

On June 24, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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. *See* 65 P.S. § 67.1101(c).

On July 7, 2016, the District submitted a position statement, reiterating its reasons for denial, and verified by John Smart, Esq., who performed the investigation into the boys' basketball program. On July 7, 2016, the Requester submitted a position statement, verified by Lawrence Lutz, Esq., arguing that the exemptions cited by the District do not apply to the requested report.

On August 4, 2016, following the Requester's agreement to an extension of time to issue the Final Determination in this matter, the OOR directed the District to submit the withheld report for *in camera* review. On August 15, 2016, the District submitted the report and, subsequently, the OOR performed an *in camera* review.

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 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, requisite information and evidence before it to properly adjudicate the 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 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). 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 District argues that the requested report is exempt from disclosure because it relates to a noncriminal investigation. Section 708(b)(17) exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports ... [and a] record that, if disclosed, would ... [r]eveal the institution, progress or result 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). Additionally, the investigations must specifically involve an agency’s legislatively-granted fact-finding powers. *See Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

In *Chawaga*, the Commonwealth Court held that a performance audit was not part of the Department’s legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department’s public assistance services. 91 A.3d at 259. Pursuant to *Chawaga*, the OOR has noted that “[n]ot all agency fact-finding constitutes a ‘noncriminal investigation’ subject to the protections of the RTKL.” *Hopey v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1739, 2014 PA O.O.R.D. LEXIS 1318; *see also Katz v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2014-1572, 2014 PA O.O.R.D. LEXIS 1338.

This matter is unlike the Court’s decision in *Chawaga*, as the Request here specifically seeks investigative records of an agency that conducts investigations pursuant to its legislatively-

granted authority. Regarding its authority to conduct noncriminal investigations, the District relies on the Pennsylvania Public School Code of 1949, which provides that schools “are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of this act.” 24 P.S. § 2-211. In addition, school districts retain the power to punish any employee or pupil who violates any school district rule or regulation. 24 P.S. § 5-511(a). These legislatively-granted powers necessarily include the implied power to conduct investigations into allegations of student misconduct. *See also Pa. Dep’t of Health*, 4 A.3d 803.

In support of its position, the District submitted the affidavit of John W. Smart, Esq., who attests the following:

1. I am an attorney with the law firm of Andrews & Price.
2. The law firm of Andrews & Price was retained by Leechburg Area School District in February, 2016 to perform an investigation into the School District’s High School Boys Basketball program with respect to allegations concerning hazing which had been made by some students.
3. As part of our investigation, I conducted interviews of school staff including teachers, coaches and administration. I interviewed 10-15 current and past students, and reviewed School District policy, the coaches’ handbook and team room practices. Additionally, I received records provided by the Leechburg Police Department as part of their investigation into the allegations.
4. The investigative report consists of 8 pages ... [t]he report includes investigative materials and notes and constitutes the institution, progress and result of the School District’s investigation and contains information relative to strategy and tactics.
5. The investigative report constitutes a systematic and searching inquiry which includes a detailed examination of the alleged hazing episodes within the Leechburg Area School District Boys’ high school basketball program. An investigative report was the culmination of an official probe of a non-criminal matter conducted on behalf of the School District.

Under the RTKL, a statement made under made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency’s burden of proof. *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).

Here, the District has established that it conducts noncriminal investigations as part of its legislatively-granted authority. *See also Silver v. Plum Borough Sch. Dist.*, OOR Dkt. AP 2015-2737, 2016 PA O.O.R.D. LEXIS 60 (holding that, pursuant to the Pennsylvania School Code, the School District had the authority to investigate allegations of an inappropriate relationship between an employee and student). Additionally, the District has established that an investigation into alleged hazing concerning the boys' basketball program occurred. Based on the evidence provided by the District, as well the OOR's *in camera* review, the District has demonstrated that the requested report is a record relating to a noncriminal investigation, and is therefore, exempt from disclosure. *See* 65 P.S. 67.708(a)(1); *see also Sherry*, 20 A.3d at 524 (holding that reports of Academic Honor Code violations which "contain a description of violative conduct, witness/teacher statements, and the course and result of the investigation" are exempt from disclosure as records related to a noncriminal investigation).

Although the report is not required to be disclosed, an agency has discretion to release records unless prohibited by law from doing so. *See* 65 P.S. 67.506(c) (stating that an agency "may exercise discretion to make an otherwise exempt record accessible"). Section 506(c) leaves the discretion to release records solely to the agency head and the RTKL does not provide the OOR with the authority to analyze whether the agency should have exercised this discretion in favor of disclosure. *Nereim v. Pa. Dep't of Pub. Welfare*, OOR Dkt. AP 2011-0187, 2011 PA O.O.R.D. LEXIS 639.

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 or petition for review to the Armstrong 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.¹ This Final Determination shall be placed on the website at: <http://www.openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 26, 2016

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Lawrence Lutz, Esq. (via e-mail only);
Robert Cinpinski, Esq. (via e-mail only);
Patricia Camp (via e-mail only)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).