



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

| | |
|-----------------------------------|----------------------------------|
| IN THE MATTER OF | : |
| | : |
| CRAIG JAROWECKI, | : |
| Requester | : |
| | : |
| v. | : Docket No: AP 2023-0992 |
| | : |
| PENNSYLVANIA DEPARTMENT OF | : |
| CORRECTIONS, | : |
| Respondent | : |

FACTUAL BACKGROUND

On April 18, 2023, Craig Jaroweki (“Requester”), an inmate at SCI-Coal Township, 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 records pertaining the Requester’s completion of the SOP Booster Program.¹

On April 19, 2023, the Department denied the Request in part, arguing that responsive records are exempt under the constitutional right to privacy, personal security exemption, public safety exemption, medical records exemption, criminal investigative records exemption, and

¹ The Request specifically states: “. . . I make the “Right-to-Know” request to the [Department] as to WHY the [Department] has stated that I did NOT do this SOP Booster program, when in FACT I did. . . .” The Request and the Department’s submission provides background information regarding a prior request for information regarding the Requester and the Lo-Intensity SOP group/SOP Booster Program that was denied by the Department and then untimely appealed to the OOR. Given the prior history of this specific Request as stated in submissions of the parties, the parties understand that the Requester is seeking information related to his completion of the sexual offender programming through the Department.

noncriminal investigative records exemption. *See* Pa.Const. Art. 1, §1; 65 P.S. §§ 67.708(b)(1), (b)(2), (b)(5), (b)(16), and (b)(17).

On May 1, 2023,² the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The Requester specifically states that “[t]he requested verification of completion of a program to show that I participated in it is NOT a security risk” and that this record should be released to the Requester because the record pertains to him and no one else. 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 May 15, 2023, the Department submitted a position statement reiterating its grounds for denial. The Department claims the records responsive to Request are exempt under Section 708(b)(5). In support of its position, the Department submitted the attestation of Andrew Filkosky, the Open Records Officer for the Department (“Filkosky Attestation”).

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. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the factfinder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa.*

² The appeal was received by the OOR on May 5, 2023; however, because it was postmarked May 1, 2023, pursuant to the “prisoner mailbox rule,” the appeal is considered filed on May 1, 2023. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

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 Request seeks records related to the Requester's completion of a sex offender psychological treatment program. The Department argues that any responsive record is exempt under Section 708(b)(5) of the RTKL. *See* 65 P.S. § 67.708(b)(5). 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). In support of its assertions, the Department relies upon the Filkosky Attestation which states in relevant part:

10. The Department maintains that any record reflecting an inmate's progress in an SOP program constitutes a medical record that is exempt from public access under the RTKL.
11. The Director of the Department's Office of Psychology was consulted in connection with [Requester's] RTKL Request, #0233-23, who explained/verified that the record sought here is filled out by departmental psychological staff who oversee sex offender psychological treatment for inmates incarcerated within the Department's correctional institutions, and constitutes a status update on a particular inmate's sex offender psychological treatment.
12. Therefore, any RTKL Request seeking access to a record(s) reflecting an inmate's progress in SOP programming on its face, is seeking access to medical/psychological records of that particular inmate that are exempt from public access under the RTKL.

See Filkosky Attestation, ¶¶ 10-12.³

³ Under the RTKL, a sworn 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 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)).

The Requester expressly seeks records related to a sexual offender treatment program. Such a record clearly contains the psychiatric, psychological, and medical history of an individual, treatment records, and records related to enrollment in a health care program. The OOR has repeatedly held that an individual's medical records are not subject to disclosure under the RTKL. *See Ortiz v. Pa. Dep't of Corr.*, OOR Dkt. AP 2017-2193, 2017 PA O.O.R.D. LEXIS 1819; *Wishnefsky v. Pa. Dep't of Corr.*, OOR Dkt. AP 2011-0171, 2011 PA O.O.R.D. LEXIS 172.

The Requester argues that the Department cannot prevent him from accessing his own records as they are his and should be released to him.⁴ However, a requester's identity or motivation for making a request is not relevant to determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, whether the document is accessible is based only on "whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b) [of the RTKL]." *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*).

Regarding an inmate's medical records, the Commonwealth Court has clearly held that the RTKL is not a mechanism by which an individual may access private or nonpublic information and under Section 708(b)(5) of the RTKL, "medical records are not public records." *See Williams v. Pa. Dep't of Corr.*, 2016 Pa. Commw. Unpub. LEXIS 432, *4 (Pa. Commw. Ct. 2016).⁵

⁴ The Department's denial dated April 19, 2023 states "Please note that the department policy does allow inmates to access specific staff members to discuss medical records and medical issues. Please refer to DC-ADM 003 for the procedures to make such a request or for further information."

⁵ An unreported opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414(a).

Therefore, based on the Department's submission, as well as the face of the Request, the Requester seeks treatment records that are exempt under Section 708(b)(5). *See Pa. Game Comm'n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal materials when determining whether an exemption applies).

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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 25, 2023

/s/ Catherine R. Hecker

CATHERINE R. HECKER, ESQ.
APPEALS OFFICER

Sent to: Craig Jarowecki, ME7429 (via US Mail)
Andrew Filkosky (via portal)
Tara Wikhian, Esq. (via portal)

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).