



On July 25, 2016, the District invoked a thirty day extension to respond to the Request. *See* 65 P.S. § 67.902. On August 25, 2016, the District granted Item 1 of the Request, directing the Requester to access Annual Financial Reports posted on the District’s website. The District denied Item 2 of the Request, claiming that it does not possess the requested information, but also advised the Requester that the requested information is maintained by the Pennsylvania Public School Employees’ Retirement System (“PSERS”).

On September 9, 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 District to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 21, 2016, the District filed a position statement reiterating the claims made in its response. In support of its position, the District submitted the affidavit of Dr. James Cekada, the District Superintendent.

### **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 and the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The District 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). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa.

Commw. Ct. 2010)). “The 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 District granted access to records responsive to Item 1 of the Request**

In its response, the District directed the Requester to access Annual Financial Reports containing responsive information that were posted on its publicly-available website. In further support of its position, the District submitted the sworn attestation of Dr. Cekada in which he states that he conducted a thorough search of the District’s files for responsive records. Dr. Cedka also attests that after conducting a search an inquiring of relevant personnel, he determined that the responsive records are Annual Financial Reports that are available through publicly accessible electronic means.

Section 704(b) of the RTKL permits an agency to respond to a request for records “by notifying the requester that the record is available through publicly accessible electronic means[.]” 65 P.S. § 67.704(b)(1). If a requester is unwilling or unable to access the records electronically, the requester may "submit a written request to the agency to have the record converted....” 65 P.S. § 67.704(b)(2). If the requester does not timely do so, an agency has no further obligation under the RTKL relative to a requester’s access to the particular requested record(s). An appeal to the OOR is not “a written request to the agency to have the record converted” such that it triggers an agency’s responsibility to take further action pursuant to Section 704(b)(2) of the RTKL. *See Borden v. Ridgebury Twp.*, OOR Dkt. AP 2011-1460, 2011 PA O.O.R.D. LEXIS 1223.

In the instant matter, there is no evidence that the Requester made a subsequent written request to the District to convert the online records to paper form. Moreover, directing a

requester to an Internet website satisfies an agency's obligations under Section 704 of the RTKL. *See Citizens for Pa's Future v. Pa. Turnpike Comm'n*, OOR Dkt. AP 2015-0726, 2015 PA O.O.R.D. LEXIS 856. Accordingly, the District's response regarding the requested records is permissible under Section 704 of the RTKL.

## **2. The District does not possess records responsive to Item 2 of the Request**

The District claims that it does not possess records responsive to the Item 2 of the Request. In support of its assertion, the District submitted the affidavit of Dr. Cekada, who attests that he searched the District's file for records responsive to Item 2 of the Request and determined that no responsive records exist. Dr. Cedaka explains that:

The portion of the request for the total number of "pensioners of the GSJD" from 2009 to present was denied because "pensioner" is defined as individuals who receive a pension. The District does not have a pension plan of its own. Rather all employees of the District are participants in [PSERS.] Who does and does not receive a pension from PSERS is not information in the passion of the District. Accordingly, the District has no records responsive to the Request.

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-521 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Department acted in bad faith, "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 District has met its burden of proof that it does not possess records responsive to Item 2 of the Request.

## **CONCLUSION**

For the foregoing reasons, Requester's appeal is **denied** and the District 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 Cambria 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>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 10, 2016**

/s/ Benjamin Lora

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