

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Douglas Carey,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1348 C.D. 2012
	:	Submitted: November 2, 2012
Pennsylvania Department	:	
of Corrections,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: July 3, 2013

In this matter, we revisit an appeal from the Office of Open Records’ (OOR) final determination denying access to records that Douglas Carey (Requester) sought under the Right-to-Know Law (RTKL).¹ In our opinion and order issued January 24, 2013,² we declined to affirm the OOR’s final determination in its entirety. We affirmed the OOR in part, holding the request was sufficiently specific.³ However, we reserved judgment as to whether DOC properly denied access under the Personal Security exception, Section 708(b)(1)(ii), 65 P.S. §67.708(b)(1)(ii), and the Public Safety exception, Section 708(b)(2), 65 P.S. §67.708(b)(2) (the Security Exceptions) pending receipt of supplemental evidence limited to those exceptions.

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

² Carey v. Dep’t of Corr., 61 A.3d 367 (Pa. Cmwlth. 2013) (Carey I).

³ We also determined the Noncriminal Investigative exception, Section 708(b)(17) of the RTKL, 65 P.S. §67.708(b)(17), and Predecisional Deliberative exception, Section 708(b)(10) of the RTKL, 65 P.S. §67.708(b)(10) did not protect responsive records.

On April 24, 2013, pursuant to this Court's order, the Pennsylvania Department of Corrections (DOC) supplemented its declaration of Joanne Torma, focused on the Security Exceptions (Supplemental Declaration). Upon independent review of the Supplemental Declaration, we hold DOC properly protected certain communication records and Requester's transfer petition; however, DOC did not establish a security risk posed by disclosing a release and/or recommitment order.

I. Background

As this opinion supplements our prior opinion, we do not repeat the complete background here. We review the salient facts as to the current procedural posture and the issue remaining before us. For clarity, we emphasize this opinion does not address any issues other than the Security Exceptions.

Requester submitted a request to DOC for records regarding the mass transfer of inmates to Michigan (Transfer). Requester was one of the approximately 1,000 inmates transferred. DOC denied his request in its entirety. Among several RTKL exceptions, DOC asserted the Personal Security exception and the Public Safety exception. The OOR determined DOC met its burden of proving the Public Safety exception based on Torma's original declaration. We disagreed, identifying gaps in the submission necessitating supplementation in the interest of obtaining a complete record.

In Carey v. Department of Corrections, 61 A.3d 367 (Pa. Cmwlth. 2013) (Carey I), we exercised our independent fact-finding authority and directed

DOC to supplement the record as to the Security Exceptions.⁴ In response to our directive, DOC submitted the Supplemental Declaration.

In the Supplemental Declaration,⁵ Torma, Director of the Office of Population Management (OPM), explains she oversaw transfers generally, and was involved in the Transfer that is the subject of the underlying right-to-know request (Request). In pertinent part, Torma verified the following regarding her background:

2. In my capacity as Director of OPM, I oversee inmate population movement within [DOC], including, the coordination of secure movements between [DOC] institutions, temporary transfer in and out of [DOC] custody for various purposes, management of separations of inmates from other identified staff or inmates, as well as evaluation of transfer petitions received from institutions.

* * *

5. Preparations for the Transfer involved consultation and coordination with several [DOC] Bureaus, including Security, and I am familiar with the security considerations that are presented when such a mass transportation of inmates is planned.

Supplemental Declaration at ¶¶2, 5.

Torma also attested to the reasons for redacting records disclosed, and for withholding responsive records. Specifically, she verified facts underlying the

⁴ In reviewing a final determination of the OOR involving a Commonwealth agency, this Court “independently reviews the OOR’s orders and may substitute its own findings of facts for [those] of the agency.” Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Cmwlth. 2010), appeal granted in part, ___ Pa. ___, 15 A.3d 427 (2011). We may request additional evidence in order to ensure a record sufficient for adequate judicial review. Id.; see also Office of the Governor v. Scolforo, ___ A.3d ___, (Pa. Cmwlth., No. 739 C.D. 2011, filed Apr. 23, 2013).

⁵ DOC appended responsive records it disclosed as to Nos. 1, 3 and 5 of the request.

Public Safety and Personal Security exceptions. Id. ¶¶6-9. Now considering the Supplemental Declaration, we determine whether DOC met its burden of proving the Security Exceptions as to the remaining parts of the Request.⁶

II. Security Exceptions

Under the RTKL, records in the possession of an agency are presumed to be public unless they are: (1) exempted by Section 708 of the RTKL; (2) protected by privilege; or (3) exempted “under any other Federal or state law or regulation or judicial order or decree.” Section 305 of the RTKL, 65 P.S. §67.305. DOC bears the burden of proving its asserted exceptions under Section 708(a) of the RTKL, 65 P.S. §67.708(a). See Dep’t of Transp. v. Office of Open Records (Aris), 7 A.3d 329 (Pa. Cmwlth. 2010).

In our initial opinion, we noted “DOC’s denial does not differentiate among the many potentially responsive records, and it does not adequately explain the failure to redact protected material from potentially responsive records.” Carey I, 61 A.3d at 373. In response to our opinion in Carey I, DOC identified a number of responsive records, and appended responsive records to its submission.

As to parts 1 and 3 of the Request, which seek communications of DOC regarding the Transfer, DOC disclosed some responsive records. However, DOC withheld the Pennsylvania Prisoner Operation Plan in its entirety, and redacted

⁶ In Carey I, we held records responsive to part 2 of the request, seeking identities of those who authorized the Transfer are properly withheld under the Personal Security exception, Section 708(b)(1)(ii) of the RTKL, 65 P.S. §67.708(b)(1)(ii).

portions of the records disclosed that pertain to security precautions and procedures DOC uses in effectuating out-of-state transfers. See Supplemental Declaration at ¶6. As to part 4 of the Request, in which Requester seeks his own release and recommitment forms, DOC explains the request implicates a “transfer petition.” Id. at ¶10. DOC withheld all “transfer petitions” implicated in the Request.

Armed with a greater understanding of the substantive content of the responsive records, we evaluate the Security Exceptions as to parts 1 and 3 of the Request, seeking communications to/from DOC (DOC Communications), and part 4, seeking Requester’s release/recommitment records.

1. Request for DOC Communications

DOC withheld the Prisoner Operation Plan, and it redacted information responsive to parts 1 and 3 of the Request under both the Public Safety exception and the Personal Security exception.

a. Personal Security exception

The Personal Security exception protects any record, the disclosure of which “would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual.” Section 708(b)(1)(ii) of the RTKL, 65 P.S. §67.708(b)(1)(ii). To establish this exception, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to an individual’s security if the information sought is not protected. Governor’s Office of Admin. v. Purcell, 35 A.3d 811 (Pa. Cmwlth. 2011). “More

than mere conjecture is needed.” Id. at 820 (citing Lutz v. City of Phila., 6 A.3d 669, 676 (Pa. Cmwlth. 2010)).

As we noted in Carey I, “[P]ersonal security issues are of particular concern in a prison setting.” Id. at 374 (citing Dep’t of Corr. v. Gardner, (Pa. Cmwlth., No. 631 C.D. 2011, filed April 27, 2012) (unreported) (quoting Commonwealth v. Dugger, 506 Pa. 537, 542, 486 A.2d 382, 384 (1985) “[a] prison setting involves unique concerns and security risks” and upholding Personal Security exception as to training materials of identified DOC employee)). Given the heightened risk associated with prisons, this Court finds representations regarding perceived threats to DOC personnel posed by inmates persuasive.

As to the Personal Security exception, Torma verified, “It is reasonably likely that their release would create a substantial risk of physical harm for [DOC] staff members, inmates and members of the public.” Supplemental Declaration at ¶8 (emphasis added). She offered no further detail.

Such conclusory assertions cannot form the basis for withholding records. Purcell; Lutz. DOC did not connect the alleged threat to personal security to the release of the specific record requested. Therefore, DOC did not prove the Personal Security exception as to the DOC Communications.

b. Public Safety exception

To establish the Public Safety exception, DOC must prove 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); Adams v. Pennsylvania State Police, 51 A.3d 322 (Pa. Cmwlth. 2012). We apply a two-pronged test: (1) the record at issue must relate 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. Carey I; Adams.

Regarding the Public Safety exception, Torma specified, “These records disclose the logistics of the [T]ransfer, and the disclosure thereof would create a real and substantial risk that inmates or outside parties could interrupt future transfers and facilitate a mass escape or otherwise interfere with the transfer process, thereby endangering staff, inmates and the public at large.” Supplemental Declaration at ¶7 (emphasis added). She further explains disclosure “would impair [DOC’s] ability to perform its law enforcement functions insofar as inmates armed with knowledge of the means, methods, timelines, and itinerary for a mass transportation create a real and substantial risk that the mass transportation would be compromised.” Id. at ¶9.

As these records relate to law enforcement and public protection, DOC meets the first prong. DOC sufficiently describes the content of the records as specific to logistics of transfers, including timelines and itinerary. Given their content regarding the specifics of inmate transfer, the record contains sufficient facts establishing that their disclosure would be reasonably likely to threaten public safety or protection activities.

Therefore, we hold DOC proved the necessity for the redactions from records responsive to parts 1 and 3 of the request, and for withholding the Prisoner Operation Plan in its entirety under the Public Safety exception.

2. Release/Recommitment Records

Requester seeks his own release and recommitment records in part 4.⁷ DOC represents “this request implicates a transfer petition.” Supplemental Declaration at ¶10 (emphasis in original). The Supplemental Declaration addresses all “transfer petitions” generally.

To support its denial as to Requester’s transfer petition, which is the only transfer petition implicated in part 4 of the Request, DOC offers the following:

11. Transfer petitions should not be released to the public for the following reasons.
12. [DOC] Policy 11.2.1 §8, available on [DOC’s] public website, describes the transfer petitions system utilized by [DOC].
13. Transfer petitions are requests initiated by an institution to OPM for the transfer of a particular inmate to another facility.
14. Transfer petitions may be the result of an inmate request, or may be solely the result of institutional concerns.
15. OPM reviews the petition to determine if the requested transfer should be accommodated.

⁷ Part 4 of the Request states in its entirety: “All documents which released inmate Douglas Ralph Carey [Requester] (GF-6829) from [DOC] and which recommitted inmate Carey to the State of Michigan Department of Corrections.” Certified Record (C.R.) at Ex. 1.

16. Transfer petitions contain security analysis and evaluation of the specific inmate's programming and prison adjustment, including security classification information, substance abuse, mental health or medical history and needs, programming needs, behavioral adjustment, whether separations exist for that inmate, criminal history records information, and [DOC] staff rationale leading to the particular request for transfer.

Supplemental Declaration at ¶¶11-16.

As to the security risks posed, Torma attested disclosure of “transfer information” poses several risks including: inmates would learn of the factors compiled and reviewed regarding evaluation of transfer requests; inmates would learn separation information and security threat group information; and inmates would use transfer petition information to retaliate against staff responsible for reporting unfavorable information to OPM. In addition, she advised that access to staff's comments and evaluations places the staff who made the comments or evaluations at risk for retaliation. *Id.* at ¶22-24. Torma also claims, “[P]ublic access to transfer petitions would divulge confidential mental health, medical, substance abuse, sexual or violent histories, etc., to member [sic] of the public and other inmates, since all of these factors play a role in transfer petition disposition.” *Id.* ¶25.

Based on the Supplemental Declaration, we are persuaded that Requester's transfer petition is properly protected from public access under the Public Safety exception. We apply our reasoning in Woods v. Office of Open Records, 998 A.2d 665 (Pa. Cmwlth. 2010), to reach the result here.

In Woods, we held the agency supported protecting the “Supervision Strategies” part of a sex offender registration manual under the Public Safety exception. We held the agency met the first element of the Public Safety exception because the Board of Probation and Parole is engaged in a public protection activity with regard to its handling of parolees. We held the agency met the second element of the exception based on the agency’s detailed affidavit, which described the records and the threat posed to the public protection activity from their release.

Consistent with our analysis above and in Carey I, we hold DOC met its burden of establishing its role of protecting the public with regard to the records implicated in part 4 of the Request. The Supplemental Declaration sufficiently explains the content of transfer petitions such that this Court comprehends the inherent sensitivity of such information. Like the submission in Woods, the Supplemental Declaration outlines how transfer information may be manipulated, thus permitting circumvention of the transfer process, and posing a threat to the public in the event transfer petitions were disclosed. Thus, we hold Requester’s transfer petition is exempt in its entirety under the Public Safety exception.

While DOC makes a convincing case for protecting transfer petitions, it is not clear that Requester’s transfer petition is the only record responsive to part 4 of the Request. To the extent part 4 of the Request implicates any documents other than a “transfer petition,” such as release and recommitment forms or orders, and such records exist independently of a transfer petition, DOC did not adequately support their non-disclosure.

The records request before us clearly involves transfer of a single inmate who was part of the mass transfer. From our rudimentary understanding of transfer procedures and associated paperwork, the Court contemplates that something in the nature of a free-standing release order or authorization may exist. Indeed, these records may have accompanied Requester, and been provided to him at some point in the process. DOC did not support the protection of any information outside of transfer petitions. Therefore, to the extent such records exist, and are not part of the transfer petitions, the release and recommitment orders or forms are subject to mandatory disclosure.

Further, for the reasons set forth in Carey I as to part 2 of the Request, we hold the identities of any persons or agencies who authorized Requester's release and/or recommitment are protected under the Personal Security exception. Therefore, as to part 4 of the Request, DOC is directed to disclose responsive records other than transfer petitions, consisting of release and recommitment orders or authorizations, from which identities shall be redacted.

III. Conclusion and Directive

Consistent with the foregoing, we determine DOC properly withheld the Prisoner Operation Plan, and it properly redacted records responsive to parts 1 and 3 of the Request as to DOC communications.

With regard to Requester's Release/Recommitment records sought in part 4 of the Request, we are unconvinced that all responsive records are protected by the Security Exceptions. While we hold DOC met its burden of proving

Requester's transfer petition is protected from disclosure in its entirety, the record is unclear whether the transfer petition is the only responsive record in DOC's possession or control. Accordingly, we direct DOC to disclose any discrete release order or form and recommitment order or form pertaining to Requester, with appropriate redaction of the identities in accordance with Carey I.

Our opinion in Carey I, particularly as it determined the applicability of other substantive exceptions, remains in full force and effect.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 3rd day of July, 2013, the final determination of the Office of Open Records remains **AFFIRMED IN PART** as to specificity, and as to denying access to responsive records, including any transfer petitions, pursuant to the Public Security exception in Section 708(b)(2) of the Right-to-Know Law,¹ 65 P.S. §67.708(b)(2).

To the extent a release and/or recommitment order responsive to part 4 of the Request exists in any discrete form that is separate from the transfer petition, the final determination of the Office of Open Records is **REVERSED IN PART**, and the Pennsylvania Department of Corrections is directed to disclose such orders or forms with minimal appropriate redaction of identities, within 30 days.

Our opinion dated January 24, 2013, is **CONFIRMED**.

Jurisdiction is relinquished.

ROBERT SIMPSON, Judge

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