



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
GEORGE WAYNE BROOKS,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2022-0609
	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS,	:	
Respondent	:	

INTRODUCTION

George Wayne Brooks (“Requester”), an inmate at SCI-Coal Township, 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 results of his own COVID-19 tests. The Department denied the Request, arguing this is personal health information and cannot be disclosed under the RTKL. 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 January 18, 2022, the Request was filed, seeking, in relevant part, “[t]he results of the COVID-19 tests done on me while I was confined at SCI-Coal Township.” On January 19, 2022, the Department invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On

February 22, 2022, the Department denied the Request, arguing that the records constitute individual medical records. *See* 65 P.S. § 67.708(b)(5).

On March 5, 2022, 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 Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 21, 2022, the Department submitted a position statement reiterating its grounds for denial. The Department claims that the requested records contain individual medical information and, thus, are exempt from the RTKL. In support of its position, the Department submitted the position statement of Joseph M. Gavazzi, Esq., assistant counsel for the Department.

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

¹ This is the only item being appealed from the original RTKL request. The other items included: all protocols issued by medical and pandemic management professionals as it related to COVID-19, documents for the screening process before correctional workers can enter the prison, policy concerning COVID-19 testing for correctional workers, policy concerning masks in enclosed areas.

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 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 requested records are exempt under Section 708(b)(5) of the RTKL, which 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, including drug tests; enrollment in a health care program

or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information. 65 P.S. § 67.708(b)(5).

Typically, unsworn statements of counsel do not constitute evidence; however, where it is clear from the face of an appeal that a request seeks exempt records, sworn evidence may not be needed. *Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record); *see also Pa. Game Comm'n v. Fennell*, 149 A.3d 101, 104 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions). In the case at hand, no competent evidence was submitted; only unsworn statements. As the specific tests sought by the Requester are clearly medical tests, and there is no factual dispute as to whether they are medical records, the requested records would fall under 708(b)(5). Attorney Gavazzi, in the unsworn position statement, cites to section 708(b)(5) of the RTKL, specifically;

“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 Pa. Stat. Ann. § 67.708, emphasis added.

Attorney Gavazzi further cites that “the OOR has concisely held that “the [medical] records of [a requester] are not subject to disclosure to any person for any reason,” pursuant to Section 708(b)(5). *Ortiz v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2017-2193, 2017 PA O.O.R.D. LEXIS 1819.”

Statement ¶5. Here, just as in Ortiz, there can be “no dispute that the requested records are ‘medical records,’” which are unquestionably exempt from disclosure under Section 708(b)(5). *Id.*

Thus, under *Fennell*, with uncontradicted and undisputed facts as to the identity and content of the records, the requested records would be expressly exempt under section 708(b)(5) of the RTKL as results of medical tests.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Department 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 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>.

FINAL DETERMINATION ISSUED AND MAILED: MARCH 30, 2022

/s/ Matthew Eisenberg

APPEALS OFFICER
MATTHEW EISENBERG, ESQ.

Sent to: George Wayne Brooks, AP-4884 (via US Mail only);
Andrew Filkosky (via email only);
Joseph M. Gavazzi, Esq. (via email only)

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