

On September 14, 2016, the County denied the Request stating that the Request is seeking personnel records exempt under Section 708(b)(7) of the RTKL. 65 P.S. § 67.708(b)(7).

On September 26, 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 County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On October 3, 2016, the County submitted a position statement made under the penalty of perjury, reiterating the same grounds for denial as in its response to the Request, as well as stating that no Treasurer records exist.¹ The County also submitted the affidavit of Cathy Romig, the County's Open Records Officer, attesting that certain records do not exist.

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

¹ The County is permitted to 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).

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 County 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 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. Item 1 does not seek information exempt under Section 708(b)(7) of the RTKL

Item 1 of the Request seeks employees’ names, high schools each graduated from and the year. On appeal, the County states, “65 P.S. Section 708(b)(7) Exception for public records, employee records. It is the position of ... [the] County that ...[the] request should be dismissed pursuant to 65 P.S Section 708(b)(7).”

Section 708(b)(7) of the RTKL exempts from public disclosure “records relating to an agency employee[,]” such as:

- (i) A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual...
- (ii) A performance rating or review.
- (iii) The result of a civil service or similar test...
- (iv) The employment application of an individual who is not hired by the agency.
- (v) Workplace support services programs information.
- (vi) Written criticisms of an employee.
- (vii) Grievance material, including documents related to discrimination or sexual harassment.
- (viii) Information regarding discipline, demotion or discharge contained in a personnel file...
- (ix) An academic transcript.

65 P.S. § 67.708(b)(7).

While an affidavit may serve as sufficient evidentiary support to sustain an agency’s burden under the RTKL, *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), conclusory statements are not sufficient to meet an agency’s burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Here, the County

merely references a section of the RTKL, but does not demonstrate how the information sought (names, high schools and dates of graduation) are exempt under Section 708(b)(7). Accordingly, the County has not met its burden of proving that Section 708(b)(7) exempts from disclosure the information sought in Item 1 of the Request. *See* 65 P.S. § 67.708(a)(1).

2. Records sought in Item 2 of the Request do not exist

Item 2 seeks the County Treasurer's records of payments made to Domestic Relations; however, the County states that there are no records responsive to this part of the Request. Ms. Romig attests that she conducted a good faith search and that the records requested do not exist within the County's possession, custody or control. As noted above, an affidavit may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. In the absence of any evidence that the County has acted in bad faith or that the records do, in fact, 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 County has met its burden of proof that it does not possess the records sought in Item 2 of the Request. *See Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part and denied in part**, and the County is required to provide records responsive to Item 1 of the Request 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 Mifflin 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 24, 2016

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Chris Skelly;
Stephen Snook, Esq. (via e-mail only);
Cathy Romig (via e-mail only)

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