IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tyrone P. James, Petitioner	:	
v.	:	No. 1139 C.D. 2011
	:	Submitted: January 20, 2012
Office of Attorney General, David Sumner, Right-to-Know Appeal Officer, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: April 5, 2012

Tyrone P. James (James), *pro se*, petitions for review of the May 16, 2011, Final Determination of David Sumner, the Right-to-Know Appeals Officer (Appeals Officer) of the Office of the Attorney General (OAG). The Appeals Officer denied James's appeal from the decision of the OAG's Right-to-Know Officer granting in part and denying in part James's records request relating to former agent, James H. Morgan (Morgan). We affirm the Appeals Officer's Final Determination in part, and we vacate and remand it in part.[1]

[1] Section 503 of the Right-to-Know Law (Law), Act of February 14, 2008, P.L. 6, 65 P.S. §67.503, provides that the Attorney General, instead of the Office of Open Records, shall designate an appeals officer to hear appeals from the OAG's denial of access to requested records filed under the Law. Section 1101(b) of the Law, 65 P.S. §67.1101(b), provides that an appeals officer shall make a final determination that shall be mailed to the requester and the agency within thirty days from receipt of the appeal. Moreover, Section 1303(b) of the Law, 65 P.S. §67.1303(b), provides that the record before a court shall consist of the request, the agency response, the appeal, the hearing transcript, if any, and the appeals officer's final written determination. *See Bowling v.*
(Footnote continued on next page…)

James, who is currently incarcerated at the State Correctional Institution at Coal Township, filed a "Standard Right-to-Know Request Form" with the OAG on March 3, 2011, pursuant to the Right-to-Know Law (Law), Act of February 14, 2008, P.L. 6, 65 Pa. C.S. §§67.101—67.3104. By way of this form, James requested the following records:

> All reports, documents, investigation complaints letter, IAD Reports, personal files, complaints concerning alleged misconduct; psychological or psychiatric evaluation; employment records, Work History Records, retirement Records, arrest Records, or other writing relating To: Agent James H. Morgan, (Former Bureau of Narcotic Investigation and drug control, Pennsylvania Attorney General Office, and the York City Police Department [sic].

(Certified Record, (C.R.), Document #1.)

On March 18, 2011, the Right-to-Know Officer acknowledged receipt of James's right-to-know request and further stated that James's "request for access requires the retrieval of a record stored in a remote location and a legal review is necessary to determine whether the records requested are subject to access under this [Law]." (C.R., Document #2.) The Right-to-Know Officer thus informed James that, pursuant to the Law, the Attorney General would need an additional thirty days, or until April 15, 2011, to provide a final written response to James's request.

(continued…)

Office of Open Records, 990 A.2d 813, 820 (Pa. Cmwlth. 2010), *appeal granted*, ___ Pa. ___, 15 A.3d 427 (2011). We note that the Law does not expressly prohibit the court's supplementation of the record. *Bowling*, 990 A.2d at 820.

On April 14, 2011, the Right-to-Know Officer granted James‟s request in part and denied it in part. Regarding James‟s request for work history records, the Right-to-Know Officer stated that the OAG would provide James with Morgan‟s "Personal History card," outlining his dates of employment and salary, with limited redactions pursuant to Section 708(b)(6)(i)(A) and (C) of the Law, 65 P.S. §67.708(b)(6)(i)(A) and (C).[2] (C.R., Document #3, at 1-2.) The Right-to-Know Officer also granted James‟s request with respect to Morgan‟s employment records, specifically agreeing to provide James with copies of letters from the OAG to Morgan "approving his request for outside employment positions . . . with the employer name/location of supplemental employment redacted" pursuant to section

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[2] Section 708(b)(6)(i) provides:

> (b) Except as provided in subsections (c) and (d) [relating to financial records and aggregated data, respectively, both of which are subject to limited redaction], the following are exempt from access by a requester under this act:
>
> . . .
>
> (6)(i) The following personal identification information:
>
> (A) A record containing all or part of a person‟s Social Security number, driver‟s license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.
>
> . . .
>
> (C) The home address of a law enforcement officer or judge.

65 P.S. §67.708(b)(6)(i)(A) and (C).

708(b)(1)(ii) of the Law[3] and with Morgan's home address redacted pursuant to section 708(b)(6)(i)(C). (C.R., Document #3, at 2.) As well, the Right-to-Know Officer granted James's request for Morgan's retirement records by agreeing to provide James with a copy of a "State Employees' Retirement System (SERS) Agency Notification Letter," also containing redactions pursuant to section 708(b)(6)(i)(A) of the Law.

The Right-to-Know Officer denied James's request as "overly broad" pursuant to Section 703 of the Law, 65 P.S. §67.703,[4] to the extent that James

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[3] Section 708(b)(1)(ii) provides:

> (b) Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:
>
> (1) A record, the disclosure of which:
>
> . . .
>
> (ii) 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).

[4] Section 703 of the Law provides in part that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested. . . ." 65 P.S. §67.703. Section 901 of the Law, 65 P.S. §67.901, specifically provides:

> Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.

requested only "reports, documents" and any "other writing." (C.R., Document #3, at 1.) Finally, the Right-to-Know Officer stated that, "[i]n response to ‚investigation complaints letter, IAD Reports, personal files, complaints concerning alleged misconduct, psychological or psychiatric evaluations‟ and ‚arrest records,‟ be advised that responsive records do not exist and we have no obligation to create any such records," pursuant to Section 705 of the Law, 65 P.S. §67.705.[5] (C.R., Document #3, at 3.)

On April 20, 2011, James appealed the Right-to-Know Officer‟s decision to the Appeals Officer. On May 16, 2011, the Appeals Officer issued his Final Determination denying James‟s appeal. James then filed a petition for review with this court.

On appeal here,[6] we first consider James‟s "challenge" to the Appeals Officer‟s decision upholding the OAG‟s redaction of information contained in the copies of Morgan‟s records that the OAG supplied to James.

Section 102 of the Law, 65 P.S. §67.102, defines a "[r]ecord" as

> [i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the

[5] Section 705 of the Law provides: "When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. §67.705.

[6] Our standard of review is independent review of the Appeals Officer‟s order, which allows us to substitute our own findings of fact, and our scope of review is plenary. *See Bowling,* 990 A.2d at 820.

> agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.
>
> Moreover, our court has stated:
>
> Section 305 of the Law, 65 P.S. §67.305(a), provides:
>
> If the information requested is indeed a record and is in the possession of a Commonwealth agency, it must be made accessible for inspection and duplication unless the record is protected by a privilege, exempt under Section 708 of the [Law], or exempt from disclosure under other law or court order.

Moore v. Office of Open Records, 992 A.2d 907, 908 (Pa. Cmwlth. 2010) (citing 65 P.S. §67.305(a)).

Although James purports to contest the OAG‟s redactions of information from the records it supplied him, James paradoxically admits that he is not seeking Morgan‟s personal information, (James‟s Br. at 14), *which is the precise information the OAG contends it redacted.* Instead, under the guise of complaining about the redactions, James asserts that what he is really seeking are the OAG‟s records concerning any discipline, demotion or discharge of Morgan, which James characterizes as "public information" the OAG wrongly denied him. (*Id.*)[7]

In this regard, James asserts that the Appeals Officer improperly upheld the OAG‟s denial of his request for "[a]ll reports, documents" and "other writing"

[7] James has therefore waived any challenge he may otherwise have had to the OAG‟s redaction of Morgan‟s personal information from the documents it supplied him. *See generally* Pa. R.A.P. 2119.

records relating to Morgan as overbroad. We disagree. Our decision in *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Cmwlth. 2010), provides guidance on this issue. There, an individual submitted a right-to-know request form, asking the Pennsylvania State Police (PSP) to provide

> [a]ny and all records, files, or manual(s), communication(s) of any kind, that explain, instruct, and or require officer(s) and Trooper(s) to follow when stopping a Motor Vehicle, pertaining to subsequent search(es) of that Vehicle, and the seizures of any property, reason(s) therefore (sic) taking property.

(*Id.* at 515-16) (emphasis omitted). We held that the first clause of the request, beginning "[a]ny and all records, files, or manual(s), communication(s) of any kind" was overly broad, *id.* at 517, although the request for manual(s) relating to vehicle stops, searches and seizures was sufficiently specific to require the PSP to respond. *Id.* Similarly, here, to the extent that James's request could be construed to apply to all paperwork that *merely mentions* Morgan, we hold that the portion of James's request specifically referring to "[a]ll records, documents" and "other writing[s] . . . relating [t]o" Morgan is insufficiently specific to enable the OAG to ascertain a response.

James also argues that the Appeals Officer erred in upholding the OAG's denial of his request for certain documents on grounds that those documents do not exist.[8] In his May 16, 2011, letter recounting the response of the Right-to-Know Officer, the Appeals Officer specifically informed James:

[8] To the extent that James bases his argument on the "Affidavit of Laura Jensen," we note that this court refused to supplement the record with such affidavit by order dated October 19, 2011.

> Prior to [Chief Deputy Attorney General Robert A. Mulle‟s] response, *his office* conducted a search of the records of our office‟s criminal law division and management service division. Records that were responsive to your request were provided to you in accordance with the Right-to-Know Law. You were further advised that your request was overbroad and that records sought by you did not exist.

(C.R., Document #7, at 1; emphasis added.) The Appeals Officer based his conclusion on the Right-to-Know Officer‟s *mere denial* that any records responsive to James‟s request for "investigation complaints letter," "IAD Reports," "personal files," "complaints concerning alleged misconduct," "psychological or psychiatric evaluation" and "arrest records" existed. (*See* C.R., Document #3, at 2.) We agree with James that the OAG‟s bald assertion that the records do not exist is insufficient to prove the nonexistence of those records under the Law.[9]

This court has explained that "an agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011) (relying on *Moore*, 992 A.2d at 908-09). In *Moore*, the Pennsylvania Department of Corrections (DOC) engaged in a search of its records and substantiated its assertion that the "Judgment of Sentence" sought by an inmate did

[9] Our determination is consistent with the rationale, previously expressed by this court, that the Law is remedial in nature and designed to foster access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and render such officials accountable for their actions. *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435, 439 (Pa. Cmwlth. 2011) (relying on *Bowling*, 990 A.2d at 824). Thus, any information that falls within the Law‟s broad definition of a "record" must be disclosed upon request. *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011).

not exist through both an unsworn attestation made by the employee who personally searched DOC‟s files for any responsive records and a notarized affidavit by DOC‟s Agency Open Records Officer that the requested document did not exist. We held that "[t]hese statements are enough to satisfy [DOC‟s] burden of demonstrating the non-existence of the record in question, and obviously [DOC] cannot grant access to a record that does not exist." 992 A.2d at 909.[10]

Therefore, we vacate the Appeals Officer‟s Final Determination to the extent that it upheld the OAG‟s denial of James‟s request for certain documents on grounds that those documents do not exist. We also remand the matter to the Appeals Officer for the taking of additional evidence and the issuance of a new, final administrative order addressing the existence of those records. Specifically, the Appeals Officer should direct the OAG to file *either* an unsworn attestation by the *person* who searched for the requested "investigation complaints letter," "IAD Reports," "personal files," "complaints concerning alleged misconduct," psychological or psychiatric evaluation[s]" and "arrest records" relating to Morgan *or*

[10] *But cf. Bargeron v. Department of Labor and Industry, Unemployment Compensation Board of Review*, 720 A.2d 500 (Pa. Cmwlth. 1998), which was decided under the now-repealed Right to Know Act, Act of June 21, 1957, P.L. 390, *as amended*, formerly 65 P.S. §§66.1-66.4. Bargeron, an attorney, had asked the Unemployment Compensation Board of Review (UCBR) to supply him with a list of names and addresses of claimants and employers who were contesting unemployment compensation decisions by the local job centers. The UCBR denied that such a list existed, and Bargeron did not contest this fact. We stated that, because it appeared that the list Bargeron wanted did not exist *and* because Bargeron did not challenge this fact, the UCBR‟s refusal to provide the list was "just and proper." *Id.* at 502.

file a sworn affidavit of the Right-to-Know Officer that these records do not exist.[11] If the OAG files neither an unsworn attestation nor a sworn affidavit in this regard, the Appeals Officer should direct the OAG to provide James with the requested records.

Accordingly, we affirm the Appeals Officer"s Final Determination in part, and we vacate and remand it in part.[12]

ROCHELLE S. FRIEDMAN, Senior Judge

[11] We do not immediately direct the OAG to provide these records to James because the OAG maintains that the records do not exist. We presume that an agency will act according to the law. *Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Cmwlth. 2010). However, because there is no *proof* that the records do not exist, and James challenges this fact, the OAG must either submit proof that the records do not exist or provide them.

[12] Given our decision in this matter, we need not reach James"s next assertion that the OAG violated his due process rights by denying him access to the requested records. However, were we to reach this argument, we would note that: (1) access to public records is a privilege, not a right protected by due process considerations, *Prison Legal News v. Office of Open Records*, 992 A.2d 942, 947 (Pa. Cmwlth. 2010); and (2) an appeal from an appeals officer"s order denying the request for access to public records is not the appropriate forum for contesting the constitutionality of one"s continued incarceration, *Moore*, 992 A.2d at 910.

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O R D E R

AND NOW, this 5th day of April, 2012, the May 16, 2011, Final Determination of David Sumner, the Right-to-Know Appeals Officer of the Office of the Attorney General (OAG), is hereby affirmed in part and vacated and remanded in part. We vacate the Appeals Officer‟s determination to the extent that it upheld the OAG‟s denial of Tyrone James‟s request for certain documents on grounds that those documents do not exist. We also remand the matter to the Appeals Officer for the taking of additional evidence and for the issuance of a new, final administrative order addressing the existence of the relevant records, consistent with this opinion.

Jurisdiction relinquished.

ROCHELLE S. FRIEDMAN, Senior Judge