



Requester that the prepayment of duplication fees associated with the Request was required. *See* 65 P.S. § 67.902(b); 65 P.S. § 67.1307(h). On September 6, 2017, the Department provided the Requester with an estimate of the duplication fees, which the Requester paid to the Department on September 12, 2017.<sup>1</sup>

On September 19, 2017, the Department purported to invoke a second thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b)(2). By correspondence dated September 22, 2017, the Requester objected to the subsequent extension.

On September 27, 2017, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On October 9, 2017, the Requester submitted a position statement, challenging the permissibility of the Department's second thirty-day extension and asserting that the requested records are public records under the RTKL.

On October 10, 2017, the Department submitted a position statement and a statement, made under the penalty of perjury, from Marita Kelley, the Deputy Director of the Department's Center for Local Government Services. On October 11, 2017, the Requester replied to the Department's submission.

## **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,

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<sup>1</sup> The Department estimated the duplication fees to be \$212.50.

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; however, 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, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this 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 the possession of a Commonwealth agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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)).

The Department asserts that it should be permitted to “take additional time for its collection and redaction of requested records after receipt of the [R]equester’s prepayment of duplication costs pursuant to Section 1307(h)” of the RTKL, particularly “where the [Department] has started processing the [R]equest but is unable to complete its response due to the size and scope of the [R]equest.” Section 902 of the RTKL lists seven reasons for which an agency may invoke an extension of time to respond to a records request. 65 P.S. § 67.902(a). Once an agency determines that it has a proper reason to extend the period to respond to a request, the agency is required to provide notice of that reason to the requester within five business days of its open records officer’s receipt of the request. 65 P.S. § 67.902(b)(1). “If the date that a response is expected to be provided is in excess of [thirty] days, following the five business days allowed for in [S]ection 901, the request for access shall be deemed denied unless *the requester has agreed in writing* to an extension to the date specified in the notice.” 65 P.S. § 67.902(b)(2) (emphasis added). Nothing in the RTKL permits an agency to unilaterally extend its time to respond to a request outside of the initial thirty-day extension permitted under Section 902(b)(1), even where the prepayment of fees is requested.<sup>2</sup> Because the Requester did not agree, in writing, to the subsequent extension

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<sup>2</sup> The Department also argues that “[t]he RTKL d[oes] not contemplate that a requester would unreasonably deny a request for additional time”; however, there is no indication that the Department asked the Requester for additional time to process the Request following his prepayment of fees. Rather, the Department attempted to unilaterally extend the response period for a second time on September 19, 2017, and the Requester objected to this purported extension three days later, on September 22, 2017.

invoked by the Department on September 19, 2017, the extension was invalid, and the Request was deemed denied on September 22, 2017.<sup>3</sup>

In its correspondence dated September 6, 2017,<sup>4</sup> the Department “reserve[d] the right” to assert any exemptions to production under the RTKL, such as, but not limited to, “the Department’s record exception found at [73 P.S. § 400.5106], the personal identification exception under §708(b)(6) of the RTKL, the deliberative process exemption found at §708(b)(10) of the RTKL, and the personal privacy and security protections under Article I Section I and VIII under the Pennsylvania Constitution.” Although the Department raises several prospective grounds for denying access to records in its correspondence, the Department does not identify the records responsive to the Request or the information alleged to be exempt from the records. Nor has the Department submitted evidence to support the application of these reasons for withholding access to the records. Furthermore, Ms. Kelley attests that the Department, as of October 6, 2017, “ha[s] not completed locating the full extent of responsive records due to the size, scope, and in some cases, the agency of the records requested.” Therefore, based upon the evidence provided, the Department has failed to meet its burden of proving that the requested records are exempt from disclosure under the RTKL. *See* 65 P.S. § 67.708(a).

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<sup>3</sup> In its position statement, the Department discusses the Commonwealth Court’s decision in *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638 (Pa. Commw. Ct. 2016), arguing that the facts in this case are distinguishable from those in *Bagwell* because the Department “did not delay its processing of the [R]equest and initiated its collection of records in good faith.” The Department further argues that an agency should be permitted to extend the time to respond to a request following its receipt of prepaid fees, so long as the agency continued to process the request in accordance with *Bagwell* and the request involves a voluminous amount of records. However, the decision in *Bagwell* does not grant an agency the ability to extend the response period outside of the initial thirty-day extension authorized in Section 902. Furthermore, the Court noted that “[a]n agency is not permitted to seek prepayment until it has reviewed the request, reviewed responsive records, and decided it is granting access to certain records reviewed.” 131 A.3d at 653. In other words, “an agency must assess [the] public status [of the records] before it has the right to demand prepayment under Section 1307(h) of the RTKL.” *Id.* The Department acknowledges that it had not, as of October 6, 2017, located and completed its review of all the records responsive to the Request.

<sup>4</sup> The Department explicitly states that this correspondence was not intended to be a final response to the Request.

## CONCLUSION

For the foregoing reasons, the Requester's 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 according to court rules 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>5</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: 20 October 2017**

*/s/ Joshua T. Young*

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