



Agency Name  
Employee's Last Name  
Employee's First Name  
Employee's Position  
Employee's Annual Salary  
Employee's Wage if applicable

On August 11, 2016, the Board invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902.

On September 12, 2016, the Board provided Mr. Young's title and his current salary, \$81,663. It also noted that his salary would be posted on the PennWATCH website in the upcoming months.<sup>1</sup>

On September 15, 2016, the Requester appealed to the OOR, arguing that the Board provided Mr. Young's working title, rather than his position, and that she requested monthly updates, but the Board provided only his current title and salary. The OOR invited both parties to supplement the record and directed the Board to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On September 27, 2016, the Board submitted a letter and spreadsheet that it had provided to the Requester on September 23, 2016. The Board also submitted statements made under penalty of perjury by Janaki Theivakumaran, its Open Records Officer, who attests that no "Employee Salary Report" exists, and that, in lieu of the requested report, the letter, spreadsheet and affidavits were provided. Additionally, the Board submitted a statement made under penalty of perjury by Jennifer Goetz, the Director of the Board's Bureau of Human Resources, who attests that while no "Employee Salary Report" exists, the information provided adequately addresses the Request. Ms. Goetz also explains Mr. Young's position within the organization. On September 28, 2016, the Requester submitted a supplemental position statement, challenging the Board's submissions.

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<sup>1</sup> *See* PennWATCH, available at <http://pennwatch.pa.gov/employees/Pages/Employee-Salaries.aspx>.

## 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. 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, the Board requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter. Accordingly, the request for a hearing is denied.

The Board is a Commonwealth agency subject to the RTKL that is required to disclose public records. *See* 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. 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. 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)). 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 Board has provided the requested information**

On appeal, the Board has provided Mr. Young’s title and monthly salary, along with a letter documenting his most recent promotion and a thorough explanation of his position within the organization. Accordingly, the appeal is moot as to this information.

### **2. The Board has proven that no “Employee Salary Report” exists**

The Requester seeks Gregory Young’s “Employee Salary Report”<sup>2</sup> and argues that the Board should have the Report because they are required by the PennWATCH Act to provide the information for online dissemination. However, the OOR does not assess whether an agency should have responsive records. *See, e.g., Troupe v. Borough of Punxsutawney*, OOR

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<sup>2</sup> The Requester argues that the Board erred by placing “Employee Salary Report” in quotation marks. However, this phrase was capitalized in the Request, so interpreting the Request as seeking a specific document was not unreasonable.

Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731 (“While ... evidence may establish that a [record] *should* exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such a [record] -- the OOR may only determine whether a responsive record does, in fact, exist.” (emphasis in original)).

The Board has submitted a statement made under penalty of perjury attesting to the nonexistence of an “Employee Salary Report” for Mr. Young. Under the RTKL, an affidavit may serve as sufficient evidentiary support. *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 evidence that the Borough has acted in bad faith or that the record does, in fact, exist, “the averments in [the statement] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. 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)). Accordingly, to the extent that the Request seeks a specific report, the Board has met its burden of proving the requested record is not within its possession, custody or control.

### CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied in part** and **dismissed as moot in part**, and the Board 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. *See* 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at:  
<http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 14, 2016**

/s/ Blake Eilers

Blake Eilers, Esq.  
Appeals Officer

Sent to: Rebecca Burns (via e-mail only);  
Janaki Theivakumaran (via e-mail only);  
Morgan Davis, Esq. (via e-mail only);  
Madeline Masters (via e-mail only);  
Alan Robinson (via e-mail only)

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