



# pennsylvania

OFFICE OF OPEN RECORDS  
**FINAL DETERMINATION**  
**ON REMAND**

<b>IN THE MATTER OF:</b>	:	
	:	
<b>MICHAEL FROEHLICH and</b>	:	
<b>COMMUNITY LEGAL SERVICES,</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2009-0892 R</b>
	:	
<b>DEPARTMENT OF PUBLIC</b>	:	
<b>WELFARE,</b>	:	
<b>Respondent</b>	:	

## INTRODUCTION

Michael Froehlich, on behalf of Community Legal Services, (collectively, the Requester”) filed a right-to-know request with the Department of Public Welfare (“DPW”) pursuant to the Right to Know Law (the “RTKL”), 65 P.S. §67.101, *et. seq.* seeking records and a fee waiver for duplication fees. DPW granted the request for records, but denied the fee-waiver request. The Requester appealed the denial of the fee waiver request to the OOR. The OOR determined that the decision to waive the duplication fee was in the agency's discretion and denied the appeal. The Requester appealed to the Commonwealth Court which remanded the matter back to the OOR so that DPW could articulate a non-discriminatory reason for denying the fee-waiver request. For the reasons set forth in this Final Determination, the OOR finds that DPW

failed to provide a non-discriminatory reason for denying the fee-waiver request and the appeal is **granted**.

### **FACTUAL BACKGROUND**

On September 17, 2009, the Requester submitted a request seeking records from DPW. The Requester also asked DPW to waive the duplication fees pursuant to Section 1307(f)(2) which provides that an agency “may waive the fees for duplication of a record, including, but not limited to when:...(2) the agency deems it is in the public interest to do so.” 65 P.S. § 67.1302(f). DPW granted the records request, but stated, “[w]e are unable to waive the fees for your request,” without explanation. The Requester appealed the denial of the fee waiver to the OOR. On December 16, 2009, the OOR issued a Final Determination finding that Section 1307(f) leaves the discretion to grant a fee waiver request to the agency. The Requester appealed the Final Determination to the Commonwealth Court as permitted by Section 1301(a) which was docketed as *Community Legal Services v. Department of Public Welfare*, 75 C.D. 2010.

In April 2010, the Commonwealth Court issued its decision in *Prison Legal News v. Office of Open Records*, 992 A.2d 942 (Pa. Cmwlth. 2010) finding that an agency “must articulate some non-discriminatory reason for not waiving the fee” if the requester sets forth an explanation as to why it believes a fee waiver is in the public interest. *Id.* at 948. The Court determined that “[o]nce there is some non-discriminatory reason given, there is no right to appeal that determination.” In *CLS v. DPW*, the DPW filed a “Motion for Summary Relief” asking the Commonwealth Court to remand the matter so that DPW could provide a written explanation for denying the Requester's fee waiver request in conformity with *Prison Legal News*. The Commonwealth Court entered an order

relinquishing its jurisdiction and remanded the matter to the OOR to remand to DPW to articulate a non-discriminatory reason for denying the fee waiver request.

On June 21, 2010, DPW provided the Requester with a written explanation for denying the fee waiver request. The Requester filed an appeal with the OOR. On July 29, 2010 DPW filed a Motion to Dismiss which was denied. The Requester asked that the OOR conduct a hearing and the request was denied. As directed by the Court's Order, the only issue considered in this appeal is whether DPW articulated a non-discriminatory reason for denying the fee waiver request.

Community Legal Services, Inc. ("CLS") is a nonprofit legal services law firm that provides free legal services to 18,000 low-income Philadelphia residents each year. CLS exists solely on grants from the government, foundations, and private individuals. CLS often requests "fair hearings" before the DPW on behalf of its clients. On September 17, 2009 CLS sought "[a]ll Departmental data on special allowance usage relied upon in completing the Regulatory Analysis Form accompany[ing] DPW's proposed reg[ulation]s #14-517." CLS made the request for records in response to final-omitted regulations that CLS determined would "significantly restrict the availability of welfare-to-work special allowances that [its] clients rely upon to obtain education, training, and employment." "DPW attempted to push through [] regulations in final-omitted form without the benefit of public comment. This regulatory change would have affected 155,673 Pennsylvanians and would have yielded a savings of over \$7 million per year. See Regulatory Analysis Form, pp. 4-5 (available at <http://www.irrc.state.pa.us/Regulations/RegInfo.cfm?IRRCNo=2784>.) Yet DPW insisted on attempting to implement this change will [sic] the benefit of public comment. The

Requester contends that the requested records are unpublished data that DPW relied upon “to justify the costs and usage of welfare-to-work special allowances.” The Requester asserts that a fee waiver is in the public interest for the following reasons:

1. CLS seeks to use the records to “shine a light on DPW's use of public funds by rooting out the justification for restricting work and education expenses for poor families moving from welfare to work.”

2. “[R]ecipients of welfare-to-work special allowances are, by definition, very low income....These families have very little extra money to spend on costs required to enforce their legal rights. In fact, DPW has acknowledged that costs related to the enforcement of a recipient's legal rights should be waived for low-income recipients in another context: DPW provides clients copies of their files without charge when the client files an administrative appeal. 55 Pa. Code §§ 275.3(a)(3), 275.4(a)(1)(v).

DPW's explanation for denying the fee waiver request is as follows:

1. “Like CLS, the [DPW] also serves the public. Also like CLS, DPW operates on a limited budget. Thus, in effect, I understood your request to ask that DPW subsidize CLS's operations (beyond the funding that it already provides) by shifting the record-duplication costs from CLS to DPW. In September of 2009, when you made your fee waiver request, the effects of the nationwide recession were already having a dramatic negative effect upon the Department's operations, including staff reductions, a firing freeze, and budget constraints and program cutbacks.”

2. “In light of these consideration, my determination was that any public interest that might be served by granting your fee-waiver request is outweighed by the public interest in protecting against the unnecessary reduction of resources available to this agency, for use in fulfilling its public functions.”

3. “[T]he financial circumstances of [DPW] have worsened, and the need for austerity on the part of DPW has increased.”

The Requester contends that it has demonstrated that a fee-waiver is in the public's best interest and that DPW “failed to evaluate the merits of the public interest fee wavier request.” It asserts that DPW “issued a generalized response

that it simply cannot afford it.” The Requester contends that DPW did not provide any evidence to support its position that it cannot afford to waive the fee. It argues that “DPW's apparent indigency alone is not a valid criterion to determine whether a request is in the public interest.” Further, it notes that “[s]urely the legislature knew that by permitting fees to be waived in the public interest, Commonwealth agencies would incur a cost.”

The Requester further asserts that the reason given was not non-discriminatory because DPW's decision was based “on the source of CLS's funding” which in part is DPW. It questions whether DPW would have granted the fee waiver request to another non-profit organization that did not receive funding from DPW.

DPW argues that it provides a non-discriminatory reason for denying the fee-waiver request. It points to the Pennsylvania Human Relations Act (PHRA) as support which states that a decision is discriminatory if it was determined on the basis of “race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin, [or] the use of a guide or support animal because of blindness, deafness or physical handicap....” 43 P.S. § 953. DPW notes that the Requester admits that “budgetary considerations” were the “sole factor” cited by DPW for denying the fee-waiver request. DPW contends that its obligation to make fee-waiver decisions on a “non-discriminatory” basis...”does not pertain to bases such as an entity's 'non-profit' or 'for-profit' status, or the entity's source of funding.”

DPW also argues that the Requester has no right to bring the instant appeal before the OOR because *Prison Legal News* restricts the OOR to the question of whether DPW's denial was “non-discriminatory” and not whether the denial was “wrong on the merits.” Further, DPW contends that the OOR has “no obligation (or authority) to consider whether, in exercising DPW's discretion regarding the fee-waiver request, DPW's [Agency Open Records Officer (“AORO”)] abused that discretion.”

On August 3, 2010, the OOR asked the Requester to provide the OOR with any evidence “demonstrating that the fee waiver request was denied for a discriminatory reason.” The Requester responded that it had no additional evidence and asked again for an evidentiary hearing. The Requester contends that DPW's standard “would never allow for a waiver, essentially repealing that provision enacted by the Legislature.” It proposes a narrow interpretation of non-discriminatory which “prohibits an agency from treating similarly situated requests and requester's differently for any reason.” The Requester challenged DPW's assertion that the definition of discriminatory is limited to the definition set forth in the PHRA and arguing that “discrimination” is defined as “the process by which two stimuli differing in some aspects are treated differently” quoting Merriam-Webster's Online Dictionary. See <http://merriam-webster.com/dictionary/discriminatory>. The Requester notes that “the General Assembly has prohibited dozens of different types of acts it deems as 'discriminatory.’”<sup>1</sup> which do not fall into the definition set forth by the PHRA.

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<sup>1</sup> The Requester provided the following examples of prohibited discriminatory acts. a) “Landlords may not discriminate in rental or other charges between tenants who subscribe to the

The OOR advised DPW that its June 21, 2010 response was “insufficient to determine whether the basis for denial was in fact a non-discriminatory reason.”

It asked DPW to respond to the following questions:

1. How may RTKL fee waiver requests have been made to DPW under the new law”
2. “Whether [DPW] has granted or denied any of the fee waiver requests submitted to DPW.”
3. “[I]f any fee waiver requests have been denied, please provide the grounds for such denials.”

On August 12, 2010 responded stating that “[n]othing in our letter of June 21 sets forth any discriminatory reason for denying [the Requester’s] fee-waiver request. Therefore, because [the Requester] has no right to maintain this appeal, we conclude that it would be inappropriate for DPW to provide the Office of Open Records with evidence of the sort described described in [the OOR 's August 3] letter.” DPW relies upon its reasoning set forth in its Brief in Support of its Motion to Dismiss.

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services of a CATV [cable television] system and those who do not.” 68 P.S. § 250.502-B; b) “Commonwealth agencies may not discriminate against suppliers of 'goods, supplies, equipment, materials and printing with recycled content.’” 53 P.S. § 4000.1504(a)(1); c) “Foster care parents may not be discriminated against 'for an appropriate inquiry regarding the decision or practices of an agency that affect a child residing with' them.” 11 P.S. § 2604(12); d) “Hotels and restaurants are prohibited from discriminating against 'any person wearing the uniform of the armed forces of the United States.’” 18 P.S. § 7323; e) “Employers are prohibited from discriminating against an employee who 'has been injured in the line of duty as a volunteer fireman,’ 43 P.S. § 1201.1, or 'refuses to operate a commercial motor vehicle which is not in compliance with ...existing safety laws,' 42 P.S. § 1431(a), or is a member of the National Guard, 51 P.S. § 7309(a), or whose wages are subsidized by the Department of Public Welfare. 42 P.S. § 405.5(d).”

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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.” 65 P.S. §67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* 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.*

DPW is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. §§67.102 and 301. Per the fee schedule set by the OOR, an agency may charge up to \$0.25 per page. 65 P.S. §67.1307(b)(1)(i); [http://openrecords.state.pa.us/portal/server.pt/community/open\\_records/4434/fees/481854](http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/fees/481854) (last accessed September 27, 2010). Pursuant to Section 1307(f), “[a]n agency may waive the fees for duplication of a record, including, but not limited to, when: ...(2) the agency deems it is in the public interest to do so.” If a requester seeks a fee-waiver and sets forth an explanation as to why it believes a fee waiver is in the public interest an agency “must articulate some non-discriminatory reason for not waiving the fee.” *Prison Legal News*, 992 A.2d at 948. “Once there is some non-discriminatory reason given, there is no right to appeal that determination.” *Id.* The Commonwealth Court does not set forth a definition of “non-discriminatory” in the context of a fee-waiver request denial.

The OOR has jurisdiction over this appeal because the Commonwealth Court vacated the OOR's prior Final Determination, relinquished its own jurisdiction and remanded the matter back to the OOR to remand to DPW to articulate a non-discriminatory reason. DPW provided a reason for declining to waive the fee. The Requester appealed to the OOR seeking, among other things, a final determination as to whether the reason given was non-discriminatory. The only issue considered on appeal is whether DPW's reason for denying the fee-waiver request is non-discriminatory. The Commonwealth Court's order did not require DPW to evaluate the merits of the public interest fee waiver request and therefore the OOR declines to consider that issue.

DPW denied the fee-waiver request noting budgetary concerns due to the economy and stating that “any public interest that might be served by granting your fee-waiver request is outweighed by the public interest in protecting against the unnecessary reduction of resources available to this agency, for use in fulfilling its public functions.” DPW argues that its basis for denying the fee-waiver request was not discriminatory as that term is defined by the PHRA. The OOR advised DPW that its response was insufficient to determine whether the reason for denial was “non-discriminatory.” The OOR asked DPW to support its assertion that budgetary concerns was a non-discriminatory reason by providing the number of fee-waiver requests it had received, its response to those requests, and the grounds set forth for denial of those requests. DPW declined to provide a response to the OOR's inquiry and rested on its position that it had provided a non-discriminatory reason.

Budgetary concerns could be a non-discriminatory reason where an agency always denies fee-waiver requests or denies fee-waiver requests where the cost of

duplication exceeds a particular dollar amount or has denied similar requests made during the same economic time frame. However, without supporting evidence showing that DPW had never granted a similar fee-waiver request or had never granted a fee-waiver where the fees exceed a certain dollar amount, DPW has failed to articulate a non-discriminatory reason for denying the fee-waiver request.

### **CONCLUSION**

For the foregoing reasons, the Requester's appeal is **granted**. DPW failed to set forth a non-discriminatory basis for denying the fee-waiver request and is required to provide the requested records at no cost to the Requester. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Commonwealth Court. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED: October 28, 2010**



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**APPEALS OFFICER  
AUDREY BUGLIONE, ESQUIRE**

**Sent to: Michael Froehlich, Esquire; Leonard Crumb, Esquire**



November 1, 2010

Leonard W. Crumb, Esquire  
Dept. of Public Welfare  
400 North Street  
Harrisburg, PA 17120-0225

Michael Froehlich  
Community Legal Services Inc.  
1424 Chestnut Street  
Philadelphia, PA 19102

**Re: Froehlich v. DPW, Docket AP 2009-0892 R (REMAND)**

Dear Parties:

I write in regard to the above appeal. On October 28, 2010 you were sent a copy of the Final Determination on Remand. The docket number, AP 2010-0781, in the caption was incorrect. The correct docket number is AP 2009-0892 R. Enclosed is a copy of the Final Determination on Remand reflecting the correct docket number. This change does not alter the appeal timeframes or issue date of the Final Determination on Remand which was October 28, 2010. No other changes have been made.

In addition, the original copy of the Final Determination on Remand, with the incorrect docket number, sent to Leonard Crumb was returned by the post office today for insufficient postage. This copy and the envelope are also enclosed with only a photocopy of the envelope to Mr. Froehlich for his records.

I apologize for any confusion this typographical error may have caused. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Audrey L. Buglione".

Audrey L. Buglione  
Appeals Officer



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DPW denied the fee-waiver request noting budgetary concerns due to the economy and stating that “any public interest that might be served by granting your fee-waiver request is outweighed by the public interest in protecting against the unnecessary reduction of resources available to this agency, for use in fulfilling its public functions.” DPW argues that its basis for denying the fee-waiver request was not discriminatory as that term is defined by the PHRA. The OOR advised DPW that its response was insufficient to determine whether the reason for denial was “non-discriminatory.” The OOR asked DPW to support its assertion that budgetary concerns was a non-discriminatory reason by providing the number of fee-waiver requests it had received, its response to those requests, and the grounds set forth for denial of those requests. DPW declined to provide a response to the OOR's inquiry and rested on its position that it had provided a non-discriminatory reason.

Budgetary concerns could be a non-discriminatory reason where an agency always denies fee-waiver requests or denies fee-waiver requests where the cost of

duplication exceeds a particular dollar amount or has denied similar requests made during the same economic time frame. However, without supporting evidence showing that DPW had never granted a similar fee-waiver request or had never granted a fee-waiver where the fees exceed a certain dollar amount, DPW has failed to articulate a non-discriminatory reason for denying the fee-waiver request.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**. DPW failed to set forth a non-discriminatory basis for denying the fee-waiver request and is required to provide the requested records at no cost to the Requester. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Commonwealth Court. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

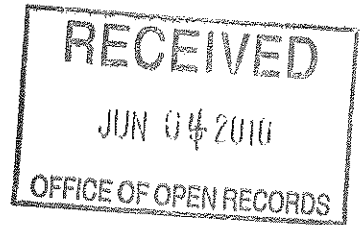
**FINAL DETERMINATION ISSUED AND MAILED: October 28, 2010**



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**APPEALS OFFICER  
AUDREY BUGLIONE, ESQUIRE**

**Sent to: Michael Froehlich, Esquire; Leonard Crumb, Esquire**



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Community Legal Services, Inc., :  
Petitioner :

v. :

Office of Open Records, :  
Respondent : No. 75 C.D. 2010

PER CURIAM

ORDER

NOW, June 3, 2010, upon consideration of the motion of intervenor Department of Public Welfare's motion for summary relief, which the Office of Open Records does not oppose and to which petitioner has not filed a response, the motion is granted. The final determination of the Office of Open Records dated December 16, 2009, is vacated and this matter is remanded for proceedings consistent with this Court's opinion in *Prison Legal News v. Office of Open Records and Department of Corrections v. Office of Open Records, Pa. Cmwlth.*, Nos. 969 and 997 C.D. 2009, filed April 8, 2010.

Argument previously set for Monday, June 21, 2010 in Courtroom 3002, Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, PA is cancelled.

Jurisdiction relinquished.

Certified from the Record

JUN 03 2010

and Order Exit



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>MICHAEL FROELICH,</b>	:	
<b>Complainant</b>	:	
<b>v.</b>	:	<b>Docket No. AP 2009-0892</b>
	:	
<b>PENNSYLVANIA DEPARTMENT</b>	:	
<b>OF PUBLIC WELFARE,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Mr. Michael Froelich (the “Requester”), staff attorney for Community Legal Services of Philadelphia (“CLS”), submitted a request to the Pennsylvania Department of Public Welfare (“DPW”), on behalf of CLS, seeking DPW data relied upon in completing the Regulatory Analysis Form accompanying DPW’s proposed regulations identified in the request pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The DPW granted the request but required prepayment for the records related to that request and a prior request that had been filled. The Requester asked that the duplication fee be waived and the DPW denied that request. The Requester filed an appeal with the Office of Open Records (“OOR”) challenging the denial of the waiver of fees.

For the reasons set forth in this Final Determination, the Requester’s appeal is **denied**.

## FACTUAL BACKGROUND

On September 17 2009, the Requester submitted a right-to-know request to the DPW seeking the DPW's "data on special allowance usage relied upon in completing the Regulatory Analysis Form accompanying DPW's proposed regulations in #14-S17." (the "Request"). On September 24, 2009 the DPW's open records officer, Kathi Bryan, issued an interim response advising that the Request would be granted, but that the DPW would not release the records without prepayment of \$80.00 (\$0.25 per page for duplication of 320 pages) for that request and \$45.25 for the cost of copies for a request previously filled. CLS agrees that it did not pay the \$45.25 owed for the prior filled request, but argues that that invoice "is not subject to this present appeal." The Requester asked the DPW to waive the \$80.00 fee as release of the documents was in the public interest. The DPW denied the request. On October 15, 2009 the Requester timely appealed to the OOR challenging the denial of his request for a waiver of fees.

In support of his appeal the Requester explained that Community Legal Services, Inc. ("CLS") is a nonprofit legal services law firm that provides free legal services to 18,000 low-income Philadelphia residents each year. CLS asserts that it needs the requested records in order to protect the interests of its clients who would be affected by the proposed regulations. Therefore, it argues providing the records at no cost would be in the public interest. CLS asserts that the DPW is required to "provide a reasonable justification for the denial [of the fee waiver]" so that "the OOR and, potentially Commonwealth Court, would have the ability to review DPW's decision-making." CLS points to Oregon's open records law which similarly allows a public body to waive or reduce fees for public interest reasons, citing O.R.S. § 192.440(5). The Oregon Court of Appeals determined that "the public body's discretion must be exercised within the range of lawful options available to it under the relevant law." In *Defense of Animals v. Or. Health Scis. Univ.*, 112 P.3d 336, 355 (Or. Ct. App. 2005). CLS acknowledges that the Oregon

court did not reach the issue as to whether the denial of the fee waiver request was reasonable because it found that the cost included inappropriate fees for review of the records. *Id.* at 353. However, CLS argues that the case provides guidance that a public body's denial of a fee waiver must be reasonable. *Id.* at 355. CLS also pointed to a Maryland case that it asserts interpreted a "similar denial under a nearly identical statute, [and] rejected the denial as 'arbitrary and capricious.'" See *Baltimore v. Burke*, 506 A.2d 683, 688 (Md. Ct. Spec. App. 1986) (citing Md. Code Ann., State Gov't § 10-621 ("The official custodian may waive a fee under this section if . . . [a]fter consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.")).

On October 27, 2009, Leonard W. Crumb, Esquire, Senior Assistant Counsel for the DPW, responded that the DPW could have withheld the records as they were exempt by section 708(b)(10) as internal predecisional records. However, the DPW chose to grant the request. The DPW first asserts that as to the fee waiver, the decision rests with the agency alone and is a "non-reviewable discretionary decision," citing *Sheldon v. Pennsylvania State Police*, OOR Dkt. AP 2009-0532 and *Repetski v. North Lebanon Township*, OOR Dkt. AP 2009-0792. The DPW argues that section 1101(a) of the RTKL limits the OOR's responsibility to "considering denials of access" and not to the review of agencies' discretionary determinations." The DPW asserts that access means either direct access, or the provision of copies, citing 65 P.S. § 67.701(a).

The DPW argues that even if the decision is reviewable, CLS failed to set forth adequate grounds to support a fee waiver because 1) it never asserted that it could not pay the \$80.00, 2) the requested regulations had been withdrawn and thus do not have public interest impact, and 3) the grounds advanced by CLS are so general they could be advanced as grounds for a blanket waiver of all duplication fees now and in the future. Finally, the DPW points out that its fee

policy includes a waiver of fees for duplication of 20 pages or less and that the request at issue comprised of 320 pages.

### LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The DPW is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.301. Records of an agency are presumed to be “public” unless: (1) the record is exempt under Section 708(b); (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. Although the DPW, on appeal, asserts that it could have withheld the records as exempt under 65 P.S. §67.708(b)(10), the DPW granted the request and does not contend that it is withdrawing that grant. Therefore, the issue on appeal is not whether the records are public, but whether the DPW improperly denied the fee waiver request.

#### **1. Charging a Fee Impermissible Under the RTKL is Constructively a Denial of Access and the OOR has Jurisdiction to Review Agency Decisions.**

The OOR is required to “[a]ssign appeals officers to review appeals of *decisions* by Commonwealth agencies or local agencies.” 65 P.S. § 67.1310(a)(5) (emphasis added). A requester is permitted to appeal when a “written request for access to a record is denied or deemed denied.” 65 P.S. § 67.1101(a)(1). The appeal is required to address, among other things, “any grounds stated by the agency for *delaying* or denying the request.” *Id.* (emphasis added). When an agency grants a request, but requires payment for access, it is constructively denying or delaying access until the fee is paid. The requester must be able to challenge the agency’s decision regarding the fee if it believes the fee or the agency’s interpretation of the fee provisions of the RTKL is inaccurate. To find that the OOR has no jurisdiction to hear appeals of this nature leaves the requester with no recourse under the RTKL to challenge the agency’s

decision. Therefore, because the DPW constructively denied access to the records by denying the fee waiver request, the appeal is properly before the OOR.

## **2. The DPW Properly Exercised Its Discretion to Deny the Fee Waiver Request.**

CLS argues that the agency erred by not providing a reviewable explanation for the denial of the fee waiver request. The RTKL contains detailed provisions regarding the issue of fees. Certain provisions leave no room for agency discretion, e.g. “Fees for postage may not exceed the actual cost of mailing.” *Id.* at 1307(a); Fees for duplication . . . “shall be established: (i) by the Office of Open Records, for Commonwealth and local agencies. . .” *Id.* at 1307(b)(1)(i). Other provisions provide for agency discretion, but define the parameters within which that discretion can be exercised, e.g. “reasonable market value of the same or closely related data sets,” *Id.* at 1307(b)(4); “user fee for enhanced electronic access must be reasonable, must be approved by the Office of Open Records and may not be established with the intent or effect of excluding persons for access to records. . .” *Id.* at 1307(e). Still other provisions provide for broader parameters for the exercise of agency discretion, e.g. “may impose reasonable fees for official certification,” *Id.* at 1307(c); “necessarily incurred costs . . . must be reasonable,” *Id.* at 1307(g). The fee provision at issue in the instant matter, however, leaves the exercise of discretion entirely up to the agency. The fee waiver provision permits an agency to waive a fee, but does not require it. CLS asks that the OOR consider the interpretation of other states regarding their fee waiver provisions. However, to do so is unnecessary as the Legislative intent is clear. Unlike other provisions, the fee waiver provision does not provide any guidance as to how an agency, the OOR or a court is to determine if the public interest warrants the waiver. Rather, by express language, it grants the decision-making authority solely to the agency: “An agency may waive the fees for duplication of a record, including, but not limited to,

when: . . . (2) *the agency* deems it is in the public interest to do so.” 65 P.S. § 67.1307(f) (emphasis added). Therefore, the decision whether to waive the fees rests solely with the DPW. Therefore, the DPW’s decision not to waive the fee for the requested records is not improper .

**3. An Agency May Require Payment of Past Due Balances for Previously Provided Records Prior to Allowing Access to Records the Subject of a Current Request.**

The final issue on appeal is whether the DPW can withhold the requested records pending payment of the current fee, \$80.00 and the past due fee of \$45.25 for records provided in response to an earlier request. Section 902 of the RTKL allows an agency to extend the deadline to respond to a request for access if “the requester refuses to pay applicable fees authorized by this act.” 65 P.S. § 67.902(a)(6). The agency must send written notice to the requester with “an estimate of the applicable fees owed when the record becomes available.” 65 P.S. §67.902(b)(1), (2). In the instant matter, the DPW advised the requester that access would be delayed until the requester paid the \$45.25 for the past due request and the \$80.00 for the records subject to the current request. CLS did not contest that it had received the earlier requested records and had not paid the \$45.25. It never challenged that the \$45.25 was an improper fee. Rather, it sought a waiver of that fee and the current fee. For the reasons discussed above, the DPW permissibly denied the fee waiver request. Therefore, the fees owed are “applicable fees authorized by [the RTKL]” and the DPW is permitted to receive payment prior to releasing any records.

**CONCLUSION**

For the foregoing reasons, the Requester’s appeal is **denied**. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either 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. This Final Determination shall be placed on the website at:

<http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: December 16, 2009**

A handwritten signature in black ink, appearing to read 'Audrey Buglione', written in a cursive style.

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**APPEALS OFFICER  
AUDREY BUGLIONE, ESQ.**

Sent to: Leonard Crumb, Esquire; Michael Froelich, Esquire