



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**DON HOPEY AND THE
PITTSBURGH POST-GAZETTE,
Requester**

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:

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v.

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Docket No.: AP 2014-1739

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**PENNSYLVANIA DEPARTMENT OF
CORRECTIONS,
Respondent**

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INTRODUCTION

Don Hopey, a reporter for the *Pittsburgh Post-Gazette* (“Requester”), submitted a request (“Request”) to the Pennsylvania Department of Corrections (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101j *et seq.*, seeking records relating to environmental and health conditions at SCI-Fayette. The Department denied the Request, arguing, among other reasons, that certain records are exempt from disclosure because they relate to a noncriminal investigation or reflect the Department’s internal, predecisional deliberations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part** and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On September 10, 2014, the Request was filed, seeking:

all information, documents, memos, emails, records and communications mentioning or pertaining to the coal waste and coal ash landfill currently owned by the Canestrone Contracting Co., and its actual or possible impact on air, water, and land pollution linked in any way to the health of prisoners and corrections officers at SCI Fayette, near LaBelle in Fayette County.

This request seeks any and all records, reports, investigations, and correspondence in any form on the coal disposal site and its impacts, or actual or possible impacts, on prisoner health and SCI Fayette employee health, from the present and throughout its history, dating to its construction in 2002 and its opening in September 2003.

Also requested are any and all information, documents, and communications related to any environmental assessment or analysis done on the site prior to construction of the SCI Fayette facility by the [Department], any state agency, or any private company or contractor hired by the [Department] or any state agency to perform such an assessment or analysis.

On September 16, 2014, the Department obtained 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, among other reasons, that the requested records are not subject to public disclosure because they relate to the Department's internal, predecisional deliberations, *see* 65 P.S. § 67.708(b)(10)(i)(A),¹ or relate to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17).

On November 6, 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 December 3, 2014, the Department submitted a position statement, along with the declarations of Christopher Oppman, the Director of the Department's Bureau of Health Care Services, Marcel Tassin, P.E., the Director of the Department's Bureau of Operations, and Ronald Hostovich, Correctional Facility Maintenance Manager III for SCI-

¹ The Department also cited the deliberative process privilege as a basis for denying access to certain records. Because "[t]he predecisional deliberative exception set forth in Section 708(b)(10)(i) codifies the deliberative process privilege," there is no need to separately address the deliberative process privilege. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013). All references to Section 708(b)(10) in this final order should be read to include the deliberative process privilege.

Fayette. In its submissions, the Department argues that it does not possess any records of environmental assessments conducted prior to the construction of SCI-Fayette, nor does it possess any records regarding the medical conditions of Department employees at SCI-Fayette.² With respect to records relating to the Canestrone Contracting Co. coal waste and coal ash landfill and its impact on the health of SCI-Fayette inmates, the Department states that these records are exempt from disclosure because, among other reasons, they relate to a noncriminal investigation, *see* 65 P.S. § 67.708(b)(17), or relate to the Department’s internal, predecisional deliberations. *See* 65 P.S. § 67.708(b)(10)(i)(A).

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).

² While the Department did not raise the nonexistence of records in its denial, the Department is not precluded from raising new grounds for denial on appeal. *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

Here, neither party requested a hearing, and 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 records regarding the Canestrале Contracting Co. coal waste and coal ash landfill and its impact on the health of SCI-Fayette inmates are exempt from disclosure

The Request seeks, among other records, records regarding the Canestrале Contracting Co. coal waste and coal ash landfill and its impact on the health of SCI-Fayette inmates. The Department argues that these records are exempt from disclosure because they relate to a

noncriminal investigation, *see* 65 P.S. § 67.708(b)(17), or reflect to the Department’s internal, predecisional deliberations. *See* 65 P.S. § 67.708(b)(10)(i)(A).

Section 708(b)(17) of the RTKL 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 Pa. Dep’t 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. *Pa. 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.” *Dep’t of Health*, 4 A.3d at 810-11; *see also Johnson v. Pa. Convention Center Authority*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

In his declaration, Director Oppman states that the Human Rights Coalition alleged that there is an increased incidence of cancer deaths among SCI-Fayette inmates, especially lung

cancer, and that these deaths are based on the proximity of SCI-Fayette to the Canestrone Contracting Co. coal waste and coal ash landfill. Director Oppman further states that based on these allegations, the Department conducted an investigation to determine whether there was a higher incidence of inmate cancer deaths at SCI-Fayette than at other State Correctional Institutions. Director Oppman goes on to state that the results of this investigation were provided to the Pennsylvania Department of Health (“Department of Health”) for its own investigation. 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 Pennsylvania 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 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 inmates at SCI-Fayette is ancillary to the overall function and operation of the Department.

Further, Director Oppman states that these records are part of an investigation that is now being conducted by the 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. *See Hayes v. Pa. Dep't 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.

In addition, the Department claims that records regarding the Canestrone Contracting Co. coal ash and coal waste landfill and its impact on inmate health are protected from disclosure as records of the Department's internal, predecisional deliberations. *See* 65 P.S. §

67.708(b)(10)(i)(A). In order to meet its burden of proof, the Department must demonstrate that: 1) the deliberations reflected are “internal” to the agency; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *PHFA v. Sansoni*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375.

In his declaration, without identifying any specific records, Director Oppman generally states that these records reflect the Department’s predecisional deliberations regarding its response to the allegations regarding SCI-Fayette inmate health; however, Director Oppman’s declaration is conclusory in nature and fails to establish that these records are limited to Department personnel or that these records do not contain factual information that is not protected from disclosure. *See McGowan v. Pa. Dep’t of Environ. Prot.*, No. 161 C.D. 2014, 2014 Pa. Commw. Ct. LEXIS (Pa. Commw. Ct. Oct. 28, 2014). The Commonwealth Court has held that an agency cannot rely on conclusory affidavits to meet its burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013). Based on the foregoing, the Department has not met its burden of proving that records regarding the Canestrале Contracting Co. coal ash and coal waste landfill and its impact on inmate health are protected from disclosure as records of the Department’s internal, predecisional deliberations.

2. The Department has established that no other requested records exist

The Request also seeks records regarding the Canestrале Contracting Co. coal waste and coal ash landfill and its impact on the health of SCI-Fayette personnel, as well as records of environmental assessments or analyses done prior to the construction of SCI-Fayette. On appeal,

the Department argues that it does not possess any medical records of SCI-Fayette personnel and that no records of any investigations into the health of SCI-Fayette personnel exist within the Department's possession, custody or control. The Department affirms that no records of environmental assessments or analyses done prior to the construction of SCI-Fayette exist within the Department's possession, custody or control. In support of these assertions, Director Oppman states that the Department does not have access to employee medical records to conduct any investigation, and, therefore, no records exist within the Department's custody, possession or control. In addition, Director Tassin and Facilities Manager Hostovich state that, if records of environmental assessments or analyses existed in the Department's custody, control or possession, these records would be in their possession and that, after a reasonable search, no records were located within the Department's custody, possession or control.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *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). Based on the materials provided, the Department has met its burden of proof that no responsive records exist within the Department's possession, custody or control.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part** and the Department is required to provide the Requester with all responsive records regarding the Canestrале Contracting Co. coal waste and coal ash landfill and its impact on the health of SCI-Fayette inmates 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 8, 2014

A handwritten signature in black ink, appearing to read 'C. Brown', with a large, sweeping flourish extending to the right.

CHARLES REES BROWN, ESQ.
CHIEF COUNSEL

Sent to: Frederick Frank, Esq. (via e-mail only);
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