



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

OMAR JACKSON,
Requester

v.

PENNSYLVANIA DEPARTMENT OF
CORRECTIONS,
Respondent

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Docket No: AP 2021-2318

INTRODUCTION

Omar Jackson (“Requester”), an inmate at SCI-Forest, 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 various Department policies. The Department denied the Request, arguing that the disclosure of responsive 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 28, 2021, the Request was filed, seeking certified copies of “any policy #6.3.1, Sections-8 and 13 as it relates to the program ‘H-Code.’” On September 30, 2021, the Department denied the Request, arguing that Section 8 of Policy 6.3.1 does not relate to the program code H-Code, and that disclosure of Section 13 would threaten personal security and

public safety exemptions of the RTKL, 65 P.S. §§ 67.708(b)(1)(ii) and (2). The Department also argued that the Sections are related to both criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16) and (17).

On October 22, 2021, the Requester appealed to the OOR, challenging the denial of access to Department Policy 6.3.1 as it relates to H-Code, specifically Section 13, and stating grounds for disclosure.¹ Specifically, the Requester argues that disclosure would not threaten security, and that any sensitive portions could be redacted. The Requester argues that the Department must consider the strong public interest in ensuring the absence of discrimination in the application of the Department's policy directives. With his appeal, the Requester included an attestation made under the penalty of perjury, asserting, among other things, that he is being treated unfairly and has not been told why he has been classified as a high-risk inmate and is considered an escape risk, among other designations. 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 11, 2021, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the attestation, made under the penalty of perjury by Major Scott Woodring, Chief of Security.

¹ The Requester specifies that he is only challenging the Department's denial of access to Section 13 and the parts of Policy 6.3.1 relating to H-Code. As the Requester does not challenge the Department's denial of access to Section 8, the Requester has waived any objections to the Department's argument that this Section should not be disclosed. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency's stated reasons for denying a RTKL request.”). The Requester states that he received the Department's denial letter on October 8, 2021. The Requester's appeal was postmarked on October 27, 2021, and was not received by the OOR until November 1, 2021. However, the appeal included a cash slip, reflecting that the appeal was given to a prison official for mailing on October 22, 2021. Therefore, pursuant to the “prisoner mailbox rule,” the appeal is considered timely filed. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

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, but 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)).

The Department argues that the disclosure of Sections 9 and 13 of Policy 6.3.1 would be reasonably likely to threaten personal security and public safety. 65 P.S. §§ 67.708(b)(1)(ii)-(2). Section 708(b)(1)(ii) of the RTKL exempts “[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 show this exemption applies, an agency must demonstrate: (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). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375 (Pa. Commw. Ct. 2013); *see also California Borough v. Rothey*, 185 A.3d 456 (Pa. Commw. Ct. 2018) (finding that an attestation that “were the video to be distributed publicly, a future prisoner might learn where the blind spots in the holding cell are located and use that knowledge to conceal drugs or weapons not discovered by the police” was insufficient to satisfy the “reasonable likelihood” test.); *Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

In the context of a correctional institution setting, a correctional facility need not demonstrate specific prior examples of physical harm to personal security to meet the agency's burden of proof under 65 P.S. § 67.708(b)(1)(ii). *See, e.g., Cessna v. Pa. Dep't of Corr.*, OOR Dkt. AP 2017-1248, 2017 PA O.O.R.D. LEXIS 1092 (holding that certain records related to a Restricted Release List were exempt from disclosure); *Everett v. Pa. Dep't of Corr.*, OOR Dkt. AP 2017-0405, 2017 PA O.O.R.D. LEXIS 447 (holding that certain information regarding prisoners on Restrictive Housing Units are exempt from disclosure). "Given the heightened risk associated with prisons, representations regarding perceived threats to individual [Department] personnel posed by inmates are persuasive." *Carey*, 61 A.3d at 374.

Meanwhile, 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). Regarding the adequacy of an agency's evidence, courts consider whether the attestation:

- (1) includes detailed information describing the nature of the records sought;
- (2) connects the nature of the various records to the reasonable likelihood that disclosing them would threaten public safety in the manner described; such that,
- (3) disclosure would impair [the agency's] ability to perform its public safety functions [in relation to] the alleged threatening consequence.

Carey v. Pa. Dep't of Corr., 61 A.3d 367, 376 (Pa. Commw. Ct. 2013); *Allegheny Cnty. Dist. Attorney's Office v. Wereschagin*, 257 A.3d 1280, 1298 (Commw. Ct. 2021) ("The mere fact that the affidavits discuss a possibility of harm if the ... [i]nformation is released does not make the affidavits speculative."); *Woods v. Office of Open Records*, 998 A.2d 665, 670 (Pa. Commw. Ct.

2010) (“the preponderance of evidence standard does not require absolute certainty that if redacted portions were to be disclosed, there would be a breach of public safety....”).

In support of the Department’s argument that disclosure of Section 13 of Policy 6.3.1 would be reasonably likely to threaten safety and security, Major Woodring attests, in relevant part, as follows:

7. Departmental Policy 6.3.1 (Facility Security) is a voluminous policy consisting of forty-seven (47) separate Sections that collectively and exhaustively discuss all of the various aspects of maintaining security within the Commonwealth’s correctional institutions, and as such, all are designated as confidential and not for public dissemination.

□

11. In addition to Section 13 of Departmental Policy 6.3.1, which inmate Jackson does correctly identify as containing information on “H-Code,” the only other section of that vast Policy that contains a mention of “H-Code” and is therefore arguably responsive to his request, is Section 9.

12. Section 9 of Departmental Policy 6.3.1 (Inmate Counts, Movement, and Accountability) contains only a brief mention of “H-Code,” but also discusses all aspects of Inmate Counts and Movement within the correctional institutions, including the pass system and call out list enabling inmates to travel within the institutions; inmates possessing this sort of information will identify patterns and vulnerabilities in order to effectuate riot and/or escape which will inevitably lead to violence to inmate

13. ... Section 13 of Departmental Policy 6.3.1 (Escape Risk List and Escape Packets) contains repeated mention of “H-Code,” as well as detailed discussion of the responsibilities of various Departmental officials as well as procedures that must be followed relative to creation and maintenance of the Escape Risk List and Escape Packets, under what circumstances various inmates or classes of inmates should be included in or removed from the same, necessary information to be included therein, necessary dissemination of that information and to what or whom it must be disseminated, etc.; all of which will most certainly be manipulated by inmates and jeopardize the safety and security of the prison facility and those working and residing within, as well as the surrounding communities.

14. Through my extensive experience in the security realm of prison institutions – without identifying any specific events or circumstances that could be copied – suffice it to say that inmates in a prison setting seek to gather, use and/or manipulate any information they possibly can in order to obtain things of value

for themselves, to harm others, or to effectuate escape, which is most always accompanied by violence to other inmates, staff members, or the public.

15. In terms of daily routines, topics such as inmate counts, movement within the institution, and accountability (as discussed within Section 9) constitute information ripe for manipulation by inmates seeking to plan and effectuate violence and/or escape.
16. Inmates will also use any information relative to classification and eligibility for particular housing units or other circumstances to manipulate their classification or eligibility in order to obtain release from certain units or circumstances and gain access back to general population where they will inevitably perpetrate violence upon other inmates and staff or attempt to effectuate escape, which is often why they are housed in those special units to begin with.
17. Inmates will similarly utilize any information on escape lists or other related information to manipulate and improperly remove themselves from such lists, or to avoid certain designations, in order to more easily plan and effectuate violence and/or escape.
18. In short, public dissemination of any of the confidential sections of Departmental Policy 6.3.1 (Facility Security) ... will with certainty directly lead to violence to inmates and staff within the Department's correctional institutions, and will similarly lead to an increased risk of riot and/or escape that will pose an immediate and serious risk to the public safety, and therefore none of these records should be released to the public.

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support to withhold requested records. *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 [attestation] 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 established that disclosure of Sections 9 and 13 of Policy 6.3.1 would create a “reasonable likelihood” of a “substantial and demonstrable

risk” to the security of Department staff, other inmates, and the public. *See Delaware County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). Likewise, the Department has established through Major Woodring’s detailed attestation that Sections 9 and 13 relate to the Department’s law enforcement and public safety activities, i.e., confining and preventing the escape of inmates, as well as ensuring the safety inmates, Department staff, and the public in general. Furthermore, Major Woodring describes how disclosure of Sections 9 and 13 would be reasonably likely to threaten those activities. *See Carey*, 61 A.3d at 374-75; *Bowen v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2021-0709, 2021 PA O.O.R.D. LEXIS 732 (finding that the disclosure of the entirety of Policy 6.3.1 would threaten safety and security); *Hammond v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2020-0073, 2020 PA O.O.R.D. LEXIS 2248 (finding that a particular Section of Policy 6.3.1 was exempt from disclosure). Accordingly, the Department may withhold Sections 9 and 13 of Policy 6.3.1.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Department does not need 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>.

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

FINAL DETERMINATION ISSUED AND MAILED: November 23, 2021

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

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