



request number CP 2015-0713. This plan is in [the] possession of the [Department] by virtue of section 3.15 of that same agreement, which requires the [C]ity to designate a high-ranking police official to help create the plan.

On May 17, 2016, the Department invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b). The Requester granted the Department subsequent extensions of time to respond to the Request on June 15, 2016 and June 22, 2016, respectively. *See* 65 P.S. § 67.902. On June 24, 2016, the Department denied the Request, stating that a finalized version of the requested security plan did not exist. Additionally, the Department argued that the security plan would threaten the personal security of an individual, 65 P.S. § 67.708(b)(1); would threaten public safety, 65 P.S. § 67.708(b)(2); and would jeopardize the physical security of a building or computer security, 65 P.S. §§ 67.708(b)(3)-(4). The Department further argued that the security plan reflects the internal, predecisional deliberations of the Department, 65 P.S. § 67.708(b)(10); constitutes or would reveal trade secrets or confidential proprietary information, 65 P.S. § 67.708(b)(11); relates to a criminal investigation, 65 P.S. § 67.708(b)(16); and relates to a noncriminal investigation, 65 P.S. § 67.708(b)(17). Finally, the Department claimed that the records are protected by the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S. § 9106(c)(4).

On July 11, 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 Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 29, 2016, the Department submitted a position statement, reasserting many of the arguments above and further arguing that the requested security plan constitutes the notes and working papers of Department employees or officials, 65 P.S. § 67.708(b)(12), and is protected

by the attorney-client privilege and attorney-work product doctrine.<sup>1</sup> The Department also submitted statements made under the penalty of perjury of Lieutenant Edward Egenlauf, the Department's Open Records Officer, and Edward Baldini, the Lieutenant of the Department's Counter-Terrorism Operations Unit.

On August 1, 2016, the OOR dismissed the instant appeal as having been untimely filed. However, by correspondence received the same day, the Department notified the OOR that it had provided inaccurate information regarding the date its open-records officer received the Request, and sought to make an amended submission. As a result, by Order dated August 1, 2016, the OOR vacated its Final Determination and the parties were granted leave to make supplemental submissions until August 10, 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

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<sup>1</sup> The Department is permitted to raise new grounds for denial on appeal. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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 Department 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).

The Department argues that the security plan did not exist at the time the Request was filed with the Department, noting that the first draft of the security plan was created during the week of July 11, 2016, more than two months after the Request was filed. In support of its position, the Department provides the statements made under the penalty of perjury of Lieutenants Egenlauf and Baldini. Lt. Egenlauf attests that he “searched the records of the [Department]” and that the “[r]equested [r]ecord did not exist at the time the [R]equest was received.” Additionally, Lt. Baldini attests that the security plan “was created the week of July 11, 2016 after a series of weekly committee and subcommittee meetings comprised of local, state and federal law enforcement agencies....” Under the RTKL, a statement 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 Department acted in bad faith or that the records exist, “the averments in [the statement] 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)).

The OOR’s review on appeal is confined to the Request as written. *See Brown v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998. Because an agency cannot release records that do not exist at the time a RTKL request is submitted, a request is necessarily limited to records possessed by the agency prior to the submission of the RTKL request. *See Rittmeyer and The Tribune-Review v. Springdale Borough*, OOR Dkt. AP 2016-0426, 2016 PA O.O.R.D. LEXIS 516; *Reading and Northern Railroad Co. v. SEDA-COG Joint Rail Auth.*, OOR Dkt. AP 2014-1947, 2015 PA O.O.R.D. LEXIS 858; *Terensky v. City of*

*Monessen*, OOR Dkt. AP 2013-0772, 2013 PA O.O.R.D. LEXIS 349. Here, at the time of the Request (May 10, 2016), the security plan did not exist, and any security plan created thereafter and possessed by the Department would not be responsive to this Request. Based upon the evidence provided, therefore, the Department has established that the security plan did not exist at the time the Request was filed. *See Hodges*, 29 A.3d at 1192.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the Department 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 Philadelphia 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: 11 August 2016**

*/s/ Joshua T. Young*

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JOSHUA T. YOUNG, ESQ.  
APPEALS OFFICER

Sent to: Austin Nolen (via e-mail only);  
Jill Freeman, Esq. (via e-mail only)

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