



[2.] Records showing reports made to DHS involving child abuse and neglect cases from 2014-2016.

[3.] Records showing reports written by case workers on child abuse and neglect calls from 2014-2016.

[4.] Records showing investigations into child abuse and neglect cases from 2014-2016 (active and closed).

On August 23, 2016, the Department invoked a thirty day extension to respond. *See* 65 P.S. § 67.902. On September 22, 2016, the Department granted Item 1 of the Request and denied Items 2-4, claiming that the records are confidential under the Child Protective Services Law (“CPSL”), 23 Pa.C.S. §§ 6301, *et seq.*, and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 45 C.F.R. § 164.502(a), and are also exempt from disclosure under Sections 708(b)(5), 708(b)(17) and 708(b)(30) of the RTKL. 65 P.S. §§ 67.708(b)(5), (b)(17), (b)(30).

On September 22, 2016, the Requester appealed Items 2-4 to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On October 4, 2016, the Department submitted a position statement reiterating its grounds for denial, and claiming that the appeal is deficient under Section 1101 of the RTKL, 65 P.S. § 1101. The Department claims that the requested records are confidential under the CPSL, HIPAA and are exempt because they relate to a noncriminal investigation and contain identifying information of a child under the age of 17 and medical information. In support of its position, the Department submitted the affidavit of Cindi Horshaw (“Ms. Horshaw”), Director of the Bureau of Policy, Programs and Operations for the Department’s Office of Children, Youth and Families. The Requester did not submit anything additional on appeal.

## 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 Department 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)).

The Requester has appealed Items 2-4 of the Request contending that, despite the confidentiality provisions of the CPSL, the records should be disclosed because it is “...important for public safety and public awareness.” The Requester also argues that the noncriminal investigation exemption should not apply because child abuse is a crime and, if the OOR determines that the juvenile records exemption, the medical records exemption or HIPAA apply”...he understand[s] that names and addresses will be redacted in the reports.

**1. The appeal is sufficient under Section 1101(a)(1) of the RTKL**

As a threshold matter, the Department argues that the instant appeal should be dismissed because the Requester failed to comply with Section 1101(a) of the RTKL, which requires appeals to “state the grounds upon which the requester asserts that the record is a public record ... and address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1); *see also Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa.

Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request”). Pursuant to this section, the Commonwealth Court has held that a requester must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access.” *Saunders v. Pa. Dep’t of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct.2012); *see also ACLU of Pa. v. City of Pittsburgh*, 116 A.3d 1189 (Pa. Commw. Ct. 2015) (holding that an appeal did not sufficiently address an agency’s grounds by “argu[ing] that the RTKL places the burden of proof upon the [agency] and that the [agency] has provided no . . . information in support of its assertion that” the records were exempt).

Here, the Requester submitted the standard OOR appeal form and supplemented his appeal with an attachment. In the attachment to the appeal, the Requester states that the “reports requested are public documents,” that release of the records would not violate the CPSL or HIPAA, and that the exemptions asserted by the Department do not apply. The Requester goes on to list various reasons why he believes the requested records should be disclosed. Accordingly, the appeal satisfies Section 1101(a)(1) of the RTKL.

## **2. The records requested in Items 2 and 3 are confidential under the CPSL**

The Department argues that Items 2 and 3 pertain to the same set of records, some of which are maintained by ChildLine and some of which are held in regional and county offices where child abuse investigations are conducted. The Department contends that the CPSL applies to support the withholding of all records requested in Items 2 and 3, as the Requester is seeking “reports involving child abuse and neglect cases,” “records showing investigations into child abuse and neglect cases” and “records showing investigations into child abuse and neglect cases,” which are exactly the types of records made confidential by the CPSL.

The Department states that it interprets Request Items 2 and 3 as follows:

[2.] The Department interprets your request to be for the reports of child abuse made to ChildLine in 2104, 2015, and the reports made thus far in 2016.

[3.] The Department interprets your request to be for the reports written by case workers during their investigations into child abuse reports in 2014, 2015, and the reports written thus far in 2016.

An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d at 824). Based on the language of the Request, the Department made a reasonable interpretation of what records were being sought.<sup>1</sup>

In support of its denial, the Department submitted the affidavit of Ms. Horshaw, who affirms that she has worked with the Office of Children, Youth and Families for fifteen (15) years and has been the Director of Bureau of Policy, Programs and Operations since 2013. Ms. Horshaw affirms that her duties include, among other things, “[o]versee[ing] operations of ChildLine, Child Abuse Appeal, Child Abuse Clearances and Interstate Compact.” Ms. Horshaw further affirms that:

6. In Pennsylvania, multiple agencies may have roles when a report of alleged child abuse is made. These agencies include:

- a. The Department
- b. County children and youth agencies (“county agencies”)....

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<sup>1</sup> Although the Department interpreted Items 2 and 3 as requesting reports of child abuse and neglect made to ChildLine, the Requester has not challenged the interpretations and, to the extent that the Requester is seeking records of reports made to the Department in some other manner, the CPSL confidentiality provisions apply to all “reports made pursuant to this chapter...” 23 Pa.C.S. § 6339.

7. The Department's role is prescribed by the [CPSL] which is set forth at 23 Pa.C.S. §§ 6301-6386.

8. The CPSL requires that the Department establish a single statewide toll-free telephone number that all persons...may use to report cases of child abuse...known as "ChildLine"....

10. The bulk of ChildLine's work is to accept reports of suspected child abuse/neglect from public and professional sources.

12. Reports to ChildLine reporting suspected child abuse/neglect are handled by trained specialists who gather information needed to determine the most appropriate course of action for each report. Such actions may include:

- a. Forwarding a report to the appropriate county agency for investigation
- b. Referring a report to a Departmental regional office for investigation
- c. Forwarding a report directly to law enforcement officials.

14. Once a report of child abuse has been sent to a county agency or a regional office of the Department, the report is assigned to an individual who has been trained to investigate child abuse reports made pursuant to the CPSL....

16. Even though the specifics of each investigation will be different, there are many similarities in each investigation including:

- a. Ensuring the immediate safety of the victim child and any other children in the home
- b. An interview with the victim child, if possible
- c. Visit the child's home at least once
- d. Interviews of the victim child siblings, friends, teachers, parents or anyone else who may have information relevant to the abuse investigation
- e. Record the facts of each interview
- f. Pictures of where an event occurred, if applicable
- g. Pictures of the victim child, including pictures of injuries
- h. An interview of a treating physician, if applicable
- i. Collection of medical records, if applicable
- j. Records from a Child Advocacy Center forensic interview of the victim child, when sexual abuse is reported.

18. Investigators create thorough records which are specific to each child and abuse allegation. These records contain a great deal of information

about the child, the child's personal history, the child's family, and the child's medical history.

19. ...[M]any investigations do contain medical records. These records can include, but are not limited to:
  - a. X-rays
  - b. Pictures and/or descriptions of injuries
  - c. Records of hospital stays
  - d. Prescriptions
  - e. Diagnoses
  - f. Records which relate to psychological evaluations or treatments.
  
20. A child abuse investigation is concluded when the investigating agency issues a concluding report....
  
22. The resulting reports contain a variety of information including:
  - a. The name, age, home address, and social security number of the child;
  - b. The name of the referral source of the report;
  - c. A description of any injuries suffered by the child;
  - d. Records detailing who was interviewed during the investigation and what information each interviewee supplied[;]
  - e. Any medical treatment provided;
  - f. The name of the perpetrator or alleged perpetrator of the abuse; and
  - g. A description of the incident in question.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *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 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)).

Pursuant to Section 305 of the RTKL, a record in the possession of an agency is presumed to be a public record unless "exempt from disclosure under any other Federal or State law or regulation...." 65 P.S. § 67.305(a)(3). The CPSL provides, in relevant part, as follows:

Except as otherwise provided in this subchapter or by the Pennsylvania Rules of Juvenile Court Procedure, *reports made* pursuant to this chapter, including, but not limited to, *report summaries* of child abuse and reports made pursuant to section 6313 (relating to reporting procedure) as well as *any other information obtained*, reports written or photographs or X-rays taken concerning alleged instances of child abuse in the possession of the department or a county agency *shall be confidential*.

23 Pa.C.S. § 6339 (emphasis added).

Because the CPSL expressly exempts the requested records, namely child abuse reports and reports written by case workers, from public disclosure and the records are precisely the types of records the statute is intended to protect, the records responsive to Items 2 and 3 are not subject to access under the RTKL. *See* 65 P.S. § 67.3101.1 (“If the provisions of [the RTKL] regarding access to records conflict with any other federal or state law, the provisions of [the RTKL] shall not apply”); *see also Evans v. York County*, OOR Dkt. AP 2010-0155, 2010 PA O.O.R.D. LEXIS 202; *Bittenbender v. Monroe County*, OOR Dkt. AP 2009-1099, 2010 PA O.O.R.D. LEXIS 38. With respect to the Requester’s argument that the records should be released as a matter of “public safety and public awareness,” Section 506 of the RTKL permits an agency to exercise its discretion to “make an otherwise exempt record accessible,” but not if disclosure is prohibited under Federal or State law or regulation. *See* 65 P.S. § 67.506(c)(1)(i).

### **3. The records requested in Item 4 relates to noncriminal investigations**

The Department states that it interprets Item 4 as seeking:

“...the investigative records created pursuant to child abuse investigations...[and]...the investigative material for child abuse reports made in 2014, 2015, and reports made thus far in 2016, regardless of whether these are active or closed investigations.”

As previously stated, an agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D.

LEXIS 513; *Signature Info. Solutions, Inc.*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. Based on the language of the Request, the Department made a reasonable interpretation of what records were being sought in Item 4.<sup>2</sup>

The Department argues that the records requested in Item 4 are exempt from disclosure because they relate to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[i]nvestigative materials, notes, correspondence and reports” and “[a] record that, if disclosed, would . . . [r]eveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). 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). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

The Department states that when an instance of abuse is reported, an investigation is commenced pursuant to its obligations and authority set forth in the CPSL and applicable state regulations. See 23 Pa.C.S. § 6334.1; 55 Pa. Code §§ 3490.54-3490.56. Ms. Horshaw affirms that each child abuse report is assigned to a trained investigator who undertakes the task of gathering facts by conducting interviews and obtaining the necessary investigative materials

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<sup>2</sup> See, *supra* n.1.

including statements, photographs, and medical records if appropriate. The result of the case worker's investigation is a concluding report which sets forth the agency's determination and recommendation for the next action in the case. Moreover, whether the documents identified in Requester's request are covered by section 708(b)(17) of the RTKL can be determined by comparing the request itself with the language of section 708(b)(17). *Coulter v. Pa. Dep't of Pub. Welf.*, 65 A.3d 1085, 1090 (Pa. Commw. Ct. 2013); *see also Pa. Game Comm'n v. Fennell*, No. 1104 C.D. 2015, 2016 Pa. Commw. LEXIS 451 (Pa. Commw. Ct. 2016) (holding that an affidavit is not required when it is clear from the request that any responsive record would be exempt from access). Here, Item 4 of the Request specifically seeks "records showing investigations into child abuse and neglect cases," which the Department interpreted as seeking the investigatory material obtained by the case workers during the noncriminal investigation. Based on the evidence presented, as well as the plain language of the Request, the Department has proven that the records requested are a product of a systematic and searching inquiry into child abuse allegations conducted pursuant to the Department's statutory and regulatory mandates. *See* 65 P.S. § 67.708(a)(1); *see also Thomas v. Pa. Dep't of Pub. Welf.*, OOR Dkt. AP 2010-0611, 2010 PA O.O.R.D. LEXIS 531 (finding that records containing information about an alleged instance of child abuse are exempt under Section 708(b)(17)).

### CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the Department 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 23, 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).