



**FINAL DETERMINATION**

**IN THE MATTER OF**

**LEONARD PERRONE,  
Requester**

**v.**

**MONTGOMERY COUNTY,  
Respondent**

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**Docket No: AP 2022-2199**

**FACTUAL BACKGROUND**

On August 9, 2022, Leonard Perrone (“Requester”) submitted a request (“Request”) to Montgomery County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[T]o review and potentially copy the full application(s) for funding assistance submitted to the Montgomery County, Office of Housing and Community Development by or on behalf of The Walters Group. This record [R]equest pertains to The Walters Group’s proposed Pennbrook Parkway project (Cornerstone project) in Upper Gwynedd Township.

This [R]equest includes the applications for funding which resulted in an award of approx. \$925,000.00 from the Federal Home Program HUD. As well as the funding approval that resulted in an award of \$375,000.00 from Pa. Housing Reinvestment source.

On September 13, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the County denied the Request, arguing that the records are exempt from disclosure

as bid proposals prior to the award of a contract under Section 708(b)(26) of the RTKL. 65 P.S. § 67.708(b)(26).

On September 21, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 12, 2022, the County submitted the attestations of Attorney Joshua Stein (“Stein Attestation”), the County’s Solicitor, and Kayleigh Silver (“Silver Attestation”), Administrator for the Office of Housing and Community Development (“OHCD”) for the County. The County claims that “no contract exists between the OHCD and/or Montgomery County and the Walter’s Group proposed Pennbrook Parkway Project (Cornerstone Project) in Upper Gwynedd Township.” Stein Attestation, ¶6. The County further argues that “[t]he full application for funding assistance on behalf of the Waters group is exempt financial information which has been requested in an invitation for a bid or request for proposals to demonstrate the bidder’s economic capability and is facially exempt under Section 708(b)(26) of the RTKL.” *Id.*, ¶12.

### **LEGAL ANALYSIS**

The County a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local 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. As an agency subject to the RTKL, the County is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence

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<sup>1</sup> The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

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 County argues that the Request was properly denied because the “County has neither awarded a Contract contemplated for this Solicitation, nor has the County rejected all proposals.” The County cites to *United HealthCare of Pa. v. Pa. Dep’t of Human Svcs.*, 187 A.3d 1046 (Pa. Commw. Ct. 2018) in support of its argument that the award of a contract for purposes of Section 708(b)(26) means the execution of the contract, not the selection of offerors.

Section 708(b)(26) of the RTKL exempts from disclosure:

A proposal pertaining to *agency* procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability; or the identity of members, notes and other records of an agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. § 67.708(b)(26) (emphasis added).

In support of its argument, the Stein Attestation states that “[t]he County has neither awarded a Contract contemplated for this Solicitation, nor has the County rejected all proposals.”

Stein Attestation, ¶10. The Silver Attestation further attests the following:

1. The [OHCD] for the County of Montgomery receives annual [Department of Housing and Urban Development (“HUD”)] entitlement grants each year: HOME, CDBG, and ESG.
2. OHCD then publicly advertises and solicits Requests for Proposal to non-profits, developers, and other prospective contractors to apply for these grant monies, along with other local funding, to help support the same activities the grants are intended to fund.

3. The application for affordable housing development for HOME grant as well as for the Housing Reinvestment Partnership money, is a specific application from the Federal Agency, the [HUD].
4. These preliminary applications/bids are reviewed by the OHCD, and [Ms. Silver] attended a public meeting to request approval from the Commissioners to preliminarily approve advertising of the preliminary funding decisions/awards for a 30 day period for public comment. This request was granted at the June 2, 2022 Board of Commissioners meeting with Resolution No. 22.C-248.
5. At the July 21, 2022, Board of Commissioners meeting, the Commissioners approved final funding decisions so that the OHCD could submit the annual action plan to HUD, which is a grant requirement that outlines how OHCD will be spending HOME, CDBG, and ESG funding.
6. Once HUD approves the proposed spending plan, the funding can be utilized and contracted out to the Bidders/Contractors beginning in October 2022.
7. Specifically, for the HOME grant funded contracts, due to funding constraints, contracts are only executed when all of the grant and HUD funding and required approvals are completed in order to begin construction on the Project.
8. No Contract with the Walters Group's proposed Pennbrook Parkway project in Upper Gwynedd Township exists with the County, and the full application for funding assistance on behalf of the Waters Group is exempt financial information which has been requested in an invitation for a bid or request for proposals to demonstrate the bidder's economic capability and is facially exempt under Section 708(b)(26) of the RTKL.

Similarly, the Stein attestation states that “[w]hile the County has received bid documents from the Waters Group, no Contract with The Walters Group’s proposed Pennbrook Parkway project (Cornerstone project) in Upper Gwynedd Township has been executed. Stein Attestation, ¶9. Furthermore, “[t]he County has neither awarded a Contract contemplated for this Solicitation, nor has the County rejected all proposals. *Id.*, ¶10.

Under the RTKL, an 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. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

In the absence of any evidence that the County has acted in bad faith, or that the contract has been executed, “the averments in the [attestations] 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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The County argues that it “has neither awarded a Contract contemplated for this Solicitation, nor has the County rejected all proposals.” However, the County misconstrues the exception. The County is not procuring nor disposing of supplies, services or construction as contemplated by the exemption; instead, the County “advertises and solicits Requests for Proposal to non-profits, developers, and other prospective contractors to apply for these grant monies, along with other local funding, to help support the same activities the grants are intended to fund.” Silver Attestation, ¶8. In other words, the County is receiving grant monies from HUD and passing that grant money on to “non-profits, developers, and other prospective contractors.” Section 708(b)(26) is limited to situations where an *agency* receives “[a] proposal pertaining to *agency* procurement or disposal of supplies, services or construction....” The purpose of the RTKL is 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). As a result, Section 708(b)(26) must be narrowly construed to find that it was not intended to shield those contracts and funding that do not apply to an agency procurement or disposal of supplies, services or construction. *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, \*16 (Pa. Commw. Ct. 2012) (“The RTKL must be construed to maximize access to government records”). Therefore, based on the evidence

provided, the County has not proven that the requested records are exempt from access pursuant to Section 708(b)(26) of the RTKL.

### **CONCLUSION**

For the foregoing reasons, the appeal is **granted**, and the County 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 Montgomery 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 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 29, 2022**

*/s/ Lyle Hartranft*

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APPEALS OFFICER  
LYLE HARTRANFT, ESQ.

Sent via email to: Leonard Perrone; Joshua Stein, Esq.; Laruen Raikowski

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<sup>2</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).