



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
RICK TOMLINSON	:	
and GREATER PENNSYLVANIA	:	
REGIONAL COUNCIL OF	:	
CARPENTERS	:	
Complainant	:	
	:	
v.	:	Docket No.: AP 2009-0760
	:	
CLEARFIELD COUNTY,	:	
Respondent	:	

INTRODUCTION

Mr. Rick Tomlinson (the “Requester”), on behalf of the Greater Pennsylvania Regional Council of Carpenters (the “Union”) filed a right-to-know request (the “Request”) with Clearfield County (the “County”) seeking copies of certified payroll records of a third-party contractor pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (the “RTKL”). The City denied the request stating that it did not have access to the records. The Requester filed a timely appeal with the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the Requester’s appeal is **granted**, and the City is directed to take further action as outlined below.

FACTUAL BACKGROUND

On July 30, 2009, the Requester on behalf of the Union filed a request for certified payrolls for the entire project known as the Bionol Ethanol Clearfield Plant that received \$14,000,000 in RCAP grants from the Commonwealth of Pennsylvania. The Union stated that the County “entered into a contract with the Commonwealth of Pennsylvania for these grant monies in September 2007.” It provided a copy of the pertinent pages of the contract. On August 7, 2009 the County denied the request stating that it “does not have access to private business payrolls or files.” It asserted that it maintained payroll records for county government departments only.” The County advised that it had forwarded a copy of the request to Bionol Ethanol.

On August 25, 2009 Marianne Oliver, Esquire filed an appeal with the OOR on behalf of the Union. In support of its appeal the Union stated that the contract makes it clear that the project is a public project and covered by the RTKL. The Union noted that the burden is on the public agency to demonstrate why the requested information is not subject to disclosure, citing 65 P.S. § 67.708(a)(1). Although not required to do so, the Union advised that it needed the requested information “in order to determine whether contractors for the project are properly classifying employees and paying them correctly under the prevailing wage statute.” The Union supplemented its appeal on September 4, 2009 advising that the certified payroll records requested “are required to be filed by contractors who ‘perform work’ for public bodies under the Pennsylvania Prevailing Wage Act [PWA].” The Union stated that the “work described in the contract between the [the County] and the Office of Budget is clearly public work as that term is defined in the [PWA], 43 Pa. C.S.A. 165-1, 165-2(5).”

The Union cited PWA, section 165-10 stating that it is the “duty of the public body (in this case, [the County]) to ‘require the contractor to file statements, in writing, in form satisfactory to the secretary, certifying to the amount then due and owing from such contract and subcontractor, filing such statement to any and all workmen for wages due on account of public work, setting forth therein the names of the persons who wages are unpaid and the amount due to each respectively, which statement so to be filed shall be verified by the oath of the contractor and subcontractor, as the case may be, that he has read such statement subscribed by him knows the contents thereof and that the same its true of his own knowledge. . . .’”

On September 4, 2009, Kim Kesner, Esquire, the County Solicitor provided the affidavit of Joan Robinson McMillen, Chairperson of the Board of Commissioners of the County, and the full pages of the Redevelopment Assistance Grant Agreement between the County and the Office of the Budget (“OMB”) as well as the subcontract between the County Economic Development Corporation and Bionol. The County maintained its position that it “has no copies of any payroll information from its sub-recipient, Bionol and/or concerning the project . . .” The County advised that “while the Grant Agreement requires compliance with the [PWA] (Article 27, Section D, Page 26), payroll information required by OMB, has been delivered directly by Bionol to OMB’s Project Manager and copies have not been provided to [the County].” The County acknowledged that payroll records of its sub-recipient Bionol obtained by it or within its possession are ‘records’ covered by the RTK law . . . [h]owever, simply put, [the County] has no records or information within the request.” The County asserted that “access would have to be

obtained through Bionol, a private company, or the Pennsylvania Department of Labor and Industry or OMB.”

LEGAL ANALYSIS

The OOR is authorized to hear appeals for Commonwealth and local agencies, 65 P.S. §67.503(a). The City is a local agency subject to the RTKL and required to disclose public records, 65 P.S. §67.302. Section 102 of the RTKL, defines the term “record” as:

“Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document,” 65 P.S. § 67.302

A “public record” is defined as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege,” 65 P.S. §67.102.

Section 506(d) states as follows: “A public record that is not in the possession of an agency, but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.” The City does not dispute that the requested records are in the possession of a party with whom it has contracted to perform

a governmental function. It does not argue that the record is exempt under the RTKL. The City acknowledges that the requested payroll record is a record of the agency. It only argues that it is not required to get the record from the contractor and provide it to the Requester.

The OOR has issued multiple Final Determinations addressing whether certified payrolls constitute public records under the RTKL or may otherwise properly be withheld: *Gribbin v. Pennsylvania Dept. of Conservation and Natural Resources*, OOR Dkt AP 2009-341; *Malley/Leet (Sheet Metal Workers) v. Office of the Budget*, OOR Dkt AP 2009-327; *Greater Pennsylvania Regional Council of Carpenters v. Pocono Mountain School District*, OOR Dkt. AP 2009-0166; *Pry v. Indiana University of Pennsylvania*, OOR Dkt. AP 2009-0119; *Purcell v. City of Philadelphia*, OOR Dkt. AP 2009-0263; *Agre v. DGS*, OOR Dkt. AP 2009-0371.

Because these Final Determinations address the same issues with regard to the public status of payroll records, the analysis within them is specifically adopted and incorporated by reference as if fully set forth herein. Therefore, the issue on appeal is whether the City is required to obtain the payroll records from the entity with which it contracted the project and provide them to the Requester.

Pursuant to section 703 a person makes a written request under the RTKL “for access to records.” Section 901 requires an agency to respond to a written request for records within five (5) business days for the date of receipt of a written request. Only one of four possible responses are provided for in the RTKL: 1) Deny the request (§903); 2) Grant access to the records (§701); 3) Partially deny/partially grant the request for access; and 4) Extend the deadline to respond (§902). Here, the City denied the request

contending that it did not have possession of the records. However, section 506(d) applies and the records are considered records of the City.

The Legislature did not include language that explains how a local or Commonwealth Agency should retrieve or obtain records in possession of a third-party contractor, nor did it include express language regarding instances in which a third-party contractor refuses to provide the records at issue. However, the Legislature stated in 506(d)(1) that records in possession of a third-party contractor are considered records of the Agency. Further, pursuant to section 506(d)(2) a request for such records must be submitted to the Agency, not the third-party contractor.¹ Additionally, section 506(d)(2) presumes interaction between the agency and the third-party contractor as fees for duplication would be sent from the Agency to the third-party, if the third-party contractor has made copies of the records..

Logically, the City cannot provide access to its records unless it retrieves them from the entity that has possession of them. Therefore, the City is required to obtain the records from the the third-party contractor in order to comply with the disclosure and access requirements of the RTKL. .

CONCLUSION

For the foregoing reasons, the Requesters appeal is **granted**. The City is directed to provide copies of the requested 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 to the Clearfield County Court of Common

¹ The Requester previously made a request for these records directly to the contractor who denied the request contending that it was not an agency subject to the disclosure provisions of the RTKL. The OOR upheld the denial. See *Greater Pennsylvania Regional Council of Carpenters v. Bionol Clearfield, LLC*, OOR Dkt. AP 2009-0420 (issued June 18, 2009).

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

FINAL DETERMINATION ISSUED AND MAILED: September 28, 2009



APPEALS OFFICER
AUDREY BUGLIONE, Esq.

Sent to: Marianne Oliver, Esquire; Kim Kesner, Esquire