pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
RAUL PEREZ,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2016-1264**
	:	
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,	:	
Respondent	:	

INTRODUCTION

Raul Perez ("Requester"), an inmate at SCI-Frackville, submitted a request ("Request") to the Pennsylvania Department of Corrections ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking work records of identified individuals and rules, regulations and policies related to the treatment of inmates. The Department sought prepayment of duplication fees prior to providing access to the requested records. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Department is not required to take any further action.

FACTUAL BACKGROUND

On July 14, 2016, the Request was filed, seeking, among other records, work records of identified individuals and rules, regulations and policies related to the treatment of inmates. On

July 19, 2016, the Department sought prepayment of $248.00 for "at least 967 pages of material" and postage. *See* 65 P.S. § 67.1307(h). Additionally, the Department stated that:

> Once payment is received the Department will process [the Request] further and will at that time: 1) make a final determination as to what records are public records under the RTKL; 2) begin search and retrieval of those records; 3) perform any required redaction; and, 4) advise you as to a date by when the records, if public, will be produced. In its final response, the Department reserves the right to assert any exceptions to production under the RTKL...

On July 26, 2016, the Requester appealed to the OOR, seeking a waiver of the fees and challenging the prepayment amount. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 2, 2016, the Department provided a position statement, along with a declaration of its Open Records Officer, who affirms that:

> [8]. The prepayment amount was $248.00 ($0.25 per page and $6.45 for postage). A rough estimate of at least 967 pages of material would be reproduced in response to this request.
> [9]. At least 967 pages would be provided once prepayment is received by the Department.
> [10]. Partial redactions may appear in the 967 pages produced in response to this request based on the following exceptions:
>
> a. Personal Security, 65 P.S. § 67.708(b)(1)(ii)
> b. Law Enforcement, 65 P.S. § 67.708(b)(2)
> c. Criminal Investigation, 65 P.S. § 67.708(b)(16)
> d. Noncriminal Investigation, 65 P.S. § 67.708(b)(17)
> e. Personal Identification Information, 65 P.S. § 67.708(b)(6)
> f. Trade Secret/Confidential Proprietary Information, 65 P.S. § 67.708(b)(11)
>
> [11]. Redactions and/or exceptions may be taken to all other documents being requested once the prepayment is received.

On August 3, 2016, the OOR asked the Department to provide the "methodology used in arriving at the prepayment amount" pursuant to *Prison Legal News v. Office of Open Records*,

992 A.2d 942 (Pa. Commw. Ct. 2010). On August 4, 2016, the Department submitted an additional declaration by its Open Records Officer, who affirms that he:

> … reached 967 pages based on the following responsive records and their page length:
>
> a. Requests (1)-(3) would result in seven employment applications, which are ten pages in length. Thus, for Requests (1)-(3) the Department would have to generate 70 pages;
>
> b. Request (4) does not exist, thus no pages were included;
>
> c. Request (5) led to the following responsive policies and the page length:
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> | | |
> |---|---|
> | i. DC-ADM 001 | 17 pages |
> | ii. DC-ADM 004 | 5 pages |
> | iii. DC-ADM 006 | 20 pages |
> | iv. DC-ADM 008 | 80 pages |
> | v. DC-ADM 201 | 11 pages |
> | vi. DC-ADM 203 | 11 pages |
> | vii. Policy 5.l.l | 104 pages |
> | viii. Policy 7.2.1 | 36 pages |
> | ix. Policy 7.4.1 | 70 pages |
> | x. Policy 13.2.1 | 302 pages |
> | xi. Policy 13.8.1 | 238 pages |
>
> d. Request (6) would result in 3 pages.

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." 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*. 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*. Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth 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)).

Section 1307(h) of the RTKL states that "[p]rior to granting access in accordance with this act, an agency may require a requester to prepay an estimate of the fees authorized under this

section if the fees required to fulfill the request are expected to exceed $ 100." 65 P.S. § 67.1307(h). In *Pa. Dep't of Educ. v. Bagwell*, the Commonwealth Court noted that "[a]n agency may only pass on the cost of duplication that corresponds to those pages to which an agency is granting access." 131 A.3d 638, 654 (Pa. Commw. Ct. 2016); *see id.* at 653 (stating that a prepayment demand must be based on "the cost of duplicating and sending public records, not potentially responsive records, to a requester"). Here, the Department's Open Records Officer attests that the Department is planning on granting access to at least 967 pages of records, some of which will be partially redacted. Although some of these records will be redacted, these records still qualify as public records for purposes of calculating prepayment. *See* 65 P.S. 67.706 ("If an agency determines that a public record ... contains information which is subject to access as well as information which is not subject to access, the agency shall grant access to redacted public records"). Under the RTKL, an affidavit or statement made under the penalty of perjury is competent evidence 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, "the averments in [the declaration] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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, the Department has demonstrated that it plans on granting access, or partially granting access, to at least 967 of pages of records, and that copying fees for these records exceed $100. Therefore, the Department permissibly requested prepayment under the RTKL.

Upon paying the prepayment fee to the Department and receiving the redacted records, the Requester, if necessary, may file an appeal of any redactions to the OOR pursuant to 65 P.S.

§ 67.1101(a)(1). *See Buehl v. Pa. Dep't of Corr.*, No. 198 C.D. 2015, 2015 Pa. Commw. Unpub. LEXIS 552 (Pa. Commw. Ct. 2015) (unpublished opinion); *see also Indiana Univ. of Pa. v. Loomis*, 23 A.3d 1126 (Pa. Commw. Ct. 2011).

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the Department 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 Commonwealth Court. 65 P.S. § 67.1301(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 OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: August 19, 2016

/s/ J. Chadwick Schnee, Esq.

APPEALS OFFICER/ ASSISTANT CHIEF COUNSEL
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[1] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).