



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>JONATHAN BARI,</b>	:	
<b>Complainant</b>	:	
	:	<b>Docket No.: AP 2010-0733</b>
<b>v.</b>	:	
	:	
<b>OFFICE OF THE GOVERNOR,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Jonathan Bari (the “Requester”) submitted a request (the “Request”) to the Office of the Governor (“Office”) seeking various records related to the Independence Visitor Center Corporation (“IVCC”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The Office denied the Request as disruptive, stated that the exemption for confidential proprietary information applies and alleged that the Office did not retain copies of IVCC board minutes. 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 Office is required to take further action as set forth herein.

**FACTUAL BACKGROUND**

On August 3, 2010, the Request was filed seeking

- A) Attachment to the letter dated July 9, 2004 from William W. Moore, former President and CEO of the [IVCC], to Governor Rendell about the IVCC and legalized gambling and casino operators....

- B) 2003 memorandum from Mr. Moore to Governor Rendell about the IVCC;
- C) All meeting minutes from March 18, 2003 (the day that Governor Rendell appointed William Graham in writing as the “Governor’s Representative on the IVCC Board of Directors) to August 2, 2010 of the IVCC Board of Directors that are in the possession of the “Governor’s Representative” who Governor Rendell official appointed to serve on the Board of the IVCC to represent the Office of the Governor. [collectively, the “Minutes”]

On August 10, 2010, the Office denied the Request, stating that, since the Requester previously filed a RTKL request for similar information and was properly denied under 65 P.S. § 67.506 (a).<sup>1</sup> The Office also alleged that responsive records are exempt as containing confidential proprietary information pursuant to 65 P.S. § 67.708(b)(11). With respect to the Minutes, the Office stated that there are no responsive records within its “possession, custody or control.”

The next day, the Requester appealed to the OOR, citing the OOR’s Final Determination in *Bari v. City of Philadelphia*, OOR Dkt. AP 2010-0157, 2010 PA O.O.R.D. LEXIS \_\_\_\_\_. The Requester also attached a March 18, 2003 letter from Governor Rendell to Graham appointing him “as [the Governor’s] representative to serve on the” IVCC. On August 12, 2010, the IVCC sought permission to participate in the appeal as a party with a direct interest pursuant to 65 P.S. § 67.1101(c). The OOR granted IVCC’s request and invited all parties to supplement the record with relevant material.

The Office provided a position statement signed under penalty of perjury from its Records Legal Liaison stating that

There are scores of boards, commissions, authorities, task forces, or the like for which [the] Governor has named a designee, who may or may not be a Commonwealth employee, depending on the specific circumstances. Typically, as in this instance, the Governor is not involved in the day-to-day operations regarding these boards, commissions, authorities, task

---

<sup>1</sup> The Office also alleged that, since the Requester did not appeal the Office’s response to his first RTKL request, the Requester lacked standing to appeal the present Request.

forces, or the like, nor are any reports or documents to be submitted to him. As in this case with the IVCC and Mr. Graham, the individuals designated to sit on those boards do so in an independent capacity and their only involvement with the Governor is being designated or nominated by him.

The IVCC provided three affidavits: from its General Manager; William Graham; and the President/CEO. These affidavits generally affirm, among other matters, that “Governor Rendell has not taken any actions (other than designating Mr. Graham as a ... Director) with respect to managing IVCC’s business of affairs” and that Graham does not report to the Office related to his activities on the IVCC Board.

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

The Office is a Commonwealth agency 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).

**1. The Request was improperly denied as “disruptive”**

Both the Office and IVCC argue the Request was appropriately denied as disruptive pursuant to 65 P.S. § 67.506(a) due to Requester’s January 10, 2010 Right-to-Know request. The RTKL provides that “[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.” 65 P.S. § 67.506(a). The OOR has recognized that, in order for this exemption to apply, 1) the request must be “repeated” and 2) the repeated request places “an unreasonable burden on the agency.” *See Slate v. DEP*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 (“A repeated request alone is not enough to satisfy § 506(a)(1)”); *but see Dreyer v. DEP*, OOR Dkt. AP 2009-0453, 2009 PA O.O.R.D. LEXIS 207 (“[W]hen a request has been made under the ... RTKL and *granted*, the OOR finds that a repeat request for the same record is repetitive and places an unreasonable burden on the agency”)(emphasis added). The

OOR has held that repeated requests for the same records, although phrased differently, may be denied as disruptive. *See Cohen v. Dept. of Labor & Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton*, 2009-0798, 2009 PA O.O.R.D. LEXIS 318 (“Slight differences in phraseology do not preclude application of [Section 506(a)]”).

In Requester’s January 10, 2010 request, he sought

- 1) Copies of all documentation including correspondence by and between the IVCC and/or the IVCC Board of Directors with the Governor of Pennsylvania and/or his staff from January 1, 2001 to January 9, 2010.
- 2) ....
- 3) Copies of all IVCC meeting minutes of the equivalent ... of the Board of Directors from ... January 1, 2004 to January 10, 2010 that have been provided to Mr. Graham and/or the ... [Office] including to the Governor and his staff.

The present Request seeks 1) an attachment to a 2004 letter from the former IVCC President and CEO; 2) and a 2003 memorandum from the IVCC President and CEO to Governor Rendell; and 3) Minutes from March 18, 2003 to August 2, 2010. As the attachment, memorandum and Minutes fall under the general categories listed in the January request and are within the date range of the prior request, the OOR finds that Request was “repeated” as to these items.<sup>2</sup> *See* 65 P.S. § 67.506(a)(1).

In support of establishing that the Request was “unreasonably burdensome,” the Office’s Records Legal Liaison states under penalty of perjury that

The RTKL protects the Office ... from being unreasonably burdened by having to expend duplicative Commonwealth resources for responding to requests for the exact same records that were previously requested, to which a response was made and no appeal filed. Attorney and staff time have been devoted to again responding at some length to the request that

---

<sup>2</sup> The OOR notes that second Request only overlaps the January request for the Minutes between January 1, 2004 and January 10, 2010. As result, the Request is only “repeated” for these minutes, rather all of the Minutes.

was already asked and answered and, given the identical nature of the request, this constitutes an unreasonable burden to the agency and the taxpayers of the Commonwealth, in a time of significant budgetary and staffing constraints.

The question, however, is not whether the Request is merely burdensome — but whether it is “*unreasonably* burdensome.” See 65 P.S. § 67.506(a) (emphasis added). Unquestionably, the RTKL imposes a burden upon public agencies, as the law was specifically designed to “scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling*, 990 A.2d at 824. Based on the evidence presented the Office failed to meet its burden that it was “*unreasonably*” burdened with having to respond to the Request merely because it involved a small subset of records previously requested in January. Additionally, the Office responded to the Request within five business days rather than invoking a thirty-day extension pursuant to 65 P.S. § 67.902(b), strongly suggesting that the Office did not encounter an unreasonable burden when forming its rapid response.

**2. The requested records are records “of an agency”**

The Office and the IVCC allege that, since the Governor has exercised no control over IVCC’s activities other than the appointment of a Board member, the attachment, memorandum and Minutes should not be considered “records” under the RTKL. See 65 P.S. § 67.102. The RTKL statutorily imposes a two-part inquiry for determining if certain material is a record: 1) Does the material document a “transaction or activity of an agency?” and 2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency?” See 65 P.S. § 67.102 (emphasis added); *Bari v. City of Philadelphia*, OOR Dkt. AP 2010-0157, 2010 PA O.O.R.D. LEXIS \_\_\_\_.

**a. The attachment, memorandum and Minutes document a “transaction or activity” of the Office**

The OOR previously addressed a similar set of records in an appeal involving the City of Philadelphia. *See Bari*, OOR Dkt. AP 2010-0157. In that case, the Mayor of Philadelphia designated himself as a member of IVCC’s Board in his official capacity pursuant to IVCC’s bylaws. The OOR held that

Regardless of whether or not [the Mayor] 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.... 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.

*Id.* (emphasis added).<sup>3</sup>

In the present case, the Governor chose to designate a representative to attend IVCC meetings in his place, but was not legally obligated to do so. Although the Office and IVCC argue that, since Graham is neither a public employee nor official under various statutes, his activities can never be made in an “official capacity,” the Governor’s official designation of Graham as his representative on the IVCC Board, sent from Commonwealth letterhead bearing the signature and title of Governor Rendell, literally places Graham in the Governor’s seat on the IVCC Board, meaning that Graham serves on the IVCC Board in *the Governor’s* official capacity. *See generally Patterson v. Eddystone Borough*, OOR Dkt. AP 2010-0629, 2010 PA O.O.R.D. LEXIS \_\_\_\_ (“Based on the letter ... on Borough letterhead using the Mayor’s title and name, the OOR ... holds that the Mayor serves on [a third party committee] in his official capacity”).

---

<sup>3</sup> The City of Philadelphia appealed this Final Determination to the Court of Common Pleas of Philadelphia County, where it is currently pending. *See* May Term 2010, No. 00152.

Because Graham serves as the “Governor’s Representative” in accordance with his appointment and IVCC’s bylaws, the records requested, including a memorandum, attachment and Minutes document a “transaction or activity” of the Office. *See Bari*, OOR Dkt. AP 2010-0157.

**b. The records were “created, received or retained” in connection with the Office’s activity**

Because the OOR holds that the attachment, memorandum and Minutes document a transaction or activity of the Office due to the Graham’s membership as the Governor’s Representative on the IVCC Board, the next crucial question is whether or not the records were “created, received or retained” in connection with this activity.

The Office stated in its original response that it “does not have copies of IVCC board minutes within its possession, custody, or control.” On appeal, however, the Office provided a statement signed under penalty of perjury that “[o]ther than [the Governor’s appointment letter,] the Office ... has no additional records *regarding Mr. Graham* either in its possession, custody or under its control.” (emphasis added). While an affidavit may serve as competent evidence of a record’s nonexistence,<sup>4</sup> the Office’s statement from its Records Legal Liaison offers no information as to whether a search for responsive records was conducted or whether the attachment, memorandum or any of the Minutes exist within the Office’s possession, custody or control. As a result, the Office’s statement that the records do not exist is an insufficient legal basis for denying the Request. *See, e.g., Bartholomew v. Smithfield Township*, OOR Dkt. AP 2010-0184, 2010 PA O.O.R.D. LEXIS 269; *Pohlman v. Middle Smithfield Township*, OOR Dkt. AP 2010-0173, 2010 PA O.O.R.D. LEXIS 268.

---

<sup>4</sup> *See Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. 2010).

Even assuming, *arguendo*, that the Office provided sufficient evidence that it does not have physical possession of the attachment, memorandum or Minutes, the fact remains, as IVCC implicitly acknowledges,<sup>5</sup> that Graham, as the Governor's Representative, presumably received copies of the Minutes in the course of his duties or was entitled to them. The OOR also finds that Minutes were created in connection with an activity of the Office, as the Minutes, according to the affidavit of IVCC's General Manager, include "specific references ... to the activities of Mr. Graham." Consequently, the OOR finds that the Minutes were "created" and/or "received" in connection with an activity of the Office.

**3. The Office failed to establish that the exemption for confidential proprietary information applies to responsive records**

Both the Office and IVCC assert that the attachment, memorandum and Minutes are subject to an exemption for confidential proprietary information. *See* 65 P.S. § 67.708(b)(11). Based on the underlying purpose of the RTKL, however, "exemptions from disclosure must be narrowly construed." *See Bowling*, 990 A.2d at 824. In support of this exemption, the IVCC provided an affidavit from its General Manager signed under penalty of perjury, as well as an affidavit from its President and CEO related solely to the memorandum.

The RTKL defines the term "confidential proprietary information" as "Commercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. § 67.102. Accordingly, an agency must

---

<sup>5</sup> The IVCC, in arguing that Section 506(d) of the RTKL does not apply, stated that "the record must be in the possession of a party with whom the agency has contracted to perform a governmental function" and noted that "Graham has not entered into a contract to perform a function for the Office..." The IVCC failed to provide any information alleging that Graham does not possess these records in the first place.

establish that both elements of this two-part test are met in order for the exemption to apply. *See, e.g., Sansoni v. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375.

In evaluating whether this exemption from public access applies, the OOR considers a number of factors, including:

- 1) the extent to which the information is known outside of the business;
- 2) the extent to which the information is known by employees and others in the business;
- 3) the extent of measures taken to guard the secrecy of the information;
- 4) the value of the information to the business and to competitors;
- 5) the amount of effort or money expended in developing the information; and
- 6) the ease of difficulty with which the information could be properly acquired or duplicated by others.

*See id.; Crum v. Bridgestone/Firestone North Amer. Tire*, 907 A.2d 578, 585 (Pa. Super. 2006).

**a. The Minutes are not protected under 65 P.S. § 67.708(b)(11)**

With respect to Minutes, the affidavit from IVCC's General Manager provided as follows:

[Requester] has sought a for-profit ticket distribution agreement with IVCC that would permit him to sell tickets to his walking tour at a booth inside the Independence Visitor Center. Through numerous RTKL requests and other actions, [Requester] has sought the contracts and terms that other vendors have agreed to with IVCC. Discussions of such contracts and terms are described in the minutes of the ... Minutes... Disclosure of the ... Minutes will put IVCC at a significant commercial disadvantage in negotiations with [Requester] and other vendors who wish to enter or renew a distribution agreement with IVCC because [Requester] and other vendors will be able to use that commercial information to influence negotiations with IVCC...

The OOR finds that this affidavit, along with the position statement offered by IVCC's legal counsel, does not adequately address the factors listed above. *Compare Giurintano v. Dept. of General Services*, OOR Dkt. AP 2010-0603, 2010 PA O.O.R.D. LEXIS \_\_\_\_ (finding that agency set forth sufficient evidence establishing that the exemption under 65 P.S. § 67.708(b)(11) applied). Specifically, the OOR holds that the Office and the IVCC failed to provide any factual detail as to whether the Minutes are kept confidential or sufficiently explain how the Minutes themselves "would cause substantial harm to the competitive position of the person that submitted the information." *See* 65 P.S. § 67.102; *see, e.g., Sansoni v. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375. As a result, the Office has not overcome the presumption that the Minutes are public records. *See* 65 P.S. § 67.305.

**b. The attachment is not protected under 65 P.S. § 67.708(b)(11)**

IVCC's General Manager affirmed under penalty of perjury that

Disclosure of the financial information in the attachment to the letter dated July 9, 2004, from William W. Moore to Governor Rendell (the "Redacted Attachment") will put IVCC at a significant commercial disadvantage in negotiations with Mr. Bari and other vendors who wish to enter or renew a distribution agreement with IVCC... The Redacted Attachment is a one-page statement of IVCC's financial position in 2005. For example, the Redacted Attachment would show the income that IVCC received in 2005 from its partners, from concessions, and from visitor center services. Such information could reveal to Mr. Bari and other vendors an estimate of the amount that IVCC charges for distribution agreements... Attached is a copy of the Redacted Attachment with sufficient redactions to protect all confidential proprietary information. The attached version redacts IVCC's total income, total expenses, itemized income by category, itemized expenses by category, the categories by which IVCC tracks its income and expense, and three footnotes that offer additional information about IVCC's income and expenses.<sup>6</sup>

---

<sup>6</sup> Inexplicably, neither the hard copy submission nor the electronic version included the Redacted Attachment. Despite the failure to provide a copy of the attachment, the OOR will evaluate the merits of the "confidential proprietary information" exemption based on the information provided.

In its position statement, IVCC provided an unsworn statement that “[t]his information is not available to the public.” Despite the fact that the OOR noted in its initial letter to the parties that “[a]ll facts relied upon must be supported by an affidavit made under penalty of perjury by a person with firsthand knowledge,” IVCC’s legal counsel only stated, without affirming under penalty of perjury, that the attachment is non-public, and failed to provide any evidence supporting an allegation that the attachment was kept secret in any way. Consequently, the OOR holds that the Office did not meet its burden of proving that the exemption under 65 P.S. § 67.708(b)(11) applies. *See* 65 P.S. § 67.305; *see, e.g., Sansoni v. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *compare Giurintano*, OOR Dkt. AP 2010-0603, 2010 PA O.O.R.D. LEXIS \_\_\_\_.

**c. The memorandum is not protected under 65 P.S. § 67.708(b)(11)**

In support of the “confidential proprietary information” exemption regarding the memorandum, IVCC stated that the memorandum “is a critical evaluation of The Constitutional Walking Tour, a commercial product in the same industry as IVCC, made to the Office ... in response to a request by that office.” IVCC’s affidavit from its CEO affirmed under penalty of perjury that

On July 21, 2003, William W. Moore, then-President and Chief Executive Officer for IVCC, authored a memorandum to Governor ... Rendell regarding the Constitutional Walking Tour... The memorandum evaluated the Constitutionanl Walking Tour as a commercial product in and around the Independence National Historical Park... The memorandum constitutes commercial information which is confidential and the disclosure of which would cause substantial harm to the competitive position of IVCC.

Similarly, this affidavit provides no factual detail with which the OOR may evaluate whether the responsive record was properly withheld as confidential proprietary information. *Compare Giurintano*, OOR Dkt. AP 2010-0603, 2010 PA O.O.R.D. LEXIS \_\_\_\_\_. As a result, the OOR holds that the Office did not meet its burden of proving that the exemption under 65 P.S. § 67.708(b)(11) applies to the memorandum. *See* 65 P.S. § 67.305; *see, e.g., Sansoni v.*

*Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Office is required to provide 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: September 13, 2010



---

APPEALS OFFICER  
J. CHADWICK SCHNEE, ESQ.

Sent to: Jonathan Bari; Cathleen McCormack; Michael Fabius, Esq.