



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JARRETT RENSHAW on behalf of,	:	
<i>THE MORNING CALL</i>	:	
Complainant	:	
	:	Docket No.: AP 2010-0171
v.	:	
	:	
	:	
CITY OF ALLENTOWN,	:	
Respondent	:	

INTRODUCTION

Jarrett Renshaw (the “Requester”), on behalf of The Morning Call, filed a right-to-know request (the “Request”) pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.*, with the City of Allentown (the “City”) seeking copies of records relating to a City contract. The City granted in part and denied in part the Request. 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 release the requested records as instructed below.

FACTUAL BACKGROUND

As background, the City contracted with CC Forestry Services to perform a tree inventory and comprehensive long term management plan. The City has stated that the plan is not final but in its beginning stages. The plan must be submitted to various government bodies and officials before it becomes final.

On January 12, 2010, the Requester filed the Request with the City. The Request read as follows:

In March of last year, the city entered into a contract with CC Forestry Services to conduct a study of South Mountain. I am requesting any and all documentation provided to the city as part of the contract, along with any and all correspondence between the city and the vendor including electronic communication.

On January 19, 2010, the City extended the time for a response as permitted under the RTKL. In a February 18, 2010 letter, the City partially granted the Request and provided the Requester with a copy of the contract with CC Forestry Services. It also partially denied the Request stating that the correspondence and memos were exempted under 65 P.S. § 67.708(b)(9) as the draft of a statement of policy and under 65 P.S. § 67.708(b)(10)(i) as records that reflect the internal pre-decisional deliberations of an agency.

The Requester filed a timely appeal with the OOR on February 26, 2010. In support of the appeal, the Requester states that the City's denial largely hinges on the relationship between the consultant's work and what the city is calling a "state Department of Conservation and Natural Resources (DCNR), Bureau of Forestry State Stewardship Plan." He points out that the City argues that the Stewardship Plan is not yet finalized and must go before the City's Shade Tree Commission and Environmental Advisory Council for final approval. However, he also contends that there is no mention

of a Stewardship Plan in the contract and that the contract was never intended to lead to a specific policy decision, but was merely a fact finding enterprise. He concludes that since the information is purely factual, the City cannot claim the exemption.

In response to the appeal, the Township argues that § 708(b)(10)(i)(A) exempts records relating to Board business including the attachments and exhibits because they pertain to future actions or decisions by the Board. In support, the City provided the affidavit of Greg Weitzel, Director of the Parks & Recreation Department of the City. The affidavit was made subject to the penalties of 18 Pa.C.S. § 4904. In the affidavit, Mr. Weitzel affirms that the City contracted with CC Forestry Service to complete a tree inventory and provide a comprehensive long term management plan on the South Mountain reservoir lands. He stated that although the contract and proposal did not specifically state that the tree inventory was to be the first part of the Forestry Stewardship Plan for South Mountain, that is what was intended.

Mr. Weitzel indicated that the first step is to take the tree inventory. The tree inventory will be the basis for the assessment of the City's values, goal, and objectives and the recommendations to achieve these goals on how to manage the forest on South Mountain. He affirmed that while CC Forestry Services was completing the tree inventory on South Mountain, the contractor discovered additional land area where the trees should be counted. As a result of a new ordinance, the City must obtain another competitive quote from a second vendor to inventory the trees on the new area. The tree inventory is not finished yet and remains in draft form.

After the inventory is completed, the consultant(s) will write the Forest Stewardship Plan for the City in accordance with DCNR program standards. The Plan

will contain recommendations for management of the forest. Some suggestions and opinions of the vendor will be utilized, others will be rejected in the course of the discourse leading to the final plan. There will be a step by step schedule over a ten (10) year period in accordance with DCNR standards.

In light of the above, the City argues that the requested correspondence and memos are internal to the City and reflect the need to get another competitive quote in order to decide whether to stay with CC Forestry Services or obtain another contractor to complete the tree inventory. The City states that because the tree inventory is not done, there has been no opportunity to discuss the City's goals for the forest which forms the basis of the Forestry Stewardship Plan and which will contain recommendations and a schedule for actions. No decision has been made yet. A decision on the direction of the forest will be made at some future time after the City and a number of other parties agree on a course of action to follow and update as necessary, making adjustments as the forestry measures are implemented and the results are gauged.

The City states that all the participants in the in the decision making process will use the requested materials in making their decision. The decision will among others cover areas such as whether trees should be harvested, whether low lying brush should be cut do to encourage wildlife to come to the woods, and whether dead trees should just be allowed to fall to the ground.

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 Township is a local agency subject to the RTKL. *See* 65 P.S. § 67.302.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions by a preponderance of the evidence. *See* 65 P.S. § 67.708. 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).

Pursuant to § 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. *See e.g. Kyle v. DCED*, OOR Dkt. AP 2009-0801

Here, the requested documents are being prepared at the request and direction of the City to permit the City to develop/institute a plan for how to manage the forest on South Mountain. The tree inventory will be used to develop that plan which will contain recommendations for management of the forest. A final decision has not been made. At this stage of the Plan development, the requested records are internal to the City.

The Requester argues that the contract was entered into as a stand alone pursuit intended to only gather facts/information about South Mountain and that the consultant's work was never intended to be part of the Stewardship Plan. The City counters by arguing that the consultant's responsibilities include both a tree inventory and a long term management plan. Regardless, while it's possible that much of the information in the requested documents may be properly characterized as pre-decisional deliberations, the OOR finds it highly unlikely that all the requested records are predecisional deliberative communications. In fact based on review of the proposal, the OOR finds it implausible that the records do not include some purely factual information or observations. By simply making a blanket denial on the basis of the pre-decisional deliberative exception, the City here failed to meet its burden of proof to show that every single aspect of every single record is exempt. Records or portions of records that contain information that is purely factual that is not otherwise exempt from disclosure in nature are public and must be provided to the Requester.

CONCLUSION

For the foregoing reasons the Requester's appeal is **granted** and the City is directed to release the requested records with any nonpublic information redacted. The parties are advised that this is a Final Determination. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Lehigh County Court of Common Pleas. All parties must be served with notice of any appeal. In addition, the Office of Open Record shall be served notice of any appeal and have an opportunity to respond according to court rules. 65 P.S. §67.1302. Please also be advised that a copy of this Final Determination will appear on our website at <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED AND MAILED March 29, 2010



APPEALS OFFICER
NATHANAEL J. BYERLY, Esquire

Final Determination Sent To:
Jarrett Renshaw
Frances Fruhwirth, Esquire