



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION ON REMAND

<b>IN THE MATTER OF</b>	:
	:
<b>EQUITY FORWARD, INC., and</b>	:
<b>MARY ALICE CARTER</b>	:
<b>Requester</b>	:
	:
<b>v.</b>	<b>: Docket No.: AP 2017-2304</b>
	:
<b>PENNSYLVANIA DEPARTMENT OF</b>	:
<b>HUMAN SERVICES,</b>	:
<b>Respondent</b>	:
	:
<b>and</b>	:
	:
<b>REAL ALTERNATIVES, INC.,</b>	:
<b>Direct Interest Participant</b>	:

Mary Alice Carter, on behalf of Equity Forward, Inc. (collectively, the “Requester”), submitted a request (“Request”) to the Pennsylvania Department of Human Services (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to a grant agreement between the Department and Real Alternatives, Inc. (“RA”). The Department partially denied the Request, asserting that certain records were not records of the Department and that other records did not exist, and the Requester appealed to the Office of Open Records (“OOR”).<sup>1</sup>

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<sup>1</sup> Pertinently for this case on remand, Item 1 of the Request sought: all program development and advancement agreements (“PDAA”) signed between Real Alternatives, its predecessor groups Morning Star Pregnancy Services and Morning Star Advisory Project Advisory Council and its Pennsylvania service providers. Item 2 of the Request

Before the OOR, the Department submitted evidence that it did not possess the records requested in Items 1 and 2 of the Request. RA submitted a request to participate before the OOR (which was granted) and submitted evidence that the records requested in Items 1 and 2 of the Request were records exchanged solely between private companies, and were not directly related to RA's contract with the Department. Therefore, RA argued, the records were not accessible through Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1).<sup>2</sup> Accepting the Department's and RA's evidence that the records requested in Items 1 and 2 of the Request were not directly related to RA's contract with the Department to perform a governmental function, the OOR concluded that the records requested in Items 1 and 2 of the Request were not subject to public disclosure. The Requester filed a further appeal with the Commonwealth Court.

Before the Commonwealth Court, the Court considered the evidence and the OOR's analysis as to whether Items 1 and 2 of the Request were subject to disclosure under Section 506(d)(1) of the RTKL. With respect to Item 1 of the Request, the Court noted that the OOR relied on the testimonial affidavit of RA's President, Kevin Bagatta, and held that because the records requested in Item 1 related to services separate and distinct from RA's contract with the Department, these records were not subject to public disclosure under Section 506(d)(1) of the RTKL. However, the Court then concluded that Mr. Bagatta's affidavit was conclusory and did not explain how the services provided under the records requested in Item 1 of the Request were not directly related to RA's performance of a governmental function on behalf of the Department. Accordingly, the Court vacated the OOR's final determination as to Item 1 of the

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sought: all invoices, receipts and expenditure documentation submitted by Pennsylvania service providers to Real Alternatives, its predecessor groups Morning Star Pregnancy Services and Morning Star Advisory Project Advisory Council.

<sup>2</sup> Records not in the possession of a government agency but which are directly related to a contractor's performance of a governmental function of that agency are accessible through Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1).

Request and remanded the matter to the OOR “to evaluate whether the [records requested in Item 1] are directly related to Real Alternatives’ performance of a governmental function under the Grant Agreement [with the Department.]”

With respect to Item 2 of the Request, the Court held that the OOR erred when it concluded that these records were not subject to public disclosure under Section 506(d)(1) of the RTKL because they were not required to be provided to the Department under the terms of RA’s contract. Rather, the Court concluded that the proper analysis was to consider whether the requested records were directly related to RA’s performance of a governmental function under the terms of its contract with the Department. Accordingly, the Court vacated the OOR’s final determination with respect to Item 2 of the Request and remanded the matter to the OOR to determine whether the requested records directly related to RA’s performance of a governmental function, and, if so, whether these records met the express terms of the Request, *i.e.*, whether they constituted “invoices, receipts and expenditure documentation submitted by Pennsylvania ‘service providers’ to Real Alternatives[.]”

On remand to the OOR, RA submitted a supplemental affidavit of Mr. Bagatta and a copy of a PDAA for *in camera* review. In his supplemental affidavit, Mr. Bagatta explains that in order to carry out its obligations under its contract with the Department, RA uses a network of twenty-eight service providers (“Service Providers”) who provide the services called for under RA’s contract with the Department. Pursuant to that contract, RA is compensated for the services provided by the Service Providers pursuant to contracts between RA and each service provider. Thus, pursuant to the contract with the Department, RA provides services *to the Department* through a series of subcontracts with the Service Providers. With respect to the PDAA’s sought in Item 1 of the Request, Mr. Bagatta explains that these are separate agreements

between RA and the Service Providers in which RA is obligated to provide services *to the Service Providers* for which the Service Providers compensate RA. The PDAAs do not evidence any contract in which the Service Providers are providing any services to RA in support of RA's performance of its contract with the Department. As the PDAAs requested in Item 1 of the Request are related to RA's performance of services to the Service Providers, the PDAAs cannot be considered to be directly related to RA's performance of services to the Department. Therefore, because they are not directly related to RA's contract to perform services for the Department, the PDAAs are not accessible through Section 506(d)(1) of the RTKL and, hence, are not subject to public disclosure.<sup>3</sup>

With respect to Item 2 of the Request, the Court remanded the matter to the OOR for the OOR to analyze whether the records requested in Item 2 are directly related to RA's performance of the Agreement with the Department. "[T]o satisfy the 'directly relates' prong, the records must relate to the performance of the governmental function." *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 940 (Pa. Commw. Ct. 2014). In determining whether records directly relate to a third party's performance of its governmental function, the Commonwealth Court has consistently looked to whether the records are relevant to the third party's performance of its governmental function. *See Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010); *Giurintano v. Dep't of Gen. Servs.*, 20 A.3d 613, 615 (Pa. Commw. Ct. 2011).

On remand, RA identified the only records responsive to Item 2 of the Request as "Service Provider Monthly Invoices," and stated that these records are mere "cost information"

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<sup>3</sup> In its opinion, the Commonwealth Court noted there was insufficient evidence to distinguish between the services provided under RA's contract with the Department and the services provided under the PDAAs; however, any similarity of the services provided under each of these agreements fails to consider that under the PDAAs, RA is performing a service for a non-governmental entity, as opposed to the service providers providing services to RA in furtherance of RA's agreement with the Department. Section 506(d)(1) of the RTKL cannot be read for the proposition that a contract between private entities is subject to public disclosure because the services provided are similar to services provided to a government agency.

which the Commonwealth Court has previously held are not related to the performance of a governmental function, and, therefore, not accessible under Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1). *UnitedHealthcare v. Baron*, 171 A.3d 943, 964 (Pa. Commw. Ct. 2017); *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010). In his affidavit, Mr. Bagatta attests that the Service Provider Monthly Invoices are generated by RA based on information entered into RA's proprietary software system by service providers, and include the client name, counseling location, counseling time provided, classes attended, services provided, and the total reimbursable amount due the service provider. Mr Bagatta further attests that the Service Provider Monthly Invoice is not provided to the Department, but, rather, is used by RA to generate a monthly "actual expenditure report aggregating all services provided by all service providers, which services are reimbursable under the Grant Agreement." It is this "actual expenditure report" which is provided to the Department to pay for services under the Grant Agreement.

While RA argues that the Service Provider Monthly Invoices are mere cost information, not subject to disclosure, Mr. Bagatta's affidavit states that these records include information beyond mere financial information, *i.e.*, service provider reimbursement amounts. These records include additional information specifically describing the services provided by the service providers in furtherance of RA's agreement with the Department. It is difficult to imagine information more relevant to the performance of a governmental function than information describing the services performed pursuant to that governmental function. *See e.g. SWB Yankees v. Wintermantel*, 999 A.2d 672 (Pa. Commw. Ct. 2010), *aff'd* 18 A.3d 1145 (Pa. 2011) (records demonstrating the performance of a governmental are subject to public disclosure). Thus, the

Service Provider Monthly Invoices directly relate to RA's performance of a governmental function, and, therefore, are subject to access under Section 506(d)(1).

Notwithstanding the foregoing, the focus of RA's argument that these records are not directly related to its performance of a governmental function appears to be that the service provider reimbursements are "cost information" not subject to disclosure. In support of its argument, RA cites to *UnitedHealthcare* and *Buehl*; however, those cases are distinguishable, in that those cases involved a request for the amounts of payments made by a government contractor to subcontractors for services at prices *separately negotiated* from the prices negotiated between the government and its prime contractor. Thus, the government contractor negotiated a price for goods and services with the government, and, then entered into separate agreements to obtain those goods and services from subcontractors (and presumably retaining the difference between the cost of goods/services sold and the cost of goods/services purchased as profit). Neither *UnitedHealthcare* or *Buehl* involved a situation, such as here, where subcontractors are *reimbursed* by the government for the cost of services provided. Thus, here, the amounts paid to the subcontractors for services provided are the same amounts paid by the government. Indeed, the amount of funds *reimbursed* to subcontractors is disclosed to the Department in the aggregate, but not by individual subcontractor. Accordingly, the reimbursement information contained within the Service Provider Monthly Invoices are not the type of information permitted to be withheld under *UnitedHealthcare* and *Buehl*.

The Service Provider Monthly Invoices also include the names of individual clients receiving counseling services under RA's agreement with the Department. While the Service Provider Monthly Invoices are public records, the Pennsylvania Supreme Court has recently found that information protected by the state constitution's right to privacy may be redacted from

otherwise public records, *Easton Area Sch. Dist. v. Miller*, 2020 Pa. LEXIS 3378 \* 33 (Pa. June 18, 2020), and it is incumbent on agencies and adjudicators to evaluate potential privacy claims even if not raised by the parties. *Id.* at \*40.

The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass'n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test). Furthermore, home addresses may be confidential even when they do not contain information,

such as names, which would lead to the identification of the resident. *Chester Hous. Auth. v. Polaha*, 173 A.3d 1240, 1252 (Pa. Commw. Ct. 2017) (“[W]e hold that the constitutional privacy protection applies when home addresses are requested, regardless of whether names or the resident’s identity are attached.”). The OOR has previously found, in certain situations, the names of private individuals, *i.e.*, individuals not employed by the government, to be subject to the protections of the constitutional right to privacy. *Sheer Evans Investment, L.L.C. v. Phila. Water Rev. Bur.*, OOR Dkt. AP 2020-0305, 2020 PA O.O.R.D. LEXIS 738; *Deeter v. Bucks County Water and Sewer Auth.*, OOR Dkt. AP 2019-1972, 2019 PA O.O.R.D. LEXIS 1554; *Krick v. Girardville Area Munic. Auth.*, OOR Dkt. AP 2018-0510, 2018 PA O.O.R.D. LEXIS 650.

To determine whether the constitutional right to privacy precludes disclosure of an individual’s personal information, the OOR must apply the balancing test enunciated in *Denoncourt v. Pa. State Ethics Comm’n*, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), “weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.” In the present matter, the Requester has not articulated any public benefit in the disclosure of the names of individuals receiving medical counseling, and, indeed, the OOR can discern no benefit in revealing the names of those individuals. Accordingly, the names of individuals receiving counseling services must be redacted from the Service Provider Monthly Invoices.

### CONCLUSION

For the foregoing reasons, the Requester’s appeal on remand is **granted in part** and **denied in part**, and the Department is required to obtain and disclose the Service Provider



Monthly Invoices subject to the redaction of client names within thirty days. This Final Determination on Remand is binding on all parties. Within thirty days of the mailing date of this Final Determination on Remand, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>4</sup> This Final Determination On Reconsideration shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ON REMAND ISSUED: June 26, 2020**

/s/ Charles Rees Brown  
CHARLES REES BROWN  
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<sup>4</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).