

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Gerald R. Bigioni,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2203 C.D. 2009
	:	Submitted: July 9, 2010
Office of Open Records,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: August 19, 2010**

Representing himself, Gerald R. Bigioni, an inmate, petitions for review from a final determination of the Office of Open Records (OOR) that denied his request for his psychiatric and psychological records under the Right-to-Know Law (Law).<sup>1</sup> Bigioni alleges a denial of due process against OOR and the Department of Corrections (DOC). We affirm OOR's determination that Bigioni's psychiatric and psychological records are exempted from access under Section 708(b)(5) of the Law, 65 P.S. §67.708(b)(5), and we determine Bigioni's denial of due process claim lacks merit.<sup>2</sup>

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

<sup>2</sup> This Court, in its appellate jurisdiction, independently reviews OOR's orders regarding Commonwealth agencies. Not limited by OOR's reasoning in the written decision subject to review, the Court enters findings and conclusions based on the evidence as a whole and explains its own rationale. Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Cmwlth. 2010) (en banc).

Bigioni, an inmate at a state correctional institution, requested his psychiatric and psychological records from DOC pursuant to the Law. Certified Record (C.R.) at Item #1 (Right-to-Know Request); see also C.R. at Item #3 (Appeal to OOR). The Law governs access to public records. Bowling. Here, the issue is limited to whether Bigioni's psychiatric and psychological records are subject to disclosure under the Law.

Initially, DOC's agency open-records officer responded to Bigioni's written request. C.R. at Item #2. The officer explained the requested records were exempt under the Law, 65 P.S. §67.708(b)(5), and denied his request. Id. Further, the response included information regarding DOC policy and procedures as possible avenues to satisfy Bigioni's request. Id.

Bigioni filed an appeal of the denial to OOR. C.R. at Item #3 (with attached exhibits). In completing the form for the appeal, Bigioni did not indicate the records were public records. Id.; see Section 1101(a)(1) of the Law, 65 P.S. §67.1101(a)(1) (entitled "Filing an appeal," stating the requester provides the grounds for asserting the record is a public record and addresses the agency's grounds for denial in the appeal). Specifically, Bigioni's response to the grounds for such an assertion was "[i]n the interests of justice, Mr. Bigioni needs the records." Id. Thereafter, OOR issued a final determination. C.R. at Item #4. OOR concluded that Bigioni's requested records were not public records under the Law and denied the appeal pursuant to 65 P.S. §67.708(b)(5). Id. Now, Bigioni petitions for review.

Under the Law, a “record” includes “information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” Section 102 of the Law, 65 P.S. §67.102. As a department of the executive branch, DOC is a Commonwealth agency. Id.

Commonwealth agencies are required to provide public records to requesters, legal residents and agencies, in accordance with the Law. 65 P.S. §67.102 and Section 301(a) of the Law, 65 P.S. §67.301(a). Although the Law presumes a record in possession of a Commonwealth agency is a public record, the presumption does not apply to exemptions under Section 708. Section 305(a)(1) of the Law, 65 P.S. §67.305(a)(1). Further, a “public record” is defined as a record of a Commonwealth agency that is not exempt under Section 708. 65 P.S. §67.102.

Section 708 (entitled “Exceptions for public records”) exempts from access “[a] record of an individual’s medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests ... or related information that would disclose individually identifiable health information.” 65 P.S. §67.708(b)(5) (emphasis added).

Generally, the Commonwealth agency’s burden of proving a requested record is exempt from public access is by a preponderance of the evidence. Section 708(a)(1) of the Law, 65 P.S. §67.708(a)(1). A “preponderance of the evidence” is defined as the greater weight of the evidence. Mitchell v.

Office of Open Records, \_\_\_ A.2d. \_\_\_ (Pa. Cmwlth., Docket No. 1353 C.D. 2009, filed June 29, 2010).

Here, the Law expressly provides that an individual’s psychiatric and psychological records are not public records. 65 P.S. §67.708(b)(5); see also Hunt v. Dep’t of Corr., 698 A.2d 147 (Pa. Cmwlth. 1997) (concluding that a law student’s request for the medical and mental health records of an executed inmate was properly denied since the records were not public records subject to disclosure under the prior Law).<sup>3</sup> Thus, Bigioni’s request is properly denied under the Law.

Although not necessary to do so, Bigioni indicated he intended to use the requested information in ongoing litigation. C.R. at Item #s 1, 3; see Section 703 of the Law, 65 P.S. §67.703 (entitled “Written requests”) and Section 1308 of the Law, 65 P.S. §67.1308 (entitled “Prohibition,” expressly prohibiting a requirement under the Law that the requester disclose the purpose or motive for his request). In his petition for review, Bigioni contends the requested records are after-discovered evidence relevant to his Post Conviction Relief Act (PCRA)<sup>4</sup> proceedings, and he seeks to have the records sent directly to the court presiding

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<sup>3</sup> The General Assembly passed a new Law in 2008. Bowling. In Hunt, DOC argued the confidentiality of documents concerning mental health treatment and requirement of the patient’s written consent to disclose as provided in Section 111 of the Mental Health Procedures Act, Act of July 9, 1976, P.L. 817, as amended, 50 P.S. §7111, supported its position that mental health records are not public records under the Law, even after the patient’s death. Now, the Law specifically provides for an exemption.

<sup>4</sup> 42 Pa.C.S. §§9541-9546.

over that litigation. Bigioni asserts that the denial of the records violated his due process rights by hindering his ability to present evidence in his criminal litigation.

As explained above, the private psychiatric and psychological records Bigioni seeks are not subject to disclosure under the Law, 65 P.S. §67.708(b)(5), to any person for any reason. Thus, Bigioni's motive for seeking the records is irrelevant. See Hull v. Pa. State Police, 768 A.2d 909 (Pa. Cmwlth. 2001) (stating that the reason or motive for the request is irrelevant in a case where petitioner argued, in part, that the denial of access to his DNA test results under the Law impacted his ability to pursue PCRA relief). Therefore, Bigioni's due process claim lacks merit.

Accordingly, we affirm the order of the Office of Open Records denying Bigioni's appeal.

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ROBERT SIMPSON, Judge

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	:	
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**ORDER**

**AND NOW**, this 19<sup>th</sup> day of August, 2010, the final determination of the Office of Open Records is hereby **AFFIRMED**.

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ROBERT SIMPSON, Judge