

3. Appellant hereby seeks OOR reconsideration of that portion of its Final Determination holding that records showing the actual costs paid by Keefe Company for items resold to state inmates are not public records under the RTKL.

Grounds for Reconsideration

In finding that records showing actual costs paid by Keefe Company for items resold to state inmates are not public records, the OOR reasoned:

The Department argues that the requested records are outside the parameters of the contract and, therefore, the reach of section 67.507(d). The OOR agrees in part. Records pertaining to what the Keefe Company pays for the items it resells to PCI are not directly related to the re-sale of items to inmates and are beyond the parameters of the contract. These records are not accessible under the RTKL.

See, 02/05/10 OOR Final Determination, pg 4, at Appendix A. It thus appears that the OOR required that any requested record must come within the "parameters of the contract" to be considered a public (and accessible) record under the RTKL.

Appellant submits that the OOR reasoning in this regard is not only premised upon a misapprehension of the material facts, but is also legally erroneous. In particular, the factual findings that, costs to Keefe are unrelated to resale of items to inmates and beyond the parameters of the contract, are unsupported (and indeed, contradicted) by the terms of said contract. Moreover, in reasoning that records of costs to Keefe are not accessible, the OOR overlooked RTKL provisions broadly defining a "financial record" and "record" to effectuate its purpose.

Misapprehension of Material Facts

The contract at issue herein is "contingent on the successful negotiation of the product and price list for both parties," with any changes "requir[ing] the mutual consent of both parties." See, 01/01/05 (initial) DOC-Keefe Contract, at

cover page. 1. The contract further provides that the "pricing methodology shall be established as a percentage markup over cost on all items." See, 01/01/05 DOC-Keefe Contract, at Attachment # 2, RFP Part II-5. Said pricing methodology is to be detailed and monitored by Keefe, and is subject to ongoing verification by DOC to ensure cost plus percentage markups remain consistent. See, 01/01/05 DOC-Keefe Contract, at Attachment # 2, RFP Part IV-4.E. Accordingly, the actual costs paid by Keefe Company for items resold to state inmates are, pursuant to very explicit terms of the contract, part of the pricing methodology and subject to monitoring and verification by the parties.

The OOR therefore proceeded upon a misapprehension of the facts in reasoning that "[r]ecords pertaining to what the Keefe Company pays for the items it resells to PCI are not directly related to the re-sale of items to inmates..." 02/05/10 OOR Final Determination, at pg. 4. Indeed, the actual costs to Keefe are clearly referenced by (and pertinent to) the contract, and directly impact the pricing of items resold to state inmates.

Given these facts, Appellant asks the OOR to reconsider its finding that the requested records (of costs to Keefe for items resold to inmates) are beyond the parameters of the contract, and not accessible under the RTKL.

Legal Error

In reasoning that the requested records (of actual costs to Keefe) must come

1. The contract between the DOC and the Keefe Company is posted as public information. See, 65 P.S. § 67.1702(a) (contracts posted on public website). See also, 02/05/10 OOR Final Determination, at pg. 3 (noting contract is available on the DOC website). The initial, 01/01/05 contract has since been extended.

within the "parameters of the contract" to be publicly accessible, the OOR applied an excessively narrow construction of the RTKL. Those RTKL provisions for access to records dealing with receipt or disbursement of public funds are "interpreted expansively" and must be "broadly" construed. See, Lukes v. Department of Public Welfare, 976 A.2d 609, 622 (Pa.Cmwth. 2009). See also, Tribune-Review Publishing Company v. Bodack, 961 A.2d 110, 114 (Pa. 2008)(broadly defining "account, voucher or contract" under RTKA). The Lukes court additionally noted that previous cases applying or interpreting the RTKA term "public record" were not superseded by the enactment of the RTKL, and remain good law. 976 A.2d at 620.

The state supreme court has specifically rejected the strict "parameters of the contract" construction applied by the OOR in this matter:

Where the RTKA specifies, for the benefit of the public and in favor of governmental transparency, that any account, voucher or contract dealing with the receipt or disbursement of funds by a Commonwealth agency constitutes a public record, the RTKA encompasses all records in any format establishing contractual rights with respect to, detailing, or otherwise evidencing a Commonwealth agency's receipt and/or disbursement of funds. **In addition, this Court has determined that the RTKA reaches materials that are not facially accounts, vouchers or contracts, but nonetheless bear some close connection with one or more of these statutory categories.**

PA State University v. State Employees' Retirement Board, 935 A.2d 530, 534 (Pa. 2007)(emphasis added), citing LaVelle v. Office of General Counsel, 769 A.2d 449, 456 (Pa. 2001). Appellant submits that, when broadly construed, the RTKL covers the requested records of actual costs to Keefe because those costs are related or connected to the function/purpose of the contract.

The purchase of items for sale or resale to state inmates via institutional commissaries was previously handled by the DOC, and is now handled by the Keefe

Company. There is no question that, if the DOC was still handling the purchases, any record of the actual costs it paid would be a "public record" subject to RTKL access. The fact that Keefe now purchases the items for resale to inmates cannot shield records of its actual costs from disclosure. See, Lukes, 976 A.2d at 621 and 624-625 (agency cannot evade disclosure of public records by contracting with third party to perform government function). See also, Associated Builders and Contractors, Inc. v. Department of General Services, 747 A.2d 962, 965 (Pa.Cmwth. 2000)(an agency may not insulate a public document from RTKA disclosure by third party contract). Moreover, the DOC both receives commissions from, and disburses funds to, the Keefe Company pursuant to the contract. ². The records of actual 24 costs to Keefe certainly bears some connection to such receipt and disbursement of funds. Said records should, therefore, be subject to access under the RTKL. See, Lukes, supra (requiring public access to third-party agreement or rates affecting expenditure of public funds).

Appellant asks the OOR to reconsider its finding that the requested records, i.e., costs to Keefe for items resold to inmates, are not within the "parameters of the contract" may be withheld. Appellant asks that DOC be required to provide access to said records.

2. It is irrelevant, for RTKL purposes, that the DOC draws funds from the inmates' accounts for disbursements. See, Tribune-Review Publishing, 961 A.2d at 114-115 (fact that agency was reimbursed for disbursements does not alter right of access under the RTKA). In any event, the DOC "profits" from funds it receives and disburses pursuant to the contract --in the form of commissions.

Conclusion

Appellant respectfully requests reconsideration of the OOR February 5, 2010 Final Determination for any or all of the reasons stated herein above.

Respectfully submitted,



Roger Buehl,
Appellant, pro se

Prisoner No. AM-7936
P.O. Box 999
Huntingdon, PA 16652

copy mailed to:

Maria Macus-Bryan, Esq. on 02/17/10



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF:

ROGER BUEHL
Complainant

v.

PENNSYLVANIA DEPARTMENT OF
CORRECTIONS
Respondent

Docket No.: AP 2010-0008

INTRODUCTION

Roger Buehl (the "Requester") filed a right-to-know request (the "Request") with the Department of Corrections (the "Department") seeking documents regarding purchase orders, invoices, and/or receipts of items sold to inmates within the Department. The Department partially granted and partially denied the Request stating that certain responsive records do not currently exist. The Requester appealed to the Office of Open Records (the "OOR").

For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part** and the Department is required to proceed as set forth below.

FACTUAL BACKGROUND

On November 17, 2009, the Requester filed the Request which sought purchase orders, invoices and/or receipts showing the wholesale or actual costs paid by Keefe

Company for items sold to inmates within the Department in 2008 and 2009. The Requester included a detailed list of specific televisions, typewriters, apparel, and shoes. The Requester also sought all purchase orders, invoices and/or receipts showing the quality of specific items resold by Keefe Company to inmates within the Department in 2008 and 2009. The Requester again included a detailed list of specific items.

On November 24, 2009, the Department responded indicating it would require an additional 30 days pursuant to 65 P.S. § 67.902. In a letter dated December 21, 2009, the Department partially granted and partially denied the Request stating that certain requested records do not currently exist. The letter stated that the Department does not maintain any records of the costs paid by Keefe Company for the items sold to inmates or any records related to the quality of items sold by Keefe Company. The Department provided the Requester a memo regarding the amount Pennsylvania Correctional Industries (PCI) pays for the listed items sold by Keefe Company and stating that the Department receives retail grade goods. The memo also indicated that PCI has not knowingly purchased items referred to as "factory seconds" or anything identified as having known defects.

On January 6, 2009, the Requester filed a timely appeal to the OOR. In his appeal he argues that even assuming the Department does not possess the records, the Department has control of the records pursuant to 65 P.S. § 67.506(d). The Requester contends that the Department has contracted with Keefe Company to provide commissary services to all inmates. He states that the services were provided by Department officials and employees prior to 2005 and that these services are a governmental function. Finally, he asserts that the requested records are financial records as defined in 65 P.S. § 67.102.

In response to the appeal, the Department provided the OOR with the sworn affidavit of Andrew Filkosky, the Department's Open Records Officer, who affirmed that the requested records do not exist in Department files. The OOR subsequently requested the Department to address the Requester's §506(d) argument.

The Department noted that it had already provided a sworn affidavit to this fact. The Department went on to confirm that the Keefe Company is a contractor responsible for providing commissary services for the Department. The Department stated that the contract with Keefe Company is available on the Department's webpage.

The Department argues that the information requested pertains to operations outside the parameters of its contract with the Department. The Department contends that Keefe's contractual obligations to the Department pertain to operating and providing commissary services and providing certain items through the commissary at agreed upon prices. The cost of the items to the Keefe Company is unknown to the Department and is not addressed in the agreement between the two parties. The Department concludes that such information cannot be considered a governmental function.

LEGAL ANALYSIS

The Office of Open Records is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). The Department is a Commonwealth agency subject to the RTKL. See 65 P.S. § 67.301.

A record in the possession of a Commonwealth or local agency is presumed to be a public record unless: (1) the record is exempt under Section 708; (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. See 65 P.S. 67.305.

However, an agency cannot provide a record that is not in its possession or does not exist. See 65 P.S. § 67.305. As the affidavit states, the requested records do not exist.

Section 708 of the RTKL states that the burden of proof rests with the public body to demonstrate by a preponderance of the evidence that the record is exempt. Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8th ed. West 2004). See also *Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992).

The Department confirmed that it contracted with the Keefe Company to provide commissary services for the Department. The Department does not provide any evidence that the requested records do not exist within the files of the Keefe Company. Therefore, Mr. Filkosky's Affidavit that the requested records do not exist within Department files is an insufficient legal basis for denying the Requester's appeal. The Department argues that the requested records are outside the parameters of the contract and, therefore, the reach of section 67.507(d). The OOR agrees in part. Records pertaining to what the Keefe Company pays for the items it resells to PCI are not directly related to the re-sale of items to inmates and are beyond the parameters of the contract. Those records are not accessible under the RTKL. However, the requested records pertaining to the quality of items resold to inmates relate directly to the contract and are well within its scope. While the OOR appreciates that the Department provided a memo in response to the Request, the Requester seeks actual records, not a memo explaining what the records may or may not contain.

The records at issue are purchase orders, invoices and/or receipts showing the quality of specific items listed in the Request that were resold by the Keefe Company to inmates within the Department in 2008 and 2009.

Section 67.506(d) states:

(d) Agency possession. —

(1) 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.

(2) Nothing in this act shall be construed to require access to any other record of the party in possession of the public record.

(3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee established under section 1307(b) and upon collection shall remit the fee to the party in possession of the record if the party duplicated the record.

In analyzing the applicability of Section 506(d), initially, the legal issues are whether the Borough has contracted out duties it would otherwise have to perform as a governmental agency, and additionally, whether the records requested “directly relate” to that governmental function and are not otherwise exempt under the RTKL. These elements must be met to reach records of a private contractor.

Here, the Department states that it has a contract with the Keefe Company to provide commissary services. The issue then is whether or not those services represent a governmental function performed on behalf of the Department. The question of whether a third party contractor is performing a governmental function is a fact sensitive inquiry conducted on a case-by-case basis, particularly in light of the array of organizational

structures and contractual relationships that exist among agencies or authorities and their contractors.

The OOR has adopted the test set forth by Judge Nealon in *SWB Yankees LLC v. WINTERMANTEL, et. al., Lackawanna CCP No. 09 CV 3691* (on appeal in the Commonwealth Court) There, the Court considered factors which determine whether or not a governmental function is being performed by a third-party contractor and stated as follows:

While no single factor should be dispositive in making that determination, the phrase "governmental function" in Section 506(d)(1), when applied to the specific facts presented in this appeal, are interpreted liberally to encompass, at a minimum, any activities: (1) that the agency is empowered to conduct; (2) that the agency previously performed prior to contractually delegating that function to the government contractor; (3) that are conducted on agency owned property; (4) in which the agency has a continuing financial interest; and (5) that affect the quality or cost of goods or services offered to the public on the agency owned property.

The OOR recognizes that it is not bound by the above-quoted decision, but has affirmatively adopted the Court's analysis, which considers a totality of the factors, as a reasonable interpretation of section 506(d) of the RTKL.

Here, the Department is empowered to provide commissary services to inmates. Further, the Department does not contest the Requester's statement that the Department operated the commissary prior to 2005. The Department concedes it contracted with the Keefe Company to operate the commissary system on its behalf. A review of the terms of that contract demonstrates that the Keefe Company pays commissions to the Department which are sent to the Department's Fiscal Management Division. This qualifies as a continuing financial interest. Commissary services are provided on agency

owned property. Finally, the operation of the commissary system affects the cost and quality of goods offered to members of the public, who are incarcerated.

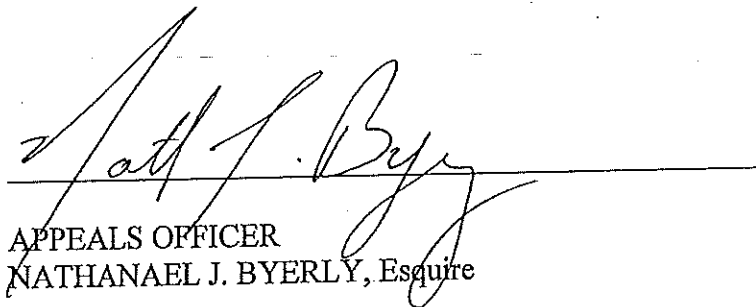
The OOR finds that the Department has contracted with the Keefe Company to perform a governmental function on its behalf, pursuant to 65 P.S. § 67.506(d).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part and denied in part**. The Department is required to obtain and provide records related to the quality of the specific items listed in the Request resold by the Keefe Company to inmates to the Requester within thirty (30) days. It is not required to obtain records from the Keefe Company showing the wholesale or actual costs it paid.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Commonwealth Court. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED AND MAILED February 5, 2010


APPEALS OFFICER
NATHANAEL J. BYERLY, Esquire

Final Determination Sent To:
Roger Buehl
Maria G. Macus-Bryan, Esquire



February 22, 2010

Mr. Roger Buehl
Prisoner No. AM-7936
PO Box 999
Huntingdon, PA 16652

RE: Petition for Reconsideration, OOR Dkt. AP 2010-0008

Dear Mr. Buehl:

We are in receipt of your Petition for Reconsideration dated February 5, 2010 in connection with the above referenced docket number. We hereby deny your Petition.

Thank you,

Sincerely,

A handwritten signature in black ink, appearing to read "C. Wilson", with a long horizontal stroke extending to the right.

Corinna V. Wilson
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Maria Macus-Bryan, Department of Corrections