



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JOHN DEBARTOLA,
Requester**

v.

**CAMBRIA COUNTY,
Respondent**

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Docket No.: AP 2016-1605

INTRODUCTION

John DeBartola (“Requester”) submitted a request (“Request”) to Cambria County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information regarding the employees of the Cambria County Child Development Corporation. The County denied the Request, stating that the requested records do not exist within the County’s possession. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **dismissed as moot in part**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On August 10, 2016, the Request was filed, seeking:

1. ... the names of all employees of the Cambria County Child Development Corporation [(“Corporation”)] with their salaries, wages, job titles and job descriptions from 2009 to present.

2. ... to know if ... [Robert Arcurio] ... is listed as [a] past or present employee with his salary, wage, job title and job description from 2009 to present.

On August 16, 2016, the County invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b). On September 14, 2016, the County denied the Request, stating that the requested records do not exist within the County's possession, custody or control.¹

On September 22, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On October 3, 2016, the County submitted an unsworn position statement explaining the relationship of the Corporation to the County. The County also states that it provided the Requester with all of the responsive records within the County's possession.² The County further argues that any other responsive records would be exempt from disclosure because they would identify individuals who have applied for or receive social services, 65 P.S. § 67.708(b)(28).³ The Requester did not submit any additional information on appeal.

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

¹ The County also provided a response from the Corporation.

² The County initially claimed that it did not possess records responsive to the Request. However, on appeal, the County acknowledges that responsive records exist and grants access to some records, while citing a RTKL exemption with respect to other records.

³ The County may raise this additional reason for denying access to records on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

“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; however, 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 of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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).

During the course of this appeal, the County provided the Requester with financial records and other information responsive to the Request. Therefore, to the extent the appeal relates to the records provided to the Requester, the appeal is dismissed as moot.

The County also argues that records responsive to the Request would be exempt under Section 708(b)(28) of the RTKL, which exempts from disclosure “[a] record or information ... identifying an individual who applies for or receives social services[,]” among other items. 65 P.S. §§ 67.708(b)(28)(i)-(ii). Under the RTKL, a sworn affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *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). However, the County’s unsworn position statement may not be relied upon as competent evidence to withhold records under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City’s counsel is a legal brief, it cannot be ... evidence at all”).

Here, the County, through its Open Records Officer, Melissa Kestermont, submitted an unsworn position statement stating that “[a]ll information that we are able to release under the [RTKL] as it pertains to the Child Care Information Services has been provided” and that “[t]he organization falls under Section 708(b)(28) exemption of the [RTKL].” However, the County does not further explain how the exemption applies to the records at issue in this appeal, nor has the County submitted evidence in support of the exemption or demonstrating that the County does not possess any additional responsive records. Based upon the evidence provided, therefore, the County has failed to meet its burden of proving that records are exempt from disclosure under Section 708(b)(28), and has not demonstrated that it provided all of the responsive records within the County’s possession, custody or control to the Requester.⁴ *See* 65 P.S. § 67.708(a)(1); *see also Hodges*, 29 A.3d at 1192.

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records sought in the Request. Absent the County’s providing a sufficient evidentiary basis that no records exist, the OOR will order disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **dismissed as moot in part**, and the County is required to provide all responsive records, other than those

⁴ To the extent any additional responsive records are possessed by the County, they are subject to disclosure; however, since the employee information of the Corporation, a private, not for profit 501(c)(3) entity, does not relate to the performance of a governmental function of the County, responsive records in the possession of the Corporation are inaccessible under Section 506(d) of the RTKL. 65 P.S. § 67.506(d); *see also Stonerook v. Greater Johnstown Sch. Dist.*, OOR Dkt. AP 2016-1355, 2016 PA O.O.R.D. LEXIS 1279 (finding that the school district was not obligated to reach out to 124 separate third-party vendors, including the Corporation, for records containing vendor employee information because the information does not relate to the performance of the school district’s governmental function).

already provided to the Requester, within thirty days. 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 Cambria 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 according to court rules 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 21 October 2016

/s/ Joshua T. Young

JOSHUA T. YOUNG, ESQ.
APPEALS OFFICER

Sent to: John DeBartola (via e-mail only);
Melissa Kestermont (via e-mail only)

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