

Re: Application of Valley Forge Convention Center Partners, LLP, Application of Bushkill Group, Inc., Petition of HSP Gaming, LP, Petitions of Sands Bethworks Gaming LLC, and Philadelphia Entertainment and Development Partners, LP

Dear Mrs. Stetler:

I am writing to repeat my verbal and written requests of February 2009 for copies of the communications sent to the Category 3 license applicants pertaining to the directive of the Board issued on January 21, 2009, that new financial data be submitted, and their responses thereto, including financial data.

I am also writing to request to speak at the public hearing scheduled for March 25th, 2009, on the topic of public concerns regarding the pending applications for Category 3 licenses, in the event that those applications are scheduled for any discussion or proceeding on that date.

Thus I ask that 72 or 48 hours' notice be granted us of any inclusion of said topics on the agenda. Thank you for your assistance.

Sincerely,
James D. Schneller

("Request"). While the Board responded to his request to speak at the public hearing, the Board did not respond to the Citizen's request for records. Therefore, his Request was deemed denied as of March 30th.

On April 9th, the Citizen filed a timely appeal with the OOR of the deemed denial, which included a copy of his Request. Also on April 9th, the OOR received a letter to the OOR Executive Director Terry Mutchler from the Assistant Chief Counsel stating "the 'appeal' is null and void in that there is nothing for him to appeal ... and we ask that you deny [it]."

The OOR acknowledgement letter invited both parties to submit additional material to support their positions. In sum, the Board's position is that the Citizen has no standing to pursue an appeal under the RTKL because he failed to submit his RTK request in the proper format and did not direct the Request to the attention of the Board's Open Records Officer ("ORO").

In its May 7th submission, the Board repeated its argument that without reference to the RTKL, the request "is *not* being made under the Act." Position Statement, p. 2 (emphasis in original). She also submitted copy of the Citizen's April 7th 'proper' request and the Board's Policy on the RTKL. No other material was submitted within the prescribed schedule.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The Board is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.301. Records of a Commonwealth agency are presumed to be “public” unless: (1) the record is exempt under Section 708(b); (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. The Board does not address the public nature of the records requested and asserts no exemptions from disclosure. Instead, it contends that Mr. Schneller’s Request does not qualify as a “proper” request under the RTKL such that the OOR has no jurisdiction to decide his Appeal. The OOR disagrees with the Board’s position.

The RTKL is to be interpreted consistent with its legislative intent, which is transparency in government. Although the RTKL does not define “Request” within Section 102, Sections 702 and 703 describe the criteria. Section 702 provides that the request must be in writing for a requester to avail himself of the “relief and remedies,” including the appeals process. The statute does not require requests to cite the RTKL nor to state that the request is being made pursuant the RTKL. Here, the Citizen’s Request was “a written request for access to a record” that satisfied Section 702 of the RTKL and should have triggered a written response from the Board.

The Board also asserts that the Citizen’s Request is defective, and therefore did not require an acknowledgement or response, because it was not directed to the attention of the Board’s designated ORO as required by Section 703. The RTKL requires all agencies “to designate an official or employee to act as the open-records officer” 65 P.S. §67.502(a)(1). Section 703 further requires that “a written request must be addressed to the open-records officer designated pursuant to Section 502. *Employees of an agency shall be directed to forward requests for records to the open-records officer.*” 65 P.S. §67.703 (emphasis added).

The Board does not post the identity of the Board's ORO, Andrew Bender on its website as required under Section 504(b)(1). Thus, at a minimum, the Board's defense that the Request did not constitute a RTK request because it was not addressed to the ORO must fail because the Board has not complied with the ORO designation and posting requirements of the RTKL. The Board's defense further fails for a more fundamental reason since Section 703 requires agency employees to "forward requests for records to the [ORO]." The Board's own Policy is consistent with the RTKL by requiring that requests not directed to the ORO, be forwarded to the ORO. Therefore, the Request satisfies Section 703 and should have triggered a response.

Further, the Board supports its failure to respond to the Request by stating that the Citizen failed to submit his request on a form. There is no requirement that requesters use a specific form. Section 504(a) states that "an agency may promulgate regulations and policies necessary for the agency to implement this Act." 65 P.S. §67.504(a). The Board adopted a Policy as permitted by the RTKL, which requires use of a form. While the Citizen's Request does not comply with the Board's Policy use a form, such non-compliance, by law, can serve only as a basis for an extension of time under Section 902. Failure to comply with an agency's policies and/or procedures does not constitute a ground for ignoring the Request and refusing to process it or substantively respond. To the contrary, "[u]pon receipt of a written request for access, the open-records officer for an agency shall determine if one of the following applies: [*i.e.*]...(5) the requester has not complied with the agency's policies regarding access to records..." 65 P.S. §67.902(a)(5). And "**upon a determination [of non-compliance with an agency policy], the open-records officer shall send written notice to the requester within five business days of receipt of the request for access**". 65 P.S. §67.902(b)(1) (emphasis added).

The OOR is cognizant that it may at times be difficult for an agency to discern whether a written request for information constitutes a RTK request, particularly when a request is indecipherable, verbose, or when it does not comply with an agency's policies. However, in the event of procedural irregularities or when infirmities exist, the law requires that the agency advise a requester of the proper procedure so the request may be clarified and its substance addressed. 65 P.S. §67.902(b)(1). An agency cannot simply choose to ignore a citizen's written request for records because it does not conform with its policies and/or procedures.

Despite requests from the OOR to provide substantive defenses, if any, to release of the records sought in the Request, the Board chose not to assert substantive defenses to justify its withholding of the records requested. Instead, it chose to rely on the sole argument that the written request for records did not constitute a RTK request and, as such, no response was required. As the Board asserted no basis for protecting the records, it cannot meet its burden to prove any Section 708(b) exceptions, and the law dictates that the records are presumed public.

CONCLUSION

For the foregoing reasons, the Citizen's Appeal is **granted**. As the Board has not overcome the presumption of openness, it is directed to release the records within thirty (30) days. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal or petition for review 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. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED: May 11, 2009


APPEALS OFFICER
LUCINDA GLINN, ESQ.