



FINAL DETERMINATION

IN THE MATTER OF :
 :
WILLIAM HALCOVAGE, :
Requester :
 : Docket No: AP 2020-2728
v. :
 :
PENNSYLVANIA BOARD OF PARDONS, :
Respondent :

INTRODUCTION

William Halcovage (“Requester”) submitted a request (“Request”) to the Pennsylvania Board of Pardons (“Board”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the investigative report used in his hearing. The Board denied the Request, stating that files maintained by the Board are confidential under the Board’s regulations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the Board is not required to take any further action.

FACTUAL BACKGROUND

On December 3, 2020, the Request was mailed, seeking “the Investigative Report, including criminal history, used by the [Board] in reference to [the Requester’s] pardon hearing.” On December 10, 2020, the Board denied the Request, claiming that pursuant to 37 Pa. Code § 81.304, records, files, and materials maintained by the Board are confidential.

On December 29, 2020, the Requester filed an appeal with the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Board to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On January 20, 2021, the Board made a submission reiterating its grounds for denial and providing a link to the Unified Judicial System of Pennsylvania Web Portal, where the Requester's convictions can be found.¹

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.*;

¹ *See* Summary Appeal Docket numbers CP-54-SA-0001537-1995 and CP-54-SA-0001610-1996.
<https://ujportal.pacourts.us/DocketSheets/CP.aspx>.

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, and the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Board 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 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)).

Initially, the OOR notes that the Board has provided a link where some responsive records, specifically the Requester’s criminal history, may be found. Accordingly, the appeal is dismissed as moot as to those records. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub.

LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

The Board argues that under its regulations, the requested records are not publicly available. The presumption that a record in the possession of a Commonwealth agency is a public record “shall not apply if[] the record is exempt from disclosure under any other Federal or State law or regulation....” 65 P.S. § 67.305(a)(3). The relevant section of the Board’s regulations state that:

- (a) Records, documents and files maintained by the Board are confidential except as provided in subsection (b).
- (b) The following records are public: monthly calendars, minutes of public hearings, vote sheets of public hearings, completed applications and lists of actions taken by the Governor. The Board’s written recommendation to the Governor will be made public only after the Governor has acted on an application.

37 Pa. Code § 81.304. Here, the requested records are not the records enumerated in subsection (b); thus, the Request facially seeks information that is expressly confidential under the Board’s regulations. Accordingly, the investigative report is not subject to disclosure under the RTKL.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied in part** and **dismissed as moot in part**, and the Board is not required to take 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: January 21, 2021

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

Sent to: William Halcovage (via email only);
Pamela Brightbill (via email only);
Thomas Howell, Esq. (via email only)

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