



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**MARY GRANT AND THE FOOD AND  
WATER WATCH,  
Requester**

:

:

:

:

:

**v.**

:

:

:

:

:

:

:

:

:

**And**

:

:

:

:

:

**AQUA PENNSYLVANIA INC.,  
Direct Interest Participant**

:

**Docket No: AP 2022-1037**

## **INTRODUCTION**

Mary Grant (“Requester”) submitted a request (“Request”) to the Bucks County Water and Sewer Authority (“Authority”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of any presentation, draft proposal, unsolicited bid or other materials or communication from Aqua Pennsylvania or Essential Utilities from January 1, 2020 to present. The Authority denied the Request, arguing that responsive records are exempt as confidential proprietary information. 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 Authority is not required to take any further action.

## **FACTUAL BACKGROUND**

On March 8, 2022, the Request was filed, seeking “[a]n electronic copy of any presentation, draft proposal, unsolicited bid or other materials or communication from Aqua Pennsylvania or Essential Utilities, or an entity representing the company, from January 1, 2020 to present.”

On March 15, 2022, the Authority invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On April 14, 2022, the Authority denied the Request, arguing that responsive records are confidential proprietary information that is exempt from disclosure. 65 P.S. § 67.708(b)(11)

On April 29, 2022, 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 Authority to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On May 24, 2022, upon being contacted by the OOR, the Authority provided a response indicating that it never received the original appeal packet from the OOR as it went to the Authority’s spam folder. The Requester provided the Authority with additional time to provide a response in this matter as a result of this technical issue, and the OOR was also given an extension in which to issue the Final Determination.

On June 6, 2022, the Authority submitted a position statement reiterating its grounds for denial. The Authority claims that records responsive to the Request are exempt bid proposals, 65 P.S. § 67.708(b)(b)(26), and are confidential proprietary records, 65 P.S. § 67.708(b)(11). In support of its position, the Authority submitted the attestation of Patrick Cleary, the Authority’s Open Records Officer.

On June 10, 2022, Aqua Pennsylvania, Inc., (“Aqua”) contacted the OOR seeking to become a Direct Interest Participant in this matter. As the record holder of responsive records, and because Aqua provided the OOR with a submission including legal and factual arguments supporting the Authority’s denial of the responsive records, the OOR hereby grants Aqua’s request to participate in this appeal.

### 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 Authority 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

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)).

The Authority argues that the requested records document proposal bid documents for the purchase of the Authority’s system and that the Authority has not awarded a contract as of the date of the Request. Section 708(b)(26) of the RTKL exempts from disclosure:

A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability; or the identity of members, notes and other records of an agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. § 67.708(b)(26).

In support of this argument, the Authority submitted the attestation of Mr. Cleary, who attests that:

The [Authority] has received bid documents from [Aqua] concerning the purchase of the [Authority’s] system.

The [Authority] has received other bid documents from other entities for the purchase of the [Authority's] system.

To date, the [Authority] has not accepted nor rejected any of the received bids received by Aqua nor any other entity.

The [Authority] has not executed a contract with Aqua nor any other entity for the sale of the [Authority's] system.

The bid documents contain the financial information of Aqua showing its ability to complete this purchase if the [Authority] had interest.

Therefore, the requested bid documents are exempt from disclosure pursuant to Section 708(b)(26) of the [RTKL] because the [Authority] has not awarded a contract nor has it rejected all bids received.

Under the RTKL, a sworn attestation or statement made under the penalty of perjury may serve as sufficient evidentiary support. *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). In the absence of any evidence that the Authority has acted in bad faith, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the Authority has provided evidence that the records responsive to the Request would document Aqua’s bid proposal and that the Authority has not made a final decision regarding the award of the contract. The Commonwealth Court in *United HealthCare of Pa. v. Pa. Dep’t of Human Svcs.* specifically concluded that “the General Assembly intended the phrase ‘award of the contract’ for purposes of Section 708(b)(26) to mean the execution of the contract.” 187 A.3d 1046, 1056-58 (Pa. Commw. Ct. 2018). The Authority’s evidence demonstrates that a contract has not been executed. Additionally, the Requester has not presented any evidence that a contract

has been executed. Accordingly, the records were properly withheld.<sup>1</sup> *See United HealthCare*, 187 A.3d at 1058; *see also Bucci v. City of Pittsburgh*, OOR Dkt. AP 2022-0073, 2022 PA O.O.R.D. LEXIS 575; *United HealthCare of America v. Pa. Dep't of Human Servs.*, OOR Dkt. AP 2020-1501, 2020 PA O.O.R.D. LEXIS 2874.

### CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Authority 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 Bucks 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 15, 2022**

*/s/ Ryan W. Liggitt*

---

RYAN W. LIGGITT, ESQ.  
APPEALS OFFICER

Sent to: Mary Grant (via email only);  
Patrick Cleary, AORO (via email only);  
Scott Holbert, Esq. (via email only)  
Bill Christman, Esq. (via email only)

---

<sup>1</sup> Although the Authority and Aqua argue that the responsive records are also exempt under Section 708(b)(11) of the RTKL, the OOR has found the responsive records to be otherwise exempt; therefore, this Final Determination will not address those other arguments to exclude responsive records. *See* 65 P.S. § 67.708(b)(11).

<sup>2</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).