pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ALFONSO PEW,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2025-1907**
	:	
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,	:	
Respondent	:	
	:	
And	:	
	:	
WELLPATH, LLC,	:	
Direct Interest Participant	:	

FACTUAL BACKGROUND

On May 14, 2025, Alfonso Pew ("Requester"), an inmate at SCI-Phoenix, filed a request ("Request") with the Pennsylvania Department of Corrections ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., stating:

> I am seeking within 30 days from Pennsylvania Department of Corrections Contractor Employee 2025 Record:
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> 1. Dr. Anthony Michael Letizio II, Letter In File Revoking Clearance Into SCI Phoenix
>
> 2. Letter of Suspension Without Pay
>
> 3. Letter of Termination
>
> 4. Letter of Resignation

5. Letters of Reprimand

6. Notice of PREA Sexual Harassment by Medical Personnel

7. From PA D.O.C. Automated Grievance System Computer the Total Number Amount of Grievances filed on Dr. Anthony Michael Letizio II during employment at SCI Phoenix?

On June 11, 2025, after invoking a thirty-day extension to respond, *see* 65 P.S. § 67.902(b), the Department partially denied the Request, arguing that certain records do not exist in its possession, custody or control and other records are exempt under various sections of the RTKL. The Department indicated that Wellpath, a Department contractor, may possess responsive records for Item # 5 of the Request (letter of reprimand). The Department granted Item # 7 of the Request.

On June 23, 2025, the Requester filed an appeal with the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.[1] 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). Specifically, the Requester argues that the Department possesses the requested records, the records are accessible under the RTKL, and any records held by Wellpath are accessible under the RKTL because Wellpath has a contract with the Department. 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 July 21, 2025, the Department submitted a position statement, reiterating its arguments. In support, the Department submitted statements made under the penalties of unsworn falsification to authorities by Kimberly Grant, Deputy Agency Open Records Officer for the Department ("Grant Declaration") and James Barnacle, Director of the Bureau of Investigations and

[1] The Requester is an inmate at SCI Phoenix. The appeal was received by the OOR on July 9, 2025. As evidenced by the mailing envelope, the appeal was placed into the mail on June 23, 2025, and pursuant to the "prisoner mailbox rule," is considered timely filed. *See Commw. v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

Intelligence ("Barnacle Declaration"). On the same day, the OOR accepted Wellpath's Request to Participate as a direct interest participant. *See* 65 P.S. § 67.1101(c). Wellpath submitted a position statement on July 25, 2025, arguing that the records requested in Item # 5 of the Request are not accessible under the RTKL because: (1) they are not a public record and they are not directly related to a government function (65 P.S. § 67.506(d)(1)); (2) they contain written criticisms of an employee and information regarding discipline contained in a personnel file (65 P.S. § 67.708(b)(7)(vi) and 65 P.S. § 67.708(b)(7)(viii)); (3) their disclosure would violate individual privacy rights as guaranteed by the Constitution; and (4) their disclosure would be reasonably likely to result in physical harm to or the personal security of an individual (65 P.S. § 67.708(b)(1)(ii)). In support, Wellpath submitted the sworn affidavit of Stefan Cange, Vice President and Senior Associate General Counsel ("Cange Affidavit"). Among other things, the Cange Affidavit verifies Wellpath's position statement. Cange Affidavit, ¶ 3.

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 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. Certain requested records do not exist in the Department's possession

The Department partially granted the Request and argues that it does not possess responsive records for Items 1-5 of the Request. The Grant Attestation provides:[2]

> 5. In response to Mr. Pew's RTKL Request, I contacted officials at SCI-Phoenix and officials in the Bureau of Investigation and Intelligence, as well as officials in the Department's Central Office and in the Department's Health Care Administrator Office, all of whom would have access to and knowledge of any existing responsive records to Request items 1-5.
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> 6. The Department's Health Care Administrator additionally contacted his point of contact at the Department's vendor/contractor, Wellpath, to ascertain whether they possess records responsive to Mr. Pew's RTKL Request items 1-5.
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> 7. In response to those inquiries, the Departmental officials listed above confirmed that the Department does not possess any records responsive to Mr. Pew's RTKL Request items 1-5.
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> 8. Wellpath officials provided an explanatory memorandum advising that they do not possess any records responsive to Request items 1-4. As to Request Item 5, Wellpath objected to its public release under the RTKL, asserting that Wellpath personnel are not state employees for whom such information must be disclosed, and disclosures of such information in a correctional environment jeopardizes both their personal as well as institutional security.
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> 9. Therefore, after conducting a good faith search in response to Mr. Pew's RTKL Request as described above, I can state here that the Department does not possess any records responsive to Request items 1-5.

"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). An attestation by the individual who searched for responsive records is sufficient to meet an agency's burden of proving the nonexistence of a record. *Id.*; *see also Pa. Dep't of Health v. Mahon*, 283 A.3d 929, 936 (Pa. Commw. Ct. 2022) (holding that, when there is evidence that a record does not exist, "[i]t is questionable to what degree additional detail and explanation are

[2] 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. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

necessary…."); *Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a "more likely than not" inquiry); *but see Mack v. Pa. Dep't of Corr.*, No. 699 C.D. 2022, 2023 Pa. Commw. Unpub. LEXIS 393, *5 (finding that the agency failed to prove that no other records exist where the open records officer's affidavit provided only that she contacted an individual who "would likely have possess[ed] such records if they existed" and that individual reported that no records existed).

In the absence of any evidence that the Department has acted in bad faith, "the averments in the [declaration] should be accepted as true." *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). The Department contacted officials at the prison where the Requester is housed, as well the Department's Health Care Administrator at the Department's Central Office, who would likely have records if they existed. Accordingly, because custodians of potentially responsive records reported that the records do not exist, the Department has met its burden of proving that not that no records exist in its possession, custody, or control for Items 1 – 5 of the Request. *See Hodges*, 29 A.3d at 1192.

2. The records are not accessible under Section 506(d)(1) of the RTKL

The fact that responsive records are not in the possession of the Department does not end the inquiry, because under the RTKL, records in the possession of third parties may be indirectly accessible through Section 506(d) of the RTKL. *See Eiseman*, 86 A.3d at 938-39. Section 506(d)(1) of the RTKL provides that:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency…

65 P.S. § 67.506(d)(1). "Under the RTKL, to reach records outside an agency's possession the following two elements must be met: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to the performance of that function." *Eiseman*, 86 A.3d at 939 (citation omitted).

The requirement that an agency have a contract with the third party from whom records are sought under Section 506(d) is essential. *See id.* at 1223. A third party performs a governmental function on behalf of an agency where it performs "a function generally performed by that agency and is not ancillary to the agency's functions." *Id.* at 939 (citing *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1044 (Pa. 2012)). This must include the "delegation of some substantial facet of the agency's role and responsibilities, as opposed to entry into routine service agreements with independent contractors." *Wintermantel*, 45 A.3d at 1043. The "'directly relates' test … 'focuses on *what* services are performed and *how* they are performed, not *who* performs them'." *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 347 (Pa. Commw. Ct. 2013) (internal citation omitted) (emphasis in original).

In *Parsons*, the requester sought payroll lists from the third-party contractor of Allegheny County, seeking "the full name of each employee, job position/title, salary and hire date." *Parsons*,61 A.3d at 340. On appeal, the Commonwealth Court analyzed the connection between the County's government function and the contractor's execution of it and found that the contractor was fulfilling a governmental function, but that the records sought did not directly relate to that function. *Id*. at 344. The Court found that the names, dates of birth and hire dates of the contractor's employees were immaterial both to the agency contract and to the agency's execution of that contract, and therefore the requested records did not directly relate to that governmental function. *Id*. at 346.

Similarly, in *UnitedHealthcare of Pennsylvania, Inc. v. Baron*, 171 A.3d 943, 964 (Pa. Commw. Ct. 2017), the court rejected the proposition that an agency's right to review nursing home provider rates made them accessible, holding that to be accessible under Section 506(d)(1), requested information must have "a direct bearing on the third-party contractor's obligations" under the contract. *See also Giurintano v. Pa. Dep't of Gen. Servs*., 20 A.3d 613, 615 (Pa. Commw. Ct. 2011) (finding that "independent contractor agreements with interpreters who have not actually performed translation services under the Contract ... are not directly related to the Contract because the interpreters have not actually performed, and may never perform, translation services under the Contract") (emphasis removed).

Wellpath is a healthcare provider at Department facilities, and there is no dispute that Wellpath has a contract with the Department to provide healthcare services to inmates. *See* Cange Affidavit, ¶ 4. The question becomes whether the records sought in Item # 5 directly relate to the performance of a governmental function. The Cange Affidavit contains the following statements:

> 14. The personnel files of Wellpath employees are kept strictly confidential within Wellpath. Wellpath carefully guards that information, and they are protected under lock and key. Indeed, the personnel files cannot be generally accessed by Wellpath employees. Any employee granted access to the requested information is bound by obligations to keep the information confidential. Wellpath's employees have a reasonable expectation of privacy in their personnel records.
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> 15. Within Dr. Letizia's personnel file are written criticisms of an employee and information regarding discipline.
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> 16. These documents contain highly confidential information of an employee that works within a correctional facility among inmates. Additionally, it contains highly confidential information about how Wellpath manages, supervises and administers its employees that work within a correctional facility among inmates.
> 17. I believe that the release of such highly confidential information can result in manipulation of the information contained therein and affect the safety and security of individuals and the prison by, among other things, subjecting individuals to threats of violence and retaliation. This could potentially threaten or jeopardize the safety of the correctional facility and the public, as violence and retaliation could

> disrupt not only the inner functioning of a correctional facility, but the public at large.

Just as in *Parsons*, this information is related to a contractor's employees; it does not directly relate to Wellpath's *performance* of its governmental function, which is the provision of medical services to inmates. Section 506(d)(1) affords access to records in the possession of third-party contractors that are directly related to the contractor's performance of a governmental function; it does not enable requesters to audit contractors' internal personnel files. As the records sought in Item # 5 of the Request are not directly related to the performance of a governmental function, they are not accessible to the public pursuant to Section 506(d)(1) of the RTKL. *See* 65 P.S. § 67.506(d)(1). Further, Wellpath established that it does not possess responsive records for any other Item of the Request. Cange Affidavit, ¶ 13.

3. Certain records are exempt under Section 708(b)(17) of the RTKL

Item # 6 of the Request seeks "Notice of PREA Sexual Harassment by Medical Personnel." The Department argues that these records are exempt from disclosure under various sections of the RTKL, including the RTKL's non-criminal investigative records exemption, 65 P.S. § 67.708(b)(17). 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). The Department provided the Barnacle Declaration in support of its position.

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including inter alia, "[c]omplaints submitted to an agency," and "[i]nvestigative materials, notes, correspondence and reports." 65 P.S. §§ 67.708(b)(17)(i)-(ii). For this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further,

the inquiry, examination, or probe must be "conducted as part of an agency's official duties." *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth*., 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted factfinding and investigative powers. *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). Records related to a complaint filed under the Prison Rape Elimination Act ("PREA") of 2003, 34 U.S.C. Ch. 303, have been found by the OOR to be exempt under Section 708(b)(17) of the RTKL. *See Lyons v. Pa. Dep't of Corr*., OOR Dkt. AP 2023-0875, 2023 PA O.O.R.D. LEXIS 874 and *Naranjo v. Pa. Dep't of Corr*., AP 2019, 0348, 2019 PA O.O.R.D. LEXIS 338; *see also* 37 Pa. Code § 95.246 (pertaining to required investigations of sexual assaults or allegations thereof that occur within a county jail facility).

Additionally, the Barnacle Declaration demonstrates that the Department conducts noncriminal investigations in response to complaints of alleged PREA violations or misconduct that may implicate the PREA. *See* Barnacle Declaration, ¶¶ 10-13. Thus, the records identified at Item # 6 are exempt under Section 708(b)(17), based upon a preponderance of the evidence. Because the records are exempt under 65 P.S. § 67.708(b)(17), 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.

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 according to court rules as per Section 1303 of the

RTKL, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.[3] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: August 5, 2025

/s/ Josh Macel
JOSH MACEL, ESQ.
APPEALS OFFICER

Sent to: Alfonso Pew, BT7263 SCI-Phoenix (*via* U.S. Mail);
Andrew Filkosky; Kelsey E. Kennedy, Esq.; William Wickard, Esq. (*via* E-file Portal)

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