

On August 8, 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 Board to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 11, 2016, the Board submitted a position statement reiterating its grounds for denial. The Board claims that the records that are responsive to the Request are confidential pursuant to 37 Pa. Code § 61.2. In support of its position, the Board submitted the sworn affidavit of Janaki Theivakumaran (“Ms. Theivakumaran”), the Board’s open records officer. On August 18, 2016, the Requester submitted a position statement and sworn statement of facts subject to the penalty of perjury reiterating that the record he seeks is public record subject to disclosure.

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. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, a hearing/*in camera* review was requested/the parties did not request a hearing/*in camera* review and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Board is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. 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). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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)).

In her affidavit, Ms. Theivakumaran states that a search was conducted and a responsive record was located. However, upon review of the records, it was determined that it constitutes a “record[], report[] and [an]other written thing[], information, evaluation[], and opinion[]” that “touch[es] upon matters concerning parolees or probationers that [is] related to their being a probationer or parolee.” Ms. Theivakumaran stated that the identified record does not constitute Board decisions that involve “a brief statement of the reasons for actions by the Board granting or refusing a parole”; accordingly, the Board argues that the records are confidential under 37 Pa. Code § 61.2.

In his submission, the Requester claims that the letter should be released to him because the exemptions cited by the Board do not apply and, since the district attorney is a public official, anything he does in the performance of his duties is public record.

The Pennsylvania Code provides, in pertinent part:

Records, reports and other written things and information, evaluations, opinions and voice recordings in the Board's custody or possession touching on matters concerning a probationer or parolee are private, confidential and privileged; except that a brief statement of the reasons for actions by the Board granting or refusing a parole will at all reasonable times be open to public inspection in the offices of the Board.

37 Pa. Code § 61.2. This language is broad enough to exempt from disclosure “all of the contents of a parole file.” *See Poindexter v. Pa. Bd. of Probation and Parole*, OOR Dkt. AP 2011-0672, 2011 PA O.O.R.D. LEXIS 461; *see also Jones v. Office of Open Records*, 993 A.2d 339, 342 (Pa. Commw. Ct. 2010) (noting “the broad language of this regulation”); *Davis v. Pa. Bd. of Probation and Parole*, No. 944 C.D. 2015, 2016 Pa. Commw. Unpub. LEXIS 402 (Pa. Commw.

Ct. 2016). Here, the Request specifically seeks a letter submitted by the prosecuting district attorney to the Board in connection with the Requester's application for parole. Therefore, the Request, on its face, seeks records contained in the Requester's parole file. As posited by the Department, these records are expressly exempt under the Code, they are not subject to disclosure under the RTKL. *See* 65 P.S. § 67.305(a)(3); *Coulter v. Pa. Bd. of Probation and Parole*, OOR Dkt. AP 2011-1444, 2011 PA O.O.R.D. LEXIS 1114; *aff'd* 48 A.3d 516 (Pa. Commw. Ct. 2012).

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied** and the Board 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 Commonwealth Court. 65 P.S. § 67.1301(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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 7, 2016

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Jeffrey Waige (via U.S. Mail only);
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¹ *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).