



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JEFF HOLLOWOOD,
Complainant**

v.

**LATROBE MUNICIPAL AUTHORITY,
Respondent**

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Docket No. AP 2010-0677

INTRODUCTION

Jeff Hollowood (the “Requester”) submitted a request to Latrobe Municipal Authority (the “Authority”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”) seeking records related to long-term control plan development and account summary statements. The Authority permitted access to certain records and advised that part of the request was insufficiently specific. The Requester timely appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part** and the Authority is directed to take further action.

FACTUAL BACKGROUND

On July 13, 2010, the Requester submitted a right-to-know request for the following, in part:

(1) All documents, correspondence, charts, graphs, drawings, digital or otherwise in regards to the [Authority’s] long term control plan, LSO system hydraulic characterization and all related projects including but not limited to the digital input and output files for SWMM 5 sewer model for the Latrobe/Authority interceptors, UTMA monastery and nine mile interceptors;

(2) audits from 2000 to the present, including any account summary statements

(the “Request”).

Thomas Gray, Open Records Officer (ORO), timely responded, with regard to Part 1 stating that the only materials in the Authority's possession that "have not already been reviewed" are the handouts and graphs for alternatives to the long-term control plan presented by the Engineer, and with regard to Part 2, stating the audits are available but that the "amount of summary statements" is insufficiently specific ("Denial").

Before he appealed, the Requester advised that his hand-written Request stated "*account* summary statements" not "amount" and that he could clarify further if needed. The Requester timely appealed arguing that with regard to Part 1, the Authority or its Engineers have the requested records, and that prior disclosure or inspection is not an excuse for failing to provide access sought in the Request; he also argues that Part 2 of the Request is sufficiently specific ("Appeal").

The Authority supplemented the record with an affidavit of Manager Thomas Gray ("Affidavit") regarding the provision of documents to the Requester's alleged client, Unity Township Municipal Authority (UTMA), in response to Part 1. The Affidavit states there is a Consent Order in litigation pending between UTMA and the Authority regarding UTMA's ability to inspect the records sought in Part 1 and attached a copy of the Consent Order. The Consent Order provides that the Authority shall provide UTMA "with the ability to inspect and review all of [the Authority's] non-proprietary files, information and documentation... by Friday, July 9, 2010, which shall include the non-proprietary raw data, to the extent completed, from the SWMM 5 sewer model for the Latrobe Interceptors and UTMA's Monastery and Nine Mile Run Interceptors." The ORO attests that the non-proprietary raw data had been provided to UTMA, that the model is available from the Environmental Protection Agency's website, and characteristics of the system, the graphs and the Engineer's power point presentation have all been provided. He contends the response to the Consent Order is a proper response to the Request.

With regard to Part 2 challenging specificity, the ORO attests that “account summary statements” does not describe any existing record of the Authority, and that it has no obligation to create one under Section 705. To the extent the Requester meant to request any financial/bank account statements, the Authority advises that the Request would have been clear and capable of response. The Authority supplied a copy of its RTK Policy and Resolution signifying its passage.

The Authority also submitted an affidavit of Kenneth Orie, the Authority’s Consulting Engineer regarding the confidential proprietary value in the information sought in Part 1, and that he had been notified as per Section 707 of the RTKL (“Engineer Affidavit”). The Engineer attests that the raw data and information sought is a trade secret valuable as an intellectual property right. The Engineer attests that the characteristics of the Authority’s system called for by the SWMM 5 sewer model has been provided to UTMA, and the raw data has been provided to UTMA in the power point presentation and graphs. He attests that the disclosure of the trade secret of the application of the SWMM 5 sewer model to any outside party would materially prejudice the Engineer’s employer, Gibson-Thomas Engineering, Co. and requests that the OOR protect the information under Section 708(b)(11).

LEGAL ANALYSIS

The RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. §67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal.

The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and

documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing and the OOR has the requisite and necessary information before it, presented through sworn testimony, to adjudicate the matter. The Authority is a local agency subject to the RTKL and required to disclose public records. *See* 65 P.S. §67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §67.305. In this case, the Authority did not raise any exemptions in its Denial, arguing only that Part 2 of the Request was insufficiently specific and that inspection of records for Part 1 “had already been provided.”

1. Part 1 of the Request is not protected from disclosure.

The Authority asserted on appeal that the requested information for Part 1 had been provided to UTMA, a client of the Requester’s firm, and that other than the non-proprietary information, UTMA has received access to the requested records in its possession. There is no dispute that the Requester serves as counsel for UTMA and is from the same firm as counsel representing UTMA in the litigation. However, the OOR notes that providing access to UTMA as part of a pending litigation does not satisfy its obligation to respond to a proper right-to-know request made by an individual associated with the litigation. Therefore, the provision of access and of the graphs, raw data and power point to UTMA does not satisfy the Request.

Under the RTKL, the Authority is obligated to comply with Section 903. Section 903 provides that the “specific reasons for the denial, including a citation of supporting legal authority” and “the procedure to appeal the denial of access” are required to be included in the response. The Authority’s response did not include this required information. During the Appeal, the Authority raised new grounds for denial of Part 1, as “confidential proprietary information” protected under Section 708(b)(11). The Commonwealth Court held in *Signature*

Information Solutions v. Aston Tp., 995 A.2d 510 (Pa. Commw. 2010), that agencies are limited to the bases for denial set forth in the original response to the right-to-know request. Accordingly, the OOR cannot consider legal arguments against disclosure raised for the first time on appeal like the Authority's argument and Engineer Affidavit submitted to support protection under the trade secret exception at (b)(11). The OOR also notes that it is unclear to which parts of the Request the exception is asserted to apply, as the Authority attested it provided many of the responsive records, and/or access to same, to UTMA in compliance with the Consent Order.

As the Authority raised no grounds for withholding access from the Requester here, and did not attest that records had been provided to the Requester in accordance with his Request, the OOR is compelled to find that the Authority failed to overcome the presumption of openness and the requested records within the Authority's possession or control must be disclosed as to Part 1.

2. Part 2 of the Request is sufficiently specific.

With regard to Part 2, the Authority contended that the Request was insufficiently specific. Section 703 provides that a request must "identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." 65 P.S. §67.703. The OOR finds that the description "account summary statements" is sufficiently specific to identify responsive records, and includes statements of accounts the Authority holds.

However, on appeal, the Authority attests that it does not have any records that qualify as "summary statements" and is not required to create such summaries, citing Section 705. Section 705\ states "an agency shall not be required to create a record which does not currently exist." 65 P.S. §67.705. Because the Affidavit substantiates that summary statements do not exist, the Authority has no responsive records to provide and met its obligation as to Part 2.

CONCLUSION

For the foregoing reasons, the Requester's Appeal is **granted in part and denied in part**. Part 2 of the Request is denied to the extent it seeks non-existent records, *i.e.*, summaries. The Request is granted as to the records sought to be inspected in Part 1, and the Authority is directed to provide access to the Requester to inspect the requested information 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 Westmoreland 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 on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 25, 2010



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Jeff Hollowood, Esq.; Donald J. Snyder, Jr., Esq. for Authority