

IN THE MATTER OF	:	
	:	
ABDUL KARIEM MUHAMMUD,	:	
Complainant	:	
	:	
v.	:	RTKL Appeal No. 2014-01
	:	
PENNSYLVANIA COMMISSION	:	
ON SENTENCING,	:	
Respondent	:	

FINAL DETERMINATION

INTRODUCTION

Abdul Kariem Muhammad (Requester), an inmate at the Federal Correctional Institution, Elkton, in Lisbon, Ohio, submitted a request (Request) to the Pennsylvania Commission on Sentencing (PCS) pursuant to the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (RTKL), seeking information relating to his criminal case in Pennsylvania. PCS denied the request and Requester appealed to the Legislative Reference Bureau (LRB). For the reasons set forth in this Final Determination, the appeal is denied and PCS is not required to take any further action on the request.

FACTUAL BACKGROUND

On March 3, 2014, PCS received a written request from Requester who sought copies of transcripts, police reports, guideline sentencing forms and parole and probation transcripts for docket cases CP-51-CR-0509611-1990 and CIP-51-CR-1029531-1991 from Philadelphia County. PCS denied the request on March 14, 2014, for the reason that “the record(s) sought are not in the possession, custody or control of the PCS.” PCS also stated that the Clerk of Courts in the county in which Requester was sentenced was the official custodian of the records sought

and added that it is not the policy of PCS to release completed guideline sentencing forms. Requester was then notified of his right to appeal the decision to LRB.

Requester appealed the decision in a letter dated March 25, 2014. Due to an incorrect address on the envelope, the appeal letter was erroneously delivered to the Office of Open Records (OOR) at the Commonwealth Keystone Building in Harrisburg. LRB was informed by electronic message from OOR on March 31, 2014, that the hard copy was being forwarded. The hard copy of Requester's appeal was not received by LRB in the Main Capitol until April 2, 2014.

On April 2, 2014, LRB sent a letter to Requester and PCS informing them that they had seven days from the date of the letter to submit additional information and legal argument in support of their positions. They were notified that statements of fact needed to be supported by affidavit. LRB received a timely letter dated April 10, 2014, from counsel for PCS that included an affidavit of the Executive Director of PCS. In his affidavit, the Executive Director stated, *inter alia*, that: the records sought were not "legislative records" as defined in the RTKL; they were not in the possession, custody or control of PCS; and the Executive Director "... directed a search to be done of the records of the Commission to ascertain if there are any copies of the requested records on file and none were found." No additional information was received by LRB from Requester.

#### LEGAL ANALYSIS

"[T]he objective of the Right-to-Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). Further, this important open-government 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...". *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commonwealth Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

LRB is required by section 503(c)(1) of the RTKL to hear appeals from all legislative agencies. *See* 65 P.S. § 67.503(c)(1). In performing that duty, LRB must appoint an appeals officer. The appeals officer has the legal duty to "[r]eview all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). The appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Department of General Services*, 20 A.3d 613, 617 (Pa. Commonwealth Ct. 2011). Here, neither party has requested a hearing and LRB has the necessary, requisite information and evidence before it to properly adjudicate the matter. The evidence consists of an affidavit from the Executive Director of PCS.

PCS is a legislative agency subject to the RTKL and, as such, is required to disclose its legislative records. 65 P.S. § 67.303(a). A legislative record in the possession of a legislative agency is presumed to be available in accordance with the RTKL unless an exemption applies. 65 P.S. § 67.305(b). Upon receipt of a request under the RTKL, a legislative agency is required to assess whether a record is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. The legislative agency bears the burden of proving by a preponderance of the evidence the applicability of any cited exemption. *See* 65 P.S. § 708(a)(2). The preponderance of the evidence has been defined as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435, 439 (Pa. Commonwealth Ct. 2011)

(quoting *Department of Transportation v. Agricultural Lands Condemnation Approval Board*, 5 A.3d 821, 827 (Pa. Commonwealth Ct. 2010)).

Before considering whether an exemption applies for a record sought from a legislative agency under the RTKL, there is a more fundamental question: whether the record falls within the statutory definition of a “legislative record.” Only legislative records are required to be made accessible under the act. *See* 65 P.S. § 67.303(a). If the record or document sought does not satisfy the definition of a legislative record, there is no need to discuss exemptions. In such a case, the record or document is not subject to the RTKL.

Section 102 of the RTKL provides the following pertinent definition:

"Legislative record." Any of the following relating to a legislative agency or a standing committee, subcommittee or conference committee of a legislative agency:

- (1) A financial record.
- (2) A bill or resolution that has been introduced and amendments offered thereto in committee or in legislative session, including resolutions to adopt or amend the rules of a chamber.
- (3) Fiscal notes.
- (4) A cosponsorship memorandum.
- (5) The journal of a chamber.
- (6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.
- (7) The transcript of a public hearing when available.

(8) Executive nomination calendars.

(9) The rules of a chamber.

(10) A record of all recorded votes taken in a legislative session.

(11) Any administrative staff manuals or written policies.

(12) An audit report prepared pursuant to the act of June 30, 1970 (P.L.442, No.151) entitled, "An act implementing the provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission."

(13) Final or annual reports required by law to be submitted to the General Assembly.

(14) Legislative Budget and Finance Committee reports.

(15) Daily legislative session calendars and marked calendars.

(16) A record communicating to an agency the official appointment of a legislative appointee.

(17) A record communicating to the appointing authority the resignation of a legislative appointee.

(18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.

(19) The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

65 P.S. § 67.102. There are numerous specific types of records of legislative agencies that fall within the definition of “legislative record.” However, unless a record satisfies one of these types of enumerated types, it is not required to be produced by a legislative agency under the RTKL.

In this case, Requester seeks a copy of records relating to his criminal convictions from Philadelphia County. They consist of transcripts, police reports, guideline sentencing forms and parole and probation transcripts from criminal cases for which Requester provides specific docket numbers. According to the affidavit of the Executive Director as submitted by PCS, the only documents sought by Requester that are “within the purview of the Sentencing Commission” are the original guideline sentencing forms. The forms are routinely “produced by the courts and filed with the clerk of courts, with a copy going to the Commission.” This process is established at 204 Pa. Code §303.1 (relating to sentencing guidelines standards).

It is clear that neither the guideline sentencing forms nor the other records relating to Requester’s criminal convictions fall within any of the 19 types of records enumerated within the definition of a legislative record for purposes of the RTKL. Therefore, PCS is correct in its assertion that the forms are not subject to a RTKL request. It is acknowledged that PCS’s initial reason for denying the request did not specify this reason. However, the failure of PCS to do so

is not dispositive. PCS is not precluded from raising new grounds for denial on appeal. *See Levy v. Senate of Pennsylvania*, 65 A.3d. 361 (Pa. 2013).

Even if the documents requested were legislative records within the meaning of the RTKL, it would not matter in this case. According to the affidavit of the Executive Director, PCS conducted a search for the records sought and they could not be found within the possession, custody or control of PCS. The records simply do not exist within PCS. A legislative agency cannot be compelled under the RTKL to produce documentation which is nonexistent.

#### CONCLUSION

For the foregoing reasons, Requester's appeal is denied and PCS is not required by the RTKL to take any further action. This Final Determination is binding on all parties. Within 30 days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court of Pennsylvania. 65 P.S. § 67.1301(a). If a party appeals, it must serve notice of the appeal to all other parties and LRB. Pursuant to section 1303(a) of the RTKL, LRB has the right to respond.

FINAL DETERMINATION ISSUED AND MAILED: APRIL 16, 2014

Duane M. Searle, Esq.  
Appeals Officer

