

On May 10, 2016, the District invoked a thirty-day extension of time to respond to the Requests. *See* 65 P.S. § 67.902. The District did not subsequently respond and the Requests were deemed denied on June 13, 2016. *Id.* On June 15, 2016, the District sent the Requester a letter explaining why it did not respond to the Requests, and arguing that the Requests would be disposed of by a pre-existing appeal.

On June 27, 2016, the Requester appealed to the OOR, stating that he had not received the records.¹ The Requester further explained that he had met with the District on June 24, 2016, (“June Meeting”) and during that meeting, the parties had come to an arrangement by which the records might be provided; however, since he wished to preserve his appeal rights in the event that the District did not follow through, he intended to maintain his appeal until he received the records and/or a letter confirming the arrangements. The OOR invited the parties to supplement the record, and directed the District to notify third parties of their ability to participate in the appeal. 65 P.S. § 67.1101(c).

On July 1, 2016, the Requester submitted an e-mail from counsel for the District to the OOR, which memorialized the agreements reached in the June Meeting and asked that he withdraw the appeal. The Requester explained that he no longer wished to withdraw the appeal because he believed that the District’s delay was unacceptable and believed that the OOR should determine if the District was in violation of the RTKL. The same day, the District responded, arguing that the instant appeals had been resolved by the June Meeting and that the continued appeal was frivolous. The parties each made several more submissions, culminating in a

¹ The Requester filed two appeals, docketed at OOR Dkts. AP 2016-1103 and AP 2016-1104. They are hereby consolidated into the above-captioned docket number, OOR Dkt. AP 2016-1104. Further, the record in this case is shared in large part with four other appeals, docketed at OOR Dkts. AP 2016-1105, AP 2016-1106, AP 2016-1107 and AP 2016-1108, respectively. These cases have not been similarly consolidated.

submission by the District on July 4, 2016, summarizing the situation and requesting that the OOR consider the correspondence as a motion to dismiss.

On July 7, 2016, the District submitted a position statement arguing that the Requester had been granted access to the records he sought and that, consequentially, the OOR did not possess jurisdiction over the instant appeal or, in the alternative, the appeal should be denied. The District also submitted the affidavit of Michael Vuckovich, the District's Right To Know Officer, who attested to the full timeline of the Requests, as well as the events at the June Meeting. The District also submitted the affidavit of Amy Arcurio, the assistant to the District Superintendent, who attested that she was present at the June Meeting and that the District's characterization of it was accurate while the Requester's account was incorrect.

On July 8, 2016, the Requester made an unsworn submission in which he stated that he had visited the District's administrative offices on July 6, 2016 and spoken with the employee he had been directed to contact for inspection, and been told by her that the records were not yet available.² He also argued that the agreement reached in the June Meeting did not apply because the e-mail which memorialized it was not a "certified letter," as they had agreed upon. The Requester further asked the OOR to contact a named witness who would support his account.

On July 8, 2016, the OOR responded to the Requester, informing him that the OOR was unable to contact witnesses *ex parte* and that if he wished to have a statement considered as evidence, he should submit it in the form of an affidavit.

² The Requester's July 8, 2016 submission was received after the record closed, however to develop the record, that submission and all subsequent statements have been considered. See 65 P.S. § 1102(b)(2) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

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; however, 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 of the parties requested a hearing, and the OOR has the requisite information and evidence before it to properly adjudicate this 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 the possession of a local agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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 OOR has jurisdiction over the appeal

The District argues that the OOR must dismiss the appeal because the Requests had been granted. Section 1101 of the RTKL provides that “[i]f a written request for access to a record is denied or deemed denied, the requester may file an appeal with the Office of Open Records....” 65 P.S. § 67.1101(a)(1). The District argues that the OOR lacks jurisdiction to hear this appeal because it “granted” the Request at a meeting between the parties following the deemed denial and before the filing of the instant appeal. In *Fikry v. Retirement Board of Allegheny County*, the OOR rejected the argument by stating:

An agency’s use of the word “granted” does not automatically remove the OOR’s authority to review whether a request was actually granted. Here, the Requester challenges [an agency’s] efforts to determine whether it has responsive records. Such a matter is within the jurisdiction of the OOR, even if [the agency’s] response is that it granted the request and provided all the requested records.

OOR Dkt. AP 2010-0012, 2010 PA O.O.R.D. LEXIS 35; *Henry v. Phila. Parking Auth.*, OOR Dkt. AP 2016-0975, 2016 PA O.O.R.D. LEXIS 944. Therefore, although the District maintains that it has granted the Requester access to the materials sought, the OOR retains jurisdiction to determine if such access was actually granted.

2. Requests 1 and 2 were granted by the District and the records properly provided

The Requests concern access to a full video of a School Board meeting and full copies of the District's meeting minutes for 2015 and 2016. The Requests specifically seek inspection and not copies of these materials. The Requester maintains that he has not received access to these records.

In three separate affidavits, the District attests that these materials have been available to the Requester since the June Meeting, and he has failed to schedule a time to inspect them, despite repeated visits to the District's administrative offices.

In the absence of any competent evidence that the District acted in bad faith, "the averments in [the affidavits] 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)). The Requester has not offered any evidence that these affidavits are untrue, nor expressed any rationale for his failure to schedule an inspection.³ When only inspection of records is sought, it is appropriate for an agency to require that the requester schedule a time for inspection. *Frame v. Menallen Twp.*, OOR Dkt. AP 2009-0878, 2009 PA. O.O.R.D. LEXIS 338 ("[I]t was not unreasonable for the Township to require the Requester to schedule an appointment so it could have the records ready and ensure that it has

³ On July 8, 2016, the Requester did offer a statement that he had contacted the offices and been told that certain unidentified records were not available. The description of the event suggests that the Requester was referencing the records from the requests in OOR Dkts. AP 2016-1105 and AP 2016-1106, rather than these records. In any event, the fact that this submission is unsworn means it cannot be used as evidence to rebut the District's affidavits.

appropriate personnel to assist the Requester”); *Mezzacappa v. Borough of West Easton*, OOR Dkt. AP 2010-1012, 2010 PA. O.O.R.D. LEXIS 929 (“An agency may require a requester to schedule an appointment to inspect records”). Since the District has made all of the records at issue available to the Requester, this appeal is denied.

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 Cambria 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 according to court rules 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 26, 2016

/s/ Jordan Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: John DeBartola (via e-mail only);
Jarad Handelman, Esq. (via e-mail only);
Michael Vuckovich (via e-mail only)

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