

[2.]...copies of the last ten emails from the account of Jason Frederick Cleck. I would also like copies of the Borough's meeting notes that contain entries for his hire(s), all changes in employment status, and when he left employment for Jason Frederick Cleck.

On August 12, 2016, the Borough invoked a thirty day extension during which to respond. *See* 65 P.S. § 67.902. On August 22, 2016, the Requester limited Item 1, stating he was no longer seeking the resume and employment application. On September 13, 2016, the Borough responded to the Requests, providing a copy of the "Employee Record Master" form from which personal identification information was redacted, 65 P.S. § 67.708(b)(6), and claiming no other records exist. However, the Borough failed to respond within thirty days, and the Requests were, therefore, deemed denied on September 12, 2016. *See* 65 P.S. § 67.902(b).

On September 21, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 28, 2016, the Borough submitted a position statement regarding Item 1, claiming that it provided the responsive record to the Requester subject to redaction of personal identification information pursuant to Section 708(b)(6) of the RTKL. The Borough states that its September 13, 2016 letter responding to the Requests was returned in the mail because the Borough failed to include the inmate number on the envelope. The Borough attached a copy of the responsive record to its submission. In support of its position, the Borough submitted the affidavit of Douglas Brown, the Borough's Open Records Officer. On October 10, 2016, the Borough submitted its position statement regarding Item 2, stating that there are no e-mails or

¹ The OOR received two appeals which were docketed at OOR Dkt. AP 2016-1597 and OOR Dkt. AP 2016-1600. The OOR hereby consolidates these matters into one appeal, docketed as OOR Dkt. AP 2016-1597.

meeting notes regarding Officer Cleck's changes in employment. The Borough indicates that the only record responsive to Item 2 for changes in employment is the Employee Record Master form provided in response to Item 1. The Borough submitted an additional affidavit from Mr. Brown in support of its statements.

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, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Borough 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)). 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. No other records responsive to the Requests exist

The Borough states that information sought in Item 1 regarding Officer Cleck’s date of hire and termination, as well as information regarding changes in his employment status, is contained within the Employee Record Master form provided to the Requester. The Borough also states that with respect to Item 2, there are no responsive e-mails or meeting notes regarding

Officer Cleck's hire and changes in employment. Mr. Brown attests that, after a good faith search, no records responsive to either Request exist, except for the Employee Master form.

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 competent evidence that the Borough 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 Borough has met its burden of proving that no other responsive records exist in the Borough's possession, custody or control.

2. The Borough may redact personal identification information from the responsive record

The Borough states that it redacted personal identification information from the Employee Record Master form, such as Officer Cleck's social security number, home telephone number, spouse's name and marital status. Section 708(b)(6) of the RTKL states that "personal identification information" includes "a person's Social Security number...home, cellular or personal telephone numbers..." and a "spouse's name [and] marital status." 65 P.S. §§ 67.708(b)(6)(i)(A)-(B). Furthermore, Section 708(b)(6)(i)(C) excludes from disclosure "[t]he home address of law enforcement officer or judge." 65 P.S. § 67.708(b)(6)(i)(C); *see also SERS v. Fultz*, 107 A.3d 860 (Pa. Commw. Ct. 2015) (holding the home addresses of law enforcement officers and judges are not subject to access, even when the requester is seeking the address of an individual who also resides at the exempt address).

The Borough submitted a copy of the redacted record on appeal and, upon reviewing the record, it appears that the information redacted is the social security number, telephone number and emergency contact information section wherein an individual's name, home address and telephone number have been redacted—the spouse's information. Accordingly, the Borough has redacted information consistent with Section 708(b)(6) of the RTKL.

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the Borough 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 Dauphin 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 18, 2016

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Charles Hoyer, JH-1287;
David Wion, Esq. (via e-mail only);
Douglas Brown (via e-mail only)

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