



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MARK SCHWEMLER AND AETNA	:	
BETTER HEALTH OF PENNSYLVANIA,	:	
INC.,	:	
Requester	:	Docket No: AP 2020-2256
	:	
v.	:	
	:	
PENNSYLVANIA DEPARTMENT OF	:	
HUMAN SERVICES,	:	
Respondent	:	

INTRODUCTION

Mark Schwemler, Esq. on behalf of Aetna Better Health of Pennsylvania, Inc., (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Human Services (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to the Department’s Request for Applications (“RFA”) No. 07-19. The Department partially denied the Request arguing, among other things, that the records are procurement records that may not be disclosed prior to the award of a contract. 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 Department is not required to take any further action.

FACTUAL BACKGROUND

On September 9, 2020, the Request was filed, seeking, in relevant part:

1. That portion of the response of UnitedHealthcare of Pennsylvania, Inc. (“United”) to Request for Applications (“RFA”) 07-19 consisting of that applicant’s Work Statement Questionnaire Responses to Member Management Question 3 and Care Management Question 7. These aspects of United’s application are specifically referenced in United’s July 8, 2020 protest as to RFA 07-19, and form the basis of one aspect of that protest.
2. All records reflecting the transmission of the contents or substance of the records described in item No. 1, above, to any DHS employee or representative between December 17, 2019 and July 1, 2020.

On October 16, 2020, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the Department denied the Request as to the relevant Items, arguing that the records responsive to Item 1 are part of the application proposal submitted in response to RFA 07-19, while the record responsive to Item 2 is a communication with the evaluation committee which reveals the identity of members. 65 P.S. § 67.708(b)(26).

On November 6, 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 Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 19, 2020, the Requester withdrew the appeal as to Item 1 of the Request, leaving only Item 2 at issue.

On November 23, 2020, the Department submitted a position statement claiming that the record responsive to Item 2 contains the names and identities of the members of the Evaluation

¹ On November 16, 2020, the Requester granted the OOR a brief extension to issue the 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).”).

Committee. In support of its position, the Department submitted the statements made under penalty of perjury of Karen Kern, Procurement Specialist, Office of Administration, Department of Human Services and Andrea Bankes, the Department's Open Records Officer.

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, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Department 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)).

Ms. Kern attests that the only record responsive to Item 2 is “a communication with the members of the evaluation committee about how to access the submitted proposals” which reveals the identities of the committee members. Section 708(b)(26) of the RTKL exempts from disclosure “the identity of members, notes and other records of an agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).” 65 P.S. § 67.708(b)(26).

In support of its position, the Department relies on the affidavit of Ms. Kern, who attests, in relevant part, as follows:

2. My duties includes serving as the Issuing Officer for procurements assigned to the Complex Procurements Unit, such as [RFA 07-19] HealthChoices Physical Health Services.

...

10. The subject RTKL request pertains to a procurement conducted by the Department.

11. The Department published RFA 07-19 on October 15, 2019.

...

14. Section 513 of the Commonwealth Procurement Code pertains to “[c]ompetitive sealed proposals.” 62 Pa.C.S. § 513.

...

17. When issuing this RFA, similar to the requirements for a Request for Proposal (“RFP”), the Department established “evaluation factors” to be applied in evaluating the competing applications, as well as “[t]he relative importance of the evaluation factors be fixed prior to opening the proposals.” See 62 Pa.C.S. § 513(e).

18. After issuing RFA 07-19 and as in prior procurements with competitive sealed proposals, the Department established an evaluation committee.

19. One function of an Evaluation Committee is to analyze and evaluate each applicant’s technical submittal in accordance with the predetermined evaluation criteria. Based on this evaluation, the Evaluation Committee for each technical submittal will arrive at a numeric score for each rated criteria.

20. Each member of an Evaluation Committee is provided with instructions and guidance on the process of the evaluation and scoring the technical submittals of the applications.

21. These instructions were not developed by the Evaluation Committee but used during the deliberative process.

22. An Evaluation Committee does not decide which applicant(s) is selected for negotiations. Rather, the function of the Evaluation Committee is to evaluate and score the technical submittals of applications. Once the Evaluation Committee’s evaluation is complete, it provides the resulting scores to the issuing office.

...

31. The only record responsive to paragraph 2 of the request is a communication with the members of the evaluation committee about how to access the submitted proposals.

32. The communication identifies the members of the evaluation committee and reveals information about the evaluation process.

33. The Evaluation Committee members are advised that the Evaluation Committee materials are confidential, and the Evaluation Committee members signed confidentiality agreements.

31. The Evaluation Committee materials and member names are to remain confidential in order to shield the internal procurement process against external threats to its integrity for the evaluators to freely express their opinions.

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 evidence submitted] 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)). Therefore, based upon the evidence provided, the Department has met its burden of proving that the record identified as responsive to Item 2 of the Request is exempt from disclosure. *See, e.g., Voltz v. City of Phila.*, OOR Dkt. AP 2013-1711, 2013 PA O.O.R.D. LEXIS 931.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Department 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. 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 3, 2020

/s/ Erin Burlew

ERIN BURLEW, ESQ.
APPEALS OFFICER

Sent to: Mark Schwemler, Esq. (via email only);
Marisa Cohan, Esq. (via email only)

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).