



FINAL DETERMINATION

IN THE MATTER OF

**JAN MURPHY AND PENNLIVE,
Requester**

v.

**PENNSYLVANIA OFFICE OF
ADMINISTRATION,
Respondent**

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Docket No.: AP 2020-1483

INTRODUCTION

Jan Murphy, a reporter with PennLive (collectively, the “Requester”), submitted a request (“Request”) to the Pennsylvania Office of Administration (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to contract employees hired by the Pennsylvania Department of Environmental Protection (“DEP”). The Office denied the Request, asserting, in part, that the requested records are not in the Office’s possession, custody or control. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Office is not required to take any further action.

FACTUAL BACKGROUND

On July 13, 2020, the Request was filed, seeking “the name, birth year, resume, hiring date and visa status for the last 20 contract employees hired by [DEP] from the vendor LingaTech, Inc.” On August 19, 2020, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2),

the Office denied the Request, asserting that it “does not have within its possession, custody or control records that are responsive to [the R]equest.”

On August 19, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. Specifically, the Requester argues that the Office “has an obligation to facilitate access to these records from LingaTech upon request under [S]ection 506(d) of the RTKL.” *See* 65 P.S. 67.506(d)(1).

On September 10, 2020, the Office submitted a position statement reiterating its grounds for denial. The Office also contends that the requested records contain personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), and information that is protected under the constitutional right to privacy. The Office further asserts that disclosure of the responsive records would threaten personal security, 65 P.S. § 67.708(b)(1)(ii), and that the records contain information that is confidential under federal law. In support of its position, the Office presented the attestations of Wha Lee Strohecker (“Ms. Strohecker”), the Office’s Open Records Officer, and Janis Brown (“Ms. Brown”), Commodity Specialist and ITQ Administrator within the Bureau of Procurement for the Pennsylvania Department of General Services (“DGS”). The Requester did not submit additional evidence on appeal.

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, 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, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Office is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

In the instant matter, the Office claims that the records sought are not records of the Office. Under the RTKL, two groups of records are accessible—those records in an agency’s actual or constructive possession reached directly under Section 901 of the RTKL and records that are only in the possession of third parties that are indirectly accessible through Section 506(d) of the RTKL. *See Pa. Dep’t of Public Welfare v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014), *aff’d* 124 A.3d 1214 (Pa. 2015). Section 102 of the RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency”; and, if so, 2) was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency.” *Id.*; *see also Allegheny Co. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of a “record” must be liberally construed. *See A Second Chance, Inc.*, 13 A.3d at 1034; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012).

The Office asserts that it does not possess the requested records. In support of its position, the Office relies on the attestation of Ms. Strohecker, who attests, in relevant part, as follows:

6. Upon receipt of the Request, I conducted a thorough examination of files in the possession, custody and control of the [Office] for records responsive to the Request ... and discussed the appeal with relevant [Office] personnel.
7. As a result of my search and discussions with [Office] personnel, I determined that [the Office] did not have within its possession, custody or control records that were responsive to [the] Request.
- ...
11. [The Office] does not have a contractual relationship with LingaTech, Inc. or Optimal Solutions & Technologies, Inc. (OST, Inc.) as it relates to contracted resources procured by [DEP]....

Under the RTKL, an attestation is competent evidence to sustain an agency's burden of proof. *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 competent evidence that the Office acted in bad faith or that the records exist within the Office's possession, "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)). Based upon the evidence presented, the Office has established that it does not actually possess the requested records.

While the Office has demonstrated that it does not actually possess records responsive to the Request, Section 506(d)(1) of the RTKL provides that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency....

65 P.S. § 67.506(d)(1); *see Dental Benefit Providers, Inc. v. Eiseman*, 124 A.3d 1214, 1223 (Pa. 2015) (stating that Section 506(d)(1) requires an actual contract with a third party in possession of

the records). In *Buehl v. Office of Open Records*, a requester sought records evidencing the wholesale price paid by a third-party contractor that provided commissary services to the Pennsylvania Department of Corrections (“DOC”). *Buehl v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2010-0008, 2010 PA O.O.R.D. LEXIS 88. DOC denied the request, stating that it did not possess the requested records. The requester appealed to the OOR, arguing that the records were accessible under Section 506(d)(1) because they were directly related to the contract to provide commissary services at state correctional institutions. The OOR disagreed, holding that the price paid for goods to be resold under its commissary contract was not directly related to that contract because the contractor’s cost of goods to be sold at the commissary was unknown to the government and was not part of the underlying contract.

On appeal to the Commonwealth Court, the Court upheld the OOR, reasoning that the price paid for goods to be sold under the commissary contract was “beyond the parameters of its contract ... [and] does not directly relate to performing or carrying [the governmental function of providing commissary services.]” 6 A.3d 27, 31 (Pa. Commw. Ct. 2010). Thus, *Buehl* can be read for the proposition that a vendor’s costs to perform its contractual obligations are not directly related to the underlying contract. *But see Commonwealth v. Eiseman*, 125 A.3d 19 (Pa. 2015) (holding that a contractor’s costs to perform its contractual obligations were subject to disclosure where the government agency reviewed and approved the costs charged to the contractor).

In *Allegheny County Department of Administrative Services v. Parsons*, the Commonwealth Court analyzed whether employee names of a third-party contractor were directly related to the government contract and concluded that because the employee names were not provided to the government and performance under the contract was not contingent upon this information, the information was not directly related to the contract. 61 A.3d 336, 344 (Pa.

Commw. Ct. 2013). Thus, unless contractor information is required to be provided to the government, and performance is contingent on the requested information, such contractor information is not “directly related” to the contract’s governmental function, and, therefore, not accessible under Section 506(d)(1).

Here, the Request seeks records regarding “contract employees hired by [DEP] from the vendor LingaTech, Inc.” The Office asserts that it does not have a contractual relationship with LingaTech, Inc. In support, Ms. Brown attests¹, in part, as follows:

1. I serve as a Commodity Specialist and ITQ Administrator within the Bureau of Procurement for the Pennsylvania Department of General Services (DGS). As a Commodity Specialist I am responsible for administering the Commonwealth of Pennsylvania’s IT Staff Augmentation Services Contract (Contract).
2. As the Commodity Specialist that administers the Contract, I can attest to the fact that Optimal Solutions & Technologies (OST, Inc.) is the Commonwealth’s only contracted vendor for statewide IT staff augmentation services.
3. The Contract is between OST, Inc. and DGS only and, since this is a statewide contract, Commonwealth agencies may issue purchase orders off of the Contract to procure contracted resources.
3. While OST, Inc. provides the individuals or “resources” procured by various Commonwealth agencies as contracted resources, those contracted resources are generally not employees of OST, Inc., but rather are employed by third-party vendors (subcontractors) that have subcontracts with OST, Inc. to provide contracted resources.
4. The Contract provides a procurement vehicle for all Commonwealth agencies to procure IT staff augmentation services, i.e. contracted resources, through a managed service provider, which is OST, Inc.
5. Pursuant to the Contract, OST, Inc., as the prime contractor, must fulfill the Commonwealth’s need for contracted resources within the job titles and skills listed within the Contract either through direct resources or subcontractors.
6. The Commonwealth agencies do not engage in individual contracts with each OST, Inc. subcontractor (LingaTech, Inc.).
7. Purchase orders for the contracted resources, including those provided by a

¹ Ms. Brown’s attestation lists Paragraph numbers 3, 7 and 8 twice.

subcontractor, are issued to OST, Inc. only and not OST, Inc.'s subcontractors (such as LingaTech, Inc.).

7. The Commonwealth agency when it procures a contracted resource is generally not aware of the name of the company that employs the contract resource.
8. As a result of the way the Contract operates, a Commonwealth agency that procures a contracted resource would generally not be in possession of the information regarding the name of the company that employs the contracted resource that was procured by the Commonwealth agency through the Contract with OST, Inc.
8. In addition, it is the procuring Commonwealth agency that issues the purchase order with OST, Inc. for the contracted resource.
9. I am familiar with the RTKL [R]equest submitted ... to the ... Office....
10. In [the R]equest, [the Requester] is seeking the names of the contracted resources that were procured by ... DEP and not the ... Office....
11. Contracted resources procured by DEP would be procured through a purchase order issued by DEP to OST, Inc. and not through a purchase order issued by [the Office]
12. [The Office] is not a party to the purchase order(s) issued by DEP to procure such contracted resources and [the Office] is not a party to the OST, Inc. Contract.
13. As such, there is no contractual relationship between [the Office] and OST, Inc. or between [the Office] and LingaTech, Inc. with respect to contracted resources procured by DEP as referenced within [the R]equest.

Based upon the evidence presented, the Office has established that it does not have a contractual relationship with LingaTech, Inc. As such, the records requested are not accessible under Section 506(d)(1).² See *Allegheny County Dep't of Admin. Servs.*, 61 A.3d at 344; *Int'l Assoc. of Sheet Metal, Air, Rail & Transp. Workers, Local Union No. 19 v. Garnet Valley Sch. Dist.*, OOR Dkt. AP 2017-1020, 2017 PA O.O.R.D. LEXIS 1024 (finding that the requested

² As the records are not accessible under Section 506(d)(1), the OOR need not consider whether the records are subject to any exemptions under the RTKL. See *Bell v. Collier Twp.*, OOR Dkt. AP 2019-0466, 2019 PA O.O.R.D. LEXIS 481.

construction reports that were in the subcontractor's possession were not accessible under Section 506(d)(1) of the RTKL); *Monaco v. Upper Darby Sch. Dist.*, OOR Dkt. AP 2017-1516, 2017 PA O.O.R.D. LEXIS 1475 (concluding that because the agency was not a party to the contracts between the agency's subcontractors, such contracts were not accessible under Section 506(d)(1) of the RTKL).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the Office is not required to take any further action. 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.³ This Final Determination shall be placed on the OOR's website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 28, 2020

/s/ Magdalene C. Zeppos-Brown

MAGDALENE C. ZEPPOS-BROWN, ESQ.
APPEALS OFFICER

Sent to: Jan Murphy (via email only);
Wha Lee Strohecker, AORO (via email only); and
Angela Rainey, Esq. (via email only)

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