

contracts provided comprise the totality of the responsive contracts, as the rest of the District administrators work under an Act 93 agreement and do not have contracts.

On October 26, 2018, the Requester submitted a second request, seeking “a copy of all Act 93 contracts for all employees of the [District]” and “a copy of Act 93.” The Requester also asked “when Act 93 was put in place at the [District] and when ... contracts switch[ed] over to it.” On October 27, 2018, the District provided the Requester with an Act 93 template as provided by the Pennsylvania Principals Association.

On November 1, 2018, the Requester filed an appeal with the OOR, arguing that more contracts exist that are responsive to his first request, and, on November 5, 2018, the Requester filed a second appeal, challenging the District’s response to his second request.¹ The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On November 16, 2018, the District submitted a position statement reiterating its argument that all responsive records had been provided to the Requester. In support of its position, the District submitted the affidavit of Dr. Erik Bentzel, the District Superintendent.

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 The appeal of the first request was docketed at OOR Dkt. AP 2018-1969; the second was docketed at OOR Dkt. AP 2018-1981. Because they involve the same parties and similar records, the appeals are hereby consolidated at OOR Dkt. AP 2018-1969.

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

The District 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)(1). 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)). Likewise, “[t]he 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).

Initially, a request must seek records rather than answers to questions. *See Walker v. Pa. Ins. Dep’t*, No. 1485 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 425 at *16 (Pa. Commw. Ct. 2012) (“The RTKL is not a forum for the public to demand answers to specifically posed questions to either a Commonwealth or local agency. In fact, there is no provision in the RTKL that requires an agency to respond to questions posed in a request”); *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *14 (Pa. Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”); *see also Stidmon v. Blackhawk Sch. Dist.*, No. 11605-2009 at 5 (Beaver Com. Pl. Dec. 14, 2009) (“The [RTKL] d[oes] not provide citizens the opportunity to propound interrogatories upon local agencies, rather it simply provides citizens access to existing public records”). The presence or absence of a question mark is not determinative as to whether a request asks a question. *See Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766. Therefore, the portions of the second request that ask questions are not proper RTKL requests, and the District is not required to respond to them.

With regard to the records requested, Dr. Bentzel attests that the District provided the following records to the Requester:

- The [District's] Act 93 plan pertaining to the compensation and benefits of administrators covered by the Act 93 plan.
- All employment contracts that the [District] has entered into with employees who are covered by the [District's] Act 93 plan. The employees in question are all "professional employees" under the Pennsylvania School Code, as follows: (i) Thomas McGee, (ii) Melissa McInerney, (iii) John Rizzo, (iv) William Vogt, (v) Bradly Reist, (vi) Benjamin Wenger, and (vii) Jennifer Hassler.

The Requester alleges that additional records should exist. However, Dr. Bentzel explains, in relevant part:

4. Some employees covered by the Act 93 plan are classified as "professional employees" under the Pennsylvania School Code, and they have professional employee contracts with the [District]- those contracts, as well as the Act 93 plan, have been provided to [the Requester]. Employees covered by the Act 93 plan who are not "professional employees" under the Pennsylvania School Code do not have contracts, and thus there are no contracts to provide [the Requester] with regard to such employees.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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). In the absence of any competent evidence that the District acted in bad faith, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Accordingly, the District has met its burden of proving that no additional records exist.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the District 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 Lebanon 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 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 11, 2019

/s/ Blake Eilers

Blake Eilers, Esq.
Appeals Officer

Sent to: Andrew Murphy (via email only);
Dr. Erik Bentzel (via email only);
Howard Kelin, Esq. (via email only)

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).