¹ the Requester filed an appeal with the Office of Open Records ("OOR"), claiming that the Request was deemed denied. *See* 65 P.S. § 67.901. 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. 65 P.S. § 67.1101(c).

On January 19, 2023, the Department submitted a position statement in response to the appeal. The Department first argued that the appeal was premature; second, it argued that it did in fact issue a final response to the Request, dated December 28, 2022, where it granted the Request in part by providing the responsive CO2 duties records, but denied the Request pursuant to 65 P.S. § 67.708(b)(1)(ii), personal security of an individual. Further, the Department also denied the Request pursuant to 65 P.S. § 67.708(b)(2), law enforcement records. In support of its position, the Department submitted the attestations of Kimberly Grant ("Grant Attestation"), Deputy Open Records Officer ("AORO"), and Major John Oliver ("Oliver Attestation"), Chief of Security for the Department.²

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Department is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. §

¹ The appeal was received by the OOR on January 9, 2023; however, it was postmarked January 6, 2023. Therefore, pursuant to the "prisoner mailbox rule," the appeal is considered filed as of January 6, 2023. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

² The Grant Attestation and the Oliver Attestation were subject to penalties under 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

67.708(a)(1). The preponderance of the evidence standard 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 not premature

First, the Department argues that the Requester's appeal is premature because the Requester initiated his appeal on December 29, 2022, and by the Department's own admission, a final response had already been mailed to the Requester on December 28, 2022. As a result, the Department argues that the Requester likely would not have received the final response before filing his appeal.

However, a final response to the Request, after extension, was issued on December 28, 2022. 65 P.S. § 67.902(b). Section 1101(a)(1) of the RTKL states that a requester may appeal to the OOR "within 15 business days of the mailing date of the agency's response or within 15 business days of a deemed denial." 65 P.S. § 67.1101(a)(1). The Requester had 15 business days from the date of the final response to appeal to the Office of Open Records, which he did in a timely fashion by filing his appeal on January 6, 2023, as previously explained above. As such, the appeal is not premature.

2. The records are exempt pursuant to Section 708(b)(1)(ii) of the RTKL

The Department argues that disclosure of the document showing which correctional officer, by name, conducted a bar and window check at SCI-Mahanoy from August 20, 2022, through August 30, 2022, which cells were checked, and a blank copy of the bar and window

checklist are exempt from public disclosure under the RTKL, pursuant to 65 P.S. § 67.708(b)(1)(ii).

Section 708(b)(1)(ii) of the RTKL exempts from public 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 Section 708(b)(1)(ii) of the RTKL 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 Commonwealth Court has held that "[b]elief alone without more, even if reasonable, does not meet this heightened standard." See 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); see also California Borough v. Rothey, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018) (holding that in order to show a reasonable likelihood, "[a]n agency must offer more than speculation or conjecture to establish the security-related exceptions under the [RTKL]"). However, 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); see also, 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).

Here, the Department argues that disclosure of these records, collectively referred to as "Cell Security Inspection Logs", could reasonably result in retaliation and violence against other inmates or staff. In support of the Department's argument, the Oliver Attestation states the

following, in part:

6. The inspection logs outline the exact parameters and locations within an inmate's cell that are to be inspected.

7. The inspection logs also identify which staff are working the individual units to conduct these inspections.

8. Finally, the inspection logs identify which cells were inspected using inmate identification numbers.

9. The information contained in the inspection logs are security sensitive in that they contain information as to who is conducting inspections and what is being inspected.

10. As to the identity of staff who are working the units, release of the inspection logs would create/show a pattern of staff work schedules for inmates to use to their benefit.

11. Staff would be less willing to conduct these inspections and complete these inspection logs if it is known that inmates can have access to the records or that the general public would have access to them.

12. Similarly, if an inmate is aware of the identity of the individual who is responsible for these inspections and when, that individual is reasonably likely to be the target of harassment, threats or physical harm[.]

13. As to the identity of what parts of the cell staff are inspecting, public disclosure of the inspection logs would provide inmates with information on where or where not to hide contraband, drugs, and/or weapons.

14. As a whole, the requested records are maintained by the Department in connection with its law enforcement function of supervising the incarceration of inmates in a safe and secure manner.

15. These security inspections are instituted, and such information is maintained, for the purpose of maintaining necessary institutional order, safety and security within the Department's correctional institutions, which of course also bears upon the safety/security of the public.

16. Public dissemination of the inspection logs would most certainly lead to inmate manipulation of that information to their advantage in any number of ways, including hiding contraband in appropriate locations within a cell.

17. Public dissemination of this information, and more specifically staff schedule patterns, would definitely lead to inmate retaliation against staff who are implicated or identified therein with whom an inmate may have an issue.

18. Such retaliation and violent potential not only bear upon the risk of safety to those inmate and staff individuals, but also pose a larger risk associated with riot and/or escape if that sort of violence is coordinated or otherwise escalates within the institution, thereby posing a risk to the public.

19. For the foregoing reasons, the disclosure of the Cell Security Inspection Logs is reasonably likely to result in a substantial and demonstrable risk of physical harm to, or the personal security of, institution staff, community members, or the inmates, as well as threaten public safety compromise the Department's public protection activities and function of maintaining order and control of inmates.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 attestation] 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).

In this instance, Major Oliver, the Chief of Security for the Department, explains how the Cell Security Inspection Logs becoming public would affect the safety of the inmates and staff in sufficient detail. Specifically, the Oliver Attestation provides the purpose of the logs, the information within the logs, and how such information could threaten public safety and impair the agency's ability to supervise the inmate population and protect inmates and staff.

Opinions of safety and security rendered by a qualified law enforcement officer in police and prison settings are more than mere speculation or conjecture to show a real risk of harm. *See Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 182 (Pa. Commw. Ct. 2013) (holding that agency demonstrated real risk of harm to the staff and the detainees when a qualified individual from the agency offered evidence, showing that public access to the security footage would potentially allow the general public and the detainees to achieve harmful objectives). Accordingly, the Department has proven that the document showing which correctional officer, by name, conducted a bar and window check at SCI-Mahanoy from August 20, 2022, through August 30, 2022, which cells were checked, and a blank copy of the bar and window checklist are exempt under Section 708(b)(1)(ii) of the RTKL.³

CONCLUSION

For the foregoing reasons, the 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. 65 P.S. § 67.1303. 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.⁴ This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: February 3, 2023

/s/ Tope L. Quadri

TOPE L. QUADRI APPEALS OFFICER

Sent via first class mail:	Robert Fennell, GW0392
Sent via portal to:	Kimberly Grant, Deputy AORO Tara Wikhian, Esq.

³ Because the responsive Cell Security Inspection Logs are exempt from disclosure under Section 708(b)(1)(ii) of the RTKL, the OOR need not reach the Department's alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

⁴ Padgett v. Pa. State Police, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).