



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**LOREN MCCUTCHEON,
Requester**

v.

**PENNSYLVANIA GAME COMMISSION,
Respondent**

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Docket No: AP 2021-0090

INTRODUCTION

William Moore, Esq., legal counsel for Loren McCutcheon (“Requester”), submitted a request (“Request”) to the Pennsylvania Game Commission (“Commission”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records reflecting the whereabouts of a kangaroo seized by the Commission. The Commission denied the Request, arguing that disclosure of the records would threaten personal security. 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 Commission is not required to take any further action.

FACTUAL BACKGROUND

On December 24, 2020, the Request was filed, seeking the “whereabouts of a male kangaroo seized by the ... Commission on 11/9/2018 in Haycock, Township, Bucks County, PA.”

On January 7, 2021, the Commission denied the Request, arguing that disclosure of the requested records would be reasonably likely to threaten the personal security of an individual. 65 P.S. § 67.708(b)(1)(ii).

On January 8, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Commission to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 4, 2021, the Commission submitted a position statement, reiterating the argument above, as well as the affidavit, made under the penalty of perjury, of Shawna Burkett, a Wildlife Conservation Officer (“WCO) in the Commission’s Southeast Region, who, in addition to making her own statements, verifies the accuracy of the factual statements made in the Commission’s position statement. The Commission also provided several criminal docket sheets concerning the Requester. The Requester did not submit any additional legal argument or evidence during the appeal.

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

¹ The appeal documents submitted by the Requester did not include a copy of the Commission’s final response to the Request. On January 21, 2021, the OOR issued a Deficiency Order directing the Requester to provide a copy of the Commission’s final response. On January 26, 2021, the Requester provided a copy of the Commission’s final response, perfecting the appeal. Thereafter, on January 27, 2021, the OOR established case deadlines, including a Final Determination due date of February 25, 2021.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Commission 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 Commission denied the Request pursuant to Section 708(b)(1) of the RTKL, which exempts from disclosure “[a] record the disclosure of which ... would be reasonably likely to result in 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 this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Delaware County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). “Reasonable likelihood” requires an agency to “offer more than speculation or conjecture....” *California Borough v. Rothey*, 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 v. Pa. Dep't of Corr.*, 61 A.3d 367, 373 (Pa. Commw. Ct. 2013)).

In support of its position, the Commission provides the affidavit of WCO Burkett, who attests, in relevant part, as follows:

... I have been a duly-sworn law enforcement professional for over eight years, all of which have been with the [Commission].

It is the statutory duty of the [Commission] to protect, manage, and preserve the game and wildlife of the Commonwealth and to enforce the laws of the Commonwealth relating to game and wildlife. The Pennsylvania Game and Wildlife Code authorizes WCOs to enforce the game and wildlife laws and to arrest any person who has violated any provision of the Game and Wildlife Code. Convictions for violations of the Game and Wildlife Code carry criminal penalties, including the imposition of fines, costs, and/or imprisonment.

The ... Commission confiscated [the Requester]’s kangaroo on November 9, 201[8], as it was not properly permitted under Title 58 [of] the Pennsylvania Code. The kangaroo was then placed with Peaceable Kingdom. On or about January 17, 2019, [the Requester] broke into Peaceable Kingdom and attempted to steal the kangaroo. [The Requester] and the owner of [P]eaceable [Kingdom] were involved

in an altercation. As a result of [the Requester] breaking into Peaceable Kingdom, the kangaroo was relocated to its current location.²

Under the RTKL, a sworn affidavit or 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 Commission acted in bad faith, "the averments in [the affidavit] 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)). Based upon the evidence presented, including the description of the Requester's conduct at Peaceable Kingdom and the criminal docket sheets associated therewith, the Commission has met its burden of proving that disclosure of the requested information would be reasonably likely to threaten the personal security of an individual at the kangaroo's current location. 65 P.S. § 67.708(a)(1); *see also Crocco v. Pa. Dep't of Health*, 214 A.3d 316 (Pa. Commw. Ct. 2019).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Commission 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

² The Requester did not submit evidence challenging the assertions made by WCO Burkett.

party to any appeal and should not be named as a party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 24 February 2021

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: William Moore, Esq. (via email only);
Melissa Liskey, AORO (via email only)

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