

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Indiana University of Pennsylvania,	:	
Petitioner	:	
	:	
v.	:	No. 633 C.D. 2010
	:	SUBMITTED: November 24, 2010
Steve Atwood,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: August 10, 2011

The Indiana University of Pennsylvania (IUP) petitions for review of the March 19, 2010 final determination of the Office of Open Records (OOR) that granted the request of Steve Atwood for documents pertaining to exterior improvements at IUP’s Stapleton Stabley Library under the Right-to-Know Law (the Law).¹ The parties’ dispute centers on IUP’s reliance on a record retention policy as a justification for not producing the certified payrolls of a private contractor that it engaged to perform construction activities on its behalf. It is undisputed that IUP’s policy is to inspect the certified payrolls in order to verify that the wage payments as listed on the wage certifications are correct and then either to destroy those records or return them to the contractor. We affirm.

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101 - 67.3104.

The background of this case is as follows. Atwood, business development director for Iron Workers Local No. 3, submitted a February 15, 2010 right-to-know request to IUP referencing exterior improvements at its Stapleton Stabley Library and general contractor CNC Construction, Inc.² In relevant part, Atwood requested “Certified Payrolls including the Statement of Compliance for any contractor or subcontractor who has or is performing the installation of reinforcing steel, structural steel, or the installation of miscellaneous metals at the site of work during the time period requested [December 7, 2009 to February 19, 2010].” Atwood’s February 15, 2010 Request at p. 1; Reproduced Record (“R.R.”) at 1 (emphasis in original).

In its letter denying Atwood’s request, the IUP open records officer stated: “Your request is denied because the information you request is not maintained by the University.” IUP’s February 16, 2010 Denial at p. 1; R.R. at 2. Atwood appealed IUP’s denial, asserting that the records requested, certified payrolls for CNC Construction, Inc., were public records. The OOR appeals officer in his initial review of Atwood’s appeal made the following request of IUP:

I request that you provide me with an Affidavit made under penalty of perjury by a person with knowledge confirming that the requested record(s) do(es) not exist. Please state on the Affidavit what record(s) do(es) not exist.

If the requested records do exist, please indicate what agency/party holds the records and address whether [Section 506(d) of the Law,] 65 P.S. § 67.506(d) applies. Further, if the records do exist, please provide the legal and factual basis for your denial of the request for

² As support for his request, Atwood erroneously referenced the federal Freedom of Information Act, 5 U.S.C. § 552. IUP correctly processed it as one made pursuant to the Law.

records. Any response should be supported by sufficient factual background and a detailed legal analysis with citation to any relevant section(s) of [the Law], relevant case law, and/or Final Determinations of the OOR. Please note that the agency has the burden of overcoming the presumption that any requested records that do exist are public and supplement the record in accordance with the deadline set forth above.

February 22, 2010 Initial Review of OOR Appeals Officer at pp. 1-2; R.R. at 10-11 (emphasis added). Section 506(d) addresses situations where a private third-party contractor, engaged by a governmental agency to perform a governmental function on behalf of the agency, possesses a public record.

In response to the appeals officer's request, IUP submitted only the sworn affidavit of Raymond Wygonik, Director of Engineering and Construction for IUP. In that affidavit, which bore a notarial seal, Mr. Wygonik represented that IUP "does not maintain certified payrolls of contractors in the ordinary course of business and did not maintain such records for the project [at issue]." March 2, 2010 Wygonik Affidavit at p. 1; R.R. at 5.

Upon review of IUP's submission, the OOR determined that it could not consider Wygonik's affidavit because it did not indicate that he had made his statements and verified them subject to the penalties of perjury or those found in Section 4904 of the Crimes Code, *as amended*, 18 Pa. C.S. § 4904. In addition, noting that IUP failed to address whether the payrolls were subject to production under Section 506(d) of the Law, the OOR concluded that IUP failed to provide specific legal and factual support to substantiate a denial of the requested records and, thus failed to meet its burden of proving that the records were exempt from disclosure. Accordingly, the OOR in its final determination granted Atwood's

appeal and directed IUP to release the requested records with any nonpublic information redacted.³ IUP's timely appeal to this Court followed.⁴

IUP presents two issues on appeal: 1) whether the OOR erred in determining that the affidavit was insufficient to prove nonpossession of the certified payroll records because it did not indicate that it was made "under penalty of perjury;" and 2) whether the OOR erred in determining that IUP maintained, possessed or controlled the certified payroll records such that it was obligated to produce them. We first address the OOR's rejection of the affidavit.

IUP asserts that there is nothing in the Law requiring affidavits to be signed under penalty of perjury and that therefore, the OOR's rejection of the affidavit at issue is legally unsupportable. IUP maintains that, even absent language to the effect that an affidavit is being made subject to the penalty of perjury, there are several sections in the Crimes Code criminalizing the provision of false statements. In addition, IUP asserts that this Court in *Moore v. Office of Open Records*, 992 A.2d 907 (Pa. Cmwlth. 2010), determined that the Department of Corrections' submission of sworn and unsworn affidavits to the effect that it did not possess a certain record and that such a record did not currently exist were sufficient to satisfy the Department's burden of establishing the non-existence of a record. Accordingly, IUP argues that Wygonik's affidavit should have been more than sufficient to satisfy the evidentiary requirements of the Law.

³ The appeals officer in his final determination noted that Atwood in his appeal referenced only the payrolls for CNC Construction, Inc. Accordingly, we limit our decision to those items.

⁴ While we review OOR appeals in our appellate jurisdiction, the appeals are subject to independent review and fact-finding. In short, we are not prohibited from supplementing the record through hearing or remand and not limited to the rationale offered in the OOR's written decision. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010), *petition for allowance of appeal granted*, ___ Pa. ___, 15 A.3d 427 (2011).

Atwood does not challenge the legality of the affidavit at issue, arguing only that the Law required IUP to provide copies of the requested records to him *regardless* of IUP's claimed lack of possession. At all events, we conclude that the OOR erred in rejecting the affidavit. Notwithstanding the absence of specific language, there is no indication that the affiant made his statements without sufficient verification. Additionally, there is no real dispute that IUP did not have the payrolls in its possession; rather, the dispute centers on the issue of whether those payrolls nonetheless should be subject to production. We turn now to consideration of that substantive issue.

As an initial matter, we note that “[t]he burden of proving that a record of a Commonwealth agency ... is exempt from public access shall be on the Commonwealth agency ... receiving a request by a preponderance of the evidence.” Section 708(a)(1) of the Law, 65 P.S. § 67.708(a)(1). Here, the OOR determined that IUP failed to meet its burden because it failed to address the issue of whether the records were subject to Section 506(d) of the Law, which addresses situations where a private third-party contractor with whom the agency has contracted to perform a governmental function possesses a public record. Section 506(d)(1) of the Law provides as follows:

(d) Agency possession.—

(1) 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 for purposes of this act.

65 P.S. § 67.506(d)(1).

In support of its position that Section 506(d) does not mandate that it retain actual physical possession of the certified payrolls at issue, IUP cites, *inter alia*, Section 507 of the Law, “Retention of records,” providing that “[n]othing in this act shall be construed to modify, rescind or supersede any record retention policy or disposition schedule of an agency established pursuant to law, regulation, policy or other directive.” 65 P.S. § 67.507. In that regard, it asserts that Section 10 of the Pennsylvania Prevailing Wage Act (PWA)⁵ and regulation 35 Pa. Code § 9.110 require only that it confirm that a contractor is paying prevailing wages on public works projects, not that it maintain such forms. Accordingly, IUP contends that the PWA and its regulations supersede the Law’s general rule that a public record must be accessible “[u]nless otherwise provided by law.” Section 701(a) of the Law, 65 P.S. § 67.701(a).

In making this argument, IUP misses the point. The question here is not whether IUP properly discarded its copies of the records pursuant to its record retention policy. Neither the OOR nor Atwood has challenged IUP’s policy, nor does this Court have any occasion to address it. Rather, what IUP fails to understand, or refuses to acknowledge, is that Section 506(d) mandates that if such records still exist, albeit solely in the possession of the third-party contractor, the contracting agency must produce them.⁶ Essentially, these records are deemed to

⁵ Act of August 15, 1961, P.L. 987, *as amended*, 43 P.S. § 165-10.

⁶ In that regard, Section 506(d)(3) of the Law provides as follows:

(3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall access the duplication fee established under section 1307(b) and upon collection shall remit the fee to the party in possession of the record if the party duplicated the record.

be in the constructive possession of the agency, and this would be true even if the agency had never been in actual physical possession of the records.

As we recently determined in *Edinboro University of Pennsylvania v. Ford*, 18 A.3d 1278 (Pa. Cmwlth. 2011), certified payroll records maintained by a party who contracted to perform work for a state university on a specified project as pertaining to that project but no longer in a state university's possession are "public records" because, despite the fact that the university did not maintain them, it received them consistent with the definition of "record." In pertinent part, "record" is defined as "[i]nformation, regardless of physical form or characteristics, 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." Section 102 of the Law, 65 P.S. § 67.102 (emphasis added). Further, just as we determined in *Ford*, there is no conflict in the present case between the Law and the PWA in that the latter does not generally require a university to maintain certified payroll records.

Accordingly we conclude that the OOR correctly directed IUP to release the requested records, subject to the redaction of nonpublic information, and we affirm that order.⁷

BONNIE BRIGANCE LEADBETTER,
President Judge

⁷ In *Department of Conservation and Natural Resources v. Office of Open Records*, 1 A.3d 929 (Pa. Cmwlth. 2010), we held that the exemptions from disclosure found in Section 708(c) of the Law, 65 P.S. § 67.708(c), did not apply to the certified payroll records at issue in that case. We also held, however, that the agency had the discretion to redact the names and addresses of the private contractor's employees when producing the records. No request to redact has been made here, so that issue is not before us.

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ORDER

AND NOW, this 10th day of August, 2011, the final determination of the Office of Open Records in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge