



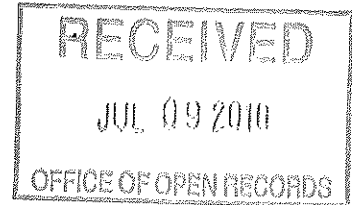
CITY OF PHILADELPHIA

One Parkway
1515 Arch Street
Philadelphia, PA 19102-1595
SHELLEY R. SMITH
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ARRIS R. MURPHY
Deputy City Solicitor
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July 9, 2010

Ms. Lucinda Glimm
Appeals Officer
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225



**Re: Petition for Reconsideration
OOR Docket No. AP 2010-0473
Juzang/MEE Productions v. City of Philadelphia**

Dear Ms. Glimm:

Please consider the attached *Petition for Reconsideration* of the Final Determination issued on June 25, 2010 under the above referenced docket, and our request that the underlying appeal be denied in its entirety.

Sincerely,

Arris R. Murphy
Deputy City Solicitor

P.01

Jul 9 2010 11:51

Fax: 215-683-5069

CORPORATE GROUP



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

IN THE MATTER OF

IVAN JUZANG,
Complainant

v.

CITY OF PHILADELPHIA,
Respondent

:
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:
:
:
:
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Docket No. AP 2010-0473

PETITION FOR RECONSIDERATION

The Respondent, City of Philadelphia (the "City"), files this Petition for Reconsideration under Pennsylvania's General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241, and respectfully represent:

1. On June 25, 2010, the Office of Open Records ("OOR") issued and mailed a Final Determination in the above captioned appeal, a copy of which is attached hereto as Exhibit A (the "Determination").

CITY'S INTEREST

2. At page 4 of the Determination, the City is directed to disclose the evaluation scoring documents, "other than the scoring sheets and their contents."

3. At page 4 of the Determination, OOR took the position that "the City did not substantiate any facts to demonstrate that the evaluation scoring documents are also internal to the City and were made prior to a decision."

4. At page 4 of the Determination, OOR took the position that "a statement in a letter is not sufficient evidence to meet the preponderance of evidence test" as it relates to the City's assertion that certain documents are internal.

RELEVANT FACTS and PERTINENT AUTHORITIES

5. The OOR Determination in Juzang v. City of Philadelphia, OOR Docket No. AP 2010-0473 states that:

a. The City failed to satisfy the three-part test that the requested records are (1) internal, (2) predecisional, (3) deliberations of an agency, at page 3;

b. The City met its burden of proof related to the predecisional and deliberative nature of the requested records, at page 3;

c. The City did not substantiate any facts to demonstrate that the evaluation scoring documents are also internal to the City and were made prior to a decision, at page 4.

6. The City asserts that the requested documents are exempt from access by a requester under Section 708(b)(10)(i)(A) of the Right-to-Know Act 65 P.S. Section 67.101 *et seq.*, (the "Act").¹

7. The legal basis for this Petition for Reconsideration are set forth in the Act, and to qualify for protection under Section 708(b)(10) of the Act, the agency must pass a three-part test.

8. The City must show that (1) the communications were *internal* to the agency, including its representatives, (2) the communications were *predecisional*, meaning they were made before the deliberative process of decision-making was completed, and (3) the communications were *deliberative* in character in that they make recommendations or expresses opinions on the matter, and were not purely factual in nature. *Grumet v. Department of Insurance*, OOR Docket No. AP 2009-0747.

¹ Section 708(b)(10)(i)(A) of the Act protects from access by the requester "a record that reflects 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 . . . course of action, or any research, memos or other documents used in the predecisional deliberations."

9. The records sought are evaluation forms, notes, ranking reports, memorandums, emails and telephone messages related to the RFP submissions for Appellant's company (MEE Productions) and Neiman Group (who was awarded the contract).

10. The City's selection committee met to review the written submissions for the subject RFPs, and used the evaluation forms to check off receipt of required content, made margin comments regarding the written submission, and issued points for each submission as part of its initial ranking for the responding organizations.²

11. The selection committee also placed comments regarding the written submission in the margins and other available space of such written proposal during the review process.

12. Through discussion among the committee members and based on the total weighted scores, the submissions received an initial ranking.

13. At page 3, the OOR determines that the City met its burden of proof related to the predecisional and deliberative nature of the requested records.

14. The City reiterates that the process was *internal* to the committee (with the exception of the facilitator from the Health Department) and the requested documents with notes and comments were *internal* to the committee in that they were prepared by the City (evaluation forms) or prepared for the City for the sole purpose of responding to the subject RFPs (proposals or written submissions); therefore, satisfies part one of the predecisional test.

15. The review of written submissions or proposals, margin comments, internal discussions and initial ranking from the committee occurred during the selection process, and prior to the final decision being made on the winning proposal.

² The evaluation forms consisted of 11 questions with a weight of 3, 4 or 5, that could earn a score between 1 and 5, to reach a total weighted score. Each question provided space for the committee member's comments regarding strengths and weaknesses, with a request to rate the submitted response as *poor, adequate, average, good or best possible* for each question.

16. The committee used the evaluation forms and proposals to note their comments regarding the strengths and weaknesses of the written materials.

17. When performing this task, the committee member would express his or her opinion regarding the anticipated effectiveness of the RFP's written description (e.g., *interesting sounding campaign; balanced; no implementation strategy*), which clearly represent opinions and support the total weighted score and ranking given by the applicable evaluator.

18. The City represents that all scoring documents, written submissions or proposals and the corresponding margin comments and notes were used by the selection committee prior to a final decision, and remained *internal* to the selection committee.

19. Additionally, the City has provided an Attestation of Predecisional Record, which is attached hereto as Exhibit B (the "Affidavit") in which it reasserts that the scoring documents are the type of internal predecisional deliberation records that Section 708(b)(10) of the Act seeks to protect.

20. The City offers that this Petition for Reconsideration and the Exhibit B are in no way an attempt to introduce new arguments or defenses in response to the appeal; though, it is the City's response to OOR's assertion that the City's facts are deficient as they relate to internal predecisional deliberations and the protection afforded under the Act.

REQUESTED RELIEF

The City respectfully requests that the OOR grant the City's Petition for Reconsideration and, thereafter, that it modify the Determination in this matter as follows:

21. At page 4 of the Determination, the first sentence of the "Conclusion" should be amended to state that the Requester's appeal is denied in its entirety and the City is not required to take further action; and the second and third sentences of the paragraph should be deleted.


22. At page 4 of the Determination, the last paragraph of the "Legal Analysis" should be deleted.

23. At page 1, the second paragraph of the "Introduction" should be amended to state that the appeal is denied in its entirety, and the City is not required to take further action.

WHEREFORE, the City respectfully requests that the OOR grant its Petition for Reconsideration in the above-captioned matter, and that the OOR modify its Final Determination in the manner set forth above.

Respectfully submitted,

Date: July 9, 2010


Aris R. Murphy
Deputy City Solicitor
City of Philadelphia -- Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102

cc: Mr. Ivan Juzang, MEE Productions


COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

IN THE MATTER OF: JUZANG v. CITY OF PHILADELPHIA
Docket No. AP 2010-0473

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing documents upon all parties of record in this proceeding in accordance with the requirements of §33.32 (relating to service by a participant).

July 9, 2010



Arris R. Murphy
Deputy City Solicitor
City of Philadelphia – Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
Arris.Murphy@phila.gov

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Jul 9 2010

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3. Any document/record confirming that evaluation panel members reviewing the Tobacco Cessation RFP did not have a conflict of interest in the RFP;
4. Any document/record confirming that evaluation panel members reviewing the Obesity Prevention RFP did not have a conflict of interest in the RFP; and
5. Any document/record justifying why the City's Small Business Policy or applicable Mayor's Executive Orders were not included in the subject RFP[s].

(the "Request").

After invoking the thirty-day extension, the Deputy City Solicitor timely responded, partially denying the Request as to Parts 1 and 2 above under Section 708(b)(10), the predecisional deliberative exception, citing *Digital-Intk, Inc. v. DGS*, 923 A.2d 1262 (Pa. Commw. 2007), and advised that records responsive to Parts 3 through 5 sought "verifiable facts" so were not proper under Section 703 (the "Denial"). The Requester timely appealed arguing that scoring records are essential to assess the RFP process and that the records should exist (the "Appeal").

The City supplemented the record to support its exception and substantiate non-existence of records. The City submitted an attestation of Donald Schwartz, Health Commissioner attesting that the records sought in Parts 3 through 5 do not exist ("Attestation"). The City also submitted legal argument of its Deputy Solicitor that the evaluation scoring records are protected by Section 708(b)(10)(A)(i) because they were internal, and made prior to the decision on awarding the RFP to Neiman Group rather than the Requester's company. The City argues the evaluation forms were created through the evaluation committee's deliberation and reveal members' opinions. The City did not substantiate by affidavit or otherwise the facts set forth in counsel's argument.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. Records in possession of a local agency are presumed to be

public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. See 65 P.S. §67.305. However, the City cannot produce a record that does not exist. The City substantiated that records sought in Parts 3 through 5 do not exist with the Attestation, and so cannot be compelled to produce them. The Appeal is denied as to these records.

The City asserted the predecisional deliberative exception in Section 708(b)(10) to protect the evaluation scoring documents of the evaluation committee (Parts 1-2). Under Section 708(a), the City bears the burden of proving its asserted exceptions by a "preponderance of the evidence" meaning the "greater weight of the evidence." *Commonwealth v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Pursuant to Section 708(b)(10)(i)(A), a record reflecting the "internal, predecisional deliberations of an agency... or predecisional deliberations between agency members, employees or officials...including predecisional deliberations relating to a ...contemplated or proposed policy or course of action...or other documents used in the predecisional deliberations" are protected from disclosure. 65 P.S. §67.708(b)(10)(i)(A).

The City argues that the three elements required to meet the exception are met here, (1) deliberations reflected are "internal" to the agency; (2) the deliberations reflected are predecisional, *i.e.*, before a decision on an action; and (3) the contents are deliberative in character, *i.e.*, pertaining to proposed action/policy-making. See *PHFA v. Sansoni*, OOR Dkt. AP 2010-0405; *Kyle v. DCED*, OOR Dkt. AP 2009-0801. There is no dispute that the Request seeks "evaluation scoring documents" related to an RFP that has been awarded and that the "evaluation scoring documents" sought were prepared by the evaluation committee. These records are necessarily deliberative in character as recognized by *Digital-Ink, supra* and *Kyle v. DCED*. See also *Rodwanski v. West Chester University*, OOR Dkt. AP 2010-0238 (protecting evaluation scoring sheets for RFP under Procurement Code and Section 708(b)(26)).

Based upon applicable decisional law, the City meets the deliberative character criterion. However, the City did not substantiate any facts to demonstrate that the evaluation scoring documents are also internal to the City and were made prior to a decision. The explanation of the RFP approval process, the Requester's Appeal and type of records involved indicate that the evaluation scoring sheets were created prior to a decision being made upon awarding the RFP. But the City failed to substantiate that the evaluation scoring documents are strictly internal to the committee and its agents. The Deputy Solicitor stated as much in her letter to the OOR, but a statement in a letter is not sufficient evidence to meet the preponderance of evidence test.

Accordingly, other than the scoring sheets, which are not public under applicable decisions, the City is directed to release the evaluation scoring documents.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part and denied in part**. The Appeal is denied as to Parts 3 through 5 shown to not exist, and granted as to Parts 1 and 2 other than for scoring sheets. The City is directed to disclose the evaluation scoring documents, other than the scoring sheets and their contents, 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 Final Determination, either party may appeal to the Philadelphia County Court of Common Pleas. 65 P.S. §67.1302(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 as per Section 1303. This Final Determination shall be posted at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: June 25, 2010


LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Ivan Juzang; Arris Murphy, Esq. for City

ATTESTATION OF PREDECISIONAL RECORD

Date: July 7, 2010
Agency: Philadelphia Department of Public Health
Requester: Ivan Juzang
Records Requested: A copy of all evaluation scoring documents, including but not limited to notes, memoranda, vendor ranking summary reports, emails, and telephone messages for responses submitted by Neiman Group and MEE Productions Inc. to RFP #21100201103005 (Tobacco Cessation), and RFP #21100201104534 (Obesity Prevention).

Re: Juzang v. City of Philadelphia, OOR Docket No. AP 2010-0473

I, Donald F. Schwarz, MD, MPH, Health Commissioner, City of Philadelphia, make this statement under penalty of perjury as more fully set forth in 18 Pa. C.S. §4904.

I attest that as it relates to the records requested above: (1) the scoring documents were internal to the agency, including its representatives, (2) the scoring documents were predecisional, meaning they were made before the deliberative process of decision-making was completed, and (3) the scoring documents were deliberative in character in that they make recommendations or express opinions on the matter, and were not purely factual in nature.

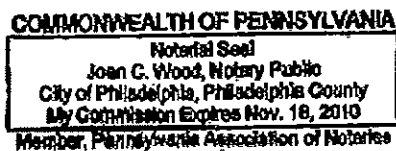
My contact information, including telephone number and e-mail address, is:

Donald F. Schwarz, MD, MPH
Health Commissioner
Department of Public Health
600 Municipal Services Building
1401 JFK Boulevard
Philadelphia, PA 19102
(215) 686-5000
donald.schwarz@phila.gov

Handwritten signature of Donald F. Schwarz, MD
Donald F. Schwarz, MD

Sworn to and subscribed before me on this 7th day of July 2010

Handwritten signature of Notary Public
Notary Public



Jul 9 2010 11:52 P.12
CORPORATE GROUP
Fax: 215-683-5069



July 13, 2010.

Arris Murphy
Deputy City Solicitor
City of Philadelphia
Law Department, One Parkway
1515 Arch Street
Philadelphia, PA 19102-1595

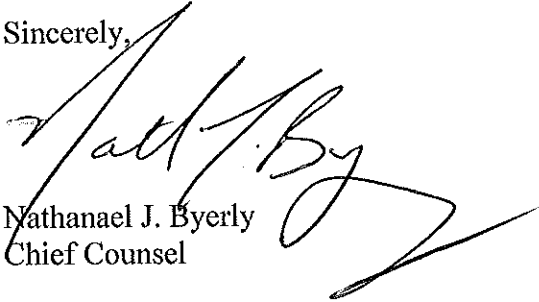
RE: Petition for Reconsideration dated July 9, 2010

Dear Ms. Murphy:

We are in receipt of your Petition for Reconsideration dated July 9, 2010 that was received by this office on the same day in connection with the Office of Open Records Final Determination in *Juzang/MEE Productions v. City of Philadelphia*, OOR Dkt. AP 2010-0300. All factual assertions must be supported by an affidavit executed under penalty of perjury by a person with first hand knowledge. Such an affidavit was not submitted to the OOR as part of the record before the Appeals Officer. Therefore, we hereby deny your Petition.

Please contact me if you have any further questions.

Sincerely,


Nathanael J. Byerly
Chief Counsel

Cc: Ivan Juzang



July 21, 2010

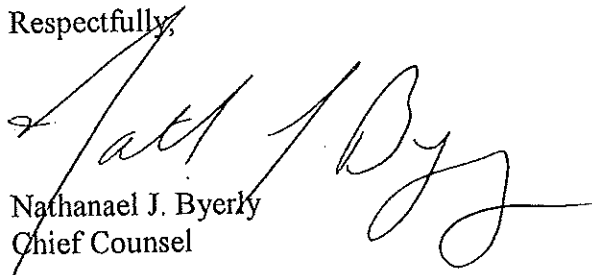
Arris Murphy
Deputy City Solicitor
City of Philadelphia
Law Dept., One Parkway
1515 Arch Street
Philadelphia, PA 19102-1595

RE: Correction to Correspondence concerning Petition for Reconsideration

Dear Ms. Murphy:

The July 13, 2010 letter denying the July 9, 2010 Petition for Reconsideration should have indicated that it was regarding *Juzang/MEE Productions v. City of Philadelphia*, OOR Dkt. AP 2010-0473. My apologies for any inconvenience this may have caused.

Respectfully,


Nathanael J. Byerly
Chief Counsel

cc: Ivan Juzang
File