



conflict with Harry Cancelmi, Esq. of the Public Defender's Office ("Denial"). Co-counsel for the County, David Pollock, responded to the Requester the same day by e-mail that he believed she would be entitled to the record once personal information is redacted, and advised that Attorney Bigley had an independent contractor relationship with the County.

The County supplemented the record with an affidavit from Gene Lee, Chief Clerk for the County, regarding the County's non-possession, a docket sheet showing the appointment of Attorney Bigley, and an affidavit of Public Defender Cancelmi that he provided the entire file to Attorney Bigley. The County relies upon *Maley v. Greene County Public Defender's Office* ("PDO"), OOR Dkt. AP 2009-0863 which addressed the PDO's non-possession of the record.

The OOR asked the County for additional submissions regarding the independent contractor relationship that County Counsel Pollack advised existed with Attorney Bigley.

In response, the County supplemented the record with two additional affidavits from the same county employees, and a letter from Counsel Cowen. Cowen represented that she has been assured there is no contract with Attorney Bigley, nor is there County control over him. She confirmed that neither the Office of the Public Defender, nor the Office of the Chief Clerk has a copy of the Application. The Affidavit from Harry Cancelmi advised that there is no contract for the representation of Ms. Moore with Attorney Bigley, and at the time of his appointment as Ms. Moore's counsel, he was not employed by nor in a contractual relationship with the County. Gene Lee attested that the Office of the Chief Clerk also did not have any contract with Attorney Bigley.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. Records of a local agency are presumed to be "public" unless the record is: (1) exempt under Section 708(b); (2) protected by a privilege; or (3) exempt from

disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. However, the County contends that it has no responsive records to provide.

The County submitted affidavits to establish its lack of possession of the Application and explained it does not have it because that would have been part of the file provided to Attorney Bigley for Ms. Moore's representation. The County represented that it did not maintain a copy of any of the file contents, including the Application. The two affidavits from the County are sufficient to establish that fact, and thus, the County has established non-possession of the record.

With regard to any alleged control over the Application, the County further clarified that it did not have any contractual relationship with Attorney Bigley, contrary to the representation made by County Counsel Pollack, and submitted additional affidavits as to the lack of a contractual relationship or control as appointed counsel. As decided in *Maley v. PDO, supra*, there is no basis for finding County control over the files held by Attorney Bigley, and they cannot be reached through Section 506(d) of the RTKL. Based upon the affidavits submitted in this Appeal and the holding in *Maley v. PDO*, the County satisfied its duty and need not take further action.

The Requester also asked the County to provide her with an affidavit to confirm that the Application exists. The RTKL is clear that an agency cannot be required to create a document in response to a right-to-know request, 65 P.S. §67.705, and the County has no duty to do so here.

### **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 Greene 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 according to court rules. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: January 26, 2010**

A handwritten signature in cursive script that reads "Lucinda Glinn".

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**LUCINDA GLINN, ESQ.  
APPEALS OFFICER**

Sent to: Darlene Maley; Cheryl Cowen, Esq. for County