

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Jason Clark,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2500 C.D. 2011
	:	
Department of Labor and Industry,	:	Submitted: October 5, 2012
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ANNE E. COVEY, Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: December 7, 2012**

Jason Clark (Requestor), pro se,<sup>1</sup> petitions for review from the Final Determination of the Office of Open Records (OOR) denying Requestor's appeal from the Department of Labor and Industry's (Department) denial of Requestor's Request for records relating to the identity of employers and claimants of unemployment compensation (UC) hearings held by the Department. Requestor argues that the Department's regulations permit the disclosure of the records he

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<sup>1</sup> Requestor appears to be an attorney based in Florida, (Request, R.R. at 8a); however, there is no indication in the record that he is licensed in Pennsylvania.

seeks and, because the UC hearings are open to the public, the Department cannot rely on its regulations, which provide that the information he seeks is confidential, to justify its denial.

On July 13, 2011, Requestor submitted the Request to the Department. The Request sought records relating to UC hearings that took place during a specific week, stating in pertinent part:

I'd like to get records of unemployment hearing decisions for the week of July 5 through July 8, 2011.

I seek the names and addresses of employers who have been in ALJ hearings and the case number with name of the claimant if available. I believe one way this can be done is to supply the names of all employers who have participated, with a code attached indicating the outcome.

I am not interested in obtaining any social security numbers or employer identification numbers. I understand that I may need to pay programming costs to set up the information file I desire.

I request that this file be provided in magnetic media format in a text or Excel file via email.

(Request, R.R. at 8a.) The Department issued its Response on July 20, 2011, denying the Request on the basis that: (1) the records requested were confidential pursuant to Section 206(b) of the UC Law,<sup>2</sup> Section 708(b)(28) of the Right to

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<sup>2</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 766(b). Section 206(a)-(b) provides that employers must keep employment records, make these records available to the Department, and that this information will be confidential:

(a) Each employer (whether or not liable for the payment of contributions under this act) shall keep accurate employment records containing such information, as may be prescribed by the rules and regulations adopted by the  
(Continued...)

Know Law (RTKL),<sup>3</sup> and the Department's regulations; and (2) the Request would require the Department to create a record that did not exist. (Response at 1, R.R. at 10a.) Requestor appealed to the OOR, arguing that the Department's denial ignored the fact that UC hearings are open to the public and, therefore, that "all of the information pertaining to the hearing, including identifying information of the parties has been opened to the public as soon as the hearing is commenced." (OOR Appeal at 1, R.R. at 13a.)

The OOR issued its Final Determination on September 2, 2011, denying Requestor's appeal. The OOR held that, because Section 61.25(a)(1)(i) of the Department's regulations, 34 Pa. Code § 61.25(a)(1)(i), provides that information identifying the name of employer, claimant or employee is confidential, this information was not subject to disclosure pursuant to Section 305 of the RTKL, 65

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department. Such records shall be open to inspection by the department and its agents at any reasonable time, and as often as may be deemed necessary, but employers need not retain such records more than four (4) years after contributions relating to such records have been paid. The department may require from such employers such reports as it deems necessary, which shall be sworn to, if required by the department.

(b) Information thus obtained shall not be made public or be open to public inspection, other than to the members of the board, the officers and employees of the department and other public employees in the performance of their public duties, but any employee or employer at a hearing on an appeal shall, upon request, be supplied with information from such records to the extent necessary for the proper presentation and consideration of the appeal.

43 P.S. § 766(a)-(b). We note that the Request in this case seeks UC Referee decisions rather than information from the employer reports required by Section 206(a).

<sup>3</sup> Act of February 14, 2008, P.L. 6, 65 P.S. § 67.708(b)(28).

P.S. § 67.305. The OOR also held that the Department was not required to create a record that did not exist, pursuant to Section 705 of the RTKL, 65 P.S. § 67.705, and, therefore, to the extent that the Request sought a compilation of employers and results, the Department was not required to create records that it did not maintain, such as lists of hearing participants. The OOR did not address the Department's argument that the records requested are exempt from disclosure pursuant to Section 708(b)(28), which generally exempts disclosure of identifying information of persons seeking social services, including UC benefits. Requestor now appeals to this Court.<sup>4</sup>

Requestor argues on appeal that the records sought by the Request: (1) should be disclosed pursuant to Regulation 61.25(a)(3) because Requestor seeks the information in order to ensure the proper administration of the UC Law and the records are disclosable under Federal regulations; (2) should only be redacted to exclude information that is confidential under Regulation 61.25, not withheld altogether; and (3) are disclosable pursuant to Section 101.21(c) of the

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<sup>4</sup> When reviewing a final determination from the OOR:

this Court “independently reviews the OOR’s orders and may substitute its own findings of fact for that of the agency.” With regard to what evidence this Court may consider in reviewing a decision of the OOR, this Court “is entitled to the broadest scope of review” but “should consider the manner of proceeding most consistent with justice, fairness and expeditious resolution.” The RTKL does not prohibit this Court from considering evidence that was not before the OOR.

Department of Transportation v. Office of Open Records, 7 A.3d 329, 332 n.2 (Pa. Cmwlth. 2010) (citations omitted) (quoting Bowling v. Office of Open Records, 990 A.2d 813, 818, 820, 823 (Pa. Cmwlth. 2010) (en banc), appeal granted in part, 609 Pa. 265, 15 A.3d 427 (2011)).

Department's regulations, 34 Pa. Code § 101.21(c), which requires that UC hearings be open to the public thereby making the requested records public information. In addition, Requestor argues that the OOR erred in holding that the Request required the Department to create a record that did not already exist. The Department argues that, in addition to Regulation 61.25, the information sought by Requestor is also exempt from disclosure pursuant to Section 708(b)(28) of the RTKL, which exempts from disclosure the identities and information about individuals applying for social services.

Initially we note that, in his appeal to the OOR, Requestor did not raise his arguments that the records he sought should be disclosed pursuant to Regulation 61.25(a)(3) and that, even if some information he sought was not subject to disclosure pursuant to Regulation 61.25, the Department should be required to redact this information from the Referee decisions, not be permitted to withhold the records altogether.<sup>5</sup> Because Requestor did not raise these arguments in response to the Department's denial before the OOR, these arguments are waived. Saunders v. Department of Corrections, 48 A.3d 540, 542 n.4 (Pa. Cmwlth. 2012). Moreover, even had Requestor preserved these issues, they would not require reversal or modification of the OOR's Final Determination.

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<sup>5</sup> Before the OOR, Requestor argued only that because Referee hearings are open to the public pursuant to Regulation 101.21(c), the Department could not withhold the records he sought under the aegis of Regulation 61.25, and that the Department erred in refusing to provide records in the requested format without advising Requestor as to the format in which the requested records exist. (OOR Appeal at 1-2, R.R. at 13a-14a.)

Requestor argues that the records sought by the Request should be disclosed pursuant to Regulation 61.25(a)(3) because Requestor seeks the information in order to ensure the proper administration of the UC Law and because the records are disclosable under Federal regulations. Section 305(a) of the RTKL provides that a record in the possession of a Commonwealth agency is presumed to be a public record, disclosable under the RTKL, unless “the record is exempt from disclosure under any other . . . State law or regulation.” 65 P.S. § 67.305(a)(3). Regulation 61.25(a)(2)(i) provides that “[u]nemployment compensation information is confidential and may be disclosed only as permitted in this subsection.” 34 Pa. Code § 61.25(a)(2)(i). Regulation 61.25(a)(1)(i) defines the term “unemployment compensation information” as including “[i]nformation in the possession of the Department or the [Unemployment Compensation Board of Review] pertaining to the administration of the [UC] [L]aw which reveals the name or any other identifying particular about an employer, employee or claimant or which could foreseeably be combined with publicly available information to reveal any identifying particular.” 34 Pa. Code § 61.25(a)(1)(i). Thus, pursuant to Regulation 61.25, the names of employers and claimants, along with other identifying information, are confidential and may only be disclosed pursuant to the provisions of Regulation 61.25(a).<sup>6</sup> Therefore, such records are not presumed to be public records under Section 305(a).

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<sup>6</sup> Section 61.25(a)(3) provides for limited disclosure of confidential UC information:

The Department or the Board may disclose or authorize disclosure of [UC] information only as follows:

- (i) To officers and employees of the Department and members and employees of the Board in the administration of the [UC] [L]aw.

*(Continued...)*

Requestor argues that the disclosure of the requested records is permitted pursuant to Regulation 61.25(a)(3)(v) and (vi) in order to ensure the proper administration of the UC Law and compliance with Federal law. These provisions provide that confidential UC information, such as that in the records sought by Requestor, may be disclosed:

(v) As determined by the Department or the Board to be necessary for the proper administration of the [UC] program.

(vi) As permitted by provisions of the [UC] [L]aw or as required or permitted by Federal law.

34 Pa. Code § 61.25(a)(3)(v)-(vi). Subsection (v) explicitly provides that the necessity of the disclosure of confidential information for the proper administration of the UC program is to be determined by the Department or by the UC Board, not by the party requesting records under the RTKL. Thus, this provision does not mandate an exception to Regulation 61.25's general rule of confidentiality.

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(ii) To a claimant, the last employer of the claimant, a base year employer of a claimant or a representative of any of the foregoing in accordance with paragraph (7), to the extent necessary for the proper determination of the claimant's application for benefits and claims for compensation.

(iii) To an employer or a representative of an employer in accordance with paragraph (7), to the extent necessary for the proper determination of the employer's liability for reports and payments under the [UC] [L]aw and the proper administration of the employer's account.

(iv) To public employees in the performance of their public duties.

(v) As determined by the Department or the Board to be necessary for the proper administration of the [UC] program.

(vi) As permitted by provisions of the [UC] [L]aw or as required or permitted by Federal law.

34 Pa. Code § 61.25(a)(3).

With regard to Section 61.25(a)(3)(vi), Requestor argues that Section 603.5 of Title 20 of the Code of Federal Regulations, 20 C.F.R. § 603.5, permits the disclosure of UC Referee decisions under Regulation 61.25(a)(3)(vi). Federal Regulation 603.5(b) states, “[d]isclosure of appeals records and decisions, and precedential determinations on coverage of employers, employment, and wages, is permissible provided all social security account numbers have been removed and such disclosure is otherwise consistent with Federal and State law.” 20 C.F.R. § 603.5(b).<sup>7</sup> However, Federal Regulation 603.5 also provides that such disclosure is only permitted “if authorized by State law.” 20 C.F.R. § 603.5. Requestor does not address this provision of the Federal regulation and identifies no provision of Pennsylvania law that authorizes the disclosure described in Federal Regulation 603.5(b).<sup>8</sup>

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<sup>7</sup> Section 603.3 of Title 20 of the Code of Federal Regulations, 20 C.F.R. § 603.3, indicates that Federal Regulation 603.5 was promulgated pursuant to Section 303(a)(1), (a)(7), (c)(1), (d), (e), (h), and (i) of the Social Security Act, 42 U.S.C. § 503(a)(1), (a)(7), (c)(1), (d), (e), (h), and (i), and Section 3304(a)(16) of the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(16).

<sup>8</sup> Federal Regulation 603.5 sets out exceptions to a general rule of confidentiality under Federal UC Law. This general rule, set forth at Section 603.4(a) of Title 20 of the Code of Federal Regulations, provides that in order to receive Federal funds for UC benefits, States must “include provision for such methods of administration as are found by the Secretary of Labor to be reasonably calculated to insure full payment of [UC] when due.” 20 C.F.R. § 603.4(a) (citing Section 303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1)). The Secretary of Labor interprets the Social Security Act as requiring States to require confidentiality of UC information:

The Department of Labor interprets Section 303(a)(1) . . . to mean that “methods of administration” that are reasonably calculated to insure the full payment of UC when due must include provision for maintaining the confidentiality of any UC information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information

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In addition, as the Department pointed out in its Response to the Request, Section 708(b)(28) of the RTKL exempts from disclosure the names and other identifying information of UC claimants. Section 708(b)(28) exempts from disclosure records:

- (i) identifying an individual who applies for or receives social services; or
- (ii) relating to the following:
  - (A) the type of social services received by an individual;
  - (B) an individual's application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or
  - (C) eligibility to receive social services, including the individual's income, assets, physical or mental health, age, disability, family circumstances or record of abuse.

65 P.S. § 67.708(b)(28). Section 102 of the RTKL, 65 P.S. § 67.102, defines “social services” to include UC benefits. Thus, records identifying UC claimants, including a Referee’s decision “to grant, deny, reduce or restrict benefits,” is exempt from disclosure under Section 708(b)(28). 65 P.S. § 67.708(b)(28). Section 102 defines a “public record” as “[a] record . . . of a Commonwealth . . . agency that: (1) is not exempt under Section 708; [or] (2) is not exempt from being disclosed under any other Federal or State law or regulation.” 65 P.S.

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to reveal any such particulars, and must include provision for barring the disclosure of any such information, except as provided in this part.

20 C.F.R. § 603.4(b). The Federal regulations state that their purpose is to ensure confidentiality of UC information while allowing for the disclosures of such information required by Federal law. 20 C.F.R. § 603.3. Thus, in context, these regulations set forth what State UC provisions must or may contain; these regulations do not independently provide mandates or authorizations aside from their effects on State provisions.

§ 67.102; Department of Health v. Office of Open Records, 4 A.3d 803, 815 (Pa. Cmwlth. 2010). Because the records Requestor seeks are confidential pursuant to Regulation 61.25 and are exempt from disclosure under Section 708(b)(28), they are not public records and are not, therefore, subject to disclosure.<sup>9</sup>

Requestor also argues that, pursuant to Section 706 of the RTKL, 65 P.S. § 67.706, the OOR should have ordered that any confidential information be redacted from the requested records. Requestor argues that Section 706 “mandates that, rather than denying access to a public record that contains some information not subject to disclosure, the Commonwealth agency must produce the disclos[ible] portion, but with the exempt information redacted.” (Requestor’s Br. at 12.) As Requestor points out, Section 706 provides for the redaction of public records:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as

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<sup>9</sup> In support of his argument on this point, Requestor cites Florida Attorney General Opinion AGO 2005-42, which states that the confidentiality provisions of Florida UC law make confidential identifying information regarding employers and employees, but that this confidentiality does not include decisions of Florida’s UC referees or the Florida Unemployment Appeals Commission. (Requestor’s Br. at 13.) This opinion interprets statutory language that is substantially different to that found at Regulation 61.25:

Information revealing an employing unit’s or individual’s identity obtained from the employing unit or any individual under the administration of this chapter, and any determination revealing that information, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution [having to do with public access to information]. This confidential information may be released in accordance with the provisions in 20 C.F.R. part 603.

Fla. Stat. § 443.1715(1). In addition, this opinion does not address any provision similar to the exemption found at Section 708(b)(28).

well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9.

65 P.S. § 67.706. However, as discussed above, the records Requestor seeks are not public records as defined by Section 102. Because the requested records are confidential under Regulation 61.25, these records are *not* presumed to be public records pursuant to Section 305(a) of the RTKL, and they do not fall within the definition of "public record" found at Section 102. Therefore, they are not subject to mandatory redaction pursuant to Section 706, which, by its terms, applies only to *public* records. Department of Health, 4 A.3d at 815. Moreover, Requestor does not explain what part of his Request he believes would survive if the information made confidential by Regulation 61.25 were redacted. The Request sought "records of unemployment hearing decisions for the week of July 5 through July 8, 2011" and specified that it sought "the names and addresses of employers who have been in ALJ hearings and the case number with name of the claimant if available." (Request, R.R. at 8a.) Regulation 61.25 specifically provides that the names of claimants and employers are confidential. 34 Pa. Code § 61.25(a)(1)(i), (2)(i). The addresses of employers, likewise, constitute identifying particulars about employers; therefore, the OOR did not err in not ordering the disclosure of redacted records.

Finally, we address Requestor's argument that, because the Department's regulations provide that UC hearings are open to the public, the information he seeks is public information that the Department may not withhold. The Department's Regulation 101.21(c) provides that UC Referee hearings "shall be open to the public, subject to the availability of suitable and reasonable facilities." 34 Pa. Code § 101.21(c). In addition, Requestor argues that there is a public interest in the right to attend trials and other civil cases. (Requestor's Br. at 13.) Pursuant to this regulation, members of the public could have attended the hearings regarding which Requestor seeks records. This fact, however, does not change the regulatory language of Regulation 61.25 or the statutory language of Section 708(b)(28) of the RTKL that makes the *records* of these hearings, although not the hearings themselves, confidential. While there is a strong public interest in open courts and tribunals, there is also a strong privacy interest of participants in the UC system, which is recognized both by the Department's regulations and by the RTKL. Therefore, we hold that the OOR did not err in determining that the records sought were not subject to disclosure.<sup>10</sup>

For these reasons, we affirm the Final Determination of the OOR denying Requestor's appeal.

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**RENÉE COHN JUBELIRER, Judge**

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<sup>10</sup> Due to our holding that the records sought by Requestor were not subject to disclosure, we do not reach Requestor's argument that the OOR erred in holding that the Request would have required the Department to create records that do not already exist.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Jason Clark,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2500 C.D. 2011
	:	
Department of Labor and Industry,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, December 7, 2012, the Final Determination of the Office of Open Records in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**