



IN THE MATTER OF

V.

and

[illegible]

Docket No: AP 2021-1562

Michael Simmonds (“Requester”) submitted a request (“Request”) to the Pennsylvania Turnpike Commission (“PTC”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking subcontractor agreements. The PTC denied the Request, arguing that responsive records did not exist in the PTC’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 **granted in part, denied in part, and dismissed as moot in part**, and the PTC is required to take further action as directed.

FACTUAL BACKGROUND

On July 28, 2021, the Request was filed, seeking: “all subcontractor agreements between Black and Veatch and their subcontractors for the ongoing project awarded to Black and Veatch.” On August 4, 2021, the PTC denied the Request, arguing that the records do not exist within its possession, custody, or control.

On August 9, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. Specifically, the Requester notes that the Request sought contracts between “Black & Veatch, prime contractor, and their subcontractors,” and that “[t]h[eir] records were created for the project, therefore they are subject to the [RTKL].” The OOR invited both parties to supplement the record and directed the PTC to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 18, 2021, the PTC submitted a copy of a letter dated August 12, 2021 that it had sent to Black & Veatch Corporation, notifying the company of the appeal. On August 26, 2021, BVCI, the union construction entity owned by Black & Veatch Corporation (collectively “BVCI”), submitted a Request to Participate and a position statement, arguing that BVCI’s contracts with subcontractors for the project are not in the possession of the PTC, are not “records” for purposes of the RTKL, and, alternatively, contain exempt trade secrets and confidential proprietary information, *see* 65 P.S. § 67.708(b)(11), and proposals and bids, *see* 65 P.S. § 67.708(b)(26).

On August 30, 2021, the Requester submitted a position statement, arguing that it is in the public interest that the records be disclosed and that they are accessible under Section 506(d) of the RTKL. *See* 65 P.S. § 67.506(d). The Requester also argues that the contracts do not contain confidential proprietary information, as there are industry standards for the work performed under

the contract; moreover, the PTC proscribed the specifications for the work performed. Further, the Requester argues that pricing is not confidential, as such projects are unique and subcontractor pricing is irrelevant to future projects. The Requester also sought *in camera* review of the responsive records.

On the same date, the PTC submitted a position statement, acknowledging that it entered into two contracts with BVCI to build a fiber optic network, but that the PTC does not recognize BVCI's subcontractors and those subcontractors deal exclusively with BVCI; thus, the subcontractor agreements are not accessible under Section 506(d). The PTC also argues that BVCI treats the subcontractor agreements as exempt from disclosure as containing confidential proprietary information. In support of its position, the PTC submitted an attestation, made under penalty of perjury by Steven Dale, a Senior Engineer Project Manager for the PTC. Also on August 30, 2021, BVCI submitted the sworn affidavit of Shelby Barbier, BVCI's President, who argues that the subcontracts contain confidential proprietary information.

On September 9, 2021, in response to the OOR's request for evidence, the PTC submitted a letter, acknowledging that its agreement with BVCI has certain diverse business requirements, and that to verify that BVCI is meeting these requirements, BVCI can provide the PTC with copies of agreements with these subcontractors. The PTC asked BVCI for copies of those agreements and BVCI provided five responsive subcontracts. The PTC asserted that it does not have any other responsive contracts. On September 13, 2021, in response to another request for evidence, the PTC provided the statement made under penalty of perjury of L. Evan Van Gorder, Esq., the PTC's Assistant 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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, the Requester has requested *in camera* review; however, because a review of the particular responsive records is not necessary to properly adjudicate this matter, the request is denied.

The PTC 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).

1. The appeal is moot in part

During the appeal, the PTC provided the Requester with five responsive subcontracts. Accordingly, insofar as it seeks those records, the appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. Records do not exist in PTC’s possession, but are accessible under the RTKL

The PTC argues that no other subcontracts exist in its possession, custody, or control. Mr. Dale attests:

6. Pursuant to the agreements between PTC and BVCI, PTC does not recognize subcontractors and deals exclusively with BVCI.
7. The services being performed by BVCI are not contingent upon any subcontracts that BVCI entered into for completing such work.
8. PTC does not pay or have any contractual obligations to pay any subcontractors for work performed on BVCI’s behalf.

9. PTC generally does not request or receive copies of the subcontracts between BVCI and its subcontractors.

In response to the OOR's request for clarification, Attorney Van Gorder attests:

5. On September 10, 2021, counsel for BVCI provided me with five agreements that are responsive to the Request.
6. That same day, I supplemented my response to the Request by providing those agreements to Requester.
7. Apart from the records produced on September 10, 2021, PTC does not have any other agreements that are responsive to the Request.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 PTC acted in bad faith, "the averments in [the statement] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)). Accordingly, the PTC has met its burden of proving that no other requested subcontracts exist in its physical possession. *See Hodges*, 29 A.3d at 1192.

However, the Requester identifies another subcontract by name and PTC acknowledges the presence of additional subcontracts that are not in its physical possession. Public records in the possession of third parties are accessible through Section 506(d) of the RTKL if certain conditions are satisfied. *See Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (citation omitted), *aff'd* 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 (citation omitted).

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 *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029,1044 (Pa. 2012)). 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. 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 506(d)(1), and that such provision contemplates an actual contract with a third party in possession of salient records”).

The fact that information may relate to the contract does not establish a direct relationship to the governmental function of the contractor. *Allegheny County Dep’t of Admin. Servs. v. Parsons*, 61 A.3d 336, 345 (Pa. Commw. Ct. 2013), *appeal denied*, 72 A.3d 604 (Pa. 2013). The “‘directly relates’ test ... ‘focuses on *what* services are performed and how they are performed, not *who* performs them.’” *Id.* at 347 (internal citation omitted) (emphasis in original). The requested 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). 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.

Here, the PTC’s function, in its own words, is “to maintain and operate a turnpike,” but it acknowledges that the construction of a fiber optic network may be considered non-ancillary to the PTC’s governmental function. Mr. Dale attests:

3. On or about September 17, 2019 and December 6, 2019, PTC entered into two agreements with [BVCI] to furnish all materials and perform all work required for designing and building a fiber optic network.
4. The fiber optic network is intended to increase bandwidth and boost connectivity between the PTC’s administrative buildings and support automated tolling capabilities, among other advanced telecommunications applications for improved safety and mobility
5. [REDACTED]
6. Pursuant to the agreements between PTC and BVCI, PTC does not recognize subcontractors and deals exclusively with BVCI.
7. The services being performed by BVCI are not contingent upon any subcontracts that BVCI entered into for completing such work.
8. PTC does not pay or have any contractual obligations to pay any subcontractors for work performed on BVCI’s behalf.

The PTC has contracts to design and build a fiber optic network with BVCI and BVCI has subcontracted out the performance of various aspects of BVCI’s obligations under the contracts.

If designing and building a fiber optic network is a governmental function, contracts that BVCi entered into with other entities to perform aspects of that function are directly related to the performance of that function. As Mr. Dale attests, the services being performed by BVCi are not contingent on the subcontracts; in other words, BVCi remains contractually obligated to PTC to design and build the network. In the language of *Parsons*, *who* performs the contract, *i.e.* which individual subcontractor, is irrelevant to this analysis; what matters is *what* services are performed, *i.e.* the delegated portion of designing and building the network. BVCi has obligations that it has delegated to a subcontractor, and, since subcontracts explain the subcontractor's obligations to perform, they are directly related to the performance of the governmental function of designing and building the network. Since the subcontracts were executed by BVCi, they would be in BVCi's possession, and because BVCi has a contractual relationship with the PTC, the subcontracts are accessible under the RTKL.

3. BVCi has not proven that the remaining subcontracts contain confidential proprietary information

BVCi argues that the subcontracts contain confidential proprietary information under the RTKL.¹ *See* 65 P.S. § 67.708(b)(11). Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” *Id.*

Confidential proprietary information is defined by the RTKL as:

Commercial or financial information received by an agency:

- (1) which is privileged or confidential; and
- (2) the disclosure of which would cause substantial harm to the competitive position of the [entity] that submitted the information.

¹ In its original position statement, BVCi argued that the subcontracts contain exempt proposals and bids. *See* 65 P.S. § 67.708(b)(26). However, BVCi does not address this exemption in its affidavit. Similarly, although both the PTC and BVCi argue that the subcontracts also contain trade secrets, BVCi's affidavit only addresses confidential proprietary information.

65 P.S. § 67.102.

The Commonwealth Court, citing two Ninth Circuit decisions, has stated: “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and (2) a likelihood of substantial competitive injury if the information were released....” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part*, 125 A.3d 19 (Pa. 2015), citing *Watkins v. U.S. Bureau of Customs & Board Prot.*, 643 F.3d 1189 (9th Cir. 2011); *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994)). The Court has further explained that “[c]ompetitive harm should not be taken to mean simply any injury to competitive position,” as “‘substantial’ appears in the statute to characterize the degree of injury needed to apply this exception.” *Id.* (quoting *Watkins*, 643 F.3d at 1195). Additionally, “[c]ompetitive harm analysis ‘is limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position.’” *Pa. Dep’t of Corr. v. Maulsby*, 121 A.3d 585, 590 (Pa. Commw. Ct. 2015) (citing *Watkins*, 643 F.3d at 1194).

Here, Mr. Barbier attests:

I believe that as a standard business practice BVCi sufficiently and narrowly identifies that Confidential Information to those business sensitive terms and routinely protects that Confidential Information from disclosure.... Specifically, the pricing information contained in these subcontracts is considered by BVCi to be Confidential Information.

Further, when the individual subcontracts are issued to the given subcontract[er] there is a standard provision which governs and restricts the disclosure of the confidentiality of the information contained therein and generally each BVCi issued subcontract template carries a footer that it is to be considered “Confidential”.

I am familiar in general with the fiber build industry and there is competition in this market. Many private companies and states/municipalities are interested in building

fiber networks to supply communications services and this field is growing rapidly with increased reliance on internet usage. Pricing information regarding subcontracts for jobs of this nature is generally valuable competitor intelligence and if it is available it can permit competitors to align with or undercut BVCI's prices resulting in loss of jobs which in turn would result in a direct and substantial harm to BVCI.

In addition, [duplicative material omitted] there is the likelihood of competitive injury to BVCI should our Confidential Information in the form of pricing information be released.

Mr. Barbier attests that BVCI generally treats subcontracts as confidential and establishes the presence of competition in the field of building fiber optics networks. Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support.² *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 BVCI acted in bad faith, "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)).

However, to demonstrate that disclosure of confidential information will cause "substantial harm to the competitive position" of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released. *See Eisenman*, 85 A.3d at 1128 (citing *Watkins*, 643 F.3d at 1194; *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994) (adopting the standard from *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 162 U.S. App. D.C. 223 (D.C. Cir. 1974)). The *Eisenman* Court discussed its prior holding in *Giurintano*, where the requester sought independent contractor agreements between a private company and

² Mr. Barbier's affidavit is sworn, as verified by Susan Stanley. The affidavit facially suggests that Ms. Stanley is a notary, although Ms. Stanley's signature block does not confirm this.

interpreters for telephone translation services. The company submitted detailed evidence substantiating its assertion that the identity of its interpreters was a highly valuable business asset. Evidence included a description of the investment involved in developing a list of quality interpreters, including how the identities of the interpreters were safeguarded and the specific nature and degree of the harm that would result if the list were disclosed. In contrast, the evidence before the *Eisenman* court was insufficient, as it did not discuss how the potential harm resulting from disclosure would be substantial.

As in *Eisenman* and unlike in *Giurintano*, the evidence presented here does not establish that the harm resulting from disclosure would be substantial. Although Mr. Barbier attests that the fiber optic field is competitive and that the disclosure of pricing information for subcontracts *could* allow competitors to undercut BVC, resulting in job loss and harm to BVC, he does not elaborate on the basis for that assessment, nor does he address the likelihood or degree of the potentially resulting harm. Furthermore, BVC's evidence does not address the Requester's argument that the design and construction of this network are performed using industry standards, and since the project is a unique event, the exposure of subcontractor pricing is irrelevant to future projects. Accordingly, the evidence submitted by BVC is insufficient to meet its burden of proving that the subcontracts are exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part**, and **dismissed as moot in part**, and the PTC is required to provide all remaining subcontracts in the possession of BVC to the Requester within thirty days. 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 website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 17, 2021

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent via email to: Michael Simmonds; L. Evan Van Gorder, Esq.; Susan Stanley

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