

2. Departmental documents, which authorize the Department of Revenue to implement a program of Special Project Discovery Assessments and documents, which specified the parameters and procedures that govern the program; and
3. Documents, which publically disclosed that the Department of Revenue had implemented a program of Special Project Discovery Assessments and publicly disclosed the parameters and procedures that govern the program.

On July 27, 2016, the Department invoked a thirty day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On August 26, 2016, the Department denied the Request, claiming that the Request required the Department to conduct legal research, 65 P.S. § 67.703, and that the Request was further denied because the records requested reflected the internal, predecisional deliberations of the Department, 65 P.S. § 67.708(b)(10)(i)(A).

On August 29, 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 September 14, 2016, the Department submitted a position statement reiterating its grounds for denial. The Department claims that the Requester is barred from bringing litigation against the City of Philadelphia by three Court Orders. The Department also asserts that Item 1 of the Request requires legal research and that there are no records responsive to Items 2 and 3 of the Request. In support of its position, the Department submitted the affidavit of Lisa Bratz, the Department's Open Records Officer.

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, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Department 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Department has not provided sufficient evidence to establish that the Request is barred by a court order

The Department argues that the Requester is barred from filing litigation against the Department by three court Orders. The Department refers to a June 3, 2014 Order and a June 4, 2014 Order issued by the Philadelphia County Court of Common Pleas, which state that “Nathan Lerner is barred from instituting additional litigation against the Philadelphia Tax Board, the City of Philadelphia or other related defendants arising from the same or related claims without leave of Court.” On January 8, 2016, the Commonwealth Court issued an Opinion and Order affirming the Court of Common Pleas’ June 4, 2014 Order.

Although these Orders exist limiting the Requester’s litigation against the City of Philadelphia, including the Department, the Department does not provide sufficient evidence demonstrating that the Request subject to this appeal is encompassed by the above-described court Orders. In particular, it is unclear if the Request here relates to the claim in the above litigation. Based on the evidence provided, therefore, the Department has not proven that these court Orders bar the Requester from filing this RTKL appeal. *See* 65 P.S. § 67.305(a)(3).

2. Item 1 of the Request requires the Department to conduct legal research

The Department also argues that Item 1 of the Request requires legal research to locate any legislation or statutes that authorize the Department to implement a Special Project Discovery Assessment. Section 703 of the RTKL requires that a request for records “identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. An agency cannot be required to perform legal research for a requester. *See, e.g., Monighan v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2013-1967, 2013 PA O.O.R.D. LEXIS 1118; *Aliota v. Millcreek Twp.*, OOR Dkt. AP 2012-1351, 2012 PA O.O.R.D. LEXIS 1170. The Commonwealth Court has found that “[a] request that explicitly or implicitly obliges legal research is not a request for a specific document; rather, it is a request for someone to conduct legal research with the hopes that the legal research will unearth a specific document that fits the description of the request.” *Askew v. Pa. Office of the Governor*, 65 A.3d 989, 993 (Pa. Commw. Ct. 2013).

Here, the Request requires the Department to perform legal research by locating the applicable laws and the requested information in these laws. Because the Department is not required to perform such legal research, the Request is insufficiently specific under Section 703 of the RTKL. *See Kostelac v. Municipal Auth. of Westmoreland County*, OOR Dkt. AP 2016-1138, 2016 PA O.O.R.D. LEXIS 1039; *Neal v. Pa. Dep’t of State*, OOR Dkt. AP 2014-1470, 2014 PA O.O.R.D. LEXIS 1189; *Whitaker v. Pa. Dep’t of State*, OOR Dkt. AP 2014-1463, 2014 PA O.O.R.D. LEXIS 1191 (holding that the Department is not required to perform legal research to locate laws and identify officials involved in the creation of Title 18); *Maddrey v. Pa. Dep’t of State*, OOR Dkt. AP 2013-2204; 2013 O.O.R.D. LEXIS 1249 (holding that the Department is not required to perform legal research to locate “enacting clause” in Title 18).

3. Records responsive to Items 2 and 3 of the Request do not exist

Ms. Bratz attests that she searched the Department's records and that there are no records responsive to Items 2 and 3 of the Request. Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *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 Department acted in bad faith or that the records exist, "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)).² Based on the evidence provided, the Department has met its burden of proving that no records responsive to Items 2 and 3 of the Request exist in the Department's possession, custody or control. *See* 65 P.S. § 67.705; *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, Requester's 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 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 21, 2016

¹ *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

/s/ Jill S. Wolfe

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