



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**DAJUAN PORTER,
Requester**

v.

**PENNSYLVANIA DEPARTMENT OF
CORRECTIONS,
Respondent**

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Docket No: AP 2019-0082

INTRODUCTION

Dajuan Porter (“Requester”), an inmate at SCI-Somerset, 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 correspondence sent from the Dauphin County District Attorney’s Office to the Department. The Department denied the Request, arguing that disclosure of the record 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 November 30, 2018, the Request was filed, seeking “... a letter or email that was sent to the Department at some time between 4/21/15 and 5/21/15 from the Dauphin County District Attorney’s Officer...” On December 4, 2018, the Department invoked a thirty-day extension to respond. 65 P.S. § 67.902(b). On December 28, 2018, the Department denied the Request,

arguing, among other things, that disclosure of the record would threaten personal security and public safety. 65 P.S. §§ 67.708(b)(1)(ii), (2).

On January 18, 2019, 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 January 29, 2019, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the declaration, made under penalty of perjury, of Shawn Kephart, the Deputy Superintendent of the Diagnostic and Classification Center at SCI-Camp Hill.

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 law also states that an appeals officer may admit into evidence testimony,

evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

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). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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).

The Department argues that the record responsive to the Request is exempt from disclosure because its release would threaten the personal security of inmates and Department staff. Section 708(b)(1)(ii) of the RTKL exempts from disclosure a record that “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show : (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Del. County v. Shaefer*, 45 A.3d 1149 (Pa. Cmmw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also 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). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *16 (Pa. Commw. Ct. 2012) (“The RTKL must be construed to maximize access to government records”). 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., Harris v. City of Phila. Prison System*, OOR Dkt. AP 2015-1167, 2015 PA O.O.R.D. LEXIS 1028 (holding that prison inmate visitor logs are exempt from disclosure based upon the evidence provided); *Mele v. Monroe County*, OOR Dkt. AP 2011-1230, 2011 PA O.O.R.D. LEXIS 1358; *Bernstein v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-1603, 2011 PA O.O.R.D. LEXIS 1295 (holding that prison inmate

policy manuals are exempt from disclosure); *Rizzuto v. Pa. Dep't of Corr.*, OOR Dkt. AP 2010-0916, 2010 PA O.O.R.D. LEXIS 900 (records of prison staff observations, opinions, and impressions of inmates and inmates' behavior exempt from disclosure); *Chance v. Pa. Dep't of Corr.*, OOR Dkt. AP 2011-0539, 2011 PA O.O.R.D. LEXIS 726; *Viney v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009-0666, 2009 PA O.O.R.D. LEXIS 125; *Lancaster Newspapers, Inc. v. Lancaster County*, OOR Dkt. AP 2011-0407, 2011 PA O.O.R.D. LEXIS 652; *Blom v. Pa. Dep't of Corr.*, OOR Dkt. AP 2010-1075, 2010 PA O.O.R.D. LEXIS 888. The OOR finds credible the professional opinion of individuals assessing the risks of security and will not substitute its judgment for that of those with far more familiarity with issues involving personal security. See *Knauss v. Unionville-Chadds Ford Sch. Dist.*, OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238.

In support of its denial, the Department submitted the declaration of Mr. Kephart, who attests as follows:

5. I have reviewed this letter, which was sent to the Diagnostic and Classification Center at SCI-Camp Hill on or about April 24, 2015, and in my professional opinion, the requested record should not be released to the public for the following reasons.
9. The letter at issue was sent to the Diagnostic and Classification Center for use in the classification of Inmate Porter.
10. As such it was part of the review and evaluation process pertinent to the assignment of Inmate Porter's custody level and programming code(s).
11. While an inmate is notified of their security level and program code assignments, an inmate is not informed of all of the information or the content of thereof, that the Department considers in establishing the security level and program assignments.
12. The requested record is maintained by the Department in connection with its official law enforcement function of supervising the incarceration of inmates, including assigning their proper security and program code classifications for appropriate housing.

13. Inmates are not permitted to review records that were used to assign custody level and program codes because such information will then be used by inmates to manipulate custody level and program code determination.

16. An inmate with knowledge of the information that formed the basis for his program code(s) or custody level is reasonably likely to manipulate future behavior or information, which will in turn cause inappropriate housing decisions to be made for that inmate.

17. Inappropriate housing and security decisions will endanger the inmate, other inmates, staff or others present in the institution or even the public, thereby compromising the Department's role as a public safety agency.

On appeal, the Requester argues that disclosure would not threaten personal or public safety because the letter is about him and he would ask for a redaction of anyone who would be at risk. However, the identity of the requester is not relevant to the determination of the public status of a record. *See DiMartino v. Pa. State Police*, No. 340 C.D. 2011, 2011 Pa. Commw. Unpub. LEXIS 787 at *18-19 (Pa. Commw. Ct. 2011); *Wheelock v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009-0997, 2009 PA O.O.R.D. LEXIS 725 (stating that the only information available under the RTKL is a "public record" available to all citizens regardless of personal status or stake in the requested information). Regardless, as Mr. Kephart has explained, it is not only the Requester's security that would be jeopardized by disclosure, but also that of other inmates and prison staff.

Under the RTKL, an affidavit 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 Department acted in bad faith, "the averments in [the declaration] 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)). Upon review of the evidence, the Department has met its burden of proving that disclosure of the requested record

“would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual,” including Department staff and inmates, because of the potential for retaliation against staff members, inmates, or the Requester, himself, given the information contained in the record and the prison’s unique setting. *See* 65 P.S. § 67.708(a)(1).

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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 8, 2019

/s/ Ryan W. Liggitt

RYAN W. LIGGITT, ESQ.
APPEALS OFFICER

Sent to: Dajuan Porter (via email only);
Andrew Filkosky (via email only)

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