



On July 19, 2016, the Borough invoked a thirty-day extension to respond to the Request. *See* 65 P.S. § 67.902. On August 19, 2016, the Borough partially denied the Request claiming that, to the extent the Request seeks “all” reports for “at least” the past two years, it is insufficiently specific. *See* 65 P.S. § 67.703. However, the Borough identified and provided responsive police and incident reports for the two years prior to the Request. Pursuant to Section 708(b)(6) of the RTKL, the Borough redacted certain personal identification information from the records. 65 P.S. § 67.708(b)(6). The Borough also identified an e-mail between the Borough and its Engineer; however, it was not provided to the Requester, as it related to a vacant house located across the street from the property referenced in the Request. As a courtesy, the Borough provided the name of the Borough’s insurance carrier despite claiming that it is not required to answer questions. The Borough claims that no other responsive records exist.

On September 1, 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 Borough 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 Borough submitted a position statement reiterating its grounds for denial and claiming that, upon a thorough search of its records, no records exist in the Borough’s possession, custody or control, other than those already provided to the Requester.<sup>1</sup> In support of its position, the Borough submitted the affidavit of Tammy Firda, the Borough’s Open Records Officer.

On September 22, 2016, the Requester submitted a supplemental position statement; however, because the submission was made after the record closed, is unsworn, and addresses

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<sup>1</sup> The Borough is permitted to assert this new reason for denial of access to records on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

issues beyond the scope of the Request, it was not considered for purposes of this appeal. *See* 65 P.S. § 67.1102(b)(3) (“In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

### **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, the parties did not request 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 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. The Request cannot be modified on appeal**

The Borough argues that the Requester has improperly modified his Request on appeal. A requester may not modify, explain or expand upon a request on appeal to include other records.. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA

O.O.R.D. LEXIS 256 (“A requester may not modify the original request as the denial, if any, is premised upon the original request was written”).

On his appeal form, the Requester states that he requested:

Police report, incident report, or complaints regarding the police chief, assistant secretary, and borough engineer showing up on property at 29 Harrison Road, and 30 Harrison Road, on March 23, 2016, unannounced and without property owners [sic] permission.

A comparison of this language to the language of the Request submitted to the Borough reveals that the Requester modified the language of the Request on appeal to include different records and an additional property—30 Harrison Road. However, the OOR’s review on appeal is confined to the Request as written, and any modifications of the Request on appeal will not be considered. *See Petka v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2014-1288, 2014 PA O.O.R.D. LEXIS 996. As stated by the Borough in its submission on appeal, nothing in this Final Determination prohibits the Requester from filing a new request with the Borough to obtain the additional records he may be seeking.

## **2. The Borough is permitted to redact personal identification information**

The records provided by the Borough were redacted based on Section 708(b)(6)(i)(A) of the RTKL because they contained personal identification information. According to the response letter, the Borough redacted personal identification information including Social Security numbers, drivers’ license numbers, cellular or personal telephone numbers, or personal e-mail addresses. The RTKL permits the withholding of “[t]he following personal identification information:”

A record containing all or part of a person's Social Security number; driver’s license number; personal financial information; home, cellular or personal telephone numbers; personal email addresses; employee number or other confidential personal identification number.

65 P.S. § 67.708(b)(6)(i)(A). Pursuant to Section 708(b)(6), the Borough is permitted to redact the information cited in its response letter. 65 P.S. § 67.708(b)(6)(i)(A); *see also Office of the Lieutenant Governor v. Mohn*, 67 A.3d 123, 133-34 (Pa. Commw. Ct. 2013); *Office of the Governor v. Raffle*, 65 A.3d 1105, 1111 (Pa. Commw. Ct. 2013) (finding that government-issued e-mail addresses and government-issued telephone numbers “personal” under Section 708(b)(6)); *but see Pa. State Sys. of Higher Educ. v. Fairness Ctr.*, No. 1203 C.D. 2015, 2016 Pa. Commw. Unpub. LEXIS 245 (Pa. Commw. Ct. 2016) (holding that an otherwise exempt e-mail addresses “held out to the public” by a government agency was subject to access).

**3. The Borough has proven that no other responsive records exist in its possession, custody or control**

The Borough initially argued that the Request is insufficiently specific. Nonetheless, the Borough conducted a search for responsive records for the two years prior to the Request and provided them to Requester. The Borough asserts that no additional responsive records exist, other than those already provided to the Requester.

In support of the Borough’s position, Ms. Firda attests that upon receipt of the Request, she conducted a thorough examination of the Borough’s files, inquired of relevant Borough personnel regarding the Request, and located records that were potentially responsive to the Request. Ms. Firda also attests that, following a good faith search, she has determined no other requested records exist in the Borough’s possession, custody or control.<sup>2</sup> 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

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<sup>2</sup> The OOR makes no determination as to whether these records should exist, only that the Borough does not possess any additional responsive records. *See, e.g., Troupe v. Borough of Punxsutawney*, OOR 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 [record] -- the OOR may only determine whether a responsive record does, in fact, exist”).

(Pa. Commw. Ct. 2010). In the absence of any evidence that the Borough 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 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)). Based on the evidence provided, the Borough has met its burden of proof that it does not possess additional records responsive to the Request.

### 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 Allegheny 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 28, 2016**

/s/ Kelly C. Isenberg

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