



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ANTHONY RUBY,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2021-2272
	:	
PENNSYLVANIA PAROLE BOARD,	:	
Respondent	:	

INTRODUCTION

Anthony Ruby (“Requester”), an inmate at SCI-Houtzdale, submitted a request (“Request”) to the Pennsylvania Parole Board (“Board”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information pertaining to the individuals involved in denying the Requester parole and all of the information used to make the decision to deny the Requester parole. The Board partially denied the Request, arguing that it withheld information that is exempt pursuant to the RTKL and the Prison and Parole Code. 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 September 22, 2021, the Request was filed, seeking the following information:

The first and last names of and titles/rank of any and all individuals in the [Board] involved in the decision to deny me parole during and/or after my Parole Hearing

of [July 12, 2021,] and/or who are responsible for the “Notice of Board Decision” of [July 26, 2021]. Included in this Request is a request for any and all of the specific information used to make the decision to deny me Parole in the “Notice of Board Decision” of [July 26, 2021], where exactly each individual piece of information came from, and the individual dates each individual piece of information was acquired.

On September 29, 2021, the Board responded to the Request in pertinent part as follows:

[The] [R]equest is granted in part and denied in part as follows.

The records for which access is granted are enclosed:

- Board Member C. James Fox and Hearing Examiner Roger Leidy participated in your parole interview and associated decision.

However, the Board has withheld information that is exempt from disclosure by law, as follows:

- You seek records that are not considered “public” pursuant to 65 Pa. C.S. § 67.305 (a)(3). Records, reports, or 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. *See* 37 Pa. Code § 61.2.
- You seek records that are not considered “public” pursuant to 65 Pa. C.S. § 67.305 (a)(1) since they are related to [the] Board’s duties in gathering criminal investigation information. *See* 65 Pa. C.S. § 67.708 (b)(16); *see also* Prisons and Parole Code, 61 Pa. C.S. § 6135 (investigation of circumstances of offense).
- You seek records that are not considered “public” pursuant to 65 Pa. C.S. § 67.305 (a)(1) since they are related [the] Board’s duties in conducting non-criminal investigation information. *See* 65 Pa. C.S. § 67.708 (b)(17); *see also* Prison and Parole Code, 61 Pa. C.S. § 6135 (Investigation of circumstances of offense).
- You seek records that are not considered “public” pursuant to 65 Pa. C.S. § 57.305 (a)(3) and Pennsylvania’s Criminal History Record Information Act (CHRIA), 18 Pa. C.S. §§ 9101-9183. CHRIA prohibits secondary dissemination of information generated by another law enforcement agency.

On October 20, 2021, the Requester appealed to the OOR, challenging the partial denial and stating reasons 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 November 4, 2021, the Board submitted a position statement, arguing that the responsive records are confidential pursuant to 37 Pa. Code § 61.2. In support of its position, the Board submitted the attestation, made subject to the penalties of 18 Pa.C.S. § 4909 relating to unsworn falsification to authorities, of Mr. 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 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 Board 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 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

In support of the Board’s position, Mr. Butts attests that the responsive records in the Board’s custody or possession touch upon matters concerning the Requester, a probationer or parolee, and none of the records constitute “a brief statement of reasons for actions by the Board granting or refusing parole.” Under the RTKL, an 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 Board acted in bad faith, “the averments in [the sworn 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 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); *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. 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 21, 2021

/s/ Kerianne Baker

APPEALS OFFICER
KERIANNE BAKER, ESQ.

¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Sent to: Anthony Ruby (via US Mail);
David Butts (via email)