

denied the Request, arguing that the “University does not possess donation records of the independent 501c3 organization.” The University further asserted that the release of the requested records would disclose the identity of an individual or individuals who made donations to the University, 65 P.S. § 67.708(b)(13).

On September 13, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record and directed the University to notify third parties of their ability to participate in the appeal. 65 P.S. § 67.1101(c).

On September 17, 2018, the Requester submitted the Memorandum of Understanding between the University and The Foundation for California University of Pennsylvania. On September 26, 2018, the University submitted a position statement, reiterating its argument that the requested records are exempt from disclosure because they would identify individual donors, 65 P.S. § 67.708(b)(13).¹

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

¹ On appeal, the University no longer argues that it does not possess the requested records, stating that “it does not matter whether the Foundation possesses the records or the University, access to donor records is protected from disclosure under 708(b)(13).” The Commonwealth Court has recognized that “[f]oundations at the various institutions of the [State System of Higher Education] in large part are alter egos of the member universities to carry out activities that those universities want to undertake; otherwise they would not exist.” *W. Chester Univ. v. Schackner*, 124 A.3d 382, 395 (Pa. Commw. Ct. 2015). Further, the Commonwealth Court has found that certain records in possession of a university foundation are subject to access under the RTKL pursuant to Section 506(d). *Id.* at 395-96; *E. Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. Ct. 2010).

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; however, 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, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The University 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 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) provides: “(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 University denied access to the requested records pursuant to Section 708(b)(13) of the RTKL, which exempts from disclosure:

[r]ecords that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to provide remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

65 P.S. § 67.708(b)(13).

The University asserts that the Manheim Corporation is an “independent IRS 501c3 corporation.” The University further asserts that while the term “individual” is not defined by the RTKL, “the General Assembly repeated[ly] defined the term ‘individual’ to include a corporation.” In support of its argument, the University cites to the Business Corporation Law, which states that business corporations “shall have the legal capacity of natural persons to act,” 15 Pa.C.S. § 1501, and the Domestic Non-Profit Corporation Law, which states that non-profit corporations “shall have the legal capacity of natural persons to act,” 15 Pa.C.S. § 5501. The University also cites to the Fiscal Code, which defines an individual to include a “natural person and shall include the members of a partnership or association and the shareholders of a Pennsylvania S corporation.” 72 P.S. § 7301(I). The University contends that “[t]he Pennsylvania Associations Code² and Fiscal Code recognize a corporation as an individual. Thus, any donation by a corporation is subject to the same recognition under the RTKL.”

² The University explains that the Business Corporation Law is known as the Association Code, 51 Pa.C.S. § 101(a).

As noted by the University, the RTKL does not define the term “individual” for purposes of applying Section 708(b)(13). The OOR addressed this issue in *Roxbury News v. City of Harrisburg*, stating:

The Statutory Construction Act of 1972, 1 Pa.C.S. §§ 1501 *et seq.*, defines a “person” as “a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.” 1 Pa.C.S. § 1991. Conversely, the Statutory Construction Act of 1972 defines an “individual” only as a “natural person.” *Id.* Thus, “individuals” are natural persons, while “persons” are natural persons as well as other legal entities. Had the General Assembly intended for Section 708(b)(13) of the RTKL to exempt the identity of corporate or other legal entities from disclosure, the General Assembly could easily have used the word “person” instead of “individual.” By using the word “individual” instead of “person,” it can only be concluded that the General Assembly intended to limit[] the protections of Section 708(b)(13) to natural persons and not other legal entities. *See* 1 Pa.C.S. § 1921(a) (statutes are to be interpreted to effectuate the intent of the General Assembly). Therefore, only the identities of natural persons are exempt from disclosure under Section 708(b)(13) of the RTKL.

OOR Dkt. AP 2012-1748, 2012 PA O.O.R.D. LEXIS 1457; *see also* *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173 (Pa. Commw. Ct. 2017) (“The constitutional right to informational privacy only inures to individuals. Stated differently, individuals, as distinct from ‘persons’ (which may include corporations), may assert a privacy interest under Article I, Section 1”).

In light of the above, Section 708(b)(13) of the RTKL does not apply to corporations, including 501(c)(3) corporations. As such, the University has failed to meet its burden of proving that the responsive records are exempt from public access. *See* 65 P.S. § 67.708(a)(1); *see also* *Pa. Sch. Bds. Ass’n v. Tacony Acad. Charter Sch.*, OOR Dkt. AP 2015-1225, 2015 PA O.O.R.D. LEXIS 1348 (stating that Section 708(b)(13) of the RTKL “has only ever been applied to ‘natural persons’ as defined by 1 Pa.C.S. § 1991, and not corporations, partnerships, associations and other entities”).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the University is required to provide the Requester with all responsive 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 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.³ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 15, 2018

/s/ Magdalene C. Zeppos

MAGDALENE C. ZEPPOS
APPEALS OFFICER

Sent to: Gideon Bradshaw (via email only);
Robert Thorn, AORO (via email only); and
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³ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).