



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PAUL VAN OSDOL AND	:	
WTAE-TV,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2017-2247
	:	
CITY OF PITTSBURGH,	:	
Respondent	:	

INTRODUCTION

Paul Van Osdol and WTAE-TV (collectively, “Requester”) submitted a request (“Request”) to the City of Pittsburgh (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other items, a copy of a proposal submitted to Amazon. The City denied the Request, stating, among other reasons, that the records are confidential proprietary information and trade secrets. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the City is required to take further action as directed.

FACTUAL BACKGROUND

On October 19, 2017, the Request was filed, seeking:

- A copy of the proposal submitted by Pittsburgh to Amazon to locate Amazon’s second headquarters (HQ2) in the Pittsburgh region.

- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word “Amazon,” between Mayor Bill Peduto and anyone using the email domains @AlleghenyCounty.us, @pa.gov, @maya.com or @amazon.com.
- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word “Amazon,” between Chief of Staff Kevin Acklin and anyone using the email domains @AlleghenyCounty.us, @pa.gov, @maya.com or @amazon.com.
- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word “Amazon,” between Acklin and Peduto.

On November 22, 2017, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the City denied the Request, stating that “[t]he records you seek are exempt from public dissemination” and citing the following exemptions: 65 P.S. § 67.708(b)(10)(i)(A) (internal, predecisional deliberations), 65 P.S. § 67.708(b)(11) (trade secrets and confidential proprietary information), 65 P.S. § 67.708(b)(22) (real estate evaluations), and 65 P.S. § 67.708(b)(26) (proposals pertaining to agency procurement or disposal of supplies, services or construction).¹ The City also argued that certain emails do not exist.

On December 1, 2017, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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. *See* 65 P.S. § 67.1101(c).

On December 13, 2017, the City submitted a position statement in support of the exemptions cited by the City in its response. The City also submitted the attestations, made under penalty of perjury, of Kevin Acklin, the Mayor’s Chief of Staff and Chairman of the Board of the Urban Redevelopment Authority, and Brian Ross, Deputy Director for Project Management for

¹ The City did not explain how or why these exemptions applied. *See* 65 P.S. § 67.903.

the Pennsylvania Department of Community and Economic Development (“DCED”).² Additionally, the City stated that it adopted the arguments set forth by Allegheny County (“County”) in the appeal docketed at *Van Osdol and WTAE-TV v. Allegheny County*, OOR Dkt. AP 2017-2248, which was also assigned to this Appeals Officer and involved similar records.³

On December 20, 2017, the OOR requested additional information from the City and County regarding PGHQ2, LLC, the entity that submitted the proposal to Amazon, and the City and County’s claims that proposal contains information that is exempt under Section 708(b)(22) of the RTKL. On December 29, 2017, the City and County submitted a joint response providing additional information.

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.

² However, DCED did not request to participate in this appeal pursuant to 65 P.S. § 67.1101(c), and the OOR does not construe Mr. Ross’ attestation as a request to participate by DCED. The OOR notes that Mr. Ross’ attestation was executed in response to this and similar appeals; as a result, it is apparent that DCED had notice of the appeal.

³ Most of the arguments and evidence submitted by the County in OOR Dkt. AP 2017-2248 are duplicative of the submissions made by the City in this appeal, and as a result, do not need to be separately discussed here; however, the County is referenced throughout the Final Determination due to the regional nature of the proposal.

The decision to hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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 proposal cannot be withheld

The City argues that the Amazon proposal is not subject to public access. First, it maintains that the proposal is exempt under Section 708(b)(11) of the RTKL, which exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). These terms are defined in Section 102 of the RTKL as follows:

“Confidential proprietary information.” 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.

“Trade secret.” Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) derives independent economic value, actual or potential, from not being generally known to and not being readably ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; *and*
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102 (emphasis added). An agency must establish that both elements of either of these two-part tests are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part*, *Pa. Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). “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.” *Id.*

Pennsylvania courts confer “trade secret” status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. Ct. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS § 757 (1965)). To constitute a “trade secret,” the information must be an “actual secret of peculiar importance to the business and constitute competitive value to the owner.” *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177 (Pa. Commw. Ct. 2006). The most critical criteria are “substantial secrecy and competitive value.” *Crum*, 907 A.2d at 585. While the City has also separately raised the Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301 *et seq.*, as a basis for denial, the RTKL’s “self-contained trade-secrets exception supplants the more general application of the Uniform Trade Secrets Act,” so that the OOR need not separately analyze whether the Uniform Trade Secrets Act applies. *See Eiseman*, 125 A.3d at 32-33; *see also Pa. Dep’t of Rev. v. Flemming*, No. 2318 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 626, *9-10 (Pa. Commw. Ct. 2015) (“[The RTKL’s] definition [of trade secrets] is identical to that contained in the Uniform Trade Secrets Act”).

a. The proposal is not a trade secret

The City argues that the proposal contains confidential proprietary information. However, the City has also adopted the arguments and evidence submitted the County in OOR Dkt. AP 2017-2248, which argues that the proposal constitutes both confidential proprietary information and a

trade secret.⁴ Although the City and County maintain that the proposal has economic value, and disclosure of the proposal would allow other jurisdictions to appropriate that economic value, the proposal is not covered by the trade secrets exemption.

While not defined in the RTKL, “trade” is commonly defined as: “1. The business of buying and selling or bartering goods or services; COMMERCE.... 2. A transaction or swap. 3. A business or industry occupation; a craft or profession. – trade, vb.” BLACK’S LAW DICTIONARY 1721 (10th ed. 2014). Commerce, meanwhile, is defined as “[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and countries.” *Id.* at 325. Necessarily, a “trade secret” pertains to business or commerce, and this context is crucial in understanding the exemption. *See* 1 Pa.C.S. § 1903(a) (“Words and phrases shall be construed according to rules of grammar and according to their common and approved usage ...”); 1 Pa.C.S. § 1923(c) (“Words and phrases which may be necessary to the proper interpretation of a statute and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof”). As explained by Mr. Acklin’s attestation, the proposal is intended “to bring Amazon to Pittsburgh” in order to “give[] this region the potential for 50,000 more jobs and \$5 billion in investment over the next decade and a half.” The proposal is not related to any business or commerce being conducted by the City or the County; instead, through the proposal, the City and County are hoping to attract Amazon to the region so that *it* may engage in commerce, and the region can reap the benefits of jobs and investment.

Neither the City nor County has pointed to any support for the proposition that a government agency may have a trade secret when not engaging in business or commerce. The Pennsylvania Supreme Court has stated that a trade secret must be “of peculiar importance *to the*

⁴ Additionally, in a footnote, the City states that “[t]o the extent that the Pennsylvania Uniform Trade Secrets Act ... is applicable, the City is prohibited from releasing the bid.”

business and constitute competitive value to the owner.” Parsons v. Pa. Higher Educ. Assistance Agency, 910 A.2d 177, 185 (Pa. 2006) (emphasis added); see also Hoffman v. Commonwealth, 455 A.2d 731 (Pa. Commw. Ct. 1983) (finding that “the trade secret contention ceases to be of any moment when the function is recognized as governmental, rather than that of a private business”). While Pennsylvania courts have intimated that agencies, when engaging in business, may have trade secrets, *see Parsons, 910 A.2d at 186-87; Flemming, 2015 Pa. Commw. Unpub. LEXIS 626, *13-14*, the OOR cannot find any support for the notion that an agency can have a trade secret when it is not engaged in business or commerce. *See Hacke and PublicSource v. Pa. Cyber Charter Sch., OOR Dkt. AP 2017-1684, 2017 PA O.O.R.D. LEXIS 1773* (“However, the OOR cannot conclude that the Charter School engages in a trade or that the Charter School’s marketing plan is the type of information from which economic value can be derived where the primary activity of the Charter School is providing the essential governmental service of education and its ‘competitors’ are primarily other local agencies”). Therefore, the proposal cannot constitute or contain trade secrets of the City or County.

b. The proposal is not confidential proprietary information

The City argues that the proposal contains confidential proprietary information, and therefore must be withheld in its entirety. While the City, County, and Commonwealth have treated the proposal as confidential, this alone does not make the proposal confidential proprietary information. Instead, certain requirements must be met. The definition of confidential proprietary information requires that the information be “received by an agency.” 65 P.S. § 67.102. Likewise, the definition requires that there must be “substantial harm to the competitive position of *the person that submitted the information.*” *Id.* (emphasis added). “Person” is undefined in the RTKL; however, the Statutory Construction Act defines “person” to include “a corporation, partnership,

limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.” 1 Pa.C.S. § 1991; *see also McKelvey and PennLive v. Pa. Dep’t of Health*, OOR Dkt. AP 2017-1443, 2018 PA O.O.R.D. LEXIS ____ (discussing the difference between “person” and “individual” under the RTKL). Therefore, while the City and County can constitute a person, the definition of confidential proprietary information requires that they *submit* the information to an agency.

Here, it is undisputed that the proposal was submitted to Amazon through PGHQ2, LLC, which “was formed to serve as the conduit through which a response to the Amazon RFP would be prepared and submitted on behalf of the Pittsburgh-Allegheny County region.”⁵ There is no claim that the proposal is confidential proprietary information of PGHQ2, LLC; rather, the City and the County claim that the proposal contains the confidential proprietary information of the City, County, and Commonwealth.⁶ The proposal was not received by or submitted to another agency; instead, it was received by and submitted to Amazon. Because the confidential proprietary information exemption does not protect this type of record, the proposal cannot be confidential proprietary information under the RTKL.⁷

The City has also provided the attestation of Brian Ross, Deputy Director for Project Management for DCED, who attests that the proposal contains a “DCED/Commonwealth

⁵ An explanation of PGHQ2, LLC’s formation is contained in the City and County’s joint response to the OOR’s request for additional information.

⁶ Based on the evidence submitted, PGHQ2, LLC is an alter ego of the City and County. *See West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 395 (Pa. Commw. Ct. 2015) (“Foundations at the various institutions of the SSHE in large part are alter egos of the member universities to carry out activities that those universities want to undertake; otherwise, they would not exist”). Mr. Acklin, who is the Mayor’s Chief of Staff and Chairman of the Board of the Urban Redevelopment Authority, also identifies himself as Manager of PGHQ2, LLC. Any argument that PGHQ2, LLC is a separate legal entity under the RTKL would ignore the reality that PGHQ2, LLC was formed so that the City and County could submit a regional proposal.

⁷ Additionally, Section 708(c) of the RTKL states that the exemption does not apply to financial records. *See* 65 P.S. § 67.708(c); *see also* 65 P.S. § 67.102 (defining “financial record”). The City fails to explain how financial components of the proposal, specifically financial incentives, do not meet this definition.

Incentive Proposal” and that this information is “confidential proprietary information to the Department and the Commonwealth of Pennsylvania.” However, the Commonwealth is not a “person” under the definition of confidential proprietary information. *See* 1 Pa.C.S. § 1991 (excluding the Commonwealth). Because the Commonwealth is not a person, DCED’s incentive proposal cannot constitute confidential proprietary information of the Commonwealth under the RTKL.⁸

c. The City has not met its burden of proving that the proposal is exempt under Section 708(b)(22) of the RTKL

The City also argues that the proposal contains real estate feasibility estimates and evaluations. Section 708(b)(22) exempts from disclosure:

The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations *made for or by an agency* relative to the following:

- (A) The leasing, acquiring or disposal of real property or an interest in real property.
- (B) The purchase of public supplies or equipment included in the real estate transaction.
- (C) Construction projects.

65 P.S. § 67.708(b)(22)(i) (emphasis added). However, the exemption “shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.” 65 P.S. § 67.708(b)(22)(ii).

Amazon’s RFP asks bidders to:

⁸ Mr. Ross does not suggest that the information constitutes a trade secret. Although the RTKL’s “self-contained trade-secrets exception supplants the more general application of the Uniform Trade Secrets Act,” the definition of “person” in the Uniform Trade Secrets Act includes the government, and does not exclude the Commonwealth. *See* 12 Pa.C.S. § 5302. While this definition is relevant to the determination of whether information constitutes a trade secret under the RTKL, it is inapplicable to confidential proprietary information, which is not covered under the Uniform Trade Secrets Act. Regardless, as set forth above, there is no support for the incentive proposal being a trade secret of the Commonwealth. Further, although having notice of this appeal, DCED has not requested to participate pursuant to 65 P.S. § 67.1101(c).

Please provide information regarding potential buildings/sites that meet the criteria described herein. Along with general site information, please provide the current ownership structure of the property, whether the state/province, or local governments control the property, the current zoning of the site, and the utility infrastructure present at the site.

The City argues that the proposal contains “specific parcels of privately owned real estate ... so as to meet Amazon’s requirements for square footage,” and that “not only has the City not closed these deals, but there has been no legislative consent to acquire these parcels, which is required before the City acquires real property.” Mr. Acklin, meanwhile, attests that the bid “contains sensitive and confidential information concerning future land acquisitions obtained by [PGHQ2], LLC from private landowners who have expressed strong interest in being part of the future Amazon development with whom non-disclosure agreements have been executed” and that “as the governing bodies of this region do not now own all of the square footage Amazon requires, there are many privately owned parcels that we have included in our bid.” The City’s joint response with the County further explains:

The sites identified in the [proposal] as potential locations for Amazon’s second headquarters are either within the City or are outside the City but within the County. These sites include properties owned by private landowners as well as properties owned by various public entities. Amazon could acquire ownership of any of these identified properties from either a public entity owner or from a private owner. Amazon could also decide to enter into long-term lease arrangements for any of these identified properties. In the alternative, another private entity could acquire the property (or properties) and either sell or lease to Amazon. Again, the intent was to create flexibility, not a pre-determined ownership structure.

Based on Amazon’s RFP instructions and Mr. Acklin’s attestation, the City performed evaluations to locate properties that meet the criteria for Amazon. These evaluations were “made for or by an agency” as required by Section 708(b)(22). However, neither the City nor the County are necessarily leasing, acquiring or disposing of real property on Amazon’s behalf. As explained above, there is flexibility in how these properties could be obtained, and it is unclear whether

Amazon would obtain these properties directly, or if the City or County (or even PGHQ2, LLC) would obtain the properties to convey to Amazon. Under the exemption, if Amazon itself performed the evaluations, the evaluations would not be exempt from disclosure because the evaluations were not prepared “by or for” an agency. *See, e.g., Cedar Realty Trust v. Lower Macungie Twp.*, OOR Dkt. AP 2013-1799, 2013 PA O.O.R.D. LEXIS 1072. Similarly, the exemption does not permit an agency to perform real estate evaluations on a private entity’s behalf, when that agency is not the entity ultimately leasing, acquiring or disposing of real property. “Consistent with the RTKL’s goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015) (citation omitted). Therefore, the exemption is limited to evaluations performed in conjunction with an agency’s lease, purchase, or disposition of property, and the proposal is not subject to the exemption.

d. The City has not met its burden of proving that the proposal is exempt under Section 708(b)(26) of the RTKL

Finally, the City argues that the proposal is exempt from disclosure under Section 708(b)(26) of the RTKL, which 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 to bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability; or the identity of the members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. § 67.708(b)(26) (emphasis added).

The City argues that this exemption “protects the integrity of the sealed bid,” and that “the City is effectively participating in a sealed bid process, and Amazon is acting as the agency.” Ultimately, the City concludes, “[t]he spirit of 708(b)(26) is to protect against unfair bidding

practices.” However, the City misconstrues the exemption. The RTKL defines “agency” as “[a] Commonwealth agency, a local agency, a judicial agency or a legislative agency.” 65 P.S. § 67.102. As a publicly-traded corporation, Amazon is none of these. The City and the County are neither procuring nor disposing of supplies, services or construction from Amazon, as contemplated by the exemption; instead, as explained in Amazon’s RFP instructions, the information provided in the proposal “will allow Amazon to determine the ideal location for our Project.” While the City points to the “spirit” of the exemption, Section 708(b)(26) is limited to situations where an *agency* receives a proposal. The purpose of the RTKL is to “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*, 990 A.2d at 824. As a result, it is clear that Section 708(b)(26) was not intended to shield promises made, and incentives offered, to third parties by government agencies.

2. The City has not met its burden of proving that the requested emails are exempt from disclosure

In its response, the City states that certain emails responsive to Item 2 of the Request do not exist. Additionally, the City argues that the remaining emails are exempt for many of the same reasons as the proposal. On appeal, the City does not address the alleged nonexistence of any records. As a result, it has not met its burden of proof. *Hodges*, 29 A.3d at 1192. Additionally, for the reasons set forth above, the City has not demonstrated that any responsive emails are exempt under Sections 708(b)(11), 708(b)(22), or 708(b)(26) of the RTKL.

In its response and on appeal, the City further argues that the requested emails reflect internal, predecisional deliberations about the proposal. Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure a record that reflects “internal, predecisional deliberations of an agency.” 65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an

agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, *i.e.*, before a decision on an action; and 3) the contents are deliberative in character, *i.e.*, pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). To establish that records are deliberative, an agency must show that the information relates to the deliberation of a particular decision. *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 378-88 (Pa. Commw. Ct. 2014). The term "deliberation" is generally defined as "[t]he act of carefully considering issues and options before making a decision or taking some action...." BLACK'S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep't of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, *aff'd* No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014). Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan*, 103 A.3d at 385-86.

In its unsworn position statement, the City argues:

Requester seeks email between [C]ity and [C]ommonwealth, [C]ity and [C]ounty, [and C]ity and contractors, all of the major players in the bid. There is a very short, intense time period that is at issue. Revealing the emails will reveal names of the members of the team, which is part of the unique and proprietary nature of the information requested.... Every email and attachment that meets the criteria in the [R]equest is by definition internal and predecisional as to the product that was to be produced: the bid itself. Making release of the requested records even more problematic is the fact that the bid is not necessarily the end of the process. When Amazon reveals the top tier locales in early 2018, there is every reason to expect that each jurisdiction will tweak its proposal even harder... As the City has demonstrated, the email requested is internal, predecisional, and would reveal information that is proprietary....

However, Mr. Acklin's attestation does not address how any emails are internal, predecisional, and deliberative, stating only that "[e]mail[s] ... were ... prepared with the expectation that they would not be in the public domain."

Under the RTKL, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (en banc); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d at 659 (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *Schackner et al.*, 124 A.3d at 393 (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)). Moreover, unsworn statements of counsel do not constitute evidence. *Davis*, 122 A.3d at 1193 (“Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the *evidentiary* record”) (citations omitted); *see also Hous. Auth. of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (noting that “assertions in briefs” are “not evidence of record”).

Here, the City’s unsworn, conclusory, submission is insufficient to meet its burden of proof. The City asks the OOR to assume that any emails generated regarding the proposal are subject to the exemption; however, the OOR cannot assume that emails containing the keyword “Amazon” were internal or necessarily involve deliberation. *Cf. Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements when construing exemptions).⁹ The City has the burden of proving that records are

⁹ Additionally, the City does not explain whether the emails contain any factual content or how this factual content cannot be disclosed.

exempt from disclosure, *see* 65 P.S. § 67.708(a)(1), and the City has not provided sufficient evidence to meet its burden of proof.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the City is required to provide all responsive records to the Requester within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Allegheny 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.¹⁰ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 24, 2018

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Paul Van Osdol (via e-mail only);
Eileen Hotham (via e-mail only);
Celia Liss, Esq. (via e-mail only)

¹⁰ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).