

On May 23, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester argued that he had already been provided with some of the photographs. The OOR invited the parties to supplement the record, and directed the Township to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On June 1, 2016, the Township submitted a position statement and the affidavit of Stephan M. Letavic, the Township's Agency Open Records Officer. In these statements, the Township explains that the photographs had been taken for the purpose of determining whether there were violations of the Township's Floodplain Ordinance.

On June 6, 2016, the Requester submitted a response to the Township's position statement, reiterating that the Township had already shared the photographs with other non-governmental third parties. The Township responded the same day, arguing that the Requester's submission was untimely.¹

LEGAL ANALYSIS

“The 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 L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (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. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

¹ The Requester's June 6 submission was received after the record closed, however to develop the record, both the Requester's and the Township's submissions were considered. *See* 65 P.S. § 1102(b)(2) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review 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). An appeals officer may conduct a hearing to resolve an appeal; however, the decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). 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.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct.

2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The photographs relate to a noncriminal investigation.

The Township argues that the photographs taken on Shelley Island are exempt because they relate to noncriminal investigations conducted by the Township. Section 708(b)(17) of the RTKL exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(ii). To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814. An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep't of Public Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

The Flood Plain Management Act (“Act”), 32 P.S. §§ 679.101 *et seq.*, gives the Township authority to conduct inspections of Shelley Island. Section 403 of the Act states that:

- (a) An agency or employee of the Department of Community Affairs, the Department of Environmental Resources, or of a municipality administering flood plain management regulations shall have the power and duty to, upon presentation of proper credentials:
 - (1) Enter any land for the purpose of surveying flood plains.
 - (2) Enter any land in a flood plain for the purpose of ascertaining the location and condition of obstructions.
 - (3) Enter land or, while under construction, any structure located in a flood plain for the purpose of ascertaining the compliance

or noncompliance with the flood plain management regulations adopted pursuant to this act.

32 P.S. § 679.403(a); *see also* 12 Pa. Code § 113.9. Regulations implementing the Act state that “[e]ach identified municipality is required by the act to adopt floodplain management regulations which at a minimum comply with the requirements of the program, the act and this chapter.” 12 Pa. Code § 113.4(a). Mr. Letavic attests that “investigative inspections for Shelley and Bashore Islands were conducted by the [Township’s] Code/Zoning Office, all in consultation with the [Township’s] solicitor, and were conducted for various purposes, including but not limited to:

- a. Determining whether violations of the Londonderry Township Floodplain Ordinance (the “Ordinance”) exist and the extent of the violations;
- b. Analyzing compliance with the requirements of the Community Assistance Visit Report issued by the Federal Emergency Management Agency National Flood Insurance Program; and
- c. Gathering evidence for potential civil legal actions and/or settlement of violations.”

Therefore, the Act provides the authority for the Township to conduct inspections pursuant to its Ordinance, and Mr. Letavic attests that the photographs were taken as part of an investigation conducted to determine compliance with the Ordinance. In addition, the letter sent by the Township to the York Haven Power Company that the photographs were taken primarily to document the results of that investigation. As a result, the Township has met its burden of proving that it conducted noncriminal investigations, and that the records relate to these noncriminal investigations. Consequently, the Township has met its burden of proving that these records are exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

The Commonwealth Court has cautioned that “it [is] incumbent upon [an agency] to determine whether records exist[] that [do] not fall within the exception or whether an exception to the noncriminal investigation [exemption] require[s] that certain documents be disclosed.” *Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1075 (Pa. Commw. Ct.

2013); *see also* 65 P.S. § 67.708(b)(17)(vi)(A). Therefore, the OOR must determine whether an exception to Section 708(b)(17) applies – namely, whether the record documents “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.” *See* 65 P.S. § 67.708(b)(17)(vi)(A). Here, the Request seeks photographs taken during inspections rather than any results of the inspections. Regardless, Mr. Letavic attests that the photographs were taken to determine whether violations of the Township’s Ordinance occurred, and to gather evidence for any potential legal actions. Therefore, the Request does not seek records that are subject to public access. However, the Requester is not prohibited from seeking records documenting fines or penalties assessed as a result of the above-referenced inspections.

2. The Township has not waived its right to withhold nonpublic records.

The Requester argues that the Township has effectively waived its argument that the records are exempt from disclosure by providing him with some of the requested photographs, as well as providing the full set of photographs to the York Haven Power Company. The Requester further argues that there is no reason to withhold the remaining photographs.

An agency has discretion to release otherwise exempt records unless prohibited by law. *See* 65 P.S. § 67.506(c) (stating that an agency “may exercise its discretion to make an otherwise exempt record accessible”). However, the Commonwealth Court has held that “[a]lthough Section 506(c) grants an agency the discretion to release an otherwise exempt record under certain circumstances, it does not require an agency to do so.” *Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 815 (Pa. Commw. Ct. 2010). Here, while the Township has previously released some of the records, it has chosen to not release the records in this instance.

The Township's decision to release some of the records to the Requester cannot constitute a waiver as to the rest of the photographs. As a result, the OOR does not have jurisdiction to order the Township to release the withheld records.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the Township is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Dauphin County Court of Common Pleas. 65 P.S. § 67.1302(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. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED:

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Nicholas Moss (via e-mail only);
LaToya Winfield Bellamy, Esq. (via e-mail only);
Stephan Letavic (via e-mail only)

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).