

2. The names of the ... officers that [were] injured on duty from December 10, 2004 through May 12, 2005.

3. The names of the ... officers who [were] denied compensation benefits from January 1, 2004 through April 30, 2005.

On July 29, 2016, the Department invoked a thirty day extension during which to respond to the Request. *See* 65 P.S. § 67.902. On August 26, 2016, the Department denied Item 2 of the Request, claiming that these records are exempt from public disclosure because they would reveal an individual's health information, 65 P.S. § 67.708(b)(5), and are confidential pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. § 164.502(a). The Department also states that there are no records responsive to Items 1 and 3 of the Request.

On September 7, 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 23, 2016, the Department submitted a position statement, reiterating its grounds for denial. The Department also submitted an affidavit made under the penalty of perjury from Lt. Edward Egenlauf, 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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* 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.* 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). 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 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. Records responsive to Items 1 and 3 of the Request do not exist

The Department states that there are no records responsive to Items 1 and 3 the Request, as attested by Lt. Egenlauf that the Department “possesses no records containing the names of ... officers who received compensation benefits in year of 2005 at issue in Item 1 ... [and] no records that contain the names of ... officers who were denied compensation benefits ... at issue in Item 3 of the Request.”

Under the RTKL, an affidavit made under the penalty of perjury 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)). Based on the evidence provided, the Department has met its burden of proving that no records responsive to Items 1 and 3 of the Request exist in the Department’s possession, custody or control.

2. Records responsive to Item 2 are not subject to public access pursuant to Section 708(b)(5) of the RTKL

The Department identifies the records responsive to Item 2 as Form 82-5-30: medical referral authorization; Form 82-S-58: injury form; and, Form 75-628: heart and lung claim form. The Department states that each of these records are exempt under Section 708(b)(5) of the RTKL and HIPAA. Section 708(b)(5) of the RTKL exempts from disclosure:

A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

65 P.S. § 67.708(b)(5). Additionally, HIPAA provides that “[a] covered entity may not use or disclose protected health information.” 45 C.F.R. § 164.502(a). HIPAA defines a “covered entity” as “(1) A health plan; (2) A health care clearinghouse; (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.” 45 C.F.R. § 160.103.

Here, Lt. Egenlauf attests that:

7. Mr. Fennell has previously sought various injured on duty forms which reflect an individual's medical history, disability status, and/or individually identifiable health information.

a. Form 82-5-30, potentially at issue in Item 2, is an industrial medical care provider referral authorization form. This form is used when an officer is injured in the line of duty and contains accident/injury information in detail as well as previous emergency treatment by a hospital or doctor, if any. This form also has payroll number and assignment of the officer.

b. Form 82-S-58, potentially at issue in Item 2, is a form used when a police officer is injured on-duty. This form contains the occurrence of the injury, body parts injured, how the officer was injured, witness accounts of

the occurrence of the injury, a description of the injury, and where the officer was injured. This form also has payroll number and assignment of the officer.

c. Form 75-628, potentially at issue in Item 2, is a heart and lung claim form. This form is used when an officer is injured on-duty to ensure that officers injured on-duty meet the requirements of the Pennsylvania Heart and Lung Act. This describes the injury of the officer, body parts injured, where the officer was injured (*sic*), how the officer was injured, medical treatment received, and witness accounts of the injury.

While the Department has not submitted evidence to demonstrate that it is a covered entity as defined by HIPAA, the Department has demonstrated that the above forms contain individually identifiable health information. *See also Fennell v. City of Phila. Police Dept.*, OOR Dkt. AP 2016-0423, 2016 PA O.O.R.D. LEXIS 506. Consequently, the Department has met its burden of proving that the requested records are not subject to disclosure. *See* 65 P.S. § 67.708(a)(1).¹

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

¹ Although the records responsive to Item 2 of the Request are exempt from disclosure, the Department exercised its discretion to release the names of two officers. *See* 65 P.S. § 67.506(c) (stating that an agency "may exercise its discretion to make an otherwise exempt record accessible"); *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 815 (Pa. Commw. Ct. 2010) (holding that "[a]lthough Section 506(c) grants an agency the discretion to release an otherwise exempt record under certain circumstances, it does not require an agency to do so"); *see also Nereim v. Pa. Dep't of Pub. Welf.*, OOR Dkt. AP 2011-0187, 2011 PA O.O.R.D. LEXIS 639 (Section 506(c) leaves the discretion to release records solely to the agency head, and the RTKL does not provide the OOR with the authority to analyze whether the agency should have exercised this discretion in favor of disclosure).

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: October 3, 2016

/s/ Jill S. Wolfe

APPEALS OFFICER
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Sent to: Robert Fennell, GW-0392;
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² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).