



The Office of Open Records webinar will begin soon

- Use the “Conversation” box to submit questions
- Submitted questions are records under the RTKL
- After the webinar ends:
 - Email openrecords@pa.gov or call 717-346-9903
- OOR website has resources for agencies & requesters
 - <https://www.openrecords.pa.gov/>



pennsylvania

OFFICE OF OPEN RECORDS

Erik Arneson, Executive Director

AOROs: Preparing Affidavits for Appeals

March 14, 2019

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Introduction

Topics

- Why is an affidavit needed
- What is an affidavit
- Writing an affidavit

Terms

- AO = Appeals Officer
- FD = Final Determination
- AORO = Agency Open Records Officer
- Affidavits = attestations, statement of facts

• Purpose

- Improve Efficiency
- Assist AOROs

Why is an affidavit needed

- The burden is on the agency to show that the exemption asserted applies. See 65 P.S. § 67.708(a).
- Affidavits are how an agency details and supports why an exemption applies to a certain record. It is evidence.
 - Testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption. Heavens v. Pa. Dep't of Env'tl. Prot., 65 A.3d 1069, 1073 (Pa.Cmwlth 2013).

Why is an affidavit needed

- If the agency fails to file a sufficient affidavit (evidence) in support of its legal argument, it will likely fail to meet the burden.

Practice Tip: When an agency files an argument with the OOR alleging that a record is exempt or does not exist, it should **always** be supported by an affidavit.

- The same standard applies to third party direct interest participants. It is good practice to tell third parties that they will also need to file an affidavit in support of any legal argument.

What is an affidavit

- An affidavit is a **factual** statement made under oath or penalty of perjury. It claims that **a fact** – or **set of facts** – is true to the best of the affiant's knowledge.
 - It is a **factual** statement, not a legal argument.
 - Legal conclusions, arguments, and affiant opinions should be made in the letter brief, not the affidavit.
 - The affidavit supports the legal arguments; it should not make the legal arguments.
 - EXAMPLE:
 - Factual statement: The records requested contain employee social security numbers.
 - Legal argument/conclusion: The records are exempt under § 708(b)(6) because they contain personal information.

What is an affidavit: Fact vs. Conclusion

- It is a factual statement not a conclusion - conclusory.
 - Factual: The requested email was deleted on April 7, 2018 as part of the County's record retention policy.
 - Conclusory: The requested email does not exist.
- Factual: The requested document contains the social security number of John Doe.
- Conclusory: The record is exempt under § 708(b)(6).

Writing an affidavit: Pre-Drafting

- Put yourself in the place of the AO.
- The AO probably does not know:
 - the facts or history of your case
 - acronyms your agency uses
 - what your agency calls or names records/files
 - the contents of the records
 - the agency filing and backup system
 - the agency's retention schedule/policy
 - unique nature of documents
- The AO only needs to know what is applicable to the case.
 - For example, the AO doesn't need to know irrelevant details surrounding the records or the relationship between the agency and requester
- Tell a story – Be a Guide

Writing an affidavit: Structure

- Include the caption and docket number of the case at the top.
 - Example: Smith v. Home County, OOR Dkt. AP 2019-5678
- Indicate that the affidavit is one of these three:
 - pursuant to 18 Pa.C.S. § 4904 (option used on OOR forms)
 - made under penalty of perjury
 - made under oath and notarized
- Arrange the facts in a coherent manner.
- State each fact in a separate paragraph.
- Number the paragraphs so that the affidavit is easier to read and refer to in the FD.
- Reference any supporting documents by marking them as exhibits.
- Use a reference or index where necessary.
 - Numbered pages
 - Dates
 - Bate Stamp

Writing an affidavit: The affiant

- The affidavit should include the name and title of the person giving the testimony.
 - Why is it important that this person is telling the AO this?
 - Why does this person know what the affidavit says is true?
 - How or why does this person know about the records at issue?
 - Why would they know where the records are or what they contain?
 - What would they know about the facts or situation(s) surrounding the record or request?

Writing an affidavit: Drafting

- An affidavit should establish a nexus between the exemption and any withheld records or redactions.
- It should answer these general questions:
 - Who
 - What
 - Where
 - When
 - How
 - Why

Writing an affidavit: Examples

- Example: Records do not exist or are not in the possession* of agency.
 - Questions should at least include:
 - Who looked for the records
 - Where did the AORO or affiant look for the records
 - Why did they look there
 - What records did the AORO or affiant look at during search
 - Who would know if a record was never created
 - When was the search conducted
 - What keywords were used as part of the search
 - Where else would the records be – another agency
 - Were all copies destroyed/deleted
 - When
 - Why
 - By whom
 - What is agency retention policy

Writing an affidavit: Examples

Moore v. Department of Corrections, 2017 Pa. Commw. Unpub. LEXIS 704, 177 A.3d 1073

- Request was for records that DOC claimed did not exist
 - DOC provided affidavit to OOR that stated that:
 - “no responsive records exist within the Department’s custody, possession or control”
 - the AORO “reviewed [Moore’s] request and researched it”
- Court held that this was conclusory and generic
 - More details are needed and at a minimum should include a description of the records the AORO reviewed

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

**Thomas, Vincent
Requestor**

v.

**PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Respondent**

:

:

:

:

:

:

:

:

Docket No. AP-2018-1608

AFFIDAVIT OF DAVID M. BUTTS

I, David Butts, hereby declare under the penalty of perjury, pursuant to 18 Pa. C.S. § 4901, that the following statements are true and correct based upon my personal knowledge, information, and belief:

1. Currently, the Pennsylvania Board of Probation and Parole (Board) employs me as the Agency Open Records Officer (AORO).
2. I was appointed to my current position as the AORO in May of 2017.
3. I am responsible for RTKL requests for public records information under the RTKL relating to the: (1) the Board; (2) Sexual Offender Assessment Board (SOAB); (3) Office of Victim Advocate (OVA); and (4) County Probation and Parole Officers' Firearm Education and Training Commission (FETC).
4. I am responsible for logging in, tracking, researching, and issuing responses to all Right-to-Know Law (RTKL) requests received by the Board, SOAB, OVA, and FETC.

5. The Board received Mr. Thomas' RTKL request on August 8, 2018.

6. The Board responded to Mr. Thomas' RTKL request on August 15, 2018. See Exhibit A attached to the Board's position statement filed on September 19, 2018.

7. Mr. Thomas's requested "Waiver Form showing that I signed off on waiving my rights to counsel for Parole proceedings."

8. The Board form "Waiver of Representation by Counsel (PBFP 72)" is used for preliminary, detention, violation and revocation hearings before the board.

9. Parole records reside in OnBase, an electronic document management system. I have received training in OnBase functionality and have more than 16 months experience using the document management system.

10. Accordingly, I conducted a thorough review of the Board's records for Mr. Thomas at Inmate No. AM7061 and Parole No. 3329R.

11. Further, I consulted a legacy file management system to determine if a paper file remained. That system indicated the file was made wholly electronic in November 2017; therefore, no additional versions endure.

12. Additionally, Mr. Thomas has never been before the Board for a preliminary, detention, violation, or revocation hearing.

13. After a careful review of the electronic record, I concluded a waiver of counsel, either entered as a PBPP 72 or in any other format, does not exist.

Respectfully submitted,



David Butts
Agency Open Records Officer
Pennsylvania Board of Probation and Parole

Date: September 24, 2018

Writing an affidavit: Examples

- The AORO Guidebook Exhibits 16 – 18 are **updated** OOR samples:
 - <https://www.openrecords.pa.gov/RTKL/AgencyGuides.cfm>
- Look at the exemption and ask what facts would help determine if the exemption may apply.
 - Example: Release of video would threaten public safety and endanger safety of the building
 - Not enough to just say it's a risk or it's a threat to security
 - Questions should at least include:
 - What is in the record that makes it a threat or risk
 - Why/How would release threaten safety or security
 - Can info be redacted
 - Who is attesting that threat or risk exists
 - Experience
 - Expertise
 - Knowledge of situation

Writing an affidavit: Examples

Gregg Twp. v. Grove, 2018 Pa.Comm.w.Unpub. LEXIS 343; 2018 WL 3097074

- Request was for footage from security cameras in building used for municipal offices
 - Agency denied claiming release would threaten public safety and endanger safety of the building § 708(b)(2) and (3)
- Court held agency did not meet burden and video was public
 - Why?
 - Affidavit was silent as to what was depicted in the video
 - Affidavit referred generally to all of the cameras but failed to explain why footage from one camera will jeopardize safety
 - Affidavit did not explain how the cameras are used to enhance public safety – monitored some contemporaneously
 - Affidavit did not address whether information could be redacted
 - Affidavit had conclusory statements without explaining details about how security will be jeopardized

Writing an Affidavit: Editing

- Re-read and edit your affidavit.
- Proofread for both accuracy and grammar.
 - Example:
 - The records requested are not within the Agency's possession, custody, or control.
 - The records requested are within the Agency's possession, custody, or control.
- One word can make a big difference.
- Eliminate language that makes the affidavit contradictory.

Follow-up from the AO

- Respond to AO requests for more information.
 - Do not take it personally
 - Do not take it as an attack on your credibility
 - More detail may be needed
 - More explanation of process, terms, or content may be required
 - A stated fact is better than making an inference of fact

Court cases and OOR Final Determinations

- Look for situations or facts similar to yours.
 - What exemption was cited
 - What records were requested
 - Why did the court or the OOR say the affidavit did or did not support the agency's argument

Brown v. DOC, 2017 Pa. Commw. Unpub. LEXIS 653, 177 A.3d 1066

- DOC denied a request for records due to outstanding fees
- Court said that DOC failed to show the requester owed outstanding fees
- Affidavit stated:
 - Records were copied and prepared for Requester
 - Requester had not paid
 - He had an outstanding balance
- Affidavit should have also identified the documents that were copied as well as the number of pages included in the charge

List of court cases

- Affidavits must be detailed, nonconclusory, and submitted in good faith. [Office of the Governor v. Scolforo, 65 A.3d 1095, 1103-1104, 2013 Pa. Commw. LEXIS 120, *20-22, 2013 WL 1729755;](#)
- The affidavit must (1) include detailed information describing the nature of the records sought and (2) connect the nature of the various records to the reasonable likelihood that they can be properly withheld under an exemption. [Carey v. Pa. Dep't of Corr., 61 A.3d 367, 375-376, 2013 Pa. Commw. LEXIS 30, *16-19, 2013 WL 257149;](#) [Harrisburg Area Cmty. College v. Office of Open Records, 2011 Pa. Commw. Unpub. LEXIS 378, *19, 2011 WL 10858088;](#)
- It's not sufficient to recite a list of subjects that records *might* include, which would cause them to fall under a certain exception. The affidavit must describe "how" the records reflect information that is protected by the exception. [Office of the Governor v. Scolforo, 65 A.3d 1095, 1103-1104, 2013 Pa. Commw. LEXIS 120, *20-22, 2013 WL 1729755;](#)
- When an affidavit discusses a group or category of records, the affiant must explain which of the records in that category are protected and which are not. [Carey v. Pa. Dep't of Corr., 61 A.3d 367, 375-376, 2013 Pa. Commw. LEXIS 30, *16-19, 2013 WL 257149;](#)
- An affidavit must be specific enough to permit the Court [and AO] to evaluate the exemptions as they apply to *particular documents*. [Vista Health Plan, Inc. v. Dep't of Human Servs., 2018 Pa. Commw. Unpub. LEXIS 295, *19, 189 A.3d 41, 2018 WL 2436329;](#)

Webinar Q&A

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