

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA  
No. 225 CD 2018**

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EQUITY FORWARD, MARY ALICE CARTER  
PETITIONER

v.

DEPARTMENT OF HUMAN SERVICES,  
RESPONDENT

And

REAL ALTERNATIVES, INTERVENOR

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**BRIEF OF EQUITY FORWARD PETITIONER**

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Appeal from the Final Determination of the Pennsylvania Office of Open  
Records dated January 22, 2018 docketed at OOR as No. 2017-2304 now  
identified in this Court as  
**No. 225 CD 2018**

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## **I. STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to 42 Pa. C.S.A 763(a)(2)(“...the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases: ...[a]ll appeals of which is vested in the Commonwealth Court by any statute hereafter enacted.”) and 65 P.S. 67.1301(a)(“within 30 days of the mailing date of the final determination of the appeals officer related to a decision of a Commonwealth agency . . . issued under 1101(b) or the date a request for access is deemed denied, a requestor or the agency may file a petition for review or other document as might be required by rule of court with the Commonwealth Court.”)

## II. ORDER IN QUESTION

For the foregoing reasons, the Requester's appeal is denied, and the Department is not required to take any further action...

**FINAL DETERMINATION ISSUED AND MAILED:** January 22,  
2018

/s/ Magdalene C. Zeppos  
MAGDALENE C. ZEPPOS, ESQ.  
APPEALS OFFICER

### **III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW**

In appeals to the Commonwealth Court from Final Determinations of the Office of Open Records, the standard of review is de novo; the scope of review is plenary. *Bowling v. Office of Open Records*, 75 A.3d 453, 476-77 (Pa. 2013).

#### **IV. STATEMENT OF THE QUESTIONS INVOLVED**

**1. Did the Final Determination err in failing to address DHS's underlying procedural response under the RKTL?**

**a. *Suggested Answer:* Yes. DHS's underlying response to Requestor was flawed as it failed to comply with the following procedural requirements of the RTKL: Sections 305, 707, 901; 903.**

**2. Did the OOR err in holding that the DHS does not possess the records requestor?**

**a. *Suggested Answer:* Yes. The agency had constructive possession.**

**3. Did the OOR err in holding that DHS was not required under Section 506(d) to retrieve the records at issues?**

**a. *Suggested Answer:* Yes. The records sought are public under Section 506(d) and the agency was required to obtain them.**

## V. STATEMENT OF THE CASE

This appeal stems from a Final Determination issued by the independent Office of Open Records (“OOR”) on January 22, 2018. The OOR denied access to financial records, upholding the Department of Human Services (“DHS”) denial of a Right to Know Law request.

The history of this request and appeal is as follows. On September 25, 2017, Mary Alice Carter (“Requestor”) filed a RTKL request with the DHS seeking the following records:

1. All Program Development and Advancement Agreements signed between Real Alternatives or its predecessor groups Morning Star Pregnancy Services and Morning Start Project WIN Advisory Counsel and its Pennsylvania service providers.
2. All invoices, receipts and expenditure documentation submitted by the Pennsylvania service providers to Real Alternatives, or its predecessor Morning Star Pregnancy Services and Morning Start Project WIN Advisory Counsel and its Pennsylvania service providers.
3. All invoices, receipts and expenditure documentation held by Real Alternatives related to the \$1.42 M it spent on “advertising and promotion” in 2015.

4. All reporting related to Real Alternatives maintenance of the PA hotline, 1-888-LIFE AID, including number of calls, number of client referrals; names of service providers that received client referrals and any other reporting related to the efficacy of the hotline. R. 1.

On October 3, 2017, DHS sent an interim communication to the Requestor, invoking a 30-day extension. R. 1.

On November 1, 2017, DHS sent a request for an extension beyond the 30-day extension invoked on October 3, 2017. The Requestor agreed to an extension beyond the 30 days, or until Nov. 15, 2017 for the DHS to issue a Final RTKL response. On Nov. 15, 2017, DHS issued a Final RTKL response. DHS denied RTKL requests No. 1, 2, and 3, which (for continuity in the appeal) it identified as Paragraph 1-3 as follows:

“Paragraph 1 of your request is denied. The department does not have the possess the records responsive to your request. The department contacted Real Alternatives regarding your request for documents and Real Alternatives has asserted the following:

- The program development and Advancement Agreements (PDAA’s are not “records” at all, let alone “public records” since they do not document a transaction or activity of an agency.
- The request seeks private documents of a private party. Private documents of a private party are only subject to access under Section 506(d) of the RTKL, and the PDAA’s between Real Alternatives and its services providers are not directly related to any governmental function performed by Real Alternatives under a contract with any Commonwealth Agency.

- Further, even if the PDAA's were not statutorily excluded from access under section 506(d), they are otherwise exempt from access under Section 708(b)(11) of the RTKL, since they reflect confidential proprietary information and trade secrets." [Nov. 15, 2017 denial letter by DHS ORO Andrea Banks].

"Paragraph 2 of your request is denied. The department does not have the possess the records responsive to your request. The department contacted Real Alternatives regarding your request for documents and Real Alternatives has asserted the following:

- The documents requested are not records at all, let alone public records, since they do not document a transaction or activity of the agency.
- The request seeks private documents of a private party. Private documents of a private party are only subject to access under Section 506(d) of the RTKL, and the PDAA's between Real Alternatives and its services providers are not directly related to any governmental function performed by Real Alternatives under a contract with any Commonwealth Agency.
- Further, even if such documents were not statutorily excluded from access under section 506(d), they are otherwise exempt from access under Section 708(b)(11) of the RTKL, since they reflect confidential proprietary information and trade secrets." [Nov. 15, 2017 denial letter by DHS ORO Andrea Banks].

"Paragraph 3 of your request is denied. The department does not have the possess the records responsive to your request. The department contacted Real Alternatives regarding your request for documents and Real Alternatives has asserted that no such records exist. Furthermore, Real Alternatives asserts that even if the documents existed, they would not be subject to access based on the following:

- The requested documents are not "records" at all, let alone "public records" since they do not document a transaction or activity of an agency.
- The request seeks private documents of a private party. Private documents of a private party are only subject to access under Section 506(d) of the RTKL, and the invoices, receipts and expenditure documentation held by real alternatives related to advertising and promotion are not directly related to any governmental function performed by Real Alternatives under a

contract with any Commonwealth Agency.” [Nov. 15, 2017 denial letter by DHS ORO Andrea Banks].

DHS denied requests No. 1, No. 2, and No. 3, and the Petitioner appealed those denials (DHS responded to No. 4 and Petitioner did not challenge to the OOR the sufficiency of that response). The OOR held that 1) the records requested in Item 1 do not directly relate to the grantee’s performance of governmental function and are not accessible under 506(d)(1); 2) the service provider monthly invoices are not part of the grant agreement with the Department and as such not subject to public access. R. 9. Additionally, the OOR held that the Department does not possess any records that are responsive to Item 3 of the Request. R. 9.

## VI. ARGUMENT SUMMARY

Do taxpayers have a right to know how 100 percent of a state-issued grant is spent, or are they entitled to see only 97 percent of their money? That is the seminal question in this RTKL case in which the Department of Human Services awarded a \$30 Million five-year contract to a grantee, but improperly shielded a portion of public dollars from public access.

The Legislature enacted the Right to Know Law to expand citizen access to government records and to correct the corrosive effect secrecy has had on Pennsylvania's governmental operation. In embracing this sweeping remedial legislation, the Courts declared that its objective is to prevent secrecy," "empower citizens," "promote access to official government information" and "make public officials accountable." Agencies **must** presume records are public and "narrowly construe" exemptions. Yet still, some agencies remain recalcitrant to follow basic RTKL procedures, particularly when requestors seek government expenditures and conduct broad analysis to not release public record.

Taxpayers have given more than \$150 Million over twenty years to Real Alternatives to perform a governmental function. In denying the request, DHS abdicated its statutory responsibility under sections 305, 707, 506(d) 901, and 903. DHS failed to conduct a good- faith search, failed to

identify proper exceptions and failed to provide independent legal analysis for denial. **The most dangerous aspect of this response is that DHS placed a third-party in a decision-making role to determine whether a record is public.** The need for scrutiny of taxpayer monies to third-parties is paramount, regardless of the philosophical foundations of a grantee. DHS should be required to comport with all aspects of the RTKL to ensure maximum transparency of taxpayer dollars.

The Legislature adopted the RTKL to make access easier and more reliable for requestors to obtain public record. Requestors should not have to go through a full-blown OOR appeal just to receive bona-fide reasons for a denial. DHS should have held the grantee to a standard of competent evidence if it believed the records were not public. The Requestor was entitled a proper response at the request level, without undertaking an OOR appeal and now a court appeal.

## VII. ARGUMENT

The Commonwealth has a long history of ensuring citizens' access to inspect records of their government. This right to inspect records was embedded in the common law and later codified with the Right to Know Act ("RTKA"), 65 P.S. §§ 66.1-66.4 (repealed, effective January 1, 2009). As early as the 1950s, the General Assembly stated the law was designed to "strike the veil of secrecy from [those] . . . government departments and agencies." Pennsylvania Legislative Journal, Session 1957, No. 35, April 10, 1957, 2186. In 2008, the General Assembly acted again, creating an even more powerful tool of government transparency – the Right to Know Law, 65 P.S.66.101, *et. seq.* This law represented a sea of change for the Commonwealth by setting forth a new process for obtaining public records and a new interpretation to determine whether information is public record. *Pennsylvania State Educ. Ass'n v. Commonwealth , Dep't of Cmty. & Econ. Dev.*, 637 Pa. 337, 353, 148 A.3d 142, 153 (2016). This was "a dramatic expansion of the public's access to government documents." *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013).

The Courts embraced this important law and declared that the "[t]he objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government."

*SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013). These Court holdings did not limit such accountability to only 97 percent of taxpayer money, or “most” official actions.

Here, Petitioner seeks to review taxpayer money given to a particular grantee by requesting a copy of invoices, receipts, expenditures, and contracts. The requested records represent the type of the records repeatedly declared to be public record by the OOR and the Courts. The grantee, apparently with a DHS endorsement, attempts to shield from the taxpayer millions of dollars of taxpayer money by stating that the state has no relationship to the grantee and those the grantee hires to perform a governmental function. In error, the OOR agreed. Petitioner asserts that DHS should hold this grantee accountable to document 100 percent of the money it receives. To hold otherwise would “frustrate the purposes of the RTKL by [allowing agencies to place] ... their records in the hands of third parties to

avoid disclosure.” *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-939 (Pa. Commw. Ct. 2014), *aff’d*, 633 Pa. 205, 124 A.3d 1214 (2015).

**I. THE OOR FAILED TO HOLD DHS ACCOUNTABLE FOR ITS FLAWED PROCEDURAL RESPONSE UNDER THE RTKL.**

DHS abdicated its statutory responsibility under sections 305, 707, 901, 903 and 506(d) in responding to this request for records, and the OOR erred by not addressing the agency’s flawed response. Specifically, DHS failed to enumerate to requestor even one applicable exception under the RTKL or provide independent legal citation or analysis in support of its denial. Instead, DHS, without independent assessment as required by law, merely provided to requestor a response “purportedly” provided to DHS by Real Alternatives. Petitioner underscores “purportedly” because DHS never provided to Petitioner or OOR the stated response by Real Alternatives, upon which DHS presumably relied in making its decision to deny the records. Instead, DHS merely reported to Petitioner that Real Alternatives contended that the records sought are information of a private entity not subject to the law, do not directly relate to a government function, or otherwise are protected as trade secrets or confidential proprietary information. Neither DHS or the third-party provided legal support for those assertions at the request level.

By way of background for the Court, the grantee, Real Alternatives, performs a governmental function for the state by administering this state-funded program that provides adoption referrals, counseling services, and temporary housing needs to Pennsylvania residents. R. 7. DHS has a contract with Real Alternatives. R. 7. Real Alternatives receives a \$12.7 Million, one and a half year grant to, among other things, administer Pennsylvania's Alternatives to Abortion and reimburse 29 service providers that provide those services. R. 7, Ex 1. **DHS provides State General Funds money, as well as federal funds, to this grantee.** R. 7, Ex 1. The Office of Special Programs for DHS administers the Grant Agreement between the state and Real Alternatives. R. 7, Ex 1. DHS's Bureau of Financial Operations conducts audits of this entity related to its compliance with the Grant Agreement to ensure that its performance of its governmental function on behalf of DHS comports with state law.<sup>1</sup>

DHS failed to comply with many procedural requirements of the RTKL. The Court has held that failing to follow RTKL procedure can be held to be bad faith. *See, e.g., Uniontown Newspapers, Inc., d/b/a/ The Herald Standard; and Christine Haines v. PA Dept. of Corrections*, No. 66 M.D. 2015, filed March 23, 2018.

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<sup>1</sup> This audit and additional information about this organization are available at: [http://www.dhs.pa.gov/cs/groups/webcontent/documents/document/c\\_226594.pdf](http://www.dhs.pa.gov/cs/groups/webcontent/documents/document/c_226594.pdf).

**a. DHS failed to comply with Section 901, A Good-Faith Search.**

DHS failed to conduct a good faith effort to determine if the records requested in request No. 1, 2, and 3, were public. 65 P.S. 66.901. Even a cursory examination of DHS response demonstrates that it is flawed. DHS response to Request No. 1 is as follows:

“Paragraph 1 of your request is denied. The department does not possess the records responsive to your request. The department contacted Real Alternatives regarding your request for documents and Real Alternatives has asserted the following:

- The program development and Advancement Agreements (PDAA’s are not “records” at all, let alone “public records” since they do not document a transaction or activity of an agency.
- The request seeks private documents of a private party. Private documents of a private party are only subject to access under Section 506(d) of the RTKL, and the PDAA’s between Real Alternatives and its services providers are not directly related to any governmental function performed by Real Alternatives under a contract with any Commonwealth Agency.
- Further, even if the PDAA’s were not statutorily excluded from access under section 506(d), they are otherwise exempt from access under Section 708(b)(11) of the RTKL, since they reflect confidential proprietary information and trade secrets.” [Nov. 15, 2017 denial letter by DHS ORO Andrea Banks].
- To the extent that the Department has misinterpreted your request, it submits that the request was not set forth within the required requisite of specificity. R. 1.

The DHS response provides the same language, void of analysis or evidentiary support, for Request No. 2 and 3. R. 1.

Section 901 requires that “[u]pon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record.” 65 P.S. § 67.901. The Commonwealth Court has stated that: by its plain language, Section 901 describes the actions that an agency is obligated to take when it receives a request for a record. The agency must: first, make a good faith effort to ascertain if the requested record is a public, legislative or financial record; second, determine whether the agency has possession, custody, or control of the record; and third, respond promptly. *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 621-22 (Pa. Commw. Ct. 2011); see also *In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (noting that “[i]t is ... the open records officer’s duty and responsibility to determine whether the record is public, whether the record is subject to disclosure, or whether the public record is exempt from disclosure”).

The RTKL does not define “good faith effort.” However, in *Pennsylvanians for Union Reform v. Pa. Office of Administration*, the Commonwealth Court found that the Office of Administration: ... complied with Section 901 of the RTKL by timely making a **substantive determination** that record of only two specifically-named Commonwealth

employees' PAC contributions were not accessible public records, and concluding that revealing whether OA had possession, custody or control of such records would disclose otherwise protected information. *Pennsylvanians for Union Reform v. Pa. Office of Administration*, 129 A.3d 1246, 1254 (Pa. Commw. Ct. 2015)(emphasis added).

Here, DHS made no substantive determination of its own. DHS merely reported to Petitioner that DHS "contacted" Real Alternatives. DHS provides Petitioner no information, let alone competent evidence, as to how it contacted the third-party. Was it a telephone call? If so, when and to whom? Was it an email? If so, when? To whom? Did that person have the requisite knowledge and authority to respond? Given that DHS asserted a trade secret and confidential proprietary exemption, did the "contact" with Real Alternatives contain a formal request pursuant to Section 707? The OOR failed to address DHS's response under the law.

**b. DHS Failed to Comply with Section 707 Requirements.**

DHS asserted that the records were trade secrets and confidential proprietary and thus exempt. Under Section 707, both the agency and the third-party are required to take certain action if they assert that a record is exempted as a trade secret or as confidential proprietary. Here, neither the agency nor the third-party appears to have complied with these provisions.

Moreover, OOR's Final Determination did not address this component of DHS's response.

Section 707 states in pertinent part:

Production of certain records.

(a) General rule. — If, in response to a request, an agency produces a record that is not a public record, legislative record or financial record, the agency shall notify any third party that provided the record to the agency, the person that is the subject of the record and the requester.

(b) Requests for trade secrets. — An agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information.

Notification shall be provided within five business days of receipt of the request for the record. The third party shall have five business days from receipt of notification from the agency to provide input on the release of the record. The agency shall deny the request for the record or release the record within ten business days of the provision of notice to the third party and shall notify the third party of the decision. *65 P.S. 66.707.*

No evidence was provided that this procedure was followed by DHS or the grantee. If a third-party, in this case the grantee, asserts that its documents constitute trade secret or confidential proprietary, as it asserted, the third-party would have been required to submit to DHS a 707-letter. Moreover, if that 707-letter had been in play, DHS would have been required to provide notice in writing to the third-party and seek its input related to the records. At the request level, DHS, without legal analysis or

citation in support, merely passed on to Petitioner the grantee's "conclusory statements" that the information sought is not public. Petitioner is unaware whether a 707-letter existed or was reviewed by DHS, or that upon a request for records that DHS employed its notice-requirements to the agency as prescribed. Moreover, even if they asserted confidentiality, Section 707 also permits agencies to deny those claims when they are not made in good faith. 65 P.S. § 67.707. The OOR Final Determination did not address this.

**c. Specificity; Section 703.**

DHS did not provide to Petitioner a proper response with regard to the records as required by law. In fact, DHS's response provided a mixed-message response to the request for records in terms of specificity. DHS flatly denied the requests, without legal citation, and then at the same time contended that the request for records was not specific per the requirements of section 703. R. 34-37. In rote language often repeated by Commonwealth agencies, DHS stated that "to the extent that "the department has misinterpreted your request, it submits that the request was not set forth within the required requisite of specificity." 65 P.S. 66.703. [*Nov. 15, 2017 denial letter by DHS ORO Andrea Banks*]. R. 1.

Section 703 of the RTKL states that "[a] written request should identify or describe the records sought with sufficient specificity to enable

the agency to ascertain which records are being requested.” 65 P.S. § 67.703. When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813).

In determining whether a request under the RTKL is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). The OOR examines to what extent the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pennsylvania Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121, 1125 (Pa. Commw. Ct. 2015).

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Id.* In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting

timeframe to be sufficiently specific “to apprise [the agency] of the records sought.” *Carey v. Pennsylvania Dep't of Corr.*, 61 A.3d 367 (Pa. Commw. Ct. 2013), *supplemented*, No. 1348 C.D. 2012, 2013 WL 3357733 (Pa. Commw. Ct. July 3, 2013). Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See Pennsylvania Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121, 1125 (Pa. Commw. Ct. 2015). Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. This last factor is the most fluid and is dependent on the requests subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad. *Id.* Here, the records sought were sufficiently specific under each of the above required analysis.

## **II. THE OOR ERRED IN HOLDING THAT DHS DID NOT POSSESS THE RECORDS REQUESTED.**

### **a. The records were public under 506(d).**

The OOR inaccurately held that the records sought in Item 1 and Item 2 are not records of the Department. R.9.

Under the RTKL, two groups of records are accessible—those records in an agency’s actual or constructive possession reached directly under Section 901 of the RTKL and records in the possession of third parties that are indirectly accessible through Section 506(d) of the RTKL. *See Weaver v.*

*Fox Chapel Area School District*, OOR Dkt. AP 2013-1462, 5 2013 PA O.O.R.D. LEXIS 842; 65 P.S. § 67.901; see also 65 P.S. § 67.506(d)(1) **(requiring agencies to provide records in the hands of third party contractors)**).

Section 506 of the RTKL provides that: “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[.]” 65 P.S. § 67.506(d)(1). In *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, the Commonwealth Court explained that records “in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency” are presumptively public records subject to public access, “so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL.” 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011); see also 65 P.S. § 67.305(a); *Makanvand v. Borough of Loganville*, OOR Dkt. AP 2012-0338, 2012 PA. O.O.R.D LEXIS 270; *Schillinger v. Lackawanna County*, OOR Dkt. AP 2009-1059, 2010 PA O.O.R.D LEXIS 93.

The law explicitly provides for how an agency must determine whether it has possession of a record, and what it must do when it has constructive possession - the concept of accessing records “of” an agency that are outside an agency's possession, but are within its legal custody or control. *See, United Healthcare of Pennsylvania, Inc. v. Baron*, 171 A.3d 943, 958–60 (Pa. Commw. Ct. 2017) (citing *Bagwell v. Dep't of Educ.*, 76 A.3d 81 (Pa. Cmwlth. 2013) (*en banc*) (non-agency records may qualify as “of” agency when they document agency activity; assess nexus of agency to record).

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 Pa. Stat. Ann. § 67.506.**

Real Alternatives itself acknowledges that it performs a governmental function for DHS. As the OOR stated on Page 8 of its Final Determination:

“Real Alternatives acknowledges that it performs a governmental function, namely, ‘to provide counseling, referral and other specified services for alternatives to abortion.’ R. 9.

DHS attested in relevant part as follows:

8. I provided all of the documents in my possession, responsive to the [R]equest....

12. The Department does not receive the records requested in [Items] 1, 2, and 3 of the [R]equest in the general course of monitoring the grant agreement with [Real Alternatives].... R. 7.

DHS may have in fact provided all the documents in its possession, but that does not relieve it of its requirements under constructive possession to obtain them from Real Alternatives, under the law.

**Item 2: OOR erred in holding that Item 2 was not reachable under 506(d).**

The OOR decision stated:

“Real Alternatives has demonstrated that the records responsive to Item to of the request, i.e., the Service Provider Monthly Invoices, are not part of the Grant Agreement with the Department. Real Alternatives has likewise established that the Service Provider Monthly Invoices are not provided to the Department, and the Department does not review or approve them. As such, the Service Provider Monthly Invoices are not subject to public access under 506(d)(1). R. 175-186.

However, the OOR reached the opposite conclusion in a Final Determination involving different requestors seeking financial records of a third-party that contracted with an agency to perform a governmental service. Since 2013, the OOR has handled a long-line of cases involving the City of Monroeville and a requestor named John Yakim.

The most recent is compelling. In *Yakim v. Municipality of Monroeville and Ambulance Fire Station No. 5*, OOR Dkt. 2017-2241, the requestor sought “all ambulance bills submitted and all records of payments

received for any hospital to hospital transfer by any of Monroeville Fire Station 5's ambulances.”

The agency and the third-party, a Fire Company, argued – as DHS and the OOR argue here – that it used a third-party billing subcontractor for receipt and processing of bills and records related to ambulance service responses, and that the information collected was not a term of the Fire Company's agreement with the Municipality. In that case, the Municipality of Monroeville, as did DHS, submitted a sworn affidavit that it did not possess the records and was not required to obtain them under 506(d) as the records sought were not part of their contract, and that the third-party was not required to provide that information to the agency. The OOR 2017 Final Determination, which ordered release of those records, bears quoting at length:

“As a preliminary matter, it is undisputed that the Municipality contracts with the Fire Company to carry out essential governmental functions—including ambulance services, among other things. *See, e.g., Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2017-0515, 2017 PA O.O.R.D. LEXIS 445.

The requested bills and payments received for hospital to hospital ambulance transfers are “directly related” to that function, as they pertain to the collection of funds by the Fire Company for the provision of ambulance services within the Municipality—the contracted governmental function. *See id.; Romig v. Macungie Borough*, OOR Dkt. AP 2017- 0441, 2017 PA O.O.R.D. LEXIS 480 (holding that an agency was required to obtain copies of firefighter

certificates from a fire company because those records “directly relate[] to the provision of fire protection services”).

The Municipality and Fire Company argue that, because Fire Company is not contractually obligated to provide the Municipality information regarding billing for emergency medical services, the requested information does not directly relate to the delegated governmental function. However, because this Request seeks records documenting the Fire Company’s provision of ambulance services pursuant to the Fire Service Agreement, the records relate directly to the Municipality’s delegation of governmental authority to the Fire Company even though the contract does not expressly require the Fire Company to provide the requested billing information to the Municipality. *See A Second Chance, Inc.*, 61 A.3d at 345 (“[t]he ‘directly relates’ test ... focuses on what services are performed and how they are performed, not who performs them”); *Monaco and IBEW Local No. 98 v. Pa. Dep’t of Gen. Servs.*, OOR Dkt. AP 2015-0826, 2015 PA O.O.R.D. LEXIS 1067; *Yakim*, OOR Dkt. AP 2013-1894, 2013 PA O.O.R.D. LEXIS 1150 (finding that “financial expenditures ... in furtherance of the provision of emergency services directly relate to the contracted governmental function”). Thus, the records are subject to access under Section 506(d) of the RTKL. *Yakim*, OOR Dkt. AP 2017-0747, May 17, 2017, quoting *Yakim*, OOR Dkt. AP 2013-1894, 2013 PA O.O.R.D. LEXIS 1150.

**Item 3: OOR erred in holding that Records responsive to Item 3 of the request do not exist.**

The OOR held that Real Alternatives does not possess Item 3 based on the affidavit of Director Herrling.

The Petitioner sought the following records:

“Paragraph 3 of your request is denied. The department does not have the possess the records responsive to your request. The department contacted Real Alternatives regarding your request for documents and Real Alternatives has asserted that no such records exist. Furthermore, Real Alternatives asserts that even if the documents existed, they would not be subject to access based on the following:

- The requested documents are not “records” at all, let alone “public records” since they do not document a transaction or activity of an agency.
- The request seeks private documents of a private party. Private documents of a private party are only subject to access under Section 506(d) of the RTK1, and the invoices, receipts and expenditure documentation held by real alternatives related to advertising and promotion are not directly related to any governmental function performed by Real Alternatives under a contract with any Commonwealth Agency.” [Nov. 15, 2017 denial letter by DHS ORO Andrea Banks].

Director Herrling attested that “After searching my records, I did not physically have any records responsive to [Item]...3 of the request.” R.8. While this may be a true statement, it is also irrelevant. The question isn’t whether the records are in her physical possession, but rather, whether the agency is required to obtain them under 506(d). Petitioner argues, *supra*, that this information is public record and should be held so by the Court.

**b. DHS Failed to Support the Third-Party’s Conclusion that Records Sought Constitute Confidential Proprietary Information.**

Because the OOR concluded that the Agency did not have possession of the records, it did not address DHS’s underlying argument that the records are exempt pursuant to the confidential proprietary and trade secret exemptions. Petitioner addresses these arguments here. DHS conducted no analysis of whether the records sought constitute trade secrets or confidential

proprietary information, and merely accepted a conclusory statement – with no evidentiary proof – to support such an exemption.

Section 708(b)(11) of the RTKL exempts from disclosure a record that “constitutes or reveals a trade secret or confidential proprietary information.” See 65 P.S. § 67.708(b)(11). The RTKL defines “confidential proprietary information” as “[c]ommercial 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 (emphasis added). An agency must establish that both elements of this two-part test are met in order for the exemption to apply. *See, e.g., Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375.

### **III. DHS FAILED TO SUPPORT THE THIRD-PARTY’S CONCLUSION THAT RECORDS ARE TRADE SECRETS.**

DHS states that Real Alternatives asserts that the requested records constitute trade secrets, but provides no analysis or support for that position.

Section 708(b)(11) exempts from disclosure “[a] record that constitutes or reveals a trade secret.” 65 P.S. § 67.708(b)(11). The RTKL defines a “trade secret” as: 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.

In *Com., Dep't of Pub. Welfare v. Eiseman*, the Pennsylvania Supreme Court held that the RTKL trade secret exception “supplants the more general application of the Uniform Trade Secrets Act based, *inter alia*, on the principle of statutory construction that more specific provisions control over general ones.” 633 Pa. 366, 387, 125 A.3d 19, 32 (2015) (citing 1 Pa.C.S. § 1933, holding that a special provision in a statute shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail).

Under the case law addressing the RTKL definition of a “trade secret,” the Pennsylvania Supreme Court has held that records which are considered financial do not fall under the RTKL trade secret exception. *Com., Dep't of Pub. Welfare v. Eiseman*, 633 Pa. 366, 387, 125 A.3d 19, 32 (2015). The records at issue here deal with an agency’s use of public monies,

and should not fall under the trade secret exception in 65 P.S. § 67.708(b)(11).

Likewise, ticket information from state lottery records, specifically the number and amount of winning tickets sold by retailer, is not a “trade secret” protected from disclosure under trade secrets exception of Right-to-Know Law (RTKL). *Pennsylvania Dept. of Revenue v. Flemming*, 2015 WL 5457688, Unreported, CmwltH.2015. This determination was based on the facts that the Department of Revenue did not protect secrecy of requested information in all circumstances. *See id.*

There is no “trade secret” application of these records. The records sought concern the disbursement of public funds, and therefore should be made public. *Com., Dep't of Pub. Welfare v. Eiseman*, 633 Pa. 366, 387, 125 A.3d 19, 32 (2015).

DHS is required by law to presume that records sought are public, unless one of the enumerated exceptions applies. The Nov. 15, 2017 denial letter provides no information as to what, if any, review DHS undertook to ascertain whether the records are public and instead simply repeated for each request for records that the third-party determined they were not public. There is a great deal at stake to Pennsylvania taxpayers. DHS provides a \$12.7 million, one and a half year contract with Real Alternatives and

administers the program. The need for scrutiny of taxpayer monies is paramount to any agency, and any grantee, regardless of the philosophical foundations of the organizations. DHS should be required to comport with all aspects of the RTKL to ensure maximum transparency of taxpayer dollars.

## CONCLUSION

The RTKL request at issue is a garden-variety request. Petitioner respectfully asks the Court to reverse **the Final Determination of the Office of Open Records dated January 22, 2018**, hold that the records in question are public, and order DHS to provide unredacted copies of the records sought.

Respectfully Submitted,

/s/ Terry L. Mutchler

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

IN THE MATTER OF :  
 :  
 EQUITY FORWARD : No. 225 CD 2018  
 :  
 *Mary Alice Carter,* :  
 Petitioner :  
 :  
 :  
 v. :  
 :  
 PENNSYLVANIA DEPARTMENT :  
 OF HUMAN SERVICES and :  
 REAL ALTERNATIVES, :  
 Respondents :

**PROOF OF SERVICE**

I, Terry L. Mutchler, hereby certify that on Monday, May 14, 2018, I caused the foregoing Brief of Appellants to be filed with the Court, and served the same via email upon the following:

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