

the Lead Disclosure and Certification Law since the law took effect,” and 3) “dust wipe sample test results submitted with individual certifications.” Additionally, the Request stated “for the above data sets, please include a record lay-out and data dictionary.” On June 28, 2016, the Department invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On July 26, 2016, the Department denied the Request, asserting that records listing properties where lead hazards have been found are exempt from disclosure under the Disease Prevention and Control Law of 1955, 53 P.S. §§ 521 *et seq.* (“Act”). Additionally, the Department denied access to the Lead Free Certifications because the records would identify the name, home address, or date of birth of a child 17 years of age or younger. *See* 65 P.S. § 67.708(b)(30). And finally, the Department denied access to dust wipe sample test results, asserting that these records do not exist.

On July 26, 2016, Wendy Ruderman, on behalf of the *Philadelphia Daily News*, appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On September 15, 2016 and September 19, 2016, respectively, the Department submitted position statements, reiterating its reasons for denial, while also arguing that only Ms. Laker can file an appeal of a denial of access to records under the RTKL, that the portion of the Request seeking a record lay-out is insufficiently specific, 65 P.S. § 67.703, and that all of the requested records are exempt from disclosure because they are related to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17). Additionally, the Department argues that records responsive to Item 1 of the Request are also exempt from disclosure because they contain personal identification

¹ In her appeal, the Requester granted the OOR an additional thirty days to issue a final determination. 65 P.S. § 67.1101(b)(1). Thereafter, the Requester granted the OOR until October 7, 2016 to issue a final determination.

information and individually identifiable health information.² See 65 P.S. §§ 67.708(b)(5)-(6). Further, the Department states that no database of Lead Free Certifications or data dictionary exists, while disclosure of other records would reveal home addresses, which raises security concerns.³ And lastly, the Department states that, during the course of the appeal, records responsive to Item 3 of the Request (dust wipe samples) were identified, but these are exempt from disclosure because they are related to a noncriminal investigation, contain information identifying a child under the age of 17, and are confidential under the Act. The Department also submitted the sworn affidavits of Dr. Caroline Johnson, the Department's Deputy Health Commissioner, and Ricardo Frenche, Abatement Services Supervisor for the Department.

The Requester submitted a position statement on September 15, 2016, arguing that the Department did not meet its burden of proving that the requested records are exempt from disclosure as the records sought are not medical records, and that the Department failed to address the portion of the Request that seeks a "record layout."

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).

² The Department is permitted to raise these additional reasons for denying access to records on appeal to the OOR. See *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

³ The Department does not cite a specific RTKL exemption with respect to its security concerns.

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 requisite information and evidence before it to properly adjudicate the matter.

The Department 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 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 appeal is sufficient under Section 1101(a)(1) of the RTKL

The Department argues that, because the Request was filed by Barbara Laker on behalf of the *Philadelphia Daily News*, Ms. Laker is the only individual, other than an attorney representing her, who is permitted to file an appeal in this matter. The instant appeal was filed by Wendy Ruderman on behalf of the *Philadelphia Daily News*. Section 1101(a)(1) 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). Additionally, Section 102 of the RTKL provides that a requester is “[a] person that is a legal resident of the United States and requests a record pursuant to ... [the RTKL]. This term includes an agency.” 65 P.S. § 67.102. Although filed by different representatives of the *Philadelphia Daily News*, the Request and appeal were both filed on behalf of the *Philadelphia Daily News*. As the *Philadelphia Daily News* is the Requester, the appeal is sufficient and was appropriately filed under the RTKL. *Spatz v. City of Reading*, OOR Dkt. AP 2013-0210, 2013 PA O.O.R.D. LEXIS 189.

2. The Requester cannot modify, explain or expand the Request on appeal

On appeal, the Requester attempts to explain what is sought in Item 1 of the Request, while also stating in its position statement that the Requester “did not attempt to modify our [R]equest on appeal but rather assist the [Department] in locating the records.” A requester may not modify, explain or expand upon a request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water and Sewer*

Auth., OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (“A requester may not modify the original request as the denial, if any, is premised upon the original request was written”). Therefore, the OOR’s review on appeal is confined to the Request as written, and any modification or explanation of the Request on appeal will not be considered. *See Petka v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2014-1288, 2014 PA O.O.R.D. LEXIS 996.

3. The Department has demonstrated that certain records do not exist in its possession, custody or control

The Department asserts that no database of Lead Free or Lead Safe Certifications,⁴ or data dictionary exists in its possession, custody or control. The Department further argues that it is unable to define the term “record lay-out.”⁵ In support of its position, the Department submitted the sworn affidavit of Ricardo Frenche, Abatement Services Supervisor for of Environmental Health Services for the Department, who attests that the Department “does not possess or maintain a database of ‘Lead Free Certifications’ or of ‘Lead Safe Certifications’” and that “[a]s there is not [a] database of Lead Free or Lead Safe Certifications, there is no ‘data dictionary’.” Additionally, Mr. Frenche attests that he is “not familiar with the term ‘record lay-out’.” Under the RTKL, a sworn affidavit or a statement 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). In the absence of any competent evidence that the Department acted in bad faith or that the requested records exist, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374,

⁴ The Department acknowledges that while no *database* of Lead Free Certifications exists, printed copies of the Lead Free Certifications exist.

⁵ On appeal, the Requester suggest that a “record lay-out” is “a standard form that describes the fields and structure of a database.” While a requester may not modify a request on appeal, the OOR notes that the term “record lay-out” most often relates to records in a computer database. In the instant case, the Department has attested that no such database exists.

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, the Department has met its burden of proving that no database of Lead Free Certifications, data dictionary, or record lay-out exists in the Department's possession, custody or control.

4. Records responsive to Item 1 of the Request are exempt from disclosure under the Act

The Department argues that the records responsive to Item 1 of the Request are maintained by the Department pursuant to the Act, and are therefore confidential. The Requester argues that the records sought are not records protected by the Act because the Request seeks information regarding addresses, not individuals. Section 15 of the Act provides:

State and local health authorities may not disclose **reports of diseases**, any records maintained as a result of any action taken in consequence of such reports, **or any other records maintained pursuant to this act or any regulations**, to any person who is not a member of the department or a local board or department of health, except where necessary to carry out the purposes of this act. State and local health authorities may permit the use of such data contained in disease reports and other records, maintained pursuant to this act, or any regulation, for research purposes, subject to strict supervision by the health authorities in insure that the use of the reports and records is limited to specific research purposes.

35 P.S. § 521.15 (emphasis added). Therefore, any reports of diseases or any records maintained by the Department pursuant to the Act are confidential. *Id.*

Under the Act, local boards and departments are primarily responsible for the prevention and control of non-communicable diseases. 35 P.S. § 521.3. The Pennsylvania Department of Health has promulgated regulations, to which the Department is subject, regarding communicable and non-communicable diseases, including lead poisoning, under Title 28, Chapter 27 of the Pennsylvania Code. In accordance with those regulations, the Department receives reports of lead poisoning for children under the age of 16 pursuant to the Act. 28 Pa. Code § 27.34; *see also* 28 Pa. Code § 27.21a(b)(1) (requiring health care practitioners to report

lead poisoning within 24 hours). In support of its position that the list responsive to Item 1 of the Request is confidential under the Act, the Department submitted the sworn affidavit of Caroline Johnson, M.D., Deputy Health Commissioner for the Department, who attests to the following:

3. Pursuant to the ... Act, local departments of health, of which ... [the Department] is, are responsible for the prevention and control of communicable and non-communicable diseases.
4. Commonwealth of Pennsylvania regulations identify lead poisoning as a non-communicable disease, and require the reporting of elevated blood levels in children 16 years of age and young to the State. 28 Pa. Code §§ 27.22, 27.34.
5. Because lead poisoning is a reportable non-communicable disease, ... [the Department] immediately learns when a patient in Philadelphia has been diagnosed with lead poisoning.
6. Pursuant to Pennsylvania regulations all case reports submitted to the health department or to local health departments are confidential.
7. Once ... [the Department] is aware of a child with an elevated blood lead level, ... [the Department] conducts an investigation to determine where the child came into contact with lead, and the child's home is tested for deteriorated lead paint. Any property that is discovered to have a lead hazard is then ordered by ... [the Department] to come into compliance with City and federal regulations.
8. [The Department] only becomes aware of properties with lead hazards as the result of the investigation conducted upon the reporting of a child with an elevated blood lead level.
9. Properties identified as having a lead hazard are not updated to reflect whether the patient has moved out of the residence, which means all addresses associated with lead hazards reflect patient information. There is no way to confirm whether a patient continues to reside at a property with a lead hazard without creating a new record.

Based on evidence submitted, the Department has demonstrated that reports of lead poisoning, as well as the information contained in the reports, are maintained by the Department pursuant to the Act, and are, therefore, subject to the Act's broad confidentiality provisions.⁶ *See Young and*

⁶ Because records responsive to Item 1 of the Request are confidential under the Act, the OOR need not reach the Department's alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dep't*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

USA Today v. Pa. Dep't of Health, OOR Dkt. AP 2011-1040, 2011 PA O.O.R.D. LEXIS 677 (holding that records of blood-lead test data were confidential under the Disease Prevention and Control Law). Accordingly, the reports are not public records under the RTKL. See 65 P.S. § 67.102 (defining “public record”); 65 P.S. § 67.305(a)(3); see also 65 P.S. § 67.3101.1 (“If the provisions of [the RTKL] regarding access to records conflict with any other federal or state law, the provisions of [the RTKL] shall not apply”).

However, the Department has not demonstrated how Lead Free Certifications and dust wipe sample test results, submitted to the Department pursuant to the Lead Paint Disclosure and Certification Law, are confidential under the Act.

5. The Department has not demonstrated that records responsive to Items 2 and 3 of the Request are exempt as records related to a noncriminal investigation

The Department argues that records responsive to Items 2 and 3 of the Request are exempt from disclosure under the RTKL because they are related to a noncriminal investigation.

Section 708(b)(17) exempts from disclosure:

[a] record of an agency relating to a noncriminal investigation, including:

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- (iii) A record that includes the identity of a confidential source, including individuals subject to the ... Whistleblower Law.
- (iv) A record that includes information confidential by law.
- (v) Work papers underlying an audit.
- (vi) A record that if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.
 - (B) Deprive a person of the right to an impartial adjudication.
 - (C) Constitute an unwarranted invasion of privacy.
Hinder an agency’s ability to secure an administrative or civil sanction.

(D) Endanger the life or physical safety of an individual.

65 P.S. § 67.708(b)(17). 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. Pennsylvania 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).

In support of the Department’s position, Dr. Johnson attests the following:

10. Pursuant to the Philadelphia Health Code, a lessor is required to provide ... [the Department] either a Lead Free or a Lead Safe Certificate when a child under the age of 6 will reside in the property. A Lead Safe Certificate is required to be renewed every two years, while a Lead Free Certificate is valid indefinitely.
11. Dust wipe samples are required to obtain a Lead Safe Certificate. Dust wipe samples are collected in compliance with regulations promulgated pursuant to the Environmental Protection Act (40 C.F.R. 745.227), and are required by the Philadelphia Health Code to obtain a Lead Safe Certificate.

The Department argues that because the Philadelphia Code requires lessors to provide copies of Lead Free or Lead Safe Certificates to the Department, the Certificates are maintained to determine compliance with the Code and are related to a noncriminal investigation. Section 6-803(3) of the Philadelphia Code provides the following:

- (a) No lessor shall enter into a lease agreement with a lessee other than renewal lease, to rent any Targeted Housing,⁷ or a unit in such Targeted Housing,

⁷ The Philadelphia Code defines “targeted housing” as follows: “[f]or purposes of the provisions of this Chapter relating to lease agreements, residential property built before March 1978, but excluding: (a) dwelling units developed by or for an educational institution for the exclusive residential use and occupancy by that institution’s students; (b) buildings containing dwelling units all of which are leased only to students enrolled in a college or

unless (.1) he or she provides the lessee with a valid certification prepared by a certified lead inspector stating that the property is either lead free or lead safe; and (.2) the lessee acknowledges receipt of the certification by signing a copy.

(b) A valid certification that a property is lead safe under this section shall state that the certified lead inspector determined that the property or unit was free of any Deteriorated Paint, and that interior dust samples were collected in compliance with EPA regulations, including 40 C.F.R. § 745.227 and any amendments or successor regulations, were tested and were found not to contain Lead-Contaminated Dust as defined in this Chapter. Additional statements or test results are not required. Any corrective action taken in order to qualify the property for such certification shall be performed in compliance with applicable laws.

(c) Upon entering into such a lease agreement, the lessor shall (.1) provide a copy of the signed certification to the Department of Public Health; and (.2) provide to the tenant, in addition to any written notifications required by applicable laws, a written notification advising the tenant to perform a visual inspection of all painted surfaces periodically during the term of the lease, and advising that the tenant may inform the lessor of any cracked, flaking, chipping, peeling, or otherwise deteriorated paint surfaces. Upon receipt of any such tenant notification the lessor shall promptly inspect and correct any defective conditions as required by section PM-305.3 of the Philadelphia Property Maintenance Code and in compliance with other applicable laws.

Phila. Code § 6-803(3). The Philadelphia Code requires all lessors of targeted housing to file either Lead Free or Lead Safe Certificates with the Department. These Certificates are not filed pursuant to a noncriminal investigation, but rather are required of all lessors before leasing a targeted property. Therefore, the Department has not established that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted with regard to either the Lead Free Certifications filed with the Department pursuant to the Lead Disclosure and Certification Law, or the dust wipe sample test results submitted with the Certifications. Therefore, the Department has not met its burden of proving that Lead Free Certifications or dust

university degree program; (c) dwelling units owned or subsidized by the Philadelphia Housing Authority or its subsidiaries, or privately owned but currently leased under the Housing Choice Voucher Program and therefore subject to federal requirements administered by HUD; and (d) dwelling units in which children aged six (6) and under do not and will not reside during the lease term.” Phila. Code § 6-802(12).

wipe sample test results are exempt from disclosure under Section 708(b)(17). *See* 65 P.S. § 67.708(a)(1).

6. The Department may redact information identifying a minor

The Department argues that the Lead Free and Lead Safe Certifications and dust wipe sample test results are provided only when a lessor rents a residential property in which a child under the age of 6 years of age will reside, and therefore raise “security concerns.” Section 708(b)(30) of the RTKL exempts from access records “identifying the name, home address or date of birth of a child 17 years of age or younger.” 65 P.S. § 67.708(b)(30). Accordingly, any information within the responsive records identifying the name, home address or birthdate of a minor may be redacted from the records.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the Department is required to provide the requested Lead Free Certifications and dust wipe sample tests results, subject to the redaction of the name, home address and/or birthdate of a minor, 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 or petition for review to the Philadelphia 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.⁸ This Final Determination shall be placed on the website at: <http://www.openrecords.pa.gov>.

⁸ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: October 7, 2016

/s/ Kathleen A. Higgins

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