



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

CHARLES SCHILLINGER,
Complainant

v.

LACKAWANNA COUNTY,
Respondent

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Docket No. AP 2009-0168

INTRODUCTION

Charles Schillinger submitted a request to Lackawanna County (“County”) seeking rules and regulations pertaining to medical treatment of inmates at the County Prison, pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The County supplied certain records but withheld internal medical protocols of Correctional Care, Inc., its third-party contractor as “trade secrets.” Mr. Schillinger filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, Mr. Schillinger’s appeal is **granted**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

Charles Schillinger is a reporter for *The Scranton Times-Tribune*. On February 9, 2009, Mr. Schillinger submitted his right-to-know request via email to the County seeking:

Rules and Regulations used by the Lackawanna County Prison for the medical treatment and care of inmates, including but not limited to medical protocols for inmates who are pregnant. Rules and regulations used by parties contracted by Lackawanna County Prison for the medical treatment and care of inmates, including but not limited to medical protocols for inmates who are pregnant.

(“Request”). He noted the County’s obligations to procure documents from its contractor.

On February 10, 2009, Mr. Schillinger was provided with the following: (1) the Rules and Regulations used by the Lackawanna County Prison Board for medical treatment care of inmates and (2) Minutes of the September 2007 and October 2007 Lackawanna County Prison Board meetings that include medical protocols used for pregnancies by Correctional Care, Inc., as approved at the October 2007 meeting. However, the rules and regulations used by its third-party contractor, Correctional Care, were not supplied.

Within thirty days, on March 10, 2009, Maria Elkins, the County Chief of Staff, responded to the Request. She advised that the third-party contractor protocols sought are confidential proprietary material/trade secrets under Section 708(b)(11), 65 P.S. §67.708(b)(11).

In addition, the information sought includes programs that “derive economic value, actual work potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use” and “is the subject of efforts that are reasonable under the circumstances to maintain secrecy” as a trade secret.

(“Denial”). The Denial also asserted attorney/client, work-product and physician/patient privileges. She also advised that the information is excepted under Sections 708(b)(1), (2), (5), (17) and (26) due to a potential loss of funds, potential threat to public safety, disclosure of patient information, and confidential information contemplated in awarding the County contract.

Mr. Schillinger filed a timely appeal with the OOR on March 10, 2009. In support of his appeal, he advises that the records are presumed public unless shown otherwise, and that the records should be available “to ensure employees of the health care provider are taking necessary steps to properly care for prison inmates, specifically those who are pregnant” (“Appeal”). With respect to the trade secret exception, he notes that the agency “fails to explain how disclosure of such policies – some of which were examined and adopted by a public agency which oversees the prison – could be used to economically undermine the third-party health care provider.”

The OOR sought supplementation from both parties for the record. Mr. Schillinger supplied his original Request on March 30, 2009. The OOR asked the County to supply a copy of the correspondence to and from Correctional Care regarding the application of the trade secret exception, and sought a sworn statement attesting to the alleged confidential and trade secret nature of the internal medical protocols requested. The OOR also sought additional explanation and support for the assertion of the other exceptions under Section 708(b), including subsections (1), (2), (5), (17) and (26), for which facts of record were lacking.

In response, on April 3, 2009, County Solicitor John R. O'Brien advised that Correctional Care objected to the Request as seeking "confidential proprietary information" as it may do under Section 707(b) of the RTKL. He advised that the "internal medical procedures of a third party medical supplier, as it relates to patient care, is information that concerns the delivery of patient care." The Solicitor did not submit any factual or legal basis to support the County's non-trade secret exceptions. While his letter was to include a copy of the Comprehensive Health Services Agreement, ("Agreement"), and the letter from Correctional Care alleging trade secret status in response to an identical request, these documents were not supplied until April 7th.

On April 7th, the Solicitor supplied a January 16, 2009 Letter signed by Edward J. Zaloga, President and Chief Medical Officer of Correctional Care ("Objection Letter"). In the Objection Letter, Dr. Zaloga states that the internal medical protocols are protected as "confidential proprietary information" and "trade secrets" and asserts additional exceptions reiterated by the County in its Denial. The Objection Letter includes no facts to substantiate its assertions. The Solicitor also attached his letter addressed to Dr. Zaloga requesting reconsideration of the asserted trade secret protection and submission of a more detailed explanation about how the exception applies to protect the protocols "at [his] earliest possible opportunity." An extension for the Final Determination was granted to April 14th. No additional materials were submitted.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. Records of a local 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 County asserts a number of exceptions under the RTKL in its Denial, but has limited its defense on appeal¹ to the trade secret exception in Section 708(b)(11), 65 P.S. §67.708(b)(11). To overcome the legal presumption, the County must show that its claimed exception applies by a preponderance of the evidence. *See* 65 P.S. §67.708(a). To prove by “preponderance of the evidence” means to show by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). The County fails to show that the trade secret exception applies here.

Under Section 707(b), “an agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information.” 65 P.S. §67.707(b). In order to trigger Section 707(b), two elements must be present: (1) the County must have a copy of the records at issue, *i.e.*, the internal medical protocols of Correctional Care; **and** (2) Correctional Care provided a written statement signed by one of its representatives that the record at issue contains trade secret/confidential proprietary information.

¹ The County did not supply any factual or legal grounds in support of its other alleged exceptions. The OOR notes that the asserted exceptions are verbatim lifted from Dr. Zaloga’s Objection Letter without any support. As the County bears the burden of proof on its exceptions, and need only contact the third party with regard to the trade secret aspect of that party’s documents, the third party’s asserted non-trade secret exceptions are not proper.

Based upon the facts as represented to the OOR through counsel, the County does not have the internal medical protocols, and in fact “has no access to those internal protocols” which means that the first trigger for Section 707(b) is not met. Further, the OOR requested the County supply a copy of the written signed statement attesting to the trade secret/confidential proprietary status which should have been submitted by Correctional Care to accompany the internal medical protocols, and none was provided. As neither of the triggers to Section 707(b) were shown to exist, the OOR concludes that Correctional Care was not entitled to notice of the Request within five business days of its receipt in order for Correctional Care to respond to it.

As this provision of the RTKL is new, the OOR notes that the County attempted to comply with its terms by inviting Correctional Care to participate in this process and to submit its input with regard to its earlier claimed “trade secret” protection. Had Section 707(b) been properly invoked, the County would have been required to advise Correctional Care of the Request within five business days of receiving it to enable Correctional Care to respond with its factual basis for claiming it as “trade secret” information within five business days. From the record, it appears that the County did not notify Correctional Care of the Request until April 3rd, after the filing of the Appeal. Although the County attempted in good faith to assert the exceptions Dr. Zaloga asserted in his Objection Letter sent mid-January 2009, the OOR advises that the County is not bound by the exceptions asserted by its third-party contractor, and may release the record should it find the contractor’s trade secret assertions to lack merit.

Section 708(b)(11) protects the release of “a record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. §67.708(b)(11). Both “trade secrets” and “confidential proprietary information” 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 [one] that submitted [it].

Trade secret: Information including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives economic value, actual work potential, from not being generally known to and not being readily 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). Correctional Care failed to supply any facts to show the application of this exception as either “confidential proprietary information” or “trade secrets.”

With regard to “confidential proprietary information,” the medical protocols do not qualify. First, the medical protocols requested are not on their face “commercial” or “financial information” as required to be proprietary information in the first instance. Second, the County must show that the protocols are privileged or confidential. “Privilege” is defined in the RTKL as a legally recognized privilege in the Commonwealth, including doctor-patient privilege. Protocols are not “privileged.” Protocols are plans for treatment which themselves would not contain doctor-patient privileged communications as they are to be applied universally to a number of patients as opposed to an individual treatment plan. The County has not shown that disclosure of the medical protocols would jeopardize Correctional Care’s competitive position, nor explained the value in maintaining the medical protocols confidential. The fact that the medical protocols used for pregnancies were discussed at the County Prison Board meeting, for which minutes were provided, weighs against their alleged confidential nature. Thus, the County has not established the protocols requested qualify as “confidential proprietary information.”

With regard to “trade secrets,” the County likewise does not show that medical protocols outlining the treatment for inmates qualify for protection. The OOR notes that the Uniform Trade Secrets Protection Act, 12 Pa. C.S. §§5301 *et seq.* defines “trade secrets” identically to the RTKL. *See* 12 Pa. C.S. §5302. Both before and after the 2005 adoption of the Uniform Act, Pennsylvania courts have conferred “trade secret” status based upon the following factors:

- 1) the extent to which the information is known outside of his 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 his 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 Crum v. Bridgestone/Firestone North Amer. Tire., et al., 907 A.2d 578, 585 (Pa. Super. 2006)(from the RESTATEMENT OF TORTS §757); *Iron Age Corp. v. Dvorak*, 880 A.2d 657, 663 (Pa. Super. 2005); *Parsons v. PHEAA*, 910 A.2d 177 (Pa. Commw. 2006). The most critical criteria are “substantial secrecy and competitive value.” The County did not receive sufficient facts from its third-party contractor to show that the medical protocols possess an inherent economic value that would cause competitive harm by another care provider if released. As *PHEAA* held, unsubstantiated claims of competitive harm are insufficient to show a trade secret.

Although a significant body of decisional law has defined the terms “confidential proprietary information” and “trade secret,” the County cited no cases in support of its decision to withhold medical protocols of its third-party contractor, Correctional Care. Correctional Care did not submit any facts to support its assertion of “trade secret” protection, and did not assist the County in meeting its burden of proof. The OOR finds the assertion of trade secret protection weak, and likens this case to *PA Childcare LLC v. Flood*, 887 A.2d 309 (Pa. Super. 2005), in which a newspaper sought documentation from the County showing how ChildCare, a third-party contractor of Luzerne County, treated juveniles in its detention facility. ChildCare asserted the Uniform Trade Secrets Act to protect records regarding the “unique manner it operated its business” from disclosure. Though ChildCare attested its business model was unique and

“privately designed and financed,” and named its potential competitor in the market—neither of which were supplied by Correctional Care—the court was not persuaded. Tellingly, the Superior Court declared “ChildCare’s weak assertions involving trade secrets appear to be nothing more than a ruse to prevent public exposure.” 887 A.2d at 313. Based upon the record submitted, for which Correctional Care supplied no facts to establish a trade secret, the OOR concludes the medical protocols do not qualify for trade secret protection under Section 708(b)(11). As the County did not supply any facts to support any other exceptions, all of which require predicate facts, the OOR concludes the medical protocols cannot be withheld from Mr. Schillinger.

CONCLUSION

For the foregoing reasons, Mr. Schillinger’s appeal is **granted**. The OOR concludes that the medical protocols of Correctional Care are not shown to be “trade secrets” or “confidential proprietary information.” The OOR finds that the County exercised diligence in attempting to furnish materials to satisfy its burden of proof, and notes that Correctional Care was not cooperative in giving the County the requisite facts. The County is directed to obtain the medical protocols from Correctional Care and supply them to Mr. Schillinger 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 to the Lackawanna 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 according to court rules. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED: April 13, 2009



**APPEALS OFFICER
LUCINDA GLINN, ESQ.**