



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOE SMYDO AND <i>THE</i>	:	
<i>PITTSBURGH POST GAZETTE</i>	:	
Complainants	:	
v.	:	Docket No. AP 2009-0589
	:	
PITTSBURGH	:	
SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Joe Smydo of *The Pittsburgh Post Gazette*, (the “Reporter”) submitted a request to the School District of Pittsburgh (“School District”) seeking invoices, contracts, bids and RFPs and correspondence pertaining to the purchase or contemplated purchase of promotional items pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The School District denied based upon Section 708(b)(10)(i)(A), the predecisional deliberative exception. The Citizen timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Citizen’s appeal is **granted in part and denied in part**, and the School District is required to take further action as directed.

FACTUAL BACKGROUND

On May 15, 2009, the Citizen submitted a right-to-know request seeking:

Invoices, contracts, bids, RFPs and correspondence (including all emails) pertaining to the District’s purchase or contemplated purchase of [] T-shirts , hats and other items used to promote the District, schools or special events...generated in the past 12 months.

(the “Request”).

After invoking the thirty-day extension, the School District substantively responded on June 19th, denying the Request as to any records of “contemplated purchases” based upon Section 708(b)(10)(i)(A) as records reflecting internal predecisional deliberations (the “Denial”).

The Reporter timely appealed the Denial to the OOR on July 9th. In support, he explains that the exception is applied too broadly because it should pertain only to deliberations, meaning “discussions for or against a measure” (the “Appeal”). He contends that if a board member advocates the use of a particular vendor in correspondence, then the correspondence does not constitute a “discussion.” The Reporter further contends that correspondence lacking reasons for the position stated do not rise to the level of “deliberations.” He cites *Turney v. Department of Transportation* in support of his Appeal. The Reporter further asserts that the records requested for contemplated purchases are financial in nature, and therefore cannot be exempt under (b)(10).

The OOR requested the School District to support the basis for its Denial, and to address the test employed by the OOR in its Final Determinations regarding the application of Section 708(b)(10)(i)(A), including the “deliberative character” of the records at issue. In response, the Assistant Solicitor for the School District stated that access for all completed purchases had been provided such that all “financial records” had been disclosed. He notes that the School Code contains a procedure for promotional items, *see* 24 P.S. §8-807.1, and that no competitive sealed bids were needed because no purchases of promotional items exceeded \$10,000. The Assistant Solicitor explained that purchases between \$4,000 and \$10,000 require three telephone price quotes, and purchases under that range do not require quotes.

The School District contends that the contemplated purchase records do not constitute “financial records” as that term is defined in Section 102 of the RTKL. The records that comprise qualifying “financial records” under the definition had already been supplied.

The School District argues that the exception protects “any research, memos or other documents used in the predecisional deliberations.” 65 P.S. §67.708(b)(10)(i)(A). The School District contends that the three-part test utilized by the OOR in assessing whether a record qualifies for protection under this exception is narrower than the language of the exception allows. The School District asserts that any correspondence, quotes, or bids are equivalent to “research” so that even though a quote may not meet the three-part test, because it is not internal and does not “reflect” deliberations, that does not preclude protection under this exception. The mere use of material in its decision-making process is sufficient to permit the records to qualify for protection according to the School District.

On July 30th, the OOR requested additional supplementation, particularly as to the type of records merely submitted to the School District that do not themselves contain deliberations or “deliberative character.” In response, the School District supplied a flow-chart from its Finance Department that shows the decision-making process for purchases. The flow-chart shows that there are a number of times within the process that internal deliberations occur. The School District advised that the quotes are used in the predecisional deliberations when considering whether the contemplated purchase should become an actual purchase, and are thus “integral” to the decision-making process. The School District argues that the quotes qualify as “research, memos or other documents used in predecisional deliberations” and thus squarely fit within the exception, regardless of OOR Final Determinations requiring deliberative character.¹ The School District contends that unlike other cases in which agencies did not meet their burdens of proof, its submissions were sufficient since it explained how the records at issue were included in or related to the District’s decision-making process. No additional material was submitted.

¹ The School District advised that the following Final Determinations do not apply: *Felder v. East Stroudsburg Area School District*, OOR Dkt. AP 2009-0262, *Rotenberg v. Montgomery County Redev. Authority*, OOR Dkt. AP 2009-0512, *Knauss v. Unionville Chadds Ford School District*, OOR Dkt. AP 2009-0443.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for Commonwealth and local agencies. 65 P.S. §67.503(a). The School District is a local agency subject to the RTKL and required to disclose public records. 65 P.S. §67.302. Records of a local agency like the School District are presumed to be “public” unless the record is: (1) exempt under Section 708(b); (2) protected by a legal privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. The School District raised only the predecisional deliberative exception at Section 708(b)(10)(i)(A) to the disclosure of the records. The School District bears the burden of proving the exception’s application by a preponderance of the evidence, 65 P.S. §67.708(a), meaning “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Here, the School District did not satisfy its burden with regard to any records that are not correspondence that actually reflect the comments upon the contemplated purchases. The School District failed to satisfy its burden because it provided no support for its assertion that all records related to its contemplated purchases reflect predecisional deliberations.

Pursuant to Section 708(b)(10)(i)(A), a record *reflecting* the “internal, predecisional deliberations of an agency... or predecisional deliberations between agency members, employees or officials...” are protected from mandatory disclosure under the RTKL. 65 P.S. §67.708(b)(10)(i)(A). To qualify for protection under this exception, a record must *reflect* an agency’s deliberations, and relate to a proposed policy or course of action for the agency. The OOR has consistently held that in order to establish that this exception applies, an agency must show the following three elements: (1) the communication must be *internal* to the agency, including its representatives, (2) the communication must be *predecisional*, meaning it was made before the deliberative process of decision-making was completed; and (3) the communication

must be *deliberative in character* in that it makes recommendations or expresses opinions on legal or policy matters, and is not purely factual in nature.

The Courts have defined “internal predecisional deliberations” when the deliberative process privilege was raised as grounds for protection under the current RTKL’s predecessor. *See, e.g., LaValle v. OGC*, 564 Pa. 482, 496, 769 A.2d 449, 458 (2001); *Com. v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999). Contrary to the School District’s contentions, the statutory language of the exception does not require that any material that is merely utilized and reviewed by an agency, yet not prepared by nor at the direction of that agency, may be protected under the “predecisional deliberative” exception. Under that construction, any material submitted to an agency at any time prior to a decision being made that may have been consulted in the decision-making process would be protected.

The OOR has already addressed this issue in its Final Determination *Rotenberg v. Montgomery County Redevelopment Authority*, OOR Dkt. AP 2009-0512. In that case, the records prepared by a third-party developer were not deemed to be protected under Section 708(b)(10)(A) because the records did not reflect the opinions or recommendations of the agency. For that reason, the quotes submitted to the School District likewise cannot be protected. Quotes prepared by third parties for promotional items do not qualify as “deliberative” in character as none of the agency’s opinions are reflected. In this case, the School District submitted no evidence to suggest that the quotes at issue for the contemplated purchases qualified as deliberative in nature. As described by the School District, quotes that are less than \$10,000 are not treated as bids, and the contemplated purchase of promotional items at issue in the Request is less than \$10,000 such that quotes were received. Therefore, records of quotes cannot be protected under this exception.

With regard to the described correspondence by and between Board members, it is unclear whether the correspondence qualify as “deliberative” in character based upon the record. The OOR notes that correspondence, to include e-mails, as sought in the Request may be internal and predecisional, but will not be protected unless they are also shown to be deliberative. The School District did not describe nor submit any evidence regarding the correspondence potentially implicated in responding to this Request. As the Reporter explained, correspondence in which Board members discuss issues related to the contemplated purchases do not necessarily qualify for protection because there is a difference between discussion and deliberation.

Appellate courts have noted that agency discussion differs from deliberation in that a Board can discuss pros and cons of an issue informally, and “inquire, question and learn about agency issues” without being “deliberation.” *Sovich v. Shaughnessy*, 705 A.2d 942, 945 (Pa. Commw. 1998) (cited by *Mazur v. Trinity Area Sch. Dist.*, 926 A.2d 1260 (Pa. Commw. 2007)). The OOR notes that the existence of correspondence, including e-mails, of agency officials and employees is likely and the non-existence of responsive correspondence has not been raised by the School District. There are insufficient facts and evidence to enable the OOR to find that this exception applies to the requested correspondence. To the extent that such correspondence, such as e-mail, exists, the OOR finds that it is responsive and may only be minimally redacted to remove personal e-mail addresses and specific opinions and recommendations of the decision-makers regarding the actual purchase decision to be made.

The OOR agrees with the School District that contemplated purchase records, while related to finances, do not qualify as “financial records” as that term is defined under the RTKL. Accordingly, Section 708(b)(10) may protect records of contemplated purchases had the School District established the elements of the exception. As concluded above, here, it did not.

CONCLUSION

For the foregoing reasons, the Citizen's Appeal is **granted in part and denied in part**. The OOR concludes that the records of contemplated purchases, including quotes, were not shown to be deliberative in character as is required for Section 708(b)(10) to apply. As the School District did not meet its burden, the School District is directed to provide the Reporter the contemplated purchase records, with only personal e-mail addresses and specific opinions and recommendations redacted from any internal correspondence among decision-makers for the actual purchase, 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 Allegheny County Court of Common Pleas. 65 P.S. §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 as per Section 1303. This Final Determination shall be posted at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 10, 2009



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Joe Smydo; Robert Max Junker, Esq. Asst. Solicitor for Pittsburgh School District