



investigation into an ‘Internet transportation business.’” Specifically, the Request sought the following records:

1. ... [C]opies of any internal reports or summaries regarding the ... investigation.
2. ... [C]opies of any further e-mails sent from [TLD@philapark.org](mailto:TLD@philapark.org) between the dates of June 1, 2012 through May 31, 2013 that reference “Uber.”
3. ... [C]opies of any email sent to or received between June 1, 2012 and March 31, 2016 between James Ney ... and [a list of seven identified e-mail addresses] ....

On July 28, 2016, the Authority invoked a thirty-day extension to respond to the Request. *See* 65 P.S. § 67.902. The Authority did not respond by the extended deadline, and the Request was deemed denied. *See* 65 P.S. § 67.902.

On September 2, 2016, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Authority to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 13, 2016, the Authority submitted a position statement claiming that it responded to the Requester by letter dated September 9, 2016. In its response, the Authority denied access to records sought in Item 1 of the Request, arguing that these records are records of a noncriminal investigation, 65 P.S. § 67.708(b)(17). The Authority also claimed that it does not possess records responsive to Item 2 of the Request. Finally, the Authority granted access to 3,300 pages of records responsive to Item 3 of the Request and imposed a duplication fee of \$825.00. In support of its position, the Authority submitted the affidavit of Richard Dickinson, Jr., the Authority’s Open Records Officer.

On September 16, 2016, the OOR established a briefing schedule to further develop the record in this appeal.

On September 21, 2016, the Requester claimed that the Authority offered to provide a CD containing records in response to a similar request for a cost of \$2.00 and stated that he is seeking electronic copies of the responsive records. In addition, the Requester contested the Authority's claim that the records responsive to Item 1 of the Request are exempt from public access and, in the alternative, argued that the Authority should exercise its discretion to release of the withheld records.

On September 23, 2016, the Authority described the records withheld in response to Item 1 of the Request. The Authority also explained that the duplication fee was imposed because the Requester sought copies of responsive records. In support of its position, the Authority submitted the supplemental affidavit of Mr. Dickinson.

### **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. 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 Authority is a Commonwealth agency subject to the RTKL that is required to disclose public records. 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. *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 Authority does not possess records responsive to Item 2 of the Request**

The Authority claims that it does not possess records responsive to Item 2 of the Request. Section 705 of the RTKL states that “an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705. Mr. Dickinson attests that:

4. Upon receipt of the Request ... I directed that a thorough examination of files in the possession, custody and control of the Authority be conducted for records responsive to the [R]equest[.]
5. Additionally, I have directed the inquiry of relevant Authority personnel as to whether the requested records exist in their possession and to identify any potential third party source of records as to all parts of the [R]equest and the search for records.

....

7. After conducting a good faith search of the Authority’s files and inquiring with relevant Authority’s [sic] personnel and upon information and belief assert that the Authority has no records responsive to section 2 of the Request....

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 Authority has acted in bad faith or that the requested records do, in fact, exist, “the averments in [the affidavits] 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 Authority has met its burden to show that it does not possess records responsive to Item 2 of the Request.

## **2. The Authority may not impose duplication fees for records responsive to Item 3 of the Request**

The Requester argues that the Authority's duplication fee should have been limited to the cost of a CD and objects to the imposition of duplication fees for paper copies. The RTKL provides that "[a] record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists." 65 P.S. § 67.701(a). The RTKL does not define "medium"; however, the OOR has defined it "as the substance through which something is transmitted or carried, a 'means,' such as on paper or on a hard-drive or on a database or over the Internet." *Acton v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2009-0926, 2009 PA O.O.R.D. LEXIS 786, *aff'd* No. 2010-719 (Wash. Com. Pl. July 26, 2011), *aff'd* 38 A.3d 1092 (Pa. Commw. Ct. 2012), *petition for allowance of appeal denied* 57 A.3d 72 (Pa. 2012).

Here, Item 3 of the Requests seeks e-mails. E-mails are intrinsically electronic records. The Authority does not dispute that the requested e-mails exist electronically, assert any exemption for withholding access, or argue that any of the e-mails were redacted. As a result, the imposition of a duplication fee is not permissible because the records exist in an electronic medium and were requested to be provided in that medium. *See* 65 P.S. § 67.701(a). Therefore, the Authority must provide those records to the Requester in electronic format subject to fees for a CD and the cost of mailing consistent with the OOR Fee Schedule. *See* Official RTKL Fee Schedule, *available* *at* [http://www.openrecords.pa.gov/Documents/RTKL/Official\\_RTCL\\_Fee\\_Structure.pdf](http://www.openrecords.pa.gov/Documents/RTKL/Official_RTCL_Fee_Structure.pdf).

### **3. The records withheld in response to Item 1 of the Request relate to a noncriminal investigation**

The Authority claims that it withheld records responsive to Item 1 of the Request because they are related to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “complaints submitted to the agency.” 65 P.S. § 67.708(b)(17)(i). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). The Commonwealth Court has held that “[a]n official probe only applies to ‘noncriminal investigations conducted by an agency acting within its legislatively granted fact-finding and investigative powers.’” *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014) (quoting *Johnson*, 49 A.3d at 925); *see also Collier v. Pa. Dep’t of State*, OOR Dkt AP 2014-0361; 2014 PA O.O.R.D. LEXIS 398; *Bhaya v. Central Bucks Sch. Dist.*, OOR Dkt. AP 2014-0319; 2014 PA. O.O.R.D. LEXIS 372.

The Authority explains that, under 53 Pa.C.S. §§ 5705 (relating to the Authority’s prosecution and adjudication of complaints) and 5711 (relating to the Authority’s authority power to “issue, suspend, cancel or revoke certificates of public convenience”), it is “the sole regulator of taxicab and limousine service in Philadelphia and is authorized to license carriers and enforce violations of the law or applicable regulations.” The Authority also explains that, because the Authority has the statutory authority to regulate the taxicab and limousine industry, the Authority has the authority to investigate individuals and entities that violate the law

regarding the provision of that service. *See id.* Here, the Authority has established that investigating complaints and violations of taxicab and limousine laws occurring within the City is part of its legislatively-granted authority.

Finally, the Authority describes the records responsive to Item 1 of the Request as follows:

The records at issue amount to 6 pages. They relate to 2 informal complaints filed by individuals in the taxicab industry requesting investigation of what was then a new motor vehicle transportation service called “Uber” providing illegal taxicab or limousine service in Philadelphia on May 3, and May 5, 2012. There is also contemporaneous communication between Authority staff regarding the complaint and status of the investigation.

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21. Accordingly, based on the evidence provided, the Authority has met its burden of proof that the withheld records related to the Authority’s noncriminal investigation into compliance with its taxicab and limousine licensing requirements.

## CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part**, and the Authority is required to provide electronic copies of records responsive to Item 3 of the Request as set forth above. 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. 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>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>1</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: October 24, 2016**

/s/ Benjamin A. Lorah

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APPEALS OFFICER  
BENJAMIN A. LORAH, ESQ.

Sent to: Connor McGee (via e-mail only);  
Dennis Weldon, Jr., Esq. (via e-mail only);  
Richard Dickinson (via e-mail only)