

FACTUAL BACKGROUND

On May 29, 2020, the Request was filed, seeking a “copy of a conversation between Wayne County Communication Center and Cpl. Chevanka, Pa State Police, made on May 15, 2020, at approx. 4[:]00/pm. Conversation was concerning the status of Honesdale Borough Police Department shift coverage.” On June 2, 2020, the County denied the Request, arguing that the record is an exempt communication made to emergency dispatch.² 65 P.S. § 67.708(b)(18)(i).

On June 4, 2020, the Requester appealed to the OOR, 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. 65 P.S. § 67.1101(c).

On July 10, 2020, the County submitted the attestation, made under penalty of perjury, of Andrew Seder, the County’s Chief Clerk and Open Records Officer.³ Mr. Seder asserts that the responsive record is an exempt recording of a telephone call made to emergency dispatch personnel.

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

² The appeal did not include a copy of this denial, and on two occasions, the OOR requested that the parties provided a copy of this denial. Neither party produced a copy of any correspondence denying the Request; the only correspondence produced by the parties was a copy of the Request itself. However, it is undisputed that the County denied the Request on June 2, 2020. As a result, it appears that the denial was made verbally. Under Section 903 of the RTKL, denials of access must be in writing. 65 P.S. § 67.903.

³ Mr. Seder submitted a completed Request to Participate form as part of the County’s response to this appeal. However, neither the parties to an appeal nor their counsel are required to complete that form. The Request to Participate form is intended for use by persons, other than the parties or their counsel, that may have a direct interest in the records at issue. *See* 65 P.S. § 67.1101(c); 65 P.S. §§ 67.707(a), (b).

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, the parties did not request 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)).

In the instant matter, the County argues that the requested audio recording is exempt pursuant to Section 708(b)(18) of the RTKL, which protects from disclosure “[r]ecords or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.” 65 P.S. § 67.708(b)(18)(i). However, “[t]his paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.” 65 P.S. § 67.708(b)(18)(ii).

Mr. Seder attests that the audio recording falls under the exemption and that neither “Mr. Southerton, nor the Honesdale Police Department, are part of this call or conversation [and] ... do not have legal standing to obtain that recording file.”⁴ Here, the Request seeks a record that is expressly exempt under Section 708(b)(18) of the RTKL. *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101, 104 (Pa. Commw. Ct. 2016) (holding that evidence may be unnecessary when an exemption is clear from the face of the record). While the RTKL does not preclude the County from releasing the record, the County has not indicated that the public interest in disclosure of the record outweighs nondisclosure, and that determination is the County’s to make. 65 P.S. § 67.708(b)(18)(ii); *see also Brady v. Franklin Cnty.*, OOR Dkt. AP 2020-0219, 2020 PA O.O.R.D.

⁴ While the County or the Communications Center may have a policy against releasing a 911 recording without a subpoena or unless it is part of a law enforcement investigation, as explained above, nothing in the RTKL prevents such a recording from being released “if the agency ... determines that the public interest in disclosure outweighs the interest in nondisclosure.” 65 P.S. § 67.708(b)(18)(ii).

LEXIS 439; *Irwin v. Wayne Cnty. Dist. Atty's Office*, OOR Dkt. AP 2016-0983, 2016 PA O.O.R.D. LEXIS 943; *Hammond v. Lancaster Cnty. Dist. Atty's Office*, OOR Dkt. AP 2016-0494, 2016 PA O.O.R.D. LEXIS 600. The OOR is without authority to compel the County to exercise its discretion in favor of disclosing the audio recording. *Pa. Dep't of Pub. Welf. v. Froelich*, 29 A.3d 863 (Pa. Commw. Ct. 2011); *Loro v. Delaware Cnty.*, OOR Dkt. AP 2019-0779, 2019 PA O.O.R.D. LEXIS 590.

Further, under the RTKL, the identity of the requester or the reason for the request are not relevant to the determination of the public status of a record; the RTKL must be construed without regard to the identity of the requester. *Advancement Project v. Pa. Dep't of Transp.*, 60 A.3d 891 (Pa. Commw. Ct. 2013); *Schneller v. Phila. District Attorney's Office*, “[a] requester’s identity as the subject of the record, or other relationship to the record offers no greater access because such considerations are irrelevant in the statutory scheme.” 174 A.3d 1204 (Pa. Commw. Ct. 2017); *see also* 65 P.S. § 67.302(b) (“A local agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law”). Therefore, for these reasons, the responsive recording may be withheld.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the County 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 Wayne 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. 65 P.S. § 67.1303. 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 31, 2020

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Richard Southerton (via email only);
Andrew Seder (via email only)

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