



FINAL DETERMINATION

IN THE MATTER OF

**JOHN HEINTZ,
Requester**

v.

**HARRISBURG AREA COMMUNITY
COLLEGE,
Respondent**

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Docket No: AP 2024-0483

FACTUAL BACKGROUND

On December 18, 2023, John Heintz (“Requester”) submitted a request (“Request”) to the Harrisburg Area Community College (“HACC”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq*, seeking the following records “related to RFP 24-01 for Consulting Services – Ellucian Banner”:

1. Complete Bid Documents: All submitted bid documents from each bidder, including attachments, appendices, and supplementary materials.
2. Summary and Analysis of Bids: Documents, presentations, or reports presented to decision-makers summarizing and analyzing the bidders and their bids.
3. Final Awarded Contract: The complete contract awarded as a result of RFP 24-01, including all terms, conditions, scopes of services, deliverables, and pricing details.
4. Pricing Information on All Bids: Detailed breakdowns of the service pricing proposed by each bidder, including any unit pricing and total contract values.
5. Evaluation Criteria and Decision Matrix: Specific evaluation criteria, decision matrix, scoring rubrics, and notes used for assessing and comparing the bids.
6. Meeting Minutes and Internal Communications: Minutes of meetings, emails,

memos, and any internal communications related to the evaluation and decision-making process for RFP 24-01.

7. Vendor Communications: Correspondence between [HACC] and all bidders during the RFP process, including Q&A sessions, clarifications, and responses.
8. Decision Rationale and Award Justification: Any documentation or communication that explains the rationale behind the decision to award the contract to the selected bidder, including any comparative advantage or unique qualifications noted.

On February 13, 2024, following an extension during which to respond,¹ 65 P.S. § 67.902(b), HACC granted the Request in part, providing records responsive to the Request.² HACC denied the Request in part, arguing that it withheld those records relating to confidential proprietary information or trade secrets. 65 P.S. § 67.708(b)(11).³

On February 20, 2024, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.⁴ Specifically, the Requester challenges those redactions regarding “pricing information and other details within the bids.” The OOR invited both parties to supplement the record and directed HACC to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).⁵

On February 27, 2024, HACC notified the OOR that the instant “appeal involves confidential and proprietary information of a third party” and asked for additional time to notify third parties and allow them to meaningfully participate. That same day, the OOR, noting that the Request seeks information that may contain confidential and proprietary information of a third

¹ HACC initially invoked a thirty-day extension on December 19, 2023. On January 16, 2024, prior to the conclusion of the thirty-day extension, HACC sought and received an additional thirty-day extension.

² HACC provided a link to a Google drive that included records responsive to the Request.

³ HACC further noted that there was “no final contract [that] had been signed by [HACC] as related to this RFP. Please further note that the award was published via PennBid on Dec.12, 2023, and is available on PennBid.”

⁴ The Requester granted the OOR additional time 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).”).

⁵ Again, on March 4, 2024, to the extent that it had not already done so, the OOR directed HACC to provide notice to third parties.

party, asked the Requester for additional time to permit potential third-party direct interest participants an opportunity to submit evidence.⁶

On March 1, 2024, HACC submitted its position statement, explaining that it “contacted each vendor to ask for redactions to its bids/proposals to the extent anything was confidential or proprietary. It received redactions from three vendors: David Kent Consulting, Ferrilli, and Inspirational Digital. The other vendors did not respond to the request for redactions. Accordingly, HACC made redactions in the other proposals for information similar to that of David Kent Consulting, Ferrilli, and Inspirational Digital.” HACC further explained that “in light of the vendors’ prior failure to provide responses to HACC’s request for which information they would like to maintain confidential, HACC has elected to provide copies of these bids to Requester with much reduced redactions (only EIN numbers).”⁷ Finally, HACC argues that “[w]ith respect to David Kent Consulting, Ferrilli, and Inspirational Digital, however, HACC is not in a position to defend their designations of confidential and proprietary information.” In support of its position, HACC submitted the attestation of Lee Hayes, Executive Director of Procurement and Contracts for HACC (“Hayes Attestation”).

On March 7, 2024, in response to an inquiry by the OOR, the Requester explained that “[t]he March 1, 2024, response from HACC included documents related to five bids, leaving three bids undisclosed.”

On March 15, 2024, HACC submitted a supplemental position statement, arguing that “[a]t issue in this appeal are now just three proposals from Ferrilli, Inspirational Digital, and David Kent Consulting.” HACC further confirms that “[o]n March 1, 2024, [HACC] provided notice of this

⁶ On March 4, 2024, the Requester agreed to said extension.

⁷ The revised documents provided to the Requester were attached as Exhibit C to HACC’s March 1, 2024 submission.

matter to these vendors.”⁸

On March 26, 2024, the OOR asked the parties to confirm the remaining issues for the OOR to decide (i.e. the three proposals and redactions from Ferrilli, Inspirational Digital, and David Kent Consulting). In response, HACC confirmed that it “has provided Requester with the bids/proposals of David Kent Consulting, Ferrilli, and Inspirational Digital in a redacted form. The redactions were made by the vendors based on the information being confidential and/or proprietary.” To date, the Requester has not responded to the OOR’s March 26, 2024 inquiry.

LEGAL ANALYSIS

HACC is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. 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, HACC 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 appeal as it relates to the records provided is moot

During the appeal, HACC provided the Requester “with copies of these proposals [relating to the remaining five vendors] without the redactions, since the vendors themselves were not asserting them on their own behalf.” Hayes Attestation, ¶ 8. As such, the appeal as it relates to the records provided is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931

⁸ Attached to HACC’s March 15, 2024 supplemental position statement are copies of communications notifying these vendors of the extension of time to make submissions to the OOR.

(Pa. Commw. Ct. 2019) (holding that an appeal is properly dismissed as moot where no controversy remains).

2. HACC has not demonstrated that the redacted records from Ferrilli, Inspirational Digital, and David Kent Consulting constitute confidential proprietary information or trade secrets

On appeal, HACC explains that it withheld redacted information from Ferrilli, Inspirational Digital, and David Kent Consulting because they contained confidential proprietary information or trade secrets. Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” The RTKL defines these terms in Section 102:

“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....

And,

“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.

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102.

An agency must establish that both elements of either two-part test have been met 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.*

Similarly, 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. *See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. Ct. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS § 757 (1965)). To constitute a “trade secret,” the information must be an “actual secret of peculiar importance to the business and constitute competitive value to the owner.” *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177 (Pa. Commw. Ct. 2006). The most critical criteria are “substantial secrecy and competitive value.” *Crum*, 907 A.2d at 585.

As noted above, HACC invoked Section 708(b)(11) in reliance on redactions by third-parties in submitting bid information. HACC’s Executive Director of Procurement and Contracts explains that HACC “received vendor redacted proposals from David Kent Consulting and Inspirational Digital” and that “[t]he three vendors (Ferrilli, David Kent Consulting and Inspirational Digital) provided requested redactions to their bids on the basis that they contain

confidential and/or proprietary information.” Hayes Attestation, ¶¶ 4-5. HACC further explains that it “does not have information relating to confidential or proprietary nature of the information redacted by David Kent Consulting, Ferrilli, and Inspirational Designs.” *Id.* at ¶ 9.

Where a third party makes a submission and marks it as confidential proprietary information or as containing a trade secret, HACC 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 Department 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 evaluate and discern the validity of claimed exemptions to disclosure in the first instance, including those made by third parties.”). Here, HACC’s attestation and position statement sufficiently explain HACC’s reasoning for raising Section 708(b)(11).

There is no evidence before us that addresses all the various factors set forth in the definition of “trade secret” or “confidential and proprietary information.” HACC is unable to address the economic value of the marked information, the “efforts ... to maintain its secrecy” or present any evidence that disclosure of any of the marked information is likely to cause “substantial harm to the competitive position [of the submitting entity],” 65 P.S. § 67.102, as it is unlikely that HACC even has access to the information it would need to establish such factors.

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 chose to participate on appeal or submit any evidence or argument in favor of exemption despite being notified by HACC. Because “agencies are not permitted to waive a third party’s interest in protecting the records,” *Bagwell*, 131 A.3d at 650, HACC properly did not waive the third parties’ interest at the Request stage and instead withheld third-party records potentially exempt pursuant to Sections 707(b) and 708(b)(11) of the RTKL. *See* 65 P.S. § 67.707(b); 708(b)(11). However, because the burden of proof as to whether the exemption applies has not been met on appeal and the affiliated third parties have not participated on appeal by submitting any argument/evidence in support of withholding records under Section 708(b)(11) of the RTKL, those records may not be redacted or withheld under Section 708(b)(11) of the RTKL. Thus, because David Kent Consulting, Ferrilli, and Inspirational Designs failed to participate on appeal, the OOR is constrained to find that those records must be provided to the Requester in unredacted form. *See e.g., Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 138 (Pa. Commw. Ct. 2019) (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 in part** and **dismissed as moot in part**, and HACC is required to provide the Requester with unredacted 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.⁹ All documents or communications following the issuance of this 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: March 29, 2024

/s/ Lyle Hartranft

LYLE HARTRANFT, ESQ.
APPEALS OFFICER

Sent via e-file Portal to: John Heintz; Linnie Carter, Ph.D., AORO; Lindsey Cook, Esq.

⁹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).