



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
FORD TURNER,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2022-2521
	:	
PENNSYLVANIA DEPARTMENT OF	:	
GENERAL SERVICES,	:	
Respondent	:	

FACTUAL BACKGROUND

On September 20, 2022, Ford Turner (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of General Services (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

A - Complete proposals received by the Department in response to Solicitation for Proposals #95192, associated with the planned sale of 195.167 acres known as the Allentown State Hospital property.

B - All correspondence between the department and organizations that responded to the solicitation, including any correspondence that shows reasons the proposals were deemed non-conforming or were not accepted.

C - Any other Department of General Services documents that show the reasons the proposals were deemed non-conforming or were not accepted.

On October 27, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Department denied the Request, stating:

... The proposals are exempt under Section 708(b)(26) as “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 agency proposal evaluation committees". 65 P.S. §§ 67.708(b)(26). At this time, the agency has not yet awarded a contract with respect to the purchase/redevelopment of the Allentown State Hospital property. Consequently, your request for copies of rejected proposals submitted in response to this solicitation is denied in accordance with the RTKL.

On November 3, 2022, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 15, 2022, the Department submitted a position statement reiterating its grounds for denial. The Department states:

As stated in the response to [Requester] dated October 27, 2022, the proposals received are exempt under Section 708(b)(26) because the award of the contract never occurred and there was no rejection of all the bids. The proposals that were received were deemed "non-responsive" proposals. Under the Procurement Code, a responsive proposal is defined as "a proposal which conforms in all material aspects to the requirements and criteria in the request for proposals." 62 Pa. C.S. § 103. When the proposals are opened by the issuing office, the proposals are checked for responsiveness. Responsiveness is a threshold issue. If a proposal is deemed responsive, it is then forwarded to an evaluation committee for review and possible award or rejection. It is at the end of this stage of the process where if all bids were rejected, then all of the rejected bids would be available as public records and not exempt under the Right to Know Law (RTKL).

[The Department] is following the plain language of the RTKL. Because none of the proposals were responsive, none of the proposals could be evaluated. Since there were no proposals evaluated, there were no proposals that were awarded or rejected. Being found non-responsive and being rejected are two different concepts. As stated above, responsiveness is a threshold issue. If the proposal cannot meet the minimum requirements of the solicitation, the proposal will not be reviewed. A rejection only comes after the responsive proposal is reviewed for the merits of the proposal by the evaluation committee.

In this case, two proposals were received. However, both proposals were

¹ 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).").

found to be non-responsive and did not qualify to be reviewed by the evaluation committee for either approval or rejection. Both proposals lacked the material aspects to the requirements and criteria in the solicitation. As a result, no proposals were submitted to the evaluation committee. Because the proposals were not considered, the proposals were not rejected by the evaluation committee. The solicitation did not result in an award and no bids were rejected.

Concerning the request for correspondence between [the Department] and organizations that responded to the solicitation, the organizations were contacted through email indicating that the proposals were found to be non-responsive. These emails would be exempt under the Section 708(b)(10)(i)(A) of the RTKL. These emails would reflect the internal, predecisional deliberations of the agency. The agency, through the issuing office, reviewed the proposals and found the proposals to be non-responsive before any decision was made on the award.

See Department Submission, November 15, 2022. On November 18, 2022, the Requester submitted a position statement arguing that:

This solicitation process is complete. There will be no contract awarded as a result of this solicitation, because Gov. Tom Wolf on Nov. 3 signed into law Act 100 of 2022, which repealed Act 71 of 2019 - the legislation that spelled out the process for competitive bidding that resulted in the two proposals at issue here. Further, Act 100 calls for a direct conveyance of the property (the proposed purchase of which was the subject of the two proposals) to a specific purchaser.

See Requester Submission, November 18, 2022.

On July 2, 2019, Governor Wolf signed Act 71, which is an act authorizing and directing the Department to grant and convey certain lands and improvements situated in the cities of Allentown and Bethlehem through a competitive solicitation process. Act 71 provides as follows:

Section 1. Conveyances in City of Allentown and City of Bethlehem.

(a) Authorization.--The Department of General Services, with the approval of the Governor, is authorized and directed on behalf of the Commonwealth of Pennsylvania to grant and convey the following tracts of land together with any improvements thereon, known as the former Allentown State Hospital, situate in the City of Allentown and City of Bethlehem, Lehigh County, through a competitive solicitation for proposal process to evaluate and select a buyer based upon best value and return on investment post-demolition, which, in addition to price, may include the proposed use of the property post-demolition, job creation, return to the property tax rolls and other criteria specified in the solicitation documents. A competitive solicitation committee shall be established to review proposals and recommend a buyer. The competitive solicitation committee shall be

comprised of the Secretary of General Services or their designee, the member of the Senate in whose district the majority of the property is located or their designee, the member of the House of Representatives in whose district the majority of the property is located or their designee and an official representative of the municipality in which the majority of the property is located or its designee.

(b) Property description.--The property to be conveyed under subsection (a) consists of approximately 195.167 acres of land and improvements located thereon . . .

LOT #1 . . .

CONTAINING 165.846-Acres. BEING shown as Lot #1 on the Final Minor Subdivision Plan of the Allentown State Hospital prepared by the City of Allentown Department of Public Works, Drawing #06-005, dated July 20, 2007, last revised March 25, 2009. . . .

LOT #2 . . .

CONTAINING 29.321-Acres. BEING shown as Lot #2 on the Final Minor Subdivision Plan of the Allentown State Hospital prepared by the City of Allentown Department of Public Works, Drawing #06-005, dated July 20, 2007, last revised March 25, 2009. . . .

(c) Condition precedent to property disposition.--Prior to the competitive solicitation process under subsection (a) and notwithstanding any other provision of law, the Department of General Services is authorized and directed to demolish all buildings and structures located on the property, with the exception of a Commonwealth-owned air monitoring station, utilizing funds appropriated in section 3(7)(ii)(A) of the act of October 30, 2017 (P.L.831, No.52), known as the Capital Budget Project Itemization Act of 2017-2018. The Department of General Services shall use the competitive sealed proposal method of procurement authorized by 62 Pa.C.S. § 513 (relating to competitive sealed proposals) to enter into a design/build contract to undertake the demolition of the buildings and structures. . . .

On January 19, 2022, the Department advertised a solicitation for proposals to purchase the 195.167 acre property known as the former Allentown State Hospital (hereinafter “Property”).² This solicitation included the requirements for the submission of the proposals and indicated that proposals were due by May 18, 2022. The Department received two proposals and the Department determined that both proposals were non-responsive and thus did not qualify to be reviewed by

² <http://www.emarketplace.state.pa.us/Solicitations.aspx?SID=95192>

the evaluation committee. The Department determined both proposals lacked the material aspects to the requirements and criteria in the solicitation.

On November 3, 2022, Governor Wolf signed Act 100³ which immediately repealed Act 71 and in Section 4 conveyed the Property as follows:

Section 4. Conveyance in the City of Allentown and the City of Bethlehem, Lehigh County.

(a) Authorization.--The Department of General Services, with the approval of the Governor, is hereby authorized and directed on behalf of the Commonwealth of Pennsylvania to grant and convey, for \$5,500,000, the following tracts of land together with any buildings, structures or improvements thereon, situate in the City of Allentown and the City of Bethlehem, Lehigh County, to City Center Investment Corp.

(b) Property description.--The property to be conveyed pursuant to subsection (a) consists of approximately 195.167 acres of land and improvements located thereon
...

BEING shown as Lot #1 on the Final Minor Subdivision Plan of the Allentown State Hospital prepared by the City of Allentown Department of Public Works, Drawing #06-005, dated July 20, 2007, last revised March 25, 2009. . . .

BEING shown as Lot #2 on the Final Minor Subdivision Plan of the Allentown State Hospital prepared by the City of Allentown Department of Public Works, Drawing #06-005, dated July 20, 2007, last revised March 25, 2009. . . .

(h) Costs and fees.--All costs and fees incurred by the Department of General Services shall be borne by the grantee.

(i) Alternate disposition.--In the event that the conveyance authorized under subsection (a) is not completed within two years of the effective date of this subsection, the authority to convey the property under this section shall expire and the property may be disposed of in accordance with section 2405-A⁴ of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929.

(j) Proceeds.--The proceeds from the sale shall be deposited into the General Fund.

³ <https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2022&sessInd=0&act=100>

⁴ <https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1929&sessInd=0&smthLwInd=0&act=175&chpt=24A&sctn=5&subsectn=0>

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 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. As an agency subject to the RTKL, the Department 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 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 Department failed to prove the requested records are exempt under Section 708(b)(26)

Subpart A of the Request seeks:

A - Complete proposals received by the Department in response to Solicitation for Proposals #95192, associated with the planned sale of 195.167 acres known as the Allentown State Hospital property.

The Department argues that “[t]he solicitation did not result in an award and no bids were rejected”; thus, the two proposals received during the solicitation process are exempt from disclosure under Section 708(b)(26). The Requester argues that the solicitation process is completed, no contract was awarded, and because of Act 100 of 2022, the Department will never award a contract for solicitation number 95192; thus, to exempt the two proposals in perpetuity is a perverse outcome and contrary to the intent of the RTKL.

Pennsylvania case law supports the contention that a proposal may be “rejected” prior to reaching the evaluation committee. *See Pepco Energy Servs. v. Dep’t of Gen. Servs.*, 49 A.3d 488, 490 (Pa. Commw. Ct. 2012) (noting that when a proposal contains “conditional language,” thereby

rendering it “non-responsive”, that proposal was “rejected” by the agency); *Midasco, Inc. v. Pa. Tpk. Comm’n*, 813 A.2d 942, 943 (Pa. Commw. Ct. 2002) (noting that two proposals were “rejected” prior to any analysis for responsiveness or responsibility). Furthermore, a review of solicitation number 95192 and the attached documents is instructive regarding whether a non-responsive proposal can indeed be “rejected.” The attachment posted on the solicitation advertisement entitled “Allentown State Hospital Solicitation for Proposals No. 95192”⁵ states in multiple places that unsigned proposals will be rejected. The solicitation advertisement attachment further states:

Proposers must submit a complete proposal. Failure to include any of the required information or forms will delay evaluation of the proposal and may, at the Commonwealth’s sole discretion, result in its rejection.

Rejection of a proposal for failing to sign a proposal is clearly a rejection for non-responsiveness to the solicitation conditions and not a rejection of a responsive proposal after evaluation by the committee. Thus, in this context, the Department’s argument that non-responsiveness and being rejected are two different concepts is without merit.

In light of the above, the OOR is constrained to agree with the Requester. The Property is clearly no longer in the competitive bidding process. The purpose of Section 708(b)(26) is to protect competitive bidding and this exemption ceases to apply once the competitive bidding process is over. *UnitedHealthcare of Pa., Inc. v. Pa. Dep’t of Human Servs.*, 187 A.3d 1046, 1054 (Pa. Commw. Ct. 2018). “Section 708(b)(26) temporarily exempts offerors’ proposals from disclosure until a contract is awarded or the procurement is canceled.” *See id.* at 1054 (emphasis added); *see also, Commonwealth v. Walsh/Granite JV*, 149 A.3d 425, 430 (Pa. Commw. Ct. 2016); *Greco v. Dep’t of Gen. Servs.*, 173 A.3d 1259, 2017 Pa. Commw. Unpub. LEXIS 485, slip

⁵http://www.emarketplace.state.pa.us/FileDownload.aspx?file=95192/Solicitation_17.pdf&OriginalFileName=Allentown%20State%20Hospital%20Solicitation%20for%20Proposals%20No.%2095192.pdf

op. at 6-8 (Pa. Commw. Ct. 2017). Under the Department’s interpretation of Section 708(b)(26), because the Department never reviewed and “rejected” the two bids and was subsequently divested of authority to award a contract for the Property, this “temporary” exemption is rendered permanent. Such an interpretation is untenable considering the purpose of Section 708(b)(26) is to protect competitive bidding. Because all of the proposals were rejected, the Property subject to the solicitation for proposal process has been sold, and the competitive bidding process is over, Section 708(b)(26) does not exempt the “proposals received by the Department in response to Solicitation for Proposals #95192, associated with the planned sale of 195.167 acres known as the Allentown State Hospital property.” *See Ali v. Phila. City Planning Comm'n*, 125 A.3d 92, 110-11 (Pa. Commw. Ct. 2015) (finding that the Section (b)(26) exemption no longer applies and the proposals submitted for award of contract are subject to full disclosure where the record is clear that the contract at issue was awarded).

2. The Department failed to prove the requested records are exempt under Section 708(b)(10)

Subparts B and C of the Request seek:

B - All correspondence between the department and organizations that responded to the solicitation, including any correspondence that shows reasons the proposals were deemed non-conforming or were not accepted.

C - Any other Department of General Services documents that show the reasons the proposals were deemed non-conforming or were not accepted.

The Department argues that records responsive to subparts B and C are exempt under Section 708(b)(10)(i)(A)—predecisional deliberations. The Department specifically argues:

Concerning the request for correspondence between DGS and organizations that responded to the solicitation, the organizations were contacted through email indicating that the proposals were found to be non-responsive. These emails would be exempt under the Section 708(b)(10)(i)(A) of the RTKL. These emails would reflect the internal, predecisional deliberations of the agency. The agency, through the issuing office, reviewed the proposals and found the proposals to be non-responsive before any decision was made on the award.

Section 708(b)(10)(i)(A) exempts a record:

[T]hat reflects . . . [t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

See 65 P.S. § 67.708(b)(10)(i)(A). In order to establish the applicability of the predecisional deliberations exception, the Department is required to show that the information is: (1) internal; (2) prior to agency decision or course of action; and (3) deliberative in character. *Payne v. Pa. Dep't of Health*, 240 A.3d 221, 226 (Pa. Commw. Ct. 2020); *Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 61 (Pa. Cmwlth. 2016). Records satisfy the “internal” element when they are maintained internal to one agency or among governmental agencies. *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 658. Records are not “internal” under Section 708(b)(10) if they are sent to or from a party that is not an employee or official of an entity that is defined as an agency under the RTKL. *Chester Water Auth. v. Pa. Dep't of Cmty. and Econ. Dev.*, 249 A.3d 1106, 1114 (Pa. 2021). Thus, communications with third parties, such as outside consultants and independent contractors, are not “internal,” and are therefore, not subject to the exemption. *Id.* The term “deliberation” is generally defined as “[t]he act of carefully considering issues and options before making a decision or taking some action. . . .” BLACK’S LAW DICTIONARY 492 (9th ed. 2009); see also *Heintzelman v. Pa. Dep't of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, aff'd No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014). To demonstrate that a record is deliberative in character, an agency must “submit evidence of specific facts showing how the information relates to deliberation of a particular decision.” *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 379 (Pa. Commw. Ct. 2013). “Only

. . . confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice [are] protected as ‘deliberative.’” *Id.* at 378. Factual information is not deliberative in character. *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 386-388 (Pa. Commw. Ct. 2014).

In the instant case, the Department provided no evidence as to the search conducted or if any responsive records were identified. Furthermore, the Department did not submit any affidavits or evidence which would demonstrate how the responsive records are internal, predecisional, or deliberative. Subpart B seeks “[a]ll correspondence between the department and organizations that responded to the solicitation” By its own terms, records responsive to Subpart B would not satisfy the “internal” element of Section 708(b)(10). Accordingly, the Department did not meet its burden to prove the responsive records to Subparts B and C of the Request are exempt under Section 708(b)(10)(i)(A). *See Scolforo v. Off. of the Governor*, 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”); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (holding that conclusory arguments that merely cite an exemption are insufficient).

CONCLUSION

For the foregoing reasons, the 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 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.⁶ This Final

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 27, 2022

/s/ Catherine R. Hecker

APPEALS OFFICER
CATHERINE R. HECKER, ESQ.

Sent to: Ford Turner (via portal);
Troy Thompson (via portal)