

Borough, that the forms and tentative assessment changes were pulled from in order to print the letters, please send these electronic files in lieu of the forms. In other words, if any electronic document exists that contains all the “tentative assessment changes” for the properties in these boroughs, please send. [Addresses omitted]

On February 24, 2020, the County denied the Request, asserting that it was not in possession of responsive records.

On March 3, 2020, 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 County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On March 11 and 16, 2020, the Requester submitted position statements. On March 13, 2020, the County submitted a position statement, arguing that the records are internal, predecisional and deliberative. *See* 65 P.S. § 67.708(b)(10)(A). The County’s submission included the affidavit of Anne Coogan, the County’s Open Records Officer; on March 23, 2020, the County submitted a response to the Requester’s position statements.

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

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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)).

The County argues that the requested records reflect internal, predecisional deliberations.¹ See 65 P.S. § 67.708(b)(10)(i)(A). Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure a record that reflects:

The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, ... including predecisional deliberations relating to a budget recommendation, ... or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). In order for this exemption to apply, three elements must be satisfied: 1) “[t]he records must ... be ‘internal’ to a governmental agency”; 2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and 3) the contents must be deliberative in character, *i.e.*, pertaining to proposed action. See *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

Here, Ms. Coogan attests that:

5. I was informed by our Tax Assessment Office that the Notices of Tentative Assessment Change and Tentative Property Values requested by [the Requester] were provided by [Tyler] to a printer which sent them directly to property owners.

6. I was informed by our Tax Assessment Office that such Tentative Property Values are not final and are being used solely by Tyler as part of the informal meeting process with property owners prior to determining final assessment values.

7. I was informed by our Tax Assessment Office that Tyler does not provide a copy of the Tentative Property Values to the Agency; rather, Tyler will provide final

¹ As a preliminary matter, the OOR notes that public records in the possession of third parties are accessible through Section 506(d) of the RTKL where the third party performs a governmental function on behalf of the agency and the records are directly related to that function. See *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (citing *Honaman v. Lower Merion Twp.*, 13 A.3d 1014 (Pa. Commw. Ct. 2011)), *aff'd*, 124 A.3d 1214 (Pa. 2015). While the County originally asserted that records are not in its possession, it appears to have abandoned this argument on appeal, acknowledging that it contracts with Tyler Technologies, Inc. (“Tyler”) to conduct a preliminary reassessment and informal review pursuant to 53 Pa.C.S. § 8848(b).

property values to the Agency after informal meetings, which informal meetings must be completed no later than June 1.

Ms. Coogan's affidavit acknowledges that the requested records are mailed to property owners. Furthermore, as the County acknowledges in its brief, the purpose of the letters is to "allow property owners to engage in an informal review process with Tyler (not the County) as part of Tyler determining final assessment values." Therefore, as both evidence and uncontradicted assertions demonstrate, the letters are not internal to the County; as the records do not satisfy the first element of the test, they cannot be exempt as records reflecting internal, predecisional deliberations.²

CONCLUSION³

For the foregoing reasons, the Requester's appeal is **granted**, and the County is required to provide 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 Delaware 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,

² While the County has not raised the issue, the records appear to include home addresses. In *Pa. State Educ. Ass'n v. Commonwealth*, the Pennsylvania Supreme Court held that an individual possesses a right to privacy in certain types of personal information, including his or her home address. 148 A.3d 142 (Pa. 2016). However, the OOR has found the public has an interest in knowing the names of property owners for tax purposes that outweighs privacy interests where no privacy interest has been raised. See *Signature Info. Solutions v. Mount Lebanon Sch. Dist.*, O.O.R. Dkt. AP 2016-2043, 2017 PA O.O.R.D. LEXIS 29; see also *DiLiberto v. City of Wilkes-Barre*, O.O.R. Dkt. AP 2019-0132, 2019 PA O.O.R.D. LEXIS 210 (holding that, while an individual's name and home address may be protected by the right to privacy, names and addresses are not subject to the constitution balancing test where no evidence was presented that the addresses were those of individuals' homes); but see *Chester Hous. Auth. v. Polaha*, 173 A.3d 1240, 1252 (Pa. Commw. Ct. 2017) ("[W]e hold that the constitutional privacy protection applies when home addresses are requested, regardless of whether names or the resident's identity are attached").

³ Regarding the deadlines in this section, note that the Supreme Court has suspended all time calculations and deadlines relevant to court cases or other judicial business through April 3, 2020. (See <http://www.pacourts.us/assets/files/page-1305/file-8634.pdf>, last accessed March 24, 2020.)

the OOR is not a proper party to any appeal and should not be named as a party.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 30, 2020

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to: Michael Marcavage (via email only);
Anne Coogan (via email only);
Jonathan Lichtenstein, Esq. (via email only)

⁴ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).