



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**ADAM SCOTT,  
Requester**

**v.**

**PENNSYLVANIA BOARD OF  
PROBATION AND PAROLE,  
Respondent**

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**Docket No.: AP 2021-1354**

### **INTRODUCTION**

Adam Scott (“Requester”), an inmate at FCI-Berlin, submitted a request (“Request”) to the Pennsylvania Board of Probation and Parole (“Board”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking copies of detainers lodged against him. The Board partially denied the Request, arguing, among other reasons, that records are confidential because they relate to a probationer or parolee. 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 Board is not required to take any further action.

### **FACTUAL BACKGROUND**

On June 16, 2021, the Request was filed, seeking “a copy of every detainer that was lodged against me or removed from 2010-2021. I am also requesting any other data or details regarding the removal/lodging of any and all detainers and their current status.” When the Board did not respond to the Request by June 23, 2021, it was deemed denied on that date. *See* 65 P.S. § 67.901.

On June 24, 2021, the Board purported to deny the Request in part, providing a responsive Administrative Action recorded on June 26, 2012, but withholding other responsive records, stating that records concerning a probationer or parolee are private, confidential, and privileged pursuant to the Board's regulations. *See* 37 Pa. Code § 61.2. The Board also argued that responsive records are related to both criminal and noncriminal investigations, *see* 65 P.S. §§ 67.708(b)(16)-(17), and are protected by the Criminal History Record Information Act, 18 Pa.C.S. §§ 9101-9183 ("CHRIA").

On July 13, 2021, the Requester filed an appeal with the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the Board to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On July 22, 2021, the Board submitted a position statement and the affidavit of David Butts, the Board's Open Records Officer.

### **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

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<sup>1</sup> The Requester's appeal was postmarked July 7, 2021, and, pursuant to the "prisoner mailbox rule," is considered timely filed. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

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, the Board requested a hearing; however, this request is respectfully denied.

The Board is a Commonwealth agency subject to the RTKL that is required to disclose public records. *See* 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. 65 P.S. § 67.305(a). 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. 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 Board argues that the requested records are protected by the Board’s confidentiality regulation, which states:

Records, reports and other written things and information, evaluations, opinions, and voice recordings in the Board’s custody or possession touching on matters

concerning a probationer or parolee are private, confidential and privileged; except that a brief statement of the reasons for actions by the Board granting or refusing a parole will at all reasonable times be open to public inspection in the offices of the Board.

37 Pa. Code § 61.2. Mr. Butts attests that the only record that constitutes “a brief statement of the reasons for actions by the Board granting or refusing a parole” has been provided to the Requester; the rest of the responsive records in the Board’s custody or possession touch upon matters concerning the Requester, a probationer or parolee.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 Board 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)). Accordingly, the Board has met its burden of proving that the records are exempt from disclosure because they are confidential under the Board’s regulations. *See* 65 P.S. § 67.305(a)(3); *Wallace v. Pa. Bd. of Probation and Parole*, OOR Dkt. AP 2017-1815, 2017 PA O.O.R.D. LEXIS 1578 (denying a request for various records in a parole file); *Jones v. Office of Open Records*, 993 A.2d 339, 342 (Pa. Commw. Ct. 2010) (noting “the broad language of this regulation”); *Davis v. Pa. Bd. of Probation and Parole*, No. 944 C.D. 2015, 2016 Pa. Commw. Unpub. LEXIS 402 (Pa. Commw. Ct. 2016).

## CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Board 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.

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

**FINAL DETERMINATION ISSUED AND MAILED: August 2, 2021**

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

Sent to: Adam Scott, 61781-066 (via regular mail);  
David Butts (via email only);  
Morgan Davis, Esq. (via email only)

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