

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

On August 12, 2016, the Department submitted a statement made under penalty of perjury by the Commissioner of the Department's Bureau of Commissions, Elections and Legislation, who supervises the division responsible for recording Acts of the General Assembly. The Commissioner reasserts the argument that the Department is not required to perform legal research for the Requester and attests that the Crimes Code is not a "record" of the Department, but is, rather, a compilation of laws by a private corporation.¹ On August 24, 2016, the Requester submitted a statement made under the penalty of perjury asserting that he had previously been provided with statutes when he had only included the Purdon's statute numbers.

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 agencies. 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request"

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

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, the parties did not request a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department 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 Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. 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. 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)).

Here, the Department argues that the Crimes Code is not a record “of” the Department. The RTKL imposes a two-part inquiry for determining if certain material is a record: (1) does the material document a “transaction or activity of the agency”? and (2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency”? See 65 P.S. § 67.102; *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). In *A Second Chance*, the Commonwealth Court interpreted the word “documents” as meaning “proves, supports [or] evidences.” 13 A.3d 1034.

Here, although the Department is responsible for assigning final act numbers, the current Crimes Code, as compiled by a private corporation, does not prove, support or evidence a transaction or activity of the Department.² The Department attests that, with regard to legislation, it only has the authority to assign final act numbers and maintain copies of the final acts. Therefore, it follows that the Crimes Code does not evidence a transaction or activity of the Department. Cf. *Poindexter v. Pa. Bd. of Prob. and Parole*, OOR Dkt. AP 2011-0672, 2011 PA O.O.R.D. LEXIS 461 (concluding that the Parole Act is not a record “of” the Probation and Parole Board); *Leiberton v. Alleg. Valley Sch. Dist.*, OOR Dkt. AP 2009-0357, 2009 PA O.O.R.D. LEXIS 647, *rev'd on other grounds* SA-09-760 (Allegheny Com. Pl. May 5, 2010) (“State laws and local ordinances that are not enacted by the School Board do not qualify as ‘records of’ the School District....”). Under the RTKL, an affidavit may serve as sufficient

² The OOR notes that the Pennsylvania General Assembly maintains Title 18, Crimes and Offenses, on its website at <http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=18>. Additionally, the Unofficial Purdon's Pennsylvania Statutes from WestlawNext are freely available online at [https://govt.westlaw.com/pac/index?transitionType=Default&contextData=\(sc.Default\)&bhcp=1](https://govt.westlaw.com/pac/index?transitionType=Default&contextData=(sc.Default)&bhcp=1).

evidentiary support. *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 evidence that the Department has acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. 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 on the evidence provided, the Department has met its burden of proving that the requested records are not records of the Department.

CONCLUSION

For the foregoing reasons, the Requester’s the 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 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 12, 2016

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to: Alton Brown, DL 4686;
Rebecca Fuhrman (via e-mail only);
Karen Cummings, Esq. (via e-mail only)

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