

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Raymond J. Smolsky,	:	
	:	
Petitioner	:	
v.	:	No. 1718 C.D. 2010
	:	Submitted: January 28, 2011
Department of Corrections,	:	
	:	
Respondent	:	

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

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED:** June 1, 2011

Raymond J. Smolsky (Smolsky) petitions for review of a final determination of the Office of Open Records (OOR), issued July 26, 2010. OOR dismissed as moot in part and denied in part Smolsky’s appeal from the Department of Correction’s (DOC) denial of his request for records under the Right-to-Know Law (RTKL).<sup>1</sup> For the reasons that follow, we affirm.

Smolsky is an inmate currently incarcerated at the State Correctional Institution at Mahanoy (SCI-Mahanoy). On June 2, 2010, Smolsky filed a RTKL request with DOC seeking: (1) “The P.A.C.T.<sup>[2]</sup> Policy Number 11.3.1 (1999 et.

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<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-.3104.

<sup>2</sup> “P.A.C.T.,” or “PACT,” stands for Pennsylvania Additive Classification Tool, which is defined by DOC as:

The instrument for ascertaining appropriate custody levels for inmates [which] is designed to be objective and behavior driven in that a “just desserts” model dictates inmates’ custody levels. Classification decision-making is centralized, monitored, and

seq.) [sic]” (DOC Policy Number 11.3.1); (2) “The P.A.C.T. Policy Number 11.3.1 (1999 et seq.) [sic] Classification ‘Form’” (PACT Classification Form); and (3) “The Name and Address for the ‘Local Franchise Authority’ for SCI-Mahanoy.” (Original Record (O.R.), App. 1, at 1.) On June 14, 2010, DOC denied Smolsky’s request in its entirety. DOC determined that DOC Policy Number 11.3.1 and the PACT Classification Form are exempt from disclosure under Sections 708(b)(1)(ii), 708(b)(2), and 708(b)(17) of the RTKL.<sup>3, 4</sup> DOC further determined

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controlled through an automated data system by Central office Classification Personnel. The system is designed to reduce over-classification of inmates resulting in the placement of inmates in the least restrictive security level based on an objective assessment of his/her custody needs.

DOC Policy Statement 11.2.1, 47 (January 21, 2011), available at [http://www.cor.state.pa.us/portal/server.pt/community/department\\_of\\_corrections/4604/doc\\_policies/612830](http://www.cor.state.pa.us/portal/server.pt/community/department_of_corrections/4604/doc_policies/612830) (last visited April 28, 2011).

<sup>3</sup> 65 P.S. § 67.708(b). Section 708(b) of the RTKL provides, in pertinent part:

(b) Exceptions.—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.

(2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.

....

(17) A record of an agency relating to a noncriminal investigation, including:

....

that the requested information relating to the “Local Franchise Authority” for SCI-Mahanoy does not exist. *See* Section 705 of the RTKL.<sup>5</sup>

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(ii) Investigative materials, notes, correspondence and reports.

....

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of an agency investigation.

....

(D) Hinder an agency’s ability to secure an administrative or civil sanction.

(E) Endanger the life or physical safety of an individual.

<sup>4</sup> In determining that the requested information is exempt from disclosure under Sections 708(b)(1)(ii) and 708(b)(17) of the RTKL, DOC relied, at least in part, on this Court’s holding in *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa. Cmwlth. 1997). In *Weaver*, this Court was asked to determine whether the PACT Manual, which is “utilized by [DOC] treatment staff in determining the level of custody of each inmate, which, in turn, dictates an inmate’s housing status,” was subject to disclosure under the Right-to-Know Act (RTKA), Act of June 21, 1957, P.L. 390, *as amended, formerly* 65 P.S. §§ 66.1-66.4, repealed by the RTKL. *Weaver*, 702 A.2d at 371. We held that the PACT Manual was exempt from disclosure under Section 1 of the RTKA, 65 P.S. § 66.1, which excluded from the general definition of “public record” any “report, communication or other paper, the publication of which would *disclose the institution, progress or result of an investigation* undertaken by an agency . . . or which would *operate to the prejudice or impairment of a person’s reputation or personal security.*” (Emphasis added.) In so holding, we accepted DOC’s argument that “the PACT Manual is used as an investigatory tool to assess inmates for housing, and to allow them access will allow them to manipulate that assessment, causing an inappropriate housing decision for an inmate . . . [which] could endanger the inmate, other inmates or staff.” *Weaver*, 702 A.2d at 372.

<sup>5</sup> 65 P.S. § 67.705. Section 705 of the RTKL 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.

On June 28, 2010, Smolsky appealed DOC's denial to OOR. Specifically, Smolsky argued that the requested information was not exempt from disclosure under Section 708(b)(1)(ii) of the RTKL because:

There is NO demonstrable reasonable likelihood of a substantial risk of physical harm or personal security of this Petitioner or any other particular individual for that matter or any inmate by Petitioner having access to and reading [DOC Policy 11.3.1] and the [DOC Classification Form] used for simply calculating the criminal record history score and behavior record score of Petitioner for his housing/residency/classification.

(O.R., App. 3, at 1.) Smolsky further contended that the requested information is not exempt from disclosure under Section 708(b)(2) of the RTKL because the requested information “neither affects nor concerns operation procedures, public safety, security, government secrecy, investigations or State or National security concerns,” and that “nothing contained in the [requested information] would threaten public safety or DOC activities in maintaining safe and secure order in [its] institutions.” (*Id.* at 3.) Finally, Smolsky maintained that the requested information is not exempt from disclosure under Section 708(b)(17) of the RTKL because there is no ongoing “noncriminal investigation” related to the requested information. Smolsky did not appeal DOC's denial of his request for information relating to the “Local Franchise Authority” for SCI-Mahanoy.

Responding to DOC's apparent reliance on *Weaver*, Smolsky clarified that he was seeking only DOC's policy statement concerning the PACT and the PACT Classification Form, not the PACT Manual itself.<sup>6</sup> In light of Smolsky's

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<sup>6</sup> Supplementing the record before OOR with a copy of DOC's policy statement regarding DOC Policy Number 11.3.1, issued July 22, 1992, (Supplemental Original Record (Supp. O.R.) at 5-9) and an undated version of the PACT Classification Form (*Id.* at 10), Smolsky explained that he has no interest in the PACT Manual, and that he is merely seeking

clarification, DOC revisited its denial of Smolsky’s RTKL request and provided Smolsky with a copy of DOC’s policy statement regarding PACT. DOC, however, maintained its position that the PACT Classification Form was exempt from disclosure under Sections 708(b)(1)(ii), 708(b)(2), and 708(b)(17) of the RTKL. As support, DOC provided the declaration of Rex Hildebrand (Hildebrand), Chief of the Assessment and Classification Division of the DOC’s Bureau of Treatment Services, who, *inter alia*, “monitor[s] policies, procedures, and implementation of standardized and specialized offender classification and assessment tools and instruments for [DOC], including [PACT].”<sup>7</sup> (Supp. O.R. at 17.) Hildebrand’s declaration provides, in pertinent part:

12. The Attachments to the PACT Manual are considered to be part of the [PACT] Manual itself; they contain forms and references used with the PACT Manual for the assessment of inmate security custody needs.

....

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DOC’s “newest” policy statement regarding DOC Policy Number 11.3.1 and DOC’s “newest” version of the PACT Classification Form. (*Id.* at 3.)

<sup>7</sup> Hildebrand’s declaration identifies the exact documents being requested by Smolsky. According to Hildebrand, PACT information was once contained in DOC Policy Number 11.3.1, but is now found in DOC Policy Number 11.2.1, which is entitled “Reception and Classification,” and that DOC Policy Number 11.2.1 is comprised of two main sections: a Policy Statement and a Procedures Manual. (Supp. O.R. at 18.) Hildebrand explained that the Policy Statement to DOC Policy Number 11.2.1—which was provided to Smolsky by DOC—“is available to the public, is posted on [DOC]’s public website at [www.cor.state.pa.us](http://www.cor.state.pa.us) and should be available in each institutional library for the benefit of inmates.” (*Id.*) As for the Procedures Manual, Hildebrand stated that Section 3 of the Procedures Manual in DOC Policy Number 11.2.1 contains the PACT Manual, and that the PACT Manual includes seven attachments, “which are sequentially numbered beginning with Attachment 3-A and ending with Attachment 3-G.” (*Id.*) Hildebrand reasoned that, “[b]ased upon the description and example provided by Mr. Smolsky, Mr. Smolsky’s request for the PACT [Classification Form] is a request for Attachments 3-A (Initial Classification Form) and/or 3-C (Reclassification Form) of the PACT Manual.” (*Id.* at 19.)

14. Contrary to Mr. Smolsky's assertions, [DOC] does not permit the PACT forms, including Attachments 3-A and/or 3-C, to be viewed, maintained, shared with or accessed by inmates.

15. The PACT Manual and/or its attachments are investigatory tools used to assess inmate security needs to determine housing/custody levels.

16. Access to the PACT Manual and/or its attachments is reasonably likely to result in the manipulation of the [PACT] which will in turn cause inappropriate housing decisions to be made for inmates.

17. Inappropriate housing and security decisions will endanger the inmate, other inmates, staff or others present in the institution or even the public. For instance, an inmate who should be assigned a higher security classification may manipulate the process with the result that he or she obtains housing in a less secure facility/housing unit where they will be a risk to others or will attempt to escape.

....

19. Improper classification of an inmate could result in the inmate's improper consideration for parole, pre-release, clearance for outside work assignment, reclassification, or similar opportunities, which in fact the inmate has only manipulated the procedures and guidelines in place to his or her advantage.

(*Id.* at 18-20.)

By final determination issued July 26, 2010, OOR dismissed as moot in part and denied in part Smolsky's appeal. OOR first determined that Smolsky's appeal was moot insofar as it concerned DOC's policy statement regarding the PACT because DOC had provided Smolsky with a copy of the relevant policy statement during the pendency of Smolsky's appeal. OOR then denied Smolsky's request for the PACT Classification Form (Attachments 3-A and/or 3-C of the PACT Manual) pursuant to Section 708(b)(1)(ii) of the RTKL, determining that disclosure of the PACT Classification Form "would be reasonably likely to result

in a substantial and demonstrable risk [to] . . . the personal security of an individual.” In so determining, OOR relied on Hildebrand’s declaration and this Court’s reasoning in *Weaver*. This petition for review followed.

On appeal,<sup>8</sup> Smolsky argues that the PACT Classification Form is not exempt from disclosure under Section 708(b)(1)(ii) of the RTKL because he and other inmates already possess the requested document—as evidenced by the fact that Smolsky supplemented the record before OOR with a copy of the PACT Classification Form—and, therefore, the criteria contained therein are already known to inmates. Smolsky contends that any inmate interested in reading the “leaked” PACT Classification Form need only contact someone who already has it. Smolsky further contends that DOC has not shown one instance where an inmate has used the “leaked” PACT Classification Form to manipulate DOC’s housing assessment. Finally, Petitioner maintains that, unlike the PACT Manual, the PACT Classification Form does not reveal *how* DOC performs its housing assessment; instead, the PACT Classification Form “simply provides ‘numerical scores’” based on objective criteria. (Smolsky’s Brief at 8.)

Initially, we reject Smolsky’s contention that he already possesses the requested PACT Classification Form. By his own admission, Smolsky supplemented the record before OOR with an out-dated version of the PACT Classification Form. Smolsky’s RTKL request, however, is for the “newest” version of the PACT Classification Form. Moreover, the fact that a requester has

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<sup>8</sup> This Court “is entitled to the broadest scope of review” in reviewing a final determination of OOR, but “should consider the manner of proceeding most consistent with justice, fairness, and expeditious resolution.” *Bowling v. Office of Open Records*, 990 A.2d 813, 820, 823 (Pa. Cmwlth. 2010) (en banc), *appeal granted*, \_\_\_ Pa. \_\_\_, \_\_\_ A.3d \_\_\_ (2011). Under our standard of review, this Court “independently reviews the OOR’s orders and may substitute its own findings of fact for that of the agency.” *Id.* at 818.

somehow managed to obtain information that is the subject of an RTKL request through alternative means is not necessarily dispositive as to whether an agency must disclose the requested information under the RTKL.

Although *Weaver* was decided under the old version of the RTKL, its reasoning is still viable. There, we held that disclosure of the PACT Manual could endanger the personal security of inmates and DOC staff because it could be used by an inmate to manipulate DOC's housing assessment, which, in turn, could lead to an inappropriate housing decision for the inmate. *Weaver*, 702 A.2d at 372-73. Regardless of the objective nature of its criteria, inmates could use the PACT Classification Form in the same fashion. Furthermore, according to Hildebrand's declaration, the attachments to the PACT Manual, including the PACT Classification Form (Attachments 3-A and/or 3-C of the PACT Manual), "are considered to be part of the [PACT] Manual itself; they contain forms and references used with the PACT Manual for the assessment of inmate security custody needs." (Supp. O.R. at 18.) We refuse to compromise the integrity of the PACT Manual by viewing the PACT Classification Form in isolation. The PACT Classification Form, therefore, is exempt from disclosure under Section 708(b)(1)(ii) of the RTKL because release of the PACT Classification Form could result in an inappropriate housing decision being made for an inmate which "would be reasonably likely to result in a substantial and demonstrable risk [to] . . . the personal security" of the inmate, other inmates, DOC Staff, or the public.

Accordingly, we affirm.

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P. KEVIN BROBSON, Judge



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	:	
Petitioner	:	
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v.	:	No. 1718 C.D. 2010
	:	
	:	
Department of Corrections,	:	
	:	
Respondent	:	

***ORDER***

AND NOW, this 1st day of June, 2011, the final determination of the Office of Open Records (OOR), issued July 26, 2010, is hereby **AFFIRMED**.

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**P. KEVIN BROBSON, Judge**