



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

JONATHAN BARI,
Complainant

:

:

:

:

v.

:

Docket No.: AP 2010-0157

:

CITY OF PHILADELPHIA
Respondent

:

:

INTRODUCTION

Jonathan Bari (the “Requester”) filed a right-to-know request with the City of Philadelphia (the “City”) pursuant to the Right-to-Know Law (the “RTKL”), 65 P.S. §67.101, *et. seq*, seeking records related to the Independence Visitor Center Corporation (IVCC). The City denied the request. The Requester timely appealed the denial to the Office of Open Records (the “OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the City is required to take further action as set forth below.

FACTUAL BACKGROUND

On January 11, 2010, the Requester submitted a request to the City seeking the following:

1. Copies of all documentation including correspondence by and between the IVCC and/or the IVCC Board of Directors with the Mayor of Philadelphia and/or his staff from January 1, 2001 to January 9, 2010.

2. Copies of all documentation including correspondence by and between the Mayor of Philadelphia and the IVCC whereby the Mayor wrote to the IVCC Chairman of the Board to provide written notice of such nomination to the IVCC Board of Directors for the “Mayor’s Representative”, in accordance with the IVCC Bylaws, as detailed above, from February 6, 1998 to January 9, 2010.
3. Copies of all IVCC meeting minutes or the equivalent (“Minutes”) of the Board of Directors from its January 1, 2004 to January 10, 2010 that have been provided to Ms. Wilkerson, Mayor Nutter and/or the Mayor’s office including to the Mayor and his staff.

(“Requests”). On January 19, 2009, the City timely asserted a 30 day extension. On January 29, 2010, Christopher DiFusco, Esquire, counsel for the City, denied the request stating that no records responsive to Requests 1 and 2 are in its possession. As to the third request, the City argued that although it has some of the meeting minutes requested they are not public records of the City as defined by §102 as they “do not document a transaction of [sic] activity of an agency.” The City asserted that “[t]he Mayor’s participation on the IVCC Board, where he sits as 1 of 15 Board members, does not convert documents of an entity previously ruled by OOR not to be subject to the Act into public records.” The City included copies of an objection letter from IVCC and the subsequent response letter from the Requester, but advised that the “objections and responses were not relevant to our determination.” (“Denial”). The Requester filed a timely appeal with the OOR on February 22, 2010.

In support of his appeal, the Requester asserts the following:

[T]he Mayor of Philadelphia only serves on the IVCC’s Board of Directors because of his official capacity of Mayor of the City of Philadelphia. The Bylaws of the IVCC specifically provide for a “Mayor’s Representative” In other words, the Mayor’s Representative (in the present case that is Mayor Michael Nutter himself) serves on the IVCC’s Board in his official capacity as Mayor and not as a private citizen.

The parties were invited to provide information in support of their respective positions. On February 23, 2010, pursuant to section 1101(c), the IVCC requested permission to submit information as a party with a direct interest. On February 25, 2010 that request was granted. On March 8, 2010, Michael D. Fabius, counsel for the IVCC, submitted an Information Memorandum supporting the City's denial as well as the affidavit of James Cuorato, President and Chief Executive Officer of IVCC.¹ Mr. Cuorato states the following:

1. "Other than the right to designate one director, there is no role, duty or responsibility reserved for or required from the Mayor of Philadelphia or...in IVCC's Articles of Incorporation or Bylaws." Affidavit, ¶ 4.
2. "[A] Class B Director, designated by the Mayor of Philadelphia, ...[has] served on the IVCC Board of Directors since January 1, 2004 to January 10, 2010. Based on my knowledge and belief, during that time, two individuals have served as the Class B Director: Joyce Wilkerson and Mayor Michael A. Nutter." Affidavit, ¶ 5.
3. "Since he designated himself a Class B Director on or around June 19, 2008, Mayor Nutter has been invited to all meetings of the IVCC Board of Directors and receives copies of the minutes of the meeting of the IVCC Board of Directors in that capacity as a Class B Director." Affidavit, ¶ 6. "IVCC's corporate records indicate that

¹ Mr. Cuorato provided the statement subject to the penalties of 18 Pa.C.S § 4904, regarding false verifications to authorities.

Mayor Nutter has not personally attended any of the meetings of the IVCC Board of Directors.” Affidavit, ¶ 7.

4. “[N]othing in the minutes relate to or document actions taken by Mayor Nutter in furtherance of the business or activities of the City of Philadelphia. The minutes do document the presence or absence of any such Director.” Affidavit, ¶9.

On March 10, 2010 the City submitted an affidavit in support of its position. However, the affidavit was not accepted into the record as the record closed on March 8. The Requester sought permission to respond to the IVCC’s submission, but the request was denied as the record was closed.

LEGAL ANALYSIS

Pursuant to section 67.503(a), the OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The City is a local agency whose records are subject to the RTKL, 65 P.S. §67.302.

The RTKL defines a “record” as follows: “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. ...” 65 P.S. §67.102. (emphasis added).

The issue on appeal is whether the requested minutes in the possession of the City as a result of the Mayor’s service as a Director of the IVCC are public records. In order for the requested minutes to be a record of the City the following elements must be met: The information must 1) document a transaction or activity of an agency and it must have

been 2) created, received or retained either a) pursuant to law or b) in connection with a transaction, business or activity of an agency..

The City is indisputably a local agency. The IVCC, through its Bylaws and Articles of Incorporation, require that one Board member be the Mayor or the Mayor's representative. The Mayor's participation as an IVCC Board member is purely associated to his official capacity as the Mayor of the City and not as a private citizen. There is no dispute that the Mayor is a member of the Board. Thus, the Mayor's service is an activity of the City. The RTKL definition of record includes records that are created, received or retained "*in connection with* a transaction, business or activity of the agency." The City does not dispute that it is in possession of some of the requested meeting minutes. Therefore, the minutes of the IVCC Board meetings are received "in connection with a[n] ...activity of" the City.

The Mayor designated himself a Director of the Board, as per the IVCC's bylaws, in June, 2008. Accordingly, he is invited to meetings and receives minutes. The minutes document the presence or absence of any Director. The City received and retained meeting minutes in connection with the Mayor's service on the Board. Regardless of whether or not he attends meetings, sends a representative, or is absent, the City participates by virtue of the Mayor's membership and it is thus an activity of the City. The minutes meet all aspects of the definition of record in that they document an activity of the City and were received and retained in connection with that activity.

Finally, amendments to the RTKL were made in an effort to provide open and accessible government to the citizenry according its legislative history. Senator A.H. Williams said during discussion of the proposed bill: "[w]e are cutting through a variety

of bureaucratic tape to allow for the constituents across the Commonwealth of Pennsylvania to have access to their government, and more importantly, to have confidence in their government and confidence in those leaders, to know what they are talking about, to know why they are talking about it..." (Legislative Journal – Senate November 28, 2007 at page 1406). If a public official serves on a private board in an official capacity, the public has a right to know the extent of that service and see records associated with it.

CONCLUSION

For the foregoing reasons, the appeal is **granted and the City is required to provide the requested records in its possession to the Requester within thirty (30) days.** 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 Common Pleas Court, Philadelphia County. 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: April 7, 2010



AUDREY BUGLIONE, Esq.
Appeals Officer

Sent to:
Jonathan Bari, Michael Fabius, Christopher DiFusco