

On August 8, 2016, the County partially denied the Request, asserting that, although the records regarding prisoners and staff at SCI-Greene are publically available, responding to this portion of the Request would require the compilation of a report that does not currently exist; the County granted access to the other requested records.

On August 23, 2016, the Requester appealed to the OOR, challenging the denial of the requested records regarding prisoners and staff at SCI-Greene 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 25, 2016, the County submitted a statement made under penalty of perjury by its Open Records Officer, Jeffrey Marshall, who attests that no report compiling the records requested regarding prisoners and staff at SCI-Greene exists. On September 15, 2016, in response to a request for clarification by the OOR, the County submitted a second statement attesting that the records at issue in the appeal do not exist outside of the possession of the District Attorney and Clerk of Courts. The Requester did not submit any additional information on appeal.

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. 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, 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. 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. 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)). 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).

Section 705 of the RTKL pertains to requests for records that are not within the possession of an agency or that exist in a different format than the one requested. That section provides, “[w]hen responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705. “That provision precludes a requester from being able to ‘shanghai’ government employees to create a record when one does not exist and take them away from carrying out their normal responsibilities.” *Pa. State Police v. McGill*, 83 A.3d 476, 481 (Pa. Commw. Ct. 2014).

Here, the Requester correctly points out that the Request seeks individual criminal informations, not a report compiling such documents. However, Section 705 still applies because complying with the Request would require the County to access the records of another entity, namely SCI-Greene, obtain the names of all of its prisoners and staff, and then cross-reference that list with any criminal informations possessed by the County.¹ Pursuant to Section 705, the RTKL simply does not require this. *See id.* at 481-482 (“To obtain the information

¹ The County has attested that the records at issue in the appeal do not exist outside of the possession of the District Attorney and Clerk of Courts. The OOR notes that it does not have jurisdiction over judicial agencies, which includes the County Clerk of Courts. *See, e.g., Court of Common Pleas of Lackawanna County v. Office of Open Records*, 2 A.3d 810, 813 (Pa. Commw. Ct. 2010); *Antidormi v. Lackawanna County Clerk of Courts*, No. 274 C.D. 2011, 2011 Pa. Commw. Unpub. LEXIS 779, *5-6 (Pa. Commw. Ct. 2011). The law defines a judicial agency as “[a] court of the Commonwealth or any other entity or office of the unified judicial system.” 65 P.S. § 67.102.

necessary to comply with the request, the PSP cannot simply examine and compile information already in its possession”).

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. *See 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 evidence that the County has 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)). Based on the evidence provided, therefore, the County has met its burden of proving that records responsive to the Request do not exist within its possession, custody or control. *See* 65 P.S. § 67.705; *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the Requester’s 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 Greene 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>.

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

FINAL DETERMINATION ISSUED AND MAILED: September 22, 2016

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

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