



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
KIMBERLY BORLAND,	:	
Requester	:	
	:	
v.	:	Docket No. AP 2016-0497
	:	
CITY OF WILKES-BARRE,	:	
Respondent	:	
	:	
and	:	
	:	
WILKES-BARRE AREA SCHOOL	:	
DISTRICT,	:	
Direct Interest Participant	:	

INTRODUCTION

Kimberly Borland, Esq. (“Requester”) submitted a request (“Request”) to the City of Wilkes-Barre (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records regarding a Wilkes-Barre Area School District (“District”) construction project. The City purportedly granted the Request, providing two pages of responsive records. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part and dismissed as moot in part**, and the City is required to take further action as directed.

FACTUAL BACKGROUND

On February 8, 2016, the Request was filed, seeking:

All applications, with all attachments, for permits by Panzitta Enterprises, and/or subcontractors of Panzitta Enterprises, and by or on behalf of the Wilkes-Barre Area School District for or related to any work performed at or about the Mackin School, 13 Hillard Street, Wilkes-Barre, for all periods from January 1, 2014 through the present, and all permits issued.

On February 16, 2016, the City purportedly granted the Request, providing two pages of responsive records.

On March 8, 2016, the Requester filed an appeal with the OOR, asserting that not all of the responsive records were provided. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On March 10, 2016, the City notified the District of the instant appeal.

On March 18, 2016, the City submitted a position statement and provided additional responsive records regarding the requested City permits and contracts. The City also stated that it was not providing the requested building plans based upon the District's objection to the release of these records. Additionally, the City provided the sworn affidavit of Attilio Frati, the City's Operations Director.

On March 18, 2016, the District submitted a request to participate in this matter, claiming that the Request is seeking plans and specifications regarding a renovation project that was recently completed by the District. The District also submitted a position statement, arguing that the requested plans and specifications are exempt from disclosure because disclosure would threaten the personal security of an individual, as well as the physical security of a building. *See* 65 P.S. § 67.708(b)(1)(ii); 65 P.S. § 67.708(b)(3)(iii). The District further argues that the requested plans and specifications are exempt from disclosure because they involve confidential proprietary information. *See* 65 P.S. § 67.708(b)(11). In support of its position, the District also submitted sworn affidavits from Kyle Kinsman, whose firm is the lead architectural firm for the District, as well as from Brian Lavan, the District's Director of Police Operations and Security,

and from Patrick Endler, whose architectural firm is a joint member of the District's design/consulting team. Based on the information submitted, the OOR accepted the District as a direct interest participant on March 23, 2016.

Due to a similar pending appeal involving the same parties, at OOR Dkt. AP 2016-0120, the OOR extended the submission deadline in this matter, and the Requester granted the OOR an extension of time to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1). On May 19, 2016, the District submitted the supplemental sworn affidavit of Kyle Kinsman, who attests to the number of drawings for the schools. Attached to Mr. Kinsman's affidavit is a Table of Contents for the specifications and the final construction drawings of the Mackin School project. The Requester did not submit any evidence on appeal.

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 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 City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local 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). 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 City provided responsive records during the appeal

During the course of the appeal, the City provided the Requester with 239 pages of additional responsive records. As such, the appeal as to the records provided during the appeal is dismissed as moot.

2. The requested building plans and specifications are not exempt under Section 708(b)(1)(ii) of the RTKL

The District argues that the requested records are exempt from public access under Section 708(b)(1)(ii), which exempts from disclosure a record that “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corr.* OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

In support of its position that disclosure of the requested plans would threaten personal security, the District submitted the sworn affidavit of Kyle Kinsman, Architect for the District’s design team, who attests the following:

3. I have over 28 years’ experience in the design and construction of school facilities and my firm is currently the lead architectural firm for the Design Team of the Wilkes-Barre Area School District ... and I am intimately familiar with the Plans and Specifications
7. The public release of school building plans and specifications submitted in the course of the project design and PlanCon process creates an immediate and direct safety/security risk to the students, staff and facilities of [the District] or any other school entity whose documents might be released publicly.
8. When school buildings are designed, the building plans and specifications often consist of thousands of pages of material and contain numerous critical features: (1) location and dimensions of rooms; (2) location of entrances and exits; (3) access points to roof and subfloor area; (4) building site details; and (5) column support and load-bearing wall supports.

9. In addition, the plans and specifications also include important security details such as: (1) exact type of, and location of, all structural systems; (2) description of the type and location of mechanical systems; (3) description of the type and location of electrical systems; (4) description of the type and location of plumbing and wastewater systems; (5) description of the type and location of safety and security systems, including locations and operation of security cameras, and fire detection and suppression systems; and (6) description of the kinds of data and communication systems and the location of the hardware and connectivity of those systems; (7) any areas of shatterproof glass, whether exterior or interior; (8) the location of drop-down security gates and securable zones throughout the building in the event of a security situation. These systems are critical to maintaining or protecting the health and safety of the individuals within the school facility. These systems provide the life-maintaining water, air and heat for occupants of buildings. The plans and specifications also identify the storage of flammables and other potential explosives in the building or on the site; and describe the methods of sanitary sewage disposal.
10. The threat of domestic violence, international terrorism, and other types of violence against Pennsylvania school buildings that daily house millions of occupants is very real. An individual or terrorist organization with access to the information in the Mackin Project or High School Project Plans and Specifications could use this information to place explosive charges in order to maximize destruction and loss of life.
11. Each of the occupants of public school facilities are potential targets of domestic violence, domestic and international terrorism and other types of violence that have become national trends.
12. Knowledge of the school facility itself greatly assists the perpetrators of school violence in carrying out their horrific plans that always seem to catch the local community off-guard.
13. To assist in the prevention of further tragic incidents, all public access to floor and site plans for state-funded school construction projects should be strictly prohibited.

The District also submitted the sworn affidavit of Brian Lavan, Director of Police Operations and Security for the District, who attests the following:

2. I have been a School Resource Officer for [the District] since March 3, 2000. Prior to that I was a police officer for the City of Wilkes-Barre for eighteen years. Combined I have over thirty-four years in police and public safety experience....

4. As explained more fully below, the public release of school building plans and specification creates an immediate and direct safety and security risk of the students, staff, and facilities of any school entity whose documents might be released publicly.
5. Any action that establishes precedent for the release of the information contained in school building plans and specifications affect the future safety and security of students, staff, and visitors of the [District].
6. Public access to school building plans may represent the single greatest asset to one who would seek to inflict the greatest amount of harm to the largest number of students and staff.
7. School plan documents containing blueprints or drawings can yield insights into the structural integrity of the building as well as other structures used in escape or evacuation, such as stairways and elevators.
8. Illicit uses for plans of transport lines for flammable or hazardous liquids and noxious or explosive gases – otherwise part of a safe heating and cooling system, are also obvious risks to the safety of students, staff and building structures.
9. Public access to escape and evacuation routes open the possibility of secondary attacks.

While a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof under the RTKL, *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), conclusory statements are not sufficient to meet an agency's burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Here, the District has not offered any evidence other than conclusory statements to demonstrate that disclosure of the requested plans and specifications “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). Rather, Mr. Kinsman attests that there are “thousands of pages of material” and then lists general categories of building plans and

specifications. The District has described serious general concerns but does not address how disclosure of any specific records within these overall categories of records threaten the personal security of an individual. Furthermore, Mr. Kinsman’s affidavit does not meet the established standard of showing that disclosure of the records would result in a “reasonable likelihood” of “substantial and demonstrable risk.” Therefore, the District has not met its burden of proving that release of the requested records would threaten the personal security of an individual. *See* 65 P.S. § 67.708(a)(1); *see also Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency’s conclusory affidavit was insufficient to sustain its burden of proof); *Borland v. Wilkes-Barre Area Sch. Dist.*, OOR Dkt. AP 2016-0120, 2016 PA O.O.R.D. LEXIS 887.

3. The requested building plans and specifications are not exempt from disclosure under Section 708(b)(3)(iii) of the RTKL

The District argues that the requested building plans and specifications are also exempt from access under Section 708(b)(3)(iii) of the RTKL, which exempts from disclosure, a record that:

the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include ... building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

65 P.S. § 67.708(b)(3)(iii); *see Crockett v. SEPTA*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under this

exemption); *but see Moss v. Londonberry Twp.*, OOR Dkt. AP 2009-0995, 2009 PA O.O.R.D. LEXIS 724 (holding that records related to the Three Mile Island nuclear power plant were not subject to public access). In order for this exemption to apply, “the disclosure of” the records — rather than the records themselves — must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including buildings and infrastructure. *See* 65 P.S. § 67.708(b)(3).

In support of this exemption, Mr. Kinsman further attests as follows:

14. The planning and construction documents that are necessary to design and build Pennsylvania’s public schools and administrative facilities provide extremely detailed information about the project buildings and their sites.
15. The school building plans and specifications for the Mackin project and those being developed for the new high school project include not only information regarding the location of rooms, entrances and exits, access to roof and subfloor areas, possible escape routes, etc., but also includes important security information such as the exact type of, and location of, all structural, mechanical, electrical, plumbing, data and communication systems.
16. Even the specific means of supplying life-maintaining water, air, and heat, as well as methods of sanitary sewage disposal systems, storage of flammables and other potential explosives, are also documented in the smallest and largest scale, for all on-and off-site systems.
17. These documents also indicate the critical absence of important system protections. This alone could reveal a facilities “Achilles heel” during an attack. Clearly, information this detailed does not need to be accessed by the building inhabitants or those who may harbor ill-will against them.

The District argues that this matter is similar to that of *Knauss v. Unionville-Chadds Ford School District*, where a school district established that disclosure of construction plans submitted to the Department of Education were exempt from disclosure pursuant to Sections 708(b)(1) and 708(b)(3) of the RTKL. OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238. In *Knauss*, the OOR found that the affidavits submitted by the school district “address disclosure of the Plans at issue in great length.”

In *Werner v. School District of Pittsburgh*, a school district submitted an affidavit containing conclusory statements that did not contain any substantive information, or establish how release of the requested records would be reasonably likely to endanger the safety and physical security of the school infrastructure under Section 708(b)(3) of the RTKL. OOR Dkt. AP 2015-0478, 2015 PA O.O.R.D. LEXIS 507. In *Werner*, the OOR held that while “the School District presented evidence that records may reveal the location of pipes, walls, lighting fixtures, exits and other information,” there was no evidence that the disclosure of these locations — the majority of which may already be publically known — would be reasonably likely to jeopardize the safety or physical security of any school district building or structure. *Id.*

Here, like in *Werner*, the District has submitted conclusory affidavits which describe serious general concerns but has not sufficiently established how disclosure of the requested records, including the locations that Mr. Kinsman attests to, “creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system.” 65 P.S. § 67.708(b)(3)(iii). As such, the District has not demonstrated that disclosure of the requested plans would threaten the security of a building. *See* 65 P.S. § 67.708(a)(1).

4. The requested building plans and specifications are not exempt from disclosure under Section 708(b)(11) of the RTKL

The District next argues that the requested plans and specifications are confidential proprietary information. Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). Confidential proprietary information is defined by the RTKL, as follows:

Commercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

65 P.S. § 67.102. An agency must establish that both elements of this two-part test are met in order for the exemption to apply. *See Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *see also Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011) (involving confidential proprietary information).

In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.”

Id.

In support of its argument, Mr. Kinsman attests as follows:

18. As a secondary matter, requiring [the District] to copy these planning and construction documents could create serious legal issues regarding the ownership of the intellectual property that these documents represent. When the creator of the documents, such as the Architect, Engineer, Hazardous Materials Consultant, etc., retains ownership of the copyright of the intellectual property, which is the case here, it could be illegal for [the District] to copy the documents and distribute them to others.
19. Additionally, the plans for the new high school project remain in the earliest development stages and are not even in a form to be submitted to PDE as part of the PlanCon process and this work in progress remains the intellectual property of the Design Team and is not property of the [District].

Additionally, Patrick Endler, licensed architect and Vice President of Borton-Lawson, a firm that is part of the design and consulting team for the District, attests that the requested records are “work-product and proprietary and the intellectual property of Borton-Lawson.” Mr.

Endler further attests that the plans are in the earliest development stages, are subject to change and are not property of the District.

Here, the District has not submitted evidence to establish the requisite “substantial harm to the [company’s] competitive position” necessary in order to establish that the requested records are exempt as confidential proprietary information. Consequently, the District has not demonstrated that the requested plans and specifications are confidential proprietary information. *See* 65 P.S. § 67.708(a)(1).

5. The City has demonstrated that no other responsive records exist in its possession, custody or control

The City argues that other than the records provided and the withheld building plans and specifications, no additional responsive records exist in the City’s possession, custody or control. In support of its position, the City presents the sworn affidavit of Attilio Frati, the City’s Operations Director, who attests to that he “directed [C]ity employees to perform a thorough review for any and all records which would be responsive to the [Request].” Operations Director Frati further attests that other than the documents provided and the withheld plans and specifications, the City has no other documents that are responsive to the Request. Based on the evidence provided, the City has met its burden of proving that other than the withheld building plans and specifications, it has provided the Requester with all responsive records in its possession, custody or control.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part, denied in part and dismissed as moot in part**, and the City 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 Luzerne 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 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 19, 2016

/s/ Magdalene C. Zeppos

APPEALS OFFICER
MAGDALENE C. ZEPPOS, ESQ.

Sent to: Kimberly Borland, Esq. (via e-mail only);
Raymond Wendolowski, Esq. (via e-mail only);
Timothy Henry, Esq. (via e-mail only)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).