

2. Since this is a small request that will fit on one page, I am asking you waive the fee.

On October 21, 2021, the Department denied the Request, arguing that the Requester owes an outstanding balance of \$64.45 in connection with a previous RTKL request that he submitted to the Department in August 2021.

On October 28, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The Requester also argues that he does not owe an outstanding balance to the Department because the previously requested records were not copied or mailed to him, and that the Department acted in bad faith. 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. 65 P.S. § 67.1101(c).

On November 16, 2021, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the attestation, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of its Deputy Open Records Officer, Kim Grant.

On November 19, 2021, the Requester submitted a position statement in support of the appeal.²

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.*

¹ The appeal was received by the OOR on November 4, 2021; however, it was postmarked October 28, 2021. Therefore, pursuant to the “prisoner mailbox rule,” the appeal is considered filed as of October 28, 2021. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

² The Requester’s submission was postmarked on November 19, 2021 and was received by the OOR on November 23, 2021. *Id.* Although the submission was received after the record closed, in order to develop the record, the submission was considered. See 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

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

1. The Department did not prove the Requester owes outstanding fees

The Department argues that it is entitled to deny access to the records requested because the Requester owes outstanding fees in the amount of \$64.45 in connection with a previous RTKL request that he submitted to the Department in August 2021. The Requester argues that he does not owe an outstanding balance because copies of the requested records were not made or mailed to him and, therefore, the Department did not incur the copying and mailing costs listed on the invoice submitted by the Department as evidence of the alleged past-due balance. The Requester further argues that Department did not incur actual costs, since the invoice states that the “fees are for reproduction...and postage, not for research or retrieval.”

While a requester may not normally challenge fees owed stemming from a prior request, here, the fees charged in a prior request are being utilized to withhold access to records in the present Request. *See Mezzacappa v. Borough of West Easton*, OOR Dkt. AP 2011-0833, 2011 PA O.O.R.D. LEXIS 553 (holding that a requester was collaterally estopped from challenging fees owed for a prior RTKL request). Therefore, the validity of those fees is at issue.

The Department argues that the Requester must pay the outstanding balance for records that were prepared in response to the prior request. An agency may deny access to public records where a requester has an outstanding balance due for previous RTKL requests. *See Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, 363 (Pa. Commw. Ct. 2012). An agency asserting unpaid fees as a basis for denying access to records has the burden of proving the requester’s indebtedness. *Id.* at

364. On appeal, the agency must provide sufficient evidence explaining the alleged past-due balance, whether the requester was notified of the balance, the records that were prepared, the date on which they were prepared, and whether they were made available to the requester. *See Brown v. Pa. Dep't of Corr.*, 2017 Pa. Commw. Unpub. LEXIS 825 (Pa. Commw. Ct. 2017) (finding that the agency's conclusory affidavit was inadequate to prove that the requester owed an outstanding balance for a prior RTKL request).³

Here, Ms. Grant attests that the Requester owes fees associated with a prior RTKL request, docketed by the Department as #0791-21, in the total amount of \$64.45. Ms. Grant further attests, in pertinent part:

...[The Requester] was informed on August 18, 2021 that the Department would be unable to provide an estimated cost if the request is granted.

On September 16, 2021 a [f]inal [r]esponse was provided which outlined that [the Requester] has been granted access to responsive records, that he is free to personally inspect the granted records at the Department's Central Office location (or designate someone to do so in his stead), or to pay the costs of duplication and mailing in lieu thereof, just as [the Department] has done in multiple previous instances with inmate requesters.

The invoice included therewith established his debt owed in the amount of \$64.45.

Additionally, the Department provides a copy of the invoice dated September 16, 2021 in the amount of \$64.45 for copying 266 pages of responsive records at \$0.25/page and for \$7.95 postage fees.⁴

³ The OOR cites for its persuasive value.

⁴ Section 1307 of the RTKL provides that the OOR has the authority to establish fees for duplication for Commonwealth and local agencies. 65 P.S. § 67.1307(b)(1)(i). Section 1307(g) of the RTKL provides as follows: "[e]xcept as otherwise provided by statute, no other fees may be imposed unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable. No fee may be imposed for an agency's review of a record to determine whether the record is a public record, legislative record or financial record subject to access in accordance with this act." 65 P.S. § 67.1307(g). To show that a cost may be imposed on a requester, the agency must show that the cost at issue is both necessary to fulfill the request and reasonable in scope. *See Iverson v. Southeastern Pa. Transp. Auth.*, OOR Dkt. AP 2011-0742, 2011 PA O.O.R.D. LEXIS 477; *Lauff v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2011-0701, 2011 PA O.O.R.D. LEXIS 470.

Under the RTKL, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. 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)).

Here, with regard to the prior RTKL request, the appeal record shows that the request was submitted on August 18, 2021 and that the records were made available to the Requester on September 16, 2021. The appeal record also shows that, on September 16, 2021, the Requester was made aware of the \$64.45 fee for duplication and postage fees, should he choose to have the responsive records mailed to him. However, the submission provided by the Department does not show that the responsive records were, in fact, copied or mailed to the Requester. In its position statement, the Department states that its Open Records Office, Andrew Filkosky, “searched for and gathered the responsive records, and ultimately issued [the Requester] a letter indicating that he had been granted access to pages of responsive records, that he was free to personally inspect the granted records at the Department’s Central Office location (or designate someone to do so in his stead), or to pay the costs of duplication and mailing in lieu thereof.” Likewise, Ms. Grant attests that the Department notified the Requester that he “has been granted access to responsive records, that he is free to personally inspect the granted records at the Department’s Central Office location (or designate someone to do so in his stead), or to pay the costs of duplication and mailing in lieu thereof.” However, both the Department’s position statement and Ms. Grant’s attestation are silent as to whether the Department made copies of the

requested records or mailed the requested records to the Requester.⁵ Without providing evidence showing that the Department actually incurred expenses associated with copying and mailing the documents responsive to the prior request, the Department has not met its burden of proof that the Requester owes outstanding fees. Accordingly, based on the evidence presented, the Department has not established that the Requester owes outstanding fees to the Department, and that, as a result, the Department has failed to prove that it permissibly denied the instant Request. *See* 65 P.S. § 67.901.

2. The OOR lacks jurisdiction over Item #2 of the Request, a fee waiver

The Requester argues that he requested a waiver of fees associated with the Request. 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:

[B]ecause 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. To the extent that the Requester is seeking a fee waiver, the OOR is without jurisdiction to consider that portion of the Request.

⁵ 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 \$ 100.00.” 65 P.S. § 67.1307(h). However, an agency is only permitted to require prepayment of duplication fees if the fees are estimated exceed \$ 100.00. *Id.*

3. The OOR declines to make a finding of bad faith

The Requester asserts that the Department acted in bad faith by denying him access to the requested records in the instant matter because, in his previous request, he asked for each of the six items to be considered separately for the charging of duplication and postage fees. The Requester further contends that the Department acted in bad faith because he cannot afford the previous \$64.45 fee, because he requested a waiver of any fee associated with the instant Request, and because the Department did not incur actual costs regarding the prior request.

While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith...”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$ 1,500 if an agency denied access to a public record in bad faith.”).

The Requester bears the burden of proving an agency committed bad faith by demonstrating the agency did not make a good faith effort to find and obtain responsive records before denying access. *Chambersburg Area Sch. Dist. v. Dorsey*, 97 A.3d. 1281 (Pa. Commw. Ct. 2014). In this instance, there is no evidence in the record supporting a finding of bad faith. Under the RTKL, finding of bad faith is appropriate where an agency refuses to comply with its statutory duties under the RTKL. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 2020 Pa. LEXIS 6488, at *20-21 (2020). Bad faith involves failing to perform a detailed search and review of records to ascertain if the requested material exists or if any exclusion may apply prior to denial of access. *Id.* In this instance, there is no evidence to show that the Department failed to ascertain that the requested material exists or that the Department failed to determine whether the requested

material was subject to access under the RTKL. *Id.* Rather, the Department denied access based on its belief that an outstanding balance was owed by the Requester in connection with a previous RTKL request. Accordingly, the record does not support a finding of bad faith in this matter.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Department is required to provide all responsive records within thirty days. 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. 65 P.S. § 67.1303. 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 30, 2021

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO, ESQ.

Sent to: Zachary Spada, NX7892 (via regular email only);
Ralph M. Salvia, Esq. (via email only);
Andrew Filkosky (via email only)

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).