



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOHN A. KANE	:	
And McKEESON HEALTH	:	
SOLUTIONS,	:	
Complainant	:	
	:	
v.	:	Docket No. AP 2009-1104
	:	
DEPARTMENT OF	:	
PUBLIC WELFARE,	:	
Respondent	:	

INTRODUCTION

McKeeson Health Solutions, (the “McKeeson”) through its representative, Kevin Ryan submitted a right-to-know request to the Department of Public Welfare (the “DPW”) seeking records related to the proposals and scoring of responses to Request for Proposal (“RFP”) 44-08 pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The DPW denied access in part based upon various exceptions under the RTKL including sectionw 708(b)(10) and 708(b)(26) and granted access in part. McKeeson filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Citizen’s appeal is denied and DPW is not required to take further action.

FACTUAL BACKGROUND

On October 15, 2009, Kevin Ryan, the Vice President of Business Development for McKeeson, submitted a right-to-know request to the DPW seeking electronic copies of various records related to the proposals and scoring of responses to Request for Proposal (“RFP”) 44-08. After extending the deadline to respond by thirty days, the DPW responded on November 20, 2009 by partially granting and partially denying the request. The grounds for denial were section 708(b)(10), internal predecisional deliberations, and section 708(b)(26), related to agency procurement documents. On December 14, 2010 on behalf of McKeeson, John Kane, Esquire appealed the partial denial to the OOR.

On December 24, 2009 the DPW responded to the appeal and generally described the RFP process. The DPW provided the affidavit of Jennifer Basom, Director of the Division of Quality Management/ACCESS Plus within the Bureau of Fee for Service Programs for the DPW in support of its position. The DPW explained that the Procurement Code, 62 Pa.C.S. § 513, requires that when an RFP is used to solicit potential contractors, the proposals must be evaluated by an “evaluation committee,” citing 62 Pa.C.S. §513(f). Basom Affidavit, ¶7. Ms. Basom explained that the proposals submitted by offerors such as McKeeson were required to include a technical component, a cost component, and a disadvantaged business component. Basom Affidavit, ¶4. “[E]ach member [of the evaluation committee] was given a copy of each technical proposal, so that he or she can review and individually score its contents in advance of the Evaluation Committee’s meeting.” Basom Affidavit, ¶8. “The Evaluation Committee met to, among other things, discuss the proposals.” Basom Affidavit, ¶9. The “final technical scores were combined with the cost and Disadvantaged Business scores as well as any bonus points that may have been awarded.” Basom Affidavit, ¶11. After adjustments for submitted Best and Final Scores, “[t]he offeror having the highest final score is then recommended for ‘contract

negotiation.’ (Part of this process can also include ‘discussions and negotiations ...for the purpose of clarification and of obtaining best and final offers.’ 62 Pa. C.S. § 513(f)).” Basom Affidavit, ¶¶ 12, 13. Ms. Basom “created a written recommendation that one offeror’s proposal was most advantageous to the purchasing agency...” Basom Affidavit, ¶ 14. Her “recommendation was that an offeror other than McKeeson (i.e., APS) should be selected for the next stage of the procurement process (contract negotiation).” Basom Affidavit, ¶ 15. “McKeeson has filed two [] protests. Because of these protests, ‘contract negotiation’ has not been completed, nor has any contract been awarded.” Basom Affidavit, ¶ 18.

McKeeson asserts that section 708(b)(10) does not apply to procurement process records as those records are addressed in the “separate and express but narrow exception set forth at 65 P.S. §67.708(b)(26) that specifically governs release of records involving an agency’s procurement of goods and services.” McKeeson contends that the release of information sought in the Request “promotes the public’s perception that the procurement process is fair, fosters confidence in government, discourages concerns and minimizes conflicts about selection decisions and enhances performance of the selection process itself.”

The requested records subject to the appeal are set forth below as well as McKeeson’s position and DPW’s position as provided by its Senior Counsel, Leonard Crumb, Esquire regarding each record.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The DPW is a Commonwealth agency subject to the RTKL that is required to disclose public records. *See* 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 RTKL states that “the burden of proving that a record of Commonwealth or local agency is exempt from public access shall be on the . . . agency receiving a request by a preponderance of the evidence.” 65 P.S. §67.708(a). To prove by a “preponderance of the evidence” means to prove by the “greater weight of the evidence.” *Commonwealth v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001).

Section 708(b) (26) of the RTKL exempts the following records from public disclosure:

A proposal pertaining to agency procurement or disposal of supplies, services or construction 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 to demonstrate the bidder’s or offeror’s economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. §513 (relating to competitive sealed proposals.)

65 P.S. §67.708(b)(10)(i)(A) exempts from disclosure a record that reflects the following:

The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative amendment, contemplated or proposed policy or course of action or any research, memos, or other documents used in the predecisional deliberations.

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. Therefore, the exception applies to protect records pertaining to agency business and specifically, discussions about policies and future actions or decisions. The burden is on the agency denying access to prove that the records sought are truly pre-decisional and deliberative and not merely factual or otherwise.

“Internal predecisional deliberations” have been defined in case law prior to the enactment of the current RTKL interpreting the “deliberative process privilege” as those deliberative aspects of decision-making that reflect policy-making, recommendations, or work-product. *LaValle v. OGC*, 564 Pa. 482, 496, 769 A.2d 449, 458 (2001). As we stated in *Felder v. East Stroudsburg Area School District*, OOR Dkt. AP 2009-0262, and in several prior final determinations, the “Supreme Court imposed three conditions for the privilege to apply: (1) the communication must have been made before the deliberative process was completed; and (2) the communication must be deliberative in character in that it makes recommendations or expresses opinions on legal or policy matters; and (3) the information cannot be purely factual in nature.” citing *Com. v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999).

A. **“Recommendation of Contractor Selection” prepared by the Evaluation Committee for DPW RFP No. 44-08.**

McKeeson argues that the Recommendation constitutes the final decision by the Evaluation Committee and is thus not predecisional; nor is it a “note” or informal record exempt by section 708(b)(26). McKeeson contests the DPW’s reduction of the issue on appeal from “its general refusal to release the record to an appeal about redacted sections. . .”

The DPW asserts that the procurement process for RFP No. 44-08 is in the intermediate stage as no contract has been awarded. However, in response to the appeal, DPW provided a redacted copy of the Recommendation. DPW redacted the total cost of the contract which is the amount included in the selected offeror’s proposal. The Procurement Code, 62 Pa.C.S. §513(d) prohibits the disclosure of a proposal’s contents to competing offerors.

62 Pa.C.S. § 513(d) provides as follows:

(d) Receipt of proposals.--Offerors shall submit their proposals to ensure that their proposals are received prior to the time and date established for receipt of the proposals. Proposals shall be submitted in the format required by the request for proposals. *Proposals shall be opened so as to avoid disclosure of their contents to competing offerors.*

(emphasis added).

DPW adds that the Recommendation also “discusses the ‘proposed RMPM rates’ set forth in the selected proposal, and sets forth the ‘(total funds) savings from the budget over the three base years of the proposed contract term.” DPW asserts that because the “budget over the three base years’ is a matter of public record . . . it is a matter of simple arithmetic to compute the ‘proposed RMPM rates.” It contends that disclosure of the proposed rates set forth in the selected proposal violates section 513(d) of the Procurement code; thus, that information is also redacted.

Finally, the identity of the “Raters”, i.e. the members of the Evaluation Committee has been redacted as permitted by section 708(b)(26). McKeeson advised that it did not object to the redaction of the names of the Committee members. However, DPW also redacted the offices and the bureaus in which those persons work as it contends it would be relatively simple to use that information to “track down each and every member of the Evaluation Committee.”

Initially, the OOR notes that because the DPW provided the record in redacted form, during the course of the appeal, the issue as to whether the entire record was properly withheld is moot. Only the withholding of the redacted information is still subject to the appeal. The redactions by the DPW are proper as 62 Pa.C.S. § 513(d) expressly provides that the contents of the proposals are not to be disclosed to competing offerors. It would be an absurd result to allow access to the contents of the proposal simply because the information appears on a record other than the proposal, i.e. the Recommendation. Therefore, the DPW properly redacted the “total cost of the contract,” and “the RMPM rates” from the Recommendation. In addition, section 708(b)(26) expressly protects the identity of the Raters. Therefore, the information that would allow discovery of Raters’ identity was properly redacted. The appeal as to the Recommendation is denied.

B. Instructions provided to the members of the Evaluation Committee regarding the review and analysis of the proposals submitted in response to RFP No. 44-08.

The RTKL expressly exempts “other records” of the evaluation committee. 65 P.S. §67.708(b)(26). McKeesson asserts that the Instructions are not prepared by the Committee and are not a record of the Committee thus not exempt by section 708(b)(26). The DPW argues that “[a]ny instructions that the committee members used in the course of conducting their deliberations were records of the Committee.” McKeesson challenges the DPW’s interpretation arguing that “in defining the various exceptions in Section 708, except for ‘other records’ in (b)(26), the General Assembly was clear when it intended to include an expansive scope of records exempt from disclosure.” There is no dispute that the Instructions were used by the Committee during the course of their review and analysis of the proposals. The exemption is not expressly limited to only those records that were prepared by the Committee; rather the General Assembly provided for a broad interpretation of which records of the Committee that are properly withheld. Therefore, because the instructions were used by the Committee during the course of its evaluation they constitute “other records” of the Committee. The appeal as to the Instructions is denied.

C. The summary scoring sheets for each Offeror’s proposal.

McKeesson argues that the Summary Scores are final decisions that disclose facts and finding, not mere notes or informal records. DPW considers the Summary Scores “other records” of the Evaluation Committee as the Evaluation Committee created the summaries by compiling the technical score’s given by each individual Evaluation Committee member as well as the total score. As discussed above, “other records” of an agency’s evaluation committee are expressly exempt by section 708(b)(26). The Summary Scores sought were created by the

Evaluation Committee. Section 708(b)(26) does not limit the exemption to only informal records of an evaluation committee. Therefore, the Summary Scores were properly withheld and the appeal as to those records is denied.

D. The analysis and comments by the Evaluation Committee members of the Cost Submittal and Technical Proposal submitted by each Offeror.

DPW asserts that the records were “created by the Evaluation Committee, and used by that Committee in the course of its deliberations” thus clearly a record of the Committee and exempt by RTKL section 708(b)(26). This is not disputed by McKeeson, rather it argues that the records reflect the actual basis for selection recommendation and decision, and are not mere notes or personal information of the type that the term “other records” was intended to protect. As discussed above, the exemption for “other records” set forth in section 708(b)(26) is not limited to informal or personal information. Therefore, because the records that reflect the analysis and comments by the Evaluation Committee members are records of the Committee they are expressly exempt by section 708(b)(26). The appeal as to those records is denied.

E. The evaluation by the Evaluation Committee of the financial capability of APS Healthcare Midwest (“APS”) with regard to Part II-6 of the RFP No. 44-08.

McKeeson again argues that this record is a formal finding and not exempt under section 708(b)(26) as an “other record” of the evaluation committee. On its face the Request seeks the evaluation, of an agency evaluation committee. Therefore, as discussed above, because section 708(b)(26) does not exempt only informal records of an evaluation committee the DPW properly denied this request. The appeal is denied as to the evaluation of the financial capability of APS.

F. The independent evaluation performed by the Department of General Services, Bureau of Minority and Women Business Opportunities, of each Offeror’s Disadvantaged Business Submittal.

McKeeson argues that because the DPW concedes that this evaluation was done independently of the Evaluation Committee and was a final decision, it is not exempt under section 708(b)(10) as predecisional. DPW asserts that section 708(b)(10) exempts “any research, memos or other documents used in the predecisional deliberations.” It advised that the Evaluation Committee used the scoring results assigned by the Bureau of Minority and Women Business Opportunities (“BMWBO”) as part of the process of arriving at its recommendation.

Section 708(b)(10) exempts “other documents” used in the predecisional deliberations. The requested Disadvantaged Business Component evaluation was used by the Evaluation Committee during its deliberations to recommend the most advantageous proposal. 62 Pa.C.S. §513(g) requires that the “price and all evaluation factors” are considered. Evaluation factors included the technical component, the cost component and the Disadvantaged Business scores. Therefore, the requested evaluation by BMWBO of each offeror’s Disadvantaged Business submittal is an “other document” that was used in the predecisional process and thus entirely exempt from disclosure through the RTKL by section 708(b)(10)(i)(A).

G. Correspondence related to RFP No. 44-08

DPW advised that it would provide 1,219 pages of correspondence related to RFP No. 44-08 with some of the contents withheld as either predecisional deliberation communications or protected by the attorney-client or attorney work product privilege. It sought prepayment of copying costs prior to providing the records. McKeeson contends that DPW’s actions were improper because no factual explanation or analysis was provided for redactions thus it had “no basis to know whether it agreed with the Department’s assertions. . .” It does not contest the redaction of documents involving the attorney-client privilege or records that “disclose actual provisions of a proposal (as opposed to records about a proposal).”

Section 706 of the RTKL provides that an agency may redact from otherwise public record, that “information which is not subject to access.” 65 P.S. §67.706. “Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9.” *Id.* DPW asserts that the “redactions speak for themselves (heading of letters and emails were left in as were the subject of the correspondence).” Section 903 provides that a denial of access “shall include: (1) a description of the record requested [and] (2) The specific reasons for the denial, including a citation of supporting legal authority.”

In this case, the DPW granted access to the records subject to redaction and demanded prepayment of copy fees prior to providing the correspondence as the copy costs exceeded \$100. 65 P.S. §67.1307(h). On appeal it advised that the redacted portions included 1) correspondence from a DPW program office to a DPW attorney or vice versa requesting or providing advice; 2) the substance of the correspondence involved the contemplated procurement exempt as predecisional communications; or 3) records or information about a particular offeror’s proposal protected by section 513 of the Procurement Code. It advised that the “redactions speak for themselves (headings of letters and emails were left in as were the subject of the correspondence).” McKeeson challenges only those redactions based on application of the predecisional deliberations exemption.

During the course of the appeal the DPW attempted to submit copies of the redacted correspondence to the OOR for its review. The DPW asserted that it did not provide McKeeson a copy because requiring an agency to do so “would allow a requester to simply file an appeal of its request to avoid paying the associated copying fees with production of the requested documents.” The OOR rejected the submission as accepting it would require the DPW to provide a copy to McKeeson as evidence submitted during the appeal.

The DPW described the responsive records as letters and e-mails. It advised that the predecisional deliberation exemption applied to those records, not otherwise exempt by the attorney-client privilege or the Procurement Code, where the subject of the correspondence was the contemplated procurement. It did not redact the headings or subject of the correspondence. Therefore, the DPW has described the record requested and given the specific reason for the denial. It has agreed to grant access to the records and is not required to release the records for review by McKeeson until it has received payment for copy costs. Upon receipt of payment the DPW is required to provide the requested correspondence noting where the information is redacted as predecisional communications. Therefore, the appeal as to the redacted correspondence is denied as the request was granted and the redactions identified and described. If upon receipt of the records, McKeeson disagrees with one or more redactions it is not precluded from challenging the specific redaction(s).

CONCLUSION

For the foregoing reasons, McKeeson's appeal is **denied**. 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 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 AND MAILED: February 1, 2010



**AUDREY BUGLIONE, ESQ.
APPEALS OFFICER**

Sent to: JohnA. Kane, Esquire; Leonard Crumb, Esquire