



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION ON RECONSIDERATION

IN THE MATTER OF	:	
	:	
ROGER BUEHL,	:	
Complainant	:	
	:	Docket No.: AP 2010-0760
v.	:	
	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS,	:	
Respondent	:	

INTRODUCTION

Roger Buehl (the “Requester”) submitted a request (the “Request”) to the Pennsylvania Department of Corrections (“DOC”) seeking the contracts between DOC and JPay, Inc. pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). DOC partially denied the Request by redacting portions of the current contract pursuant to various exemptions under the RTKL and the Requester appealed to the Office of Open Records (“OOR”). The OOR issued a Final Determination in the above-captioned appeal on September 10, 2010 and a Petition for Reconsideration was filed on September 24, 2010 and granted on September 27, 2010.

For the reasons set forth in this Final Determination on Reconsideration the appeal is **granted in part** and **denied in part** and the DOC is required to take further action as set forth herein.

FACTUAL BACKGROUND

On August 3, 2010, the Request was filed, seeking copies of all “contracts between ... DOC and J-Pay, up to July 2010.” DOC provided access to two expired contracts with JPay, as well as to a redacted version of the current JPay contract. DOC stated that “Computer screenshots, financial information, and personal information pertaining to employees and references have been redacted,” citing the exemptions for “personal identification information” (65 P.S. § 67.708(b)(6)); “trade secrets or confidential proprietary information” (65 P.S. § 67.708(b)(11)); and the exemption for agency procurement under 65 P.S. § 67.708(b)(26).

The Requester appealed to the OOR on August 19, 2010, challenging the exemptions cited by DOC and stating that the JPay contract should be “made available for free via [a] public website” pursuant to 65 P.S. § 67.1702. The OOR invited both parties to supplement the record. On September 2, 2010, JPay sought to participate in this appeal as a party with a direct interest pursuant to 65 P.S. § 67.1101(c) and submitted a declaration signed under penalty of perjury from its General Counsel related to the current contract. DOC also submitted a position statement, as well as an affidavit from an accountant in the Fiscal Management Division of the Bureau of Administration.

LEGAL ANALYSIS

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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 or not 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, the facts are undisputed, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The DOC is a Commonwealth agency required to disclose public records. 65 P.S. § 67.301. Records in 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. 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 “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

The OOR granted JPay’s request to participate as a party with a direct interest in this appeal pursuant to 65 P.S. § 67.1101(c), and reviewed materials submitted. The

DOC notes that approximately fifty pages of the 256-page JPay contract contain some form of redaction.

1. The DOC properly redacted confidential proprietary information and trade secrets

In support of the redactions, the DOC noted that a copy of the JPay contract, with redactions, was posted on the Department of Treasury's website in accordance with 65 P.S. § 67.1702.¹ The DOC withheld four general categories of records as exempt as confidential proprietary information or trade secrets pursuant to 65 P.S. § 67.708(b)(11): 1) Facility System Descriptions and Screenshots; 2) an Electronic Payment Flow Chart; 3) an Implementation Plan; and 4) a Customer List. In support of this exemption, JPay provided a declaration from its General Counsel describing the records and efforts to keep these records confidential.

The RTKL defines the term "confidential proprietary information" 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 person that submitted the information." 65 P.S. § 67.102. Accordingly, 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. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375.

In evaluating whether this exemption from public access applies, the OOR considers a number of factors, including:

- 1) the extent to which the information is known outside of the business;

¹ See http://contracts.patreasury.org/Admin/Upload/108349_JPay%2c%20Inc..pdf.

- 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 of difficulty with which the information could be properly acquired or duplicated by others.

See id.; *Crum v. Bridgestone/Firestone North Amer. Tire*, 907 A.2d 578, 585 (Pa. Super. 2006).

a. Facility Descriptions and Screenshots

JPay's declaration described the redacted material as follows:

The facility system descriptions and screenshots are descriptions of the system, products and processes and actual screen shots of computer program screens marketed by JPay to provide the underlying services requested by the DOC. The facility system and screenshots set forth in the redacted materials describe JPay's proprietary methods and processes for providing its e-commerce services to the DOC. JPay has taken a number of steps to maintain the confidentiality of its system and interface as described in such materials. JPay only provides this information to its clients via an online interface depicted in the screenshots, and each client logs into the system with personal login credentials. Clients and JPay employees are the only individuals having access to this information. As such information is not generally made available to the public, disclosure of this information would result in substantial economic harm as JPay's competitors would have access to JPay's proprietary information. JPay competes in a niche market by providing certain services, including e commerce, communication, and financial services to prison systems. Provision of this information to JPay's competitors will allow them to simulate those processes, or otherwise impede JPay's ability to compete for the same market share. Furthermore, JPay has expended considerable financial resources developing the methods and techniques embodied in the redacted information. JPay currently has a pending patent on all of its applications and the related Intel system which is fully integrated with each individual service offered by JPay to the DOC. This patent-pending

system is accessible via the online interface described in the facility descriptions and screenshots JPay is seeking to protect.

The OOR finds that this declaration, along with the position statement provided by JPay, adequately addresses each of the above factors and meets the high burden of establishing that the facility system descriptions and screenshots are properly protected as both confidential proprietary information and trade secrets. *See, e.g., Giurintano v. Dept. of General Services*, OOR Dkt. AP 2010-0603, 2010 PA O.O.R.D. LEXIS 555; *Dahlgren v. DGS*, OOR Dkt. AP 2009-0631, 2009 PA O.O.R.D. LEXIS 96; *see* 65 P.S. § 67.708(b)(11); *see also Palattella v. Erie Western Pennsylvania Port Authority*, OOR Dkt. AP 2009-0657, 2009 PA O.O.R.D. LEXIS 115.

b. Electronic Payment Flow Chart

In support of redacting the flow chart, JPay's declaration set forth that the

chart reflects JPay's proprietary method for processing a funds transfer which is central to one of JPay's main services offered to the DOC and its inmates. Such information is not generally available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to this confidential information.

DOC also pointed out that the "chart derives independent economic value because the processes that it describes are not known to JPay's competitors and are not reasonably ascertainable by proper means; the information is distributed only to JPay's clients and employees."

The OOR holds that this declaration and DOC's supporting descriptions, address all of the necessary elements establishing that the flow chart is properly protected as trade secrets. *See, e.g., Giurintano*, OOR Dkt. AP 2010-0603, 2010 PA O.O.R.D. LEXIS 555; *Dahlgren*, OOR Dkt. AP 2009-0631, 2009 PA O.O.R.D. LEXIS 96; *see* 65 P.S. §

67.708(b)(11); *see also Palattella*, OOR Dkt. AP 2009-0657, 2009 PA O.O.R.D. LEXIS 115.

c. Implementation Plan

The declaration also addresses the implementation plan:

The implementation plan reflects JPay's proprietary method, technique and process to install and operate its patent-pending system. Such information is not generally available to the public and the disclosure of such information would result in substantial economic harm as JPay's competitors would have access to this confidential information.

DOC further clarified that the plan is only known to JPay's clients and employees.

The OOR also finds that the plan was properly protected from public access under 65 P.S. § 67.708(b)(11) based on the evidence provided by JPay and the DOC. *See, e.g., Giurintano*, OOR Dkt. AP 2010-0603, 2010 PA O.O.R.D. LEXIS 555; *Dahlgren*, OOR Dkt. AP 2009-0631, 2009 PA O.O.R.D. LEXIS 96; *see* 65 P.S. § 67.708(b)(11); *see also Palattella*, OOR Dkt. AP 2009-0657, 2009 PA O.O.R.D. LEXIS 115.

d. Customer List

Under the RTKL, a customer list may be withheld as exempt as a trade secret if the list "derives independent economic value ... from not being generally known" and "is the subject of efforts ... to maintain its secrecy." *See* 65 P.S. § 67.102. The OOR finds that JPay's declaration and DOC's position statement serve as sufficient evidence supporting the redaction of this information pursuant to the trade secrets exemption under 65 P.S. § 67.708(b)(11).

2. DOC properly withheld the tax return

The Department notes that a one-page tax return was submitted by JPay in response to a request for proposals to demonstrate the bidder's economic capability and

argues that the tax return was properly withheld under 65 P.S. § 67.708(b)(26). The RTKL provides that an agency may withhold “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...” 65 P.S. § 67.708(b)(26). The Department provided sufficient evidence that the tax return is financial information submitted by JPay to demonstrate JPay’s economic capability and expressly exempt under the RTKL. *See Howard v. DOC*, OOR Dkt. AP 2010-0776, 2010 PA O.O.R.D. LEXIS 753 (holding JPay’s tax return exempt under 65 P.S. § 67.708(b)(26)).

3. The résumés of JPay personnel were improperly withheld

In its submissions to the OOR, the DOC states that the résumés contain the telephone numbers of various employees and, if produced, would have been redacted pursuant to 65 P.S. § 67.708(b)(6). As such information is facially exempt under the RTKL, the OOR agrees.

With respect to the rest of the information on the résumés, the DOC argues that the remainder of the résumés are protected as confidential proprietary information under 65 P.S. § 67.708(b)(11). In support, the DOC states that

Such information reveals the identities and qualification of key JPay personnel. JPay is engaged in [a] highly competitive field wherein employees are sought after by competitors for their abilities, knowledge in the field, knowledge of competitor operations, etc. Accordingly, divulging the identifies of key employees to the public will cause substantial harm to the competitive position of JPay and is not required under the RTKL.

With respect to the résumés, JPay merely asserts that the résumés “were redacted ... because they include ... confidential proprietary information” without providing any information as to the factors used to evaluate whether this exemption applies. *See*

Sansoni, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375 (listing elements for establishing the exemption for confidential proprietary information); *compare Giurintano*, OOR Dkt. AP 2010-0603, 2010 PA O.O.R.D. LEXIS 555 (finding that agency set forth sufficient evidence establishing that the identities of various individuals were protected under 65 P.S. § 67.708(b)(11)).

Further undercutting the argument that the “identities of key personnel” should be withheld is the fact that the JPay contract specifically lists six individuals, their titles, phone numbers, responsibilities and experiences.² In other words, the identities of key JPay personnel have already been exposed to public access, meaning that any efforts to keep such information confidential have been ineffective. As a result, the OOR holds that DOC and JPay did not meet the burden of demonstrating that the résumés should be withheld from public access, and must produce these records subject only to redactions pursuant to 65 P.S. § 67.708(b)(6). *See* 65 P.S. § 67.305.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part** and the DOC is required to provide responsive résumés, subject to redactions pursuant to 65 P.S. § 67.708(b)(6), within thirty (30) calendar days. This Final Determination is binding on all parties. Within thirty (30) 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 according to court rules as per Section

² *See* FN 1, *supra* at 207-08. The DOC noted that six pages of resumes were withheld. The OOR assumes that the six pages correspond to the six individuals listed in the JPay contract.

1303 of the RTKL. This Final Determination shall be placed on the OOR website at:
<http://openrecords.state.pa.us>.

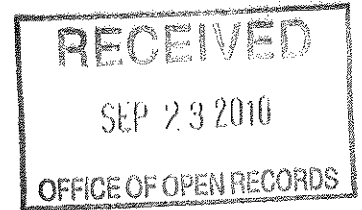
FINAL DETERMINATION ON RECONSIDERATION ISSUED AND MAILED:

October 14, 2010



APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Roger Buehl; Theron Perez, Esq.; Katrina Gleber, Esq.



September 24, 2010

Terry Mutchler, Director
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: Petition for Reconsideration of Final Determination
Appeal No.: 2010-0760 (*Buehl v. PA DOC*)

Dear Ms. Mutchler:

Please accept this letter as a formal Petition for Reconsideration of the Final Determination issued on September 10, 2010 in the above-captioned case.

The Department of Corrections ("Department") submits that the Final Determination errs in directing that the Department provide the requester, Mr. Roger Buehl, with access to a one-page tax return that was submitted by JPay, Inc., ("JPay") in response to a Request for Proposals to demonstrate its economic capability. The Final Determination holds that "once a contract is awarded. . . these submissions are no longer protected under [65 P.S. § 67.708(b)(26)]" and directs the Department to provide access to the tax return to the requester. See *Buehl v. PA DOC*, AP 2010-0760, Final Determination, page 7 and 9.

Subsequent to the Final Determination in *Buehl*, the Office of Open Records ("OOR") issued a conflicting Final Determination with regard to the production of the same document. See *Howard v. PA DOC*, AP 2010-0776, Issued September 17, 2010. That decision specifically disavowed OOR's determination in *Buehl*:

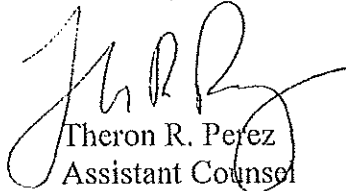
In *Buehl v. Dept. of Corrections*, OOR Dkt. AP 2010-0760 (issued Sept. 10, 2010) the OOR determined that the same tax return at issue in the instant appeal was improperly withheld. Section 708(B)(26) protects financial information and also protects "[a] proposal . . . prior to the award of the contract 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 . . ." In *Buehl* the OOR erred in interpreting the

language of "prior to the award of the contract..." to pertain to the proposal as well as to the financial information within the proposal. The provisions are independent clauses and the bidder or offeror's financial information is protected regardless of the stage of the proposal.

See Howard v. PA DOC, AP 2010-0776, Final Determination, p. 8.

For the reasons set forth by the OOR in *Howard*, the Department respectfully requests that the OOR reconsider the Final Determination issued in *Buehl*.

Sincerely,



Theron R. Perez
Assistant Counsel

cc: Katrina Gleber, Esquire, J Pay, Inc.
Nathanael Byerly, Chief Counsel, Office of Open Records
J. Chadwick Schnee, Esquire, Office of Open Records
Roger Buehl, AM 7936, SCI-Smithfield

-----Original Message-----

From: Perez, Theron
Sent: Thursday, September 23, 2010 4:54 PM
To: Byerly, Nathanael; Schnee, J. Chadwick
Cc: 'Katrina Gleber'
Subject: 2010-0760 - Buehl v PA DOC

Please see attached Motion for Reconsideration in the above-referenced matter.

Theron R. Perez, Assistant Counsel
Office of Chief Counsel
Pennsylvania Department of Corrections
55 Utley Drive
Camp Hill, PA 17011
PH: (717) 731-0444
Fax: (717) 975-2217

PRIVILEGED AND CONFIDENTIAL COMMUNICATION

The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any use of this information other than by the intended recipient is prohibited. If you receive this message in error, please send a reply e-mail to the sender and delete the material from any and all computers. Unintended transmissions shall not constitute waiver of the attorney-client or any other privilege.

-----Original Message-----

From: Ricoh@state.lcl [mailto:RicoH@state.lcl]
Sent: Thursday, September 23, 2010 5:13 PM
To: Perez, Theron
Subject:

This E-mail was sent from "RNPEE6074" (Aficio MP 5000).

Scan Date: 09.23.2010 17:12:48 (-0400)
Queries to: RicoH@state.lcl



September 27, 2010

Theron R. Perez, Esquire
Department of Corrections
Right to Know Office
55 Utley Drive
Camp Hill, PA 17011

RE: Petition for Reconsideration received September 23, 2010, OOR Dkt. AP 2010-0760

Dear Mr. Perez:

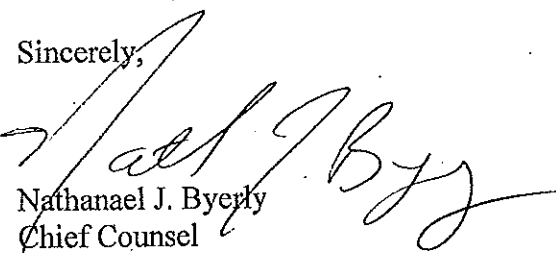
We are in receipt of your Request for Reconsideration received in connection with the office of Open Records Final Determination in *Buehl v. Department of Corrections*, OOR Dkt. AP 2010-0760. We hereby grant your Request.

We note here that in the absence of applicable Office of Open Records interim regulations regarding petitions for reconsideration, this office will follow the procedures set forth in Pennsylvania General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241.

We also note that the Requester, Roger Buehl, may file a response in the nature of an answer within 15 days of the issuance of this order granting reconsideration or by Tuesday, October 12, 2010.

This office will issue a determination responsive to this Petition for Reconsideration no later than 30 days from the mailing date of your petition (September 23, 2010) or by Monday, October 25, 2010.

Please contact me if you have any further questions.

Sincerely,

Nathanael J. Byerly
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Roger Buehl