



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SUSAN SPICKA AND EDUCATION	:	
VOTERS OF PA,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2021-2799
	:	
COMMONWEALTH CHARTER	:	
ACADEMY CYBER CHARTER SCHOOL,	:	
Respondent	:	
	:	
and	:	
	:	
TARGET MEDIA, INC.,	:	
Direct Interest Participant	:	

INTRODUCTION

Susan Spicka and Education Voters of PA (collectively, the “Requester”) submitted a request (“Request”) to the Commonwealth Charter Academy Cyber Charter School (“Charter School” or “CCA”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking invoices related to the Charter School’s participation in a parade. The Charter School denied the Request, stating, among other things, that it does not possess the requested records. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Charter School is not required to take any further action.

FACTUAL BACKGROUND

On November 29, 2021, the Request was filed, seeking:

1. An invoice or other documentation that shows the cost of the parade balloon that was used in the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.
2. An invoice or other documentation that shows the cost to enter CCA group in the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.
3. An invoice or other documentation that shows the cost of a promotional spot for CCA during the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.

On December 6, 2021, the Charter School denied the Request, stating that “CCA does not have any records responsive to your [R]equest as written.” Alternatively, to the extent the Charter School would possess the requested records, the Charter School argues that “records related to the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia” would reveal a trade secret and confidential proprietary information, 65 P.S. § 67.708(b)(11).

On December 7, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Charter School to notify any third parties of their ability to participate in this appeal.¹ 65 P.S. § 67.1101(c).

On December 17, 2021, the Charter School submitted a “Motion for Dismissal of Deficient Appeal,” arguing that the Requester’s appeal was deficient because it failed to “identi[f]y flaws in CCA’s decision for denying the [R]equest....”²

On December 21, 2021, the Requester submitted a position statement, arguing, among other things, that the records should exist “because CCA would need an invoice in order to pay the

¹ The Charter School provided notice to at least one interested party on or about December 8, 2021.

² On the same day, the OOR advised the Charter School that it would take the Motion under advisement and render a decision on the Motion in this Final Determination.

vendors” and that the records should be public because the Charter School “is a public institution organized to execute the government’s responsibility to educate children.” Finally, the Requester notes that “[t]axpayers have a right to know how this school is spending the tax dollars it receives.”

On December 22, 2021, Target Media, Inc. (“Target” or “Target Media”), through its President and Chief Executive Officer, John Bowser, submitted a request to participate in the appeal as a direct interest party, which the OOR granted on January 21, 2022. Target argues that the requested records constitute trade secrets and confidential proprietary information of Target and are, therefore, exempt from disclosure under Section 708(b)(11) of the RTKL. *See* 65 P.S. § 67.708(b)(11). In support of its position, Target submitted an affidavit, made under the penalty of perjury pursuant to 18 Pa.C.S. § 4904, from Mr. Bowser (“Bowser Affidavit”).

On December 23, 2021, the Charter School submitted a position statement, reiterating its belief that the appeal is deficient, asserting the requested records do not exist within the Charter School’s possession, custody or control and arguing that any responsive records would reveal trade secrets or confidential proprietary information. The Charter School also provide an affidavit, made under the penalty of perjury pursuant to 18 Pa.C.S. § 4904, from Timothy Eller, Senior Vice President of Outreach and Government Relations for the Charter School (“Eller Affidavit”).

On January 10, 2022, the Requester submitted a supplemental position statement addressing the arguments made in the Charter School’s submission and suggesting that the evidence provided by the Charter School and Target is conclusory and fails to meet the requisite burden of proof.³

³ By correspondence dated January 12, 2022, the Charter School asked the OOR to disregard the Requester’s supplemental submission because it was made after the record had closed. While the Requester’s January 10, 2022 submission was received after the record had closed and is somewhat cumulative, the Requester’s supplemental submission will be accepted into the record, as it responds to assertions made in the submissions of the Charter School and Target, both of which were submitted after the Requester provided her initial position statement, and further describes the Requester’s position related to arguments made in earlier submissions and on her appeal form. *See* 65

On January 28, 2022, in response to a request for additional information from the OOR, the Charter School submitted a supplemental statement, made under the penalty of perjury, from Mr. Eller. On the same day, Target Media also submitted a supplemental statement from Mr. Bowser.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government 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. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

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” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Charter School is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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. Upon receipt of a request, an agency is required to assess whether a record requested

P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and *the expeditious resolution of the dispute.*”) (emphasis added).

is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. 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 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)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The appeal is not deficient under Section 1101(a)(1)

As a preliminary matter, the Charter School argues, in the form of a Motion to Dismiss, that the appeal is deficient because it did not address the Charter School’s grounds for denying access to records. More specifically, the Charter School contends that “[s]ince Requester used OOR’s standard appeal form and did not attach additional documentation to address the grounds FFA raised in its response, i.e., identi[f]y flaws in CCA’s decision for denying the [R]equest, ... it’s unclear whether the Requester is challenging the nonexistence of records or the stated exemption.” In support of its argument, the Charter School relies primarily on the recent decision in *Keystone Nursing and Rehab of Reading, LLC v. Simmons-Ritchie*, wherein the Commonwealth

Court concluded that “[t]he standard electronic appeals form, coupled with Requesters’ written submission, satisfy the requirements set forth in Section 1101(a)(1).” No. 1631 C.D. 2018, 2020 Pa. Commw. Unpub. LEXIS 8, *15.

When filing her appeal, the Requester used the OOR’s Standard Appeal Form, which states that “[b]y submitting this form, I am appealing the Agency’s denial, partial denial, or deemed denial because the requested records are public records *in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL*, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.” (emphasis added). While the Charter School correctly notes that courts, and the OOR for that matter, have held that failure to comply with Section 1101(a)(1) renders an appeal deficient, *see Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013); *Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011), a general statement “that the records are public records that ‘do not qualify for any exemptions under [S]ection 708, are not protected by privilege, and are not exempted under any Federal or State law or regulation,’ is sufficient” to satisfy the requirements of Section 1101(a)(1).⁴ *Barnett v. Pa. Dep’t of Public Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Therefore, the appeal is sufficient, and the OOR will reach the merits of the case.⁵

2. The Charter School has proven that it does not possess the requested invoices and need not retrieve the invoices under Section 506(d)

The Charter School asserts that it does not possess the records sought in the Request. In his affidavit, Mr. Eller attests that he, along with the Charter School’s Open Records Officer,

⁴ Notably, the Court in *Keystone Nursing* found only that the language on the standard appeal form and the accompanying statements from the Requester satisfied Section 1101(a)(1); it did not find that the language on the appeal form was insufficient to do so by itself. Further, because *Keystone Nursing* was an unreported decision, it is not binding precedent and may only be cited for its persuasive value. 210 Pa. Code § 69.414.

⁵ Based upon this finding, it follows that the Charter School’s Motion to Dismiss is denied.

Jennifer Clarke, assessed whether the requested records existed within the possession, custody or control of the Charter School or a third-party contractor. *See* Eller Affidavit, ¶¶ 3-4. Mr. Eller further attests that the Charter School “did not purchase, lease, or rent a balloon or float for the Parade,” “did not enter a balloon or float in the Parade,” and “did not request a balloon or float for the Parade.” Additionally, Mr. Eller attests as follows:

CCA did not receive, nor does it have in its possession, custody or control, an invoice or other documentation requesting payment for or showing costs of a balloon or float in the parade.

CCA did not enter a group of staff, contractors, agents, or volunteers in the Parade.

CCA did not compensate any individuals for their participation in the Parade.

To the best of my knowledge, no CCA employees, contractors, agents, or volunteers participated in the Parade.

Finally, in his supplemental statement, Mr. Eller affirms that “CCA did not pay for a promotional spot for CCA during the November 2021 6abc Dunkin’ Donuts Thanksgiving parade ...; consequently, CCA has not and will not receive an invoice from Target for a promotional spot during the Parade.” As such, Mr. Eller attests that the Charter School does not possess invoices or other documentation responsive to the Request.⁶ *See* Eller Affidavit, ¶¶ 13-16. Therefore, based upon the evidence provided, the Charter School has demonstrated that it does not possess invoices or other documentation responsive to the Request. *See Hodges*, 29 A.3d at 1192.

However, under the RTKL, two groups of records are accessible—those records in an agency’s actual or constructive possession reached directly under Section 901 of the RTKL, and records in the possession of third parties that are indirectly accessible through Section 506(d) of

⁶ A sworn affidavit or statement made under the penalty of perjury constitutes competent evidence to sustain an agency’s burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

the RTKL. See *Pa. Dep't of Pub. Welf. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014), *aff'd* 124 A.3d 1214 (Pa. 2015). Section 506 of 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 further explained, in *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, that records “in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency” are presumptively public records subject to public access, “so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL.” 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011).

In this case, there is no dispute that the Charter School contracts with Target to perform a governmental function, as Mr. Eller and Mr. Bowser affirm that Target serves as a contractor of the Charter School providing “strategic media and marketing consulting services[.]” Bowser Affidavit, ¶ 4; Eller Affidavit, ¶ 23. Similarly, based upon the statements made in Mr. Bowser’s Affidavit, there is no dispute that Target possesses at least one “media invoice” responsive to the Request. Bowser Affidavit, ¶¶ 3, 9-10. The primary question is whether the invoices directly relate to the performance of the governmental function. The fact that information may relate to the contract does not establish a direct relationship to the governmental function of the contractor. *Allegheny Co. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 345 (Pa. Commw. Ct. 2013), *appeal den'd* 72 A.3d 604 (Pa. 2013). The “‘directly relates’ test ... focuses on *what* services are performed and how they are performed, not *who* performs them.” *Id.* at 347. (internal citation omitted) (emphasis in original). Rather, the requested information must have “a direct bearing on

the third-party contractor's obligations" under the contract. *UnitedHealthcare of Pa., Inc. v. Baron*, 171 A.3d 943, 964 (Pa. Commw. Ct. 2017).

In his supplemental statement, Mr. Eller affirms as follows:

CCA ... purchase[d] a sustaining media package that included the Parade from 6abc through Target. A sustaining media package differs from a promotional spot or advertising in that it is a way CCA maintains an active role in the communities it serves. Due to the nature of the contract between CCA and Target, the costs approved by the Board, and how CCA is invoiced for fees and media buys, CCA has not and will not receive an invoice from Target that individually sets forth the costs of such sustaining media package.

To state in other words, the sustaining media package for the Parade is part of the contracted services provided by Target to CCA, which did not result in the expenditure of additional Charter School Funds.

Further, in his supplemental statement, Mr. Bowser attests that "Target Media possesses and creates the media invoices and ultimately pays each media vendor accordingly[,]” noting that “[i]nvoices are paid by Target Media, based on approval of gross media budget by client.” As such, Mr. Bowser explains that “[t]he invoices exchanged between Target Media and the media vendor representatives of the Parade, were paid by Target Media, and part of the overall strategic media and marketing consulting services provided under contract with client.”

In *Buehl v. Office of Open Records*, the Commonwealth Court found that records regarding the actual or wholesale costs paid by a contractor that operated the Department of Corrections' commissary did not directly relate to the governmental function being performed. 6 A.3d 27 (Pa. Commw. Ct. 2010). The court reasoned that the contractor's "only contractual obligations ... pertain to providing commissary services and re-selling items to inmates at agreed upon prices.... [W]hat [the contractor] paid for the items is beyond the parameters of its contract....” *Id.* at 31; *see also Baron*, 171 A.3d at 964 (holding that "mere cost information does not directly relate to performance of a governmental function" under Section 506(d)(1)). Similar to the cost and rate

information at issue *Buehl* and *Baron*, the invoices sought by the Requester represent the price negotiated by Target Media as part of the overall contract between the Charter School and Target. As explained by Mr. Eller, the Charter School neither approved nor did it incur extra cost associated with Target's decision to purchase and negotiate promotional time with the Parade. Accordingly, consistent with the Court's decision in *Buehl*, an invoice paid by Target to the Parade, and the pricing and rate information contained thereon, does not sufficiently relate to the governmental function for which the Charter School contracted Target and need not, therefore, be requested by the Charter School.⁷

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Charter School is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Dauphin 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 as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁸ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁷ However, this decision should not be read to preclude a request for financial information relating to the contract for "strategic media and marketing consulting services" between the Charter School and Target.

⁸ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: 4 February 2022

/s/ Joshua T. Young

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Sent to: Susan Spicka (via email only);
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