



On September 22, 2016, the Requester appealed to the OOR, challenging the fee for the DVD. The OOR invited both parties to supplement the record and directed the Municipality to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c). Neither party made a submission on appeal.

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

The Municipality 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)(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 the instant appeal, the Requester challenges the amount of the fee charged by the Municipality for the DVD. The permissibility of fees is within the OOR’s jurisdiction and may be challenged on appeal. *See Prison Legal News v. Office of Open Records*, 992 A.2d 942 (Pa. Commw. Ct. 2010); *State Employees’ Ret. Sys. v. Office of Open Records*, 10 A.3d 358 (Pa. Commw. Ct. 2010). The RTKL provides that the OOR shall establish fees to be charged by Commonwealth and local agencies. 65 P.S. § 67.1307(b)(1)(i). Pursuant to Section 1307(b)(i),

the OOR established a fee structure, which is available on the OOR's website at <http://openrecords.pa.gov/RTKL/FeeStructure.cfm>.

Pursuant to Section 1310(a)(8) of the RTKL, the OOR conducted a statutorily mandated bi-annual review of the OOR's Fee Schedule. 65 P.S. § 67.1310(a)(8). As a result, a revised Fee Schedule was adopted on September 15, 2016, and posted on the OOR's website. The revised Fee Schedule permits an agency to charge a requester the actual cost of the reproduction of a DVD, up to \$3.00 per disc. Because the Request was made on September 15, 2016, the day the Fee Schedule was adopted and posted, and the Municipality responded on September 22, 2016, the revised Fee Schedule was in effect and applicable to the Request.<sup>1</sup>

Here, the record at issue is a DVD for which the OOR Fee Schedule permits an agency to charge up to the actual cost of reproducing the DVD, not to exceed \$3.00 per disc. The Municipality imposed a \$10.00 fee to provide the requested record in DVD form. However, the Municipality has not submitted any evidence regarding the actual cost to reproduce the DVD and has imposed a fee in excess of \$3.00, thus failing to follow the OOR's Fee Schedule. Accordingly, the Municipality must provide the DVD to the Requester at the actual cost of its reproduction, but may charge no more than \$3.00; and, to the extent necessary, must reimburse the Requester any fees received in excess of \$3.00 or the actual cost of the DVD's reproduction.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Municipality is required to provide the requested DVD to the Requester within thirty days, upon the payment of the actual cost of the DVD, not to exceed \$3.00. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal

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<sup>1</sup> Cf. *Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2016-1564, 2016 PA O.O.R.D. LEXIS 1401 (Request was submitted prior to the adoption of the revised Fee Schedule).

to the Allegheny 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.<sup>2</sup>

This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 20, 2016**

*/s/Kelly C. Isenberg*

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APPEALS OFFICER  
KELLY C. ISENBERG, ESQ.

Sent to: John Yakim (via e-mail only);  
Joseph Sedlak, Open Records Officer (via e-mail only)

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<sup>2</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).