

to the Request pursuant to 65 P.S. § 67.902. On June 10, 2016, the Borough denied the Request, stating the records are related to criminal and noncriminal investigations. *See* 65 P.S. §§ 67.708(b)(16)-(17).

On June 21, 2016, the Requester appealed to the OOR,¹ challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On June 28, 2016, the Borough submitted a one-page, unsworn statement reiterating its reasons for denying access to the records and inviting the OOR to conduct an *in camera* review of the records.

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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute.

¹ The Requester agreed to allow the OOR additional time to issue a final order in this matter. *See* 65 P.S. § 67.1101.

Id. Here, while the Borough requested that the OOR conduct an *in camera* review of the records, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Borough is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed 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 respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *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 Borough did not establish that the records are related to a noncriminal investigation

The Borough contends that the records at issue are protected from disclosure under 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL provides that records “relating to a noncriminal investigation” are protected from disclosure. *Id.* In order for this exemption to

apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See 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; *see also Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

In the present case, the Borough has not submitted any evidence in support of withholding access to the requested records, and, in the absence of even a preliminary showing that the records may be exempt under 65 P.S. § 67.708(b)(17), the OOR declines to conduct an *in camera* review of the requested records. Accordingly, the Borough has not demonstrated that the records are exempt from disclosure under 65 P.S. § 67.708(b)(17). *See* 65 P.S. § 67.708(a)(1).

2. The appeal is transferred with respect to the Borough’s assertion that the records are related to a criminal investigation

The Borough also alleges that the records are exempt because they are related to a criminal investigation. 65 P.S. § 67.708(b)(16). Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation.” *Id.* As the Borough is statutorily-empowered to create a police department, the Borough qualifies as a local law enforcement agency. *See* 8 Pa.C.S. § 1121; *see generally* OOR Advisory Opinion issued Jan. 15, 2010 (stating that a township police department is not a separate agency from a township). The OOR does not have jurisdiction to hear appeals related to criminal investigative records held by local law enforcement agencies. *See* 65 P.S. 67.503(d)(2). Instead, appeals involving records alleged to be criminal investigative records held by a local law enforcement agency are to be heard by an appeals officer designated by the local district attorney. *See id.* Accordingly, the appeal is hereby transferred to the Appeals Officer for the Luzerne County

District Attorney's Office. A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Luzerne County District Attorney's Office.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **transferred in part** to the Appeals Officer for the Luzerne County District Attorney's Office, and the Borough is not required to take any further action at this time. 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 Luzerne 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 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: August 15, 2016

/s/ J. Chadwick Schnee, Esq.

APPEALS OFFICER/ ASSISTANT CHIEF COUNSEL
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² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).