



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF:

:

BRET FORD
Complainant

:

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:

:

v.

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Docket No.: AP 2010-0246

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EDINBORO UNIVERSITY
Respondent

:

:

INTRODUCTION

Bret Ford (the “Requester”) filed a right-to-know request (the “Request”) pursuant to the Right-to-Know Law (the “RTKL”), 65 P.S. §67.101, *et. seq.*, with Edinboro University (the “University”) seeking copies of certified payrolls. The University denied the Request. 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 March 10, 2010, the Requester filed the Request with the University. Specifically, he sought “[a] complete set of Certified Payrolls from the roofing contractor (G&W Roofing) who performed the work on Early Hall, Edinboro University.” In a response dated March 12, 2010, the University denied the Request stating that the

University is no longer retaining Certified Payrolls and that under § 705 of the RTKL it is not required to create records that do not exist.

The Requester filed a timely appeal to the OOR on March 22, 2010. In response to the appeal, the University states that it is not in possession of the requested records and that the appeal should be denied pursuant to § 705. The University asserts that upon receipt of the prevailing wage form, it certifies that the information is accurate and then either returns the form to the contractor or destroys it. The University says there is no legal reason for it to maintain the form. The University states that under the Prevailing Wage Act, the contractor has the responsibility to maintain the certified payroll forms for two years and that the only right it has is to inspect the wage records during reasonable hours. See 43 Pa CSA 165-6. The University does keep a log reflecting the date wage forms are received and certified.

The University also argues that while it has contracted with G&W Roofing to perform services, that does not require it to maintain every record that relates to the project. The University argues that while the laws and regulations require that the records at issue be open for inspection by the University, this does not create a public record that is now maintained by the Contractor. The University reasons that the requested records do not constitute a public record for the purposes of the RTKL because it is a record that is not required nor is needed to be maintained by the University.

The University further argues that if granted the Request would require the University to take action that it is not otherwise obligated to take because the University no longer possesses or has a right to possess the payroll/wage forms. The University points out that while the Prevailing Wage Act allows the University to inspect the records

of the contractor, if it so chooses, construing the Right to Know Law to require agencies to take discretionary action is not reasonable. The University states that such a result would create the situation where a Requester is initiating a mandamus action with every request where the record is not required to be maintained by the University. The University contends that this cannot be the purpose of the RTKL.

The University argues that the section of the Prevailing Wage Act that permits an agency to inspect a wage certification cannot reasonably be read to imply that an agency now has an affirmative duty to inspect and copy the wage certification every time it receives a RTKL request.

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.

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).

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, custody or

control or that does not exist. See 65 P.S. § 67.705. The University argues that it is not in possession of the requested records and that the appeal should be denied.

Pursuant to the Prevailing Wage Act, the University has the right to inspect the records of the contractor if it so chooses. Such a right amounts to control. When responding to a request under the RTKL, an agency is required to determine whether the agency has possession, custody, or control over the identified record. See 65 P.S. 67.901. Here, the University has control over the requested certified payrolls. Therefore, it is required under the RTKL to retrieve a copy of the certified payrolls in response to the Request. The University may redact nonpublic information as permissible under the RTKL.

The University argues the certified payrolls do not constitute a public record for the purposes of the RTKL as it is a record not required to be maintained by the University. However, the RTKL's definition of record contains no such requirement. Section 102 of the RTKL, defines the term "record" as:

"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. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document."

Here, the certified payrolls are documents that reflect the transaction (i.e. a contract to provide services) of the University and were created in connection with that transaction. The fact that an agency is not required to maintain a record does not alter its status as a public record. Further, the University's return or destruction of the records does not change their status as public records. The RTKL states that 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. See 506(d)(3). Once the agency determines that it has control over the records, it is required to retrieve those documents/records.

Finally, the University argues that the Request forces/requires it to take discretionary action it would not otherwise be required to take. It argues that in essence such a result creates a situation where every request is a mandamus action if the record is not required to be maintained by the University. The OOR disagrees. In defining a public record, the RTKL does not distinguish between whether an agency is required or not required to maintain a record. If an agency has a public record in its possession, custody, or control it is required to obtain and release that record subject to any applicable exemptions. Here, the University has control over the certified payrolls and is required to obtain them for the Requester. The OOR notes that the payrolls may be redacted in accordance with the RTKL. Home addresses may not be redacted unless the individuals are public employees or retired public employees.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted** and the University is required to obtain the records and provide them to the requester subject to any applicable exemptions. 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 April 21, 2010



APPEALS OFFICER
NATHANAEL J. BYERLY, Esquire

Final Determination Sent To:
Bret W. Ford
Michael S. Ferguson, Esquire