



AMENDED FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
TAMMIE MCCLINTICK,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2020-0622
	:	
HUSTON TOWNSHIP	:	
MUNICIPAL AUTHORITY,	:	
Respondent	:	

INTRODUCTION

Tammie McClintick (“Requester”) submitted a request (“Request”) to the Huston Township Municipal Authority (“Authority”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of a settlement agreement and solicitor invoices. The Township denied the Request, arguing that the responsive records are exempt pursuant to a judicial order. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Authority is required to take additional action as directed.

FACTUAL BACKGROUND

On January 13, 2020, the Request was filed, seeking a “[c]opy of the settlement agreement with Jay Township Authority for the lawsuit that was just settled,” and “[c]opies of all invoices from Zwick Law since they became the Authority Solicitor.” On February 11, 2020, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the Authority denied the Request, arguing

that the settlement agreement was exempt pursuant to a judicial order, *see* 65 P.S. § 67.305(a)(3), and that the responsive invoices are exempt pursuant to the attorney-client privilege, attorney work-product doctrine and the ethics-based rule of confidentiality.

On February 18, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Authority to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 6, 2020, the Authority submitted a position statement reiterating its grounds for denial and providing a copy of the court order sealing the settlement agreement. The Authority also argues that the invoices are exempt because they contain detailed line items which reveal information prohibited from disclosure by the sealing order.

Also on April 6, 2020, the Requester provided a memorandum laying out the timeline of her Request and arguing that confidentiality clauses in settlement agreements are unenforceable in Pennsylvania.

On April 15, 2020, the OOR sought evidence from the Authority regarding the invoices. On May 6, 2020, the Authority sought *in camera* review of the invoices for the OOR to determine whether production of the documents would violate the sealing order. On May 7, 2020, the OOR sought an affidavit from the Authority regarding how the invoices would reveal the terms of the settlement agreement. The Authority did not respond.

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.*

¹ On appeal, the Requester granted the OOR additional time to issue its Final Determination. *See* 65 P.S. § 67.1101(b)(1).

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, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 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” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Authority sought *in camera* review; however, the Authority failed to respond to the OOR’s request for additional information and therefore, the request for *in camera* review is denied.

The Authority is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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 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)(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 Authority may withhold the settlement agreement filed under seal

The Authority contends that the settlement agreement was filed under seal with the Clearfield County Court of Common Pleas. The Authority argues that this sealed record is exempt from disclosure pursuant to Section 305, which removes the presumption that a record in the possession of an agency is public if said record is “exempt from disclosure under any ... judicial order or decree.” 65 P.S. § 67.305(a)(3). The Authority provided the OOR with a valid judicial order sealing the record, specifically precluding dissemination of the agreement’s terms through the RTKL and ordering that the agreement remain confidential to the parties and their successors in interest.

When dealing with records that are alleged to have been sealed by court order, the OOR relies upon the actual wording of the court order to determine what records are sealed. *See, e.g., Spatz v. City of Reading*, OOR Dkt. AP 2013-0210, 2013 PA O.O.R.D. LEXIS 189. In this case, the language of the order signed by President Judge Fredric Ammerman presented to the OOR directs the Prothonotary to “seal the record in the captioned matter such that only the parties or

their respective counsel may access the same.” It also orders that “the settlement agreement ... shall remain confidential” and “preclude[s] dissemination by the parties of their written Settlement Agreement or the terms thereof in any fashion; including but not limited to, a response to a request made to either party under the Commonwealth’s Right to Know Law.”

The Requester argues that confidentiality clauses in settlement agreements are enforceable. However, the confidentiality clause in the agreement is not at issue here; instead, there is a court order sealing the record, including the settlement agreement.

Accordingly, the Authority may withhold the settlement agreement that was filed under seal, pursuant to the Court’s order. *See* 65 P.S. § 67.305(a)(3).

2. The invoices are subject to disclosure

In its final response to the Requester, the Authority argued that the invoices were protected by the attorney-client privilege and the attorney work-product doctrine; however, on appeal, the Authority instead suggests that the disclosing the invoices might violate a court order.² The invoices do not expressly fall under the court order. Although the OOR sought additional information, the Authority failed to provide any evidence that disclosing the invoices would reveal the terms of the settlement agreement and therefore be a violation of said agreement. As such, the Authority has not demonstrated that the invoices are sealed pursuant to the court order and must provide them.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Authority is required to provide all invoices within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party

² Because the Authority abandoned its privilege argument, the OOR will not further address the argument in this final determination.

may appeal to the Clearfield County Court of Common Pleas. 65 P.S. § 67.1302(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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 21, 2020

/s/ Erin Burlew

APPEALS OFFICER
ERIN BURLEW

Sent to: Tammie McClintick (via email only);
C.J. Zwick, Esq. (via email only)

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