



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
RONALD RUDBERG,	:	
Complainant	:	
	:	Docket No.: AP 2010-0774
v.	:	
	:	
PENNSYLVANIA DEPARTMENT OF	:	
LABOR & INDUSTRY,	:	
Respondent	:	

INTRODUCTION

Ronald Rudberg (the “Requester”) submitted a request (the “Request”) to the Pennsylvania Department of Labor & Industry (“L&I”) generally seeking various employment-related records pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). L&I partially denied the Request under various RTKL exemptions and the Requester 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 L&I is not required to take further action.

FACTUAL BACKGROUND

On June 30, 2010, the Request was filed, seeking a variety of records related to “Position No. 185116, Announcement No. 23-407,” including:

1. For each interview conducted for the above noted position notes, written evaluations, and grading/scoring notes of each of the interviewees by each interviewer who conducted the interviews....
- [2.] For each interview referenced in paragraph 1 above, the interview questions that were posed to each interviewee....
- [3.] The equal Employment Review Certificate (EERC) Form STD-483 for the Position Number 185116 herein referenced interviews.
- [4.] Any document related to or reflects the scoring criteria, notes and process for the interviews references in paragraph 1 above.
- [5.] For all interviewees, copies of their SC[S]C applications submitted for position number 185116. Additionally, all interviewee resumes, Employee Performance Reviews (EPR's) and any other materials submitted for the above referenced interviews.
- [6.] The dates all three interviewers attended the [L&I] Interview and Selection Training for managers and supervisors.
- [7.] Information as to how the interview panel was selected and who determined the interview panel members.
- [8.] An explanation as to why a representative of the EEOC was not present for this particular interview.
- [9.] A copy of the policy/procedure of when and when not an EEOC representative participates in interviews.

Within five business days, L&I invoked a thirty-day extension to respond pursuant to 65 P.S. § 67.902(b). On August 9, 2010, L&I granted the Request for item 3 and item 5 with respect to the application and résumé of the successful applicant with redactions for personal identification information under 65 P.S. § 67.708(b)(6), but denied the remainder of the Request. With respect to the employment applications, résumés and EPRs for the unsuccessful applicants, L&I withheld these records under 65 P.S. § 67.708(b)(7). Additionally, L&I denied access to items 1, 2 and 4 of the Request under the 65 P.S. § 67.708(b)(7) and the “internal, predecisional deliberations” exemption pursuant to 65 P.S. § 67.708(b)(10).¹ The EPR for the individual hired was withheld under the personnel records exemption. Further, L&I denied items 6, 7 and 8, stating that

¹ L&I also cited the exemption for “notes and working papers” under 65 P.S. § 67.708(b)(12), but did not address this exemption on appeal.

these items sought answers to questions rather than records. Finally, item 9 was denied based on its nonexistence.

The Requester appealed to the OOR on August 23, 2010, contending that L&I improperly denied access to the applications, résumés and EPRs for the unsuccessful applicants, as well as items 1, 2 and 4. The Requester also stated that L&I should have provided responsive records related to items 6, 7 and 8. The OOR invited both parties to supplement the record. L&I provided a position statement further explaining its reasons for denying access to responsive records, as well as a sworn affidavit from its Labor Relations Coordinator.

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.

L&I 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).

1. Applications, résumés and EPRs for the unsuccessful applicants

Under the RTKL, certain “records relating to an agency employee,” such as a “performance rating or review” or an “employment application of an individual who is not hired” by an agency, are exempt. *See* 65 P.S. § 67.708(b)(7). Based on the underlying purpose of the RTKL, however, “exemptions from disclosure must be narrowly construed.” *Bowling*, 990 A.2d at 824.

The OOR has previously held that résumés and applications of individuals not hired are exempt under 65 P.S. § 67.708(b)(iv). *See Bartley v. Lock Haven University*, OOR Dkt. AP 2009-0931, 2009 PA O.O.R.D. LEXIS 733. As a result, the OOR holds

that the résumés and applications of unsuccessful applicants were properly withheld from public access under this exemption.

The Requester does not dispute that the EPR for the individual hired by L&I was properly withheld under 65 P.S. § 67.708(b)(7)(ii). Unquestionably, the EPRs constitute “a performance rating or review” — the issue here is whether the EPRs for the unsuccessful, non-employee applicants “relat[e] to an agency employee.” *See* 65 P.S. § 67.708(b)(7).

In *Kirkpatrick v. Department of Public Works*, the OOR, upon the filing of a Petition for Reconsideration of its Final Determination, specifically rejected the argument that “interview summaries and scoring matrices” for applicants are exempt under 65 P.S. § 67.708(b)(7). OOR Dkt. AP 2009-0422 (on reconsideration), 2010 PA O.O.R.D. LEXIS 475. Instead, the OOR held that these summaries of applicant interviews were properly withheld because they document the “internal, predecisional deliberations” of the agency because “the records were created internally by [agency] management and before a decision was made regarding which of the candidates would be hired.” *Id.* Unlike the agency in *Kirkpatrick*, L&I only asserted that 65 P.S. § 67.708(b)(7) applied to these records, rather than the exemption for “internal, predecisional deliberations” under 65 P.S. § 67.708(b)(10). Because L&I did not provide sufficient legal or factual basis that the EPRs related “to an agency employee” rather than merely applicants for employment or assert that 67 P.S. § 67.708(b)(10) applies to these records, the OOR has no choice but to find that L&I improperly withheld responsive EPRs for unsuccessful applicants. *See Bowling*, 990 A.2d at 824 (“exemptions from disclosure must be narrowly construed”). L&I may, however, redact personal identification information on

these EPRs pursuant to 65 P.S. § 67.708(b)(6). Additionally, to the extent that any applicant is currently a public employee, L&I may redact these individuals' home addresses pursuant to Judge Friedman's Order in *Pa. State Educ. Ass'n v. Dep't of Cmty. & Econ. Dev.*, 981 A.2d 383, 386 (Pa. Commw. Ct. 2009), which has since been affirmed by the Supreme Court. *See Campbell v. State Employees' Retirement System*, OOR Dkt. AP 2010-0568, 2010 PA O.O.R.D. LEXIS 496; *Verley v. Midland Borough*, OOR Dkt. AP 2010-0744, 2010 PA O.O.R.D. LEXIS 708.

2. Items 1, 2 and 4 were properly denied

With respect to items 1, 2 and 4 of the Request, L&I states that responsive records are exempt under 65 P.S. § 67.708(b)(10)(i) as reflecting the "internal, predecisional deliberations of an agency." In its sworn affidavit, L&I affirms that these records

were created and used as part of [L&I's] deliberations to determine which interviewees were the most appropriate candidates for the instant position [and that d]isclosure of interview notes, written evaluations, grading/scoring notes, and interview questions would reveal the predecisional thoughts and reasoning of the panelists with respect to a contemplated course of action. Further, such records were used in such deliberations.

The OOR finds that this affidavit provides sufficient evidence that items 1, 2 and 4 were used in the internal, predecisional deliberations surrounding the decision to award employment to an individual. *See Kirkpatrick*, OOR Dkt. AP 2009-0422 (on reconsideration); *Bair v. Dept. of Environmental Protection*, OOR Dkt. AP 2010-0684, 2010 PA O.O.R.D. LEXIS 581; *Kyle v. Dept. of Community and Economic Development*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310.

2. No responsive records exist related to items 6, 7 and 8

L&I provided an affidavit from its Labor Relations Coordinator affirming under penalty of perjury that no responsive records exist. Such an affidavit serves as sufficient evidence of the nonexistence of responsive records under the RTKL. *See Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010); *see, e.g., Treichler v. Washington Township Municipal Authority*, OOR Dkt. AP 2010-0680, 2010 PA O.O.R.D. LEXIS 592; *Anderson v. Dept. of State*, OOR Dkt. AP 2010-0642, 2010 PA O.O.R.D. LEXIS 552. Consequently, the OOR finds that L&I established that no responsive records exist related to items 6, 7 and 8 of the Request.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and L&I is required to provide all EPRs for unsuccessful applicants, subject to redactions for home addresses and personal identification information pursuant to 65 P.S. § 67.708(b)(6), within thirty (30) 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. § 67.1302(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 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 20, 2010



APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Ronald Rudberg; Thomas Howell, Esq.