



FINAL DETERMINATION

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| IN THE MATTER OF | : | |
| | : | |
| TIMOTHY BROWNE AND | : | |
| LOCAL UNION #98, I.B.E.W, | : | |
| Requester | : | |
| | : | |
| v. | : | Docket No.: AP 2020-2742 |
| | : | (CONSOLIDATED) |
| | : | |
| UPPER MERION AREA | : | |
| SCHOOL DISTRICT, | : | |
| Respondent | : | |

INTRODUCTION

Timothy Browne and Local Union #98, I.B.E.W. (collectively “Requester”) submitted four Requests (“Requests”) to the Upper Merion Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records pertaining to an electrical contractor. The District denied the Requests, stating that it does not possess any responsive records. 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 District is required to take further action as directed.

FACTUAL BACKGROUND

On November 4, 2020, the Requests were filed, seeking the following with respect to Boro Construction, an electrical contractor for a District construction project, and the project itself:

- “... [T]he Safety Manual for Boro Construction ... for the project...”¹
- “...[T]he Bond for the project...”²
- “Weekly, Bi-Weekly, and Monthly Job Meeting Minutes for Boro Construction ... for the project...”³

On December 11, 2020, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the District denied the request for Boro Construction’s Safety Manual and meeting minutes, stating that the records do not exist in the District’s possession or control. The District denied the request for the bond, arguing that the record is an exempt procurement record, 65 P.S. § 67.708(b)(26), or a record relating to a communication with an insurance carrier, administrative service organization, or risk management office, 65 P.S. § 67.708(b)(27).

On December 29, 2020, the Requester appealed to the OOR, challenging the denial of the Requests and stating grounds for disclosure.⁴ The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in the appeals. *See* 65 P.S. § 67.1101(c). Because they involve the same parties and dates, the following appeals are hereby consolidated into OOR Dkt. AP 2020-2742: OOR Dkts. AP 2020-2743, AP 2020-2744, and AP 2020-2745.

On January 14, 2021, the District submitted a position statement in support of its denial and the attestation, made under penalty of perjury, of Michael Keeley, the District’s Open Records Officer and Business Administrator.

¹ The appeal of this request was ultimately docketed at OOR Dkt. AP 2020-2742. The Requester also filed another appeal stemming from this request that was docketed at OOR Dkt. AP 2020-2744. This Final Determination will involve both appeals.

² The appeal of this request was ultimately docketed at OOR Dkt. AP 2020-2743.

³ The appeal of this request was ultimately docketed at OOR Dkt. AP 2020-2745.

⁴ The Requester provided the OOR with additional time to issue its Final Determination. 65 P.S. § 67.1101(b)(1). This additional time was not provided with respect to OOR Dkt. AP 2020-2743, apparently by accident, and the OOR informed the Requester that a final determination for that appeal would be issued at the same time as the other appeals referenced above.

On January 19, 2021, the Requester made a submission in response to the District's position statement and provided a copy of the contract between the District and Boro Construction, regulations pertaining to apprenticeship programs, and the Pennsylvania Steel Procurement Act.

On January 29, 2021, the District submitted supplemental argument and a supplemental attestation from Mr. Keeley.

On February 2, 2021, the Requester attempted to make an additional submission in response to the District. Upon objection from the District, the OOR declined to accept the submission into the record, as the record had closed. 65 P.S. §§ 67.1102(a)(2), (b)(3).

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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The District 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. 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). 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)). “The 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).

1. The request for the bond is insufficiently specific

On appeal, the District argues that the request for the bond is insufficiently specific, as the request does not identify which bond it is seeking. 65 P.S. § 67.703. As explained by the District, “[c]onstruction projects such as this regularly have multiple bond requirements, some during bidding and some connected to the awarded contract.” In light of this, Mr. Keeley attests that he “was unable to determine the specific bond being requested.”

Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. In determining whether a particular request is sufficiently specific,

the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep't of Educ.*, 119 A.3d at 1125. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See id.* at 1125. Third, “[t]he timeframe of the request should identify a finite period of time for which the records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request's subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

The request at issue seeks “the Bond for the project named ‘Construction of New High School, Upper Merion Area School District’ with the prevailing wage numbers 20-00683 and 20-03208.” This language provides a subject matter (the project) and implies a timeframe; however, the scope of the request does not explain *which* bond it seeks. Because the request implicates multiple records but only seeks one, it is insufficiently specific. The Requester is not prohibited from filing a new request for the specific bond sought.

2. The meeting minutes must be obtained from Boro Construction pursuant to Section 506(d)

The District denied each of the remaining Requests, stating that the records do not exist in its control. In support of this assertion, Mr. Keeley, the District’s Open Records Officer and Business Administrator, attests, in relevant part, as follows:

2. In my capacity as the Open Records Officer and Business Administrator for the District, I am familiar with the records of the District, especially business records.

3. Specifically, as Business Administrator for the District[,] I am personally familiar with all records that might potentially be responsive to the requests underlying the instant appeals.
4. I am also aware of all other District personnel who might have knowledge of potentially responsive records, and I am aware of my obligation to inquire with those individuals regarding responsive records... [However,] I determined that I did not need to consult with any other District personnel regarding this request because, in my capacity as Business Administrator, I have the most complete knowledge of potentially responsive documents....
9. In order to identify potentially responsive records, I conducted a thorough search of records available to me ... and I consulted with the District's legal counsel.
10. As a result of the above search, I determined that the District was not in possession of records responsive [to the requests for the Safety Manual and meeting minutes].

Under the RTKL, a sworn affidavit or statement made under 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 competent evidence that the District acted in bad faith, “the averments in [the attestations] 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)).

Due to his knowledge of possibly responsive records as Business Administrator, Mr. Keeley’s attestation is sufficient to prove that the District does not possess these records. The Requester argues that the District did not perform a good faith search for records, as it did not contact the relevant third-party contractor, 65 P.S. § 67.901, while the District argues that it is not required to obtain the records from Boro Construction. With respect to records in the possession of third-party contractors, Section 506(d) of the RTKL states:

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 for purposes of this act.

65 P.S. § 67.506(d).

The District acknowledges that it has delegated governmental functions but argues that these governmental functions are limited. The District cites to three sections of the Public School Code of 1949, arguing that while a District is required to “provide ... suitable school buildings,” 24 P.S. §7-701, that “conform to standards established by the State Board of Education as to heating and ventilation systems, light area, floor space, cubical contents, substantiated need and cost standards,” 24 P.S. § 7-733(a), the District is prohibited from performing construction work itself when the value exceeds \$18,500. 24 P.S. § 7-751(a.2). Thus, according to the District, “[o]nly records that directly relate to the suitability of the completed building, or the District’s compliance with [State Board of Education] Standards, are potentially accessible,” as the actual electrical work performed by Boro Construction is not a governmental function because it is unable to be performed by the District. We do not agree.

The Pennsylvania Supreme Court has defined “governmental function” as “the delegation of some non-ancillary undertaking of government.” *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). It is “an act of delegation of some substantial facet of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors.” *Id.* at 1043. The Public School Code permits school districts to perform “work of any nature,” including construction and electrical work, “by its own maintenance personnel,” if the total value is lower than a certain base amount. 24 P.S. § 7-751(b.1). Thus, “it is a function generally performed by [the District], and is not ancillary to the [District’s] functions.” *Dental*

Benefit Providers, Inc. v. Eiseman, 86 A.3d 932, 939 (Pa. Commw. Ct. 2014), *aff'd*, 124 A.3d 1214 (Pa. 2015). The fact that the Public School Code requires that the District engage in a bidding process for this work if it exceeds a certain monetary threshold is not dispositive to our inquiry; construction and electrical work is a governmental function of the District as defined by the Pennsylvania Supreme Court, no matter the monetary threshold. Therefore, Boro Construction's work pursuant to its contract with the District is a governmental function.

The OOR must now determine whether the records requested above directly relate to the performance of this governmental function. The Commonwealth Court has noted that “the records reached [by Section 506(d)] are only those that relate to the *performance* of [the governmental] function.” *Allegheny County Dep’t of Admin. Servs. v. Parsons*, 61 A.3d 336, 346 (Pa. Commw. Ct. 2013), appeal denied, 72 A.3d 604 (Pa. 2013). Put differently, the information must have “a direct bearing on the third-party contractor’s obligations” under the contract. *UnitedHealthcare of Pa., Inc. v. Baron*, 171 A.3d 943, 964 (Pa. Commw. Ct. 2017); *see also Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613 (Pa. Commw. Ct. 2011) (finding that “independent contractor agreements with interpreters who have not actually performed translation services under the Contract ... are not directly related to the Contract because the interpreters have not actually performed, and may never perform, translation services under the Contract”) (emphasis removed). The “direct relationship” requirement of Section 506(d) “focuses on *what* services are performed and *how* they are performed, not *who* performs them.” *Parsons*, 61 A.3d at 347.

The fact that information may pertain to the contract does not establish a direct relationship to the governmental function of the contractor. *Id.* at 345. For example, in *Buehl v. Office of Open Records*, the Commonwealth Court found that records regarding the actual or wholesale costs paid by a contractor that operated the Department of Corrections’ commissary did not directly relate to

the governmental function being performed. 6 A.3d 27 (Pa. Commw. Ct. 2010). The Court reasoned that the contractor's "only contractual obligations ... pertain to providing commissary services and re-selling items to inmates at agreed upon prices.... [W]hat [the contractor] paid for the items is beyond the parameters of its contract...." *Id.* at 31. Relying upon *Buehl*, the Court has found that "mere cost information does not directly relate to performance of a governmental function." *Baron*, 171 A.3d at 964 (citing *Buehl*).

Mr. Keeley attests, in relevant part, that Boro Construction is not contractually obligated to provide the District with any of the requested items. While such evidence is relevant to the OOR's inquiry, it is not dispositive. Boro Construction has been awarded a contract to perform electrical work on the construction of the District's new high school, and the OOR must determine whether the records are directly related to the performance this governmental function.

Based upon the above cited caselaw, the OOR agrees with the District that the requested Safety Manual does not directly relate to Boro Construction's government function. This record appears to be an internal document of Boro Construction that outlines its safety procedures. While such document is related to the project, it is not directly related to the performance of Boro Construction's governmental function, as it would exist independently of the project. *See, e.g., Parsons*, 61 A.3d at 345 (finding that contractor employee names are not directly related to the contractor's governmental function). Section 506(d) only provides for limited access to a contractor's records. *See, e.g., 65 P.S. § 67.506(d)(2).*

However, the requested meeting minutes directly relate to Boro Construction's governmental function. As acknowledged by the District, these records "document the progress

of the performance of the governmental function.”⁵ In light of this, they pertain to the “what” and “how” of the performance of the governmental function. As a result, they directly relate to that governmental function under Section 506(d) of the RTKL and must be provided to the Requester.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part**, and the District is required to take further action as directed above. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Montgomery 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. 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 1, 2021

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Timothy Browne (via email only);
A. Kyle Berman, Esq. (via email only);
Michael Keeley (via email only)

⁵ Mr. Keeley attests that the meeting minutes “document discussions about progress rather than the actual progress of the contracted work” but such distinction, to the extent there is one, does not appear to be material to the analysis here. The meeting minutes document how Boro Construction is exercising its governmental function.

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).