



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**HENRY NEWTON,
Requester**

v.

**PENNSYLVANIA DEPARTMENT OF
CORRECTIONS,
Respondent**

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Docket No: AP 2020-2133

INTRODUCTION

Henry Newton (“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 policies relating to the COVID-19 pandemic or other state emergencies. The Department denied the Request, arguing, among other things, that disclosure of the policies would threaten personal security and public safety. 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 Department is not required to take any further action.

FACTUAL BACKGROUND

On September 8, 2020, the Request was filed, seeking:

1. Emergency Lockdown Policy due to the pandemic including inmate showers, commissary
2. Policy on transfers during a pandemic or state emergency declaration or institutional pandemic lockdown policy at SCI-Camp Hill

On October 7, 2020, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Department denied the Request, arguing that disclosure of the policies would threaten personal security and public safety. 65 P.S. §§ 67.708(b)(1)(ii)-(2). The Department also argues that the records relate to criminal and noncriminal investigations. 65 P.S. §§ 67.708(b)(16)-(17).

On October 22, 2020, 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. 65 P.S. § 67.1101(c).

On November 2, 2020, the Department submitted a position statement, reiterating that disclosure of the requested records would jeopardize public safety or a public protection activity.¹ 65 P.S. § 67.708(b)(2). In support of its position, the Department submitted the declaration, made under the penalty of perjury, of Kenneth Goodman, Deputy of the Department's Bureau of Facility Security and Special Operations.

On November 11, 2020, the Requester submitted an unsworn position statement, arguing that the Department "keep[s] bringing inmates, staff into the prison with Covid[-]19" and that the Department is "hiding information when inmates may have come in contact with someone who has tested positive." Furthermore, the Requester asserts that the Department is violating inmates' constitutional rights by prohibiting them from regularly showering during the pandemic and by failing to provide inmates with personal protective equipment.

¹ On appeal, the Department did not further address or present evidence in support of its arguments made under Sections 708(b)(1)(ii), 708(b)(16) or 708(b)(17) of the RTKL.

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 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 necessary 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 the 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)(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)).

The Department denied access to the requested policies under Section 708(b)(2) of the RTKL, which exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, an agency must show: (1) the records at issue relate to a law enforcement or public safety activity; and (2) disclosure of the records would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). 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].” *California Borough v. Rothery*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018). The Commonwealth Court has “defined substantial and demonstrable [risk]

as actual or *real and apparent*.” *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 180 (Pa. Commw. Ct. 2019) (emphasis in original) (quoting *Carey*, 61 A.3d at 373).

In the context of a correctional institution setting, an agency need not demonstrate specific prior examples of physical harm to personal security or public safety to meet the agency’s burden of proof. *See, e.g., Wool v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2018-0447, 2018 PA O.O.R.D. LEXIS 496; *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). 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 Ocasio v. Pa. Dep’t of Corr.*, 183 A.3d 506, 2018 Pa. Commw. LEXIS 18 (Pa. Commw. Ct. 2018) (“This Court has repeatedly recognized that the nature of the prison setting requires that personal security and public safety issues be given serious consideration where a RTKL request seeks records concerning prisons”); *see also Carey*, 61 A.3d at 374 (“Personal security issues are of particular concern in a prison setting”) (citations omitted).

The Department asserts that the responsive records are “Security policies,” which were “created ... to instruct staff, inmates, and outsiders on prison rules, guidelines, security, etc.” In support of its argument that disclosure of these policies would jeopardize public safety, the Department provides the declaration of Deputy Goodman, who attests, in relevant part, as follows:

In my capacity as Deputy, I oversee the security aspects of the Department, including, supervision of special response teams and institutional security offices, and reviewed all policies and procedures as they relate to security.

I am aware of the [R]equest of [the Requester] pursuant to the [RTKL] for policies pertaining to the emergency lockdown policy due to the pandemic and policy on

transfers during a pandemic.... In my professional opinion, these policies pertain directly to the operation of Pennsylvania's State Correctional Institutions and should not be released for the following reasons.

I am familiar with the policies requested. These policies are confidential and pertain directly to the security function of operating Pennsylvania's correctional institutions.

Public disclosure of these policies would undermine the Department's efforts of maintaining institutional order and security because they involve the processes required for the orderly operation of the correctional institutions.

Dissemination of this information will jeopardize prison security by providing inmates with sensitive information regarding processes and procedures implemented ... during lockdown and inmate transfers.

The disclosure of the requested records would threaten public safety and the Department's public protection activities in maintaining safe and secure correctional institutions by allowing inmates or others to access information that will interfere with the orderly operation of a prison during a time of addressing COVID-19 concerns.

For the foregoing reasons, the disclosure of the requested policies are reasonably likely to result in having a detrimental effect on the Department's ability to maintain institutional order and security.

Under the RTKL, a statement 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)). However, conclusory statements are not sufficient for an agency to meet its burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records"); *Office of the Dist. Attorney of Phila. v.*

Bagwell, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (internal citations omitted).

The evidence presented by the Department does not identify the specific policy or policies responsive to the Request, nor does it describe their contents in any meaningful way, outside of plainly stating that the policies “pertain directly to the security function of operating Pennsylvania’s correctional institutions” and “involve the processes required for the orderly operation of the correctional institutions.” As noted by the Commonwealth Court in *Carey*, an “[a]dequate description of responsive records is crucial to demonstrate how disclosure threatens public safety.” 61 A.3d at 377. Despite the Department’s evidence, the OOR has previously concluded that information pertaining to institutional lockdowns is exempt from disclosure under Section 708(b)(2) because its release would “allow inmates to ‘manipulate that knowledge to obstruct the security measures in place during a lockdown.’” *Jones v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2016-1908, 2016 PA O.O.R.D. LEXIS 1696 (finding that information from the Department’s security policy regarding institutional lockdowns is exempt from disclosure under Section 708(b)(2) of the RTKL). Furthermore, the Request expressly seeks the Department’s emergency lockdown policy during the COVID-19 pandemic, as well as SCI-Camp Hill’s policy regarding the transfer of inmates during the pandemic or any other state emergency declaration or institutional lockdown. *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider undisputed facts contained in the appeal documents). Therefore, based upon the evidence provided, the Department has met its burden of proving that

disclosure of the requested emergency lockdown and inmate transfer policies would be reasonably likely to jeopardize the Department's public protection activity. 65 P.S. § 67.708(a)(1).

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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 20 November 2020

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: Henry Newton, HF-9632 (via U.S. Mail only);
Ralph Salvia, Esq. (via email only);
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² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).