

in the context of the attached Court Order from Grand Jury Supervising Judge Thomas Kistler.

2. ... all written communication exchanges between the dates of February 4, 2017 and December 29, 2017 between Centre County District Attorney Stacy Parks Miller and any attorney or employee of the law firm Kline and Specter, PC, pertaining to the drafting (i.e. creation, editing, ideas for input) of the grand jury report (Dkt. No. CP-14-MD-1367-2015) currently being posted on the Centre County DA's website re: the hazing incident at ... Pennsylvania State University in February 2017... This request seeks all written exchanges regardless of whether the exchanges occurred on DA Parks Miller's governmental or personal communication devices.

On January 3, 2018, the Office invoked a thirty-day extension of time to respond to the Requests. *See* 65 P.S. § 67.902(b). On February 2, 2018, the Office denied the Requests, arguing that the requested records do not exist in the Office's possession, custody or control.

On February 6, 2018, the Requester appealed to the OOR, challenging the denial of the Requests and stating grounds for disclosure.¹ The OOR invited the parties to supplement the record and directed the Office to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On February 15, 2018, the Office notified the relevant third parties of the instant appeal; however, none of the third parties sought to participate.

On February 20, 2018, the Office submitted a position statement, reiterating that it does not possess records responsive to the Requests. In support of its assertion, the Office provides an attestation made under the penalty of perjury from Amanda Bernier, Esq., the Office's Open Records Officer, and the sworn affidavit of William Browder, Director of Information Technology for RBA Professional Data Systems ("RBA"), the subcontractor responsive for managing and maintaining electronic records for the Office. The Requester did not submit any additional legal argument or evidence during the appeal.

¹ On February 9, 2018, the OOR consolidated the appeals docketed as OOR Dkts. AP 2018-0227 and AP 2018-0228 into the above-captioned docket number, AP 2018-0227, as the appeals involve the same parties and similar issues.

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 necessary information and evidence before it to properly adjudicate the matter.

The Office 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 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).

The Office asserts that it does not possess records responsive to the Requests.² In support of the non-existence of records, the Office provides the attestation of Attorney Bernier, who attests as follows:

... I conducted a thorough examination of files in the possession, custody, and control of our Office for records responsive to the [R]equest underlying this appeal, specifically, by making inquiry among the personnel of this Office, examining the contents of the electronic folders wherein the records of the ... Office are reposed, and running “keyword” searches in those electronic folders.

Additionally, I have inquired with relevant Office personnel and, if applicable, relevant third-party contractors as to whether the requested records exist in their possession. Specifically, a request was sent to RBA, to which they replied in a sworn affidavit, that while it is possible that information responsive to the [R]equest

² Regarding Item 1 of the Requests, the Office explains in its response to the Requests that, by the time Item 1 was reviewed, “all paper documents for Notice Number 11 submitted to the Centre County Investigating Grand Jury had been transferred” to the Pennsylvania Attorney General’s Office.

is contained on backup equipment, the files are not readily retrievable, and searching for and recreating such would come at an extraordinary cost....

After conducting a good faith search of the Office's files and inquiring with relevant Office personnel, I did not locate any documents responsive to the [R]equest underlying this appeal.

Under the RTKL, a sworn affidavit or attestation 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). Based upon the evidence provided, therefore, the Office has demonstrated that it does not actually possess the requested records.

However, the Office may have constructive possession of responsive records. Under the RTKL, two groups of records are accessible: records in an agency's actual or constructive possession reached directly under Section 901 of the RTKL, and records that are in the possession of third parties that are indirectly accessible through Section 506(d) of the RTKL. *See Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014), *aff'd* 124 A.3d 1214 (Pa. 2015). In *Eiseman*, the Commonwealth Court explained the concept of constructive possession under the RTKL as follows:

Constructive possession focuses on an agency's access to a record. The analysis emphasizes the statutory language in Section 901 of the RTKL that mandates an agency "determine whether [it] has possession, custody or control of the identified record." 65 P.S. § 67.901. We recognize constructive possession under Section 901 as a means of access so agencies cannot frustrate the purposes of the RTKL by placing their records in the hands of third parties to avoid disclosure. *See Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Cmwlth. 2012); *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Cmwlth. 2011).

However, this Court does not infer constructive possession from the mere availability of the records to an agency upon request. *Office of the Budget* (construing "control" narrowly as to records of a private contractor). The litmus test under Section 901 remains whether the records document a transaction of the agency to which the request was directed, not whether they document a transaction of a private contractor. This Court explained: "Similarly, while [the Office of the]

Budget has the right to audit these payroll records, there is no evidence that they have ever been in Budget's possession or that Budget is attempting to play some sort of shell game by shifting these records to a non-governmental body." *Office of the Budget*, 11 A.3d at 621.

Id. The Commonwealth Court has established that when records in the possession of an agency official or third-party contractor document a transaction or activity of an agency, those records constitute "records" of an agency under the RTKL and are in the agency's constructive possession.

See, e.g., Barkeyville Borough v. Stearns, 35 A.3d 91, 95 (Pa. Commw. Ct. 2012).

Here, the Office explains that Centre County ("County") contracts with RBA to manage and maintain the electronic records of the County. In his affidavit, Mr. Browder attests, in relevant part, as follows:

RBA ..., as subcontractor, is the party responsible by contract for managing and maintaining electronic records of the County....

RBA regularly completes and maintains back up files for the electronic files and records, including electronic communications, of the County which includes those of County officials, the Office of the Centre County District Attorney ... and all County employees.

I am the Director of the RBA office maintained on County property and responsible for managing all obligations under the RBA contract with the County....

While it is possible that information responsive to the [R]equest is contained on back up equipment, the files are not readily retrievable for the following reasons:

The new system employed for the County's electronic system ... was initiated in March, 2015, but back-ups beyond 90 days are stored on tape (rather than disk which stores the last remaining 90 days) and therefore require the information to be located on the back up tapes, indexed, restored and recreated, then extracted to different media so the same could be searched to locate any records responsive to a request for information.

Further, tapes may contain data that is problematic – used former email system – so the restoration/recreation may fail and numerous attempts to recreate the same will involve more time and expense.

The Office does not claim that it never possessed copies of the requested records or that the records do not document a transaction or activity of the Office; rather, it claims that the records are not subject to access because they are “contained on back up equipment, ... are not readily retrievable, and searching for a recreating such would come at an extraordinary cost.” However, “an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the request[er].” *Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012). Because the Office has constructive possession of records contained on the servers managed by RBA, the Office must search for and, to the extent responsive records exist, obtain the records from the servers and provide them to the Requester to comply with its obligations under the RTKL.³ See *Pa. Dep’t of Labor and Indus. v. Earley*, 126 A.3d 355 (Pa. Commw. Ct. 2015) (concluding that an agency failed to meet its burden of proof where the agency did not search its servers for previously deleted emails responsive to the request); *Edinboro Univ. of Pa. v. Ford*, 18 A.3d 1278, 1281 (Pa. Commw. Ct. 2011), *appeal denied*, 55 A.3d 525 (Pa. 2012) (holding that an agency was required to re-obtain records that it had previously received but no longer retained). Based upon the evidence, therefore, the Office has failed to prove that it does not possess records responsive to the Requests. See *Hodges*, 29 A.3d at 1192.

Section 901 of the RTKL requires that “[a]ll applicable fees shall be paid in order to receive access to the record requested.” 65 P.S. § 67.901. The RTKL favors a contemporaneous exchange of fees for records, but in no event is an agency required to provide records without first receiving duplication fees, postage and any other permissible fees. See *Frame v. Menallen Twp.*, OOR Dkt. AP 2009-1072, 2010 PA O.O.R.D. LEXIS 155; *but see State Employees’ Ret. Sys. v. Office of*

³ As the Requests seek records in the constructive possession of the Office and not records created by an agency contractor pursuant to the delegation of a government function, the OOR need not address whether the records are subject to access under Section 506(d) of the RTKL.

Open Records, 10 A.3d 358, 363 (Pa. Commw. Ct. 2010) (finding that the RTKL does not authorize the charging of labor costs); *D&S Enterprises, Inc. v. Upper Tulpehocken Twp.*, OOR Dkt. AP 2017-1456, 2017 PA O.O.R.D. LEXIS 1287. Therefore, to the extent responsive records are located, the Office need not provide the records to the Requester before receiving payment of the applicable fees.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the Office is required to conduct a complete search of its files, including those contained on the servers maintained by RBA, and, insofar as responsive records are located, to provide all responsive records to the Requester 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 Centre 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 6 March 2018

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: Simon Campbell (via e-mail only);
Amanda Bernier, Esq. (via e-mail only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).