

CITY OF PHILADELPHIA LAW DEPARTMENT
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CITY OF PHILADELPHIA
MAYOR'S OFFICE

Appellant

v.

MEGAN SHANNON

Appellee

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
TRIAL DIVISION

May Term, 2018
No. 02926

CITY OF PHILADELPHIA
DEPARTMENT OF COMMERCE

Appellant

v.

MEGAN SHANNON

Appellee

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
TRIAL DIVISION

May Term, 2018
No. 02928

MOTION OF APPELLANT CITY OF PHILADELPHIA
TO SUPPLEMENT THE RECORD

Appellant, the City of Philadelphia (the "City"), by and through its undersigned counsel,
hereby moves to supplement the record in the above-captioned appeal as follows:

1. In the instant matter, the City of Philadelphia has appealed the April 26, 2018
Final Determination of the Office of Open Records ("OOR") in *Shannon v. City of Philadelphia*

Department of Commerce and Philadelphia Industrial Development Corporation, AP 2018-0460 (consolidated) granting Megan Shannon’s (“Requester’s”) appeal of the City’s February 26, 2018 Responses (“Final Responses”) to her January 18, 2018 Right to Know Requests (“Requests”). The City now moves to supplement the record with an additional affidavit in support of its position on appeal.

2. The OOR consolidated two separately docketed appeals, *Shannon v. City of Philadelphia Department of Commerce*, AP 2018-0460 and *Shannon v. City of Philadelphia Mayor’s Office*, AP 2018-0461, and issued a single Final Determination.

3. In its Final Responses, the City partially denied granted the requests in part and denied the requests in part, providing a redacted copy of the Philadelphia Delivers Proposal. *See* Certified Record (“C.R.”)¹ at 16-17. Ms. Shannon appealed the City’s partial denials to the OOR. C.R. at 09-11.

4. When a requester appeals a local agency denial under the Right-to-Know Law, the local agency has a very short time to put together a submission, including all legal argument and factual support, to the OOR. The agency’s ability to obtain further time is constrained by the OOR’s requirement to issue a final determination within a statutorily defined timeframe which can only be extended by the requestor.

5. The City was initially provided only seven (7) business days to respond to the instant appeals before the OOR. C.R. at 45. Due to numerous factors, ***including the City unexpectedly being closed due to a snowstorm***, complications from the upcoming Good Friday holiday, numerous attorneys from the City’s Right to Know division being out of the office, and the City’s high volume of Right to Know requests, the City requested a brief one-week extension

¹ Leading zeros have been omitted from citations to the Certified Record for ease of reference.

of time to make its submission to the OOR. C.R. at 52. This request was opposed by the Requester, and the City was ultimately granted only a three (3) business day extension. C.R. at 50-52.

6. In the appeals before the OOR, the City submitted an affidavit from Sylvie Gallier Howard, the First Deputy Commerce Director of the City's Department of Commerce, which described the City's proposal to Amazon, Inc. (the "Philadelphia Delivers Proposal"), the process Amazon was undertaking to select a location for its second headquarters ("HQ2"), and how the release of the Philadelphia Delivers Proposal would harm the City's efforts in attracting HQ2 to Philadelphia. C.R. at 88-93.

7. The affidavit submitted to the OOR briefly explained how the Philadelphia Delivers Proposal was just that – a *proposal* that contemplates a business relocating to the Philadelphia region. Affidavit of Sylvie Gallier Howard, First Deputy Commerce Director, City of Philadelphia Department of Commerce ¶ 14, C.R. at 90.

8. The OOR issued its Final Determination on April 26, 2018, granting Ms. Shannon's appeal. C.R. at 276. The City filed a timely appeal.

9. The Supreme Court of Pennsylvania has held that courts hearing appeals from the OOR have the "have the authority to expand their record to fulfill their statutory role" as fact-finders. *Bowling v. Office of Open Records*, 75 A.3d 453, 476 (Pa. 2013).

10. Moreover, the Commonwealth Court has specifically and repeatedly held that agencies may meet their burden of proof in Right-to-Know matters through the submission of affidavits. *See, e.g., Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011) ("[A]n agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of

nonexistence of the record.”). However, as mentioned above, agencies are constrained by an extremely limited time-frame for responding at the OOR level, with the OOR being statutorily limited in their own time-frame to issue a final determination.

11. The affidavit of Ms. Gallier Howard that the City submitted before the OOR is supportive of the City’s arguments regarding why the release Philadelphia Delivers Proposal would harm the City’s competitive position as Amazon searches for a location for HQ2. With more time to respond in the post-OOR phase, however, the City has been able to put together additional factual support for the issues before the Court, specifically as to why the Philadelphia Delivers Proposal represents the City’s strategy to achieve the successful adoption of a legislative proposal. The OOR found that the City did not previously support this argument and dismissed it out of hand. C.R. at 274. The City therefore moves to supplement the record with a new affidavit from Ms. Gallier Howard, attached as Exhibit A, which provides additional factual information regarding that argument.

12. The City has relied on the supplemental affidavit in its briefing before this Court, and it will provide the Court with additional factual background that will be helpful in making its determination.

13. For the reasons discussed, supplementation of the record is necessary to clarify the factual issues discussed above.

WHEREFORE, for the foregoing reasons, the City respectfully requests that the Court grant its Motion to Supplement the Record with the supplemental record attached as Exhibit A.

Respectfully submitted,

/s/ Robert L. Kieffer
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May Term, 2018
No. 02928

BRIEF IN SUPPORT OF MOTION OF APPELLANT CITY OF PHILADELPHIA TO
SUPPLEMENT THE RECORD

Appellant, the City of Philadelphia (the "City"), by and through its undersigned counsel,
hereby moves to supplement the record in the above-captioned appeal and states as follows:

I. Matter Before the Court

The matter before the court is Appellant's Motion to Supplement the Record.

II. Statement of Question Involved:

Should the Court grant the instant motion to supplement the record with one additional affidavit where the Court has authority to expand the record to fulfill its statutory function as fact-finder, where the City had limited time to submit a record before the administrative agency below, and where the Right-to-Know requests at issue seek exempt records?

Suggested Answer: Yes.

III. Brief Statement of Relevant Facts and Procedural History

In the instant matter, the City of Philadelphia has appealed the April 26, 2018 Final Determination of the Office of Open Records (“OOR”) in *Shannon v. City of Philadelphia Department of Commerce and Philadelphia Industrial Development Corporation*, AP 2018-0460 (consolidated) granting Megan Shannon’s (“Requester’s”) appeal of the City’s February 26, 2018 Responses (“Final Responses”) to her January 18, 2018 Right to Know Requests (“Requests”). The City now moves to supplement the record with an additional affidavit in support of its position on appeal.

The OOR consolidated two separately docketed appeals, *Shannon v. City of Philadelphia Department of Commerce*, AP 2018-0460 and *Shannon v. City of Philadelphia Mayor’s Office*, AP 2018-0461, and issued a single Final Determination.

In its Final Responses, the City partially denied granted the requests in part and denied the requests in part, providing a redacted copy of the Philadelphia Delivers Proposal. C.R. at 16-17. Ms. Shannon appealed the City’s partial denials to the OOR. C.R. at 09-11.

When a requester appeals a local agency denial under the Right-to-Know Law, the local agency has a very short time to put together a submission, including all legal argument and factual support, to the OOR. The agency’s ability to obtain further time is constrained by the OOR’s

requirement to issue a final determination within a statutorily defined timeframe which can only be extended by the requestor.

The City was initially provided only seven (7) business days to respond to the instant appeals before the OOR. C.R. at 45. Due to numerous factors, ***including the City unexpectedly being closed due to a snowstorm***, complications from the upcoming Good Friday holiday, numerous attorneys from the City's Right to Know division being out of the office, and the City's high volume of Right to Know requests, the City requested a brief one-week extension of time to make its submission to the OOR. C.R. at 52. This request was opposed by the Requester, and the City was ultimately granted only a three (3) business day extension. C.R. at 50-52.

In the appeals before the OOR, the City submitted an affidavit from Sylvie Gallier Howard, the First Deputy Commerce Director of the City's Department of Commerce, which described the City's proposal to Amazon, Inc. (the "Philadelphia Delivers Proposal"), the process Amazon was undertaking to select a location for its second headquarters ("HQ2"), and how the release of the Philadelphia Delivers Proposal would harm the City's efforts in attracting HQ2 to Philadelphia. C.R. at 88-93.

The affidavit submitted to the OOR briefly explained how the Philadelphia Delivers Proposal was just that – a *proposal* that contemplates a business relocating to the Philadelphia region. Affidavit of Sylvie Gallier Howard, First Deputy Commerce Director, City of Philadelphia Department of Commerce ¶ 14, C.R. at 90.

The OOR issued its Final Determination on April 26, 2018, granting Ms. Shannon's appeal. C.R. at 276. The City filed a timely appeal.

IV. Argument

The Supreme Court of Pennsylvania has held that courts hearing appeals from the OOR have the “have the authority to expand their record to fulfill their statutory role” as fact-finders. *Bowling v. Office of Open Records*, 75 A.3d 453, 476 (Pa. 2013).

Moreover, the Commonwealth Court has specifically and repeatedly held that agencies may meet their burden of proof in Right-to-Know matters through the submission of affidavits. *See, e.g., Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011) (“[A]n agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.”). However, as mentioned above, agencies are constrained by an extremely limited time-frame for responding at the OOR level, with the OOR being statutorily limited in their own time-frame to issue a final determination.

The affidavit of Ms. Gallier Howard that the City submitted before the OOR is supportive of the City’s arguments regarding why the release Philadelphia Delivers Proposal would harm the City’s competitive position as Amazon searches for a location for HQ2. With more time to respond in the post-OOR phase, however, the City has been able to put together additional factual support for the issues before the Court, specifically as to why the Philadelphia Delivers Proposal represents the City’s strategy to achieve the successful adoption of a legislative proposal. The OOR found that the City did not previously support this argument and dismissed it out of hand. C.R. at 274. The City therefore moves to supplement the record with a new affidavit from Ms. Gallier Howard, attached as Exhibit A, which provides additional factual information regarding that argument.

The City has relied on the supplemental affidavit in its briefing before this Court, and it will provide the Court with additional factual background that will be helpful in making its determination.

For the reasons discussed, supplementation of the record is necessary to clarify the factual issues discussed above.

V. Relief Requested

For the foregoing reasons, the City respectfully requests that the Court grant the City's Motion to Supplement the Record with the supplemental record attached as Exhibit A.

Respectfully submitted,

/s/ Robert L. Kieffer
Robert L. Kieffer, Esq.
Assistant City Solicitor
City of Philadelphia Law Dept.
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May Term, 2018
No. 02928

ORDER

AND NOW, this ____ day of _____, _____, upon consideration of Appellant City of Philadelphia's Motion to Supplement the Record, it is hereby **ORDERED** and **DECREED** that the Motion is **GRANTED**, and the Certified Record shall be supplemented to include the contents of Appellant's Exhibit A.

J.

Exhibit A

***City of Philadelphia Mayor's Office v. Shannon, Court of Common Pleas Phila. County,
May Term 2018, No. 02926***

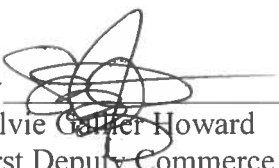
***City of Philadelphia Department of Commerce v. Shannon, Court of Common Pleas Phila.
County, May Term 2018, No. 02928***

**Affidavit of Sylvie Gallier Howard, First Deputy Commerce Director,
City of Philadelphia Department of Commerce**

I, Sylvie Gallier Howard, am the First Deputy Commerce Director for the City of Philadelphia (the "City") Department of Commerce ("Commerce") and am authorized to execute this affidavit. I am submitting this affidavit to supplement my affidavit of March 28, 2018, and state the following to the best of my knowledge, information and belief under penalty of perjury pursuant to 18 Pa.C.S. § 4904 relating to unsworn falsification of authorities:

1. I am familiar with the requests at issue in the above-captioned appeals (the "Requests"), which seek the following records:

"I am requesting a copy of all documents sent to Amazon as part of the "Philly Delivers" proposal sent to Amazon in response to its Requests for Proposals for cities to compete for its second headquarters. Amazon requested an electronic copy and five hard copies of the city's response to be sent between October 16 and 19, 2017. I would like a copy of all documents sent in response to Amazon's RFP, including Philadelphia's written responses to the RFP questions."
2. I am familiar with the proposal submitted by the City to Amazon for Amazon HQ2 (the "Philadelphia Delivers Proposal"), which is the record responsive to both Requests. In my role as Commerce's Chief of Staff, which was my job title at that time, I participated in the creation and submission of the Philadelphia Delivers Proposal.
3. The Philadelphia Delivers Proposal does not make any binding commitments to Amazon or to any other third-parties. To the best of my knowledge, information, and belief, any financial incentives proposed in the Philadelphia Delivers Proposal would require legislation to implement. Any other proposed incentives would require contracting by the City and/or third-parties to be binding, depending on the incentive at issue.
4. The City strategically proposed an incentives package which was structured in a manner the City felt would both appeal to Amazon and have support in the legislative process. The incentives package was developed to creatively leverage the City's resources to minimize the cost to the City while maximizing the benefits offered to Amazon. Thus, the disclosure of the incentives package would reveal the strategy that the Administration would use to accomplish these goals and achieve the passage of the necessary legislation.

By  on 9/17/2018
Sylvie Gallier Howard
First Deputy Commerce Director
Department of Commerce
1515 Arch St., 12th Floor
Philadelphia, PA 19102
(215) 683-2009 (phone)
Sylvie.GallierHoward@phila.gov

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**CITY OF PHILADELPHIA
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Appellant

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Appellee

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**COURT OF COMMON PLEAS
PHILADELPHIA COURT
TRIAL DIVISION**

**May Term, 2018
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**COURT OF COMMON PLEAS
PHILADELPHIA COURT
TRIAL DIVISION**

**May Term, 2018
No. 02928**

CERTIFICATE OF SERVICE

I, Robert Kieffer, hereby certify that a true and correct copy of the foregoing Motion of Appellant City of Philadelphia to Supplement the Record and Supporting Brief in the above-captioned matter was filed by sending this paper to the Court's electronic filing system (EFS) website pursuant to Pa.R.C.P. 205.4(g) and Phila. Civil Rule *205.4(f), and by virtue of

automatic electronic service by the Court to all parties, who have entered their appearance on the Court's electronic docket.

/s/ Robert L. Kieffer
Robert L. Kieffer
Assistant City Solicitor

Dated: September 17, 2018

PHILADELPHIA COURT OF COMMON PLEAS
PETITION/MOTION COVER SHEET

FOR COURT USE ONLY	
ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE: 10/09/2018
<i>Do not send Judge courtesy copy of Petition/Motion/Answer/Response. Status may be obtained online at http://courts.phila.gov</i>	

CONTROL NUMBER:

18091855

(RESPONDING PARTIES MUST INCLUDE THIS
NUMBER ON ALL FILINGS)

May 2018
Month Term, Year
No. 02928

CITY OF PHILADELPHIA DEPARTMENT OF
COMMERCE VS SHA

Name of Filing Party:

CITY OF PHILADELPHIA DEPARTMENT OF

INDICATE NATURE OF DOCUMENT FILED:

☐ Petition (*Attach Rule to Show Cause*) ☒ Motion
☐ Answer to Petition ☐ Response to Motion

Has another petition/motion been decided in this case? ☐ Yes ☒ No

Is another petition/motion pending? ☐ Yes ☒ No

If the answer to either question is yes, you must identify the judge(s):

TYPE OF PETITION/MOTION (see list on reverse side) MISCELLANEOUS MOTION/PETITION		PETITION/MOTION CODE (see list on reverse side) MTMIS
ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):		
I. CASE PROGRAM OTHER PROGRAM Court Type: <u>AGENCY APPEAL</u> Case Type: <u>MISC ADMINISTRATIVE AGENCY</u>	II. PARTIES (<i>required for proof of service</i>) (Name, address and telephone number of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.) ROBERT L KIEFFER CITY OF PHILA LAW DEPARTMENT 1515 ARCH ST. 17TH FLOOR , PHILADELPHIA PA 19102 MEGAN SHANNON 1801 MARKET ST SUITE 2300 , PHILADELPHIA PA 19103 CHARLES REES BROWN OFFICE OF OPEN RECORDS 333 MARKET ST 16TH FLOOR , HARRISBURG PA 17101	
III. OTHER		

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

(Attorney Signature/Unrepresented Party)

September 17, 2018
(Date)

ROBERT L. KIEFFER
(Print Name)

(Attorney I.D. No.)

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date.
No extension of the Answer/Response Date will be granted even if the parties so stipulate.