



FINAL DETERMINATION

IN THE MATTER OF	:
	:
JASON HOPKINS and	:
THE IMMIGRATION REFORM LAW	:
INSTITUTE,	:
Requester	:
	:
v.	: Docket No: AP 2021-0947
	:
CITY OF PHILADELPHIA,	:
Respondent	:

INTRODUCTION

Jason Hopkins and The Immigration Reform Law Institute (collectively “Requester”) submitted a request (“Request”) to the City of Philadelphia (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to the Pennsylvania Immigrant Family Unity Project (“PAIFUP”). The City denied the Request, arguing that it has no involvement in PAIFUP, and 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 City is not required to take any further action.

FACTUAL BACKGROUND

On March 30, 2021, the Request was filed, seeking:

1. All PAIFUP records that reflect operational guidance or instruction to attorneys, screeners, or any other individuals, who represent or screen potential non-citizens for removal proceedings in the City of Philadelphia from and including January 1, 2019 up to and including March 29, 2021.

2. All PAIFUP records explaining policies, procedures, and definition of terms, used by attorneys, screeners, or related individuals, to disqualify a non-citizen as ineligible for representation in removal proceedings in the City of Philadelphia from and including January 1, 2019 up to and including March 29, 2021.

3. All PAIFUP records identifying the source(s) of funding to pay for the attorneys during the PAIFUP legal representation of non-citizens during the removal proceedings in the City of Philadelphia from and including January 1, 2019 up to and including March 29, 2021.

4. All PAIFUP records identifying the nature and type of any criminal charges and convictions of non-citizens, without disclosing Personally Identifiable Information (PII), in the City of Philadelphia. Only provide the number of non-citizens involved by head count from and including January 1, 2019 up to and including March 29, 2021.

On May 7, 2021, following a thirty-day extension, 65 P.S. § 67.902(2), the City denied the Request, stating that the City is not involved with removal proceedings and has no responsive records.

On May 13, 2021, the Requester appealed to the OOR, challenging the denial and arguing that PAIFUP is funded and controlled by the City.¹ The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On June 3, 2021, the City submitted a position statement reiterating its position that it does not control PAIFUP and has no records of PAIFUP's actions. In support of this argument, the City submitted the verification of Kathleen Lonie, the Open Records Officer for the Mayor's Office of the City, who attests that PAIFUP is not part of the City and the City has no access to its records.

On July 14, 2021, in response to an inquiry by the OOR, the City informed the OOR that it was unaware of any contracts it might have with PAIFUP, and argued that it could not have

¹ The Requester granted the OOR a 30-day extension to issue a final determination. See 65 P.S. § 67.1101(b)(1).

contracted any governmental function to PAIFUP because the City is not involved in immigrant removal proceedings.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The City 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)). 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).

The only question on appeal is whether the City has access to the responsive PAIFUP records. The City argues on appeal that it does not control PAIFUP or have access to its records, and in support of that argument submits the verification of Ms. Lonie, who attests that:

3. As far as I can tell and as stated in the appeal, PAIFUP stands for the Pennsylvania Immigrant Family Unity Project.
4. PAIFUP is an entity separate and distinct from the [City].
5. As a result, the [City] does not have records responsive to the underlying [R]equest.

Under the RTKL, a 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 City has acted in bad faith or that the requested records exist, “the averments in [the affidavit] 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)).

In response to the City’s position, the Requester argues that the City is directly involved in PAIFUP because it spends taxpayer dollars on the program, directly funding its representation of clients. The Requester also argues that the City is aware of charges against non-citizens, as it received responsive records in a prior OOR appeal.²

The parties generally agree that PAIFUP is a nonprofit organization operating in the City. Although the City has demonstrated that it has no access to PAIFUP’s records, this does not end the inquiry, because public records in the possession of third parties are accessible through Section 506(d) of the RTKL. *See Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (*citing Honaman v. Lower Merion Twp.*, 13 A.3d 1014 (Pa. Commw. Ct. 2011)), *aff’d by*, 124 A.3d 1214 (Pa. 2015). 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). “Under the RTKL, to reach records outside an agency’s possession the following two elements must be met: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to the performance of that function.” *Eiseman*, 86 A.3d at 939 (citations omitted).

The requirement that an agency have a contract with the third party from whom records are sought under Section 506(d) is essential. *See Eiseman*, 124 A.3d at 1223 (Pa. 2015) (“Upon consideration, we agree ... that the [RTKL] channels access to third-party records through Section

² This argument appears to refer to *Hopkins v. Philadelphia District Attorney’s Office*, OOR Dkt. AP 2020-2553, 2020 PA O.O.R.D. LEXIS _____. Notably, the Philadelphia District Attorney’s Office is an agency separate from the City.

506(d)(1), and that such provision contemplates an actual contract with a third party in possession of salient records”). Here, there is no evidence that a contract for services exists between the City and PAIFUP; however the City has not produced evidence that no contract exists. A third party performs a governmental function on behalf of an agency where it performs “a function generally performed by that agency and is not ancillary to the agency’s functions.” *Eiseman*, 86 A.3d at 939 (citing *Wintermantel*, 45 A.3d at 1044). This must include the “delegation of some substantial facet of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors.” *Wintermantel*, 45 A.3d at 1043.

Furthermore, the information sought must “directly relate” to the performance of this governmental function. The Commonwealth Court has construed “directly relates” in a number of cases involving Section 506(d). *See Allegheny Cnty. Dep’t of Admin. Servs. v. Parsons*, 61 A.3d 336 (Pa. Commw. 2013) (*en banc*) (while social services performed by contractor fulfill government function, contractor employee information does not directly relate to performing the services under the contract); *Giurintano*, 20 A.3d 613 (holding subcontracts for interpretation services with contractors who are not selected are not directly related as there is no contract performance); *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010) (the purchase cost of commissary items does not directly relate to the re-sale to inmates); *Eiseman*, 86 A.3d at 940 (the cost of provider services does not directly relate to the performance of the government function).

Here, the Request seeks operational policies and budgets for attorneys representing immigrant clients in removal hearings, as well as information concerning the charges against those clients. Although the Requester alleges that the City provides PAIFUP with funding, no item of the Request identifies any governmental power granted to PAIFUP. *See Misus v. Delaware Cnty.*

Intermediate Unit 25, OOR Dkt. AP 2016-1904, 2017 PA O.O.R.D. LEXIS 102 (providing a public grant to an organization does not necessarily qualify as the exercise of governmental power for the purposes of Section 506(d) of the RTKL); *Browne v. Montgomery Cnty. Intermediate Unit 23*, OOR Dkt. AP 2021-0161, 2021 PA O.O.R.D. LEXIS 459. The Requester has not identified any statutory or traditional obligation for a municipal government to provide representation to immigrants in federal removal hearings, and the City has submitted evidence showing that it takes no part in such cases. Therefore, the City has demonstrated that no responsive records exist within its possession, custody, or control. *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the City 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 Philadelphia 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: July 21, 2021

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS, ESQ.

Sent via email to: Jason Hopkins (via email);
Jill Freeman, Esq. (via email)

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