



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>CHARLES CARLSON,</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2013-1820</b>
	:	
<b>HOUSING AUTHORITY OF THE CITY</b>	:	
<b>OF PITTSBURGH,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Charles Carlson, (“Requester”) submitted a request (“Request”) to the Housing Authority of the City of Pittsburgh (“Authority”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), seeking a copy of a particular federal grant application submitted to the U.S. Department of Housing and Urban Development (“HUD”). The Authority granted the Requester access to inspect the record; however, the Authority refused to permit the Requester to copy the record, arguing that the application process is highly competitive and the release of the record would jeopardize the Authority’s funding. For the reasons set forth in this Final Determination, the appeal is **granted** and the Authority is required to take further action as directed.

**FACTUAL BACKGROUND**

On September 12, 2013, the Request was filed by e-mail, seeking a copy of the final application and any addenda of the Larimer Choice Neighborhood application. On the same day,

Michelle Jackson, Open Records Officer (“ORO”) of the Authority, informed the Requester that she was forwarding the Request to its “Mod and Dev Department.” On September 17, 2013, the Authority informed the Requester that a copy of the application would be available for review once the location was finalized. However, on September 18, 2013, the Authority revoked the offer to review the application, claiming that the Authority is prohibiting the distribution of the application until it is fully reviewed by HUD.

On September 30, 2013, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Authority to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On October 9, 2013, the Authority provided a position statement, verified by its General Counsel, supporting its denial on the grounds that the disclosure of the record would result in the loss of federal funding, and would reveal the internal, predecisional deliberations of the Authority. *See* 65 P.S. § 67.708(b)(1)(i); 65 P.S. § 67.708(b)(10)(iii). In addition, the Authority argued that, since the Requester failed to submit the approved records request form to the Authority’s Open Records Officer, the e-mailed Request did not trigger a response under RTKL, thus rendering the appeal premature.<sup>1</sup>

### **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,

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<sup>1</sup> On October 15, 2013, the Requester submitted additional information. As this information was received after the record closed, it was not considered. *See* 65 P.S. § 67.1102(b)(3) (appeals officers shall rule on procedural matters on the basis of justice, fairness and the expeditiously resolution of the dispute).

scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* No. 20 MAP 2011, 2013 Pa. LEXIS 1800 (Pa. Aug. 20, 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.” 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.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Authority 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 existence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep’t of Transp. V. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

### **1. The appeal is not premature**

The Authority argues that because the Request was not submitted on the Authority’s approved request form, the Authority had no obligation to respond to the Request. The RTKL provides that a requester may submit a request in person, by mail, by e-mail, or by facsimile. 65 P.S. § 67.703. The RTKL does not require the use of any specific form, but an agency may promulgate regulations and policies to govern its administration of the RTKL. 65 P.S. § 67.504(a). The OOR has held that “[a]n agency that has a posted policy requiring use of a form may deny access to the requested records where the request fails to use the required form, provided the agency timely responds to the Request notifying the Requester of the policy.” *See Mezzacappa v. West Easton Borough*, OOR Dkt. AP 2012-1605, 2012 PA O.O.R.D. LEXIS 1284.

Here, upon the receipt of the Request, the ORO responded to the Requester immediately, and forwarded the Request to the department within the Authority handling the requested application. The Authority initially granted the Request by allowing the Requester to inspect the record; however, the Authority later denied access. Furthermore, the Authority has not submitted any evidence that showing that the Authority has a policy requiring the use of any particular form, or that the Requester was notified of any such policy. Consequently, the OOR finds that the Request is a valid request for records. *See Commonwealth v. Office of Open Records*, 48 A.3d 503 (Pa. Commw. Ct. 2012), *appeal granted* No. 504 MAL 2013, 2013 Pa. LEXIS 2033 (Pa. 2013).

**2. The record is not exempt from disclosure under 65 P.S. § 67.708(b)(1)(i)**

The Authority argues that disclosure of the application would result in the loss of federal funding, and, therefore, the record is exempt under Section 708(b)(1)(i) of the RTKL. Section 708(b)(1)(i) exempts from disclosure a record which “would result in the loss of Federal or State funds by an agency or the Commonwealth.” 65 P.S. § 67.708(b)(1)(i). The Authority claims that the funds that it is seeking are to be awarded by HUD in 2014, and disclosure of the contents of the application prior to any award of grant funding creates a substantial risk that the Authority could lose federal funding because other public housing agencies in contention for these funds could use the information to gain a competitive advantage. While the Authority believes that the disclosure of the requested record would result in the loss of federal funding, the Authority has proffered no evidence that it will *actually* lose any federal funding. *See Brown v. Dep’t of Cons. & Nat. Resrcs.*, OOR Dkt. AP 2009-0222, 2009 PA O.O.R.D. LEXIS 42 (disclosure of ATV registrants would result in the loss of federal funding where the Transportation Equity specifically withholds funding for disclosure of motor vehicle records). Accordingly, the Authority has not met its burden of proving the requested application is exempt from disclosure under Section 708(b)(1)(i) of the RTKL.

**3. The record is not exempt from disclosure under 65 P.S. § 67.708(b)(10)**

The Authority also argues the requested application is a record that would reveal the internal, predecisional deliberations of the Authority. Section 708(b)(10) of the RTKL exempts from disclosure “[t]he internal, predecisional deliberations of an agency ....” 65 P.S. § 67.708(b)(10)(i)(A). The OOR has consistently held that an agency must show three (3) elements to substantiate this exception: (1) the deliberations reflected are “internal” to the agency; (2) the deliberations reflected are predecisional, i.e., before a decision on an action; and

(3) the contents are deliberative in character, i.e., pertaining to proposed action and/or policy-making. See *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *PHFA v. Sansoni*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375. Section 708(b)(10)(iii) of the RTKL contains an exception to the exemption, and states that record is not exempt from public disclosure if it reflects “a written or Internet application or other document that has been submitted to request Commonwealth funds.” 65 P.S. § 67.708(b)(10)(iii).

The Authority argues that since there is an absence of a reference to “federal” funds, under Section 708(b)(10)(iii), the RTKL was not intended to make federal grant applications subject to public disclosure. Notwithstanding the foregoing, however, the exception to the exemption is applicable only if an agency can demonstrate that the exemption applies to the requested record. Here, the Authority provides no evidence that the application is internal, predecisional or deliberative. To the contrary, it is undisputed that the application has been submitted to HUD,<sup>2</sup> thus, destroying any internal aspect of the record. Therefore, because the Authority has not shown that the record is subject to the foregoing exemption, the fact that the application relates to federal, as opposed to Commonwealth, funding is irrelevant. Consequently, the Authority has not met its burden of proving the application is exempt from disclosure under Section 708(b)(10) of the RTKL.

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted** and the Authority is required to provide the requested application within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Allegheny County Court of Common Pleas. 65 P.S. § 67.1302. All parties

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<sup>2</sup> HUD is not an “agency” as defined by the RTKL. See 65 P.S. § 67.102.

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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: October 30, 2013



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APPEALS OFFICER  
BINA SINGH, ESQ.

Sent to: Charles Carlson (via e-mail only);  
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