

2013, the District invoked a thirty (30) day extension of time to respond pursuant to 65 P.S. § 67.902. On January 24, 2013, the District partially denied the Request, providing only “the criteria used by executive management to identify schools that would be considered candidates for school closure.” The District argued that all other responsive records are records of draft policies or records reflecting the internal, predecisional deliberations of the District, and, therefore, exempt from disclosure pursuant to Section 708(b)(9) and Section 708(b)(10) of the RTKL.

On February 14, 2013, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal pursuant to 65 P.S. § 67.1101(c).¹ On March 1, 2013, the District submitted a position statement, along with the affidavit of Michael Davis, Esq., General Counsel for the District. On March 5, 2013, the Requester submitted a position statement. On March 19, 2013, the District provided another submission. The District’s position statement, and affidavits indicated that withheld records are documents produced by the Boston Consulting Group for the purpose of identifying schools to be closed by the District. The District further indicates that while Boston had previously been under contract with the District, the records produced by Boston were produced while Boston was under contract to the William Penn Foundation.

On April 1, 2013, the OOR requested that the District “provided evidence regarding whether the William Penn Foundation, or any other third party, had access to any of the withheld records at any time.” On April 9, 2013, the District provided the affidavit of Thomas Knudsen, Chief Recovery Officer and Acting Superintendent of the District.

¹ There is no evidence in the record that the District notified any third party of their ability to participate, including Boston Consulting Group (“Boston”).

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. Ct. 2010), *appeal granted* 15 A.3d 427 (Pa. 2011). 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 or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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 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 “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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The District argues on appeal that the withheld records are exempt from disclosure pursuant to Section 708(b)(10) of the RTKL, which exempts from disclosure “a record that reflects ... [t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency.” 65 P.S. § 67.708(b)(10)(i)(A). The OOR has consistently held that an agency must show three (3) elements to substantiate this exception: (1) the deliberations reflected are “internal” to the agency; (2) the deliberations reflected are predecisional, *i.e.*, before a decision on an action; and (3) the contents are deliberative in character, *i.e.*, pertaining to proposed action and/or policy-making. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *PHFA v. Sansoni*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. DCED*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310.

It is undisputed that these records were produced by Boston and used by the District prior to a decision being made about school closures. Accordingly, the Requester concedes that the records are predecisional and deliberative in nature. Therefore, the only issue is whether the records are “internal” to the District. Mr. Davis’s affidavit explains, in relevant part:

8. At all times relevant hereto, the services of [Boston] were donated to the [District] by the William Penn Foundation and other grantors. Initially, this was done by a direct grant paid by the William Penn Foundation to the [District]. Subsequently, the William Penn Foundation and others contracted directly with, and paid, [Boston] and donated [Boston's] services to the [District]. All of [Boston's] services relevant hereto were donated to the [District] either through a direct monetary grant or as in-kind contributions of services to the [District].
9. At all times relevant hereto, the [District] remained the sole owner of all work product and materials generated and prepared by [Boston] and for the benefit of the [District].
10. At all times relevant hereto, representatives of [Boston] served as the [District's] consultants, selected by the [District] and remained under the direct supervision and control of the [District]. Specifically, the activities of [Boston] relevant hereto were undertaken at the request of and under the supervision of agency officials and employees.

Mr. Knudsen's affidavit adds:

9. On April 24, 2012, the [District] released the "Blueprint for Transforming Philadelphia's Public Schools" ... which included two primary goals and five overarching strategies to help meet the [District's] financial and academic challenges[.]
14. Following the [District's] release of the Blueprint, the work product which forms the basis of the [District's] internal predecisional deliberative records was shared by and between public agency officials, employees and members and those of other public agencies as they related to budget recommendations and particular courses of action.
15. To the best of my knowledge, information and belief, the "list of schools identified by the Boston Consulting Group as their top candidates for school closure as well as their criteria for choosing their recommended schools" and which forms the basis of this appeal ... was never a specific topic of conversation or exchange between representatives of the William Penn Foundation and me, [District] staff or consultants employed by [Boston].

The District's affidavits explain that Boston's services were donated to the District and that Boston was acting as an agent of the District. However, the affidavits do not clearly address whether the William Penn Foundation, the party that paid for Boston's services, had access to the withheld records. The OOR specifically requested whether the William Penn Foundation, or any

other third party, had access to the withheld records. In response, Mr. Knudsen attests that the withheld records “[w]ere never a specific topic of conversation or exchange” between the District and the William Penn Foundation. This statement does not directly address the OOR’s request for information. It is the District’s burden to prove, by a preponderance of the evidence, each element of a claimed exemption. *See* 65 P.S. § 67.708(a)(1). Based on the evidence before it, the OOR cannot conclude that the withheld records were “internal” to the District. Therefore, the District has failed to meet its burden of proving that the withheld records are exempt pursuant to Section 708(b)(10) of the RTKL.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted** and the District is required to provide all withheld responsive records to the Requester within thirty (30) days. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Philadelphia 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 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: April 12, 2013



APPEALS OFFICER
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