IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

DYLAN SEGELBAUM	:	
and THE YORK DAILY RECORD	:	**Docket No.: 2022-SU-000516**
Respondents	:	
	:	
v.	:	**Appeal from Final Determination of OOR**
	:	
YORK COUNTY	:	
Petitioner	:	**OOR Docket No. AP 2021-2943**

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PEITIONER'S MEMORANDUM OF LAW

Submitted by: Michélle Pokrifka, Esquire
Solicitor for the County of York, Pennsylvania

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PETITIONER'S MEMORANDUM OF LAW

AND NOW, TO WIT, this 3rd day of August, 2022, comes the Petitioner, the County of York, by and through its Solicitor, Michélle Pokrifka, Esquire, and files a Memorandum in Support of the Petition for Review of the Final Determination of the Pennsylvania Office of Open Records.

I. PROCEDURAL HISTORY AND STATEMENT OF THE FACTS.

PROCEDURAL BACKGROUND: Petitioner, County of York on behalf of the Prison Board of Inspectors, Petitioner, County of York, ("Petitioner"), is a third-class county of the Commonwealth of Pennsylvania with its principal office located at 28 East Market Street, Second, Floor, York, Pennsylvania 17401. Respondents, Dylan Segelbaum and The York Daily Record ("Respondents"), who at the time of the request was a reporter for The York Daily Record and The York Daily Record is a newspaper located in York County at 1891 Loucks Road, York, PA 17408.

The Pennsylvania Office of Open Records (hereinafter "OOR") is a governmental agency who is authorized to hear and determine appeals of the Right to Know Law (RTKL) decisions from local agencies such as the County of York, pursuant to 65 P.S. §67.1101 and §67.1302. The Final Determination of the OOR was dated January 31, 2022. Such Final Determination granted the relief requested by Respondent. Petitioner requests review of the Final Determination.

On Thursday, January 20, 2022, the Office of Open Records entered an initial Final Determination finding that the County of York failed to respond to the OOR appeal filed by

Requester. (The initial Final Determination was attached to the Petition for Review as Exhibit A). On the same day, the County contacted the OOR to indicate that the appeal to the OOR by the Requester had not been properly served upon the County by the OOR, and as a result, was not received by the County.

That same day, Thursday, January 20, 2022, the OOR issued a directive rescinding the final determination. The rescinded directive acknowledged the County's position that they had not properly received the Notice of Appeal. The OOR then issued a second directive also on January 20, 2022, which directive required a response by Tuesday, January 25, 2022. The OOR only provided the County of York three business days to conduct a search, investigate the matter, contact any third parties that may be affected by such determination, which was clear by the request that it involved third party documents, and to prepare and file an answer. Three business days is an insufficient and unreasonable time period within which to properly respond to an appeal. Despite the unreasonable time frame, a response was prepared and filed with the OOR. The OOR then issued its second "final" determination on January 31, 2022. The County filed an appeal to the second "final" determination to the Court of Common Pleas on March 2, 2022. Pursuant to *65 P.S. § 67.1302(a)* of the RTKL such review is de novo.

FACTUAL BACKGROUND: On November 12, 2021, Respondent Segelbaum submitted a right-to-know request seeking records in the possession of a third-party contractor of the York County Prison Board of Inspectors. Specifically, the request was for " a copy of the curriculum vitae" for Joseph Garcia …" (Exhibit "A").

On December 14, 2021, after a search of the records of the Prison Board of Inspectors and contact with the Prison's Intelligence Commander, Shawn Rohrbaugh, confirming that the County did not believe that it was in possession of a CV or resume of Joseph Garcia, the York County

Office of Open Records denied the request indicating that no documents existed that were responsive to the request. [1] No appeal was properly served upon the County.

After the entry of the directive that rescinded the initial Final Determination of the OOR on January 20, 2022, the York County Office of Open Records made a second request of the Prison's Intelligence Commander, Shawn Rohrbaugh, to request and confirm that the Petitioner did not have a CV of STL Joseph Garcia (STL Garcia). Commander Rohrbaugh, again confirmed at that time he did not have a CV of STL Garcia, but that his office had received an email from STL Garcia on September 19, 2021, that included approximately 129 pages of information which included third party letters of reference, photographs of training that identified STL Garcia, a current service contractor of the York County Prison, along with other identified individuals and also disclosed locations where various forms of training by STL Garcia had taken place. Other documents in the packet were copies of citations or certifications related to STL Garcia, which identified the type training he has received. The packet of information and the email that was attached to the document stated that the information was "confidential" (N.T. p. 17), and also marked as "classified". (N.T. p. 25, 26).

Commander Rohrbaugh testified that this information was not provided during the initial or subsequent vetting process in 2020 or 2021. (N.T. p. 14,16). That in fact Commander Rohrbaugh only completed another NCIC check on STL Garcia prior to the finalization of the second contract in November 2021. (Exhibit "C"), (N.T. p. 20-21).

Commander Rohrbaugh indicated that the 129-page document was provided by STL Garcia in response to media reports at that time that "were calling into question his past history with different agencies and his credentials," (N.T. p. 19), and that "he wanted to debunk the articles

[1] This same request had been addressed in June, 2021, docketed in York County at 21-0159. The request was denied and was not appealed at that time.

written against him in the local newspaper," (N.T. p. 20), and that this information was not requested, but was provided by STL Garcia on his own after such reports surfaced in The York Daily Record. (N.T. p. 19-20).

Commander Rohrbaugh testified that he vetted STL Garcia prior to the entry of the November 2020 contract being entered and he used contact information from documents provided in person by STL Garcia who then took them with him when he left the same day. (Exhibit "B"), (N.T. pp.14- 15). Commander Rohrbaugh testified that he contacted several of those references provided pre-2020 contract and completed an NCIC background check and this information satisfied him with regard to STL Garcia's level of experience. (N.T. pp. 15-16).

Prior to the finalization of the second contract with STL Garcia and CSAU in 2021, Commander Rohrbaugh did not request a CV or resume, did not request letters of reference and did not complete further reference reviews of STL Garcia or CSAU. (N.T. p. 16).

Commander Rohrbaugh testified that when he received the 129-page document in September 2021, that it was password protected and the availability to the document was set to expire by STL Garcia. (N.T. pp. 23-24).

He further testified that nearly each document was marked as classified (N.T. p. 25) and that the initial email received with the document stated it was private and confidential and included a confidentiality requirement. (N.T. p. 26, 29).

It should be noted that the request that is the subject of the appeal was for records of a third -party vendor who is located in or near Greenville, S.C., and who travels for significant periods of time in and outside of the country.

As a result of his unavailability and the unreasonably short time frame provided by the OOR, it was not until after the January 25th deadline set for response that the Solicitor for the County of York was able to speak with Commander Shawn Rohrbaugh and STL Garcia. The

phone conference with the third-party vendor and the Prison Intelligence Security Officer occurred in early February 2022.

During the conference call, STL Garcia questioned why the County would continue to have the information provided by him as it was sent under encryption only available for 72 hours, which then expired and that such information also had attached a "confidentiality requirement". (N.T. pp. 29). STL Garcia during that conversation also indicated that a CV had been provided to the County along with the packet of information. (N.T. p. 28).

After the County was provided with that information from STL Garcia, Commander Rohrbaugh again searched for the documentation identified during the telephone conference. It was only after that time that Commander Rohrbaugh realized that one of the documents forwarded by STL Garcia in September 2021, although not provided related to the vetting process, was unable to be opened at the time of receipt.

After the conversation between the County and STL Garcia in February 2022, it came to light that the encrypted document, which was unable to be opened, was a prepared "CV" which also contained a confidentiality requirement related to the attachments, the 129-page document, and further required that if copied all documents were to be returned, and also identified the documents as confidential and directed that they were only to be shared with specific personnel. The requirement also stated that the documents were the property of CSAU, and after the vetting process was completed, all reviewed information was required to be returned. (N.T. pp. 26-30).

The only document that was able to be accessed in the email of September 2021, was the 129-page supplemental document, which was only made available to view for 24 hours. This document contained reference letters, photographs, and certification documents. (N.T. pp. 24-26). The information was never returned to STL Garcia as required, it was not destroyed and although not available electronically after 24 hours, security Officer Rohrbaugh did retain a copy of the

supplemental documents. (N.T. pp. 23-24). Due to the failure of the other document to load and open, Officer Rohrbaugh was unaware that he was restricted from downloading, copying, or retaining the information provided by STL Garcia.

The OOR did not provide the required period of time to research, review and respond to the appeal to the County or to connect with the third-party contractor and only provided a three-business day window to respond to the OOR appeal. As a result, the County had to reply to the appeal without the contractor's involvement or assistance. The OOR essentially provided three business days to the County of York to properly mount a defense to the appeal. As a direct result of the actions of the OOR, this critical information regarding the unopened document, and the confidential and proprietary nature of the information, was unable to be realized until after the expiration of the timeline provided to respond to the appeal.

It is the County's belief that if a reasonable time period would have been provided this information would have been uncovered and the actual CV of STL Garcia would have been realized. Due to the short and unreasonable period of time to respond the County was required due to its requirement of transparency in OOR matters, to describe to the OOR the supplemental paperwork provided by STL Garcia which was held in violation of his confidentiality requirements, and without the knowledge of the of the lengths C-SAU and STL Garcia had taken to keep this information private.

II. SCOPE AND STANDARD OF REVIEW

The reviewing court is entitled to the broadest scope of review and has the authority to expand the record to fulfill their statutory role. *Bowling v. Office of Open Records*, 621 Pa. 133,173, 75 A.3d 453,476 (2013). The Courts have determined that Chapter 13 of the RTKL authorizes the Court of Common Pleas to be the "ultimate finders of fact and that they are able to

conduct full de novo reviews of appeals from all decisions made by the RTKL appeals officers." *Bowling v. Office of Open Records*, 621 Pa. 133,168, 75 A.3d 453,474 (2013).

III. QUESTIONS PRESENTED

A. Whether the County fully complied with the request for the "CV of Joseph Garcia" after it was located by the County and provided to Requester, and as a result, whether the Court should reverse the determination of the OOR requiring the release of the additional 129-page documentation as moot?

B. Whether the document identified by the County during the OOR appeal, the 129-page document, is not a "record" of the agency, pursuant to the RTKL, and as a result, cannot be disclosed?

C. Whether the 129-page document, if considered a "record" pursuant to the RTKL, is exempt as a trade secret as a result of its confidential and proprietary nature?

IV. ARGUMENT

A. The County fully complied with the request for the "CV of Joseph Garcia" after it was located by the County and provided to Requester, and as a result, the Court should reverse the determination of the OOR requiring the release of the additional 129-page documentation as moot.

The request of Dylan Segelbaum was for:

> A copy of the curriculum vitae (CV) for Joseph Garcia, the "senior team leader" of CSAU-1 LLC, a "corrections special operations" organization based in Greenville, South Carolina. (RTK request was marked as Exhibit A).

At the time of the request, after adequate investigation, the County denied the submission indicating that the County did not have in its possession a CV of STL Joseph Garcia. After the appeal was filed and the final determination entered, the County became aware through STL Garcia that he had in fact emailed a CV to the County in September 2021.

After locating the email that contained the CV, which was dated in September 2021, the County realized that the CV and other attachments were password protected and were time barred for access. The County further determined that at the time of the receipt of the CV it was unable to be opened, and at the time of the subject RTK request, November 12, 2021, access to it, had been terminated. As a result, at the time of the request in November, the County was not in

possession of a CV of STL Garcia. Despite that fact, during the appeals process, STL Garcia provided temporary access to the CV to Commander Rohrbaugh after the conference call, which led to the discovery that it had been forwarded to the County in September, 2021. (N.T. p. 27).

The County then filed a Petition for Review on March 2, 2022. In preparation for the hearing on the Petition, there were communications with C-SAU, STL Garcia and the group's executive officer. Petitioner then prepared a lightly redacted version of the CV, which was approved to be shared with Respondent as responsive to the initial request. (N.T. p. 90). The County then provided the redacted copy of the CV to the Requester. (Exhibit F).

As a result, the request for the CV, although correctly not in the possession of the County at the time of the request, was later provided, resulting in satisfaction of the initial request. The Court correctly noted that, "how does the fact that the CV that has been requested has now been produced, how does that not make the appeal moot…" (N.T. p. 66).

The County believes that in fact the request has been satisfied and despite the fact that the County at the time of the appeal to the OOR had in its possession other documents provided by STL Garcia, that those documents were clearly not the subject of the request. As a result, the Final Determination of the OOR should be dismissed and the matter deemed moot as a result of the provision of the CV of STL Garcia to the requester.

Requester had to admit to the Court that in fact the request was only for a CV, which was provided and that "it was difficult for us to refute that." (N.T. p. 74).

B. The document identified by the County during the OOR appeal, the 129-page document, is not a record of the County pursuant to the RTKL, and as a result, may not be disclosed.

If the Court finds that the matter is not moot and that the request as written has not been fulfilled by the County, the County suggests that the Court consider that the supplemental 129-page document is not a "record" subject to public disclosure. The RTKL defines a "record" as

"[i]nformation . . . that documents a transaction or activity of an agency and that is created, received, or retained pursuant to law or in connection with a transaction, business, or activity of the agency." *RTKL 65 P.S. §67.102; Commonwealth Dep't of Lab. & Indus. v. Simpson*, 151 A.3d 678, 682 (Pa. Commw. Ct. 2016).

It is the position of the County that this supplement provided by the vendor is not a record as defined by the RTKL as it was not created, received, or retained in connection with an agency transaction. It was not requested by the County and was not utilized by the County to support any transaction or activity of the agency.

In fact, Commander Rohrbaugh testified that in fact he did not use the 129-page document during any of the vetting process prior to the County's hiring of STL Garcia. (N.T. pp. 14-16). STL Garcia also indicated that he voluntarily provided the information as he was concerned about the misinformation being reported about him in the York Daily Record and wanted to provide some confirmation of his expertise and skills. (N.T. pp. 81-82, 85).

It should be further noted that Commander Rohrbaugh was unaware of the restrictions upon the retention and copying of the document at the time it was received due to the fact that the other email attachment was unable to be opened and he only later found out that he had copied and retained that information in violation of the authorized use of the document. (N.T. pp.30-31).

Under the RTKL, agency records are presumed to be public records and must be made available to a requester unless they fall within specific, statutory exceptions. 65 P.S. §§ 67.305, 67.701(a). A party seeking access to information under the RTKL must establish that the information sought is a "record" of the agency. *Pennsylvania Office of Attorney General v. Philadelphia Inquirer*, 127 A.3d 57, 60 (Pa. Commw., 2015). Section 102 of the RTKL as stated above defines a "record" of the agency.

A public record pursuant to the RTKL is defined as, "A record, including a financial record, of a Commonwealth of local agency that: (1) is not exempt under section 708. . ." 65 P.S. § 67.102. If a document falls under the definition of a record, it is presumed public, but the presumption does not apply if the record is exempt under Section 708. 65 P.S. § 67.305(a)(1).

The objective of the RTKL "is to empower citizens by affording them access to information concerning the activities of their government." *Office of General Counsel v. Bumsted*, 247 A.3d 71, 76 (Pa. Commw., 2021). The RTKL is intended to promote access to official government information.

The Respondents request for the background information provided by STL Garcia when he provided a copy of his CV does not have the effect of meeting any of the objectives of the RTKL, it is not an activity of the government and is purely an invasion of privacy, as its release would not provide access to any information regarding the activities or transactions of the County, but would result in a release of information marked classified, testified to as confidential, and includes trade and proprietary information for which the County was not authorized to retain pursuant to the instructions of the third-party vendor.

The requested 129-page document is not a public records pursuant to *65 P.S 67.102* in that such record does not document a transaction or activity of the agency and it must be noted that records in the possession of a private contractor must relate directly to the government function performed by the contractor for such records to be subject to disclosure. *65 P.S. § 67.506(d)*. These records do not meet that requirement.

As stated in *Allegheny County Dept. of Administrative Services v. Parsons*, "All records "of" contractors who perform a government function are not accessible under Section 506(d). Instead, records of a government contractor may be subject to the RTKL only if the function is governmental in nature, and the precise information sought directly relates to performance of

that governmental function." *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 346 (Pa. Commw. Ct. 2013).

The evidence established that the receipt and cursory review of the supplemental information provided by STL Garcia to Commander Rohrbaugh was not conducted in relation to any services that were being provided to the County and was not necessary for the hiring of the vendor. As the Court held in *Allegheny*, "[t]he evidence does not support the crucial nexus needed to convert private records into potentially public ones. The information is not relevant to contract entry, management, supervision, or the employees' performance of the governmental function of social services." *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons,* 61 A.3d 336, 346–47 (Pa. Commw. Ct. 2013). In fact, the 129-page document was provided by STL Garcia voluntarily as he was concerned about his reputation with those that he was working with. STL Garcia testified that he was concerned about the misrepresentation of his background and that he was not this person that they were writing about. (N.T. p. 81). The email specifically stated, " I know that I do not have to send this, but this should give you …. 100 percent confidence in my background and ability, capability, and skill sets." (Exhibit "D"), (N.T. pp. 92-93).

The Court should further consider that this information likely falls under the exemption of 65 P.S. §67.708(b)(12), which states that notes and working papers that are prepared for an agency employee solely for their own personal use and which do not have an official purpose are exempt from the definition of a public record. STL Garcia also testified that this is not part of his CV, is not provided as part of his CV and was put together for Petitioner County as a result of the errors in the press coverage of his experience. (N.T. p. 81, 110).

Under the RTKL, to reach documents that are not records of the agency or outside of its possession, the Court must consider if the third-party contractor is providing a governmental function on behalf of the agency and second the information requested must directly relate to that

function. 65 PS §67.506(d)(1). Here neither element can be met. The services provided by C-SAU and STL Garcia are training services. (N.T. p. 17) and the records provided do not relate to an activity or function of the agency.

The RTKL does not provide access to a private company's records based solely upon an agency's legal right to review them. *United Healthcare of Pennsylvania, Inc. v. Baron*, 171 A.3d 943, 959 (2017) 65 P.S. §67.901. Here, although Commander Rohrbaugh did review some of the information in the 129-page document, it was not in relation to the contract or training provided by C-SAU or STL Garcia and that cursory review does not morph the documents into a record of the agency subject to public disclosure.

As in the *Allegheny* case, the Court must consider and find, regardless of how these records were submitted to the County, that the records alone must have a direct relationship to C-SAU's contractual obligations to the County to even be considered a record subject to public disclosure. This is the application of the "[t]he 'directly relates' test" as applied to cases such as the instant case and must result in a finding that as the 129-page document was not directly related to the work or the services that the contractor was already doing and had in fact been doing since November 2020, and as a result, is not a public record and is not subject to disclosure. *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 347 (Pa. Commw. Ct. 2013).

The Courts of the Commonwealth have been clear that "for an activity to qualify as a 'governmental function' of an agency under the standard established in *SWB Yankees*, it must involve a 'non-ancillary undertaking' of the agency and a 'substantial facet of the agency's role and responsibilities*".* *Kelly and Assoc. v. Northeastern EIU,* 36 Pa. D & C. 5th 300 (2014). Further, such documents must be within the agency's "legal custody and control". *United Healthcare of Pa v. Baron*, 171 A.3d 943, 958 (2017). As the Petitioner has admitted, this document was not in the legal custody of the County at the time of the request.

The County agrees with the Courts suggestion that such a broad view of what the requester is entitled to obtain places an "unfair burden on an agency responding to a request to not just look at the documents that are requested but try to assume what the requestor really wants to get at and provide those even though they may not be what was requested. (N.T. p. 69). The Requester attempted to argue that such a broad view of what is responsive is required to be provided under the RTKL. Through this very broad view Requester attempts to argue that it is the responsibility of the agency to locate and provide all information that may be remotely related to or relevant to the request, on the thin basis that the vendor is providing a service for the County. The Requester even indicated to the Court that "And it doesn't really matter why the agency has them." (N.T. p. 73), referring to the CV and 129-page document. This is a complete misrepresentation of the statutory and case law related to third-party documents as referenced in 65 P.S. §67.506(d). This interpretation of the RTKL is not supported in the statute and not supported in the caselaw. The Court in *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons* case was clear that "we cannot permit the public's right to know to devolve from a matter of statutory interpretation into a subjective exercise that varies depending on the perspective of the beholder." *Id.*, p. 347. Additionally, the Requesters attempts to argue the speculative importance of the 129-page document. As such argument does not meet the 'directly relates' test, it cannot be considered by the Court.

As the Court held in *Dental Benefit Providers v Eiseman*, "[i]nformation in the attachments is beyond the parameters of the contract with the Dept. and does not directly relate to performing or carrying out this government function." *Id.*, 86 A.3d 932, 940 (2014).

The CV of STL Garcia which was provided in a lightly redacted version specifically states that references would be available upon request. As a result, it is clear that even just the reference material in the supplemental document was never intended to be a part of the CV.

It must also be noted that the OOR was abundantly aware that such matter involved the records of a third-party contractor, since the request was specifically for records of an "organization based in Greenville, South Carolina."(Exhibit "A"). Although the OOR was unaware until the filing of the County's position statement that the County had wrongfully retained a 129-page document of background information regarding STL Garcia, they were aware that the request involved third-party information and they were required to provide sufficient time for the third-party to become involved in the process. The OOR providing a significantly reduced period of time was unreasonable and prejudicial to the County and to the third-party vendor. Such significantly shortened period is violative of *65 P.S. §67.1102*. The Courts have held that "private third parties have no adequate process under the Right-to-Know Law to assert exemptions to disclosure …" and the OOR's failure to provide adequate time for the County and third parties to appropriately connect and respond to the improperly served appeal, was a violation of fundamental due process and was prejudicial to the parties. *Allegheny County Dept of Administrative Services v. Parsons,* 61 A.3d 336, 348 (Commw. Ct., 2013).

Had the appropriate period of time been provided, it is likely the CV would have been discovered and provided to the Requester avoiding the need for this protracted litigation. As the Court held in *Pennsylvania Department of Corrections v. Maulsby*, "[t]his is a clear violation of law and Section 1101(c) of the RTKL which guarantees that a direct-interest participant will have fifteen (15) days to submit such information," and that "the courts in Pennsylvania have "consistently recognized the serious due process concerns implicated by [a] lack of notice, particularly where the confidential information of a private entity is at stake.' *Department of Corrections v. Maulsby*, 121 A.3d 585, 590 (Pa. Commw. 2015).

Not all information necessary to properly respond to the request and subsequently to defend the appeal was able to be compiled due to the shortened period of time provided by the OOR in violation of *65 P.S. §67.1102*.

The County's position is that the 129-page document is not a "record" as defined and intended by the RTKL. Here, the OOR violated the due process rights of the third-party vendor and the County, by failing to provide a reasonable period of time to submit evidence supporting the Petitioners response, and by failing to take all precautions before ordering the release of confidential proprietary information. If the OOR had provided the required statutory period of time to the County and to the third-party vendor to respond, an appropriate investigation would have uncovered the actual requested document and would have avoided the OOR's prejudicial determination to release confidential and proprietary documents in the nature of trade secrets of the third-party vendor.

C. The 129-page document if considered a "record" pursuant to the RTKL by the Court is exempt as a trade secret and as a result of its confidential and proprietary nature.

The County asserts that if the Court finds that the matter has not been determined moot as a result of providing the CV of STL Garcia to Requester and that the 129-page document is a "record" as defined by the RTKL, that the Court must also consider that it is exempt from disclosure as both a "trade secret" and as a third-party's confidential and proprietary information.

The RTKL , 65 P.S. §67.708(b)(11) exempts from disclosure confidential proprietary information and trade secrets. The term "[t]rade secret" is defined by 65 P.S. §67.102 of the RTKL as follows:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique, or process that:
>
> (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. 65 P.S. §67.102.

"A 'trade secret' must be 'an actual secret of particular importance to the business and constitute competitive value to the owner'." *Crouthamel v. Dep't of Transp.*, 207 A.3d 432, 438-39 (Pa. Commw. 2019) (quoting *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 185 (Pa. Commw., 2006). Pennsylvania courts have conferred "trade secret" status based upon the following test:

> (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 his business and to competitors;
> (5) the amount of effort or money expended in developing the information; and
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Com., Dept. of Public Welfare v. Eiseman , 85 A.3d 1117, 1126 (2014).

The courts have held that "trade secrets" include business and marketing information, customer accounts, compilations of data, and customer lists. Additionally, "the burden to seek such exemption is very low, a preponderance of the evidence." *Crouthamel v. Dep't. of Transp.,* 207 A.2d 432, 439 (2019).

As stated in the *Allegheny* case, "a private contractor is not subject to the RTKL the same way as the government agency, and a private contractor's … information is likewise not subject to the RTKL in the same way." *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 346 (Pa. Commw. Ct. 2013).

In this matter, the third-party contractor, STL Garcia, had taken appropriate steps to maintain the privacy and secrecy of this information. STL Garcia testified that this information is not known outside of his business and that in fact only two employees have access to the information that was provided. (N.T. p. 95). The information is only permitted to be shared with limited individuals and cannot be acquired in any other way. (Exhibit E). STL Garcia further

testified that he generally provides some of the information that was included in the 129-page document in person, and then leaves with it after the agency has had an opportunity to review it. (N.T. p. 91, 95). He further indicated that when the information is emailed or provided electronically, it is sent through a secure encrypted site, and that a password is sent or provided in another manner, as well as having a time- out feature, which in this case was set to expire in 24 hours, which it did. (N.T. pp. 88-89, 91). The documents include a "Confidentiality Requirement" which also requires all documents to be returned after viewing. (Exhibit E) This insures there is no further access without specific authorization.

STL Garcia further testified as to why such information was confidential and marked "classified" and that further restrictions on retention of copying of the information is clear from the title page of the document. (Exhibit E and F) (N.T. pp. 94, 96, 98).

STL Garcia also indicated that this information represents a "client list" or "rolodex of his clients" both current and in the recent past and that such information is not available anywhere else on social media or other sites, despite Requester's attempts to prove otherwise. (N.T. pp. 82-83, 86, 155-156). The definition of a "trade secret" pursuant to the RTKL includes "client lists".

STL Garcia also indicated that the training, skills and references for work completed were obtained over a period of time, resulting in being able to provide a uniquely qualified service. (N.T. p. 98-100).

The Courts have held that information used for business and marketing information are trade secrets, and trade secrets are exempt from disclosure pursuant to the RTKL. *Union Carbide Corp. v UGI Corp.*, 731 F.2d 1186, 1191 (5th Circ., 1984).

C-SAU and STL Garcia have taken significant measures to protect the information by establishing internal controls over its dissemination. It should be noted that the information was provided by STL Garcia to clear his business name from the York Daily Record's constant barrage

of misinformation about STL Garcia, and but for the County's inadvertent but non-compliant retention beyond the scope of the provided permissions and in violation of the non-disclosure documents, such information would not be the subject of this appeal.

The 129-page document is not a public record pursuant to *65 P.S. §67.708(b)(11*) as they are considered trade secrets pursuant to *65 P.S, §67.103* and are exempt from disclosure. The information contained therein is not known to other persons outside of the third-party vendors business, including competitors, and such information is not readily ascertainable in the public domain, and the information is subject to reasonable efforts to maintain their confidentiality.

The term "[c]onfidential proprietary information" is defined by the RTKL 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.

When determining whether records are "confidential," the Court must also look to "the efforts the parties undertook to maintain their secrecy." *Eiseman*, 85 A.3d at 1128. This test is referred to by the OOR and the parties as the "efforts test." As outlined above, C-SAU and STL Garcia met the "efforts test" in meeting the requirements for the information to be considered a "trade secret" pursuant to the RTKL, and as a result, has met the "efforts test" in determining that the records are "confidential and proprietary".

"In determining whether disclosure of confidential information will cause 'substantial harm to the competitive position' ... an entity needs to show: (1) that there is competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information w[as] released." *Id.*

STL Garcia testified that he and his training are "uniquely qualified" that it is a "very competitive market…there is not a lot of providers in our area of work and …the core capability of the instructors is what makes them uniquely qualified." (N.T. p. 100).

He further testified that some of the information was essentially his client lists and that "in our business we do not share or openly discuss client lists … as another company can go and solicit business because the groundwork has been done. (N.T. p. 102). Additionally, he testified that by putting his experience and skills in the public domain it permits other companies to hire individuals that may have some of his expertise and then undercut his business. (N.T. p. 100). He testified that he is "working on trademarking" several of his unique trainings (N.T. p. 100).

He also indicated that reputation is important and that in fact, some information about his experience has been misconstrued and reported incorrectly in the media, which has already resulted in the loss of a contract in Allegheny County. (N.T. pp. 86, 102, 156).

STL Garcia and C-SAU have met the requirements of the "efforts test" and due to the highly competitive industry in which this work occurs, all of which is based upon experience and skills of those that provide the services and all of this information is included in the 129-page document. The release of which would cause substantial harm to the competitive position of the vendor or third-party contractor as there are no other contractors that have the same level of experience and training and disclosure of such information would allow competitors to replicate his trainings. (N.T. pp. 103, 137-138). The courts have held that trade secrets are "business and marketing information…" *Union Carbide Corporation v UGI Corporation*, 731 F.2d 1186, 1191 (5th Cir., 1984).

It is anticipated that the Requester will attempt to argue that even if such 129-page document is found by the Court to be confidential and proprietary or part of a trade secret that the referral sources included should be excepted from that finding, as STL Garcia is a contactor and

not a W-2 employee. The County/Petitioner would argue that although the RTKL does protect referral sources of W-2 employees from disclosure, it is unreasonable to apply such restriction to solely W-2 employees and such provision should reasonably be applicable to both employees and third-party contractors.

The protection of third-parties names and disclosure of their position, titles, contact information, etc., although not specifically stated in the RTKL has been protected by the constitutional right to privacy.

This constitutional right to privacy to third parties does not hinge on whether the applicant is a W-2 employee or contactor as the Requester and the Office of Open Records tends to believe. In *Butterfield v Lycoming County* OOR 2019-0281, the County sought to exempt from disclosure the references of an appointee. The Court considered the difference in protection of an employee vs. an appointee. They held that names of references of an appointee "constitute personal information". That same reasoning applies to the references of STL Garcia and C-SAU. Additionally, Respondents have failed to articulate a public interest in this information that would outweigh the privacy rights of private individuals or in the right to retain such information as confidential by the third-party vendor. "…the names of private citizens in the possession of a governmental agency have been found to be protected by the constitutional right to privacy …" *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (1998).

In *University of Pittsburgh v Dept of Labor*, the Court held that an "external letter of reference" in a state employee's personnel files is different from a performance evaluation, where an evaluation would be made available to an employee, the employee would not be provided access to letters of reference. If a letter of reference of an employee cannot be made

to the employee, how could such information be made available to the public at large through a RTKL request. *Id.* 208 Ed. Law Rep. 831, 896 A.2d 683, 689 (2006).

Finally, it cannot be discounted that the Petitioner/County was not authorized to retain these documents and the Court must consider that the unauthorized retention of a third-party document does not make it a public record of the agency. The documents were provided voluntarily by the third-party contractor to the County. Such documents specifically stated that they were not to be duplicated (Exhibit "E, F"), they were only to be shared with "need to know personnel". (N.T. pp. 30, 78). Such document also stated that the County was not authorized to print, retain, or disclose any of the confidential information after review by the representatives of the Prison Board of Inspectors. (N.T. p. 88-89, 94). Such agreement and authorization were unintentionally violated by retention of the document after completion of the review.

It must also be stated that the 129-page document which was disclosed in the County's position statement filed with the OOR is not a public record of the County as it was retained by the Prison Board of Inspectors improperly in violation of the confidentiality requirement and instructions on the document. (Exhibit E, F). and outside of the scope of the authority received by the County in relation to this information.

The County's position is that the third-party vendor has a clear interest in protecting their own records and trade secrets and the County cannot waive or ignore that interest through disclosure to the public to items determined to be confidential, proprietary, or part of their trade secrets.

Further, the Requester has even acknowledged that the information included in the 129-page document *may be confidential or proprietary or covered by trade secrets* (emphasis added) when they stated that with regard to the document that "potentially there is something in there that should be redacted under the ..confidential and proprietary trade information" (N.T. p. 71). What

Requester does not understand is that once a document is deemed confidential, covered by an exemption for trade secret or determined to be proprietary information, it is not a public record, it is exempt. As a result, redacting what is otherwise not a public record to make it such is not permitted under the RTKL. After the exemption has been proven the consideration of disclosure is over.

These documents are not public records pursuant to *65 P.S. §67.708(b)(11)* as they are confidential proprietary information, which are exempt from disclosure.

V. CONCLUSION

The Court should reverse the determination of the OOR and find that the Request has been fully satisfied by the provision of the redated CV of STL Garcia, and that the further request for the 129-page document provided by STL Garcia is not a record of the agency and if it is determined to be a record, it is exempt pursuant to the RTKL provisions related to trade secrets and confidential and proprietary information of a third-party that the County was not authorized to retain.

Respectfully submitted,

s/ Michélle Pokrifka
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and THE YORK DAILY RECORD	:	**OF YORK COUNTY, PENNSYLVANIA**
Respondent	:	
	:	
V.	:	**No. 2022-SU-000516**
	:	
YORK COUNTY	:	
Petitioner	:	**OOR Docket No. AP 2021-2943**

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2022, a true and correct copy of the foregoing Memorandum of Law was served via electronic mail on the following:

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Date: August 4, 2022

s/ Michélle Pokrifka
Michélle Pokrifka, Esquire

CERTIFICATE OF COMPLIANCE WITH THE PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that requires the filing of all confidential information and documents as authorized under the Rule.

Date: August 3, 2022

s/ Michélle Pokrifka
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