



On August 4, 2016, the City's Law Department ("Law Department") acknowledged receipt of the Request and notified the Requester that the Request had been transferred to counsel for the Child Welfare Unit. The City did not respond within five business days of its receipt of the Request, and the Request was deemed denied. *See* 65 P.S. § 67.901.

On August 25, 2016, the Requester appealed to the OOR, challenging the deemed denial 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 12, 2016, the City submitted a position statement, claiming that the OOR lacks jurisdiction to consider the appeal because the Request was not directed to an Open Records Officer and was not submitted on the standard statewide RTKL request form. The City also contends that the requested records are not subject to disclosure under the RTKL, arguing, among other reasons, that the requested records are confidential under the Child Protective Services Law ("CPSL") and 55 Pa.Code §§ 3130.44, 3490.91(a). In support of its position, the City submitted the affidavit of Jonathan Houlon, Esq., the City's Chief Deputy City Solicitor for the Child Welfare Unit. On September 20, 2016, the Requester made a submission challenging the City's argument that the OOR is without jurisdiction to consider the appeal, as well as its reliance on Sections 708(b)(16) and 708(b)(17) of the RTKL to deny the Request.<sup>1</sup>

## **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.*

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<sup>1</sup> The Requester's September 20, 2016 submission was received after the record closed; however, to develop the record, the submission was considered. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

*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, 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 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)).

### **1. The OOR has jurisdiction over this appeal**

The City argues that the OOR lacks jurisdiction to entertain the instant appeal. Specifically, the City asserts that the Request was not addressed to the Open Records Officer for the Child Welfare Unit. The City also asserts that jurisdiction is lacking because the Request was not submitted on the standard statewide RTKL form in accordance with published City policy.

Section 703 of the RTKL states that “[a] written request for access to records may be submitted ... by mail.” 65 P.S. § 67.703. The RTKL does not require the use of any specific form; however, an agency may promulgate regulations and policies to govern its administration of the RTKL. *See* 65 P.S. § 67.504. An agency that has a posted policy requiring use of a form may deny access to the requested records where a requester fails to use the required form, provided the agency timely responds to the request notifying the requester of the policy. *See Fennell v. City of Phila. Police Dep’t*, OOR Dkt. AP 2014-1581, 2014 PA O.O.R.D. LEXIS

1210; *Mezzacappa v. West Easton Borough*, OOR Dkt. AP 2012-1605,2012 PA O.O.R.D. LEXIS 1284.2015 PA O.O.R.D. LEXIS 357.

A review of the file in this matter reveals that the Request was sent directly to the City's Children and Youth Services; however, the Request was clearly designated as a "Pennsylvania Right to Know Request." Additionally, Attorney Houlon notified the Requester that the Request was received by the Law Department on August 4, 2016 and was referred to the Child Welfare Unit. The August 4, 2016 letter did not state that the City was treating the Request as an "informal request" outside the RTKL, nor did it provide notice that the Requester was required to resubmit the Request on the standard statewide RTKL form. Further, the letter indicated that the Requester would be notified when the records were available for review, but a response was never provided. Section 1101(a)(1) of the RTKL vests the OOR with jurisdiction over appeals of "written request[s] for access to ... record[s that are] ... denied or deemed denied" without excepting requests clearly made under the RTKL but treated as "informal" requests by agencies. *See* 65 P.S. § 67.1101(a)(1). Accordingly, the OOR has jurisdiction to address the merits of this appeal.

## **2. The requested records are confidential under the CPSL**

The City also asserts that the requested records are not subject to disclosure because they are confidential under the CPSL. The City argues that the records consist of Pennsylvania Department of Human Services ("DHS") case files that include reports, report summaries and other accompanying information protected under the CPSL. In his affidavit, Attorney Houlon attests that he is familiar with the Request and that the records requested are maintained pursuant to the CPSL. Attorney Houlon cites to 23 Pa. C.S. §§ 6339 and 6340, as well as 55 Pa. Code § 3490.91(a), in support of the City's argument that the requested records are confidential and, as

such, not public records under the RTKL. Under the RTKL, a sworn affidavit or statement 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)).

Pursuant to Section 305 of the RTKL, a record in the possession of an agency is presumed to be a public record unless "exempt from disclosure under any other Federal or State law or regulation...." 65 P.S. § 67.305(a)(3). The CPSL provides, in relevant part, as follows:

Except as otherwise provided in this subchapter or by the Pennsylvania Rules of Juvenile Court Procedure, reports made pursuant to this chapter, including, but not limited to, report summaries of child abuse and reports made pursuant to section 6313 (relating to reporting procedure) as well as any other information obtained, reports written or photographs or X-rays taken concerning alleged instances of child abuse in the possession of the department or a county agency *shall be confidential*.

23 Pa.C.S. § 6339 (emphasis added). Additionally, with respect to county-administered services, the Pennsylvania Code provides:

- (a) Reports, report summaries and other accompanying information obtained under the CPSL and this chapter in the possession of the [DHS] and a county agency are confidential. Except for the subject of a report, persons who receive information under this section shall be advised that they are subject to the confidentiality provisions of the CPSL and this chapter, that they are required to insure the confidentiality and security of the information and that they are liable for civil and criminal penalties for releasing information to persons who are not permitted access to this information....

55 Pa. Code § 3490.91. Because the CPSL expressly exempts the requested records from public disclosure, the records are not subject to access under the RTKL. *See* 65 P.S. § 67.3101.1 ("If the provisions of [the RTKL] regarding access to records conflict with any other federal or state

law, the provisions of [the RTKL] shall not apply”); *see also Evans v. York County*, OOR Dkt. AP 2010-0155; 2010 PA O.O.R.D. LEXIS 202; *Bittenbender v. Monroe County*, OOR Dkt. AP 2009-1099, 2010 PA O.O.R.D. LEXIS 38.

### CONCLUSION

For the foregoing reasons, 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 22, 2016**

*/s/ Kelly C. Isenberg*

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APPEALS OFFICER  
KELLY C. ISENBERG, ESQ.

Sent to: Tracy Whitaker (via U.S. Mail only);  
Jill Freeman, Esq. (via e-mail only)

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