

February 3, 2015; and (2) the Requester's property sheet receipt for the Requester's transfer from SCI-Mahanoy to SCI-Camp Hill in February of 2015.

On July 27, 2016, the Department granted access to thirty-one pages of responsive records and made the records available for inspection at the Department's Central Office. If the Requester did not wish to inspect the records, the Department also offered to mail the records to the Requester subject to the payment of \$7.75 in duplication fees and \$1.78 in postage.

On August 8, 2016, the Requester appealed to the OOR, challenging the Department's response and stating grounds for disclosure. The Requester explains that he is only seeking two pages of records: for Item 1 of the Request, he would only like to receive a copy of one receipt—for a pair of Nike sneakers—and, for Item 2 of the Request, the one page property receipt. The Requester also claims that he is entitled to inspect the two records responsive to the Request at SCI-Greene. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 10, 2016, the Department submitted a position statement reiterating its claim that it granted the Request by making the records available for inspection or mailing, subject to the payment of duplication fees and postage. In support of its position, the Department submitted the affidavit of Andrew Filkosky, the Department's Open Records Officer.

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 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. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party has 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 local or 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Requester cannot modify the Request on appeal

On appeal, the Requester seeks to inspect the records at SCI-Greene and requests a receipt for the purchase of Nike shoes. However, 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”). Here, the Request, as written, seeks copies of the requested records, and not the inspection of those records. In addition, Item 1 of the Request did not specifically seek a copy of a receipt for “Nike shoes.” Therefore, the OOR’s review on appeal is confined to the Request as written, and any modifications of the Request on appeal will not be considered. *See Reigle v. Dep’t of Transp.*, OOR Dkt. AP 2012-1231, 2013 PA O.O.R.D. LEXIS 88. As a result, the Requester’s claims that he is entitled to inspect records at SCI-Greene and that Item 1 of the Request should be limited to a receipt for “Nike shoes” will not be considered.

2. The Department properly calculated duplication and postage fees for responsive records

The Department properly calculated duplication and postage fees for records responsive to the Request. Section 1307 of the RTKL provides that the OOR has the authority to establish

duplication fees for Commonwealth agencies. *See* 65 P.S. § 67.1307(b)(1)(i). Pursuant to this authority, the OOR has approved fees of up to \$0.25 for the duplication of records as set forth in the OOR's Fee Schedule. The RTKL also allows an agency to charge for postage, provided the fee does “not exceed the actual cost of mailing.” *See* 65 P.S. § 67.1307(a). Here, Mr. Filkosky attests that the Department charged a duplication fee of \$0.25 per page for thirty-one pages, plus a postage fee in the amount of \$1.78. These fees are permissible under the RTKL and the OOR’s Fee Schedule.¹

The RTKL favors a contemporaneous exchange of fees for records, but in no event is an agency required to provide records without first receiving duplication fees and/or postage. *Frame v. Menallen Twp.*, OOR Dkt. AP 2009-1072, PA O.O.R.D. LEXIS 155. Section 901 of the RTKL provides that “[a]ll applicable fees shall be paid in order to receive access to the record requested.” 65 P.S. § 67.901. Therefore, pursuant to Section 901, the Department may withhold the responsive records until such time as the Requester pays the duplication and mailing fees for the records. *See Dep’t of Transp. v. Drack*, 42 A.3d 355, 363 (Pa. Commw. Ct. 2012).

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

¹ The Requester is not precluded from filing a new request with the Department seeking a subset of responsive records.

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>.

FINAL DETERMINATION ISSUED AND MAILED: September 2, 2016

/s/ Benjamin A. Lorah

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Alfonso Pew (BT-7263);
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² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).