pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
STEVEN BURDA,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2016-1701**
	:	
PENNSYLVANIA OFFICE OF	:	
INSPECTOR GENERAL,	:	
Respondent	:	

INTRODUCTION

Steven Burda ("Requester") submitted a request ("Request") to the Pennsylvania Office of Inspector General ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., asking questions and making statements regarding the Judicial Conduct Board. The Office denied the Request, stating the Request does not seek records, and the Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **dismissed**, and the Office is not required to take any further action.

FACTUAL BACKGROUND

On September 28, 2016, the Request was filed stating:

Taken from here: http://judicialconductboardofpa.org/privacy-and-confidentiality

1) "Documents (including complaints) and evidence obtained by the Board are confidential. The Board and its staff **will not answer any questions about the existence or status of a complaint**."

Yes, if a Judge from any Courthouse write[s] to you… you would or will release the status/existence information or record or activity?

2) Judging by the very next lines within the same JCB page, it sure looks like it. JCB pages says: "*…the accused judge **can request** that the Board issue a **statement** to **confirm** an **ongoing** investigation, clarify the procedural aspects of the proceedings, explain the judge's right to a fair **hearing** and provide the **judge's response** to the complaint*." From the JCB site, above (and attached)[.]

3) To me, this is a **double-standard**. Because issuing any statement to confirm **is** answering about the existence or status of [ongoing] complaint. JCB does not see it that way! **This is very concerning!**

4) Why would you issue an existence or status [statement] of a complaint to the Judge of an ongoing investigation? Not only that, you are, in essence, asking Judge to provide rebuttal while the investigation is ongoing and open, without notifying the complainer. Clearly, this is a huge no-no, and JCB is doing just that.

5) Would you issue to a State Senator? To State Representative? To Attorney General? To Government or any other Citizen of PA? Yes or NO? If not – why would you issue them any letter on a[n] ongoing investigation to the Judge – against your own saying in #1? **What a double-standard!!**

6) How many times have you done this in 2012, 2013, 2014, 2015 and 2016 -- and to which Judges? Please provide information / details / records / letters / notices / logs / transactions, as defined in #7.

7) Please treat this email as a request for clarification, and RTK[L] [R]equest as well as **RTKL** clearly defines a "record" as: **information** (*emphasis added*) regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data processed or image processed document. * Moreover, see 65 P.S. § 67.102; see **Gingrich v. Pennsylvania Game Commission, No. 1254 C.D. 2011, 2012 Pa. Cmwlth. Unpub. LEXIS 38 at *14 (Pa. Comwlth. Ct. Jan. 12, 2012),** *("How [can] any request that seeks information…not [be] one that seeks records[?]")*.

On September 29, 2016, the Office denied the Request, asserting that the Request does not seek records, and stating that the RTKL is not the proper vehicle to request that the Office conduct an

investigation or to answer questions. The Office also stated that it does not possess records related to the JCB's website. The Office further denied the Request, stating that, to the extent the Request sought records of any investigation, such records are exempt from disclosure because any such records would be related to criminal and noncriminal investigations. *See* 65 P.S. §§ 67.708(b)(16)-(17). Additionally, the Office stated that records regarding Office investigations reflect the Office's internal, predecisional deliberations. *See* 65 P.S. § 67.708(b)(10)(i)(A).

On October 11, 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 Office to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On October 20, 2016, the Office submitted a position statement, reiterating its grounds for denial, while also arguing that the appeal should be denied because the Request lacks specificity.[1] The Office also submitted the sworn affidavit of David Todd, Deputy Inspector General. On October 31, 2016, the Requester submitted a position statement, arguing that the Office has access to records of the Judicial Conduct Board.

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

[1] The Office is permitted to raise this additional reason for denial on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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 Requester has requested a hearing and *in camera* review of the responsive records; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter. Therefore, the requests for a hearing and *in camera* review are denied.

The Office 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 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)).

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] did 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.

Here, Items 1, 4, 5 and 6 seek answers to questions and do not seek records. *See Connelly v. Foster Twp.*, OOR Dkt. AP 2014-1256, 2014 PA O.O.R.D. LEXIS 1062 ("Each of the inquiries are phrased as a question, punctuated with a question mark, and the Requester asks the Township to e-mail the answers to the questions posed, further indicating the Requester's intent to ask questions"). The OOR cannot refashion the questions asked in the Request into a request for records under the RTKL. *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 refashion the request"). Additionally, Items 2, 3 and 7 are statements by the Requester and do not seek any records or information.[2]

CONCLUSION

For the foregoing reasons, Requester's appeal is **dismissed**, and the Office 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 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.[3] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: November 10, 2016

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Steven Burda (via e-mail only);
Melissa Yerges (via e-mail only);
Lishani Sunday, Esq. (via e-mail only)

[2] Deputy Inspector General Todd attests that if the Requester seeks clarifying statements about the Judicial Conduct Board website, the Office does not have any responsive records in its possession, custody or control.
[3] *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).