

FACTUAL BACKGROUND

On May 4, 2018, the Request was filed, seeking electronic copies of the following “communication records between the Millcreek Township School District [(“District”)] and OOR”:

Conner Riler Friedman & Weichler Records – Redacted...[;]

Knox McLaughlin Gornall & Sennett Records – Redacted[.]

On May 10, 2018, the OOR invoked a thirty-day extension of time to respond to the Request. 65 P.S. § 67.902(b). On June 8, 2018, the OOR denied the Request, arguing that the requested records are confidential as they were “submitted to the OOR as part of the *in camera* review process in OOR Dkt. AP 2018-0266” and that “the OOR has previously held that a requester is precluded from challenging an appeals officer’s procedural decision in the administrative proceeding before the OOR through a RTKL request.” In support of its denial, the OOR cites to the final determination issued in *Campbell v. Office of Open Records*, OOR Dkt. AP 2013-1307, 2013 PA O.O.R.D. LEXIS 752.

On June 8, 2018, the Requester appealed to the Appeals Officer, challenging the denial and stating grounds for disclosure. The Appeals Officer invited the parties to supplement the record and directed the OOR to notify third parties of their ability to participate in the appeal. 65 P.S. § 67.1101(c).

On June 22, 2018, the OOR submitted a position statement, reiterating the arguments above, as well as the attestation, made under the penalty of perjury, of Kathleen Higgins, Esq., an attorney and appeals officer employed by the OOR.

On June 23, 2018, the Requester submitted an unsworn position statement, arguing that the requested records are public records.²

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).

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 Appeal Officer has the necessary information and evidence to properly adjudicate the matter.

The OOR is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are

² The Requester’s June 23, 2018 submission was received after the record closed; however, to further develop the record in this matter, the submission was considered. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

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.

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)).

As a preliminary matter, the OOR argues that the Requester “is precluded from challenging an appeals officer’s procedural decisions in an administrative proceeding before the OOR through a RTKL request.” The OOR cites to the final determination issued in *Campbell v. Office of Open Records*, which concluded that that a requester “cannot properly seek redress of alleged procedural errors from a previous appeal in a new appeal regarding a different request for records.” OOR Dkt. AP 2013-1307, 2013 PA O.O.R.D. LEXIS 752; *see also Mezzacappa v. Borough of West Easton*, OOR Dkt. AP 2011-0833, 2011 PA O.O.R.D. LEXIS 553 (finding that a requester was collaterally estopped from challenging fees owed for a prior RTKL request). However, there is no indication that the Requester seeks to challenge any procedure or Order concerning the RTKL

appeal to which the requested records relate.³ Therefore, the only issue to be decided in this matter is whether the records are public.

The OOR argues that the requested records, which were submitted during the OOR's *in camera* review process,⁴ are confidential "because of the OOR's role as a quasi-judicial tribunal." The OOR further argues that "[b]ecause the OOR has the authority to conduct *in camera* review, the confidentiality of records is established by common law protections establishing the confidentiality of *in camera* records as reflected in the OOR's Procedural Guidelines."

In support of its position, the OOR submits the attestation of Attorney Higgins, who attests, in relevant part, as follows:

During the course of my duties, I was assigned to adjudicate the appeal docketed at AP 2018-0266, *Campbell v. Millcreek Township School District*....

On March 30, 2018, in order to further develop the record in this appeal, the OOR ordered that the District submit unredacted copies of the withheld records for *in camera* review.

On April 12, 2018, the District submitted a compact disc of redacted and unredacted records to the OOR for *in camera* review....

On May 9, 2018, the OOR notified the District that the compact disc provided for *in camera* review did not include all of the responsive records. The OOR directed the District to provide all withheld records for *in camera* review. The OOR also directed the District to provide copies of all redacted records to the OOR and the Requester.

On May 14, 2018, the District re-submitted copies of all redacted and unredacted records to the OOR and the OOR performed [an] *in camera* review. The District declined to provide copies of the redacted records submitted as part of the *in camera* review process to the Requester.

³ The requested records were submitted to the OOR in the RTKL appeal docketed as *Campbell v. Millcreek Twp. Sch. Dist.*, OOR Dkt. AP 2018-0266, 2018 PA O.O.R.D. LEXIS 664.

⁴ The OOR's authority to review records *in camera* has been recognized by the Commonwealth Court. See *Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 59 (Pa. Commw. Ct. 2016); *Commonwealth v. Center Twp.*, 95 A.3d 354, 369-70 (Pa. Commw. Ct. 2014).

Once received by the OOR, the *in camera* records submitted by the District have been stored in a secure location with restricted access as required by the OOR's Procedural Guidelines.

Pursuant to the OOR's Procedural Guidelines, the OOR has not shared the *in camera* records submitted by the District with any outside third-parties.

The *in camera* records submitted by the District were received by the OOR prior to the OOR issuing its decision in *Campbell v. Millcreek Township School District*, OOR Dkt. AP 2018-0266.

The OOR issued its final determination for *Campbell v. Millcreek Township School District*, OOR Dkt. AP 2018-0266[,] on June 11, 2018.

Under the RTKL, an 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).

The OOR relies upon the final determination issued in *Campbell v. Office of Open Records*, which involved a request for statements submitted to the OOR by third parties, under seal, in an unrelated RTKL appeal. OOR Dkt. AP 2013-1307, 2013 PA O.O.R.D. LEXIS 752. In concluding that the statements may be withheld, the OOR reasoned that:

The OOR issued an OOR Order, a quasi-judicial act authorized by 65 P.S. § 67.1310(a)(5).... The OOR Order issued by the OOR, while not judicial in the strictest sense, is judicial in nature. *See, e.g., Delaware County Nat'l Bank v. Campbell*, 106 A.2d 416, 421 (Pa. 1954) (discussing administrative agency orders that are judicial in nature and, thus, appealable). Therefore, the requested records have previously been judicially determined by the OOR in its adjudicator function, pursuant to the OOR Order in [*Campbell v. OA*,] to be nonpublic *in camera* records as a result of a personal security risk. As such, the OOR's denial is permitted. 65 P.S. § 67.305; 65 P.S. § 67.708(b)(1); *see Adams v. Office of the Atty. Gen.*, No. 2513 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 676 (Pa. Commw. Ct. 2012) (affirming the denial by the Attorney General of records previously judicially determined to be exempt despite the Attorney General's failure to submit supporting evidence).

Id.; *see also Flagg v. City of Detroit*, 268 F.R.D. 279 (E.D. Mich. 2010) (finding that "the public does not acquire a right to access discovery materials just because a judge might review it in

camera in the course of discovery proceedings”); *United States v. Wolfson*, 55 F.3d 58, 61 (2d Cir. 1995).

Here, unlike in *Campbell*, the OOR acknowledges that it did not order the District to submit the records implicated in this appeal during the *in camera* review process conducted in *Campbell v. Millcreek Township School District*, OOR Dkt. AP 2018-0266, 2018 PA O.O.R.D. LEXIS 664; rather, the OOR directed the District to submit *unredacted* copies of the records for *in camera* inspection.⁵ *Cf. Campbell*, OOR Dkt. AP 2013-1307, 2013 PA O.O.R.D. LEXIS 752 (finding that third-party statements filed, under seal, in compliance with an OOR Order constituted confidential quasi-judicial records). The redacted copies of the records were presumably submitted for illustrative purposes, so that Attorney Higgins could compare the redacted text, *i.e.*, the information the District alleged to be exempt from disclosure, to the unredacted records. The OOR’s Procedural Guidelines provide for the confidential treatment of “the records submitted for *in camera* inspection,” but documents submitted along with *in camera* records are not necessarily entitled to the same treatment, particularly where the documents are innocuous or were not otherwise requested by the OOR in its *in camera* Order.⁶ *See* OOR Procedural Guidelines, § V.E., 11. Because the records at issue in this appeal were not the unredacted records sought by the OOR in its Order for *in camera* inspection, as further evidenced by Attorney Higgins’ attestation noting

⁵ Attorney Higgins attests that, upon determining the District failed to submit all of the necessary records for *in camera* review, she directed the District to, among other things, “provide copies of all redacted records to the OOR and the Requester[.]” but the District declined to do so because copies of the redacted records were already provided to the Requester during the course of the appeal. *Campbell v. Millcreek Twp. Sch. Dist.*, OOR Dkt. AP 2018-0266, 2018 PA O.O.R.D. LEXIS 664 (“[Because] the District previously provided the Requester with the records upon receiving payment from the Requester, and the Requester acknowledge[d] receipt of those records, ... the OOR concludes that nothing in the RTKL requires that the District provide responsive records to a [r]equester more than once in response to a single Request”).

⁶ For example, the OOR’s Procedural Guidelines require an agency to submit, along with its *in camera* records, an inspection index, a copy of which must also be provided to the requester and any other participating third party. OOR Procedural Guidelines, § V.E., 3, 8. Here, it appears from the OOR’s final determination in *Campbell v. Millcreek Twp. Sch. Dist.* that both the redacted records and the District’s inspection index were consulted to determine whether the District’s redactions were appropriate. OOR Dkt. AP 2018-0266, 2018 PA O.O.R.D. LEXIS 664.

that she directed the District to provide copies of the requested records to the Requester during the course of the underlying appeal between the Requester and the District, the OOR has not established that the records are confidential records of a quasi-judicial tribunal, nor has the OOR submitted evidence demonstrating that the records are otherwise exempt from disclosure under the RTKL.⁷ Accordingly, the OOR has failed to meet its burden of proof in this case.⁸ 65 P.S. § 67.305.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the OOR is required to provide the Requester with copies of the requested records 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 Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The Appeals Officer 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 Appeals Officer is not a proper party to any appeal and should not be named as a party.⁹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁷ Notably, the letter accompanying the OOR's Official Notice of Appeal packet distributed in this appeal, and presumably in every other appeal, states that "[a]ll dockets, filings and OOR orders and opinions in this appeal will be public records and subject to public access with limited exception."

⁸ Under no circumstances should this Final Determination be construed to grant access to unredacted records submitted to the OOR during the *in camera* review process or any other record submitted under seal in response to an OOR directive.

⁹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: 9 July 2018

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: Simon Campbell (via email only);
 Benjamin Lorah, Esq. (via email only);
 George Spiess, AORO (via email only)