pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PHILIP JENSEN,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2016-1650**
	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS,	:	
Respondent	:	

INTRODUCTION

Philip Jensen ("Requester"), an inmate at SCI-Somerset, 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 the employment application of a named Department employee. The Department denied the Request, arguing, among other things, that the Requester owed outstanding fees from a prior RTKL request and that the records contain personal identification information. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **dismissed as premature**, and the Department is not required to take any further action at this time.

FACTUAL BACKGROUND

On August 24, 2016, the Request was filed seeking "Sgt. Lavan's Application for employment." On August 26, 2016, the Department invoked a thirty day extension to respond to the Request. *See* 65 P.S. § 67.902. On September 21, 2016, the Department denied the Request,

claiming that the Requester has an outstanding balance in connection with a prior RTKL Request. The Department also argues that portions of the requested records are exempt under Sections 708(b)(1), (b)(2), (b)(16), (b)(17), (b)(5), (b)(6) of the RTKL, 65 P.S. §§ 67.708(b)(1)-(2), (b)(5)-(6), (b)(16)-(17), and the Criminal History Record Information Act ("CHRIA"), 18 Pa.C.S. §§ 9102 and 9106.

On September 26, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. Specifically, the Requester argues that he does not have an outstanding balance relating to a prior RTKL request because he resubmitted payment to the Department after his original payment was returned. The Requester also claims that the same information was released by the Department in *Jensen v. Pa. Dep't of Corr.*, OOR Dkt. AP 2016-0879, 2016 PA O.O.R.D. LEXIS 877. 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 October 6, 2016, the Department submitted a position statement indicating that the Requester's outstanding fee balance has been paid and granting access to redacted records upon the payment of a fee of $4.93 for copies and postage. Further, the Department claims that the employment application was properly redacted as it contains personal identification information, exempt information in a personnel record and criminal history information. *See* 65 P.S. §§ 67.708(b)(6)-(7); 18 Pa. C.S. §§ 9102 and 9106. In support of its position, the Department submitted the sworn declaration of Andrew Filkosky ("Mr. 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 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 appeal, the Requester claims that he paid the outstanding fee stemming from the prior RTKL request. In its position statement, the Department acknowledges that, on or about October 4, 2016, the Requester paid the outstanding balance associated with the prior RTKL request. The Department's position is further supported by Mr. Filkosky's sworn declaration that "…the Department received the outstanding balance owed from Jensen."

Additionally, the Department states that the requested records have been granted, subject to redactions made pursuant to Sections 708(b)(6) and (b)(7) of the RTKL and CHRIA.[1] In his attestation, Mr. Filkosky states that the information redacted from the responsive records includes "the first name of the Corrections Officer, his home address, private email address, social security number, signatures, date of birth, place of birth, driver's license number, high school location, telephone numbers, reference information and the criminal history portions of

[1] According to its submission on appeal, the Department did not redact or deny access to information based upon Sections 708(b)(1), 708(b)(2), 708(b)(16) or 708(b)(17) of the RTKL, which were initially raised in the Department's final response to the Request.

the application." Attached to Mr. Filkosky's declaration is an invoice for the instant Request dated October 6, 2016 and addressed to the Requester.

Generally, an agency may require a requester to pay all applicable fees before granting access to records. *See* 65 P.S. § 67.901. If the requester does not pay the fee in full, the agency may withhold access to the records. *See Indiana Univ. of Pa. v. Loomis*, 23 A.3d 1126, 1128 (Pa. Commw. Ct. 2011). Here, the parties have not presented any evidence that the fee associated with the Request has been paid or that the Requester has received the redacted records, such that the Requester's appeal rights have been triggered under the RTKL. Accordingly, the Requester's challenge to the redactions is premature. Upon payment of the duplication fees assessed by the Department and the Requester's receipt of the redacted records, the Requester may file an appeal to the OOR in accordance with the requirements set forth in 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).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **dismissed as premature**, and the Department is not required to take any further action at this time. 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.[2] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

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

FINAL DETERMINATION ISSUED AND MAILED: October 31, 2016

/s/ Kelly C. Isenberg

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APPEALS OFFICER
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