

exempt from disclosure because it related to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17).

On August 1, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 10, 2016, the Township submitted a position statement arguing that the appeal should be dismissed because the Requester failed to address the grounds for denial raised by the Township in its response.¹ In the alternative, the Township reiterated its grounds for denial and provided an exemption log describing the e-mail withheld in response to the Request. In support of its position, the Township submitted the affidavit of David Burman, the Township's Open Records Officer. In addition, the Township provided three OOR final determinations addressing records similar to those sought in the Request and holding that the records were related to a noncriminal investigation. *See Batchelor v. Willistown Twp.*, OOR Dkt. AP 2015-2584, 2016 PA O.O.R.D. LEXIS 24; *Batchelor v. Willistown Twp.*, OOR Dkt. AP 2016-0004, 2016 PA O.O.R.D. LEXIS 402; *Batchelor v. Willistown Twp.*, OOR Dkt. AP 2016-0544, 2016 PA O.O.R.D. LEXIS 628.

¹ The Township argues that this appeal should be dismissed because the certain details surrounding the Request do not correspond to the copy of the Request submitted on appeal. In order to review the agency's denial of a request for records, the record on appeal is required to include both the request and the agency's response. *See* 65 P.S. § 67.1303(b). While the Township claims that the Request submitted with the appeal is not an identical copy of the Request submitted to the Township, the Township does not contest that the content of the Request is the same. In fact, comparing the records requested in the Request submitted on appeal to the quotation of the Request in the Township's response reveals no difference. Given that the parties do not dispute the content of the Request, the OOR will address the merits of the case in the interest of justice, fairness and the expeditious resolution of the dispute. *See* 65 P.S. § 67.1102(b)(3); *Schneller v. Municipality of Norristown*, OOR Dkt. AP 2015-0309, 2015 PA O.O.R.D. LEXIS 358.

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. 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. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the 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 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)(1). 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 Requester sufficiently appealed the Township’s denial

The Township argues that the appeal should be dismissed because the Requester failed to address the Township’s grounds for denial of access. Section 1101(a)(1) of the RTKL requires requesters to “state the grounds upon which the requester asserts that the record is a public record ... and ... address any grounds stated by the agency for ... denying the request.” 65 P.S. § 67.1101(a)(1); see also *Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request”). Pursuant to this section, the Commonwealth Court has held that a requester must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access.” *Saunders v. Pa. Dep’t of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012). Here, the Requester submitted his appeal using the OOR’s standard appeal form,

indicating that “the requested records are public records in the possession, custody or control of the Agency [and] the records do not qualify for any exemption under § 708 under the RTKL[.]” Therefore, the Requester satisfied the requirements of Section 1101(a) of the RTKL. *Kirk v. Mifflin County*, OOR Dkt. AP 2014-0493, 2014 PA O.O.R.D. LEXIS 439.

2. The withheld e-mail relates to a noncriminal investigation

The Township claims that it withheld one e-mail as a record of a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “complaints submitted to the agency.” 65 P.S. § 67.708(b)(17)(i). 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 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; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). The Commonwealth Court has held that “[a]n official probe only applies to ‘noncriminal investigations conducted by an agency acting within its legislatively granted fact-finding and investigative powers.’” *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014) (quoting *Johnson*, 49 A.3d at 925); *see also Collier v. Pa. Dep’t of State*, OOR Dkt AP 2014-0361; 2014 PA O.O.R.D. LEXIS 398; *Bhaya v. Central Bucks Sch. Dist.*, OOR Dkt. AP 2014-0319; 2014 PA. O.O.R.D. LEXIS 372.

The Township submitted evidence demonstrating that an investigation was conducted by the Township’s Zoning Officer, who is authorized to conduct investigations under Township Code § 139-139(A), which provides that the Zoning Officer shall investigate complaints. The Township further asserts that the Zoning Officer conducts investigations pursuant to the

Municipalities Planning Code, which provides authority for zoning officers to institute civil enforcement proceedings. *See* 53 P.S. § 10614. Under the RTKL, a statement made under made under the penalty of perjury may serve as sufficient evidentiary support 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). Here, the Township has established that investigating zoning complaints and violations is part of its legislatively-granted authority. *See Batchelor v. Willistown Twp.*, OOR Dkt. AP 2015-2584, 2016 PA O.O.R.D. LEXIS 24. In addition, the Township submitted correspondence from its zoning officer regarding this investigation, in which he concluded that no violations were found. Finally, as described by the Township’s affidavit and exemption log, the withheld e-mail relates to “[c]omplaints about 17 Laurel Circle” and the zoning officer’s subsequent investigation. Thus, the Township’s submission shows that the Township conducted an investigation pursuant to its “legislatively-granted fact-finding powers.” Accordingly, based on the evidence provided, the Township has met its burden of proof that the withheld e-mail is related to the Township’s noncriminal investigation into compliance with its zoning ordinances. *See Batchelor*, OOR Dkt. AP 2016-0004, 2016 PA O.O.R.D. LEXIS 402 (holding that e-mails related to the identical investigation were exempt records of a noncriminal investigation).

CONCLUSION

For the foregoing reasons, 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 Chester 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 31, 2016

/s/ Benjamin A. Lorah

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Peter Batchelor (via e-mail only);
David Burman (via e-mail only);
Shanna Lodge (via e-mail only)

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