

performed by your office of the Delaware Valley Intelligence Center located in Philadelphia, PA.

Any and all responsive records sought should relate to allegations, substantiated or not, into criminal, civil and administrative misconduct involving DVIC employees, contractors, grantees, and programs, and include investigations or inquiries that resulted in criminal prosecutions, fines, civil penalties, administrative sanctions, and personnel actions.

The time frame for this request includes any and all responsive records from 1 January 2007 up to and including the date this request is officially processed....

On August 2, 2016, the Office invoked a thirty-day extension to respond to the Request. *See* 65 P.S. § 67.902. On August 24, 2016, the Office denied the Request, claiming that the requested records relate to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17). The Office also argued that the records may contain internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), or information protected by the attorney-client privilege and attorney-work product doctrine. The Office also attached the affidavit of David Todd, the Deputy Inspector General, who attested that the materials were exempt from disclosure.

On September 6, 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 Office to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 15, 2016, the Office submitted a position statement reiterating its grounds for denial. The Office argues that due to the wording of the Request, any responsive records would necessarily be related to a noncriminal investigation. In support of its position, the Office submitted a second affidavit of David Todd, the Deputy Inspector General, who attested that he conducted a search and determined that the only possible responsive records are related to a noncriminal investigation.

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

The Office 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. *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)).

The Office asserts that the records requested are exempt from disclosure because they relate to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency's official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). The Commonwealth Court has held that “[a]n official probe only applies to ‘noncriminal investigations conducted by an agency acting within its legislatively granted fact-finding and

investigative powers.”” *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014) (quoting *Johnson*, 49 A.3d at 925).

In support of its position, the Office submitted the affidavit of David Todd, Deputy Inspector General, who attests, in relevant part:

4. OIG is a non-law enforcement governmental investigative agency created pursuant to Pennsylvania Executive Order 1987-7 (State Inspector General)

5. It is the purpose of OIG to “deter, detect, prevent, and eradicate fraud, waste, misconduct, and abuse in the programs, operations, and contracting of executive agencies as defined by the Commonwealth Attorney’s Act” *See* Executive Order 1987-7 § 1, paragraph a.

6. It is also OIG’s purpose to “keep the heads of executive agencies and the Governor fully informed about the problems and deficiencies relating to the administration of programs, operations, and contracting in executive agencies.” Executive Order 1987-7 § 1, paragraph b.

7. It is the duty of OIG to “initiate, supervise, and coordinate investigative activities relating to fraud, waste, misconduct, or abuse in executive agencies.” Executive Order 1987-7, § 2, paragraph a.

11. Because OIG was created pursuant to Executive Order 1987-7, all OIG investigations, which include receipts and analysis of complaints, necessarily are conducted pursuant to the Executive Order. In this capacity, OIG conducts noncriminal investigations.

...

25. I have considered the request of Dustin Slaughter and spoken with our agency open records officer regarding possible responsive records in the possession, custody or under the control of OIG.

...

27. Based on the above, OIG has determined that the only responsive records of the OIG Investigation are ones that would, if disclosed, reveal information regarding the institution, progress or result of an agency investigation or otherwise consist only of official OIG investigative materials.

28. OIG has determined that the only responsive records of the OIG Investigation contain only information which is not subject to access.

Mr. Todd further attests that all of the responsive documents would:

result in disclosing investigative records, including, but not limited to: complaints submitted to an agency; investigative materials, notes, correspondence and reports; records that include the identity of a confidential source; records that include information made confidential by law; work papers underlying an audit; and records that, if disclosed, would reveal the institution, progress or result of an agency investigation, deprive a person of the right to an impartial adjudication; constitute an unwarranted invasion of privacy, hinder an agency's ability to secure an administrative or civil sanction, or endanger the life or physical safety of an individual.

In the past, the OOR has determined that the Office has the authority to conduct noncriminal investigations for purposes of Section 708(b)(17). *See Morris v. Office of Inspector General*, OOR Dkt. AP 2016-0055, 2016 PA O.O.R.D. LEXIS 182 (holding that records relating to an ongoing investigation are exempt); *Myrick v. Office of Inspector General*, OOR Dkt. AP 2012-0148, 2012 PA O.O.R.D. LEXIS 11 (holding that records are exempt under Section 708(b)(17), if they exist); *Gozdiskowski v. Pennsylvania Office of Inspector General*, OOR Dkt. AP 2011-0467, 2010 PA O.O.R.D. LEXIS 419 (same); *Warefield v. Pennsylvania Office of Inspector General*, OOR Dkt. AP 2009-0626, 2009 PA O.O.R.D. LEXIS 68 (same).

Based on the evidence provided, the Office has established that it had the authority to conduct a noncriminal investigation, and any record that is responsive to the Request must necessarily be related to that noncriminal investigation, especially since the Request itself states that any responsive material “should relate to allegations, substantiated or not, into criminal, civil and administrative misconduct involving DVIC employees, contractors, grantees, and programs, and include investigations or inquiries that resulted in criminal prosecutions, fines, civil penalties, administrative sanctions, and personnel actions.”

Because the Office is empowered to make noncriminal investigations and the only responsive records to this Request are necessarily related to such an investigation, the Office has proven that the requested records are exempt under Section 708(b)(17).

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the Office 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 29, 2016

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Dustin Slaughter (via e-mail only);
Melissa Yerges (via e-mail only);
Lishani Sunday, Esq. (via e-mail only)

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