



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
FELIX FOLLETTI on behalf of the	:	
GREATER PA REGIONAL COUNCIL	:	
OF CARPENTERS,	:	
Complainant	:	
	:	Docket No.: AP 2010-0661
v.	:	
	:	
EDINBORO UNIVERSITY OF	:	
PENNSYLVANIA,	:	
Respondent	:	

INTRODUCTION

Felix Folletti, on behalf of the Greater Pennsylvania Regional Council of Carpenters, (the “Requester”) submitted a request (the “Request”) to Edinboro University of Pennsylvania (“University”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”) seeking documentation related to a student housing project on the University’s campus. University denied the Request, stating that it did not possess any responsive records, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the University is required to take further action as set forth herein.

FACTUAL BACKGROUND

On June 1, 2010, the Request was submitted seeking

all copies, pictures or documentation in [University's] possession or control concerning the construction and repairs of the first phase of the student housing project on Edinboro University campus. Specifically, I would request any documentation that is related to foundation repairs, water/sprinkler pipes that have broken or electrical work that was done incorrectly. Also any documentation that documents construction work not performed to specifications or building codes.

After invoking a thirty-day extension, University denied the Request on July 9, 2010, stating that it did not possess such records because the Edinboro University Foundation (“Foundation”) controlled the construction project rather than the University. Additionally, the University stated that the Foundation was not an agency subject to the RTKL.

On July 21, 2010, Requester appealed to the OOR, contending that the “conclusory statement does not establish a basis for Edinboro’s” denial. The OOR invited both parties to supplement the record in light of the Commonwealth Court’s decision in *East Stroudsburg University Foundation v. Office of Open Records* and both parties did so. The University reiterated that it does not possess any requested records, and supplied an affidavit to that effect. The Requester noted that the University had contracted with the Foundation to construct student housing on campus, and provided a copy of the “Ground Lease Agreement” between the University and the Foundation. The Requester further alleged that, pursuant to 65 P.S. § 67.506(d)(1), the University “is ... obligated to obtain the records from the ... Foundation under the RTKL.”¹

LEGAL ANALYSIS

The Right to Know Law 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

¹ The Requester also attached a copy of the OOR’s Final Determination in *Foletti v. Edinboro University Foundation*, OOR Dkt. AP 2010-0577, where the same records were sought from the Foundation, rather than the University. OOR denied the appeal, holding that the Foundation is not a Commonwealth agency.

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, the facts are undisputed, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The University is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth 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. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. §67.708(a). 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.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

In response to the Request, the University provided a sworn affidavit from its Open Records Officer stating that the records “are not in the possession or control of the University.” The OOR finds that the affidavit provided by the University demonstrates that

the University does not physically possess responsive records. *See, e.g., Martin v. DOC*, OOR Dkt. AP 2010-0486, 2010 PA O.O.R.D. LEXIS 434; *Juzang v. City of Philadelphia*, OOR Dkt. AP 2010-0473, 2010 PA O.O.R.D. LEXIS 424; *Pilchesky v. Lackawanna County Sheriff*, OOR Dkt. AP 2010-0497, 2010 PA O.O.R.D. LEXIS 427.

In the event that an agency does not possess any responsive records but another party does, the RTKL provides that

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency...

65 P.S. § 67.506(d)(1).

The Commonwealth Court recently interpreted 65 P.S. § 67.506(d)(1) in *East Stroudsburg University Foundation*. There, the court determined that the “proprietary-governmental” distinction does not apply in the context of the RTKL:

[T]he distinction under any version of the Right-to-Know Law has never been the “proprietary-governmental” distinction because the word “proprietary” is never mentioned in either act; rather the distinction has always been between “governmental function” and “essential governmental function.” Because the General Assembly only used the term “governmental function” in 65 P.S. § 67.506(d)(1), the language is plain that all contracts that governmental entities enter into with private contractors necessarily carry out a “governmental function” – because the government always acts as the government.

East Stroudsburg University Foundation, 995 A.2d 496, 504 (Pa. Commw. 2010). The court went on to explain that public access to records in this context is “restricted to records that ‘directly’ relate to carrying out the governmental function, to avoid access that may relate to the contract but do not relate to its performance.” *Id.*

The OOR finds that, because the University entered into the Ground Lease Agreement with the Foundation to construct student housing, the Foundation is performing a

governmental function, based on the reasoning of the court in *East Stroudsburg University Foundation*. This analysis, however, does not end the inquiry, as the question now turns to whether the specific records requested are “directly related” to this governmental function. *See* 65 P.S. § 67.506(d)(1).

In the present case, the Requester sought records involving the construction of student housing on the University’s campus. As the agreement between the University and the Foundation involves this construction work, the OOR finds that the requested records are “directly related” to the underlying agreement. *See id.*; *see, e.g., Giurintano v. DGS*, OOR Dkt. AP 2010-0603, 2010 PA O.O.R.D. LEXIS _____. As a result, the University must obtain the requested records from the Foundation and provide them to Requester.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted** and the University is required to provide all responsive records within 30 calendar days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(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 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 18, 2010



APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Brian Kadlubek, Esq.; Michael Ferguson, Esq.