



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

CHRISTINE HAINES AND THE
HERALD STANDARD,
Requester

:

:

:

:

:

Docket No.: AP 2014-1695

v.

:

:

PENNSYLVANIA DEPARTMENT OF
CORRECTIONS,
Respondent

:

:

INTRODUCTION

Christine Haines, on behalf of the *Herald Standard* (“Requester”), 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 documentation of illnesses contracted by inmates and staff members at SCI-Fayette. The Department denied the Request, asserting that responsive records are exempt under the RTKL because they relate to an ongoing noncriminal investigation. 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 Department is required to take further action as directed.

FACTUAL BACKGROUND

On September 25, 2014, the Request was filed, seeking “documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette.” The Requester specifically stated that she was “not seeking identifying information, only types of reported contracted illnesses and

the number of inmates or staff members with those illnesses.” The Requester further specified that “I am particularly interested in various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported” and added that “[i]f there is also information comparing the health at SCI-Fayette with the health at other state correctional facilities, that would also be helpful.”

On September 26, 2014, the Department invoked a thirty day extension of time to respond to the Request pursuant to 65 P.S. § 67.902. On October 16, 2014, the Department denied the Request, stating that responsive records are not public under exemptions for noncriminal investigative records (65 P.S. § 67.708(b)(17)); personal security records (65 P.S. § 67.708(b)(1)); public safety records (65 P.S. § 67.708(b)(2)); medical records (65 P.S. § 67.708(b)(5)); personal identification information (65 P.S. § 67.708(b)(6)); internal, predecisional deliberations (65 P.S. § 67.708(b)(10)(i)(A)); and notes and working papers prepared by or for a public official or agency employee for that individual’s own personal use (65 P.S. § 67.708(b)(12)). Additionally, the Department cites to the attorney-client privilege as a basis for denial.

On October 30, 2014, the Requester appealed to the OOR, challenging the denial and asserting 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 pursuant to 65 P.S. § 67.1101(c). On November 4, 2014, the Department submitted a position statement, along with the declaration of Christopher Oppman, the Department’s Director for the Bureau of Health Care Services, who attests that the requested records are part of a noncriminal investigation. On November 6, 2014, the Requester submitted a position statement, arguing that

she is seeking aggregated data, which is not subject to the majority of exemptions cited by the Department. *See* 65 P.S. § 67.708(d).

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 decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the OOR has the necessary, 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 clearly 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). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Department has not established that responsive records are exempt as noncriminal investigative records

On appeal, the Department argues that the records responsive to the Request constitute noncriminal investigative records and are therefore exempt from disclosure under Section 708(b)(17) of the RTKL. Section 708(b)(17) exempts from disclosure records of an agency “relating to a noncriminal investigation” including “[c]omplaints submitted to an agency” and “[i]nvestigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(i)-(ii). Additionally, Section 708(b)(17) exempts disclosure of “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by the court.” 65 P.S. § 67.708(b)(17)(vi)(A).

In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Department of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). To constitute “a systematic or searching inquiry” or “a detailed examination,” the investigation cannot be a “one time inquiry” and must instead involve “comprehensive, repeated,” and “regular” examinations or inspections. *Dep’t of Public Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Department of Health*, 4 A.3d at 810-11 ; *see also Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

In the instant matter, Director Oppman attests that:

4. The records requested by [the Requester] are presently part of a noncriminal investigation that was started by the Department and now includes the Department of Health....
6. The Department has generated the records that [the Requester] requests; however, those records were created as part of an investigation that the Department of Health is conducting.
7. The Department of Health has yet to issue results to their investigation, thus this matter, along with the requested records, are still part of the investigation.
8. Providing the requested records would reveal the institution and the progress of the investigation being conducted by the Department and the Department of Health.

While Director Oppman generally concludes that the Department started a noncriminal investigation, the Department has not provided any evidence that an inquiry, examination, or official probe was conducted as part of the Department’s official duties. *Department of Health*, 4 A.3d at 810-11; *Johnson*, 49 A.3d at 925. Not all agency fact-finding constitutes a “noncriminal investigation” subject to the protections of the RTKL. In *Chawaga*, the

Commonwealth Court held that a performance audit was not part of the Department of Public Welfare's legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department's public assistance services. 91 A.3d at 259. The Court noted that "[a] contrary determination of an 'official probe' would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure." *Id.* Recently, the Lackawanna County Court of Common Pleas held that an agency failed to meet its burden of proof when the records did not relate to the "official duties" of the agency and it was not established that the investigation that occurred was more than a "one-time inquiry." *Lackawanna County Government Study Commission v. The Scranton Times, L.P.*, No. 14-CV-4427, 2014 WL 5930128 (Lack. Com. Pl. Nov. 14, 2014) (citing *Chawaga*).

The Department is the Commonwealth agency charged with overseeing the confinement of inmates, but now asserts that it has undertaken a noncriminal investigation into medical illnesses of inmates and its employees at SCI-Fayette. However, the Department has failed to provide any evidence that an inquiry, examination, or official probe was conducted and how such inquiry, examination or official probe was conducted as part of the Department's official duties regarding the incarceration of inmates. The Department's one-time investigation into medical illnesses of its inmates or staff members at SCI-Fayette is ancillary to the overall function and operation of the Department.

Further, Director Oppman attests that the records are part of an investigation that is now being conducted by the Pennsylvania Department of Health. The investigative exemptions under the RTKL generally have only been extended to protect the records of the agency carrying out the investigation, and not the agency that is being investigated. *See Hayes v. Pennsylvania Department of Public Welfare*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530 ("[A]

review of case law interpreting the RTKL and its predecessor statute indicates that the investigative exemption has only been extended to protect the records of the agency carrying out an investigation”). Therefore, it is irrelevant if the Department of Health is now conducting its own investigation into the matter, even if the Department of Health’s investigation is being conducted pursuant to its official duties. Accordingly, the Department has not shown that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted by the Department regarding a noncriminal matter, and therefore has not met its burden of proving that the requested records are exempt under Section 708(b)(17) the RTKL. *See Department of Health*, 4 A.3d at 810-11.

2. The Department has not its burden of proving that responsive records are exempt as medical records

In its response, the Department asserts that responsive records are exempt from disclosure under Section 708(b)(5) of the RTKL. Section 708(b)(5) 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). The Department has not asserted what records are being withheld pursuant to this exemption, and has not provided any evidence on appeal to explain why these records fall under this exemption. *See Carey v. Pennsylvania Department of Corrections*, 61 A.3d 367 (Pa. Commw. Ct. 2013 (“[A]gencies must show the connection between the information and the grounds for protection”). Additionally, the Requester specifically states in her Request that she is not seeking any identifying information. Therefore, without any

additional evidence, the Department has not established that responsive records are exempt under Section 708(b)(5).

Additionally, there is no evidence that responsive records are protected by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). HIPAA states that “[a] covered entity may not use or disclose protected health information.” 45 C.F.R. § 164.502(a). HIPAA defines a “covered entity” as “(1) A health plan; (2) A health care clearinghouse; (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.” 45 C.F.R. § 160.103. Here, the Department has not shown that it is a covered entity under HIPAA. *See Pass v. Capital Area Transit*, OOR Dkt. AP 2014-0173, 2014 PA O.O.R.D. LEXIS 247.

Even if the Department was a covered entity under HIPAA, the information sought in this appeal is not “individually identifiable health information” as protected by HIPAA. “Individually identifiable health information” is defined as:

Information that is a subset of health information, including demographic information collected from an individual, and;

- (1) Is created or received by health care provider, health plan, employer or health care clearinghouse; and
- (2) Relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or
 - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

See 45 C.F.R. § 160.103. The enactment of HIPAA was to address concerns about the confidentiality of patients' individually identifiable health information. *Opis Mgmt. Res. LLC v.*

Sec’y Fla. Agency for Health Care Admin., 713 F.3d 1291, 1294-95 (11th Cir. 2013); *S.C. Med. Ass’n v. Thompson*, 327 F.3d 346, 348 (4th Cir. 2003); *Citizens for Health v. Leavitt*, 428 F.3d 167, 172-74 (3d Cir. 2005) (detailing the history of the Privacy Rule’s promulgation and explaining its requirements). In doing so, the Secretary of Health and Human Services promulgated privacy regulations addressing, among other things, individuals’ rights to individually identifiable health information. *S.C. Med Ass’n*, 327 F.3d at 349.

The Department has not provided any evidence that HIPPA would apply to the requested records. Because the Department has not shown that it is a covered entity or provided any evidence that HIPPA would apply, particularly in light of the fact that the Request states that the Requester is not seeking identifying information, the OOR finds that the Department has not established that the Request seeks exempt medical records.

3. The Department has not met its burden of proving that any other exemption applies

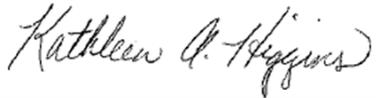
In its response, the Department generally asserts that the requested records are subject to various other exemptions under the RTKL. On appeal, however, the Department failed to provide any evidentiary support or explanation concerning these exemptions, relying solely upon its argument that the records are exempt under 65 P.S. § 67.708(b)(17). Therefore, the Department has not met its burden of establishing that any other exemptions apply. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted** and the Department is required to provide all responsive records to the Requester within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing 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 according to court rules as per section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: December 1, 2014



APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Christine Haines (via e-mail only);
Andrew Filkosky (via e-mail only);
Chase Defelice, Esq. (via e-mail only)