



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**TYRONE MARTIN,  
Requester**

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:

**v.**

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**Docket No: AP 2021-0197**

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**PENNSYLVANIA DEPARTMENT OF  
CORRECTIONS,  
Respondent**

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## **INTRODUCTION**

Tyrone Martin (“Requester”), an inmate at SCI-Phoenix, 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 related to COVID-19 infections. The Department denied the Request, arguing that records responsive to some Items of the Request are exempt under several provisions of the RTKL while no records responsive to other Items of the Request exist. 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 December 10, 2020, the Request was filed, seeking:

1. Copy of SCI Phoenix COVID-19 contact tracing list.
2. List of names who [were] found to test positive for COVID-19 here i[n] SCI Phoenix.
3. List of units within SCI Phoenix where inmates/staff tested positive for COVID-19.
4. If this request is denied provide copy of policy which supports denial.
5. Detail as to how SCI Phoenix is practicing contact tracing if they refuse to inform inmates if they have been in contact with infected staff.

On January 11, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the Department denied the Request, arguing that no records responsive to Item 4 exist, the information requested in Item 5 does not meet the definition of a record under the RTKL, 65 P.S. § 67.102, and that the records responsive to Items 1-3 are exempt medical information, 65 P.S. § 67.708(b)(5), are related to a noncriminal investigation, 65 P.S. § 67.708(b)(17), and their disclosure would threaten personal or public safety, 65 P.S. §§ 67.708(b)(1)-(2).

On January 28, 2021, 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 February 8, 2021, the Department submitted a position statement reiterating its grounds for denial as to Items 1-3 and claiming that no records responsive to Items 4 and 5 exist. In support of its position, the Department submitted the statements made under penalty of perjury of Andrew Filkosky, the Department's Open Records Officer, and Major Scott Woodring, Chief of Security for the Department.

On February 23, 2021, the Requester submitted a supplemental position statement and on February 24, 2021, the Department forwarded to the OOR a submission made by the Requester.

However, as the submissions were made after the record had closed and are not probative of the issue on appeal, they were not considered for purposes of this appeal. *See* 65 P.S. § 67.1102(b)(3) (“In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

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

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)). Likewise, “[t]he 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).

**1. The Department has demonstrated that no records responsive to Items 4 and 5 exist**

Items 4 and 5 seek a policy which supports the denial of the Request and details as to how SCI-Phoenix practices contact tracing. Mr. Filkosky attests that a search was conducted and that no responsive records exist in the Department’s possession.

In response to a request for records, ‘an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]’ 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court recently stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted).

Here, Mr. Filkosky affirms that he contacted the officials at SCI-Phoenix who would be in possession of a record regarding contact tracing if it existed and those officials informed him that no records exist in their possession custody and control. They further suggested that the Requester reach out to the Centers for Disease Control regarding contact tracing. Mr. Filkosky further affirms that no policy support denial exists because the denial is based upon the RTKL itself.

Under the RTKL, a sworn affidavit or statement made under the 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 evidence that the Department has acted in bad faith or that the records exist, "the averments in [the statements] 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 on the evidence provided, the Department has met its burden of proof that it does not possess records responsive to Items 4-5. *See Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

**2. A list of individuals who have tested positive for COVID-19 is an exempt medical record**

Item 2 of the Request seeks a list of names of those who have tested positive for COVID-

19. Section 708(b)(5) of the RTKL explicitly 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 ... or related information that would disclose individually identifiable health information.

65 P.S. § 67.708(b)(5). Such a list is clearly individually identifiable health information related to a diagnosis or result of a test and therefore exempt from disclosure under the RTKL. However, a contact tracing list does not reveal individually identifiable health information, as it does not reveal an evaluation, diagnosis or result of a test, but rather potential exposure to the COVID-19 virus.<sup>1</sup> As a result, the records sought in Item 1 of the Request does not fall under the exemption.

### **3. The contact tracing list is protected by the constitutional right to privacy**

Item 1 seeks a contact tracing list. Such a list would necessarily identify inmates and staff by name. The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

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<sup>1</sup> In its submission, the Department did not address the argument asserted in its denial letter that Item 3 seeks medical record information; as such, the OOR deems the argument abandoned on appeal and will not address that issue in this Final Determination.

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass’n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test) .

To determine whether the constitutional right to privacy precludes disclosure of an individual’s personal information, the OOR must apply the balancing test enunciated in *Denoncourt v. Pa. State Ethics Comm’n*, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), “weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.”

Here, the Requester has not articulated any public interest supporting the disclosure of names of inmates or staff who have been identified as close contacts of a COVID positive person, and the OOR is unable to perceive of any such interest in this case. Therefore, the Department withhold the contact tracing list.

**4. The Department has not demonstrated the unit list relates to a noncriminal investigation**

Item 3 seeks a list of units within the facility where inmates or staff have tested positive for COVID-19. The Department asserts that these lists are related to a noncriminal investigation.

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[c]omplaints submitted to an agency,” “[i]nvestigative materials, notes, correspondence and reports,” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation.” 65 P.S. §§ 67.708(b)(17)(i)-(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order 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. *See 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 fact-finding and investigative powers; however, not all agency fact-finding constitutes a noncriminal investigation. *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

Major Woodring attests that the lists “are a product of internal investigations of the Department.” However, the Department does not identify any legislatively granted fact-finding and investigative powers in regards to responding to a pandemic. In *Chawaga*, the Commonwealth Court held that Section 708(b)(17) of the RTKL did not exempt a report by the Department of Public Welfare regarding a one-time performance audit of the National Comprehensive Center for Fathers, reasoning that the report was not part of a:

“systematic or searching inquiry” or a “detailed examination.” Unlike the comprehensive, repeated, on-site inspections of nursing homes conducted in Department of Health, DPW did not make regular and repeated visits to NCCF locations. Rather, DPW conducted a one-time inquiry into NCCF’s finances by



interviewing management; reviewing the general ledger, payroll records, invoices, and client case files; inventorying the manufacturing equipment; and examining various other supporting documents.

*Chawaga*, 01 A.3d at 259. Similarly, here, the Department is engaged in a one-time response to a pandemic and has no explicit authority to investigate. The Department has not met its burden that the unit list is an exempt noncriminal investigative record.

**5. The Department has not demonstrated that disclosure of the unit list would threaten public safety**

The Department asserts that disclosure the list of units within the facility where inmates or staff have test positive for COVID-19 would threaten its public safety activity. Section 708(b)(2) of the RTKL 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, the Department must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record 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). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

Pursuant to Title 37, Chapter 91.2 of the Pennsylvania Code, the Department is tasked with operating its “institutions and programs to provide protection to the community, a safe and humane environment and opportunities for rehabilitation for the inmates” and given the responsibility to provide medical care to the inmate population throughout their lives with the Department. *See* Title 37, Chapter 93.12. Major Woodring attest that the lists are lists “pertain directly to the security function of operating Pennsylvania’s correctional institutions.” He affirms:

9. Sharing that information will increase the likelihood of inmates second guessing or resisting decisions by administrators, and is prone to be used as leverage for unreasonable demands in exchange for compliance with plans deemed necessary to support operational preparedness.

10. A large portion of inmates have serious mental health issues, weakened coping skills, and possess behaviors that are managerially challenging to control.

11. These lists shared indiscreetly can be manipulated to create disinformation, fear mongering, and will directly threaten our ability to safely manage facilities in an effective manner; ultimately causing staff, inmates, and public safety to suffer.

...

15. The authority of staff and the recognition of that authority by the inmate population is a critical element to the maintenance of the security and order of a state correctional institution.

16. Public disclosure of [this list] 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.

17. Dissemination of this information will jeopardize prison security by providing inmates with sensitive information regarding which...units have tested positive for the virus....

18. 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.

19. As a whole, the requested records are maintained by the Department in connection with its law enforcement function of supervising the incarceration of inmates in a safe and secure manner.

Generally, a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof under the RTKL. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. However, an agency cannot rely on conclusory statements to sustain its burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public

records”); *see also Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency’s conclusory affidavit was insufficient).

The Department is tasked with maintaining orderly operations and supervising the incarceration of inmates in a safe and secure manner. However, the argument that disclosing a list of units where a person has tested positive will increase the likelihood that inmates will second-guess or resist administrative decisions which may interfere with the orderly operation of the facility speculates as to inmate response to the information and does not demonstrate that inmates are actually reasonably likely to resist demonstrative decisions.

The Department has not demonstrated that disclosure of the records is reasonably likely to threaten a public protection activity therefore the list sought in Item 3 must be disclosed.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Department is required to provide the list of units where inmates/staff have tested positive for COVID-19 within thirty days. 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

**FINAL DETERMINATION ISSUED AND MAILED: March 1, 2021**

*/s/ Erin Burlew*

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