IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Reaves,	:	
Petitioner	:	
	:	
v.	:	No. 393 C.D. 2013
	:	Submitted: October 11, 2013
Pennsylvania Board of Probation	:	
and Parole,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: November 15, 2013

Joseph Reaves, *pro se*, petitions for review of a final determination of the Office of Open Records (OOR) denying his appeal under the Right-to-Know Law.[1] In doing so, the OOR affirmed the Pennsylvania Board of Probation and Parole's denial of Reaves' right-to-know request for statistical information on paroled sex offenders. Because the Board did not possess records responsive to Reaves' request, we affirm.

Reaves is currently incarcerated at the State Correctional Institution at Graterford. On December 6, 2012, he submitted a right-to-know request to the Board for the following information:

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

1. Evidence of the comparisons of parole rates for prisoner[s] convicted of a sex offense (Rape) before and after the 1996 amendment who were release[d] on parole.

2. Identify based on Pennsylvania Board of Probation and Parole (PBPP) Records other sex offenders with adult victims who committed their crimes before 1996, were granted parole after 1996 and were released on parole despite having, for example, [a] home plan which called for residing within 1000 feet of a school or school bus stop.

Certified Record (C.R.), Tab 1, p. 5.

By letter dated January 3, 2013, the Board's Deputy Open Records Officer, Emily Sanso, informed Reaves that the Board did not possess the records he requested. Sanso also provided Reaves with an "Agency Affirmation of Nonexistence of Record" stating in pertinent part as follows:

2) I have made a thorough inquiry of any designated and/or reasonably likely records custodians for the records requested, above; and

3) Based on the information provided to me as of the date of execution of this Affirmation, I do hereby affirm that, to the best of my knowledge, information and belief, such records do not exist within our agency.

C.R., Tab 1, p. 4. Sanso signed the unsworn affirmation under penalty of perjury pursuant to 18 Pa. C.S. §4904.

Reaves appealed the Board's response to the OOR, which invited the parties to supplement the record. In support of its position that the records requested by Reaves do not exist, the Board submitted an affidavit from Fred Klunk, the Director of the Board's Statistical Reporting and Evidence-Based Program Evaluation Office. Klunk explained that his office is responsible for "collecting, compiling and publishing statistical and other information relating to

probation and parole work[,] and such other information the Board may deem of value in probation and parole service." C.R., Tab 3, p. 5.

Klunk provided the following specific responses to Reaves' two requests:

> Request #1
>
> We do not have electronic data for inmates serving a sentence for rape up to 1996. Additionally, we do not have paper records of such cases. These requests are unattainable because the information is not available.
>
> To create this type of record set would require a review of all cases (some of which would not be available due to the death of the offenders and the file not being available through archives), find out when the offenders' initial sentence was and what it was for (if that is even available), read through the files for the decisional Board Action(s) on that sentence (parole or refuse), and count up the number that fit this request.
>
> Request #2
>
> We do not maintain records in this specific format. Sex offenders with minor victims granted parole before 1996 and subsequently released after 1996 to a home plan that was 1,000 feet from a school, day care, etc., is too definite[2] to even begin to calculate.

Id. Klunk signed his affidavit under penalty of perjury.

The OOR issued its Final Determination on February 19, 2013. The OOR held that, based upon the materials the Board provided, it established that it did not possess records responsive to Reaves' request. Because the Board was not required to take any further action, the OOR dismissed Reaves' appeal. Reaves now petitions for this Court's review.

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[2] Given the context, we presume the affiant meant "indefinite."

On appeal,[3] Reaves raises a number of arguments, which we summarize as follows. He contends that Sanso's attestation did not adequately describe her records search, which Reaves argues was not reasonably calculated to uncover all relevant documents. He also argues that the requested records are public because they reflect the activities of the Board and, thus, must be in the possession of the Secretary of the Board. The Board may not refuse to search for and produce them because it will be burdensome. He also argues that an agency's failure to maintain its files in a way necessary to meet its obligations under the Right-to-Know Law should not be held against the requester. Finally, he suggests that the statistical information he seeks can be compiled from the Board's electronic database, and Fred Klunk is responsible for doing so in his role as Director of the Board's Statistical Reporting and Evidence-Based Program Evaluation Office.[4]

The Right-to-Know 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." *Hodges v. Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011) (citation omitted). An agency has no duty, however, to create a record that does not exist or compile a record in a new or novel format. Section 705 of the Right-to-Know Law states:

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[3] This Court's standard of review of a final determination of OOR is *de novo* and our scope of review is plenary. *Bowling v. Office of Open Records*, __ Pa. __, __, 75 A.3d 453, 477 (2013).

[4] Reaves also argues that the Board waived its right to submit Klunk's affidavit to the OOR because it should have done so in conjunction with its original denial letter. We disagree. The OOR invited the parties to supplement the record. Moreover, Klunk's affidavit did not raise a new defense. Rather, it articulated additional support for the Board's position all along, *i.e.*, that it did not possess records responsive to Reaves' request.

> 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.

An agency responding to a right-to-know request bears the burden of proving by a preponderance of evidence that a record does not exist or is exempt from disclosure. Section 708(a) of the Right-to-Know Law, 65 P.S. §67.708(a). "[A]n 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*, 29 A.3d at 1192 (citing *Moore v. Office of Open Records*, 992 A.2d 907, 908-09 (Pa. Cmwlth. 2010)).

The above-cited cases are instructive on the proof necessary to satisfy the agency's burden. In *Moore*, the requester sought copies of documents from his criminal case that the Department of Corrections claimed did not exist. The Department provided the OOR with both an unsworn attestation made subject to the penalty of perjury and a notarized "Affidavit of Nonexistence of Record" swearing to the non-existence of the requested documents. This Court affirmed the OOR's holding that the Department sustained its burden of proving the non-existence of the records with its sworn and unsworn affidavits.

In *Hodges*, the requester sought records from the Department of Health related to the licensure of the health care provider at a state correctional institution. Before the OOR, the Department submitted an unsworn affidavit entitled "Agency Affirmation of Nonexistence of Record" executed by the Department's Open Records Officer attesting that she "made a good faith and

thorough inquiry to determine if the Department was in possession of the records requested." 29 A.3d at 1191. Based on that search, she determined that no responsive records existed in the possession, custody or control of the Department. This Court agreed with the OOR that the Department's unsworn affidavit satisfied its burden of proof that the records did not exist.

In the instant case, the Board provided two documents as proof of the non-existence of the requested records. The first was an unsworn attestation by the Board's Deputy Open Records Officer that she made a thorough inquiry to determine if the records existed. This attestation is nearly identical to the attestation deemed sufficient in *Hodges*. The second document submitted by the Board was the unsworn affidavit of Fred Klunk. As the Director of the Board's Statistical Reporting and Evidence-Based Program Evaluation Office, Klunk may be presumed knowledgeable about the Board's statistical records. Klunk reviewed Reaves' request and determined that the records he sought either did not exist or were not maintained in the format requested by Reaves. The OOR did not err by recognizing the relevancy and probative value of the documents submitted by the Board in support of its denial of Reaves' request.

Finally, Reaves asks this Court to order the Board to compile the records that would be responsive to his request, a task he believes falls within Klunk's job description. In support of his argument, Reaves relies upon *Department of Environmental Protection v. Legere*, 50 A.3d 260 (Pa. Cmwlth. 2012). In that case, DEP declined to produce letters it sent to well operators as part of its oversight functions because "the requested documents will be burdensome to produce." *Id*. at 263 n.4.

In affirming the OOR's order to produce the records, this Court held that "an agency's failure to maintain [its] files in a way necessary to meet its obligations under the [Right-to-Know Law] should not be held against the requestor. To so hold would permit an agency to avoid its obligations under the [Right-to-Know Law] simply by failing to orderly maintain its records." *Id*. at 265. We further held that DEP could not avail itself of Section 705 of the Right-to-Know Law, 65 P.S. §67.705, because the requester was neither seeking records that did not exist, nor was she attempting to cause DEP to compile, maintain, format or organize the documents other than the manner in which they were then maintained.

Legere is inapposite. Here, the Board provided attestations from two of its employees, both of whom were competent to attest that the records Reaves requested do not exist. Through these attestations the Board confirmed it was aware of what records it maintained and did not maintain, not simply speculating on the burden of production, as was the case in *Legere*.

For all of the foregoing reasons, the Final Determination of the OOR is affirmed.

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MARY HANNAH LEAVITT, Judge

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v.	:	No. 393 C.D. 2013
Pennsylvania Board of Probation and Parole, Respondent	:	

O R D E R

AND NOW, this 15th day of November, 2013, the Final Determination of the Office of Open Records in the above-captioned matter, dated February 19, 2013, is AFFIRMED.

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MARY HANNAH LEAVITT, Judge