

waiver, explaining that the Requester could inspect the records or, in the alternative, copies could be sent to the Requester upon payment of duplication fees and postage in the amount of \$47.20.

On August 11, 2016, the Requester appealed to the OOR, arguing that he should not be required to pay duplication fees as he is indigent and that he is entitled to a copy of the contract as he is the consumer of the service. 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 12, 2016, the Department submitted a position statement and 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. 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 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)(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)).

In his affidavit, Mr. Filkosky affirms that the Department granted the request which consists of a one-hundred sixty-three (163) page contract. The Department calculated a fee of

\$.25 per page for copies and \$6.45 for postage, totaling \$47.20. Mr. Filkosky also informed the Requester that he could inspect the records or designate a representative to do so.

On appeal, the Requester argues that the Department should waive the duplication fee because he is indigent. Mr. Filkosky states that it was explained to the Requester that “current economic circumstances and the lack of funding dedicated to the cost of fulfilling RTKL requests makes a fee waiver inappropriate in this case.”

Section 1307(f) of the RTKL states that an agency may waive fees for duplication of a record when “the agency deems it is in the public interest to do so.” 65 P.S. § 67.1307(f)(2). In *Pa. Dep’t of Public Welfare v. Froehlich ex. Rel. Cmty. Legal Servs.*, the Commonwealth Court found that:

Because waiver of fees is not a denial of access, there is no express right under the RTKL to appeal to the OOR because the General Assembly never anticipated that the agency could give a discriminatory reason for denying a request for a fee waiver. Because there is no right to appeal to the OOR and no right to appeal to the agency, the only method to challenge the alleged discrimination by an agency is by bringing an action in this Court claiming the agency denied its fee-waiver request for an unlawful discriminatory reason.

29 A.3d 863, 868-69 (Pa. Commw. Ct. 2011); *see also Mezzacappa v. Borough of West Easton*, OOR Dkt. AP 2014-1912, 2015 PA O.O.R.D. LEXIS 12; *Joseph v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2015-0018, 2015 PA O.O.R.D. LEXIS 116. Accordingly, the OOR is without jurisdiction to consider the request for a fee waiver.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **dismissed for lack of jurisdiction**, 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: September 8, 2016

/s/ Kelly C. Isenberg

APPEALS OFFICER
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Sent to: Justin Hickox (via U.S. Mail only);
Chase Defelice, Esq. (via e-mail only);
Andrew Filkosky, AORO (via e-mail only)

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