

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vincent A. Piccone,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1403 C.D. 2010
	:	
State Board of Medicine,	:	Submitted: December 30, 2010
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: August 12, 2011

Vincent A. Piccone (Requestor) petitions for review from the Order of the Office of Open Records (OOR) that denied his appeal from the determination of the Department of State, Bureau of Professional and Occupational Affairs (Bureau), which denied, in part, Requestor's request for documents relating to information in the Bureau's possession regarding Requestor (Request).

On May 10, 2010, Requestor submitted his Request to the Pennsylvania State Board of Medicine (Board), which is part of the Bureau, seeking:

1/ Copies of any [Board] correspondence to or from any private person, government agency, employer, hospital, or training program regarding myself.

2/ Copies of any letters of complaint, reprimand, or negative report from any private citizen, public official, government agency, employer, hospital or training program regarding myself.

3/ Copies of any psychiatric evaluation regarding myself.

4/ Copies of any correspondence to or from any state agency, city, or Federal Agency, state licensing board, [sic] FBI, or [S]ecret [S]ervice regarding myself.

[5]/ Copies of any criminal complaints or records from any state, federal or city agency regarding myself.

6/ Copies of any letters to or from [certain named individuals] regarding myself.

7/ Any correspondence which is to or from any member of the Kennedy, Clinton, or Molinari families or their friends or associates.

8/ Copies o[f] any other letters or correspondence not listed above involving myself.

(Request at 1-2, R. Item 1.) The Bureau issued its response to Requestor on May 19, 2010 (the Response), granting the Request in part, and providing Requestor with a copy of the Board Adjudication and Order suspending his license. The Response denied the remainder of the Request on the grounds that the requested documents were exempt from disclosure pursuant to Section 708(b)(6)-(7), (17)(i)-(ii), (vi)(A) of the Right to Know Law (RTKL).¹ Requestor appealed the Bureau's determination to the OOR.

¹ Act of February 14, 2008, P.L. 6, 65 P.S. § 67.708(b)(6)-(7), 17 (i)-(ii), (vi)(A). Section 708(b)(6) exempts certain types of personal information, such as social security numbers, from the definition of public record under the RTKL. 65 P.S. § 67.708(b)(6). Section 708(b)(7)

Requestor stated in his appeal to the OOR that he had been told by a doctor that he was being investigated by the FBI and Secret Service and that he would like the Board's correspondence with these agencies so that he could "reply directly to their concerns." (Letter from Requestor to OOR (May 24, 2010) (OOR Appeal), at 1, R. Item 3.) Requestor also stated that: he believed his career had been ruined by negative reports to "personnel files;" he disagreed with these reports; and, he wanted copies of these reports so that he could "write replies to [his] file." (OOR Appeal.) Requestor stated that he believed that Section 708(b)(17)(i)-(ii), (vi)(A) was "unconstitutional as per the fifth and six[th] amendments of the United States Constitution with reference to due process and the right to confront witnesses against [him]." (OOR Appeal.)

In its Final Determination, the OOR held that the additional records sought by Requestor were exempt pursuant to Section 708(b)(17) because they "would 'reveal the institution, progress or result of an agency investigation . . .'" (Final Determination at 3 (quoting 65 P.S. § 67.708(b)(17)(vi)(A)) (alteration and omission in original).) In reaching this holding, the OOR relied upon the affidavit of the Deputy Chief Counsel of the Prosecution Division of the Bureau, which stated:

1. The prosecution division directs investigations by the Department's Bureau of Enforcement and Investigation (BEI) on behalf of the Department's Bureau of Professional and Occupational Affairs (BPOA) and its 29 professional licensing boards, including the State Board of Medicine. Affidavit, ¶ 2.

exempts the release of certain types of information regarding agency employees. 65 P.S. § 67.708(b)(7). Section 708(b)(17) exempts certain kinds of non-criminal investigative records from the definition of public record under the RTKL. 65 P.S. § 67.708(b)(17).

2. The prosecution directed investigation and prosecution of [Requestor], before the State Board of Medicine at file number 1994-49-00183, resulting in the July 13, 1999, adjudication that indefinitely suspended his license to practice medicine in this Commonwealth, based upon disciplinary action against his license to practice[] medicine in New York. Affidavit, ¶ 3.

3. The prosecution division maintains records for file number 1994-49-00183. The records contained in this file are: the complaint received about [Requestor], documents obtained by BEI agents or prosecuting attorney or their agents to support the allegations [of] the complaint (including confidential medical reports), investigators' and attorneys' notes and correspondence, and hearing preparation materials. All of these records relate to the investigation at file number 1994-49-00183. Affidavit, ¶ 4.

4. Where formal legal action is taken, such matter is publicly filed with the Prothonotary for the Department of State and assigned a separate docket number. Under the Medical Practice Act, the State Board of Medicine may levy a civil penalty, suspend or revoke a license, or impose certain other sanctions upon a licensee for violating the Medical Practice Act or Board regulations. Any imposition of a sanction would be only as part of that legal action. Affidavit, ¶ 5.

5. If formal charges are not filed, no sanction may be imposed. The file is archived, and no public record is created. If the Department disclosed records from an investigation that did not lead to the filing of formal charges, such disclosure would [“]reveal the institution, progress or result of an investigation.” Affidavit, ¶ 6.

(Final Determination at 2 (quoting Affidavit of Bernadette Paul, Deputy Chief Counsel, Office of Chief Counsel, Prosecution Division, Department of State (Affidavit) ¶¶ 2-6).²) The OOR declined to address Requestor's contention that

² The Bureau notes in its brief that OOR neglected to include the Affidavit in the record certified to this Court despite this Court's decision in Department of Transportation v. Office of Open Records, 7 A.3d 329, 333 (Pa. Cmwlth. 2010) (stating that the record certified to this Court by the OOR in an appeal from a determination by the OOR is “to include evidence and documents admitted into evidence by the appeals officer”). However, “[b]ecause the final determination quotes the [A]ffidavit in full, the Department has not applied for an order of court directing OOR to supplement the certified record to include the [A]ffidavit.” (Bureau's Br. at 6 n.2.)

provisions of Section 708(b)(17) violate the United States Constitution on the ground that the OOR is not competent to consider the constitutionality of the RTKL. The OOR, therefore, affirmed the decision of the Bureau. Requestor now appeals to this Court.³

Before this Court, Requestor argues that:⁴ (1) Section 708(b)(17)(vi)(A) does

³ This Court has stated that:

In reviewing a final determination of the OOR, this Court “independently reviews the OOR's orders and may substitute its own findings of fact for that of the agency.” With regard to what evidence this Court may consider in reviewing a decision of the OOR, this Court “is entitled to the broadest scope of review” but “should consider the manner of proceeding most consistent with justice, fairness and expeditious resolution.” The RTKL does not prohibit this Court from considering evidence that was not before the OOR.

Department of Transportation v. Office of Open Records, 7 A.3d 329, 332 n.2 (Pa. Cmwlth. 2010) (internal citations omitted) (quoting Bowling v. Office of Open Records, 990 A.2d 813, 818, 820, 823 (Pa. Cmwlth. 2010) (en banc)).

⁴ Listed above are the arguments we can glean from the argument section of Requestor's Brief. Requestor states the questions involved as:

1/ Does the [S]tate have the right to hide documents that have had an adverse effect on the career of the petitioner from the petitioner?

2/ Is the State required to reveal “protected” documents to the petitioner as per the United States Constitution which mandates the ability to face accusers and due process rights?

3/ Is it in the best interest of the State or the petitioner to not disclose psychiatric reports that may be libelous?

4/ Does the United States Constitution and the Bill of Rights protect people against accusers who place negative reports in their personnel files without the apparent knowledge of the petitioner and supported by [S]tate secrecy statutes?

5/ Can the State use confidentiality of investigatory records to hide political mischief and tyranny (investigators' and attorneys' notes and correspondence, and hearing preparation materials are included.)

6/ Does not the petitioner always have a strong interest in knowing the institution, progress, or result of an agency investigation.

not apply because his medical license was suspended and, therefore, the records requested relate to the suspension of a license; (2) because the Bureau has the option, pursuant to Section 707(a) of the RTKL, 65 P.S. § 67.707(a), to produce a non-public record, Requestor's right to due process is violated when the Bureau does not produce the requested records; and, (3) because Requestor seeks psychiatric reports about himself, his consent to disclose those records is implied and Section 708(b)(6) should not apply to exempt those records from disclosure.

Section 301(a) of the RTKL, 65 P.S. § 67.301(a), provides that agencies must disclose public records in accordance with the RTKL. Section 102 of the RTKL, 65 P.S. § 67.102, defines a "public record" as "[a] record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege." 65 P.S. § 67.102. Section 708(b)(17) provides, in relevant part, that the following are excluded from the definition of "public record" under the RTKL and are, therefore, not subject to disclosure:

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

7/ Is not the petitioner entitled to academic transcripts, letters of recommendation, and the redactions based upon 708(b)(6).

8/ Can the State withhold documents in a personnel and disciplinary folder, under color of Statute when such documents are otherwise subject to disclosure under the State Right to Know law.

9/ What takes precedence – The United States Constitution and the intent of the State Open Records policy or poorly interpreted statute interpretation by State Officials.

(Requestor's Br. at 6.)

(i) Complaints submitted to an agency.

(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, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

(B) Deprive a person of the right to an impartial adjudication.

(C) Constitute an unwarranted invasion of privacy.

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

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

65 P.S. § 67.708(b)(17). Some of the documents requested by Requestor explicitly fall within these categories. For example, Requestor requested any complaints or negative reports about himself. (Request at 1, ¶ 2.) Such documents are exempt from disclosure under the RTKL pursuant to Section 708(b)(17)(i). Requestor also sought a number of different categories of correspondence regarding himself. (Request at 1-2, ¶¶ 1-2, 4, 6-8.) Per the Affidavit, any correspondence in Requestor's file maintained by the prosecution division were to "support the allegations [of] the complaint" against Requestor and "relate to the investigation"

of the complaint that resulted in the suspension of Requestor's medical license. (Affidavit ¶ 4 (quoted in Final Determination at 2).) Thus, all requested correspondence that exists and is in the Bureau's possession is investigative correspondence and exempt from disclosure under the RTKL pursuant to Section 708(b)(17)(ii). Likewise, the remainder of the requested documents, including psychiatric evaluations of Requestor and criminal records obtained by the Bureau regarding Requestor, constitute investigative materials, per the Affidavit, and are also exempt from disclosure pursuant to Section 708(b)(17)(ii). All of these documents, if disclosed, would reveal the institution or progress of the Bureau's prosecution division regarding Requestor and are, therefore, exempt pursuant to Section 708(b)(17)(vi)(A).

First, addressing Requestor's argument that the exemption under Section 708(b)(17)(vi)(A) does not apply to his Request because his medical license was suspended and, therefore, the records requested relate to the suspension of a license, we note that the Bureau properly disclosed the Adjudication and Order suspending Requestor's medical license. It is this record that reveals the result of the Board's investigation and suspended Requestor's medical license. However, the plain language of Section 708(b)(17)(vi)(A) does not require the Board to disclose the remainder of its investigative file, and to interpret it to do so would have a chilling effect on the Board's ability to obtain information from witnesses in other investigations. See Department of Health v. Office of Open Records, 4 A.3d 803, 811-812 (Pa. Cmwlth. 2010) (discussing how disclosure of exempt non-criminal investigative records could discourage witnesses from coming forward).

We next address Requestor’s argument that the Bureau has the option, pursuant to Section 707(a) of the RTKL, 65 P.S. § 67.707(a), of producing a non-public record, and that it violates Requestor’s right to due process for the Bureau not to produce the requested records. We first note that Section 707(a) does not, itself, create a mandate for an agency to disclose a nonpublic record. Section 707(a) provides that “[i]f, in response to a request, an agency produces a record that is not a public record . . . the agency shall notify any third party that provided the record to the agency, the person that is the subject of the record and the requester.” 65 P.S. § 67.707(a). This is a conditional provision which takes effect *if* an agency produces a non-public record. Section 707(a) does not impose a *duty* on agencies to disclose non-public records. Section 506(c) gives agencies the authority to disclose non-public records provided that:

(1) Disclosure of the record is not prohibited under any of the following:

(i) Federal or State law or regulation.

(ii) Judicial order or decree.

(2) The record is not protected by a privilege.

(3) The agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.

65 P.S. § 67.506(c). However, this authority is discretionary, not mandatory. Department of Health, 4 A.3d at 815.

Insofar as Requestor argues that the Bureau’s failure to disclose records relating to the investigation resulting in the suspension of his medical license

violates Requestor's right to due process, this argument is unrelated to the RTKL. The RTKL relates to the availability of records to the general public, not to an individual's access to records to which that individual, but not others, may have a right. See, e.g., 65 P.S. § 67.301(b) (providing that an agency "may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law"). If Requestor believes that access to the requested records is necessary to ensure his right to due process or confrontation under the Fifth and Sixth Amendments to the United States Constitution, he must seek access to these records through other legal avenues. Requestor's argued interest in these records does not convert them from exempt records to public records.

Finally, we address Requestor's argument that, because he requested his own psychiatric report, his consent to its disclosure is implicit, and the Bureau may not withhold it pursuant to the exemption at Section 708(b)(6). We need not reach the merits of this issue. Even assuming this argument were meritorious, this record would still fall under the non-criminal investigative record exemption at Section 708(b)(17), as discussed above.

For these reasons, we affirm the Order of the Office of Open Records.

RENÉE COHN JUBELIRER, Judge

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State Board of Medicine,	:	
	:	
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ORDER

NOW, August 12, 2011, the Order of the Office of Open Records in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge