



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JOHN COYLE,
Requester**

v.

**YORK COUNTY,
Respondent**

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Docket No: AP 2019-1228

INTRODUCTION

John Coyle, Esq. (“Requester”) submitted a request (“Request”) to York County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to various County Prison policies and procedures. The County partially denied the Request, arguing that disclosure of the records would likely jeopardize personal security and threaten public safety. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the County is required to take additional action as directed.

FACTUAL BACKGROUND

On June 13, 2019, the Request was filed, seeking:

2. The contract, agreement of sale, and purchase receipt for electronic control weapons in use by York County Prison corrections officers in 2018.

3. Any training materials provided to York County by the supplier of electronic control weapons in use at York County Prison in 2018.
4. All written policies governing the provision of healthcare to inmates at York County Prison in effect as of April 1, 2018.
5. All written policies governing the provision of mental health services to inmates at York County Prison in effect as of April 1, 2018.
6. All written policies governing the use of force by corrections officers at York County Prison in effect as of April 1, 2018.
7. All written policies governing confrontations of mentally unstable individuals at York County Prison in effect as of April 1, 2018.
8. All written policies governing the intake of new inmates at York County Prison in effect as of April 1, 2018.¹

Following a thirty-day extension to respond to the Request, 65 P.S. § 67.902(b), on July 18, 2019, the County partially denied the Request by providing certain records and arguing that that disclosure of the requested policies would threaten personal security and public safety, 65 P.S. §§ 67.708(b)(1)(ii)-(2), and that Item 4 is insufficiently specific, 65 P.S. § 67.703.

On July 23, 2019,² the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

¹ The Request included three additional items. However, based on the appeal documents, the Requester has limited his challenge to Items 2-8 of the Request. Accordingly, any challenge to Items 1 and 9-10 is waived. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011). Additionally, in its submission, the County references Items 2-8 as Items 1-7, because the Requester renumbered the Request Items in the appeal. However, the OOR's reference to each Item corresponds with the original Request form.

² In the appeal, the Requester granted the OOR an additional thirty days, as well as a further extension of time to issue a final determination in this matter until October 7, 2019. *See* 65 P.S. § 1101(b)(1).

On August 13, 2019,³ the County submitted a position statement reiterating its grounds for denial and also asserting that the medical policies requested contain the confidential, proprietary information of PrimeCare Health, the Prison’s healthcare and mental health services contractor. *See* 65 P.S. § 67.708(b)(11). In support of its position, the County submitted the affidavits of Clair Doll, Warden for the York County Prison, and Valerie Conway, Deputy Warden – Centralized Services for the York County Prison.

On October 1, 2019, in response to the OOR’s request for clarification, the County submitted a letter indicating that, in response to the OOR’s September 30, 2019 inquiry, it forwarded the appeal packet to PrimeCare Health and had a discussion with PrimeCare’s counsel regarding the ability to submit a request to participate in the appeal pursuant to Section 1101(c) of the RTKL, 65 P.S. § 67.1101(c).⁴ As of the date of this Final Determination, the OOR has not received a submission from PrimeCare Health. The Requester did not submit anything additional on appeal.

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,

³ On August 6, 2019, the OOR granted the County an extension of time to make a submission on appeal until August 16, 2019. *See* 65 P.S. § 1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

⁴ The OOR notes that the notice of appeal sent to the parties includes the following language, “**Agency Must Notify Third Parties:** If records affect a legal or security interest of an employee of the agency; contain confidential, proprietary or trademarked records of a person or business entity; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.** Such notice must be made by (1) providing a copy of all documents included with this letter; and (2) advising that interested persons may request to participate in this appeal (*see* 65 P.S. § 37.1101(c)).” (emphasis in original). Based on its October 1, 2019 supplemental submission, the County had not notified PrimeCare of the appeal until it received the OOR’s September 30, 2019 inquiry.

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, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local 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)).

1. The County has not proven that the disclosure of requested records would threaten personal security or public safety

The County asserts that the disclosure of the requested policies would threaten personal security and public safety. *See* 65 P.S. §§ 67.708(b)(1)(ii)-(2). The County further argues that the credible opinions of the professional individuals responsible to maintain and protect the public, prisons staff and inmates in a prison confinement setting demonstrate that the requested policies are exempt from disclosure under the RTKL.⁵

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). Under the RTKL, “reasonable likelihood” of “substantial and demonstrable risk” is necessary to trigger the personal security exception. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012).

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). In order to withhold records under Section 708(b)(2)

⁵ In its final response, the County asserted that Item 4 of the Request is insufficiently specific, 65 P.S. § 703. However, the County has not developed this issue on appeal. Accordingly, this basis for denial will not be addressed by this Final Determination.

of the RTKL, the County must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). The term, “substantial and demonstrable risk” is not defined in the RTKL, however, “reasonably likely” has been interpreted as “requiring more than speculation” *Id.* at 375. In order to show a reasonable likelihood, “[a]n agency must offer more than speculation or conjecture to establish the security-related exceptions under the [RTKL].” *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018). The Commonwealth Court has “defined substantial and demonstrable [risk] as actual or *real and apparent*.” *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 180 (Pa. Commw. Ct. 2019) (emphasis in original) (quoting *Carey*, 61 A.3d at 373); *see also Ciavaglia and the Bucks Cnty. Courier Times v. Newtown Borough*, OOR Dkt. AP 2019-0866, 2019 PA O.O.R.D. LEXIS 698. Additionally, the Commonwealth Court recognizes that the RTKL’s security-related exemptions are of particular concern in police and prison settings. *See Crocco v. Pa. Dep't of Health*, No. 1085 C.D. 2018, 2019 Pa. Commw. LEXIS 649 (Pa. Commw. Ct. 2019) (citing *Carey, supra*). The Court has upheld an OOR final determination to exempt from disclosure a record that “would, if made public, assist criminals in their efforts to achieve a criminal objection[,]” reasoning that the opinions regarding safety and security rendered by a law enforcement officer with over twenty (20) years of experience are “not mere speculation or conjecture.” *Adams v. Pa. State Police*, 51 A.3d 322, 325 (Pa. Commw. Ct. 2012).

Regarding Items 4, 5 and 7 of the Request, pertaining to what the County describes as “medical policies,” the County explains that the purpose of the policies is to control and manage individuals who are challenged with character and behavior disorders, severe mental illness and include provisions to prevent escape, abuse of medication and the personal and group safety of the

inmates and staff. The County argues that the disclosure of the records would likely result in a substantial and demonstrable risk of physical harm to the personal security of the inmates, the prison staff, and public safety. The County also argues that the disclosure of the use of force policy and records pertaining to weaponry and the related training material would likely result in a risk to personal security and public safety.

In support of the County's position, Warden Doll attests that he was employed by the Prison in 2008 as the Deputy Warden and that he became the Prison Warden on May 11, 2017.

Warden Doll further attests, the following:

My responsibilities as a Warden ... include[] maintaining the confinement (by preventing escape) of persons (inmates) legally confined at the ... Prison. These responsibilities also require ensuring the safety and wellbeing of the inmates confined at the ... County Prison as well as the safety of the prison staff including the contracted medical staff, volunteers, visitors at the prison, and the public at large.

Prison security and prison safety requires constant vigilance that recognizes the dangers and risks generated by all aspects of confinement activity. Many inmates are sophisticated enough that even the disclosure of seemingly innocuous information would be used by the inmate population to the detriment of security and safety.

The policies, procedures and training curriculums of the ... Prison, including the procedures from the contracted medical and mental health services provider, are not provided to the public, as the release of this information creates a reasonable likelihood of endangering the safety of both staff and inmates or compromises the physical security of the facility. Policies and procedures direct staff in the operation of the Prison and contain instructions as to the methods, techniques, and timeframes for carrying out assigned duties and activities. Each policy and procedure is interconnected in providing for the secure and orderly operation of the facility. The release of such information, in whole or in part, would compromise and seriously affect security operations and would allow individuals an opportunity to devise plans to counter staff responses or allow the inmates to circumvent the collection of certain information that would result in their improper classification treatment and security status thus presenting a danger to them as well as other inmates, staff and the public at large.

Some inmates are ingenious at being able to find ways to hurt themselves and others and compromise the policies and rules established for their safe confinement and rehabilitation. Other inmates are sophisticated enough to use the information obtained from medical, security and mental health procedures in order to feign illnesses that by policy and procedure require outside medical appointments. Inmate transports outside the secure prison, for any reason, is inherently less secure than prison confinement and provides increased opportunities for inmates to coordinate escape with individuals in the public or obtain contraband to introduce into the secure prison....

Request number[s] [2] and [3] would make public the amount and limitations concerning effectiveness of or electronic control weaponry. This knowledge would threaten the safety of the staff by compromising the effective use. Inmates would understand the amount of electronic control weaponry available and be able to calculate a prisoner response to counteract the available electronic control techniques, thus endangering prison staff and other inmates.

Request number [3] deals with disclosing the training materials which also, could easily compromise the effectiveness and proper use of the electronic devices. In short, providing this information to the public and to the prisoners who may be subject to the use of these instruments would threaten their effectiveness and the safety of perhaps both the user and the inmate upon which the weaponry is intended for use.

Request [4] through [8] are, likewise, part of the security policies and procedures of the ... County Prison. They are not provided to the public as a release of this information creates a reasonably likelihood of endangering safety of both staff and inmates and/or compromises the physical security of the facility.

Policies and procedures are developed to direct the staff in the safe operation of the prison and how to react to uncooperative or combative inmates. These procedures contain specific instructions as to weapons, methods, techniques, and timeframes for carrying out procedures that are necessary to provide control and safety at the prison.

The use of force policies and the weaponry [policy] requested are connected with other procedures to provide for the secure and orderly operation of the facility.

The release of information in [Items 4] through [8] would compromise and adversely affect security operations that would allow individuals the opportunity to devise plans to counter staff responses or allow inmates to circumvent the collection of certain information that would result in improper classification. This presents a danger to them as well as other inmates and staff.

As concerns the remaining requested written policies, including the request for healthcare information, there is also the very real threat posed by a public release

of this information. This is because of the propensity of the inmate population to utilize such knowledge to compromise its effectiveness.

The healthcare request[s], including those governing confrontations of mental health services and confrontations of unstable persons, have been developed by the contract healthcare provider. Their purposes is to provide effective and safe care to the inmates and its dissemination would violate the exemption provision of the [RTKL] that exempts a record that constitutes or reveals a trade secret or confidential, propriety information.

It is especially clear that releasing policies governing the management of violent or distraught individuals can compromise the effectiveness of the counter measures to deescalate the situation. The prison tactics, if known, as set forth in the request of policies, will become less effective and thus, compromise safety and security.

Finally, the [R]equest to obtain screening for a new admission includes the classification of inmates to a specific custody level. Such a procedure, if released, could easily compromise the proper management of confinement safety.

The safety of all concerned ... is, in my opinion, compromised by the release of the materials for the reasons outlined above.

In further support of the County's position, Deputy Warden Conway attests that she is familiar with the treatment programs that apply to all individuals confined in the Prison and that she is responsible for "training and the management of the inmate grievance system, which has been established to assure that the living conditions of those individuals confined...is lawful and appropriate." Regarding the risk involved in the disclosure of the requested policies and procedures, Deputy Warden Conway's attestations, which she bases on her professional training and in her capacity with the Prison, echo the assertions made by Warden Doll in his affidavit regarding security and safety.

Warden Doll and Deputy Warden Conway generally attest to how the various policies and procedures serve to maintain safety and order within the prison to ensure the safe operation of the prison and the security of all individuals involved. They also attest to how the policies and procedures are necessary for the facilitation and administration of proper physical and mental

health care, while also guarding against the misuse of the procedures for nefarious purposes. However, the County does not specifically identify a particular record that is responsive to any of the requested policies, namely, “provision of healthcare to inmates,” “provision of mental health services to inmates,” “use of force by corrections officers,” “confrontations of mentally unstable individuals” and “intake of new inmates.” Further, the County does not identify what portions of the contract or agreement of sale sought in Item 2, or the electronic control weapon training material sought in Item 3 would reveal security-related information.

There is no dispute that these types of Prison policies or procedure manuals relate to law enforcement or public safety activities performed on behalf of the County in its operation of the Prison; therefore, the first element of Section 708(b)(2) is met. However, the County must also prove that disclosure of the policies, procedures and other materials would be “reasonably likely” to threaten public safety and personal security of an individual. But, as the court concluded in *Suber-Aponte*, “reasonably likely” has been interpreted as “requiring more than speculation.” 202 A.3d at 180.

To justify an exemption under Section 708(b)(2), the agency must clearly explain how a third party could use this information to manipulate, exploit or circumvent the program. *See Sholtis & York Daily Record v. York County*, OOR Dkt. AP 2016-2054, 2017 PA O.O.R.D. LEXIS 104; *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Where the information provided by a policy is not sufficient to allow a third party to manipulate the actions of the agency and does not pose an evident threat to the safety of the public, Section 708(b)(2) does not apply. *See Wishnefsky v. Dep’t of Corr.*, OOR Dkt. AP 2015-0100, 2015 PA O.O.R.D. LEXIS 183 (holding that the release of a table of contents listing drug testing

procedures did not provide enough information for prisoners to circumvent the procedures) *cf.* *Harris v. Pa. Bd. Of Prob. and Parole*, OOR Dkt. AP 2018-1142, 2018 PA O.O.R.D. LEXIS 916 (finding that the disclosure of the Board’s Procedures governing home placement assessments for sexual offenders would threaten public safety and undermine public protection activities).

The OOR has previously concluded that portions of law enforcement policies and procedures, including prison procedures, are exempt from disclosure under the RTKL’s security exemptions found in Sections 708(b)(1) and (b)(2); however, the OOR has “distinguished portions of the withheld policy that were administrative in nature versus those that were tactical in nature.” *See Collier v. Indiana Borough*, OOR Dkt.. AP 2017-2356, 2018 PA O.O.R.D. LEXIS 229 (finding that redactions of tactical guidance in use of force continuum policy proper where agency provided evidence consisting of a description of each redacted section).

With respect to Items 2, 3 and 6, that seek records related to electronic control weapons and the use of force policy, the County neither identifies nor describes the responsive records or their contents, nor does it identify and provide a general description of portions that are administrative, as compared to the portions that are tactical in nature and may be redacted. In *Ciavaglia and the Bucks Courier Times v. Penn del Borough*, the OOR concluded that the sworn evidence presented by the Borough, including a description of the use of force policy and taser use directive and a detailed description of the redacted portions of the policy, proved that disclosure of records would jeopardize public safety or a public protection activity. OOR Dkt. AP 2019-0907, 2019 PA O.O.R.D LEXIS 910; *see also, e.g., Irwin v. Pa. State Police*, OOR Dkt. AP 2016-1634, 2016 PA O.O.R.D. LEXIS 1485 (holding that the PSP demonstrated that redactions related to suicide/mental health protocol made to the 10 page field regulation, FR- 7-3, Use of Force, were proper under Sec. 708(b)(2) of the RTKL based on sworn evidence and review of the headings of

the redacted portions of the identified record). Although the County has presented Warden Doll's and Deputy Warden Conway's affidavits, none of the evidence of record identifies or even describes the policies, procedures, manuals or portions thereof that contain security-related material. Here, the conclusory statements submitted as evidence of record do not support the County's position that the disclosure of Items 2, 3 and 6 would jeopardize personal security or public safety. While under the RTKL, an affidavit is generally competent evidence to sustain an agency's burden of proof, *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), however, "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); see also *Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL") (citations omitted); *Rothey*, 185 A.3d at 468 ("[a]n agency must offer more than speculation or conjecture to establish the security-related exceptions under the [RTKL]").

Regarding the "medical" procedures and policies sought in Items 4, 5 and 7 of the Request, again, the County does not identify the records or distinguish between general administrative portions of the policies and portions that may contain information concerning genuine safety measures, for example the transport of an inmate in need of outside medical treatment or the security controls for prescription medication. Previously, the OOR has held that health care procedures manuals and mental health policies were exempt from disclosure under the RTKL security-related exemptions. For example, in *Georigi v. Pa. Dep't of Corr.* the OOR held that an

identified section of the Pennsylvania Department of Corrections “Access to Health Care Procedure Manual” was exempt from disclosure because the release of the records would likely threaten public safety. OOR Dkt. AP 2014-1357, 2014 OA O.O.R.D. LEXIS 1065. However, unlike here, the evidence in *Georigi* consisted of a sworn affidavit from the Department’s Director of the Bureau of Health Services. *See also Wishnefsky v. Pa. Dep’t of Corr.*, No. 2319 C.D. 2012, 2013 Pa. Commw. Unpub. LEXIS 652 (Pa. Commw. Ct., Aug. 23, 2013) (affirming the OOR’s determination that the disclosure of Department policies that pertain to the treatment of inguinal hernias used by the Department’s health care contractor was likely to result in a threat to public safety was based on the sworn evidence presented by the Department’s Bureau of Health Services Chief of Clinical Services).

Notably, here, in its July 18, 2019 final response, the County stated that “[t]he healthcare policies set forth in the Inmate Handbook ... attached to this letter, explain the medical care services that are available to the inmates at the ... Prison and we believe [it] is fully responsive to your request.” However, despite this representation by the County, on appeal, it has neither addressed the provision of these records nor identified the records for the purpose of proving why any remaining portions of the Inmate Handbook should be withheld or redacted pursuant to Sections 708(b)(1) and (b)(2) of the RTKL. Again, with regard to Items 4, 5 and 7 of the Request, the County’s conclusory evidence has not satisfied its burden of proving the claimed security-related exemptions. *See* 65 P.S. § 67.708(a); *Scolforo, supra.*; *Rothey, supra.*

Regarding the request for the policy governing new inmate intake at the Prison, the County argues that the records should be denied in full because release of the records would compromise the proper confinement management and allow the new inmates to manipulate responses, thereby affecting the custody level determination. However, as compared to *Wright v. Erie County*,

wherein Erie County demonstrated, through a sworn affidavit by the prison warden, that the disclosure of the “medical, disciplinary, *housing* and *classification* records of” an identified individual were exempt from disclosure under Section 708(b)(1) and (b)(2), the Request in the present matter only seeks the more general policy documents regarding the intake of new inmates. OOR Dkt. AP 2017-1948, 2017 PA O.O.R.D. LEXIS 1832 (emphasis added); *see also Bernstein v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-1603, 2011 PA O.O.R.D. LEXIS 1295 (finding that the offender classification and assessment tool, Pennsylvania Additive Classification Tool Manual within the Department’s Policy, identified and described by the Department, was exempt from disclosure under Section 708(b)(1)(ii) of the RTKL). With regard to Item 8 of the Request, the County’s conclusory evidence has not satisfied its burden of proving the claimed security-related exemptions. *See* 65 P.S. § 67.708(a); *Scolforo, supra.*; *Rothey, supra.*

Accordingly, because the County has not presented sufficient evidence that the risk to personal security and public safety rises to the level of “more than speculation,” it has not met its burden of proving that Items 2-8 of the Request are exempt from disclosure under Sections 708(b)(1) and (b)(2) of the RTKL. *See Suber-Aponte*, 202 A.3d at 180; *see also* 65 P.S. § 67.708(a); *Scolforo, supra.*; *Rothey, supra.*

2. The County has not proven that the health care policies contain confidential, proprietary information or trade secrets

The County argues that the “healthcare policies” including the mental health services and policies to manage mentally unstable individuals, are the “product of PrimeCare Health, the contract provider of healthcare and mental services at the ... County Prison” and that the records are exempt under Section 708(b)(11) of the RKTL, 65 P.S. § 67.708(b)(11). Section 708(b)(11) of the RTKL, which exempts from disclosure “[a] record that constitutes or reveals a trade secret

or confidential proprietary information.” 65 P.S. § 67.708(b)(11). The RTKL defines these terms differently. First, a trade secret is defined as:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other person who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102. Confidential proprietary information, meanwhile, is defined as “[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” *Id.* An agency must establish that both elements of either these two-part tests are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part*, *Pa. Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.” *Id.*

On behalf of the County, Warden Doll attests that “[t]he healthcare request, including those governing mental health services and confrontations of mentally unstable persons, have been developed by the healthcare provider and ... its dissemination would violate the exemption provision of the [RTKL] that exempts a record that constitutes or reveals a trade secret or

confidential, proprietary information.” Deputy Warden Conway attests “there is a clear proprietary interest on the part of the contract healthcare provider at the ... Prison to protect[] the policies of healthcare providers that contain trade secrets or confidential, proprietary information that involves the diagnosis and treatment of inmates....”⁶

Other than general statements that the “healthcare” policies are the product of the Prison’s third party contractor and that the records contain confidential, proprietary information or trademarked material, the County has not presented evidence addressing any elements of the legal standard for the exemption. As noted above, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof under the RTKL, *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909; however, conclusory statements are not sufficient to meet an agency’s burden of proof. *See Scolforo*, 65 A.3d at 1103. Accordingly, the County has not met its burden of proving that certain records relating to the provision of healthcare in the Prison are exempt under Section 708(b)(11) of the RTKL. *See* 65 P.S. § 708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County is required to provide all responsive records within thirty days. 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 York County Court of Common Pleas. 65 P.S. § 67.1302(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.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁶ As explained above, PrimeCare Health did not request to participate in the appeal.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: October 7, 2019

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: John Coyle, Esq. (via email only);
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