

On the face of the Request, the Requester indicated that he wished to inspect the responsive records identified by the Authority. On November 5, 2018, after taking a thirty-day extension, 65 P.S. § 67.902, the Authority denied access to the records, arguing that the criteria for extracting the record from the bus were not present; therefore, the video does not exist and, in the alternative, that the Request seeks information of a noncriminal investigation, 65 P.S. § 67.708(b)(17).¹ With its response, the Authority provided sworn affidavits executed by Owen O’Neil, the Authority’s Executive Director and Open Records Officer.

On November 26, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Authority to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On December 3, 2018, the Authority submitted a position statement reiterating its grounds for denial. In addition, the Authority argues that extracting the video sought in the Request would be the creation of a record that is not required under the RTKL. *See* 65 P.S. § 67.705. Finally, the agency argued that it is not required to provide the Requester with access to agency computers for inspection under the RTKL. In support of its position, the Authority submitted an additional sworn affidavit from Mr. O’Neil.

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.*

¹ The Authority does not attempt to explain how these records could be related to a noncriminal investigation and does not claim that any investigation ever occurred, but instead cites to *Port Auth. of Allegheny County v. Towne* for the proposition that bus videos are generally exempt under Section 708(b)(17). 174 A.3d 1167 (Pa. Commw. Ct. 2017). However, the OOR rejected this argument in *Cap v. LANTA*, OOR Dkt. AP 2018-2008, 2018 PA O.O.R.D. LEXIS 1521. Because the OOR concludes that the Request was properly denied for other grounds, it does not reach the issue in this matter.

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

The Authority is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local or local 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). 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 Authority argues that it is not required to provide access to agency computers under the RTKL.² Section 701(b) of the RTKL expressly states that “[n]othing in this act shall be considered to require access to any computer either of an agency or individual employee of an agency.” 65 P.S. § 67.701(b). Here, the Authority explains the process of reviewing the requested video recovered from the on-board video equipment as follows:

- iv. Connect the on-board storage device to a computer workstation enabled with proprietary viewing software.
- v. Review the stored footage to determine if the desired footage is present on the on-board storage device. Footage may not be present due to various factors including (a) the footage may have been overwritten; (b) the video equipment may not have been functioning properly during the timeframe needed; or (c) the incorrect bus was identified. It should be noted that locating the requested footage can be difficult because the internal/clock calendar in the on-board video equipment may not be correct and so it is not easy to immediately find the requested footage based on the time and date identified.

² The Requester seeks a finding of bad faith against the Authority for failure to conduct a good-faith search for records. The OOR has repeatedly held that the Authority’s practice of only searching records that have been extracted from bus videos in response to requests does not satisfy the RTKL’s requirements for a good faith search. *See, e.g., Cap v. LANTA*, OOR Dkt. AP 2018-2008, 2018 PA O.O.R.D. LEXIS 1521; *Cap v. LANTA*, OOR Dkt. AP 2018-1337, 2018 PA O.O.R.D. LEXIS 1071. Here, however, the OOR does not reach this issue because the Authority was entitled to deny the Request on other grounds; as such, the OOR declines to make a finding of bad faith in this appeal.

In *Donahue v. Luzerne County*, the OOR ruled, in construing this section of the RTKL with respect to a request seeking to inspect an employee's email account, as follows:

While e-mails have been held to be public records subject to disclosure, *see Donahue v. Luzerne County*, OOR Dkt. AP 2013-1395, 2013 PA O.O.R.D. LEXIS 698, and have been required to be provided in electronic format if they exist in that format, *see Scott v. SEPTA*[,] OOR Dkt. 2011-0633, 2011 PA O.O.R.D. LEXIS 459, the Requester does not seek electronic copies of e-mails; rather, the Requester seeks to inspect e-mails residing in County employees' e-mail accounts. Nothing in the RTKL can be read to require the County to provide electronic access to County employees' e-mail accounts, either remotely or through the County's own computers.

OOR Dkt. AP 2013-1394, 2013 PA O.O.R.D. LEXIS 821. Similarly, the Authority has submitted evidence demonstrating that the inspection of the requested video would require access to Authority computers utilizing proprietary software. While agency videos are clearly records subject to access under the RTKL, the Authority is not required to provide access to the Authority's computers to inspect responsive records. Accordingly, the appeal is denied. *See Wachter v. City of Warren*, OOR Dkt. AP 2015-2654, 2015 PA O.O.R.D. LEXIS 2191 (“[T]he City is not required to provide access to the City's computers and, to the extent the Requester seeks to do so, that portion of the appeal is denied”).

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the Authority 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 Lehigh County Court of Common Pleas. 65 P.S. § 67.1302. All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to 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: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 21, 2018

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS, ESQ.

Sent to: Joseph Cap (via email only);
Owen O'Neil (via email only)

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