

the Authority denied access to the records sought by both Request, 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 records of a noncriminal investigation, 65 P.S. § 67.708(b)(17). With its response, the Authority provided a sworn affidavit 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. 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. 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 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 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).

1. The Authority has failed to demonstrate that the surveillance footage does not exist

The Authority argues that the requested video does not exist because, as attested by Mr. O’Neil, the criteria that warrants extraction of the video was not met. In his attestation, Mr. O’Neil explains that:

7. Video footage is captured and stored on on-board storage devices on each individual bus. Equipment is not networked in any manner. Videos are not transmitted to [the Authority] and are not stored in a central database.

8. Extracting video footage from the on-board storage devices require a physical, manual effort, which can take a significant amount of staff time, and which [the Authority] only employs based upon a law enforcement directive or an incident that demands that [the Authority] turn video footage over to insurance adjusters or [the Authority] needs it for an internal investigation

10. Due to the actions needed to complete [the extraction] process, video footage is not extracted and compiled in a format that can be saved and shared if there is no event that warrants providing a record to law enforcement, the insurance adjuster or for conducting an investigation.

11. Video footage that does not meet the criteria noted for [the Authority] to employ the extraction and procedure is not accessed and is not transmitted or duplicated in any manner.

12. In reviewing the [R]equest, I noted that no record existed for the footage requested...since the footage for the timeframe noted in the [R]equests on the buses referenced in the requests did not meet any of the criteria which would warrant that [the Authority] employ the extraction procedure....

15. Records of all video footage extracted and saved from on-board video surveillance equipment is maintained by LANTA. This includes information including the bus number, date, and time frame of the saved video footage. I reviewed the records and confirmed that the on-board video storage device for the bus requested on the dates requested was not pulled for any reason. This was done on November 1, 2018.

Under the RTKL, a sworn affidavit may serve as 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).

Here, the Authority acknowledges that none of the on-board video was preserved outside of the on-board video surveillance system. The Authority's failure to identify whether the responsive video exists becomes an issue of the Authority's good faith search. In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort" as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court recently stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted). Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open-records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody, or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by Requestor.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); see *In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer's duty and responsibility” to both send an inquiry of agency personnel concerning a request and to determine whether to deny access).

The Authority failed to take these necessary steps in response to the Request, as the OOR also determined in *Cap v. LANTA*, OOR Dkt. AP 2018-1337, 2018 PA O.O.R.D. LEXIS 1017 (instructing the Authority that for any future requests seeking video footage, it is required to conduct a good faith search for the video and that the inconvenience to extract video footage does not relieve the Authority of its responsibility). As in this matter, the argument that accessing the video is inconvenient or burdensome does not relieve the Authority of its duty search for and preserve records responsive to a RTKL request. See generally *Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (“The fact that [an agency] does not catalogue or otherwise organize [its records] in a way that permits them to be easily located, does not render the request overbroad”). Accordingly, the Authority has not conducted a good faith search to identify if the responsive video exists.¹

2. The Authority failed to establish that extracting the video from the on-board device would be the creation of a record

Mr. O’Neil attests to the procedure for extracting the requested video from the bus, explaining that it would include: removing the on-board storage device, replacing the device with a spare unit on the bus, connecting the on-board storage device to a computer enabled with the viewing software and ultimately isolating the footage and creating a record of the footage. Although the Authority acknowledges that it has the capability to extract video, it appears to argue

¹ In *Cap v. Lehigh and Northampton Transp. Auth.*, OOR Dkt. AP 2018-1337, 2018 PA O.O.R.D. LEXIS 1071, the OOR informed the Authority that determining whether footage has already been moved from an on-board device to a more permanent storage location was not a good faith search.

that the extraction and isolation of the requested portion of the video constitutes the creation of a record that is not required under the RTKL.

Section 705 of the RTKL, which states that when responding to a request, an agency is not “required to create a record which does not currently exist.” 65 P.S. § 67.705. However, “drawing information from a database does not constitute creating a record under the [RTKL].” *Pa. Dep’t of Env’tl. Prot. v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012) (emphasis in original). In *Gingrich v. Pa. Game Comm’n*, as summarized in *Cole*, the Commonwealth Court held that “an agency can be required to draw information from a database, although the information must be drawn in formats available to the agency.” No. 1254 C.D. 2011, Pa. Commw. Unpub. LEXIS 38 (Pa. 2012); *Cole*, 52 A.3d at 547. In short, “to the extent requested information exists in a database, it must be provided.” *Id.* Based on the evidence, the Authority has not proven that extracting the bus video from the on-board device and isolating the portion of the requested video constitutes the creation of a record as discussed under the RTKL.

3. The Authority failed to prove that the video relates to a noncriminal investigation

The Authority argues that the Request seeks a record of a noncriminal investigation. Section 708(b)(17) of the RTKL, which exempts from disclosure records “relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(ii). To successfully assert the noncriminal investigative records exemption, the Authority 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 or investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep't of Public Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

Here, Mr. O'Neil attests that:

16. In reviewing the Request I noted that the [R]equest seeks video footage from a bus surveillance camera. The Pennsylvania Courts have concluded that video recordings from a bus surveillance camera were exempt from disclosure under Section 708(b)(17) of the RTKL. *Port Auth. of Allegheny County v. Towne*, 174 A.3d 1167 (Pa. Commw. Ct. 2017).

In *Port Auth. of Allegheny County v. Towne*, the Commonwealth Court addressed whether surveillance videos could be related to a noncriminal investigation, holding that bus videos “created before investigations and accessed only when necessary can constitute [an] investigative record[], especially when the agency asserts that [its] only purpose is for use in investigations.” 174 A.3d 1167, 1171 (Pa. Commw. Ct. 2017). Simply citing the *Towne* case to support withholding the video is insufficient.² Mr. O'Neil's affidavit is conclusory and insufficient to establish that it conducted a noncriminal investigation pursuant to its legislatively granted fact-finding or investigative powers and that the video, which the Authority acknowledges may exist but has not been retrieved or reviewed, relates to such a noncriminal investigation. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statement are not sufficient to justify the exemption of public records”). Accordingly, the Authority failed to establish that the video is exempt under Section 708(b)(17) of the RTKL. 65 P.S. § 67.708(a)(1).

² In *Towne*, the agency demonstrated that the video at issue – which was requested five months after its creation – had been downloaded and maintained in response to a specific incident which prompted a noncriminal investigation. No evidence has been presented to suggest the same circumstances exist in the instant case.

4. The RTKL does not require an agency to allow a Requester to access an Authority computer in response to the Request

Additionally, the Authority argues that it is not required to provide the Requester access to its computers or devices, citing *Wachter v. City of Warren*, OOR Dkt. AP 2015-2654, 2015 PA O.O.R.D. LEXIS 2191.³ 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. *Wachter*, 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”). Here, the Request in this matter seeks to “review, inspect and *copy*...”⁴ (emphasis added). Because the Requester states that he is ultimately seeking a copy, the holding in *Wachter* is inapplicable, and the Authority is required to provide a copy of the requested video.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and the Authority is required to provide the responsive record within thirty days to the Requester. 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

³ 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 declines to make a finding of bad faith in this appeal.

⁴ In *Cap v. LANTA*, OOR Dkt. AP 2018-1337, 2018 PA. O.O.R.D. LEXIS 1017, the OOR denied an appeal seeking access to the responsive video because the Requester only sought to “review and inspect” the video. The OOR noted that “nothing precludes the Requester filing future Request seeking copies of on-board videos rather than inspection of those videos.”

matter, the OOR is not a proper party to any appeal and should not be named as a party.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 26, 2018

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Joseph Cap (via email only);
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⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).