



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**FLORENCE CHEN &
DOMINION VOTING SYSTEMS, INC.,
Requester**

v.

**FULTON COUNTY,
Respondent**

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Docket No.: AP 2022-1542

INTRODUCTION

Florence Chen, Esq., on behalf of Dominion Voting Systems, Inc. (collectively “Requester”), sent a request (“Request”) to Fulton County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking documents and communications related to several addresses and organizations. The County denied the Request as seeking personal information, records related to investigations, privileged records, and otherwise exempt materials, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On April 25, 2022, the Request was filed, seeking:

[F]or the time period September 1, 2020 through the present:

All communications (including letters, emails, email attachments, complete email chains, calendar invitations, calendar invitation attachments, text messages, instant messages, and social media communications) involving Fulton County Commissioners including Randy Bunch, Stuart Ulsh, and Paula Shives, Fulton County Elections Director Patti Hess, Fulton County Technology Director Eldon Martin, Senator Doug Mastriano, Senator Judy Ward, Senator Cris Dush, and Representative Jesse Topper, concerning the topics listed below.

1. All communications with anyone communicating from an email address ending in @eac.gov.
2. All communications with Rudy Giuliani, Sidney Powell, Mike Lindell, MyPillow, Patrick Byrne, Fox News, Newsmax, One America News Network (OAN), Defending the Republic, Powell P.C., or any of their officers, employees, agents, trust, attorneys, accountant, representatives, or other person/s purporting to work on their behalf.
3. All communications with anyone from an email address ending in @waketsi.com, @alliedspecialops.us, @cyberninjas.com, @federalappeals.com, @giulianisecurity.com, @giulianipartners.com, @gdcillc.com, @foxnews.com, @newsmax.com, and @oann.com.
4. All documents and communications relating to audits, reports, or investigations of the 2020 election, including by Wake TSI, Pro V&V, SLI Compliance, Allied Security Operations Group, Alex Halderman, or any state or local agencies.
5. All documents and communications concerning policies and procedures for ensuring the accuracy of voting technology and machines for the 2020 election.
6. All documents and communications, including but not limited to voicemail messages, concerning threats or harassment of local election officials.
7. All documents and communications with or relating to Cyber Ninjas, Doug Logan, Wake Technology Services, Inc, Allied Security Operations Group (ASOG), Conan Hayes, Russell Ramsland, Todd Sanders, and Joshua Merritt.
8. All documents and communications from November 3, 2020 to the present with constituents that concern or reference Dominion and/or the 2020 election, and any internal correspondence about or relating to these constituent communications.
9. All documents and communications with anyone who works for Election Systems & Software (ES&S), Hart InterCivic, or Clear Ballot.

On June 3, 2022, following a 30-day extension, 65 P.S. § 67.902(b), the County denied the Request on seven grounds, stating that it “contains a demand for communications and/or

documentation and/or information” that (1) is not included within the meaning of public records; (2) is exempt because of an ongoing investigation, 65 P.S. §§ 67.708(b)(16); (17)¹; (3) is protected by an unidentified privilege; (4) would jeopardize the individual rights of one or more of the parties subject to the Request; (5) relates to the performance of the public duties of a public officer; (6) addresses matters of an advisory nature preliminary to a final executive agency determination of policy or action, 65 P.S. § 67.708(b)(10); and (7) touches upon ongoing security measures, including security related to a computer system. 65 P.S. § 67.708(b)(3).

On June 10, 2022, the Requester sent the County an email asking the County to clarify which parts of its denial related to which parts of the Request, and what the legal basis for the denial rationale was.

On June 27, 2022, the Requester appealed to the OOR, arguing that the County had improperly issued a conclusory denial and that the County needed to provide specific evidence of its claims.² The OOR invited the parties to supplement the record and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 11, 2022, the County submitted a position statement arguing that the Requester’s appeal had narrowed the issues to only “[r]ecords regarding reviews and audits of the County’s voting machines and election procedures conducted by Wake Technology Services[] following the November 2020 elections, including agency communications with external individuals and entities[,]” and “[p]olicies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews” and that this represented a significant narrowing of the issues from the Request to the appeal under Section 1101(a) of the

¹ The denial did not cite to any of the exemptions in the RTKL as required by law; however, where appropriate, the OOR references sections of the RTKL which might be relevant to the stated grounds for denial.

² Because the OOR was closed on June 20, 2022 in observance of Juneteenth, this was the fifteenth business day since the County’s denial. 65 P.S. § 67.1101(a).

RTKL. 65 P.S. § 67.1101(a). The County further argued that such communications are exempt under 65 P.S. § 67.708(b)(6)(i)(A), the attorney-client and attorney-work product privileges, as internal, predecisional, deliberative communications pursuant to 65 P.S. § 67.708(b)(10), and as relating to a noncriminal investigation under 65 P.S. § 67.708(b)(17), although the County argued that it could not submit evidence of the existence of such an investigation, because that would disclose protected information. Finally, the County argued that records relating to the processes by which its voting machines functioned are exempt under the RTKL's security and computer exemptions, 65 P.S. §§ 67.708(b)(3)-(4), as well as the Constitution of the United States.

On July 13, 2022, the OOR asked the County to provide it with an estimate for the total number of records which it deemed privileged, as well as an estimate of the time it would require to produce a privilege log.

On July 19, 2022, the County submitted a response stating that it believed only a limited number of documents were responsive following the Requester's alleged failure to preserve issues on appeal but did not provide the requested estimates.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, both parties suggested *in camera* review, but the OOR did not conduct such a review because the County did not identify any of the records which would be subject to such a review or provide the OOR with any estimate for how long such a process would require.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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 *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa.

Commw. Ct. 2010)). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011).

1. Scope of the appeal

The Request seeks all communications involving the Fulton County Commissioners and nine named individuals that concern any of nine topics, ranging from communications with specific individuals to communications regarding threats connected to the 2020 general election.

The County argues that, on appeal, the Requester significantly narrowed the scope of the Request:

“In the instant case, Requester’s only ‘questions presented’ section to the Appeals Officer appears on page 1 of its appeal letter dated June 27, 2022. The Requester’s ‘appeal’ only takes issue with its prior request ‘regarding reviews and audits of the County’s voting machines and election procedures conducted by ‘Wake Technology Services (Wake TSI)’ following the November 2020 election, including agency communications with external individuals and entities’; and ‘[p]olicies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews.’”

[...]

“It is the County’s position preliminarily that the Requester has accepted the balance of the County’s objections and/or has waived its right to appeal those objections.”

Section 1101(a)(1) of the RTKL states that an “appeal shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for ... 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). In *Pa. Dep’t of Corr.*, the Commonwealth Court held: “it is appropriate and, indeed, statutorily required that a requester specify in its appeal to [the OOR] the particular defects in an agency’s stated reasons for denying a RTKL request...the provision merely places a burden on a requester to identify flaws in an agency’s decision denying a request.” *Id.* In the instant appeal, the Requester’s appeal correspondence addresses each of the County’s grounds for denial

in general terms - more specific issue identification is foreclosed by the fact that the County's denial is, itself, vague and general, and the County does not appear to have responded to the Requester's June 10, 2022 email seeking additional detail about the bases for denial. Therefore, the appeal meets the statutory requirement of Section 1101(a).

Separately from Section 1101(a), however, the scope of an appeal may be limited if a Requester either explicitly or implicitly waives their appeal rights to part of the response. *Id.* (“[T]he effect of a failure to file timely exceptions will be deemed a waiver to objections to a proposed report of the hearing officer”) (citing *Martella v. Dep’t of Transp.*, 841 A.2d 633 (Pa. Commw. Ct. 2004)). Here, the County argues that the Requester has failed to file exceptions to any part of the County's response save for records explicitly concerned with Wake TSI's audits and policies and procedures for ensuring accuracy of voting machines, because those issues were specifically mentioned in the “Background” section of the appeal filing, while other subjects were not referred to explicitly.

This is not a reasonable interpretation of the appeal filing. The appeal correspondence states in the “Background” section that “the [R]equest sought, *among other information*, [County] Records regarding reviews and audits of the County's voting machines and election procedures conducted by [Wake TSI] following the November 2020 elections, including agency communications with external individuals and entities.” (emphasis added). This section is meant to summarize the Requester's interest in the information; there is no indication that it was intended to narrow the scope of the Request, which was also submitted.³ Finally, as noted above, the Requester has explicitly argued that every ground raised by the County is either incorrectly raised

³ Notably, the appeal also includes the sentence, “The records requested by [the Requester] seek communications between [C]ounty officials and a private company, Wake TSI, *in addition to* explicitly external communications with a range of other specifically identified private and governmental individuals and entities.” (emphasis added).

or insufficiently supported by evidence. Therefore, the OOR is unable to adopt the County's determination that the Requester has waived some unidentified majority portion of the Request, and the OOR will proceed under the assumption that the entire Request is at issue on appeal.

2. The County has submitted no evidence that any records are exempt

On appeal, the County argues that the responsive records are exempt because they contain personal information protected by Section 708(b)(6)(i)(A) of the RTKL, 65 P.S. § 67.708(b)(6)(i)(A), because they contain information protected by the attorney-client and work-product privileges, because they contain records which constitute internal, predecisional, and deliberative communications, 65 P.S. § 67.708(b)(10)(i)(A), because they relate to one or more noncriminal investigations, 65 P.S. § 67.708(b)(17), because the records would endanger the safety or security of the County's electronic voting systems, 65 P.S. §§ 67.708(b)(3)-(4), because the records would reveal information protected by the state constitutional right to privacy, and because the Constitution of the United States of America requires that the County assure that such voting systems are secure.

The County did not identify any of the responsive records which it alleges are exempt, nor did it choose to submit any evidence to support these exemptions. By and large, the County does not explain the relevance of these exemptions to any part of the Request. The agency bears the burden of proof in appeals under the RTKL. *See* 65 P.S. § 67.708(a)(1). Unsworn statements or statements of counsel, such as the County's submissions, that are not supported by affidavit testimony, have been held not to be competent evidence under the RTKL. *See Housing Auth. of the City of Pittsburgh v. Van Osdol*, No. 795 C.D. 2011, 2012 Pa. Commw. LEXIS 87 (Pa. Commw. Ct. 2012); *Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015)

(“Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the evidentiary record”) (citations omitted).

Failure to submit evidence in response to an RTKL appeal is not necessarily a cause for default judgment, as the OOR must also consider the context and contents of the appeal filing itself. *Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions); *see also Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record). Therefore, the OOR will consider each of the County’s proposed exemptions to determine if they may be applied without any evidentiary submission.

a. Personal information under Section 708(b)(6)(i)(A)

The County withheld an unknown number of unknown records as exempt under Section 708(b)(6)(i)(A) of the RTKL. Section 708(b)(6) of the RTKL exempts from disclosure certain personal identification information, including “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 e-mail addresses; employee number or other confidential personal identification number.” 65 P.S. § 67.708(b)(6)(i)(A).

Because Section 708(b)(6)(i)(A) of the RTKL exempts specific information rather than subjective categories of information, establishing that a record contains information exempt under this section only requires evidence that any exempt information is included in a responsive record. Given the nature of the Request, it is reasonable to expect that some or all the information exempt under Section 708(b)(6)(i)(A) of the RTKL is included in responsive communications, especially home, cellular or personal telephone numbers and personal email addresses.

However, Section 708(b)(6)(i)(A) of the RTKL permits only the redaction of exempt information from responsive records; the County is not entitled to withhold responsive records without identifying them on the grounds that they contain exempt information. 65 P.S. § 67.706 (“If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency’s response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. . . .The agency may not deny access to the record if the information which is not subject to access is able to be redacted.”) While the County may redact the specific information which is exempt under Section 708(b)(6)(i)(A), it has provided no rationale or evidence to show that it may withhold any records under this section.

b. Attorney-client and Attorney-work product privilege

The County argues that an unknown number of unknown records are exempt because they are subject to the attorney-client and attorney-work product privileges. For the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citations omitted). An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to

withhold records”). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client’s goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001). The Commonwealth Court has confirmed that, after an agency establishes the privilege was properly invoked under the first three prongs outlined above, the party challenging invocation of the privilege must prove waiver under the fourth prong. *Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

The attorney work-product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. “The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation.” *Bousamra*, 210 A.3d at 976 (internal citations omitted); *see also Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted).

It is difficult to establish the existence of either privilege without evidence, either submitted by affidavit testimony or by a review *in camera*. Though the OOR does not have the power to order the disclosure of privileged material, it retains subject matter jurisdiction to determine whether otherwise-public documents are privileged. *Commonwealth v. Center Twp.*, 95 A.3d 354

(Pa. Commw. Ct. 2014). To accomplish this, it is incumbent upon the agency, which bears the burden of proof and production throughout the RTKL process, to submit evidence establishing the elements of the privilege; or, in the cases where that is not possible, to identify the privileged records to the OOR for review. See *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (*en banc*) (stating that “it is not incumbent upon OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts.”); see also *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), *appeal denied* by 223 A.3d 675 (Pa. 2020) (“A preponderance of the evidence may be the lowest burden of proof, but it still requires evidence unless the facts are uncontested or clear from the face of the RTKL request or the exemption”).

Here, the County has not identified any records which it argues are subject to the privilege, nor explained how the elements of the privilege relate to any record, except by stating that “[t]he information sought by the requester contains *both* communications and *reports* and *agent’s communications* about *reports* that are the basis for anticipated litigation” and that disclosure “would inevitably divulge privileged communications[.]” (emphasis in original). The County has not submitted any evidence which would demonstrate that either privilege applies to any record. Finally, in response to the OOR’s inquiry regarding the feasibility of creating an exemption log to address the County’s privilege claims, the County indicated that such a log would only be necessary after a reviewing court considered the OOR’s determination that the Requester had not waived their appeal as to these unidentified privileged records. As a result, the OOR is unable to determine that any responsive records are subject to either privilege.

c. Internal, predecisional deliberative records under Section 708(b)(10)(i)(A)

The County argues that the records are exempt under Section 708(b)(10)(i)(A) because they will inform the County's future actions in election administration. Section 708(b)(10)(i)(A) exempts from public disclosure a record that reflects:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, ... or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

Here, the County did not identify any of the alleged predecisional and deliberative records and did not submit any evidence to show that such records meet any of the elements of the exemption. Instead, the County states only that these records will inform the County's discussion of how to administer future elections; that statement alone fails to satisfy any of the elements of the exemption. Therefore, the OOR cannot find that any of the responsive records are exempt as internal, predecisional, and deliberative communications.

d. Records relating to computer systems under Sections 708(b)(3) and 708(b)(4)

The County denied the Request insofar as it seeks records relating to the County's methods for ensuring the accuracy of voting machines. Section 708(b)(3) of the RTKL exempts from disclosure "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information

storage system....” 65 P.S. § 67.708(b)(3). For this exemption to apply, “the disclosure of” the records - rather than the records themselves - must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3). The Commonwealth Court has held that “[a]n agency must offer more than speculation or conjecture to establish the security-related exemptions....” *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018) (internal citations omitted).

Meanwhile, Section 708(b)(4) of the RTKL exempts from disclosure “[a] record regarding computer hardware, software and networks, including administrative or technical records which, if disclosed, would be reasonably likely to jeopardize computer security.” 65 P.S. § 67.708(b)(4). “In order for a record to be exempt under Section 708(b)(4), it ‘must be on the subject of computer hardware, software or networks.’” *Monighan v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2017-2428, 2018 PA O.O.R.D. LEXIS 331 (quoting *Abraham v. Sch. Dist. of Phila.*, OOR Dkt. AP 2012-0070, 2012 PA O.O.R.D. LEXIS 47).

Here, the County has provided no description of the responsive records and has submitted no evidence to demonstrate that all responsive records contain information which is likely to jeopardize computer security. Although it is certainly possible that some records responsive to this Request could contain such information, the OOR is unable to find that the County has demonstrated any element of either exemption.⁴

⁴ The County further argues that the importance of the application of the exemptions at Section 708(b)(3) and (4) of the RTKL is underscored by the fundamental right to vote, which requires the County to secure and maintain its election systems. The OOR agrees with this claim- if release of data would endanger state and federal voting procedures, such data would be exempt under the RTKL. The fundamental issue is that the County has not identified any of the data it argues would create such dangers, nor has it offered any evidence to show such dangers are present. The OOR is legally incapable of upholding an exemption on the basis that threats exist in some general sense. *Rothey*, 185 A.3d at 468.

e. Records relating to a noncriminal investigation under Section 708(b)(17)

The County argues that an unknown number of unknown records relate to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports” or a record that, if disclosed, would “[c]onstitute an unwarranted invasion of privacy.” 65 P.S. §§ 67.708(b)(17)(i). To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *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. An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

In this instance, the County argues that records relate to a noncriminal investigation, but it does not identify the nature or provenance of the investigation. In its reply on appeal, the County affirmatively refuses to admit whether an investigation is occurring at all.⁵ Therefore, the County has not demonstrated that any records relate to any noncriminal investigation.

⁵ The County asserts a form of the so-called “Glomar response” by neither confirming nor denying that an investigation exists. In the vast majority of cases, the RTKL’s requirement that an agency demonstrate that a record is exempt from disclosure before withholding it means that the agency must provide (1) an acknowledgement that the records exist, (2) a description of the records, and (3) an analysis of why the records are exempt. Only in extremely rare circumstances can an agency meet its burden without providing all three of those elements to the OOR. *Yackamovich v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2016-1959, 2016 PA O.O.R.D. LEXIS 1763 (finding that disclosure of any responsive records would threaten public safety). Here, the County has failed to explain why security concerns should permit it to claim the benefit of an investigative exemption without meeting the elements needed to assert the exemption.

f. The Pennsylvania state constitutional right to privacy

The County argues that an unknown number of unknown records are subject to the state constitutional right to privacy. The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

Although the Pennsylvania Supreme Court did not expressly define the types of "personal information" subject to the balancing test, the Court recognized that certain types of information, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass'n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test) .

To determine whether the constitutional right to privacy precludes disclosure of an individual's personal information, the OOR must apply the balancing test enunciated in

Denoncourt v. Pa. State Ethics Comm'n, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), “weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.”

In this matter, the County has not identified any of the records, or information contained within those records, that it claims are subject to the right to privacy, nor has it submitted any evidence that it notified any third parties of their right to participate on appeal, as required by the OOR’s order. Because the County has not identified the records at issue in any capacity, the OOR is unable to determine whether the records are “sufficiently personal” to any individual to qualify for the *Denoncourt* test. Therefore, the OOR concludes that the County has not demonstrated that any records are protected by the state constitutional right to privacy.

Because the County has submitted no argument or evidence which justifies the exemption of public records, or even identified such public records, the OOR is constrained to grant the Request in full. The County cannot just rely upon the premise that it may ignore the OOR’s fact-finding in favor of an appellate court. The OOR is the initial fact-finder, and an agency shall raise and support all of its challenges before the OOR. *Levy v. Senate of Pa.*, 94 A.3d 436, 441-42 (Pa. Commw. 2014). An appellate court will generally not serve as fact-finder because doing so will give agencies “the proverbial second bite at the apple.” *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017); *see also Crocco v. Pa. Dep’t of Health*, 214 A.3d 316, 321 (Pa. Commw. Ct. 2019) (“Absent unusual circumstances or a deficient record, ... this Court declines to serve as fact-finder, and relies on the record created before [the] OOR”). Despite being presented with a full opportunity to present evidence in support of the cited exemptions, the County has not done so.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the County is required to provide all responsive records within 30 days, subject to redaction under Section 708(b)(6)(i)(A) of the RTKL. 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 Fulton 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 according to court rules 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 2, 2022

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Florence Chen, Esq. (via email only);
Thomas Carroll, Esq. (via email only);
Stacey Golden (via email only)

⁶ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).