

4-20-16 2016 2:27pm news update (as screen captured and shown in Attachment A) to be deleted from the page.

2. Any terms of use, policy, or regulation established by the [Office] that caused [the Requester] to be blocked from any further ability to post comments on <https://www.facebook.com/stacyparksmiller> after I had commented as shown in Attachment A (my first ever post on this page).
3. Any record evidencing how Centre County District Attorney Stacy Parks Miller came into personal possession of the large head shot photograph of Ayyakkannu Manivannan seen in the Facebook page (<https://www.facebook.com/stacyparksmiller>) posting captured as Attachment B.
4. Any record evidencing how Centre County District Attorney Stacy Parks Miller came into personal possession of the large head shot photograph of Mandy Cook seen in the Facebook page (<https://www.facebook.com/stacyparksmiller>) posting captured as Attachment C.

On May 9, 2016, the Office invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b). On June 8, 2016, the Office denied the Request, arguing that “the site is not run by the [Office] and the content of the page is not an [Office] record.”

On June 29, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Office to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 13, 2016, the Office submitted the attestation made under the penalty of perjury of District Attorney Parks Miller, the Office’s Open Records Officer, who asserts that the OOR lacks jurisdiction to hear the instant appeal because the Office is a judicial agency. District Attorney Parks Miller also reiterates that the requested records do not document a transaction or activity of the Office and, therefore, are not records subject to the RTKL. *See* 65 P.S. § 67.102 (defining “record”). The Requester submitted additional information on July 14, 2016.

On July 15, 2016, following a request for clarification from the OOR, the Office submitted a supplemental attestation made under the penalty of perjury from District Attorney Parks Miller, attesting that the records requested in Items 1-4 of the Request do not exist within the Office's possession, custody or control. The Requester also made a supplemental submission on July 15, 2016.

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).

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 Office 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)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Office is not a judicial agency under the RTKL

The Office argues that it is a judicial agency which is not subject to the RTKL, except to provide financial records. Under the RTKL, a judicial agency is defined as “[a] court of the Commonwealth or any other entity or office of the unified judicial system” and is only required to disclose financial records. *See* 65 P.S. § 67.304. The Commonwealth Court has expressly held that a District Attorney is not a judicial agency as defined in Section 102 of the RTKL, but rather a local agency that is subject to the jurisdiction of the OOR. *See Miller v. County of*

Centre, 135 A.3d 233 (Pa. Commw. Ct. 2016); *see also Sawicki v. Centre County District Attorney's Office*, OOR Dkt. AP 2015-0757, 2015 PA O.O.R.D. LEXIS 885 (holding that the Office is not a “judicial agency”); *Pennsylvanians for Union Reform v. Centre County District Attorney's Office*, OOR Dkt. AP 2016-0093, 2016 PA O.O.R.D. LEXIS 313. Accordingly, the Office’s argument that it is not a local agency is without merit, and the OOR has jurisdiction over this appeal. *See* 65 P.S. § 67.503(a)(2).

2. The Office has demonstrated that the records requested in Items 1-4 of the Request do not exist within its possession, custody or control

The Office states that the records requested in Items 1-4 of the Request do not exist within its possession, custody or control. Specifically, the Office claims that the Facebook page referenced in the Request is the personal page of District Attorney Parks Miller, and that the Office does not possess records pertaining to this account. In support of its position, the Office provides the attestations made under the penalty of perjury of District Attorney Parks Miller, who attests as follows:

In response to [Items] 1 and 2 – After conducting a good faith search of agency files, I have made the determination that no “terms of use,” “policies” or “regulations” responsive to Items 1 and 2 of the Request, as they relate to the Facebook page identified in the Request, exist within the possession, custody or control of the [Office].

In response to [Items] 3 and 4 – After conducting a good faith search of agency files, I have made the determination that no records responsive to Items 3 and 4 of the Request, as they relate to the “head shot photographs” specifically referenced in the Request, exist within the [Office’s] possession, custody or control.

Under the RTKL, an attestation made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Office acted in bad faith or that the

records exist, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based upon the evidence provided, therefore, the Office has demonstrated that the records requested in Items 1-4 of the Request do not exist within the Office’s possession, custody or control.¹

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Office 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 Centre 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: 25 July 2016

/s/ Joshua T. Young

JOSHUA T. YOUNG, ESQ.
APPEALS OFFICER

Sent to: Simon Campbell (via e-mail only);
Hon. Stacy Parks Miller (via e-mail only)

¹ In his supplemental submission, the Requester asks the OOR to determine whether the Facebook page referenced in the Request is a public or private page; however, such a determination is irrelevant to whether the requested records exist within the possession, custody or control of the Office. Therefore, the OOR need not address the issue in this final determination.

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