



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF:	:	
	:	
STEVE ATWOOD	:	
Complainant	:	
	:	
v.	:	Docket No.: AP 2010-0144
	:	
INDIANA UNIVERSITY OF	:	
PENNSYLVANIA	:	
Respondent	:	

INTRODUCTION

Steve Atwood (the “Requester”) filed a right-to-know request (the “Request”) with the Indiana University of Pennsylvania (the “University”) seeking documents regarding improvements to a University building. The Request sought the documents under the federal Freedom of Information Act, but the University processed the Request as one under the Right-to-Know Law, 65 P.S. § 67.101, *et. seq.* (the “RTKL”). The University denied the Request stating that the requested records are not maintained by the University. The Requester appealed to the Office of Open Records (the “OOR”).

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

FACTUAL BACKGROUND

On February 15, 2010, the Requester filed the Request. The Request referenced the University Stapleton Stabley Library Exterior Improvements, CNC Construction, Inc., and the time period 12/7/2009 – 2/19/2010. Specifically, he sought:

1. Certified payrolls including the Statement of Compliance for any contractor or subcontractor who has or is performing the installation of reinforcing steel, structural steel, or the installation of miscellaneous metals at the site of work during the time frame requested.
2. Statement and Acknowledgement, Standard form (SF-1413), for all subcontractor(s) performing the installation of reinforcing steel, structural steel, and/or miscellaneous metals during the period identified above

While the Request was made under the federal FOIA, the University processed it as one made under the RTKL. On February 16, 2010, the University denied the Request stating the information requested is not maintained by the University. The Requester filed a timely appeal with the OOR on February 17, 2010. The appeal only referenced the payrolls for CNC Construction Inc.

The OOR requested that the University indicate whether the payrolls exist and if they do exist to indicate whether 65 P.S. § 67.506(d) applies and present the legal and factual basis for the denial. In response, the University provided the OOR with a notarized affidavit of Raymond Wygonik, Director of Engineering and Construction for the University, which stated that the University does not maintain certified payrolls in the ordinary course of business and did not maintain such records for the project referenced in the Request. The affidavit did not state that it was made under penalty of perjury as requested by the OOR in its letter of February 22, 2010. The University did not address § 506(d) in its response.

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 University 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 it is exempt, privileged, or protected from disclosure under another federal or State law, regulation, judicial order or decree. See 65 P.S. 67.305. However, an agency cannot provide a record that does not exist or is not in its possession, custody or control. See 65 P.S. § 67.305. The affidavit provided was not made under penalty of perjury or subject to the penalties of 18 Pa.C.S § 4904. As such, it cannot be considered. Regardless, the University failed to address whether or not the payrolls are subject to production under 65 P.S. § 67.506(d). Therefore, the University has not provided specific legal and factual support regarding the requested records to support a denial of access. Therefore, it fails to meet the burden of proving that the records are exempt from disclosure.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted** and the University is directed to release the requested records with any nonpublic information redacted. 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 March 19, 2010



APPEALS OFFICER
NATHANAEL J. BYERLY, Esquire

Final Determination Sent To:
Steve Atwood
Robert Bowser Jr.