

On August 11, 2016, the City denied the Requests, claiming that the records are protected from disclosure due to an Order for Protection issued on November 24, 2015 in the Philadelphia County Court of Common Pleas (“Protective Order”). The City also argues that release of the records would threaten personal security. *See* 65 P.S. § 67.708(b)(1).

On August 24, 2016, the Requester appealed¹ to the OOR, challenging the denials and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 6, 2016, the City submitted a position statement reiterating its grounds for denial. The City argues that the records are protected from disclosure by judicial order. The City also submitted the affidavits of the two Assistant District Attorneys that are the subject of the Requests, Hugh Burns, Jr., Esq. and Linda Montag, Esq.

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

¹ The OOR hereby consolidates the appeals docketed at OOR Dkts. AP 2016-1440 and 2016-1441 into OOR Dkt. AP 2016-1440.

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, the Requester requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The City 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)).

The City argues that requested records are subject to the Protective Order, which states, in relevant part, as follows:

An Order of Protection is hereby **ENTERED** in favor of the City of Philadelphia, the City of Philadelphia's Fire Department and any other agency or department of the City of Philadelphia, against Christopher Barosh ... regarding any and all information or documents referencing, regarding, mentioning, or pertaining to:

...

h) City employees, investigators, and/or witnesses connected with, related to, or involved with, in any way, the underlying investigations, incidences, actions, inactions, occurrences, or hearing(s) that led to the [Requester's] conviction for arson and/or insurance fraud.

The City asserts that both Mr. Burns and Ms. Montag are "connected with, related to, or involved with" the Requester's conviction. In support of its position, the City relies on the affidavit of Mr. Burns who attests that:

One of the appeals that [the District Attorney's Office] handled during March of 2014 was [the Requester's] appeal to the Pennsylvania Superior Court, *Commonwealth v. Barosh*, 1103 EDA 2013, which appealed his conviction for arson and insurance fraud in the Court of Common Pleas.

At that time, I supervised Assistant District Attorney Peter Carr, who filed the Commonwealth's brief to the Superior Court in opposition to [the Requester's] appeal. ... My name appears on the first page and in the conclusion of [the] brief. My name also appears as a counsel of record on the docket for that appeal.

In addition, Ms. Montag attests that:

I was assigned to the prosecution of [the Requester] in *Commonwealth v. Barosh*, CP-51-0008461-2010 in the Philadelphia Court of Common Pleas. [The Requester] was being prosecuted for arson and related charges.

...I represented the Commonwealth against [the Requester] at hearings before the Court of Common Pleas. My appearances were recorded on the docket for that case.

Under the RTKL, an affidavit 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 City acted in bad faith, "the averments in [the affidavit] 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)). Based on the evidence provided, the City has demonstrated that the records responsive to the Requests fall under the protection of the Protective Order because they relate to City employees who were involved with the actions that led to the Requester's conviction.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the City 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 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: September 19, 2016

/s/ Jill S. Wolfe, Esq.

APPEALS OFFICER
JILL S. WOLFE, ESQ.

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

Sent to: Christopher Barosh, KW-9982;
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