

August 17, 2016, the County denied the Request claiming that the information relates to personnel disciplinary action and criticisms of an employee.

On August 22, 2016, 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 August 31, 2016, the County submitted a sworn position statement from Sheryl Heid, Assistant Solicitor for the County, reiterating its grounds for denial. The County claims that the door was locked in May of 2016 in response to security concerns and the records are disciplinary records and reflect the internal, predecisional deliberations of the County.¹ The County also states that on August 18, 2016 the Commissioners stated that no single employee was disciplined and that the door was locked for security reasons.

On September 7, 2016, in response to the OOR’s request for additional information—to identify the responsive records and how each record is exempt under the RTKL—the County submitted a supplement statement that there are three responsive e-mails sent between County Commissioners. The County asserts that the e-mails “are exempt for personnel reasons, security reasons and do not relate to any financial or legislative action or other governmental function.”

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,

¹ The County is permitted to raise this additional reason for denying access to records on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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 County 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 clearly 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 its submission to the OOR, the County asserts that it locked the door after security concerns in May 2016 and it denied access to records based on a “disciplinary issue and or criticisms regarding office personnel or an internal, predecisional deliberation regarding a policy of the Commissioners.” In the same submission, the County references the Commissioners’ meeting held on August 18, 2016, wherein the Commissioners stated that the “door was locked for security reasons but no single employee had been disciplined.” The County argues that it does not want to expose a vulnerability in the security of the office. In its supplemental submission to the OOR, the County stated,

There were three emails on May 12 and 13, 2016 sent between the Commissioners that are responsive to the request. We extend the position set forth in our response on August 31st that these three emails are exempt for personnel reasons and for security reasons and do not relate to any financial or legislative action or other governmental function, only office policy.

Upon reviewing the County’s submissions, it is unclear under what specific exemption(s) of the RTKL the County is withholding the e-mails. It appears that the County may be asserting 65 P.S. § 67.708(b)(7) (personnel records), 65 P.S. § 67.708(b)(10) (records of internal, predecisional deliberations), 65 P.S. § 67.708(b)(1) (records likely to result in personal harm) and/or 65 P.S. § 67.708(b)(2) (records likely to jeopardize public safety).

While an affidavit may serve as sufficient evidentiary support to sustain an agency's burden under the RTKL, *see Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909, conclusory statements are not sufficient to meet an agency's burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Here, the County never cited any specific exemptions to withhold access to the three responsive e-mails under the RTKL. Rather, it offered only general references to various exemptions under the RTKL. In fact, it provided contradictory statements—in its August 31, 2016 submission to the OOR, the County states that it withheld records because they relate to discipline of office personnel, but in the same submission indicated that no employees were disciplined; then, the County's supplemental submission to the OOR states that the e-mails are exempt for security and personnel reasons.² As such, the County has not asserted any exemptions under the RTKL, nor sufficiently identified the e-mails to determine if the responsive records meet any exemptions under the RTKL. Accordingly, the County did not meet its burden of proving that the records sought in the Request are exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the County is required to provide the three e-mails to the Requester 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 Fayette 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

² Regarding the County's assertion that the responsive records should not be released because they document “only office policy,” the RTKL provides no exemption allowing an agency to withhold records on that basis.

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: October 18, 2016

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Julie Toye (via e-mail only);
Sheryl Heid, Esq. (via e-mail only);
Amy Revak (via e-mail only)

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