



3. Does Solicitor Bagley represent the taxpayers of Cheltenham or developers (including Matrix at Ashbourne Country Club and Wyngate) and the PADEP/Philadelphia Water Department “Negotiated amicable accord between two warring sewer authorities” as stated in his Wisler Pearlstine biography?
4. How was the fee for the SEPTA/Jenkintown use of Cheltenham’s sanitary sewer system calculated?
5. Why was the Township owned property on Cheltenham Avenue just east of the Cedarbrook Mall recently surveyed and what are the plans for this forested area?
6. Who made the deal with the PADEP to have unsubstantiated groundwater infiltration of sanitary sewer laterals inspected resulting in financial hardship of as much as \$10,000 for homeowners and subsequent property value depreciation?
7. Why is Cheltenham paying fees for the Wissahickon Watershed as if we are within its boundaries?
8. What does “no taxation without representation” mean to the Township Manager, seven Commissioners and our consultant non-resident Solicitor Bagley? (Emphasis in original).

On September 14, 2016, the Township denied the Request, claiming that it seeks answers to questions and stating that an agency is not required to create a record that does not exist. 65 P.S. § 67.705.

On September 14, 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 Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 21, 2016, the Township submitted a position statement reiterating its grounds for denial. The Township further argues that the appeal is deficient because the Requester failed to address the Township’s grounds for denial. In support of its position, the Township submitted the position statement of Joseph Bagley, the Township’s solicitor (“Attorney Bagley”), which was verified under the penalty of perjury by Nancy Gibson (“Ms. Gibson”), the Township’s Open Records Officer. On the same day, the Requester made a sworn

submission that includes citations to various sections of the RTKL and Pennsylvania Commonwealth Court cases, and also attaches copies of e-mails and meeting minutes he asserts counter the denial of access by the Township and show that the Township acted in bad faith.

### 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 Township 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 appeal is sufficient under Section 1101(a)(1) of the RTKL**

As a threshold matter, the Township argues that the instant appeal should be dismissed because the Requester failed to comply with Section 1101(a) of the RTKL, which requires appeals to “state the grounds upon which the requester asserts that the record is a public record . . . and address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1); *see also Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency's stated reasons for denying a RTKL request”). Pursuant to this section, the Commonwealth Court has held that a requester

must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access.” *Saunders v. Pa. Dep’t of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct.2012); *see also ACLU of Pa. v. City of Pittsburgh*, 116 A.3d 1189 (Pa. Commw. Ct. 2015) (holding that an appeal did not sufficient address an agency’s grounds by “argu[ing] that the RTKL places the burden of proof upon the [agency] and that the [agency] has provided no . . . information in support of its assertion that” the records were exempt).

Although the Requester did not use the standard RTKL appeal form, a review of his appeal letter reveals that the Requester disputes the Township’s “refusal to answer any questions from residents” and specifically states that the denial by the Township violates his rights under Act 3.<sup>1</sup> The presumption under the RTKL is that records in possession of a local agency are public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree and the local agency is required to disclose public records. *See* 65 P.S. §§ 67.302, 67.305. Even though the Requester does not specifically address each reason for denial raised by the Township, the Commonwealth Court has held that a general statement that records are public and not subject to an exemption is sufficient to meet the requirements of Section 1101(a)(1). *See Barnett v. Pa. Dep’t of Pub. Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Therefore, the appeal meets the requirements of Section 1101(a)(1).

## **2. The Request does not seek records**

Under the RTKL, a request must seek records rather than answers to questions. *See Moll v. Wormleysburg Borough*, OOR Dkt. AP 2012-0308, 2012 PA O.O.R.D. LEXIS 197; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*14 (Pa.

---

<sup>1</sup> Act 3 is also known as 2008 Pa. Laws 3, 2007 Pa. SB 1, Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104, which repealed the former Right-to-Know Law, Act of June 21, 1957, P.L. 390, *as amended*., 65 P.S. §§ 66.1-66.4. Act 3 enacted the current version of the Right-to-Know Law under which the Requester purportedly filed the Request.

Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”); *see also Stidmon v. Blackhawk Sch. Dist.*, No. 11605-2009 at 5 (Beav. Com. Pl. Dec. 14, 2009) (“The [RTKL] d[oes] not provide citizens the opportunity to propound interrogatories upon local agencies, rather it simply provides citizens access to existing public records”). The presence or absence of a question mark is not determinative as to whether a request asks a question. *See Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766.

Here, each item of the Request begins with who, what, when, where, why, how and does, and ends with a question mark. Further, in his appeal, the Requester specifically alleges that the ...[Township’s] “refusal to *answer any questions* from residents appears to be a violation of Act 3 and the Founding Fathers’ rejection of England’s Tea taxes in 1774 – ‘No taxation without Representation.’” (Emphasis added). Therefore, the Request seeks answers to questions, rather than specific records. *See Connelly v. Foster Twp.*, OOR Dkt. AP 2014-1256, 2014 PA O.O.R.D. LEXIS 1062 (“Each of the inquiries are phrased as a question, punctuated with a question mark, and the [r]equester asks the [agency] to e-mail the answers to the questions posed, further indicating the [r]equester’s intent to ask questions”). While some of the questions involve subjects for which an individual could seek records, the OOR cannot refashion the questions asked in the Request into requests for records. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010) (“Nowhere in [the RTKL] has the General Assembly provided that the OOR can refashion the request”). Accordingly, as the Request seeks answers to questions rather than records, the appeal is dismissed. *See Petka v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2014-1288, 2014 PA O.O.R.D. LEXIS 996; *Hammond v. Lancaster County District Attorney’s Office*, OOR Dkt. AP 2016-0494, 2016 PA O.O.R.D. LEXIS 600.

## CONCLUSION

For the foregoing reasons, the Requester's appeal is **dismissed**, and the Township 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 Montgomery 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: October 5, 2016**

*/s/ Kelly C. Isenberg*

---

APPEALS OFFICER  
KELLY C. ISENBERG, ESQ.

Sent to: David Beck (via e-mail only);  
Joseph Bagley, Esq. (via e-mail only);  
Nancy Gibson, AORO (via e-mail only)

---

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