

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bruce L. Wishnefsky,	:	
Petitioner	:	
	:	
v.	:	No. 2319 C.D. 2012
	:	SUBMITTED: May 3, 2013
Department of Corrections,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge
 HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE LEADBETTER**

FILED: August 23, 2013

Petitioner, Bruce Wishnefsky, proceeding *pro se*, petitions for review of the order of the Office of Open Records (OOR), which affirmed the denial of his request submitted to the Pennsylvania Department of Corrections (Department) pursuant to the Right-to-Know Law¹ (RTKL) seeking disclosure of various policies pertaining to the treatment of “inguinal hernias.”

On September 4, 2012, the Petitioner submitted a request seeking:

- (a) all written policies and administrative staff manuals that pertain to the treatment of inguinal hernias used by the contractor, Prison Health Services, Inc. or Corizon

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

Health, Inc, [sic] under its Medical Services Agreement with the Pennsylvania Department of Corrections that are of its own devising.

(b) all written policies that pertain to the treatment of inguinal hernias used by the contractor under its Medical Services Agreement with the Pennsylvania Department of Corrections that are provided to the contractor by Interqual.

On September 11, 2012, the Department invoked a thirty-day extension of the time for responding pursuant to Section 902 of the RTKL, 65 P.S. § 67.902. On October 10, 2012, the Department denied the request, stating that the records requested are exempt under Section 708(b)(1)(ii), 65 P.S. § 67.708(b)(1)(ii), the personal security exemption; Section 708(b)(2), 65 P.S. § 67.708(b)(2), the law enforcement or other public safety activity exemption; Section 708(b)(16), 65 P.S. § 67.708(b)(16), the criminal investigation exemption; Section 708(6)(17), 65 P.S. § 67.708(6)(17), the noncriminal investigation exemption; and Section 708(6)(5), 65 P.S. § 67.708(6)(5), the medical, psychiatric or psychological history exemption.

On October 31, 2012, Petitioner appealed to the OOR, challenging the Department's denial. On November 1, 2012, OOR informed Petitioner and the Department that they were required to submit information and legal argument in support of their position within seven business days. Along with his appeal, the Petitioner submitted, *inter alia*, his own affidavit, and a Declaration of Richard Ellers, director of the Department's Bureau of Health Care Services (BHCS) dated July 2010.

On November 9, 2012, the Department submitted a letter brief and the Declaration of Nicholas Scharff, M.D., BHCS' chief of clinical services. Dr.

Scharff attested that in addition to overseeing medical, dental and mental health services for the inmate population, he performed administrative duties including the administration and enforcement of security as it related to the BHCS and its policies. Certified Record Item 3, Exhibit A, ¶ 2. Dr. Scharff further stated that:

5. The requested records were developed and/or relied upon by Prison Health Services, Inc. or Corizon, Inc. ... to provide guidance to its licensed medical professionals in making clinical decisions concerning the medical treatment of inmates and sending inmates to outside care providers.

6. An outside care provider would be a professional who provides medical services to inmates outside of the prison, which would often necessarily entail the temporary transfer of the inmate outside of the secure prison perimeter.

7 ... any such transfer involves a higher degree of risk or escape or danger to the staff or to the general public than if the inmate remained within the prison.

8. Dissemination of the requested records would reveal the types of conditions, symptoms and process for inmates to be referred to see outside medical providers.

Id. ¶¶ 5-8. Dr. Scharff attested that he has observed occasions where inmates malingered, feigned or complained of medical conditions which they did not possess in order to obtain a perceived benefit. *Id.* ¶ 9. He further stated that if the requested information was released, “inmates would be reasonably likely to manipulate the information contained therein in order to facilitate temporary transfer out of the prison into a less secure environment where there is increased opportunity for escape.” *Id.* ¶ 10-11.

OOR denied Petitioner's appeal concluding that the requested records were exempt from disclosure pursuant to Section 708(b)(2) of RTKL as records which, if disclosed, would be reasonably likely to jeopardize or threaten public safety. OOR's Final Determination at 5. OOR determined that the Department had proven that the requested records were maintained by it in connection with law enforcement and public safety activities. OOR further concluded that Dr. Scharff's attestation that release of the requested records would reveal the types of conditions, symptoms and process for inmates to be referred to outside medical providers, and that such outside referrals have in the past provided inmates with escape opportunities was sufficient to demonstrate that release of the requested records was reasonably likely to threaten public safety. *Id.* OOR rejected Petitioner's argument that Dr. Scharff's declaration lacked specific examples of attempted escapes and was not based on personal knowledge. *Id.* at 5-6. Additionally, OOR, relied upon its own case law, holding that correctional facilities do not need to demonstrate specific prior example of public safety to meet the agency's burden of proof under Section 708(b)(2). *Id.* at 6. OOR specifically credited Dr. Scharff's professional opinion assessing the risks of security and refused to substitute its judgment for that of those with more familiarity with the issues involving public safety. *Id.*

Petitioner filed a petition for review with this court asserting that OOR erred in relying upon Dr. Scharff's declaration because it was not adequate to satisfy the Department's burden. Additionally, Petitioner argues that he was denied procedural due process because OOR set a single deadline for the submission of all papers by both parties.

Petitioner asserts that he was denied procedural due process because a single deadline for submission of all papers by both parties left him unable to respond to and refute the Department's submissions. He argues that if he had been given the chance to respond, he would have submitted evidence that prisoners can be examined through telemedicine, which eliminates any public safety concerns because telemedicine involves the use of real-time, interactive, telephone and video for the delivery of healthcare services. He would also have submitted documents regarding Dr. Scharff's responsibility for security and Dr. Scharff's qualifications to opine on security issues.²

Petitioner's argument is without merit. The RTKL requires that OOR make a final determination within 30 days of receipt of an appeal, unless the requester agrees otherwise. Section 1101(b)(1), 65 P.S. § 67.1101(b)(1). The RTKL provides that OOR is responsible for setting the schedule for submission of documents. Section 1102(a)(1), 65 P.S. § 67.1102(a)(1). There is nothing in the RTKL requiring that parties be given an opportunity to respond to each other's arguments. Further, Petitioner could have requested that OOR delay rendering its decision until he had the opportunity to submit additional documents, but did not

² Petitioner also filed a motion to supplement the record. In RTKL cases, it is within the court's discretion to supplement the record. *Dep't of Conservation & Natural Res. v. Office of Open Records*, 1 A.3d 929, 937 (Pa. Cmwlth. 2010). Petitioner seeks to submit the official job description of Dr. Scharff, an organizational chart for the Department, and the Department's Central Office Functional Statements, all of which he obtained through a separate RTKL request. Petitioner asserts that the official job description will demonstrate that Dr. Scharff's position does not encompass security concerns and therefore he lacks expertise in the area. Petitioner also argues that organizational chart and functional statements will show that the responsibility for security lies within other portions of the Department. Having reviewed the documents, we find them irrelevant to the resolution of this case and accordingly, we deny the motion to supplement the record.

do so. We, therefore, reject his argument that he was denied procedural due process.

Petitioner argues that OOR erred in determining that the Department had met its burden for the following reasons:

1. OOR's reliance on the Scharff declaration was in error because there is no evidence that the declaration was made on personal knowledge and it was conclusory.
2. OOR ignored Petitioner's argument that prisoner manipulation of symptoms is impossible because it is impossible to feign a hernia without detection.
3. OOR failed to follow precedent which requires exemption determinations cannot be made on a blanket approach without differentiation between those that are or are not likely to endanger public safety.
4. The Scharff declaration lacked specific examples of escape attempts as required by case law.
5. OOR ignored evidence that the requested information is published for general use.

Section 708(b)(2) exempts from disclosure a record maintained by an agency in connection with law enforcement or other public safety activities that if disclosed would be reasonably likely to jeopardize or threaten public safety or a public protection activity. 65 P.S. § 67.708(b)(2). The Department bears the burden of proving by a preponderance of the evidence that the disclosure of the records “would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity” 65 P.S. § 67.708(b)(2).

To establish the public safety exemption, the Department was required to show that: (1) the record at issue relates to a 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. *Adams v. Pa. State Police*, 51 A.3d

322 (Pa. Cmwlth. 2012). In interpreting the “reasonably likely” part of the test, we look to the likelihood that disclosure would cause the alleged harm, which requires more than speculation. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367 (Pa. Cmwlth. 2013). The court must consider whether an affidavit: (1) includes detailed information describing the nature of the records sought; (2) connects the nature of the various records to the reasonable likelihood that disclosing them would threaten public safety in the manner described; and that, (3) disclosure would impair Department’s ability to perform its public safety functions as to inmate transfers, the alleged threatening consequence. *Id.* at 376. Speculative and conclusory statements in an affidavit do not show a reasonable likelihood of a threat to security. *Id.*

Policies and administrative staff manuals relating to the treatment of inguinal hernias by Department staff and contractors relate to the Department’s law enforcement and public safety activities, satisfying the first requirement of the public safety exception. Dr. Scharff stated in his affidavit that the requested information would, if made public, reveal the types of conditions, symptoms and process for inmates to be referred to an outside medical provider, thus providing the basis for faked illnesses and the opportunity to attempt an escape during transfer outside the prison system. Dr. Scharff also stated that he had personally witnessed inmates faking illness. He also stated that inmates have attempted to escape during outside medical treatment on prior occasions.

Contrary to Petitioner’s argument, the affidavit is not speculative in nature nor does it lack foundation. Dr. Scharff attested that he is responsible for administration and enforcement of security as it relates to the BHCS in addition to providing medical services and that he has witnessed inmates faking illness to gain

some perceived benefit. The affidavit was based on personal experience both in the administration of the prison system and provision of medical services and, accordingly, was not merely speculative.³

Petitioner also argues that OOR erred in relying on Dr. Scharff's affidavit because it would be impossible to fake a hernia without detection. Neither this Court nor Petitioner are medical experts possessing knowledge which would counter Dr. Scharff's testimony that release of the requested record would reveal the types of conditions and symptoms that result in an inmate being transferred for outside consultation.

Petitioner further asserts that OOR failed to differentiate between those likely to endanger public safety and those that are not likely to endanger the public. OOR does not consider to whom the records are being released, but rather whether the knowledge gained from such records would endanger the public safety. Dr. Scharff's affidavit adequately explains how the release of the requested records could endanger both the general public and inmates within the prison system.

Additionally, Petitioner argues that *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435 (Pa. Cmwlth. 2011), requires that the affiant provide specific examples in order to satisfy the agency's burden. Petitioner states that Dr. Scharff's affidavit was insufficient because it did not provide specific examples of attempted escapes during outside medical consultation. In this

³ Petitioner asserts that Dr. Scharff's affidavit was not specific because it did not indicate the actual number of escapes during medical consults and whether the escapes took place before or after the respondent began using Telemedicine for consultations. In this instance, an affidavit is not required to be as detailed as Petitioner argues in order to be non-speculative. The affidavit, when reviewed in its entirety, was sufficient to show a reasonable likelihood of a security threat.

context, specific examples of attempted escapes are not necessary. Dr. Scharff provided his declaration under the penalty of perjury, pursuant to Section 4904 of the Crimes Code, 18 Pa. C.S. § 4904. As previously discussed, his affidavit was based on his personal experience. Dr. Scharff's mere failure to list specific examples does not undermine the credibility of his statement.

Finally, Petitioner argues that OOR ignored evidence that the requested information is based on the Interqual criteria,⁴ which is a standardized program that is published for general medical use. Having reviewed the record, we conclude that there is no evidence that the manuals used by the BHCS are those which are published for general use by the medical profession. The record reflects that the BHCS considered several vendors to provide utilization review services and that although the criteria are standardized, the programs can be adapted to unique needs of the correctional environment.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
Judge

⁴ The Interqual criteria are used for utilization review, which evaluates the appropriateness and medical necessity of services provided to inmates.

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	:	
Department of Corrections,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of August, 2013, the order of the Office of Open Records is hereby AFFIRMED. Petitioner’s Motion to Supplement the Record is DENIED.

BONNIE BRIGANCE LEADBETTER,
Judge