



FINAL DETERMINATION

IN THE MATTER OF

**STEVEN BERKOWITZ AND
BERKOWITZ AND ASSOCIATES,
Requester**

v.

**CITY OF PHILADELPHIA
PROCUREMENT DEPARTMENT,
Respondent**

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Docket No: AP 2022-1287

INTRODUCTION

Steven Berkowitz, Esq., on behalf of Berkowitz and Associates, (collectively “Requester”) submitted a request (“Request”) to the City of Philadelphia (“City”), Procurement Department (“Department”), pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of an identified construction bid. The Request was deemed denied; however, the City later denied the Request, arguing the records consist of exempt bid material. 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 May 2, 2022,¹ the Request was filed, seeking:

¹ The City notes that because the Request was submitted on April 30, 2022, which was a Saturday and non-business day, the Request was received on the next business day, May 2, 2022.

Bid Number: B2214130
Project PW 6557 – PHL P 1989.14
Taxiway Reconstruction
Bid Results: 04/28/2022
Documents Requested: Copy of bid with attachments of two lowest bidders[.]

The City did not respond to the Request within five business days and the Request was deemed denied on May 9, 2022. 65 P.S. § 67.901. However, on May 10, 2022, the City issued a final response denying the Request and arguing that the “contract is not yet conformed,” and, therefore the records are exempt bid material, 65 P.S. § 67.708(b)(26). In addition, the City directed the Request to the public website where the City’s bids, contracts and other related materials are available online: <https://www.phlcontracts.gov/bsa/external/advsearch/advancedSearch.sdo>.

On May 27, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester argues that Section 708(b)(26) of the RTKL does not apply because the bids have been opened, an award is pending and the public will be irreparably harmed if not permitted to inspect the bids. The Requester relies on *Greco v. Pa. Dep’t. of Gen. Svcs.*, 173 A.3d 1259 (Pa. Commw. Ct. 2017) in support of its appeal. 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 6, 2022, the City submitted a position statement reiterating its grounds for denial. In support of its position, the City submitted the attestation made under penalty of perjury from LaShawnda Tompkins, the Procurement 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 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)).

The City argues that because the contract for the bid identified in the Request has not yet been executed, the requested records are exempt from disclosure under Section 708(b)(26) of the RTKL. Section 708(b)(26) of the RTKL exempts from disclosure:

A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability; or 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 the City’s argument, Ms. Tompkins attests, the following:

3. It is the ... Department’s practice, consistent with the RTKL, to not provide copies of bid proposals until the relevant contract has been executed.
4. Upon notice of [the] [R]equest, I confirmed or caused to be confirmed the status of the relevant bid in the electronic database in which City bids and contracts are maintained and tracked. I received confirmation that the relevant contract had not yet been executed.
5. I also searched or caused to be searched the City’s available public records for the relevant bid, which are posted on <https://www.phlcontracts.gov/bsol/>. Pertinent information, including preliminary bid results, were found on the website, therefore I directed or caused others to direct [the Requester] to the City’s website.
6. Following [the Requester’s] appeal and prior to signing this affidavit, I again confirmed or caused to be confirmed the status of the relevant bid in the City’s electronic database. The contract has not yet been executed as of the signing of this affidavit.
7. As there is no signed and executed contract at this time, my [D]epartment still considers this matter to be an open procurement with no contract yet awarded.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury 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 City has acted in bad faith or that records do, in fact, exist, “the averments in [the affidavit] 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)).

As set forth above, the Requester relies on *Greco v. Pa. Dep’t of Gen. Svcs.* to argue that, because the bids have been opened and an award is pending, Section 708(b)(26) does not apply to this Request and, if it were to apply, the public will be irreparably harmed because issue is capable of evading review.

The procedural history underlying the appeal before the Commonwealth Court in *Greco* included a request for a specific solicited proposals (SFPs) to lease office space submitted to the Department of General Services, Bureau of Real Estate. *Greco*, 173 A.3d 1259. The Department denied the request pursuant to Section 708(b)(26), asserting that the lease had not yet been awarded. On appeal to the Office of Open Records (“OOR”), the Department cancelled the underlying solicitation for proposals, and granted access to all of the requested records. Concluding that the exceptions to the mootness doctrine did not apply, the OOR dismissed the appeal as moot. *Id.*; see also *Greco v. Pa. Dep’t of Gen. Svcs.*, OOR Dkt. AP 2015-2653, 2016 PA O.O.R.D. LEXIS 47. On further appeal to the Commonwealth Court, the Court concluded that the exceptions to the mootness doctrine did apply to the case and reversed the OOR. The Court further remanded the matter to the OOR to reach a decision on the merits of the issue of “what constitutes an award of a contract or the rejection of all bids[.]” *Greco v. Pa. Dep’t of Gen. Svcs.*, 2017 Pa. Commw. Unpub. LEXIS 485 * 9 (Pa. Commw. Ct. 2017). The OOR issued a Final Determination on remand specifically finding that, based on a review of the record, “the evidence

is clear that no lease agreement had been executed by the Commonwealth and any bidder regarding the specific request for proposals at issue. Therefore, the fact that a proposal was selected by the Department did not render competing proposals subject to public disclosure because no contract had been executed, and, therefore, no contract had been awarded[]” and that Section 708(b)(26) prohibited the disclosure of the requested SFPs. The OOR applied the more recent holding of the Commonwealth Court in *United HealthCare of Pa. v. Pa. Dep’t of Human Svcs.*, when it concluded that, for purposes of Section 708(b)(26) of the RTKL, a contract is “awarded” when a contract is fully “executed.” 187 A.3d 1046, 1056-58 (Pa. Commw. Ct. 2018); *see Greco v. Pa. Dep’t of Gen. Svcs.*, OOR Dkt. AP 2015-2653 (Final Determination on Remand, OOR May 15, 2019).

Here, the City’s evidence demonstrates that a contract has not been executed on the responsive bid. The Final Determination on remand in *Greco* held that Section 708(b)(26) applies to exempt the disclosure of bid material prior to the execution of a contract. More importantly, the Commonwealth Court in *United HealthCare* specifically concluded that “the General Assembly intended the phrase ‘award of the contract’ for purposes of Section 708(b)(26) to mean the execution of the contract”. The City’s evidence demonstrates that a contract has not been executed and the Requester has not presented evidence that the contract has been executed. Accordingly, the records were properly withheld. *See United HealthCare*, 187 A.3d at 1058; *see also Bucci v. City of Pittsburgh*, OOR Dkt. AP 2022-0073, 2022 PA O.O.R.D. LEXIS 575; *United HealthCare of America v. Pa. Dep’t of Human Svcs.*, OOR Dkt. AP 2020-1501, 2020 PA O.O.R.D. LEXIS 2874.

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 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. 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: June 22, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Steven Berkowitz, Esq. (via email only);
Andrew Segedin, Esq. (via email only);
LaShawnda Tompkins (via email only);
Feige Grundman, Esq. (via email only)

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