



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>VINCENT A. PICCONE, M.D.,</b>	:	
<b>Complainant</b>	:	
	:	<b>Docket No.: AP 2010-0468</b>
<b>v.</b>	:	
	:	
<b>PENNSYLVANIA DEPARTMENT</b>	:	
<b>OF STATE,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Vincent Piccone, M.D (the “Requester”) submitted a request to the Pennsylvania Department of State (“Department”), pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.* The Requester sought a records related to his license to practice medicine. The Department provided records, redacted certain records and denied investigative records citing section 67.708(b)(17). The Requester timely appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Department is not required to do anything further.

**FACTUAL BACKGROUND**

On May 14, 2010, the Requester sought records related to his license to practice medicine. On May 19, 2010 the Department provided some records and denied access to others, including those related to noncriminal investigations, citing

section 708(b)(17)(vi)(A) of the RTKL. On May 27, 2010 the Requester timely appealed the denial of access to “complaints, investigative materials, notes correspondence and reports.” (“Appeal”). The Requester did not appeal the denial of any other records; therefore, the appeal is limited to the denial based upon section 708(b)(17). The Requester also asserted that section 708(b)(17) violates the Fifth and Sixth Amendments of the United States Constitution.

On May 28, 2010 the OOR invited the parties to submit additional information in support of their positions. On June 8, 2010 Thomas Blackburn, Esquire responded on behalf of the Department and provided the sworn Affidavit of Bernadette Paul, Deputy Chief Counsel, Office of Chief Counsel, Prosecution Division, Department of State. Affidavit, ¶ 1. Ms. Paul states as follows:

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.
2. The prosecution directed investigation and prosecution of Vincent Piccone, MD, 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 practice3 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 Dr. Piccone, documents obtained by BEI agents or prosecuting attorney or their agents to support the allegations fo 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.

## **LEGAL ANALYSIS**

Pursuant to section 67.503(a), the OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The Department is a Commonwealth agency subject to the RTKL, 65 P.S. §67.301. Records in possession of an agency are presumed to be “public” unless: (1) the record is exempt under Section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law, regulation or judicial order or decree, 65 P.S. §67.305. Section 67.708 of the RTKL clearly states that the burden of proof rests with the public body to demonstrate that the record is exempt.

### **A. Section 708(b)(17) Applies to Exempt the Records for Disclosure.**

Records related to a noncriminal investigation are exempt from public disclosure pursuant to the provisions of sections 708(b)(17) which exempts a record that would “[r]eveal the institution, progress or result of an agency investigation...” Through the Affidavit of Bernadette Paul the Department has provided sufficient evidence to show that responsive records contained in the file 1994-49-00183 resulting in the prosecution of Dr. Piccone are investigative records. Prior to the Appeal, the Department provided a copy of an adjudication and order dated July 13, 1999, at file number 1994-49-00183 and docket number 0170-49-1996. Therefore, records were provided subject to the exception to the exemption set forth in section 708(b)(17)(vi)(A) regarding records that reflect “the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration or similar authorization issued by an agency...” Accordingly, the Request as to those records were provided and are not subject to appeal..

## **B. The OOR does not have jurisdiction over alleged Constitutional violations**

The Requester argues that the RTKL exemption for noncriminal investigation records is unconstitutional. With respect to any alleged Constitutional violations, the OOR's review is limited to whether or not "the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree."

The OOR is not the forum to determine whether an individual's constitutional rights were or will be violated. See, e.g. *Moore v. OOR*, 1638 CD 2009, Commonwealth Court, (issued March 25, 2010) (appeal of OOR determination not proper forum to challenge constitutionality of continued incarceration). Whether a record is publicly accessible through a right-to-know request is not determined by the relationship of the Requester to the record. In fact, the RTKL expressly bars an agency from asking a requester "to disclose the purpose or motive in requesting access to records." 65 P.S. §67.1308. Rather, the analysis is limited to whether the record is subject to disclosure to the public at large.

As discussed above the Department provides sufficient evidence to meet its burden to prove that the records are exempt by section 708(b)(17).

### **CONCLUSION**

For the foregoing reasons, Requester's appeal is **denied**. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. §1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an

opportunity to respond according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED:** June 23, 2010

A handwritten signature in black ink, appearing to read 'Audrey Buglione', written in a cursive style.

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APPEALS OFFICER  
AUDREY BUGLIONE, ESQ.

Sent to: Vincent Piccone, M.D., Thomas Blackburn, Esquire