



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DUSTIN SLAUGHTER,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-0769
	:	
PHILADELPHIA AUTHORITY	:	
FOR INDUSTRIAL DEVELOPMENT,	:	
Respondent	:	

INTRODUCTION

Dustin Slaughter (“Requester”) submitted a request (“Request”) to the Philadelphia Authority for Industrial Development (“PAID”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking quarterly fundraising reports submitted to PAID by the Democratic National Convention 2016 Host Committee (“PHL 2016”).¹ PAID did not timely respond to the Request, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and PAID is required to take further action as directed.

¹ The Democratic National Convention will be held in Philadelphia from July 25-28, 2016.

FACTUAL BACKGROUND

On April 21, 2016, the Request was filed, seeking “[a]ny and all quarterly fundraising reports submitted by [PHL 2016] to [PAID] required as part of a \$15 million ‘line of credit’ ... extended by PAID to [PHL 2016], from April 1st 2016 up to and including the date this request is officially processed.” The Authority did not respond within five business days, and, therefore, the Request was deemed denied. *See* 65 P.S. § 67.901.

On May 3, 2016, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited both parties to supplement the record and directed PAID to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c). On May 5, 2016, PAID submitted correspondence acknowledging that the Request was inadvertently deemed denied and stating that PAID intended to produce the requested records.² On May 9, 2016, PAID confirmed that it had notified PHL 2016 of the appeal.

On May 17, 2016, PHL 2016 requested to participate in the appeal and provided a position statement and the affidavit of Kevin Washo, Executive Director of PHL 2016. On May 18, 2016, the OOR granted PHL 2016’s request to participate and established a briefing schedule for the parties.³ On May 25, 2015, PAID indicated that PHL 2016, rather than PAID, would submit relevant evidence to support its claim of exemption.

On May 27, 2016, PHL 2016 submitted a position statement, along with an affidavit made under the penalty of perjury from Eliza Rose, Chief Operating Officer of PHL 2016. The Requester did not make an additional submission on appeal.

² PAID explained that it attempted to invoke a thirty-day extension of time to respond to the Request, *see* 65 P.S. § 67.902(b), but that its correspondence doing so “inadvertently was not delivered to [R]equester.”

³ The Requester provided the OOR with an additional thirty days to issue its final determination. *See* 65 P.S. § 67.1101(b)(1).

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.* 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, requisite information and evidence before it to properly adjudicate the matter.

PAID 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 clearly 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)).

1. The records are not financial records under the RTKL

As a preliminary matter, the OOR must determine whether the requested records are financial records. The RTKL defines “financial record” as “[a]ny account, voucher or contract *dealing with* ... (i) the receipt or disbursement of funds by an agency; or (ii) an agency’s acquisition, use or disposal of services, supplies, materials, equipment or property.” 65 P.S. § 67.102 (emphasis added). The exemptions found in the RTKL apply in a very limited manner to financial records. Section 708(c) of the RTKL states that “[t]he exemptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17).” 65 P.S. § 67.708(c); *see also* 65 P.S. § 67.706 (stating that an agency “shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access”). PHL 2016 argues that the requested records constitute confidential proprietary information, *see* 65 P.S. § 67.708(b)(11); however, if the records are financial records, this exemption is inapplicable. *See Commonwealth et al. v. Eiseman et al.*, 125 A.3d 19, 32 (Pa. 2015) (stating that “Section 708(c) renders the [RTKL’s] own internal trade-secrets/confidential-proprietary-information exception inapplicable”).

In *Eiseman*, the Pennsylvania Supreme Court analyzed the definition of “financial records,” stating that “while [the appellees] would prefer to emphasize the definitional language associating contracts and disbursements with a government agency . . . , the statute plainly reaches more broadly via its prescription that ‘financial records’ encompass records ‘dealing with’ disbursements of public money and services acquisitions by agencies.” *Id.* at 29. Here, Ms. Rose attests:

1. . . . PHL 2016 is a private organization that is organizing and producing the events and logistics around the 2016 Democratic National Convention that will take place in Philadelphia in July.
2. PHL 2016 and [PAID] entered into a Reimbursement Agreement (“the Agreement”), dated September 1, 2015, that set forth the terms of a credit facility that is available to PHL 2016.
3. Should situations necessitate that PHL 2016 utilize this credit facility, the funds will come from Amalgamated Bank, a private organization, and be repaid by PHL 2016. To date, PHL 2016 has not accessed nor projects to access this line of credit. To date, no public dollars have been expended by PAID as part of this Agreement.
4. Pursuant to this Agreement, PHL 2016 prepares and provides financial reports to PAID. These reports project total expenses by category and track fundraising and cash flow.

While the records are clearly financial in nature, they do not meet the definition of financial records *under the RTKL* because they do not “deal with” the receipt or disbursement of funds or services by a public entity, *i.e.*, PAID. Instead, they pertain solely to the finances of PHL 2016 and do not implicate governmental functions of PAID. *Cf. id.* at 32 (“[W]e are simply unable to conclude that records which must be submitted to a government agency for approval, and which embody a delegation (albeit a downstream delegation) of a governmental function of the agency, are not records ‘dealing with’ the agency’s monetary disbursements and services acquisitions”). While PAID may be acting as guarantor for any credit that is made available to PHL 2016, the financial reports submitted to PAID by PHL 2016 do not pertain to any disbursements made, or conceivably made, by PAID. As a result, the records are not financial records under the RTKL.

2. The records are not confidential proprietary information

PHL 2016 asserts that the requested records are confidential proprietary information. Section 708(b)(11) of the RTKL exempts from disclosure a record that “constitutes or reveals a trade secret or confidential proprietary information.” *See* 65 P.S. § 67.708(b)(11). The RTKL defines “confidential proprietary information” as “[c]ommercial 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 person that submitted the information.” 65 P.S. § 67.102. An agency must establish that both elements of this two-part test are met in order for the exemption to apply. *See, e.g., Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375. In determining whether certain information is “confidential,” the OOR must consider “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* 125 A.3d 19 (Pa. 2015). In order 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.” *Id.*

In the present case, PHL 2016 argues that “[r]eleasing these financial reports would harm PHL 2016’s competitive position and likely cause PHL 2016 to raise and spend additional funds to make up for the lost commercial leverage.” In support, Ms. Rose attests, in relevant part:

5. With the exception of the disclosure requirements in the Agreement, PHL 2016 does not share these financial reports with any outside organization or person. PHL 2016 makes every effort to keep these financial reports and the information contained within the reports confidential. PHL 2016 has always expected that these financial reports would be confidential prior to the Democratic Convention.

6. PHL 2016 will be required to file a report with the Federal Elections Commission sixty days after the Democratic Convention that will contain information that is also contained in these financial reports.
7. To minimize the use of public funds, PHL 2016 has a three-pronged approach; raise as much private money as possible; solicit in-kind contributions before purchasing necessary good and services; and negotiate favorable agreements with vendors....
9. Disclosure of these reports will put PHL 2016 at a significant commercial disadvantage in their on-going negotiations with various vendors for goods and services not provided by in-kind contributions. Allowing potential vendors to view budgeted amounts and cash flow information, that is otherwise unavailable, at this point in time would harm PHL 2016's competitive position.
10. PHL 2016 is actively engaged in a campaign to raise money from individuals and organizations locally and nationally to fund PHL 2016's efforts. Disclosure of these financial reports would diminish PHL 2016's competitive position among other organizations seeking monetary and in-kind donations from the same sources.

PHL 2016 has provided evidence that it treats its financial reports as confidential and that the reports have not been disseminated to organizations or individuals other than PAID. However, PHL 2016 has not demonstrated the requisite competition in order to claim that the records are confidential proprietary information. Ms. Rose attests that "PHL 2016 is a private organization that is organizing and producing the events and logistics around the 2016 Democratic National Convention that will take place in Philadelphia in July." As such, there are no other competitors in the relevant market, *i.e.* organizing events and logistics for the 2016 Democratic National Convention, as PHL 2016 is the sole entity tasked with organizing this event. *Cf. Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011) (holding that information was confidential proprietary information after third party demonstrated "substantial harm to [its] competitive position in the interpretation industry"); *U.S. Facilities, Inc. v. School District of Phila.*, OOR Dkt. AP 2015-2765, 2016 PA O.O.R.D. LEXIS 9 (finding that a direct interest participant "has demonstrated that disclosure of the redacted information would be substantially harmful because it would allow competitors to gain insight into the salaries and benefits paid to its

employees, as well as the pricing agreed to with various subcontractors”); *Finnerty v. Pa. Dep’t of Human Servs.*, OOR Dkt. AP 2015-0255, 2015 PA O.O.R.D. LEXIS 461 (direct interest participants provided evidence that competitors could use information to the direct interest participants’ competitive disadvantage). While PHL 2016 argues generally that it “competes” with other nonprofits and organizations for donations, these nonprofits and organizations are undisputedly not competing in the same market. Furthermore, it is unclear *how* the release of PHL 2016’s financial reports would impact its ability to raise funds or provide a competitive advantage to other organizations also seeking donations.

Further, PHL 2016 has not adequately demonstrated any likelihood of substantial competitive injury, as it is not competing with any other entity in the relevant market. The 2016 Democratic National Convention is a one-time event, and as a result, the disclosure of this information will not result in any competitive injury to PHL 2016, whose sole function ceases to exist after the 2016 Democratic National Convention. Although PHL 2016 argues that knowledge of the financial reports may impact its negotiations with vendors, this alleged potential harm does not rise to the level of “substantial harm to the competitive position,” as required by Section 708(b)(11). Therefore, PHL 2016 has not demonstrated that the requested reports are confidential proprietary information. *See* 65 P.S. § 67.708(a)(1).

3. PHL 2016 has not demonstrated that release of the records would threaten public safety

PHL 2016 also argues that the reports contain information that, if released, would threaten public safety.⁴ Section 708(b)(2) of the RTKL exempts from disclosure “[a] record *maintained by*

⁴ PHL 2016 seems to argue that the reports may be withheld in their entirety under this exemption; however, in the event that any information contained in the financial reports would be subject to the exemption, “the agency shall redact from the record the information that is not subject to access, and the response shall grant access to the information which is subject to access.” 65 P.S. § 67.706.

an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity....” 65 P.S. § 67.708(b)(2) (emphasis added). In order to establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

Ms. Rose attests, in relevant part:

11. The Democratic National Convention has been designated as a National Special Security Event by the United States Office of Homeland Security, which means that the federal government considers the event a potential target for terrorist or criminal activity.
12. The financial reports include specific figures and data related to security planning. Public disclosure of this information at this point in time could negatively impact preparedness and public security.

PHL 2016 argues that “public disclosure of these figures now would draw unwanted attention to the amount of funding that is being planned for security and reveal PHL 2016’s cash flow” and that “[t]his information could be used to deduce the actual level of security preparedness at the time of the release of the financial reports.” Consequently, PHL 2016 argues that “[i]f these reports were to indicate that the security funding is less than the level proposed, there could be negative impacts on preparedness and public safety.”

PHL 2016’s argument fails for multiple reasons. First, there is no evidence that the records at issue — financial reports — are maintained by PAID “in connection with ... law enforcement or other public safety activity.” PAID does not perform a law enforcement or public safety activity, and it is undisputed that the financial reports are only provided to PAID pursuant to the Reimbursement Agreement, rather than some public safety necessity.

Assuming, *arguendo*, that the financial reports relate to a law enforcement or public safety activity, PHL 2016 has not met its burden of demonstrating that release of the records “would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity.” While the records contain “specific figures and data related to security planning,” there is no evidence that the records contain any information demonstrating how security will be handled at the event — for example, when and where security personnel will be deployed, what security equipment will be used, or what potential security weaknesses PHL 2016 plans to address. PHL 2016’s argument that the reports “could be used to deduce the actual level of security preparedness” is purely conjecture, and the argument does not explain *how* the release of the reports would allow groups or individuals to circumvent its security measures. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (explaining that “[m]ore than mere conjecture is needed” to demonstrate “a substantial and demonstrable risk of physical harm” under Section 708(b)(1)(ii) of the RTKL”); *see also Housing Authority of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (“That properly disclosed public records may enable the requestor or others, by doing further research, to learn information that is protected from disclosure is not generally a sufficient basis to refuse disclosure”).

Further, while the Democratic National Convention has been designated as a National Special Security Event, this does not mean that the disclosure of records pertaining to the event necessarily poses a security risk. Instead, under Section 708(b)(2), an agency must demonstrate that the release of a particular record would be reasonably likely to jeopardize or threaten public safety or preparedness. *See* 65 P.S. § 67.305(a) (“A record in the possession of a ... local agency

shall be presumed to be a public record”). Here, PHL 2016 has not met its burden of proof, and the records are subject to public access. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted**, and PAID is required to provide all responsive records 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 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. 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 14, 2016

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

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