



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
NATALIE JACKSON AND IBEW LOCAL	:
5,	:
Requester	:
	:
v.	:
	:
	:
PENNSYLVANIA DEPARTMENT OF	:
TRANSPORTATION,	:
Respondent	:
	:
and	:
	:
BLINK NETWORK, LLC,	:
Direct Interest Participant	:

Docket No: AP 2023-2278

FACTUAL BACKGROUND

On August 15, 2023, Natalie Jackson and IBEW Local 5 (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Transportation (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[P]roposals/contracts receiving conditional awards for the PA National Electric Vehicle Infrastructure [(“NEVI”)] round 1 for the following counties:

Allegheny[,] Bedford[,] Blair[,] Butler[,] Center[,] Clearfield[,] Greene[,] Venango[,] Washington[,] Westmoreland

On September 21, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Department partially granted the Request and provided responsive records. The

Department redacted records that contained personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), and confidential proprietary information (“CPI”) and trade secrets, 65 P.S. § 67.708(b)(11). Additionally, the Department argued that trade secrets are exempt from access under the Pennsylvania Uniform Trade Secret Act (“PAUTSA”), 12 Pa. C.S. §§ 5301-5308.¹ As such, the records responsive to Item 1 of the Request were redacted in their entirety.

On September 22, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.² Specifically, the Requester argues that the Department did not meet its burden under the RTKL in regard to the redactions contained within the responsive records. 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 October 4, 2023, Blink Network, LLC (“Blink”), submitted a Request to Participate in the appeal pursuant to 65 P.S. § 67.1101(c). Blink submitted a copy of the redacted Single Application. On the same day, the OOR granted the request to participate. To date, no further evidentiary submissions were made by Blink.³

On November 1, 2023, the Department submitted a position statement, reiterating its grounds for denial of the Request. In support of its position, the Department also submitted an attestation made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications

¹ The Pennsylvania Supreme Court has held that the RTKL’s trade secrets exemption supplants the general application of PAUTSA to exempt records from public access under the RTKL. *See Pa. Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19, 31-32 (Pa. 2015).

² 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).”).

³ These redacted records were provided to the Requester with the Department’s final response.

to authorities, authored by Derrick Herrmann (“Herrmann Attestation”), the Department’s Highway Administration Program Manager 2 and Chief of Transformational Technologies.⁴

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 factfinder ... 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 had not proven the personal identification redactions were appropriate

The Department argues that it properly redacted the names and email addresses of nongovernmental employee from the responsive records. The Department relies on *Pa. Dep’t of Conservation and Natural Res. v. Office of Open Records*, (“*DCNR*”) in support of its position. 1 A.3d 929 (Pa. Commw. Ct. 2010). In *DCNR*, the Commonwealth Court held that certified payroll records are financial records that are subject to disclosure under the RTKL. *Id.* at 939-41. Section 708(c) of the RTKL permits agencies to redact certain information from financial records. *Id.* at 942-43 (citing 65 P.S. § 67.708(c)). In *DCNR*, the Court held that the agencies did not abuse their discretion under Section 708(c) in redacting names and/or home addresses from certified payroll

⁴ On October 16, 2023, the OOR denied the Department’s request to consolidate the pending appeal with OOR Dkt. AP 2023-2466.

records to “shield the personal nature of the financial information in the certified payroll records, which is protected under Section 708(b)(6)(i)(A)” of the RTKL. *Id.* at 942. In a footnote, the Court noted that its holding was “limited to ... the certified records of private employers doing business with [public] agencies - and the propriety of the Agencies’ redactions to protect the personal financial information of private citizens.” *Id.* at n.22. Section 708(b)(6)(i)(A) of the RTKL expressly exempts from disclosure “[a] record containing all or part of a person’s...personal financial information; home, cellular or personal telephone numbers; *personal email address*...” 65 P.S. § 67.708(b)(6)(i)(A) (emphasis added).

In support of the Department’s position, the Herrmann Attestation indicates, in relevant part, the following:

8. The employee names set forth in the proposals by the vendors are nongovernmental employees.
9. Some of these records of nongovernmental employees contain, in addition to an employee name, an email address.

Under the RTKL, a sworn affidavit or statement made under the 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, “the averments in the [attestation] 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 *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The Department’s reliance on *DCNR* is misplaced. The holding in *DCNR* allows for the protection of personal financial information of private citizens, not for the blanket redaction of names and email addresses. Further, the Department has provided no evidence as to whether the

email addresses are private or public, as required by Section 708(b)(6). *See* 65 P.S. § 67.708(b)(6)(i)(A). Accordingly, the Department has not met its burden of proving that the personal identification information redactions made to the responsive records were justified.

2. The Department has not demonstrated that the responsive records contain trade secrets or confidential, proprietary information

The Department argues that the remainder of the redacted material, if disclosed, would reveal trade secrets or confidential proprietary information. Section 708(b)(11) of the RTKL provides an exemption for a record “that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 708(b)(11). These terms are defined in Section 102 of the RTKL as follows:

“Confidential proprietary information.” 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 [entity] that submitted the information.

“Trade secret.” Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use;
and
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102 (emphasis added). An agency must establish that both elements of this two-part test are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). 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), *rev'd in part*, *Pa. Dep't of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). “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.*

Pennsylvania courts confer “trade secret” status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Smith v. Pa. Dep't of Env'tl. Prot.*, 161 A.3d 1049, 1064 (Pa. Commw. Ct. 2017). The most important indicia for determining whether information constitutes a trade secret are “substantial secrecy and competitive value to the owner.” *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 136 (Pa. Commw. Ct. 2019), *aff'd in part*, 255 A.3d 385 (Pa. 2021) (citing *West Chester Univ. of Pa. v. Schackner (Bravo)*, 124 A.3d 382 (Pa. Commw. Ct. 2015)).

In support of the Department’s position, the Herrmann Attestation further indicates, in relevant part, the following:

1. As a Highway Administration Program Manager 2, Chief Transformational Technologies, my job duties include managing and overseeing [the Department’s] Transformational Technologies program[,] which includes oversight of projects and activities related to emerging technologies[,] such as automated vehicles, connected vehicles, electric vehicles, smart city applications, personal delivery devices, and broadband deployment.
2. Additionally...I am the custodian of records for the [NEVI] Program, located in the Department’s Transportation Strategic Development Implementation Office.

...

4. It is my understanding that on September 26, 2023, the Department's Office of Chief Counsel (OCC) provided notice of this appeal to Universal EV LLC, BP Products North America, Inc., Blink Network LLC, Love's Travel Stops & Country Stores, 6406 Truck Plaza LLC, Applegreen Electric PA LLC, and TA Operating LLC because the responsive records may contain trade secrets or [CPI]. The letters sent to the potentially interested third parties, provides notice of an opportunity to participate in the appeal. Copies of the third-party notice letters are attached as Exhibit "A."

5. The records responsive to the Request include proposals submitted to the Department by these third parties and contain redactions that the third parties have requested.

6. Even before this RTKL [R]equest existed, the vendors provided the Department with redacted versions of their application materials claiming that either portions or all of their application materials included CPI and trade secrets.

7. The proposals are redacted as follows:

a. 2002305025056 (BP Products North America, Inc.)

- i. The application contains redacted team member names and email addresses, redacted project budget and budget narrative.
- ii. Section 7.2 contains redactions of cost breakdown and cost narrative.
- iii. Section 11(B) redacts team member names and contact information.
- iv. Section 11 (c) redacts financial capabilities.

b. 202305025061 (BP Products North America, Inc.)

- i. The application contains redacted team member names and email addresses, redacted budget, and budget narrative.
- ii. Section 7.2 contains redactions of cost breakdown and cost narrative.
- iii. Section 11(B) redacts team member names and contact information.
- iv. Section 11 (c) redacts financial capabilities.

c. 202305035077 (6406 Truck Plaza LLC)

- i. Page 10 of the Exhibit – Chart titled Power Block Breaker Selection is redacted in its entirety.

d. 202305045198 (Love's Travel Stops & Country Stores)

i. The application contains redactions of the project budget and budget narrative.

e. 202305055275 (TA Operating LLC)

i. The application redacts the project budget, project narrative, number of travel centers, company financial structure, general description of approach, team approach, innovative technology.

ii. The entire installation manual is redacted.

iii. The BTC Dimensions are redacted.

iv. BTCP Standard Limited Product Warranty is redacted.

v. Next generation specifications sheet is redacted.

vi. Project schedule is redacted.

vii. Investor Presentation Q3 is redacted.

f. 202305055284 (TA Operating LLC)

i. The application redacts the project budget, project narrative, number of travel centers, company financial structure, general description of approach, team approach, innovative technology.

ii. The entire installation manual is redacted.

iii. The BTC Dimensions are redacted.

iv. BTCP Standard Limited Product Warranty is redacted.

v. Next generation specifications sheet is redacted.

vi. Project schedule is redacted.

vii. Investor Presentation Q3 is redacted.

g. 202305055294 (Blink Network LLC)

i. Lobbying activities, construction timeline, pricing proposal, maintenance, costs, letter of intent, funding, project costs, grant amount, charger coordinates, cybersecurity, duration of commitment, team members and their contact information, budget narrative, project budget and project site locations are redacted.

h. 202305055332 (Applegreen Electric PA LLC)

i. Project budget is redacted.

ii. Description of site when operational, partnership and relationship information, PA EV Hub proposed EV site plan, hardware suppliers, experts, and consultants, candidate site information, budget pricing and cost match, letters of support and proposal information.

i. 202305045130 (Universal EV LLC)

i. Redacted the entire proposal.

...

11. The third parties mentioned in paragraph 3⁵ above have informed the Department, during the processing of the Request that the records responsive to the Request include information classified as trade secrets and CPI because the records contain commercial and financial information, which is privileged or confidential and if disclosed, would cause substantial harm to the competitive position of the vendor because it would allow competitors to ascertain the vendor's business plans and strategies.

12. The records related to CPI or trade secrets contain information that the Vendor[s] believe should not be subject to public access and is information that can be extracted and pricing information that can be reverse engineered.

13. The records related to CPI or trade secrets contain information, that derives independent economic value, which is not generally known or readily ascertainable and obtaining the information could result in persons obtaining economic value from its disclosure.

14. The project budget numbers, financial capabilities, specifications site plans, etc. utilized in a competitive EV market is proprietary by its very nature.

15. In the hands of a competitor, the details submitted by the vendors could be used to reverse engineer grant proposal information.

16. The above referenced information has independent economic value.

Where a third party makes a submission and marks it as confidential, proprietary information or as containing a trade secret, an agency may raise Section 708(b)(11) to avoid prejudicing the rights of those third parties. *Davis v. Pa. Dep't of Health*, OOR Dkt. AP 2023-0332, 2023 PA O.O.R.D. LEXIS 524 (explaining that the agency may raise the exemption to protect the rights of third parties). However, an agency is not permitted to delegate its responsibility to determine whether a record is exempt to a third party entirely. *McKelvey v. Pa. Dep't of Health*, 255 A.3d 385, 404 (Pa. 2021) ("the language of the RTKL is plain and unambiguous, placing the burden and responsibility on the governmental agency to independently

⁵ This appears to be an error, as the parties referenced are listed in paragraph 4.

evaluate and discern the validity of claimed exemptions to disclosure in the first instance, including those made by third parties.”). Here, the Department provided notice of this appeal to all third parties. *See* Herrmann Attestation ¶ 4; *see also* Herrmann Attestation Exhibit A.

Third parties are permitted to raise and defend exemptions to protect their information. *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (en banc); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638 (Pa. Commw. Ct. 2016); *Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In this case, none of the affected third parties participated on appeal or submitted evidence or argument in favor of exemption. Thus, without this evidence, the OOR is constrained to find that no records may be redacted or withheld under Section 708(b)(11) of the RTKL. *See e.g. Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 137-138 (Pa. Commw. Ct. 2019), *appeal denied by* 223 A.3d 675 (Pa. 2020) (redactions were not supported by the evidence where the third party did not prove the confidential nature of or describe the content of its redactions).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Department is required to provide unredacted records, as set forth above, to the Requester 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; 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 65 P.S. § 67.1303. All documents or communications following the issuance of this

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

Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 21, 2023

/s/ Bandy L. Jarosz

BANDY L. JAROSZ, ESQ.
APPEALS OFFICER

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