



3. Where is the equipment that was previously purchased for the town watch program (walkie talkies, flash lights, etc)?

The Borough did not respond within five days, and the Requests were deemed denied. 65 P.S. § 67.901.<sup>1</sup>

On August 31, 2016, the Requester appealed to the OOR, stating grounds for disclosure.<sup>2</sup> 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, arguing that the Requester asked questions rather than seeking records. The Borough also provided the Requester with a copy of the Borough's budget in response to the second Request. The Requester did not make a submission.

### 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

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<sup>1</sup> On August 26, 2016, the Borough issued an untimely response to the Requests.

<sup>2</sup> As both the Borough's untimely response and the Requester's appeal addressed all of the Requests at once, the entire matter was docketed as a single appeal.

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 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 first half of the first Request and all of the third Request does not seek records**

Under the RTKL, a request must seek records rather than answers to questions. *See Moll v. Wormleysburg Borough*, OOR Dkt. AP 2012-0308, 2012 PA O.O.R.D. LEXIS 197; *Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*14 (Pa. Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”); *see also Stidmon v. Blackhawk Sch. Dist.*, No. 11605-2009 at 5 (Beav. Com. Pl. Dec. 14, 2009) (“The [RTKL] d[oes] not provide citizens the opportunity to propound interrogatories upon local agencies, rather it simply provides citizens access to existing public records”). The presence or absence of a question mark is not determinative as to whether a request asks a question. *See Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766.

The Requests are framed as questions, seeking to have the Borough produce an answer rather than a document. They begin with the words “is,” “how,” and “where,” and end with a question mark. In the Requester’s appeal, she wonders “why this process would be so difficult when discussion of fund distribution ... were vocalized” at a public meeting and expresses difficulty in “comprehend[ing] why we would have to contend with leaders in our community to provide information that is rightfully ours,” indicating a focus upon receiving answers to her questions rather than documents. While these questions involve subjects for which an individual could seek records, the OOR cannot refashion the questions asked in the Requests into requests for records.<sup>3</sup> *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010) (“Nowhere in [the RTKL] has the General Assembly provided that the OOR can

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<sup>3</sup> Shortly after the Borough indicated that the instant Requests did not seek records, the Requester submitted a new request and appeal for documents that would provide, in part, substantially the same information sought here. That appeal is pending at OOR Dkt. AP 2016-1566.

refashion the request”). Accordingly, as these Requests seek answers to questions rather than records, the appeal is dismissed. *See Petka v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2014-1288, 2014 PA O.O.R.D. LEXIS 996; *Hammond v. Lancaster County District Attorney’s Office*, OOR Dkt. AP 2016-0494, 2016 PA O.O.R.D. LEXIS 600.

## **2. The second Request seeks records, which have been provided in full**

The second Request seeks to discover “[h]ow much money is budgeted for the Town Watch and how is the money allocated?” Although this Request ends with a question mark, it is a request for the Borough’s budget reflecting a specific item. *See Varick*, 2013 Pa. O.O.R.D. 766. The Borough denied this Request for asking a question rather than seeking records, but on appeal the Borough provided a copy of the Borough’s approved budget for the year 2016. Since this document is fully responsive, the appeal is dismissed as moot as to the second Request.

## **3. The second half of the first Request seeks records**

The second half of the first Request asks the Borough to “provide the name of the leader and volunteers [of the Town Watch program].” This portion of the Request is not framed as a question, but instead seeks access to records reflecting that information. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*13 (Pa. Commw. Ct. 2012) (“The RTKL defines ‘record’ as ‘information’, thus begging the question of how any request that seeks information is not one that seeks records”). The Borough has not raised any exemptions or claimed that records responsive to this Request do not exist, and therefore the appeal is granted as to the second half of the first Request.

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. Absent the Borough providing a sufficient evidentiary basis that no records exist, the OOR will

order disclosure of responsive public records. *See Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part, dismissed in part**, and **dismissed as moot in part**, and the Borough is required to provide records reflecting the information requested in the second half of the first Request 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 Delaware 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>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 31, 2016**

*/s/ Jordan Davis*

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APPEALS OFFICER  
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<sup>4</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).