



Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

June 29, 2016

Submitted Online Only

The Honorable Tom Wheeler, Chairman
Federal Communications Commission
445 12th St. S.W.
Washington, DC 20554

**Re: *Ex Parte Submission*
Lack of Transparency in the Prison Phone Industry
WC Docket 12-375**

Dear Chairman Wheeler:

In its Second Report and Order and Third Further Notice of Proposed Rulemaking (2nd Order and 3rd FNPRM), released November 5, 2015, the Federal Communications Commission (FCC or the Commission) found adequate evidence to support the position of the Human Rights Defense Center (HRDC) that “members of the public must ‘unnecessarily spend time and money to obtain records’ of ICS contracts.”¹ Not only does this finding still remain true, in the instance reported below, Global Tel*Link (GTL) is now suing HRDC for doing nothing more than asserting its right to obtain public records.

Public Records Request

On March 27, 2015, I filed a public records request on behalf of *Prison Legal News* (PLN) with the Pennsylvania Department of Corrections (PA DOC). The request included, in part, ICS contracts and documents detailing kickbacks paid to the PA DOC dating back to 2010, as well as the fees and rates required to be paid by prisoners and their families. In May 2015, the PA DOC produced its ICS contracts with GTL and Securus Technologies; the contracts were so heavily redacted it rendered the documents near-useless. *PLN* challenged the redactions in an appeal filed on June 3, 2015 with Pennsylvania’s Office of Open Records (OOR). (**Attachment 1**). GTL submitted a request to participate in the appeal on June 19, 2015, along with a position statement and declaration of Steve Montanaro. (**Attachment 2**). Securus Technologies filed a request to participate on June 26, 2015, and also filed a position statement and sworn affidavit of Steven Cadwell. (**Attachment 3**).

¹ Second Report and Order and Third Further Notice of Proposed Rulemaking, Released November 5, 2015, at ¶202.

The OOR issued a Final Determination on August 12, 2015 in which PLN's appeal was granted in part and denied in part, and the PA DOC was required to take further action. **(Attachment 4)**. HRDC notes with interest FN1 of the Final Determination, which states that while JPay did not seek to participate as a party with a direct interest, "JPay consulted with the Department regarding redactions." While those redactions would not have been contained in ICS contracts because JPay does not provide prison phone services (except to the extent that JPay is owned by Securus), this footnote tells us how much influence the kickbacks paid to correctional facilities truly give to vendors. In this case, JPay was able to "consult" with the PA DOC to determine what information taxpayers should be allowed to see via public record requests, making a mockery of the public records process and only strengthening the argument for complete transparency with regard to ICS contracts.

A reading of the OOR's Final Determination shows that the PA DOC had incorrectly redacted bidder financial information (possibly at the behest of the ICS providers); this information is not subject to exemption under Pennsylvania's Right to Know Law (RTKL) when it is made part of a government contract. **(Id. at 5)**. The OOR further ruled that the PA DOC and GTL "have not met their burden of proving that this information constitutes trade secrets." **(Id. at 13)**. The OOR also held that the PA DOC had not met its burden of proving that either the Building Plan or signatures in the contracts were exempt from disclosure. **(Id. at 19)**.

In conclusion, the OOR determined that PLN's appeal was "subject to the redaction of tax information, [Securus] trade secrets, and personal identification" and that "the Department is required to provide the Requestor with copies of the records within thirty days." While GTL has appealed the Final Determination of the OOR concerning its contracts only, Securus and JPay did not, yet the PA DOC still refuses to produce those documents. We most recently contacted the PA DOC regarding its obligation to produce documents under the Final Determination on March 15, 2015. **(Attachment 5)**. The PA DOC is refusing to produce any documents, even documents not under appeal and as to which the OOR's decision is final and binding, until resolution of the separate GTL appeal. **(Attachment 6)**.

GTL Appeal of OOR's Final Determination

GTL has appealed the OOR's Final Determination (Commonwealth Court of Pennsylvania, No. 1678 CD 2015), and the initial briefing period has concluded. Petitioner GTL's Brief was filed December 29, 2015 **(Attachment 7)**, and Respondents' PLN and Paul Wright's Brief was filed March 16, 2016 **(Attachment 8)**.

HRDC would like to draw the Commission's attention to the vitriolic nature of the Reply Brief filed by GTL on April 18, 2016. **(Attachment 9)**. While this is not the appropriate venue to detail the numerous mischaracterizations contained in GTL's Reply, we will highlight the title of Section C: "This case is not the place for a crusade." **Id. at 19**. Historically, GTL has not been fond of HRDC's use of the term "kickback" as it relates to payments made to detention facilities in exchange for monopoly ICS contracts.

In June 2015, HRDC was required to retain counsel to respond to a cease and desist letter issued by GTL that addressed, in part, this very same issue. As Bruce Johnson of Davis Wright Tremaine LLP noted at that time, it is HRDC's opinion that "the term 'kickback' accurately describes the prisons' practice of collecting a percentage of telephone revenue in exchange for permission to render services to prisoners and their families under a monopoly contract."²

HRDC's opinion on this matter has not changed. In its Reply, GTL completely ignored Mr. Johnson's further statement that "HRDC has never said or claimed that the kickbacks GTL provides to government officials are illegal" when it informed the Commonwealth Court of Pennsylvania that HRDC's use of the term kickbacks "is an accusation that GTL is engaged in criminal activity."

The Heightened Need for Transparency in the Prison Phone Industry

The Commission is well aware of the need for transparency in the prison phone industry and said as much in its 2nd Order and 3rd FNPRM. While we appreciate the fact that the FCC has "encourage[d] ICS providers and facilities to make their contracts publicly available,"³ it is not enough.

GTL does not post ICS rates on its website. In an answer to a (not-so-easy-to-find) Frequently Asked Question, GTL states:

Q. What are the rates for my phone calls?

A. Rates vary by facility. To find out what your rates are, listen to the prompts (when the inmate calls you) and press the corresponding number to verify the call rates before you accept the incoming call. You may also contact Customer Service to request the rates for your Facility.

(Attachment 10).

Have you ever tried to call GTL's customer service? It is not possible for callers to dispute incorrect rate charges at a later time if all the "proof" of the rate they should have been charged is what a computer told them "verbally" at the time of a call. Rates change – do callers have to check every time they accept a call? Many prisoners' families are poor, often times with half their income eliminated due to the incarceration of a loved one. These families don't have access to the legal resources required to fight tooth and nail to obtain ICS contract information, including phone rates, that should be easily accessible under public records laws.

Except for HRDC, no one else has ever attempted to gather prison phone contracts nationally and analyze them. No one has ever had the resources to do a comprehensive collection and analysis of jail phone records. The reality is that these contracts and the data related to kickbacks paid by ICS providers to government agencies in exchange for these monopoly contracts are shrouded in secrecy and very difficult to obtain. In the Pennsylvania public records case cited above, HRDC was forced to retain counsel after GTL filed suit against both HRDC

² Human Rights Defense Center Comment for WC Docket 12-375, filed July 14, 2015, Attachment 8.

³ Second Report and Order and Third Further Notice of Proposed Rulemaking, Released November 5, 2015, at ¶202.

and myself personally when the company appealed the OOR's Final Determination. (See, e.g. **Attachment 7**). What are families and concerned citizens supposed to do? We have previously noted there is also criminal corruption in the ICS process, which should not come as a surprise given the secrecy which surrounds the ICS industry.

We note that neither the Commission nor anyone else has the staff, time or resources to gather and review this data. To date, HRDC is the only organization which has done so for state prison systems, which has been, and remains, a significant drain on our limited resources; also, we lack the resources to gather the ICS data for the nation's 3,200 jails in a systemic manner. We have had to sue the state prison systems of Mississippi and Illinois to obtain their prison phone contracts, belying the notion that this information is "public." For the states we have not had to sue, we have paid thousands of dollars in copying and other fees to obtain this same basic data, which also belies the notion that the information is "free."

Once again, we call on the Commission to require all ICS providers to post their ICS contracts (with rate information), kickback data and all other payments made for these monopoly contracts on their company websites within 30 days of contract execution, and that they be kept up-to-date with easy access to effective dates. We would also ask that such records be retained online and made publicly available for at least ten years.

Thank you for your time and attention in this regard.

Sincerely,



Paul Wright.
Executive Director, HRDC

Attachment 1



Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

June 3, 2015

VIA EMAIL (openrecords@pa.gov) & FACSIMILE TRANSMISSION (717-425-5343)

Office of Open Records
Executive Director
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

RECEIVED

JUN 03 2015

OFFICE OF OPEN RECORDS

RE: **Appeal of the Pennsylvania Department of Corrections' May 12, 2015 Response to PLN's March 27, 2015 Request Pursuant to Pennsylvania's Right to Know Law**

Dear Sir or Madam,

I write on behalf of Prison Legal News (PLN), a news media organization, to appeal the Pennsylvania Department of Corrections' (PDOC) May 12, 2015 response to its public records request pursuant to Pennsylvania's Right to Know Law (RTKL). PDOC's response is insufficient and fails to provide adequate rationale for its denial of the requested public records. Accordingly, I request that the withheld documents be produced immediately without redaction.

FACTS

On March 27, 2015, PLN submitted a records request to Mr. Andrew Filkosky, Agency Open Records Officer for PDOC, pursuant to Pennsylvania's RTKL. See Exhibit A (March 27, 2015 RTKL Request). On May 12, 2015, PLN was provided with a response to its request. See Exhibit B (May 12, 2015 RTKL Response). PDOC produced approximately 3,195 documents in response to PLN's request. Many of these documents contain redacted sections or pages with no identifying information or log describing the reason why the information was withheld.¹ Further, there is no description of the redacted contents in order to evaluate whether any exception pursuant to RTKL would apply. PLN created a chart of these redactions to assist in your review. See Exhibit C (Chart of Redactions). Rather, PDOC simply provided a list of general objections ostensibly justifying its redactions to "protect nonpublic and sensitive data." These exceptions lack merit as discussed below.

¹ Some documents were withheld in their entirety because PDOC claims that these documents "do not currently exist in the possession of the Department of Corrections." 65 P.S. § 67.705. Accordingly, PLN relies on PDOC's claim, but reserves the right to submit a subsequent appeal if it is determined that these documents are within PDOC's custody and control.

GROUNDS FOR APPEAL

This correspondence constitutes a timely appeal of the May 12, 2015 response to PLN's RTKL request – 15 business days subsequent to the mailing of the responses. The PDOC is a Commonwealth agency required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *appeal granted*, 15 A.3d 427 (Pa. 2011). The failure to provide complete documents without redaction is antithetical to RTKL's very purpose. Moreover, the redacted information is not properly subject to any exemptions under the RTKL and has been improperly redacted from these documents.

“Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9.” 65 P.S. § 67.706. Accordingly, the propriety of this denial is ripe for review. In so doing, the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, the RTKL states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Also, “if an agency's response is a denial of a written request for access, whether in whole in part, the denial shall be issued in writing and shall include:...(2) the specific reasons for the denial, including a citation of supporting legal authority; (3) the typed or printed name, title, business address, business telephone number and signature of the open-records office on whose authority the denial is issued; (4) date of the response; [and] (5) the procedure to appeal the denial of access under this act.” 65 P.S. § 67.903(2)(3)(5). PDOC's asserted reasons or justifications are improper for the following reasons:

- (1) 65 P.S. § 67.708 (b)(1)(ii); *Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwth. 1998); *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa. Cmwth. 1997) – excluding “records [that] fall within the personal security exemption of the RTKL.”

The personal security exception protects any record, the disclosure of which “would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. §67.708(b)(1)(ii). To establish this exception, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to an individual's security if the information sought is not protected. *Governor's Office of Admin. V. Purcell*, 35 A.3d 811 (Pa. Cmwth. 2011). Substantial and demonstrable is defined as actual or real and apparent. *Id.* “More than mere conjecture is needed.” *Id.* at 820 (citing *Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Cmwth. 2010)).

It should be noted that none of the parts of PLN's Request specifically seeks identities of individuals. To the extent that other documents or portions of documents reference individuals, it is PDOC's burden to show how such disclosure would create demonstrable risk of physical harm or the personal security of that individual. PDOC has provided no such rationale or

explanation and just relies on the quoted exemption to justify the redactions. PDOC is relying on “mere conjecture” as prohibited by the Courts.

(2) 65 P.S. § 67.708(b)(2); *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa. Cmwlth. 1997) – excluding “records maintained by an agency in connection with law enforcement or other public safety or preparedness or a public protection activity.”

PDOC bears the burden of proving by a preponderance of the evidence that the disclosure of these records “would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity” 65 P.S. §67.708(b)(2); *Adams v. Pennsylvania State Police*, 51 A.3d 322 (Pa. Cmwlth. 2012). To establish this exception, an agency must show: (1) the record at issue relates to a law enforcement or public safety activity; and, (2) disclosure of the record would be “reasonably likely” to threaten public safety or a public protection activity. *Id.* In interpreting the “reasonably likely” part of the test, as with all the security-related exceptions, the reviewer must look to the likelihood that disclosure would cause the alleged harm, requiring more than speculation. *See Purcell; Lutz, supra.*

PDOC has provided no justification, documentation or information that would allow a reviewer to determine whether the documents sought contain information that could jeopardize public safety or preparedness, or public protection activity. There is no affidavit or declaration regarding the validity of the exception. Even if an affidavit was provided, speculation and conclusory statements in an affidavit do not show a reasonable likelihood of a threat to security. *Lutz, supra.* An affidavit that does nothing more than state that, based on the affiant’s professional experience, the disclosure of the information “would create a substantial risk of physical harm” for the agency and the public is insufficient. *See Harrisburg Area Community College (HACC) v. Office of Open Records*, (Pa. Cmwlth., No. 2110 C.D. 2009, 2011 Pa. Commw. Unpub. LEXIS 378, filed May 17, 2011) (unreported). Here, there is nothing but speculation. Accordingly, this exemption is not sufficient to permit the redaction of the records.

(3) 65 P.S. § 67.708(b)(17). *See Amro v Office of AG*, 783 A.2d 897, (Pa. Cmwlth. 2001); *Senk v. Commonwealth*, 521 A.2d 532 (Pa. Cmwlth. 1987) – excluding “records of an agency relating to a noncriminal investigation, including, but not limited to: complaints submitted to an agency; investigative materials, notes, correspondence and reports; records that include the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169), known as the Whistleblower Law; records that include information made confidential by law; work papers underlying an audit; and records that, if disclosed would reveal the institution, progress or result of an agency investigation, deprive a person of the right to an impartial adjudication; constitute an unwarranted invasion of privacy, hinder an agency's ability to secure an administrative or civil sanction, or endanger the life or physical safety of an individual.”

The noncriminal investigative exemption protects agency records “relating to a noncriminal investigation.” 65 P.S. §67.708(b)(17). Again, PDOC did not explain how or where such investigations fall within the realm of responsive records. It is difficult to tell whether the records could be deemed “investigations” as that term has been interpreted by the courts. *See Dep’t of Health v. Office of Open Records*, 4 A.3d 803 (Pa. Cmwlth. 2010) (agency must show

“a systematic searching or probe” was conducted of a noncriminal matter). Therefore, it is impossible to discern any merit in this exemption.

- (4) 65 P.S. § 67.708(b)(10)(i)(A); *see also* *Lavalle v. Office of General Counsel*, 769 A.2d 449 (Pa. 2001); *Tribune-Review Publishing Co. v. Department of Community & Economic Development*, 814 A.2d 1261, 1263-1264 (Pa. Cmwlth. 2003); *City Council v. Greene*, 856 A.2d 217, 225 n.6 (Pa. Cmwlth. 2004) – excluding “information [that] outlines the internal, predecisional deliberative process of the Department’s medical care administrators. Disclosure of the requested information would reveal the process and content of documents being used by agency decision makers in pre-decisional deliberations.”

To establish the applicability of this exemption, an agency must show: (1) the information is internal to the agency; (2) the information is deliberative in character; and, (3) the information is prior to a related decision, and thus “predecisional.” *Carey v. Dep’t of Corr.*, 61 A.3d 367 (Pa. Cmwlth. 2013). “Only information that constitutes ‘confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice’ is protected as ‘deliberative.’” *Id.* at 378 (quoting *In re Interbranch Comm’n on Juvenile Justice*, 605 Pa. 224, 988 A.2d 1269, 1277-78 (Pa. 2010) (quotation omitted)).

The cited exemption makes no attempt to explain or describe how the requested documents would be deemed predecisional, and therefore subject to redaction or non-disclosure. Simply citing to and quoting this exemption provides no guidance to properly challenge the denial of the record, nor does it purport to give any adequate rationale for the non-disclosure.

- (5) 65 P.S. § 67.708(b)(6) – excluding “personal identification information from disclosure.”

Again, there is no way to determine what personal identification information PDOC seeks to withhold from disclosure. There are recognized exceptions to disclosure of personal identification that apply, and PDOC has made no attempt to clarify or otherwise describe the nature of the identifying information. *See e.g.*, *Office of the Lieutenant Governor v. Mohn*, 67 A.3d 123 (Pa. Commw. Ct. 2013) (Home address of an employee of the Office of the Pennsylvania Lieutenant Governor was not exempt from disclosure under the personal identification information exception under § 708(b)(1)(ii) (65 P.S. § 67.708(b)(1)(ii)) as there was no constitutional privacy right under Pa. Const. art. I, §§ 1 and 8 in one’s home address); *Allegheny County Dep’t of Admin. Servs. v. Parsons*, 61 A.3d 336 (Pa. Commw. Ct. 2013), appeal denied by 72 A.3d 604, (Pa. 2013) (Date of births are not categorically exempt under the Personal Identification Exception of the Right to Know Law).

- (6) 65 P.S. § 67.708(b)(11) – excluding “from disclosure records that constitute or reveal trade secrets or confidential proprietary information.”

Trade secrets are defined as, “[i]nformation including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives 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. 12 Pa. C.S. § 5302.

Pennsylvania courts confer “trade secret” status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to his business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS §757 (1965)). To constitute a “trade secret” under the Trade Secrets Act, it must be an “actual secret of peculiar importance to the business and constitute competitive value to the owner.” *Parsons v. Pennsylvania Higher Education Assistance Agency (PHEAA)*, 910 A.2d 177, 185 (Pa. Cmwlth. 2006). The most critical criteria are “substantial secrecy and competitive value.” *Crum, supra*.

Importantly, whether information qualifies as a “trade secret” is a highly fact-specific inquiry that cannot be distilled to a pure matter of law. There is nothing in the record or response provided by PDOC that would qualify any determination that a document or portion of a document is a trade secret. Absent any specific fact inquiry or information, PDOC’s reliance on this exemption lacks merit.

- (7) 65 P.S. § 67.708(b)(26); Procurement Handbook, Part I, Chapter 50 – excluding “proposals pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513.”**

The RTKL provides that an agency may withhold “financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability...” 65 P.S. § 67.708(b)(26). PDOC provided no evidence that any of the documents can be construed as financial information expressly exempt under the RTKL. PDOC should be required to submit information, by affidavit or declaration, describing and attesting to why this exception would apply to any redactions.

- (8) 65 P.S. § 67.708(b)(27) – excluding “records or information relating to communications between an agency and its insurance carrier, administrative service organization or risk management office.”**

Section 708(b)(27) provides that records “relating to a communication between an agency and its insurance carrier, administrative service organization, or risk management office” are protected from disclosure. 65 P.S. §67.708(b)(27). Under Section 708(a), PDOC bears the burden of proving the exception’s application by a preponderance of the evidence, meaning “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). PDOC failed to provide any affidavit or declaration that the responsive record (and redactions) is correspondence to its insurance carrier. There is no information to establish that any of the responsive documents pertained to putting a claim into its insurance carrier, or for insurance notification processes. Accordingly, because there is nothing to qualify the records as relating to

communication to an insurance carrier, it is not exempt under this exception and was improperly withheld.

- (9) 65 P.S. § 67. 708(b)(3) – excluding “records, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system.”**

PLN’s requests do not call for any documents that can reasonably be construed as seeking information that can endanger the safety or physical security of a building, public utility, resource, infrastructure, facility or information storage system. PDOC’s strange reliance on this exemption in order to justify redactions or the withholding of documents undermines its rationale. Because none of the documents requested would fall under this exemption, PDOC has no basis for the redactions.

- (10) Excluding “[p]ersonnel records [which] are not public records under the RTKL. Rather, access to such records is governed by the Inspection of Personnel Files Law which permits only authorized individuals to inspect records. 43 P.S. §§ 1321 et seq.”**

PDOC’s response provides no explanation as to which requests purports to seek personnel records. To the extent that there are records that would otherwise be governed by the Inspection of Personnel Files Law, it will be necessary to identify such documents – without clarification, such a general objection serves no utility and lacks merit.

- (11) Excluding “information [] covered by the deliberative process privilege and is not a public record under the law. 65 P.S. § 67.102 (See definitions of “public record” and “privilege”); 65 P.S. § 67.506(c). The deliberative process privilege applies to pre-decisional communications which reflect on legal or policy matters. *Tribune-Review Publishing Co. v. Department of Community & Economic Development*, 814 A.2d 1261, 1263-1264 (Pa. Cmwlth. 2003); See also *Lavalle v. Office of General Counsel* 769 A.2d 449 (Pa. 2001); *City Council v. Greene*, 856 A.2d 217, 225 n.6 (Pa. Cmwlth. 2004).**

To assert the deliberative process privilege, the government must: (1) Invoke it through an agency head or her subordinate who is personally knowledgeable about the information sought to be protected; (2) Identify the specific information that is protected by the privilege; (3) Give reasons for maintaining the confidentiality of the information; and (4) Demonstrate that the privileged information is: pre-decisional; and deliberative. *Commonwealth v. Vartan*, 733 A.2d 1258, 1265 (Pa. 1999) (discussing Pennsylvania’s version of the deliberative process privilege)). PDOC has not made any effort to identify specific information that would fall within this exemption or reasons why such information or documents should remain confidential. PDOC’s failure to meet these threshold requirements warrants the grant of the appeal and disclosure of the documents without redaction.

Please address these issues by sustaining this appeal and ordering the release of all the documents that have been provided to date without redaction of any information. Thank you in advance for your attention to and cooperation in this important matter. I look forward to your

prompt response. *See* 65 P.S. § 66.3-5(b). Please contact me via email if you have any questions or comments, as that is the most efficient means of communicating with me.

Sincerely,

A handwritten signature in black ink, appearing to be 'P. Wright', written in a cursive style.

Paul Wright, Editor
Prison Legal News

cc: Andrew Filkosky
Enclosures

Exhibit A



Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

March 27, 2015

Sent via email to: RA-docrighttoknow@pa.gov

Andrew Filkosky, Agency Open Records Officer
Department of Corrections
Right-To-Know Law Office
Office of the Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050

Re: Pennsylvania Right-to-Know Law Law Request

As editor of the monthly journal *Prison Legal News*, a project of the nonprofit Human Rights Defense Center, I am requesting, pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 et seq., copies of the following documents:

1. All contracts or other agreements, including all exhibits, addenda and extensions, between the Pennsylvania Department of Corrections (PA DOC) and any provider of telephone services for use by prisoners or other detainees that have been in effect at any time from January 1, 2013 to present.
2. Documents detailing all payments made to or on behalf of PA DOC from or on behalf of any telephone service provider from January 1, 2013 to present.
3. Documents detailing rates for telephone calls made by prisoners or other detainees of PA DOC that have been in effect at any time from January 1, 2013 to present.
4. Documents detailing all fees related to use of telephone services by the prisoners or other detainees of PA DOC that have been in effect at any time from January 1, 2013 to present. This request specifically includes all ancillary fees incurred by people who accept calls from prisoners or other detainees, including any fees related to prepaid phone accounts.
5. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of video visitation services that have been in effect at any time from January 1, 2010 to present.

P.O. Box 1151
Lake Worth, FL 33460
Phone: 561.360.2523 Fax: 866.735.7136
pwright@prisonlegalnews.org

6. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any video visitation provider from January 1, 2010 to present.
7. Documents detailing rates for video visitation services at PA DOC that have been in effect at any time from January 1, 2010 to present.
8. Documents detailing all fees related to video visitation services at PA DOC facilities that have been in effect at any time from January 1, 2010 present.
9. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of email or electronic messaging services for use by prisoners or other detainees that have been in effect at any time from January 1, 2010 to present.
10. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any provider of email or electronic messaging services for use by prisoners or other detainees from January 1, 2010 to present.
11. Documents detailing rates email or electronic messaging services for use by prisoners or other detainees at facilities operated by PA DOC that have been in effect at any time from January 1, 2010 to present.
12. Documents detailing all ancillary fees related to email or electronic messaging services for use by prisoners or other detainees at facilities operated by PA DOC that have been in effect at any time from January 1, 2010 present.
13. All contracts or other agreements, including exhibits, addendums and extensions, between PA DOC and any provider of services used to transfer funds to people upon their release from incarceration by PA DOC, that have been in effect at any time from January 1, 2010 to present.
14. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any provider of services used to transfer funds to people upon their release from incarceration by PA DOC from January 1, 2010 to present.
15. Documents detailing all ancillary fees related to the transfer of funds to people upon their release from incarceration by PA DOC, including but not limited to all cardholder agreements that have been in effect at any time from January 1, 2010 to present.
16. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of money transfer services, including but not limited to any services whereby members of the public can send money to prisoners or other detainees for placement on their institutional accounts, that have been in effect at any time from January 1, 2010 to present.
17. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any money transfer services provider from January 1, 2010 to present.

18. Documents detailing all ancillary fees related to money transfer services, including but not limited to fees charged to send money to prisoners or other detainees for placement on their institutional accounts that have been in effect at any time from January 1, 2010 to present.
19. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of institutional commissary or canteen services that have been in effect at any time from January 1, 2010 to present.
20. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any institutional commissary or canteen services provider from January 1, 2010 to present.
21. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of prisoner package services (i.e., services that allow prisoners or other detainees to order goods from private companies, such as Union Supply, Access, Jack L. Marcus Company, etc.), that have been in effect at any time from January 1, 2010 to present.
22. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any prisoner package services provider from January 1, 2010 to present.
23. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of book ordering services used by prisoners or other detainees in effect at any time from January 1, 2010 to present.
24. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any provider of book ordering services for prisoners or other detainees from January 1, 2010 to present.

I request that the above-described public records be provided in electronic format, via email, if they exist in or can be converted to electronic format.

If you claim that any of the requested records are not a public record, or you claim a privilege not to disclose any record, please respond by identifying any such records and explaining your claim that it is not a public record or why it is privileged or confidential or otherwise exempt, in accordance with 65 P.S. § 67.903. Please produce all records for which you do not claim an exemption or privilege.

In accordance with 65 P.S. § 67.706, if you claim that any portion of any record is exempt, please redact that portion of the record that you believe is exempt and provide both the statutory citation to any exemption you believe is applicable and the specific reasons for your conclusion that the redacted portion of the record is exempt from disclosure and produce the remainder of the record(s).

The use of these records by our non-profit organization is likely to contribute significantly to a public understanding of the operations of PA DOC and their disclosure is clearly in the public interest. Accordingly, we request a waiver of all fees for this request. Please email all records

HRDC Pennsylvania Right-to-Know Law Request to PA DOC
March 27, 2015

responsive to this request to Ryan Barrett: rbarrett@prisonlegalnews.org. I look forward to your prompt reply.

Sincerely,

A handwritten signature in black ink, appearing to be 'P. Wright', written in a cursive style.

Paul Wright
Executive Director, HRDC

Exhibit B

**Pennsylvania Department of Corrections
Right-to-Know Office
Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050
Telephone 717-728-7763
Fax 717-728-0312**

May 12, 2015

Paul Wright
Executive Director, HRDC
Human Rights Defense Center
P.O. Box 1151
Lake Worth, FL 33460

Re: RTKL 0524-15

Dear Mr. Wright,

This letter acknowledges receipt by the Department of Corrections of your written request for records under the Pennsylvania Right-to-Know Law (RTKL). Your request was received by this office on March 27, 2015. On March 31, 2015, an interim response was sent to you extending the final response date to May 1, 2015. On April 20, 2015, you agreed to an additional extension of time to May 20, 2015. A copy of the original request letter and additional correspondence is enclosed.

Item 1 of your request is granted in part. Specifically, you are granted access to a redacted version of the Global Tel Link Corporation contract, including all amendments, and a redacted version of the Securus Technologies, Inc. contract, which has not yet been amended. The redacted Global Tel Link Corporation contract is located at the corresponding web address below and the amendments responsive to this item of your request and are included on the enclosed compact disc (Item 1 – Global Tel Link Corporation Contract Amendments). The redacted Securus Technologies, Inc. contract included on the enclosed compact disc (Item 1 – Securus Technologies, Inc.). Please note, a document containing a web link to the following contract is also included on the enclosed compact disc:

Global Tel Link Corporation: <http://contracts.patreasury.gov/View.aspx?ContractID=125566>

Please note that the contracts granted in response to item 1 of your request must be redacted to protect nonpublic and sensitive data. Insofar as redaction constitutes a denial to records, the basis for the denial and instructions for filing exceptions are outlined below in accordance with the law.

Item 2 of your request is granted. The payments made to the Department from the inmate telephone service providers from 2013 to the present amount to \$16,184,405.84.

Item 3 and 4 of your request are granted. The rates/fees pertaining to the Global Tel Link Corp contract are included in the records granted in response to item 1 of your request (Item 1 – Global Tel Link Corp Contract Amendments). The rates/fees pertaining to Securus Technologies, Inc. are included on the enclosed compact disc (Items 3 and 4 – Securus Technologies, Inc. Fees - Rates).

Item 5 of your request is granted in part. Specifically, you are granted access to redacted versions of the contracts with Scotlandyard Security Services, Inc. and PA Prison Society, including all amendments. The redacted records responsive to this item of your request are included on the enclosed compact disc (Item 5 – Scotlandyard Security Services, Inc. and Item 5 – PA Prison Society). Please note that the contracts granted in response to this item of your request must be redacted to protect nonpublic and sensitive data. Insofar as redaction constitutes a denial to records, the basis for the denial and instructions for filing exceptions are outlined below in accordance with the law.

Item 6 of your request is denied for the following reason:

- The record(s) that you requested do not currently exist in the possession of the Department of Corrections. When responding to a request for access, an agency is not required to create a record which does not currently exist or to compile, format or organize a public record in a manner in which it does not currently compile, format or organize the public record. 65 P.S. § 67.705; *See Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) ("The Department cannot grant access to a record that does not exist. Because under the current RTKL the Department cannot be made to create a record which does not exist, the OOR properly denied [the] ... appeal."); *See also Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998).

Items 7 and 8 of your request are granted. The requested rates/fees are included in the contracts granted in response to item 5 of your request.

Item 9 of your request is granted in part. Specifically, you are granted access to a redacted version of the JPay, Inc. contract, including all amendments, and a redacted version of the Global Tel Link Corporation contract, which has not yet been amended. The contracts responsive to this item of your request are included on the enclosed compact disc (Item 9 – JPay, Inc. and Item 9 – Global Tel Link Corporation). Please note that the contracts granted in response to this item of your request must be redacted to protect nonpublic and sensitive data. Insofar as redaction constitutes a denial to records, the basis for the denial and instructions for filing exceptions are outlined below in accordance with the law.

Item 10 of your request is denied for the following reason:

- The record(s) that you requested do not currently exist in the possession of the Department of Corrections. When responding to a request for access, an agency is not required to create a record which does not currently exist or to compile, format or organize a public record in a manner in which it does not currently compile, format or organize the public record. 65 P.S. § 67.705; *See Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) ("The Department cannot grant access to a record that does not exist. Because under the current RTKL the Department cannot be made to create a record which does not exist, the OOR properly denied [the] ... appeal."); *See also Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998).

Items 11 and 12 of your request are granted. The requested rates/fees are included in the contracts granted in response to item 9 of your request. Additional information pertaining to the JPay, Inc. electronic messaging rates/fees is included on the enclosed compact disc as well (Items 11 and 12 – JPay, Inc.).

Items 13, 14, and 15 of your request are denied for the following reason:

- The record(s) that you requested do not currently exist in the possession of the Department of Corrections. When responding to a request for access, an agency is not required to create a record which does not currently exist or to compile, format or organize a public record in a manner in which it does not currently compile, format or organize the public record. 65 P.S. § 67.705; *See Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) ("The Department cannot grant access to a record that does not exist. Because under the current RTKL the Department cannot be made to create a record which does not exist, the OOR properly denied [the] ... appeal."); *See also Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998).

Item 16 of your request is granted in part. Specifically, you are granted access to a redacted version of the JPay, Inc. contract, including all amendments, which was granted in response to item 9 of your request and is included on the enclosed compact disc (Item 9 – JPay, Inc.). As mentioned above, this contract must be redacted to protect nonpublic and sensitive data. Insofar as redaction constitutes a denial to records, the basis for the denial and instructions for filing exceptions are outlined below in accordance with the law.

Item 17 of your request is denied for the following reason:

- The record(s) that you requested do not currently exist in the possession of the Department of Corrections. When responding to a request for access, an agency is not required to create a record which does not currently exist or to compile, format or organize a public record in a manner in which it does not currently compile, format or organize the public record. 65 P.S. § 67.705; See *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) ("The Department cannot grant access to a record that does not exist. Because under the current RTKL the Department cannot be made to create a record which does not exist, the OOR properly denied [the] ... appeal."); See also *Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998).

Item 18 of your request is granted. The requested rates/fees are included in the JPay, Inc. contract granted in response to item 9 of your request (Item 9 – JPay, Inc.). Additional information pertaining to the JPay, Inc. money transfer service rates/fees is included on the enclosed compact disc as well (Item 18 – JPay, Inc.).

Item 19 of your request is granted. The sole contract for the supply of commissary goods ended 12/31/2009. A subsequent extension was instituted. Upon the expiration of the extension, PCI entered into an Emergency Purchase Contract with various vendors. Then, a contractual bid process was implemented in 2012 to the present. The supporting contact documentation for the requested timeframe is included on the enclosed compact disc (Item 19 – Commissary Contracts [Part 1 – Part 9]).

Item 20 of your request is granted. The document showing the total payment to the Department for commissary services from January 1, 2010 to the present is included on the enclosed compact disc (Item 20 – Total Commissary Payments).

Item 21 of your request is granted. The Agreement with the Keefe Group responsive to this item of your request is included on the enclosed compact disc (Item 21 – Keefe Group).

Item 22 of your request is granted. The payments made to the Department from the inmate package service provider from 2010 to the present is included on the enclosed compact disc (Item 22 – Keefe Group).

Items 23 and 24 of your request are denied for the following reason:

- The record(s) that you requested do not currently exist in the possession of the Department of Corrections. When responding to a request for access, an agency is not required to create a record which does not currently exist or to compile, format or organize a public record in a manner in which it does not currently compile, format or organize the public record. 65 P.S. § 67.705; See *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) ("The Department cannot grant access to a record that does not exist. Because under the current RTKL the Department cannot be made to create a record which does not exist, the OOR properly denied [the] ... appeal."); See also *Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998).

Confidential information has been redacted from the contracts granted in response to item 1, item 5, item 9, and item 16 of your request for the following reasons:

- The requested records fall within the personal security exemption of the RTKL. 65 P.S. § 67.708(b)(1)(ii). That section exempts from access any record the disclosure of which would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual. *Id.* See also *Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998); *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa. Cmwlth. 1997).

- The requested records fall within an exemption of the RTKL. Specifically, the RTKL excludes records maintained by an agency in connection with law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or a public protection activity. 65 P.S. § 67.708(b)(2). The requested records are records maintained by the Department in connection with its official law enforcement function of supervising the incarceration of inmates. The disclosure of the requested records would threaten public safety and the Department's public protection activities in maintaining safe and secure correctional institutions by allowing inmates or others to access information that can be used to undermine the Department's security procedures. Therefore, disclosure of these types of records is excluded under the RTKL. *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa.Cmwth. 1997).
- The requested records fall within the noncriminal investigation exemption of the RTKL. Specifically, the RTKL exempts from disclosure records of an agency relating to a noncriminal investigation, including, but not limited to: complaints submitted to an agency; investigative materials, notes, correspondence and reports; records that include the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169), known as the Whistleblower Law; records that include information made confidential by law; work papers underlying an audit; and records that, if disclosed, would reveal the institution, progress or result of an agency investigation, deprive a person of the right to an impartial adjudication; constitute an unwarranted invasion of privacy, hinder an agency's ability to secure an administrative or civil sanction, or endanger the life or physical safety of an individual. 65 P.S. § 67.708(b)(17). See *Amro v Office of AG*, 783 A.2d 897, (Pa. Cmwth. 2001); *Senk v. Commonwealth*, 521 A.2d 532 (Pa. Cmwth. 1987). Your request implicates such information and access is denied.
- Personnel records are not public records under the RTKL. Rather, access to such records is governed by the Inspection of Personnel Files Law which permits only authorized individuals to inspect records. 43 P.S. §§ 1321 *et seq.* Such requests must be made to the Department's Human Resources office and not made through the RTKL which permits access to public records only.
- The requested information outlines the internal, predecisional deliberative process of the Department's medical care administrators. Disclosure of the requested information would reveal the process and content of documents being used by agency decision makers in pre-decisional deliberations. The RTKL excludes from disclosure all internal, predecisional deliberations of an of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations. 65 P.S. § 67.708(b)(10)(i)(A); see also *Lavalle v. Office of General Counsel*, 769 A.2d 449 (Pa. 2001); *Tribune-Review Publishing Co. v. Department of Community & Economic Development*, 814 A.2d 1261, 1263-1264 (Pa. Cmwth. 2003); *City Council v. Greene*, 856 A.2d 217, 225 n.6 (Pa. Cmwth. 2004).
- The requested information is also covered by the deliberative process privilege and is not a public record under the law. 65 P.S. § 67.102 (See definitions of "public record" and "privilege"); 65 P.S. § 67.506(c). The deliberative process privilege applies to pre-decisional communications which reflect on legal or policy matters. *Tribune-Review Publishing Co. v. Department of Community & Economic Development*, 814 A.2d 1261, 1263-1264 (Pa. Cmwth. 2003); See also *Lavalle v. Office of General Counsel*, 769 A.2d 449 (Pa. 2001); *City Council v. Greene*, 856 A.2d 217, 225 n.6 (Pa. Cmwth. 2004). Your request implicates such information and access is denied.

- The RTKL exempts personal identification information from disclosure. 65 P.S. § 67.708(b)(6). Personal identification information includes, but is not limited to a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number, a spouse's name, marital status, beneficiary or dependent information or the home address of a law enforcement officer or judge. *Id.* Your request implicates such personal identification information and access is denied.
- The RTKL exempts from disclosure records that constitute or reveal trade secrets or confidential proprietary information. 65 P.S. § 67.708(b)(11). Your request implicates such information and access is denied.
- The RTKL exempts from disclosure: proposals pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals). 65 P.S. § 67.708(b)(26); Procurement Handbook, Part I, Chapter 50. Your request implicates such information and access is denied.
- The RTKL exempts from disclosure records or information relating to communications between an agency and its insurance carrier, administrative service organization or risk management office. 65 P.S. § 67.708(b)(27). Your request implicates such information and access is denied.
- The RTKL exempts records, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system. 65 P.S. § 67.708(b)(3). Included in this exemption are building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

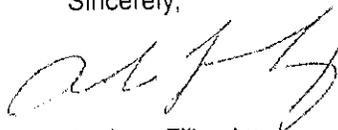
You have a right to appeal any denial of information in writing to the Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

1) this response; 2) your request; and 3) the reason why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Also, the OOR has an appeal form available on the OOR website at:

<https://www.dced.state.pa.us/public/oor/appealformgeneral.pdf>.

Sincerely,



Andrew Filkosky
Agency Open Records Officer



Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

March 27, 2015

Sent via email to: RA-docrightrightoknow@pa.gov

Received

Andrew Filkosky, Agency Open Records Officer
Department of Corrections
Right-To-Know Law Office
Office of the Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050

MAR 27
4-3-15
Right-to-Know Office, Tracking #
RTKL 524-15

Re: Pennsylvania Right-to-Know Law Law Request

As editor of the monthly journal *Prison Legal News*, a project of the nonprofit Human Rights Defense Center, I am requesting, pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 et seq., copies of the following documents:

1. All contracts or other agreements, including all exhibits, addenda and extensions, between the Pennsylvania Department of Corrections (PA DOC) and any provider of telephone services for use by prisoners or other detainees that have been in effect at any time from January 1, 2013 to present.
2. Documents detailing all payments made to or on behalf of PA DOC from or on behalf of any telephone service provider from January 1, 2013 to present.
3. Documents detailing rates for telephone calls made by prisoners or other detainees of PA DOC that have been in effect at any time from January 1, 2013 to present.
4. Documents detailing all fees related to use of telephone services by the prisoners or other detainees of PA DOC that have been in effect at any time from January 1, 2013 to present. This request specifically includes all ancillary fees incurred by people who accept calls from prisoners or other detainees, including any fees related to prepaid phone accounts.
5. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of video visitation services that have been in effect at any time from January 1, 2010 to present.

P.O. Box 1151
Lake Worth, FL 33460
Phone: 561.360.2523 Fax: 866.735.7136
pwright@prisonlegalnews.org

6. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any video visitation provider from January 1, 2010 to present.
7. Documents detailing rates for video visitation services at PA DOC that have been in effect at any time from January 1, 2010 to present.
8. Documents detailing all fees related to video visitation services at PA DOC facilities that have been in effect at any time from January 1, 2010 present.
9. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of email or electronic messaging services for use by prisoners or other detainees that have been in effect at any time from January 1, 2010 to present.
10. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any provider of email or electronic messaging services for use by prisoners or other detainees from January 1, 2010 to present.
11. Documents detailing rates email or electronic messaging services for use by prisoners or other detainees at facilities operated by PA DOC that have been in effect at any time from January 1, 2010 to present.
12. Documents detailing all ancillary fees related to email or electronic messaging services for use by prisoners or other detainees at facilities operated by PA DOC that have been in effect at any time from January 1, 2010 present.
13. All contracts or other agreements, including exhibits, addendums and extensions, between PA DOC and any provider of services used to transfer funds to people upon their release from incarceration by PA DOC, that have been in effect at any time from January 1, 2010 to present.
14. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any provider of services used to transfer funds to people upon their release from incarceration by PA DOC from January 1, 2010 to present.
15. Documents detailing all ancillary fees related to the transfer of funds to people upon their release from incarceration by PA DOC, including but not limited to all cardholder agreements that have been in effect at any time from January 1, 2010 to present.
16. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of money transfer services, including but not limited to any services whereby members of the public can send money to prisoners or other detainees for placement on their institutional accounts, that have been in effect at any time from January 1, 2010 to present.
17. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any money transfer services provider from January 1, 2010 to present.

HRDC Pennsylvania Right-to-Know Law Request to PA DOC
March 27, 2015

18. Documents detailing all ancillary fees related to money transfer services, including but not limited to fees charged to send money to prisoners or other detainees for placement on their institutional accounts that have been in effect at any time from January 1, 2010 to present.
19. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of institutional commissary or canteen services that have been in effect at any time from January 1, 2010 to present.
20. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any institutional commissary or canteen services provider from January 1, 2010 to present.
21. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of prisoner package services (i.e., services that allow prisoners or other detainees to order goods from private companies, such as Union Supply, Access, Jack L. Marcus Company, etc.), that have been in effect at any time from January 1, 2010 to present.
22. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any prisoner package services provider from January 1, 2010 to present.
23. All contracts or other agreements, including exhibits, addenda and extensions, between PA DOC and any provider of book ordering services used by prisoners or other detainees in effect at any time from January 1, 2010 to present.
24. Records detailing all payments made to or on behalf of PA DOC from or on behalf of any provider of book ordering services for prisoners or other detainees from January 1, 2010 to present.

I request that the above-described public records be provided in electronic format, via email, if they exist in or can be converted to electronic format.

If you claim that any of the requested records are not a public record, or you claim a privilege not to disclose any record, please respond by identifying any such records and explaining your claim that it is not a public record or why it is privileged or confidential or otherwise exempt, in accordance with 65 P.S. § 67.903. Please produce all records for which you do not claim an exemption or privilege.

In accordance with 65 P.S. § 67.706, if you claim that any portion of any record is exempt, please redact that portion of the record that you believe is exempt and provide both the statutory citation to any exemption you believe is applicable and the specific reasons for your conclusion that the redacted portion of the record is exempt from disclosure and produce the remainder of the record(s).

The use of these records by our non-profit organization is likely to contribute significantly to a public understanding of the operations of PA DOC and their disclosure is clearly in the public interest. Accordingly, we request a waiver of all fees for this request. Please email all records

HRDC Pennsylvania Right-to-Know Law Request to PA DOC
March 27, 2015

responsive to this request to Ryan Barrett: rbarrett@prisonlegalnews.org. I look forward to your prompt reply.

Sincerely,



Paul Wright
Executive Director, HRDC

Filkosky, Andrew

From: Ryan Barrett <rbarrett@prisonlegalnews.org>
Sent: Friday, March 27, 2015 1:28 PM
To: CR, DOC Right to Know
Cc: Carrie Wilkinson; Paul Wright
Subject: Open Records Request
Attachments: PA DOC 20150327.pdf

Dear Mr. Filkosky,

I am writing as a representative of the Human Rights Defense Center in our request of records from the Pennsylvania Department of Corrections. Please find our request attached. Please direct all communications regarding this request to this email address.

Thank you,

Ryan Barrett, Online Communications Director
Human Rights Defense Center
P.O. Box 1151
Lake Worth, FL 33460

Filkosky, Andrew

From: Paul Wright <pwright@prisonlegalnews.org>
Sent: Monday, April 20, 2015 11:47 AM
To: Filkosky, Andrew; Ryan Barrett
Subject: RE: Open Records Request 0524-15

Hi Andrew,

Thanks for your response. Yes we will agree to an extension to May 20, 2015. We are also amenable to a rolling disclosure whereby you can disclose documents as they become available.

Paul Wright
Human Rights Defense Center, Director
Prison Legal News, Editor
P.O. Box 1151
Lake Worth, FL 33460
Tel: (561) 360-2523
Fax: (866) 735-7136

pwright@prisonlegalnews.org
www.prisonlegalnews.org
www.humanrightsdefensecenter.org

From: Filkosky, Andrew [mailto:afilkosky@pa.gov]
Sent: Monday, April 20, 2015 11:42 AM
To: Ryan Barrett; Paul Wright
Subject: RE: Open Records Request 0524-15

Mr. Barrett and Mr. Wright,

The Department of Corrections is working on gathering the records responsive to your RTKL request. As of now, the final response date is May 1, 2015. Due to the scope of your request, we are hoping that you would agree to an additional extension of time for our agency to respond. At your convenience, please let me know if you agree to extend the final response date to May 20, 2015.

Sincerely,

Andrew Filkosky | Agency Open Records Officer
Department of Corrections | Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050
Phone: 717.728.7770 | Fax: 717.728.0312
www.cor.pa.gov

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT

The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any use of this information other than by the intended recipient is prohibited. If you receive this message in error, please send a reply e-mail to the sender and

delete the material from any and all computers. Unintended transmissions shall not constitute waiver of the attorney-client or any other privilege.

From: Ryan Barrett [<mailto:rbarrett@prisonlegalnews.org>]
Sent: Friday, March 27, 2015 1:28 PM
To: CR, DOC Right to Know
Cc: Carrie Wilkinson; Paul Wright
Subject: Open Records Request

Dear Mr. Filkosky,

I am writing as a representative of the Human Rights Defense Center in our request of records from the Pennsylvania Department of Corrections. Please find our request attached. Please direct all communications regarding this request to this email address.

Thank you,

Ryan Barrett, Online Communications Director
Human Rights Defense Center
P.O. Box 1151
Lake Worth, FL 33460

Exhibit C

Redactions
Pennsylvania Department of Corrections

Redaction Number	File	Contract Document	Section	Specific Item Redacted
1	Item 1 - Securus Technologies, Inc.	Contract for Inmate Telephone Services	N/A	Federal I.D. N
2	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contract Terms and Conditions (Exhibit A)	IV-3. Work Statement	A.14
3	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contract Terms and Conditions (Exhibit A)	IV-3. Work Statement	A.15
4	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contract Terms and Conditions (Exhibit A)	IV-3. Work Statement	A.16
5	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contract Terms and Conditions (Exhibit A)	Appendix K Administrative & Investigative Reports	Entire sector
6	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contract Terms and Conditions (Exhibit A)	Appendix Q Weekly Trouble Ticket Report	Entire sector
7	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contract Terms and Conditions (Exhibit A)	Questions and Answers	#10
8	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contract Terms and Conditions (Exhibit A)	Questions and Answers	#75
9	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contract Terms and Conditions (Exhibit A)	Questions and Answers	#76
10	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	3/26/14 Letter Re Commissions, Rates, and Implementation	#4
11	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	1/10/14 Letter Re Securus Proposal	#1
12	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	Executive Summary	N/A

Redaction Number	File	Contract Document	Section	Specific Item Redacted
13	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	II-2. Management Summary	N/A
14	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	II-2. Management Summary	N/A
15	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	II-3. Work Plan	Entire section
16	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	II-7. Financial Capability	Entire section
17	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	Attachment D 11/22/13 Addendum with Q & A	#10
18	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	Attachment D 11/22/13 Addendum with Q & A	#75
19	Item 1 - Securus Technologies, Inc.	RFP Number ITS 2013-90 Contractor's Technical Submittal (Exhibit D)	Attachment D 11/22/13 Addendum with Q & A	#76
20	Item 5 - PA Prison Society	SPC 278P Service Purchase Contract Amendment	N/A	Federal I.D. N
21	Item 5 - PA Prison Society	SPC 278P Service Purchase Contract	N/A	Federal I.D. N
22	Item 5 - PA Prison Society	RFP 05-BIS-VIRTUAL VISITATION-48	II-4(A). References	Reference co info
23	Item 5 - PA Prison Society	RFP 05-BIS-VIRTUAL VISITATION-48	II-11. Tax Number	Federal I.D. N
24	Item 5 - Scotlandyard Security Services, Inc.	4400008739 Contract for Virtual Visitation Services	N/A	Federal I.D. N

Redaction Number	File	Contract Document	Section	Specific Item Redacted
25	Item 9 - Global Tel Link Corporation	Contract No. AGR-13-346	N/A	Signatures
26	Item 9 - Global Tel Link Corporation	RFP #6100021729 Appendix B, Proposal	Revised Technical Proposal	Signature, na title
27	Item 9 - Global Tel Link Corporation	RFP #6100021729 Appendix B, Proposal	Appendix B, Domestic Workforce Utilization	Signature
28	Item 9 - Global Tel Link Corporation	RFP #6100021729 Appendix B, Proposal	Appendix C, Proposal Coversheet	Signature, na title
29	Item 9 - Global Tel Link Corporation	RFP #6100021729 Appendix B, Proposal	Financial Documentation	Enire section
30	Item 9 - Global Tel Link Corporation	RFP #6100021729 Appendix B, Proposal	Revised Small Diverse Business Proposal	Name and Sig
31	Item 9 - Global Tel Link Corporation	RFP #6100021729 Appendix B, Proposal	Revised Small Diverse Business Proposal	Signature
32	Item 9 - Global Tel Link Corporation	RFP #6100021729 Appendix B, Proposal	Revised Small Diverse Business Proposal	2012 Employ Quarterly Ta
33	Item 9 - Jpay, Inc.	RFP #08-IGWF-80 Technical Submittal	N/A	Redacted
34	Item 9 - Jpay, Inc.	RFP #08-IGWF-80 Technical Submittal	N/A	Redacted
35	Item 9 - Jpay, Inc.	RFP #08-IGWF-80 Technical Proposal	N/A	Redacted
36	Item 9 - Jpay, Inc.	RFP #08-IGWF-80 Technical Proposal	N/A	Redacted
37	Item 9 - Jpay, Inc.	RFP #08-IGWF-80 Technical Proposal	N/A	Redacted
38	GTL docs from URL	125566_01_K_MCI_sig_page	N/A	Signature
39	GTL docs from URL	125566_21_AttC_Part1	Attachment 13-B -- Section 1: Commission Data 5-E Financial	Signature

Redaction Number	File	Contract Document	Section	Specific Item Redacted
40	GTL docs from URL	125566_21_AttC_Part1	Attachment 13-C Section 1: Cost Data 5-E Financial	Signature
41	GTL docs from URL	125566_21_AttC_Part1	Attachment 25A -- Section 2: Commision Data 5-A.2. p. (1) (a) Option 1	Signature
42	GTL docs from URL	125566_21_AttC_Part1	Attachment 25-B -- Section 2: Commission Data 5-A. 2. p. (1) (b) Option 2	Signature
43	GTL docs from URL	125566_21_AttC_Part1	Attachment 25-C -- Section 2: Cost Data 5-D. 1. a., b & c	Signature
44	GTL docs from URL	125566_21_AttC_Part1	Verizon letter re updated pricing (RFP # 2005-081-001)	Signature
45	GTL docs from URL	125566_23_AttD1_Sec1_34-38	N/A	Entire section (financial information)
46	GTL docs from URL	125566_25_AttD1_Sec2_Tab1-3	Section 2 - Tab 3: Management summary	Description o Calling Syster Software
47	GTL docs from URL	125566_27_AttD1_Sec2_Tab6_50_80_ Part1	Section 2 - Tab 6: Technical Requirements	Description o Investigative Management Systems
48	GTL docs from URL	125566_29_AttD1_Sec2_Tab6_101_12 5_Part1	Section 2-- Tab 6: Technical Requirements	Description o Systems

Redaction Number	File	Contract Document	Section	Specific Item Redacted
49	GTL docs from URL	125566_32_AttD1_Sec2_Tab6_173_190_Part1	Section 2 - Tab 6: Technical Requirements	Description of Investigative Management Systems
50	GTL docs from URL	125566_37_AttD1_Sec2_Tab6_end_redact	Section 2 - Tab 6: Technical Requirements	59 pages entirely Investigative Redacted
51	GTL docs from URL	125566_42_AttE	Letter of intent re subcontracting to SCI	Signature
52	GTL docs from URL	125566_42_AttE	MBE/WBE Certificate	Signature
53	GTL docs from URL	125566_44-TNetixAssn	Assignment of contracts between Verizon & Tnetix	Signatures
54	GTL docs from URL	125566_45_Assign_to_Global	Assignment of contract btw. MCI & GTL	Signatures

APPENDIX F

Members of the Pennsylvania State Police must be morally and ethically above reproach at all times regardless of duty status. All members shall respect the sanctity of the law and shall be committed to holding themselves to the highest standard of accountability. No member shall depart from standards of professional conduct or disobey the law.

Members should be subject to disciplinary action only for "just cause." The following standards shall govern the elements of "just cause" for the misconduct described below and these standards shall constitute a "clean slate" relating to the twelve terminable offenses described below in that they shall supersede and replace all prior standards, agreements, past practices, and arbitration awards on the same subjects.

Certain conduct immediately and absolutely threatens the integrity of the Department's public duty and responsibility. In the following circumstances, the proper level of discipline is termination of employment, notwithstanding any mitigating circumstances. Such conduct includes, but is not limited to, the following:

[1] Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than one (1) year, or in any action that constitutes the commission of an equivalent offense in another jurisdiction, state, or territory. Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such circumstances. In addition, a declination of prosecution shall not preclude disciplinary action.

[2] Engaging in domestic violence involving physical abuse of any victim; or engaging in activity which would cause a reasonable person to be in fear of bodily injury to the extent the member's conduct falls under subsection [1] above.

[3] Any use of a firearm to threaten another except as appropriate in the scope of employment (whether or not a specific, officially assigned, duty) or in the defense of self or others. This includes the use of a loaded or unloaded firearm to threaten another, regardless whether as a joke or in horseplay.

[4] Engaging in sexual misconduct, as defined in AR 4-25; or engaging in sexual harassment as defined in AR 4-26 which is of a serious nature, including use of position to obtain or attempt to obtain sexual favors; or engaging in conduct which constitutes sexual harassment, as defined in AR 4-26, subsequent to disciplinary action for prior serious sexual harassment.

[5] The commission of a serious act of deception during a criminal, civil or administrative investigation or proceeding, when under a specific, official obligation to be truthful, involving intentional (1) lying; (2) fabrication; (3) misleading acts or words; (4) civil or criminal fraud; or (5) perjury.

Notwithstanding anything to the contrary in this Agreement, no member may be subject to disciplinary charges for violating this subsection in regard to a statement or statements the member made in a Departmental disciplinary investigation involving another member before the allegations involving the underlying investigation of that other member have been either dismissed by the Department or sustained or dismissed by an arbitrator as provided herein.

[6] Any activity that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses).

[7] Any use of any illegal substances, prohibited under 35 P.S. § 780-101 et seq., (Controlled Substance, Drug, Device and Cosmetic Act), or any substance use that constitutes the commission of an offense under Federal law or in any other jurisdiction, state, or territory, either on or off duty; or any use of controlled substances obtained by illegal means, either on or off duty.

[8] Positive drug test result under FR 3-5.

[9] "Driving under the influence" pleas, convictions or ARD under one of the following circumstances:

- (a) Second or subsequent DUI offense while employed by the Commonwealth (regardless of whether on or off duty); or
- (b) Involving a hit and run of a vehicle or property; or
- (c) While operating a state-owned vehicle.

[10] Loss of Pennsylvania operating privileges for 180 or more days, except for recall or suspension of operating privileges of any person whose incompetency has been established under Title 75 Pa. C.S. § 1519 (Motor Vehicle Code).

[11] Fighting or the use of other physical violence on the job, other than as reasonably necessary in the strict performance of a member's duties as a law enforcement officer.

[12] Any period of incarceration for a misdemeanor conviction that results in the member being disqualified from accessing information from the CLEAN system in accordance with the FBI Criminal Justice Information Security (CJIS) Policy.

This list is not all-inclusive and termination of employment may be the proper level of discipline in other situations as well.

A criminal standard of proof shall not be applied to the review of any termination decision.

The above provisions are effective for discipline arising out of any conduct occurring, in full or in part, on or after January 1, 2005. These provisions supersede any prior disciplinary penalties imposed for the twelve (12) offenses specifically set forth herein, by either the Department, Commonwealth, or any arbitrator, and no such prior penalties may be used as precedent in cases involving the above twelve (12) offenses.

Sostar, Janelle K

From: Rachel Stevens <rstevens@humanrightsdefensecenter.org>
Sent: Wednesday, June 03, 2015 4:47 PM
To: DC, OpenRecords
Cc: Filkosky, Andrew
Subject: Appeal to Agency's RTKL Response
Attachments: PA DOC RTKL Appeal 6.3.15.pdf

Dear Sir or Madam,

Please find attached an Appeal to the Agency's Response to our RTKL Request.

Thank you.

Rachel Stevens, Paralegal
Human Rights Defense Center
P.O. Box 1151
Lake Worth, FL 33460
561.360.2523 Office 866.735.7136 Fax

This communication may be confidential, privileged and/or attorney work product. If you received it in error, please notify me and delete it from your system. Any unauthorized use is prohibited and may be unlawful.

Attachment 2

Applegate, Kyle

From: Myers, Karl <KMyers@STRADLEY.COM>
Sent: Friday, June 19, 2015 2:55 PM
To: Applegate, Kyle
Cc: 'pwright@prisonlegalnews.org'; Janosik-Nehilla, Valerie
Subject: Appeal No.: 2015-0909 (Wright v. DOC) - Submission of Global Tel*Link Corporation
Attachments: GTL Submission 6-19-15.PDF; Request to Participate before OOR 6-19-15.PDF; GTL Declaration of Steve Montanaro.PDF

Mr. Applegate:

Attached please find the submission of Global Tel*Link Corporation respecting the above-referenced RTKL Appeal.

Respectfully submitted,

Karl Myers

[bio](#) | [vcard](#) | [email](#) | [map](#) | [website](#)

Karl S. Myers

Stradley Ronon Stevens & Young, LLP
(PA) 215.564.8193 | (ML) 610.640.5800
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2005 Market Street, Suite 2600 | 30 Valley Stream Parkway
Philadelphia, PA 19103-7018 | Malvern, PA 19355



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REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: 2015-0909

Today's date: 6/19/2015

Name: Global Tel*Link Corp. c/o Karl S. Myers, Esquire

IF YOU ARE OBJECTING TO THE DISCLOSURE OF YOUR HOME ADDRESS, DO NOT PROVIDE THE OFFICE OF OPEN RECORDS WITH YOUR HOME ADDRESS. PROVIDE AN ALTERNATE ADDRESS IF YOU DO NOT HAVE ACCESS TO E-MAIL.

Address/City/State/Zip 2600 One Commerce Square, 2005 Market Street, Philadelphia, PA 19103

E-mail kmyers@stradley.com

Fax Number: 215-564-8120

Name of Requester: Paul Wright

Address/City/State/Zip P. O. Box 1151, Lake Worth, FL 33460

Telephone/Fax Number: 561-360-2523 / 866-735-7136

E-mail pwright@prisonlegalnews.org

Name of Agency: Department of Corrections

Address/City/State/Zip 1920 Technology Parkway, Mechanicsburg, PA 17050

Telephone/Fax Number: 717-728-7763 /

E-mail vjanosik-n@pa.gov

Record at issue: See attached

I have a direct interest in the record(s) at issue as (check all that apply):

- An employee of the agency
- The owner of a record containing confidential or proprietary information or trademarked records
- A contractor or vendor
- Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted,  (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.



Stradley Ronon Stevens & Young, LLP
Suite 2600
2005 Market Street
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Telephone 215.564.8000
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www.stradley.com

Karl S. Myers
kmyers@stradley.com
215.564.8193

June 19, 2015

**Via Email (kyapplegat@pa.gov)
& First Class US Mail**

Kyle Applegate, Esquire
Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

**Re: Wright v. Department of Corrections
OOR Docket No. AP 2015-0909**

Dear Mr. Applegate:

This firm represents Global Tel*Link Corporation ("GTL"). Our purpose in writing to you today is twofold.

First, GTL requests permission, pursuant to 65 P.S. §67.1101(c), to appear as a direct interest party before the OOR with respect to the above-referenced Right-to-Know Law appeal.

Second, GTL asserts that certain materials requested by Paul Wright, Executive Director of the Human Rights Defense Center ("Requestor"), cannot be required to be disclosed because several RTKL exemptions apply to preclude disclosure. GTL therefore asserts that the partial denial of Requestor's RTKL request (the "Request") by the Pennsylvania Department of Corrections should be sustained by the OOR and, as a consequence, the Department should not be required to take any further action on the Request.

Philadelphia, PA • Harrisburg, PA • Malvern, PA • Cherry Hill, NJ • Wilmington, DE • Washington, DC • New York, NY

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 MERITAS LAW FIRMS WORLDWIDE

I. GTL requests permission to participate as a direct interest party.

GTL hereby requests, pursuant to 65 P.S. §67.1101(c), permission to appear before the OOR in order to assert its support for the partial denial of the Request by the Department. In this regard, also enclosed is a completed OOR Request to Participate as Direct Interest Party form. This request is timely under section 1101(c), as GTL was first notified and became aware of the Requestor's appeal to the OOR on June 5, 2015.

GTL should be allowed to participate because it has a direct and substantial interest in this dispute, and wishes to submit probative information and argument in support of its interest. Requestor seeks, among other things, copies of the inmate telephone services and kiosk contracts between GTL and the Department. The Department denied the Request as to those contracts, in part. The denials that relate to GTL pertain to information that has been redacted from the GTL contracts. GTL now seeks to protect two types of information redacted from the contracts:

- (1) GTL's confidential, internal, and proprietary financial information, which was submitted to the Department for both contracts to demonstrate GTL's financial capability as a prospective contractor, as well as the same information of a predecessor and subcontractor; and
- (2) descriptions of the confidential functions of the Investigative Management System, a security feature provided to the Department pursuant to the inmate telephone services contract.

The Department, in its partial denial, invoked several exemptions to disclosure under the RTKL that are pertinent to these redactions in GTL's contracts:

- (a) the "financial information of a bidder or offeror" exemption found in section 708(b)(26);
- (b) the "public safety" and "physical security" exemptions of sections 708(b)(2) and (3); and
- (c) the "trade secrets" and "confidential proprietary information" exemptions found in section 708(b)(11).

GTL asks that it be permitted to present the OOR with additional information and arguments concerning its position on the foregoing grounds for exemption, beyond the submissions that may be submitted by the Department and other third parties. GTL's presentation will be of assistance to the OOR in reaching a just determination on these important issues. Moreover, the interests of GTL will not be sufficiently protected unless it is permitted to

participate, as GTL is the only party with a full and complete interest in protecting its internal information from disclosure, particularly its internal financial information. No party will seek to protect that and the other information at issue here as vigorously as GTL.

For these reasons, GTL respectfully requests that the OOR allow it to participate in this matter, pursuant to 65 P.S. §67.1101(c).

II. The information redacted from the GTL-Department inmate telephone services and kiosk contracts is exempt under the RTKL.

GTL asserts that the redacted information sought by Requestor in the GTL contracts cannot be required to be disclosed because several exemptions contained within the RTKL apply to preclude disclosure here. In support, GTL submits the below arguments, as well as the enclosed Declaration of Steve Montanaro, Vice-President of Sales and Marketing Operations of GTL, who provides factual support for GTL's position that the materials sought are protected from disclosure. For the reasons expressed below, as supported by the Declaration, GTL submits that the Department should not be required to take any further action as to the GTL materials sought by Requestor.

A. GTL's confidential financials are exempt from disclosure under section 708(b)(26).

The Department's redactions 29, 32, and 45 are proper because the information subject to those redactions constitutes "financial information of a bidder or offeror" exempt under section 708(b)(26) of the RTKL.¹ That section provides an exemption for:

A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. §67.708(b)(26).

Here, redaction 29 covers the financial information that GTL provided to the Department, at the Department's request, in connection with the request for proposal process for the kiosk contract, in order to demonstrate GTL's economic capability. Declaration at ¶6. Redaction 45 covers the same information that GTL's predecessor-in-interest supplied respecting the telephone contract. Declaration at ¶7. The information supplied is highly confidential, and

¹ GTL's references to redaction numbers in this submission are to those listed in Exhibit C to Requestor's appeal, which was filed with the OOR on or about June 3, 2015.

includes audited financial statements over several years, including information about GTL's assets, income, cash on hand, receivables, expenses, licenses, taxes, property, goodwill, and other assets and liabilities. Declaration at ¶¶8-9. Each page of the redacted documents is stamped "CONFIDENTIAL." Declaration at ¶10. This redacted information is maintained by GTL with the highest degree of confidence, both internally and externally. Declaration at ¶11. Were this information to be disclosed, it would be highly damaging to GTL, a non-public company. Declaration at ¶12.

Applying the plain language of section 708(b)(26), the OOR routinely holds that financial information submitted by an offeror in connection with its bid on a government contract is exempt from disclosure. See, e.g., Smith v. Spring Cove Sch. Dist., No. AP 2011-0805, 2011 WL 3097860, *4 (OOR July 20, 2011) (holding financial information of offeror exempt even after contract awarded and even though agency did not invoke exception); Hodges v. Dep't of Corr., No. AP 2015-0241, 2015 WL 1431794, *5 (OOR Mar. 23, 2015) (holding declaration stating that documents submitted by offeror constituted its financial information was sufficient to invoke exemption); Larson v. Cheltenham Twp. Sch. Dist., No. AP 2014-02562014 WL 1284527, *1 (OOR Mar. 13, 2014) (same); see also 62 Pa.C.S. §513(f) (Procurement Code requirement of confidentiality of offerors' submissions). Accordingly, GTL's financials are exempt from disclosure.

In addition, redaction 32 covers financial information that GTL's subcontractor, Mid Atlantic Consultants, submitted in connection with GTL's offer. Specifically, that redaction covers two quarterly federal tax returns that include sensitive financial information about Mid Atlantic. Declaration at ¶¶13-14. Like the financials submitted by GTL, it is similarly well-settled that tax return documents are exempt from disclosure. See, e.g., Howard v. Dep't of Corr., No. AP 2010-0776, 2010 WL 3925177, *4-*5 (OOR Sept. 17, 2010) (tax return submitted by offeror in connection with RFP properly withheld as constituting an offeror's financial information under section 708(b)(26)); see also Office of the Budget v. Campbell, 25 A.3d 1318 (Pa. Commw. 2011) (federal tax forms exempt under 65 P.S. §67.305 because federal law requires tax returns to be kept confidential); Fort Cherry Sch. Dist. v. Coppola, 37 A.3d 1259 (Pa. Commw. 2012) (same); Kerns v. Pa. Turnpike Comm'n, No. AP 2013-0959, 2013 WL 3865451, *5 (OOR July 22, 2013) (tax identification numbers required to be redacted from proposal due to federal law); Pittsburgh Post-Gazette v. Dep't of Agriculture, No. AP 2011-1226, 2011 WL 5517403, *7 (OOR Nov. 8, 2011) (company's audited financial statement, which contained tax return information, held exempt due to federal law).

Accordingly, redactions 29, 32, and 45 were properly made by the Department, as the materials covered by those redactions are exempt from disclosure under the RTKL.

**B. Redactions covering the Investigative Management System
were properly made under sections 708(b)(2) and (3).**

The Department's redactions 46 through 50 are proper because those redactions cover details respecting the Investigative Management System, the disclosure of which would cause a threat to public safety and physical security. Those materials thus are exempt under sections 708(b)(2) and (3) of the RTKL. Those sections provide exemption for:

(2) A record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity

(3) A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act

65 P.S. §67.708(b)(2) & (3).

Here, redactions 46 through 50 cover details concerning the functionality and operation of the Investigative Management System. This important tool, as well as other similar tools, are at the Department's disposal in order to detect and obtain intelligence respecting otherwise hidden activities, which it then uses to prevent prison violence and other violations and to otherwise foster institutional security. Declaration at ¶¶15-16. Were these details to be publicly disclosed, inmates and others could use that information to circumvent the Department's investigations, thus exposing prison institutions to increased risk of violence. Declaration at ¶17.

The OOR routinely holds information like this protected from disclosure under sections 708(b)(2) and (3). See, e.g., Shaffer v. Dep't of Corr., No. AP 2015-0237, 2015 WL 1883580 (OOR Apr. 21, 2015) (holding securities procedures manual exempt because disclosure could threaten security); Buehl v. Dep't of Corr., No. AP 2015-0607, 2015 WL 2374271 (OOR May 13, 2015) (holding prison's daily logs exempt because inmates could use and manipulate that information to adversely affect safety and security); Brown v. Dep't of Corr., No. AP 2015-0427, 2015 WL 1924168 (OOR Apr. 23, 2015) (holding inmate discipline records exempt because exposing sensitive information could jeopardize prison security).

Accordingly, redactions 46 through 50 were properly made by the Department, as the material covered by those redactions is exempt from disclosure under the RTKL.

C. Alternatively, the redacted information is covered by the “confidential proprietary information” and “trade secret” exemptions in section 708(b)(11).

Finally, and in the alternative, each of the redacted items discussed above in sections A and B constitutes confidential and secret information protected from disclosure by section 708(b)(11) of the RTKL.

Indeed, the GTL financials and IMS details each constitute commercial and financial information, are maintained in confidence, their disclosure would injure GTL competitively, they are of value to GTL, and they cannot readily be ascertained by others, who could benefit financially if they knew that information. Declaration at ¶¶18-25.

Prior OOR decisions have held that similar information is exempt under this RTKL exemption. See, e.g., Colgate-Palmolive Co. v. Pa. Ins. Dep’t, No. AP 2013-1631, 2014 WL 930154 (OOR Mar. 7, 2014) (holding financial projections and forecasts exempt under section 708(b)(11)); Jackson v. Dep’t of Corr., No. AP 2010-1192, 2011 WL 382827 (OOR Jan. 19, 2011) (holding Department contractor’s “Implementation Plan and Technical Submittals and Oral Presentation” exempt under this section); Citizens For Pa.’s Future v. Pa. Dep’t of Conserv. & Nat. Res., No. AP 2013-0402, 2013 WL 5352641, *3-*5 (OOR Sept. 13, 2013) (holding plan submitted by private company to agency exempt under this exemption); Nixon v. Pa. Ins. Dep’t, No. AP 2013-0729, 2013 WL 2949126, *5 (OOR June 11, 2013) (holding report containing sensitive private company information exempt under this exemption); Barnes v. Phila. Sch. Dist., No. AP 2011-0638, 2011 WL 2973433, *6-*7 (OOR July 13, 2011) (holding documents showing proprietary information of contractor exempt under this exemption); McElroy v. Pa. Dep’t of Pub. Welfare, No. AP 2014-0194, 2014 WL 1492879, *8-*9 (OOR Apr. 9, 2014) (holding materials relating to private contractor’s proprietary system exempt under this exemption); see also 12 Pa.C.S. §§5301 to 5308 (Pennsylvania Uniform Trade Secrets Act); 65 P.S. §67.102 (defining “public record” to exclude records “exempt from being disclosed under any other Federal or State law”).

Accordingly, the above redactions were properly made by the Department on the alternative basis that the covered materials are exempt under section 708(b)(11) of the RTKL.

* * * * *

Kyle Applegate, Esquire
June 19, 2015
Page 7

For the reasons expressed above and as supported by GTL's Declaration, GTL submits that the partial denial of the Request by the Department should be sustained by the OOR. Accordingly, the Department should not be required to take any further action on the Request.

Respectfully submitted,

A handwritten signature in black ink, consisting of several horizontal strokes and a vertical stroke that loops back to the left, ending in a horizontal line.

Karl S. Myers

cc: Paul Wright (via Email and US Mail)
Valerie Janosik-Nehilla, Esquire (via Email and US Mail)

BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS

PAUL WRIGHT,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

Docket No. AP 2015-0909

DECLARATION OF STEVE MONTANARO

I, Steve Montanaro, hereby declare and affirm as follows:

1. I am the Vice-President of Sales and Marketing Operations of Global Tel*Link Corporation ("GTL").
2. I am familiar with the Right-to-Know Law request submitted by Paul Wright, Executive Director of the Human Rights Defense Center, to the Pennsylvania Department of Corrections ("DOC").
3. I am making this Declaration in connection with GTL's submission respecting Mr. Wright's appeal to the Office of Open Records, which was filed after DOC partially denied Mr. Wright's request.
4. Mr. Wright seeks, among other things, complete and unredacted copies of the inmate telephone services and kiosk contracts between GTL and DOC.
5. This Declaration addresses two types of information redacted by the DOC from those contracts:
 - (1) Financial information submitted to the Department for both contracts to demonstrate GTL's financial capability as a prospective contractor, as well as the same information of GTL's predecessor-in-interest and GTL's subcontractor; and

- (2) Descriptions of the confidential functions of the Investigative Management System, a security feature provided to the Department pursuant to the inmate telephone services contract.

6. First, as to GTL's financials, the redaction numbered 29 by Mr. Wright covers the financial information that GTL provided to the Department, at the Department's request, in connection with the request for proposal process for the kiosk contract, in order to demonstrate GTL's economic capability.

7. Redaction 45 covers the same information that GTL's predecessor-in-interest supplied respecting the telephone contract.

8. These two redactions cover information that is highly confidential to GTL.

9. The redacted information includes audited financial statements for GTL over several years, including information about GTL's assets, income, cash on hand, receivables, expenses, licenses, taxes, property, goodwill, and other assets and liabilities.

10. Each page of the redacted documents is stamped "CONFIDENTIAL."

11. This redacted information is maintained by GTL with the highest degree of confidence, both internally and externally.

12. Were this information to be disclosed, it would be highly damaging to GTL, a non-public company.

13. Similarly, redaction 32 covers financial information that GTL's subcontractor, Mid Atlantic Consultants, submitted in connection with GTL's offer on the kiosk contract.

14. In particular, that redaction covers two quarterly federal tax returns that include sensitive financial information about Mid Atlantic.

15. Second, the redactions numbered 46 through 50 by Mr. Wright relate to details concerning the functionality and operation of the Investigative Management System (IMS).

16. The IMS tool, as well as other similar tools, are at the Department's disposal in order to detect and obtain intelligence respecting otherwise hidden activities, which it then uses to prevent prison violence and other violations and to otherwise foster institutional security.

17. If details about IMS or similar investigative tools were to be publicly disclosed, then inmates and others could use that information to circumvent the Department's investigations, thus exposing prison institutions to increased risk of violence.

18. Third and finally, each of the above redactions, relating to GTL's financials and the details of the IMS tool, cover material that is confidential and proprietary to GTL and a trade secret of GTL.

19. The redacted information is treated by GTL as confidential.

20. Release would unfairly cause harm to the competitive position of GTL.

21. Competitors in this industry keep the subject information confidential.

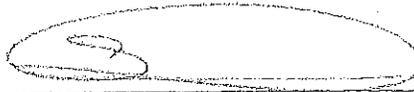
22. GTL takes steps to limit access to this information internally and externally.

23. This information has independent economic value because, if disclosed, it could be used by a competitor as part of an effort to win business away from GTL.

24. Substantial time and effort was invested to generate the information subject to the redactions.

25. Accordingly, and in sum, the redacted information constitutes commercial and financial information, is maintained in confidence, its disclosure could cause competitive harm, the information is of value to GTL, and it cannot readily be ascertained by others, who could benefit from knowing it.

I hereby declare and affirm that the foregoing statements are true and correct to the best of my knowledge and belief.



Steve Montanaro

Attachment 3

Applegate, Kyle

From: Bowman, C. Grainger <grainger.bowman@klgates.com>
Sent: Friday, June 26, 2015 4:24 PM
To: Applegate, Kyle; pwright@prisonlegalnews.org; Janosik-Nehilla, Valerie
Cc: kyapplegate@pa.gov
Subject: Office of Open Records -- Appeal No. 2015-0909 (Prison Legal News v. Pa. DOC)
Attachments: HA#305694#v1Request to Participate Before the OOR.PDF; HA#305695#v1Draft letter to K. Applegate, OOR dated 61915.pdf; HA#305696#v1Affidavit of Steven Cadwell.pdf

Mr. Applegate and Mr. Wright and Ms. Janosik-Nehilla:

Enclosed please find the submission (in three documents) of Securus Technologies, Inc. ("Securus") in connection with the above referenced appeal:

1. Securus' Request to Participate Before the OOR, dated June 26, 2015
2. Written submission of Securus, filed by its counsel K&L Gates LLP (per C. Grainger Bowman, Esq.), dated June 19, 2015
3. Affidavit of Steven Cadwell, Senior Account Executive, DOC, West Region of Securus, dated June 2015

This email transmission is being served simultaneously upon counsel for Kyle Applegate and Prison News.



C. Grainger Bowman
K&L Gates LLP
17 North Second Street
18th Floor
Harrisburg PA 17101

Phone: 717-231-5817 (Direct)
Phone: 717-231-4500 (Office)
Fax: 717-231-4501
grainger.bowman@klgates.com
www.klgates.com

This electronic message contains information from the law firm of K&L Gates LLP. The contents may be privileged and confidential and are intended for the use of the intended addressee(s) only. If you are not an intended addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this e-mail in error, please contact me at grainger.bowman@klgates.com.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: AP 2015-0909

Today's date: June 26, 2015

Name: Securus Technologies, Inc.

IF YOU ARE OBJECTING TO THE DISCLOSURE OF YOUR HOME ADDRESS, DO NOT PROVIDE THE OFFICE OF OPEN RECORDS WITH YOUR HOME ADDRESS. PROVIDE AN ALTERNATE ADDRESS IF YOU DO NOT HAVE ACCESS TO E-MAIL.

Address/City/State/Zip (for counsel): 17 N. 2nd St., 18th Fl., Harrisburg, PA 17101-1507

E-mail grainger.bowman@klgates.com

Fax Number: 717-231-4501

Name of Requester: Human Rights Defense Center

Address/City/State/Zip P.O. Box 1151, Lake Worth, FL 33460

Telephone/Fax Number: 561-360-2523 / 866-735-7136

E-mail pwright@prisonlegalnews.org

Name of Agency: Pennsylvania Department of Corrections

Address/City/State/Zip 1920 Technology Parkway, Mechanicsburg, PA 17050

Telephone/Fax Number: 717-728-7746 / 717-728-0312

E-mail RA-docrighttoknow@pa.gov

Record at issue: Portions of PADO contract with Securus Technologies, Inc.

I have a direct interest in the record(s) at issue as (check all that apply):

- An employee of the agency
- The owner of a record containing confidential or proprietary information or trademarked records
- A contractor or vendor
- Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Record contains ~~confidential~~ proprietary information. See attached statement.

Respectfully submitted, C. Grainger Bowman (must be signed)
C. Grainger Bowman

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

K&L GATES

K&L GATES LLP
17 NORTH SECOND STREET
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C. Grainger Bowman
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June 19, 2015

T +1 717 231 5817

Via Electronic Mail Only

Kyle Applegate, Esquire
Appeals Officer
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

**Re: Pennsylvania Office of Open Records - Right-to-Know Law Appeal
Docket No. AP 2015-0909
Position Statement of Securus Technologies, Inc.**

Dear Mr. Applegate:

Securus Technologies, Inc. ("Securus"), enters its appearance, by and through its undersigned attorneys K&L Gates LLP and C. Grainger Bowman, Esquire, in this Right-to-Know Appeal. Securus participates in the above-referenced appeal as a direct interest party and submits this position statement ("Position Statement") in support of the decision by the Pennsylvania Department of Corrections ("PADOC") to exempt from disclosure under the Pennsylvania Right-to-Know Law ("RTKL"), Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104, certain confidential proprietary information or trade secrets of Securus. As discussed below, the requester's June 3, 2015 appeal of the decision by PADOC should be denied.

I. Procedural History and Background

Securus accepts the procedural history recited in the submission of counsel for the Pennsylvania Department of Corrections dated June 19, 2015. Securus submits additional background information in the paragraphs below.

On October 28, 2013, the PADOC issued RFP No. 2013-90 ("RFP") to procure inmate telephone services for inmates in the Commonwealth's correctional institutions. On December 16, 2013, PADOC received three proposals in response to the RFP, including one from Securus. On April 24, 2014, the contract was awarded to Securus by PADOC. As set forth in the RFP, the contract incorporates and includes the proposal submitted by Securus in response to the RFP.

On December 2, 2014, the Prison Legal News ("PLN") submitted a records request ("Request") to the PADO. The Request sought the "current contract with Securus and the current rate sheet for all call types[.]" In response, on December 4, 2014, PADO released the requested documents to PLN but redacted (1) confidential proprietary information or trade secrets of Securus ("Securus Confidential Information") and (2) certain security information ("Security Information") contained in the contract.

On December 24, 2014, PLN appealed PADO's determination to redact the Securus Confidential Information and the Security Information. PLN argues, without any legal or factual support, that all types of the redacted information (except for a federal I.D. number) are not properly subject to any exemptions under the RTKL and have been improperly withheld from public disclosure.

This Securus submission, together with the Affidavit of Steven Cadwell, Senior Account Executive -- DOC, West Region, Securus Technologies, provides factual support for Securus' claims to the PADO's redacting of Securus' confidential information, as more fully set forth below.

The Securus Confidential Information consists of two principal categories of confidential information: (1) financial information submitted by Securus to demonstrate its economic ability to perform the services under the contract ("Financial Information"); and (2) Securus' implementation plan for providing the telephone services ("Implementation Plan"). See Affidavit of Steven Cadwell ¶ 10 ("Cadwell Affidavit"). Securus provided this information to PADO with the understanding that the information would remain confidential. See *id.* ¶ 11. At the time of submission, Securus marked the documents as confidential and provided a written statement to PADO that the records contain a trade secret or confidential proprietary information. See *id.*

II. PADO Properly Excluded the Securus Confidential Information

PADO properly redacted the Securus Confidential Information as exempt from public disclosure pursuant to Section 708(b)(11) of the RTKL as "confidential proprietary information" or a "trade secret." As a general matter, records in the possession of a Commonwealth agency such as PADO are presumed public unless exempt under the RTKL or protected by a privilege, judicial order or decree. See 65 P.S. § 67.305. In this case, the Securus Confidential Information is exempt from disclosure pursuant to section 708(b)(11) of the RTKL, which prohibits a Commonwealth agency from releasing "[a] record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11).

As will be discussed in detail below, the Securus Confidential Information falls squarely within the "confidential proprietary information" or "trade secret" exemption under Section 708(b)(11).

A. The Securus Confidential Information is exempt under Section 708(b)(11) as confidential proprietary information.

The Securus Confidential Information satisfies the statutory definition of "confidential proprietary information." "Confidential proprietary information" is defined 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. The Financial Information and the Implementation Plan each satisfy both elements of this two-part test required for the exemption to apply.

First, the Securus Confidential Information is confidential to Securus. In determining whether certain information is "confidential," the key is to consider "the efforts the parties undertook to maintain their secrecy." *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Cmwlth. Ct. 2014). In this case, Securus took reasonable and significant steps to maintain the secrecy of the documents. Securus marked each document as confidential at the time of submission to PADOE and informed PADOE that the documents contain confidential information. Cadwell Affidavit ¶ 11. Securus closely restricted access to the documents to only those employees essential to preparation of Securus' response to the RFP. *Id.* To protect against unintended disclosure of its confidential information, Securus provides confidentiality training to its employees. *Id.* Securus has not otherwise disclosed the documents or confidential information to any other party except for PADOE. *Id.* Finally, Securus destroyed all non-essential copies of the documents submitted to PADOE in order to further ensure no additional dissemination of this information. *Id.*

Second, the disclosure of Securus' confidential information will cause substantial harm to Securus' competitive position. "In determining whether disclosure of confidential information will cause 'substantial harm to the competitive position' of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released." *Id.* at 1128. A "competitive harm analysis" looks to the "harm flowing from the affirmative use of proprietary information by competitors." *Id.*

Actual competition exists in the relevant market. Here, Securus was one of three entities that submitted proposals in response to the RFP, with Securus selected by the PADOE as the winning bidder. Cadwell Affidavit ¶ 6. This provides clear evidence of actual competition in this market. Securus has faced the same or similar competitors numerous times in other public procurements throughout the United States. *Id.* ¶ 8. Each of the competitors closely guards their financial and pricing information and their operational plans to avoid inadvertent public disclosure. *Id.* ¶ 7.

Securus will suffer substantial competitive injury if the Securus Confidential Information documents are released. The Securus Confidential Information represents closely-guarded information that, if disclosed, would enable Securus' competitors to review and to understand Securus' financial and operational capabilities. This information can be utilized by Securus' competitors to gain a competitive advantage against Securus in future procurements.

Specifically, with respect to the Financial Information documents, Securus submitted a proposal package to PADOc that contained specific financial and related pricing information in response to the RFP that demonstrated Securus' financial capability to perform the contract. *Id.* ¶ 13. The Financial Information submitted by Securus includes key financial data and related financial disclosures. *Id.* If disclosed, Securus' competitors would gain insight into Securus' expected revenues, financial margins, cost structures, and profitability. *Id.* ¶ 17. This information could be utilized in subsequent procurements by the competitors to tailor and to structure their proposals in a competitively-advantageous manner. *Id.*

Indeed, the Office of Open Records has previously recognized the importance of protecting the confidentiality of such information by finding that "fees and pricing information are confidential proprietary information and may be protected as confidential proprietary information or trade secrets when the necessary facts are substantiated by the evidence submitted into the record." *Ropart Asset Mgmt. v. Pa. Turnpike Comm'n*, 2014 PA O.O.R.D. LEXIS 55, *7 (Pa. O.O.R.D. 2014). See also *In re: Colgate-Palmolive Co.*, 2014 PA O.O.R.D. LEXIS 252 (Pa. O.O.R.D. 2014); *Office of the Governor v. Bari*, 20 A.3d 634, 647-49 (Pa. Cmwlth. 2011).

With respect to the Implementation Plan documents, Securus included in its proposal to PADOc Securus' proprietary methods and processes for providing telephone services to inmates. *Cadwell Affidavit* ¶ 14. Securus developed its unique Implementation Plan in order to, among other things, differentiate Securus and its operations from its competitors. *Id.* Securus expended considerable financial resources developing the methods and techniques embodied in its Implementation Plan to accomplish this goal. *Id.* ¶ 15. If the Implementation Plan documents are disclosed to the public, Securus' competitors would gain insight into how Securus' system operates, how Securus manages the inmate calling process and how Securus generates revenues and incurs costs under the system. *Id.* ¶ 18. Securus' competitors would know exactly how to identify and to address both the strengths and weaknesses of the Securus system for use in future procurement competitions. *Id.* This information could be utilized by its competitors to tailor and to structure their systems and operational plans. *Id.* ¶ 19. In this highly competitive market, such disclosure will place Securus in a significant competitive disadvantage for future public procurements.

The key point is that Securus competes in a highly-competitive niche market by providing telephone services to inmates within prison systems. *Id.* ¶ 16. If the Securus Confidential Information is disclosed to the public, this disclosure would afford Securus' competitors insight into both Securus' financial capabilities and its Implementation Plan, as well as Securus' goals and objectives for this procurement and contract. Accordingly, disclosure of the Securus Confidential Information will place Securus in a competitive disadvantage for future public procurements against many of the same competitors. Therefore, the Securus Confidential Information is confidential proprietary information as set forth in Section 708(b)(11) and exempt from disclosure under the RTKL.

B. The Implementation Plan is a trade secret of Securus.

In addition to being confidential proprietary information, the Implementation Plan is also exempt under Section 708(b)(11) as a trade secret. A "trade secret" is defined as follows:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102.

The Implementation Plan constitutes a trade secret of Securus. The Implementation Plan reflects Securus' proprietary methods, techniques and processes to efficiently and effectively provide inmate telephone services. Cadwell Affidavit ¶¶ 14-15. Securus developed the unique Implementation Plan for its own exclusive use. *Id.* ¶ 14. The Implementation Plan is not publicly available and Securus closely guards against public disclosure of this information. *Id.* ¶ 7. In fact, the Implementation Plan derives independent economic value to Securus because it is not known by Securus' competitors and is not reasonably ascertainable by proper means. *Id.* ¶ 20. Disclosure of this information to Securus' competitors will allow them to simulate those processes or otherwise impede Securus' ability to compete on future procurements. *Id.* Furthermore, Securus has expended considerable financial resources developing the methods and techniques embodied in the redacted information. *Id.* ¶ 15. Securus would suffer great financial harm if this information is made public.

The bottom line is that the Implementation Plan is not available to the public and the disclosure of this information will result in substantial economic harm as Securus' competitors would have access to this confidential information for their own use. Therefore, the Implementation Plan information falls squarely within the definition of a trade secret under the RTKL and, accordingly, is exempt from public disclosure under Section 708(b)(11). See 65 P.S. §§ 67.102 & 67.708(b)(11).

III. Conclusion

For the reasons stated above, Securus requests that PLN's appeal be denied and, specifically, that the Securus Confidential Information be deemed as exempt from production as confidential proprietary information under Section 708(b)(11), 65 P.S. § 67.708(b)(11), of the RTKL.

Very truly yours,

C. Grainger Bowman

cc:

Paul Wright, c/o Prison Legal News, Human Rights Defense Center, P.O. Box 1151, Lake Worth, FL 33460, pwright@prisonlegalnews.org (via email)

Valerie Janosik-Nehilla, Assistant Counsel, Pennsylvania Department of Corrections, 1920 Technology Parkway, Mechanicsburg, PA 17050

numerous jurisdictions throughout the United States. In many cases, the competitions are very close and each competitor looks for any advantage to be selected for the contract.

9. For the RFP, each competitor submitted confidential information to the PADOE in order for the PADOE to evaluate and to select the offeror most advantageous to the Commonwealth. In their proposal, each competitor attempts to provide support for PADOE to reach the conclusion that their proposal is most advantageous to the Commonwealth. The competitors submit this information with the understanding that PADOE will not disclose confidential information to the public.

10. In this case, Securus submitted a proposal in response to the RFP that included several categories of confidential information that Securus takes great pains to ensure that its confidentiality is protected. This confidential information ("Confidential Information") consists of two principal categories of confidential information: (1) financial information submitted by Securus to demonstrate its economic ability to perform the services under the contract ("Financial Information"); and (2) Securus' implementation plan for providing the telephone services under the contract ("Implementation Plan").

11. Securus provided the Confidential Information to PADOE with the understanding that the information would remain confidential. At the time of submission, Securus marked the documents as confidential and provided a written statement to PADOE that the records contain a trade secret or confidential proprietary information.

12. Securus took other substantial and reasonable measures to protect the confidentiality of the Confidential Information. Securus closely restricted access to the documents submitted with its proposal to only those employees essential to preparation of Securus' response to the RFP. Securus provides confidentiality training to its employees. In addition, Securus has not otherwise disclosed the documents or confidential information to any other party except for PADOE. Finally, Securus destroyed all non-essential copies of the documents submitted to PADOE in order to further ensure no additional dissemination of this information.

13. The Financial Information contains specific financial and related pricing information that demonstrates Securus' financial capability to perform the contract that would be awarded pursuant to the RFP. This information includes key data and related financial information. If disclosed to the public, this information could be used by competitors of Securus to structure their proposals to the competitive disadvantage of Securus.

14. The Implementation Plan contains Securus' proprietary methods and processes for providing telephone services to inmates under the contract. Securus developed this unique Implementation Plan to, among other things, differentiate Securus and its operations from competitors like CenturyLink and GTL. The Implementation Plan was developed for exclusive use by Securus.

15. Securus has made a considerable financial investment in the Implementation Plan in order to develop the unique methods and techniques. One of the goals of this investment was to provide a system to correctional agencies that is both efficient and effective.

16. Securus competes in a highly-competitive niche market by providing telephone services to inmates within prison systems.

17. If the Financial Information is disclosed to the public, this disclosure would afford Securus' competitors insight into Securus' financial capabilities, goals and objectives for this procurement and contract, which will place Securus in a competitive disadvantage for future public procurements against many of the same competitors. Securus' competitors would gain insight into Securus' expected revenues, financial margins, cost structures, and profitability. This information could be utilized in subsequent procurements by the competitors to prepare their proposals in a competitively-advantageous manner and to Securus' disadvantage.

18. Similar to the Financial Information, if the Implementation Plan is disclosed to the public, this disclosure would afford Securus' competitors insight into Securus' proprietary methods and processes for providing such telephone services for PADO. Securus' competitors would gain insight into how Securus' system operates, what its components are, how Securus manages the inmate calling process and how Securus generates revenues and incurs costs. Securus' competitors would know exactly how to identify and to address both the strengths and weaknesses of the Securus' system for use in future procurement competitions.

19. This information could be utilized by the competitors to tailor and to structure their systems and implementation plan to the competitive disadvantage of Securus.

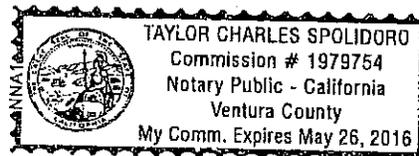
20. The Implementation Plan derives independent economic value to Securus because it is not known by Securus' competitors and is not reasonably ascertainable by proper means. Disclosure of this information to Securus' competitors will allow them to simulate the processes that Securus developed for its own use or otherwise impede Securus' ability to compete on future procurements.


Steven Cadwell

Sworn to and subscribed before me this
day of June, 2015.


Notary Public

My Commission Expires: May 26, 2016



State of California
County of Ventura

Attachment 4

FACTUAL BACKGROUND

On March 27, 2015, the Request was filed, seeking contracts between the Department and various service providers, including those providing telephone services, video visitation services, electronic messaging services, money transfer services, commissary services, and book ordering services to inmates. The Request also sought various financial records. On March 31, 2015, the Department invoked a thirty-day extension of time to respond to the Requests pursuant to 65 P.S. § 67.902. On April 20, 2015, the Requester granted the Department time until May 20, 2015 to respond to the Request. *See* 65 P.S. § 67.902(b)(2). On May 12, 2015, the Department partially denied the Request, providing redacted copies of records. The Department argued, among other reasons, that these redactions were necessary because the release of certain information would threaten personal security and public safety, 65 P.S. § 67.708(b)(1)(ii)-(2), or constitutes the financial information of a bidder, 65 P.S. § 67.708(b)(26), contains communications between an agency and its insurance carrier, 65 P.S. § 67.708(b)(27), contains personal identification information, 65 P.S. § 67.708(b)(6), or contains confidential proprietary information or trade secrets, 65 P.S. § 67.708(b)(11). The Department also argued that certain records do not exist.

On June 3, 2015, the Requester appealed to the OOR, challenging only the Department's redactions and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c). On June 10, 2015, the Department confirmed that it notified all "directly interested parties" of the appeal.

On June 18, 2015, after receiving additional time to make its submission, the Department submitted a position statement, along with the declarations made under the penalty of perjury of

Steven Hilbish, Chief of Support Services in the Administrative Services Division of the Department's Bureau of Administration ("Bureau"), Major Victor Mirarchi, Chief of Security, Robert Illgenfritz, Administrative Officer in the Bureau, Anthony Miller, Director of Correctional Industries, Michael Knaub, Accountant 3 in the Fiscal Management Division of the Bureau, and Errol Feldman, Chief Administrative Officer of JPay, Inc ("JPay").¹ On June 19, 2015, Global Tel*Link Corporation ("GTL") submitted a request to participate in this appeal, which was granted on June 22, 2015. Along with its request to participate, GTL also submitted a position statement and the declaration made under penalty of perjury of Steve Montanaro, Vice-President of Sales and Marketing Operations for GTL. On June 26, 2015, Securus Technologies, Inc. ("Securus") also submitted a request to participate in the appeal, which was granted on June 29, 2015. Along with its request to participate, Securus also submitted a position statement and the sworn affidavit of Steven Cadwell, Senior Account Executive – DOC, West Region.

LEGAL ANALYSIS

"The 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).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the

¹ JPay did not seek to participate as a party with a direct interest pursuant to 65 P.S. § 67.1101(c); instead, Mr. Feldman affirms that JPay consulted with the Department regarding redactions.

request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal; however, the decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither of the parties requested a hearing, and the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The contracts at issue are financial records

The RTKL defines “financial records” to include “[a]ny account, voucher or *contract* dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) an agency’s acquisition, use or disposal of services, supplies, materials, equipment or property.” 65 P.S. § 67.102 (emphasis added). Section 708(c) of the RTKL states that “[t]he exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (16), or (17).” 65 P.S. § 67.708(c).

Here, the records at issue constitute various portions of contracts that the Department has entered into with service providers. The contracts are financial records under the RTKL, as they involve the Department’s acquisition of services and equipment. *See* 65 P.S. § 67.102. While some of the information at issue in this appeal is contained in attachments to the contracts, these attachments are part and parcel of the contracts. As the contracts are financial records, they may be redacted only pursuant to certain exemptions under the RTKL. *See* 65 P.S. § 67.708(c). The Department, GTL, Securus, and JPay argue that the contracts contain bidder financial information that is exempt from disclosure under 65 P.S. § 67.708(b)(26) and confidential proprietary information and trade secrets that are exempt from disclosure under 65 P.S. § 67.708(b)(11). Likewise, the Department argues that the PA Prison Society contract contains a certificate of liability insurance that is exempt from disclosure under 65 P.S. § 67.708(b)(27). However, pursuant to 65 P.S. § 67.708(c), the Department may not redact information on these bases. Accordingly, Sections 708(b)(11), 708(b)(26) and 708(b)(27) of the RTKL do not apply because the contracts at issue are financial records.²

² While the OOR has previously held that government contracts may be redacted pursuant to Section 708(b)(11), *see e.g., Maulsby v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1480, 2014 PA O.O.R.D. LEXIS 1268, the appropriate legal reason for withholding trade secrets within a contract or other financial record lies under the Pennsylvania Uniform Trade Secrets Act. *Commonwealth v. Eiseman*, 85 A.3d 1117, 1124 (Pa. Commw. Ct. 2014).

However, Section 306 of the RTKL states that “[n]othing in [the RTKL] shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.” 65 P.S. § 67.306. As a result, “Section 708(c) cannot dilute operation of another law that provides an independent statutory bar to disclosure.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1124 (Pa. Commw. Ct. 2014).

2. The Department may redact confidential tax return information

The Department explains that it redacted federal employer identification numbers from the Securus, GTL, PA Prison Society, and Scotlandyard contracts, and a one-page tax return that was attached to the JPay contract. Meanwhile, Mr. Montanaro, on behalf of GTL, attests that the redacted information includes federal tax returns submitted by GTL’s subcontractor, Mid Atlantic Consultants.

Section 6103(a) of the Internal Revenue Code (“Code”) prohibits disclosure of “returns” and “return information.” 26 U.S.C. § 6103(a); *see also Fort Cherry Sch. Dist. v. Coppola*, 37 A.3d 1259 (Pa. Commw. Ct. 2012) (finding that W-2 forms constitute confidential “return information”); *Office of the Budget v. Campbell*, 25 A.3d 1318 (Pa. Commw. 2011) (same). Therefore, the OOR has held that confidential return information may be redacted from the contracts. *See Kerns v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2013-0959, 2013 PA O.O.R.D. LEXIS 592.

Here, the above-referenced tax returns are explicitly confidential under the Code. *See* 26 U.S.C. § 6103(b)(1) (defining “return”). Further, federal employer identification numbers are confidential “return information” under the Code. *Id.* § 6103(b)(2)(A) (defining “return information” to include “a taxpayer’s identity ... or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return....”); *see also*

Kerns, OOR Dkt. AP 2013-0959, 2013 PA O.O.R.D. LEXIS 592 (allowing the redaction of tax identification numbers). Therefore, the Department may withhold the tax returns and redact the tax return information pursuant to the Code.

3. Some of the redacted information constitutes trade secrets under the Pennsylvania Uniform Trade Secrets Act (“Act”)

The Department and the direct interest participants argue that certain information constitutes trade secrets. While the parties cite to Section 708(b)(11) of the RTKL as the basis for withholding these alleged trade secrets, the “Act [i]s a separate statutory defense” separate from Section 708(b)(11). *See Eiseman*, 85 A.3d at 1125. The Act 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.

12 Pa.C.S. § 5302; *see also* 65 P.S. § 67.102 (defining “trade secret” for purposes of Section 708(b)(11) of the RTKL). The Act protects against “misappropriation” of trade secrets. *See* 12 Pa.C.S. § 5302; *Parsons v. Pa. Higher Ed. Assistance Agency*, 910 A.2d 177 (Pa. Commw. Ct. 2006).

“Whether information qualifies as a ‘trade secret’ is a highly fact-specific inquiry that cannot be distilled to a pure matter of law.” *Eiseman*, 85 A.3d at 1126. Pennsylvania courts confer “trade secret” status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of

the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. Ct. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS § 757 (1965)). To constitute a “trade secret,” it must be an “actual secret of peculiar importance to the business and constitute competitive value to the owner.” *Parsons*, 910 A.2d at 185. The most critical criteria are “substantial secrecy and competitive value.” *Crum*, 907 A.2d at 585.

a. Securus contract

The Department and Securus argue that a portion of their contract known as the “Implementation Plan” is exempt from disclosure because it constitutes a trade secret. Mr. Cadwell, on behalf of Securus, attests, in relevant part:

7. Proposals submitted in response to a request for proposals are, by their nature, competitive. Each closely guards their confidential information to limit a competitor’s ability to review and to use this confidential information against the creator in future procurements.
8. With respect to the RFP, each of the competitors in this procurement, Securus, CenturyLink and GTL, has engaged in procurement competitions against one another in numerous jurisdictions throughout the United States. In many cases, the competitions are very close and each competitor looks for any advantage to be selected for the contract....
10. In this case, Securus submitted a proposal in response to the RFP that included several categories of confidential information that Securus takes great pains to ensure that its confidentiality is protected[, including] ... Securus’ implementation plan for providing the telephone services under the contract (“Implementation Plan”).
11. Securus provided the [Implementation Plan] to [the Department] with the understanding that the information would remain confidential. At the time of the submission, Securus marked the documents as confidential and provided a written statement to [the Department] that the records contain a trade secret or confidential proprietary information.
12. Securus took other substantial and remarkable measures to protect the confidentiality of the [Implementation Plan]. Securus closely restricted access to the documents submitted with its proposal to only those employees

essential to preparation of Securus' response to the RFP. Securus provides confidentiality training to its employees. In addition, Securus has not otherwise disclosed the documents or confidential information to any other party except for [the Department]. Finally, Securus destroyed all non-essential copies of the documents submitted to [the Department] in order to further ensure no additional dissemination of this information....

14. The Implementation Plan contains Securus' proprietary methods and processes for providing telephone services to inmates under the contract. Securus developed this unique Implementation Plan to, among other things, differentiate Securus and its operations from competitors like CenturyLink and GTL. The Implementation Plan was developed for exclusive use by Securus.
15. Securus has made a considerable financial investment in the Implementation Plan in order to develop the unique methods and techniques. One of the goals of this investment was to provide a system to correctional agencies that is both efficient and effective.
16. Securus competes in a highly-competitive niche market by providing telephone services to inmates within prison systems....
17. [I]f the Implementation Plan is disclosed to the public, this disclosure would afford Securus' competitors insight into Securus' proprietary methods and processes for providing such telephone services for [the Department]. Securus' competitors would gain insight into how Securus' system operates, what its components are, how Securus manages the inmate calling process and how Securus generates revenues and incurs costs. Securus' competitors would know exactly how to identify and to address both the strengths and weaknesses of the Securus' system for use in future procurement competitions.
18. This information could be utilized by the competitors to tailor and to structure their systems and implementation plan to the competitive disadvantage of Securus.
19. The Implementation Plan derives independent economic value to Securus because it is not known by Securus' competitors and is not reasonably ascertainable by proper means. Disclosure of this information to Securus' competitors will allow them to simulate the processes that Securus developed for its own use or otherwise impede Securus' ability to compete on future procurements.

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Based upon the above evidence, Securus has demonstrated that it took various measures to protect the Implementation Plan's secrecy, including limiting the employees who have access to the

Implementation Plan and destroying all “non-essential copies” of the records. Further, Securus has demonstrated that there is a competitive market to provide telephone services to inmates, and that disclosure of the Implementation Plan would allow competitors to gain insight into Securus’ business model and ultimately simulate how it conducts its business. Therefore, Securus has met its burden of proving that the Implementation Plan constitutes a trade secret and is not subject to public access.

b. JPay Contract

The Department and JPay also argue that portions of their contract constitute trade secrets. Mr. Feldman, on behalf of JPay, attests, in relevant part, regarding the records redacted or withheld by the Department:

5. Facility Descriptions and Screenshots: The above-listed facility descriptions and screenshots ... were redacted pursuant to Section 708(b)(11) of the RTKL because they constitute ... trade secrets. The facility system descriptions and screenshots are descriptions of the system, products and processes and actual snapshots of computer program screens marketed by JPay to provide the underlying services requested by the [Department]. The facility system and screenshots set forth in the redacted materials describe JPay’s proprietary methods and processes for providing its e-commerce services to the [Department]. JPay has taken a number of steps to maintain the confidentiality of its system and interface depicted in the screenshots, and each client logs into the system with personal login credentials. Clients and JPay employees are the only individuals having access to this information. As such information is not generally available to the public, disclosure of this information would result in substantial economic harm as JPay’s competitors would have access to JPay’s proprietary information. JPay competes in a niche market by providing certain services, including e[-]commerce, communication and financial services to prison systems. Provision of this information to JPay’s competitors will allow them to simulate those processes, or otherwise impede JPay’s ability to compete for the same market share.... Furthermore, JPay has expended considerable financial resources developing the methods and techniques embodied in the redacted information. JPay currently has a pending patent on all of its applications and the related Intel system which is fully integrated with each individual service offered by JPay to the [Department]. This patent-pending system is accessible via the online interface described in the facility descriptions and screenshots JPay is seeking to protect.

6. Electronic Payment Flow Chart: The above-listed electronic payment flow chart ... is proprietary information and is considered a trade secret. This chart reflects JPay's proprietary method for processing a funds transfer which is central to one of JPay's main services offered to the [Department] and its inmates. Such information is not generally available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to this confidential information.
7. Implementation Plan: The above-listed implementation plan ... is a trade secret. The implementation plan reflects JPay's proprietary method, technique and process to install and operate its patent-pending system. Such information is generally not available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to such confidential information.
8. Customer List: The above-listed customer list ... was redacted pursuant to Section 708(b)(11) of the RTKL because it is a trade secret. The definition of trade secret as set forth in the law specifically identifies customer lists as exempt information. Such information is not generally available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to such confidential information....

Based on the above evidence, the Department and JPay have demonstrated that the facility descriptions and screenshots are subject to efforts to maintain their secrecy, as only clients and employees of JPay have access to it. Further, the Department and JPay have demonstrated that disclosure of this information will allow competitors in the market to simulate JPay's processes, ultimately resulting in harm to the competitive position of JPay. Therefore, the Department and JPay have met their burden of proving that this information constitutes a trade secret.

Additionally, the Department and JPay have demonstrated that the withheld customer list constitutes a trade secret, as it is specifically defined as a type of trade secret, and subject to efforts to maintain its secrecy. Likewise, the Department and JPay have demonstrated that the electronic payment flow chart and the implementation plan are trade secrets. These records constitute a "method" or "technique" regarding how JPay processes funds and how it installs and operates its system to provide services to inmates. Additionally, the information is not generally

available to the public, and pertains to key components in how JPay performs its business. As a result, JPay has demonstrated that the release of this information would cause competitive harm to its business. Accordingly, this information constitutes a trade secret under the RTKL, and is not subject to access. *See Overby v. Pa. Dep't of Corr.*, OOR Dkt. AP 2010-1014, 2010 PA O.O.R.D. LEXIS 978 (holding that the same information is exempt from disclosure as a trade secret).

c. GTL contract

The Department and GTL argue that portions of their contract contain trade secrets. Mr. Montanaro attests:

5. This Declaration addresses ... [f]inancial information submitted to the Department for both contracts [regarding inmate telephone services and kiosks, respectively] to demonstrate GTL's financial capability as a prospective contractor, as well as the same information of GTL's predecessor-in-interest and GTL's subcontractor....
6. [A]s to GTL's financials, the redaction numbered 29 by [the Requester] covers the financial information that GTL provided to the Department, at the Department's request, in connection with the request for proposal process for the kiosk contract, in order to demonstrate GTL's economic capability.
7. Redaction 45 covers the same information that GTL's predecessor-in-interest supplied respecting the telephone contract.
8. These two redactions cover information that is highly confidential to GTL.
9. The redacted information includes audited financial statements for GTL over several years, including information about GTL's assets, income, cash on hand, receivables, expenses, licenses, taxes, property, goodwill, and other assets and liabilities.
10. Each page of the redacted documents is stamped "CONFIDENTIAL."
11. This redacted information is maintained by GTL with the highest degree of confidence, both internally and externally.
12. Were this information to be disclosed, it would be highly damaging to GTL, a non-public company....
21. Competitors in this industry keep the subject information confidential.
22. GTL takes steps to limit access to this information internally and externally.
23. This information has independent economic value because, if disclosed, it could be used by a competitor as part of an effort to win business away from GTL.
24. Substantial time and effort was invested to generate this information subject to the redactions.

Based on the evidence provided, GTL has demonstrated that it considers the withheld information as confidential, but does not explain the efforts to maintain its secrecy other than stamping records as “CONFIDENTIAL.” Notwithstanding the foregoing, however, GTL does not explain how the withheld information has independent economic value or how the information could be used to “win business away from GTL.”³ As a result, the Department and GTL have not met their burden of proving that this information constitutes trade secrets. *See Eiseman*, 85 A.3d at 1126-27.

d. Other contracts

Finally, the Department generally argues that the Scotlandyard contract contains trade secrets. However, other than the conclusory declaration of Mr. Illgenfritz, the Department has not provided any evidence in support of this assertion. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency's conclusory affidavit was insufficient). Additionally, Scotlandyard has not sought to participate in this matter nor has it submitted any evidence. As a result, the Department has not met its burden of proving that either of these contracts contain trade secrets. *See* 65 P.S. § 67.708(a)(1).

4. The release of some information would threaten personal security or public safety

³ While the evidence provided by JPay did not specifically explain how disclosure of the information would cause competitive harm, the records at issue pertain to how JPay conducts its business. Here, the records identified by GTL are strictly financial records, and GTL does not explain how disclosing this information would cause competitive harm.

The Department argues that certain information is protected under Section 708(b)(1) of the RTKL, which exempts from public disclosure “[a] record the disclosure of which ... would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Delaware County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *16 (Pa. Commw. Ct. 2012) (“The RTKL must be construed to maximize access to government records”).

In the context of a correctional institution setting, a correctional facility need not demonstrate specific prior examples of physical harm to personal security to meet the agency's burden of proof under 65 P.S. § 708(b)(1)(ii). *See, e.g., Mele v. Monroe County*, OOR Dkt. AP 2011-1230, 2011 PA O.O.R.D. LEXIS 1358; *Bernstein v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-1603, 2011 PA O.O.R.D. LEXIS 1295 (holding that prison inmate policy manuals are exempt from disclosure); *Rizzuto v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2010-0916, 2010 PA O.O.R.D. LEXIS 900 (records of prison staff observations, opinions, and impressions of inmates and inmates' behavior exempt from disclosure); *Chance v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-0539, 2011 PA O.O.R.D. LEXIS 726; *Erdley v. Pa. State Empl. Ret. Sys.*, OOR Dkt. AP

2010-0705, 20110 PA O.O.R.D. LEXIS 701; *Viney v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009- 60666, 2009 PA O.O.R.D. LEXIS 125 (first names exempt from disclosure); *Lancaster Newspapers, Inc. v. Lancaster County*, OOR Dkt. AP 2011-0407, 2011 PA O.O.R.D. LEXIS 652 (knowledge of emergency response techniques could be exploited by inmates); *Blom v. Pa. Dep't of Corr.*, OOR Dkt. AP 2010-1075, 2010 PA O.O.R.D. LEXIS 888 (mental health information likely to be used by inmates to exploit other inmates to the detriment of institutional security); *see also ACLU v. City of Pottsville*, OOR Dkt. AP 2010-0231, 2010 PA O.O.R.D. LEXIS 322 (prior knowledge of response procedures would expose police officers to physical harm). The OOR finds credible the professional opinion of individuals assessing the risks of security and will not substitute its judgment for that of those with far more familiarity with the issues involving personal security. *See Knauss v. Unionville-Chadds Ford Sch. Dist.*, OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238.

The Department also argues that the records are protected under Section 708(b)(2) of the RTKL, which exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, an agency must show: (1) the records at issue relate to a law enforcement or public safety activity; and (2) disclosure of the records would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Dep't of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

a. GTL contract

Mr. Montanaro, on behalf of GTL, attests, in relevant part:

16. The [Investigative Management System (“IMS”)] tool, as well as other similar tools, are at the Department’s disposal in order to detect and obtain intelligence respecting otherwise hidden activities, which it then uses to prevent prison violence and other violations and to otherwise foster institutional security.
17. If details about IMS or similar investigative tools were to be publicly disclosed, then inmates and others could use that information to circumvent the Department’s investigations, thus exposing prison institutions to increased risk of violence.

Meanwhile, the Major Mirarchi, on behalf of the Department, attests in relevant part:

6. In accordance with Department Policy DC-ADM 818, “Automated Inmate Telephone System (“AITS”) Procedures Manual,” every inmate telephone call is subject to interception, recording, and disclosure, except those placed to or from an attorney representing an inmate.
7. Electronic surveillance of inmate telephone calls is conducted by the Department in connection with its official law enforcement function of supervising the incarceration of inmates to, inter alia, ensure institutional security by assisting the Department in the detection of illicit or criminal activity by inmates or others and to investigation allegations of wrong-doing made against inmates or others.
8. Correspondingly, records of inmate telephone conversations are maintained by the Department in connection with its official law enforcement function of supervising the incarceration of inmates for the same reasons.
9. Fifty-nine pages entitled “Investigative Reports” have been redacted from the subject contract, from the section entitled “Value Added Communications,” because these pages contain the investigative tools of the Inmate Telephone System that provide facility staff with the capability to generate reports for purposes of, inter alia, criminal and noncriminal investigations undertaken by the Department in accordance with the monitoring of inmate telephone calls.
10. At Section 2 – Inmate Telephone Services, RFP No. 2005-081-011 – Technical Proposal – Tab 6 (“Technical Requirements”), language has been redacted from pages 61 through 63, page 104, and pages 173 through 175 and at Tab 3 (“Management Summary”), language has been redacted from page 12 because this language describes the [IMS], an investigative tool/application that the Department employs to identify and detect inmates involved in illicit and/or criminal activities.
11. Divulgence of the redacted portions of the contract would provide inmates with the necessary knowledge to take steps to circumvent the capabilities of the AITS, and undetected illicit, criminal and dangerous activities would proliferate within the institution placing the lives and safety of inmates, officers and others at risk.
12. The disclosure of the redacted portions of the contract would threaten public safety and the Department’s public protection activities in maintaining safe and secure correctional institutions by allowing inmates and others to access

information that can be used to undermine the Department's security procedures.

Based upon the foregoing evidence, the Department and GTL have demonstrated that the release of the withheld information regarding the IMS would allow inmates engaging in criminal activities to circumvent the IMS, and ultimately undermine the safety and security of the Department's institution. As the Department and GTL have demonstrated that the release of this information would be reasonably likely to threaten the personal security of Department staff and inmates, this information is exempt from disclosure under Section 708(b)(1)(ii) of the RTKL.

b. Securus contract

Major Mirarchi attests, in relevant part, that portions of the Securus contract, referred to as the "Security Information" are exempt from disclosure because their release would threaten personal security and public safety.⁴ Specifically, Major Mirarchi attests:

7. The Contract was developed to provide the Department with an innovative, state of the art, "hosted" solution for inmate telephone service and call monitoring and recording system which will provide inmates confined to the Department's institutions with a highly reliable, high quality service to call family and friends and give the Department the capability to perform oversight and monitoring of inmate telephone calls.
8. The Security Information provisions of the Contract define the investigative and intelligence processes and procedures for the recording and monitoring of inmate calls as well as the detection of cellular telephone usage by inmates.
9. The Security Information processes and procedures in the Contract are an integral and critical component of the Department's efforts to perform investigations and safely and securely monitor inmate calls.
10. The Security Information provisions are part of the Department's law enforcement functions and duties in connection with its legal responsibility for the care, custody and control of offenders committed to the Department's custody.
11. The Security Information is confidential because it contains security-sensitive information regarding the recording and monitoring of inmate telephone calls....

⁴ In its submission, Securus does not address any security concerns. Instead, it focused on the confidential proprietary nature of its information.

15. Many inmates are sophisticated enough that even the disclosure of seemingly innocuous information would be used by the inmate population to the detriment of institutional security.
16. The more the inmate population knows about the Department's telephone system and monitoring processes, the better prepared the inmates will be to use such information to cause disruptions, risking the lives of staff, other inmates, vendors, suppliers, the general public and other[s] who might be present at or near the institution.
17. Inmates could easily manipulate the Security Information contained in the Contract to circumvent the Department's call monitoring and investigation intelligence gathering and hinder the Department's ability to detect illicit calls and monitor the calls in the pursuit of appropriate administrative sanctions and/or criminal charges.
18. Knowledge of the contents of the Security Information provisions will allow inmates to take precautions to prevent the detection of illicit phone conversations by providing them with information to allow them to circumvent the tools used by the Department to monitor the calls.

Based on the foregoing evidence, the Department has demonstrated that the Security Information contains "investigative and intelligence processes and procedures" regarding the Department's law enforcement function, that if disclosed, would allow inmates to circumvent Department monitoring. The Department has also demonstrated that the release of this information would threaten institutional security. Based on this evidence, the Department has met its burden of proving that this information is exempt under Section 708(b)(2) of the RTKL.

c. Scotlandyard contract

Section 708(b)(3) of the RTKL exempts from disclosure "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system..." 65 P.S. § 67.708(b)(3). The exemption includes "building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems..." 65 P.S. § 67.708(b)(3)(iii). In regard to the contract between the Department and Scotlandyard, the Department redacted a page referenced as a "Building Plan."

Mr. Ilgenfritz, on behalf of the Department, attests that this information “was redacted in accordance with several exemptions of the RTKL, specifically, [the] building security exemption, which excludes records that create a reasonable likelihood of endangering the safety or physical security of a building, such as, the physical security of Scotlandyard’s location for video visitation.” However, conclusory affidavits or statements made under penalty of perjury are insufficient to meet an agency’s burden of proof. *See Scolforo*, 65 A.3d at 1103. The Department has not demonstrated *why* the release of the Building Plan would be reasonably likely to endanger the physical security of a building.⁵ Therefore, it has not met its burden of proving that this record is exempt under Section 708(b)(3) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

Likewise, the Department also argues that the release of the Building Plan “would reveal proprietary information and trade secrets which Scotlandyard has spent considerable time and effort in protecting,” and “would jeopardize the Department’s interests in safely and securely delivering video visitation for inmates.” However, these conclusory statements are insufficient to meet the Department’s burden of proof, as there is no explanation of why the information is a trade secret, or why the release of the Building Plan would pose a safety risk. Therefore, the Department has not met its burden of proving that the Building Plan is exempt from disclosure.

5. The Department has not met its burden of proving that signatures are exempt from disclosure

The Department also argues that various signatures are exempt from disclosure under Section 708(b)(1)(ii) because their release would threaten individuals’ personal security. However, other than conclusory affidavits merely stating that the signatures are exempt from

⁵ Notably, the Department’s Chief of Security, Major Mirarchi, attests to security risks regarding portions of the GTL and Securus contracts; however, Major Mirarchi does not address the Department’s claim that the release of the Building Plan also poses a security risk.

disclosure, the Department has not provided any competent evidence establishing that the release of the signatures would threaten individuals' personal security. *Cf. Governor's Office of Admin. v. Purcell*, 35 A.3d 811 (Pa. Commw. Ct. 2011). As such, the Department has not met its burden of proving that this information is exempt from disclosure.

6. The Department has proven that records contain personal identification information

Finally, the Department argues that it redacted six pages of resumes that were attached to the JPay contract because they contained the personal or cellular telephone numbers of JPay personnel. Section 708(b)(6) of the RTKL exempts from disclosure "personal identification information," including "home, cellular or personal telephone numbers." *See* 65 P.S. § 67.708(b)(6)(i)(A). Accordingly, the Department has met its burden of proving that the information redacted from the resumes is exempt from disclosure under Section 708(b)(6) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part** and, subject to the redaction of tax information, trade secrets and personal identification information, the Department is required to provide the Requester with copies of the records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 12, 2015



APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Paul Wright (via e-mail only);
Valerie Janosik-Nehilla, Esq. (via e-mail only);
Andrew Filkosky (via e-mail only);
Karl Myers, Esq. (via e-mail only);
Grainger Bowman, Esq. (via e-mail only)

Attachment 5

From: [Carrie Wilkinson](#)
To: ["RA-docrighntoknow@pa.gov"](mailto:RA-docrighntoknow@pa.gov)
Cc: [Paul Wright](#); [Lance Weber](#)
Subject: Follow-up on RTKL Tracking #524-15/Pennsylvania Office of Open Records Docket No.: AP 2015-0909
Date: Tuesday, March 15, 2016 2:29:38 PM
Attachments: [031516 Ltr to PA DOC re RTKL Docs.pdf](#)

Attn: Andrew Filkosky

Please see attached correspondence from Lance T. Weber, General Counsel, Human Rights Defense Center.

Thank you.

Carrie Wilkinson
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Human Rights Defense Center
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Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

March 15, 2016

Via Email: RA-docrighhtoknow@pa.gov

Andrew Filkosky,
Pennsylvania Department of Corrections
Right-to-Know Office
Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050

**Re: *Prison Legal News* RTKL Request: Tracking #524-15
PA Office of Open Records Final Determination – Docket No. AP 2015-0909**

Dear Mr. Filkosky,

As you know, my client *Prison Legal News*, appealed the Pennsylvania Department of Corrections' (PA DOC) response to its public records request filed under Pennsylvania's Right to Know Law (RTKL Tracking #524-15). A Final Determination was issued and emailed to all parties (including you) on August 12, 2015 requiring the department to take further action as directed. **(Attachment 1 at Page 1).**

A review of our file indicates that we have yet to receive the documents the PA DOC is required to produce under the Final Determination, and we request that they be produced immediately upon receipt of this letter.

Very Truly Yours,

HUMAN RIGHTS DEFENSE CENTER

By: Lance T. Weber
General Counsel

LW:cw
Attachment

FACTUAL BACKGROUND

On March 27, 2015, the Request was filed, seeking contracts between the Department and various service providers, including those providing telephone services, video visitation services, electronic messaging services, money transfer services, commissary services, and book ordering services to inmates. The Request also sought various financial records. On March 31, 2015, the Department invoked a thirty-day extension of time to respond to the Requests pursuant to 65 P.S. § 67.902. On April 20, 2015, the Requester granted the Department time until May 20, 2015 to respond to the Request. *See* 65 P.S. § 67.902(b)(2). On May 12, 2015, the Department partially denied the Request, providing redacted copies of records. The Department argued, among other reasons, that these redactions were necessary because the release of certain information would threaten personal security and public safety, 65 P.S. § 67.708(b)(1)(ii)-(2), or constitutes the financial information of a bidder, 65 P.S. § 67.708(b)(26), contains communications between an agency and its insurance carrier, 65 P.S. § 67.708(b)(27), contains personal identification information, 65 P.S. § 67.708(b)(6), or contains confidential proprietary information or trade secrets, 65 P.S. § 67.708(b)(11). The Department also argued that certain records do not exist.

On June 3, 2015, the Requester appealed to the OOR, challenging only the Department's redactions and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c). On June 10, 2015, the Department confirmed that it notified all "directly interested parties" of the appeal.

On June 18, 2015, after receiving additional time to make its submission, the Department submitted a position statement, along with the declarations made under the penalty of perjury of

Steven Hilbish, Chief of Support Services in the Administrative Services Division of the Department's Bureau of Administration ("Bureau"), Major Victor Mirarchi, Chief of Security, Robert Illgenfritz, Administrative Officer in the Bureau, Anthony Miller, Director of Correctional Industries, Michael Knaub, Accountant 3 in the Fiscal Management Division of the Bureau, and Errol Feldman, Chief Administrative Officer of JPay, Inc ("JPay").¹ On June 19, 2015, Global Tel*Link Corporation ("GTL") submitted a request to participate in this appeal, which was granted on June 22, 2015. Along with its request to participate, GTL also submitted a position statement and the declaration made under penalty of perjury of Steve Montanaro, Vice-President of Sales and Marketing Operations for GTL. On June 26, 2015, Securus Technologies, Inc. ("Securus") also submitted a request to participate in the appeal, which was granted on June 29, 2015. Along with its request to participate, Securus also submitted a position statement and the sworn affidavit of Steven Cadwell, Senior Account Executive – DOC, West Region.

LEGAL ANALYSIS

"The 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).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the

¹ JPay did not seek to participate as a party with a direct interest pursuant to 65 P.S. § 67.1101(c); instead, Mr. Feldman affirms that JPay consulted with the Department regarding redactions.

request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal; however, the decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither of the parties requested a hearing, and the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The contracts at issue are financial records

The RTKL defines “financial records” to include “[a]ny account, voucher or *contract* dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) an agency’s acquisition, use or disposal of services, supplies, materials, equipment or property.” 65 P.S. § 67.102 (emphasis added). Section 708(c) of the RTKL states that “[t]he exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (16), or (17).” 65 P.S. § 67.708(c).

Here, the records at issue constitute various portions of contracts that the Department has entered into with service providers. The contracts are financial records under the RTKL, as they involve the Department’s acquisition of services and equipment. *See* 65 P.S. § 67.102. While some of the information at issue in this appeal is contained in attachments to the contracts, these attachments are part and parcel of the contracts. As the contracts are financial records, they may be redacted only pursuant to certain exemptions under the RTKL. *See* 65 P.S. § 67.708(c). The Department, GTL, Securus, and JPay argue that the contracts contain bidder financial information that is exempt from disclosure under 65 P.S. § 67.708(b)(26) and confidential proprietary information and trade secrets that are exempt from disclosure under 65 P.S. § 67.708(b)(11). Likewise, the Department argues that the PA Prison Society contract contains a certificate of liability insurance that is exempt from disclosure under 65 P.S. § 67.708(b)(27). However, pursuant to 65 P.S. § 67.708(c), the Department may not redact information on these bases. Accordingly, Sections 708(b)(11), 708(b)(26) and 708(b)(27) of the RTKL do not apply because the contracts at issue are financial records.²

² While the OOR has previously held that government contracts may be redacted pursuant to Section 708(b)(11), *see e.g., Maulsby v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1480, 2014 PA O.O.R.D. LEXIS 1268, the appropriate legal reason for withholding trade secrets within a contract or other financial record lies under the Pennsylvania Uniform Trade Secrets Act. *Commonwealth v. Eiseman*, 85 A.3d 1117, 1124 (Pa. Commw. Ct. 2014).

However, Section 306 of the RTKL states that “[n]othing in [the RTKL] shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.” 65 P.S. § 67.306. As a result, “Section 708(c) cannot dilute operation of another law that provides an independent statutory bar to disclosure.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1124 (Pa. Commw. Ct. 2014).

2. The Department may redact confidential tax return information

The Department explains that it redacted federal employer identification numbers from the Securus, GTL, PA Prison Society, and Scotlandyard contracts, and a one-page tax return that was attached to the JPay contract. Meanwhile, Mr. Montanaro, on behalf of GTL, attests that the redacted information includes federal tax returns submitted by GTL’s subcontractor, Mid Atlantic Consultants.

Section 6103(a) of the Internal Revenue Code (“Code”) prohibits disclosure of “returns” and “return information.” 26 U.S.C. § 6103(a); *see also Fort Cherry Sch. Dist. v. Coppola*, 37 A.3d 1259 (Pa. Commw. Ct. 2012) (finding that W-2 forms constitute confidential “return information”); *Office of the Budget v. Campbell*, 25 A.3d 1318 (Pa. Commw. 2011) (same). Therefore, the OOR has held that confidential return information may be redacted from the contracts. *See Kerns v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2013-0959, 2013 PA O.O.R.D. LEXIS 592.

Here, the above-referenced tax returns are explicitly confidential under the Code. *See* 26 U.S.C. § 6103(b)(1) (defining “return”). Further, federal employer identification numbers are confidential “return information” under the Code. *Id.* § 6103(b)(2)(A) (defining “return information” to include “a taxpayer’s identity ... or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return....”); *see also*

Kerns, OOR Dkt. AP 2013-0959, 2013 PA O.O.R.D. LEXIS 592 (allowing the redaction of tax identification numbers). Therefore, the Department may withhold the tax returns and redact the tax return information pursuant to the Code.

3. Some of the redacted information constitutes trade secrets under the Pennsylvania Uniform Trade Secrets Act (“Act”)

The Department and the direct interest participants argue that certain information constitutes trade secrets. While the parties cite to Section 708(b)(11) of the RTKL as the basis for withholding these alleged trade secrets, the “Act [i]s a separate statutory defense” separate from Section 708(b)(11). *See Eiseman*, 85 A.3d at 1125. The Act 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.

12 Pa.C.S. § 5302; *see also* 65 P.S. § 67.102 (defining “trade secret” for purposes of Section 708(b)(11) of the RTKL). The Act protects against “misappropriation” of trade secrets. *See* 12 Pa.C.S. § 5302; *Parsons v. Pa. Higher Ed. Assistance Agency*, 910 A.2d 177 (Pa. Commw. Ct. 2006).

“Whether information qualifies as a ‘trade secret’ is a highly fact-specific inquiry that cannot be distilled to a pure matter of law.” *Eiseman*, 85 A.3d at 1126. Pennsylvania courts confer “trade secret” status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of

the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. Ct. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS § 757 (1965)). To constitute a “trade secret,” it must be an “actual secret of peculiar importance to the business and constitute competitive value to the owner.” *Parsons*, 910 A.2d at 185. The most critical criteria are “substantial secrecy and competitive value.” *Crum*, 907 A.2d at 585.

a. Securus contract

The Department and Securus argue that a portion of their contract known as the “Implementation Plan” is exempt from disclosure because it constitutes a trade secret. Mr. Cadwell, on behalf of Securus, attests, in relevant part:

7. Proposals submitted in response to a request for proposals are, by their nature, competitive. Each closely guards their confidential information to limit a competitor’s ability to review and to use this confidential information against the creator in future procurements.
8. With respect to the RFP, each of the competitors in this procurement, Securus, CenturyLink and GTL, has engaged in procurement competitions against one another in numerous jurisdictions throughout the United States. In many cases, the competitions are very close and each competitor looks for any advantage to be selected for the contract....
10. In this case, Securus submitted a proposal in response to the RFP that included several categories of confidential information that Securus takes great pains to ensure that its confidentiality is protected[, including] ... Securus’ implementation plan for providing the telephone services under the contract (“Implementation Plan”).
11. Securus provided the [Implementation Plan] to [the Department] with the understanding that the information would remain confidential. At the time of the submission, Securus marked the documents as confidential and provided a written statement to [the Department] that the records contain a trade secret or confidential proprietary information.
12. Securus took other substantial and remarkable measures to protect the confidentiality of the [Implementation Plan]. Securus closely restricted access to the documents submitted with its proposal to only those employees

- essential to preparation of Securus' response to the RFP. Securus provides confidentiality training to its employees. In addition, Securus has not otherwise disclosed the documents or confidential information to any other party except for [the Department]. Finally, Securus destroyed all non-essential copies of the documents submitted to [the Department] in order to further ensure no additional dissemination of this information....
14. The Implementation Plan contains Securus' proprietary methods and processes for providing telephone services to inmates under the contract. Securus developed this unique Implementation Plan to, among other things, differentiate Securus and its operations from competitors like CenturyLink and GTL. The Implementation Plan was developed for exclusive use by Securus.
 15. Securus has made a considerable financial investment in the Implementation Plan in order to develop the unique methods and techniques. One of the goals of this investment was to provide a system to correctional agencies that is both efficient and effective.
 16. Securus competes in a highly-competitive niche market by providing telephone services to inmates within prison systems....
 17. [I]f the Implementation Plan is disclosed to the public, this disclosure would afford Securus' competitors insight into Securus' proprietary methods and processes for providing such telephone services for [the Department]. Securus' competitors would gain insight into how Securus' system operates, what its components are, how Securus manages the inmate calling process and how Securus generates revenues and incurs costs. Securus' competitors would know exactly how to identify and to address both the strengths and weaknesses of the Securus' system for use in future procurement competitions.
 18. This information could be utilized by the competitors to tailor and to structure their systems and implementation plan to the competitive disadvantage of Securus.
 19. The Implementation Plan derives independent economic value to Securus because it is not known by Securus' competitors and is not reasonably ascertainable by proper means. Disclosure of this information to Securus' competitors will allow them to simulate the processes that Securus developed for its own use or otherwise impede Securus' ability to compete on future procurements.

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Based upon the above evidence, Securus has demonstrated that it took various measures to protect the Implementation Plan's secrecy, including limiting the employees who have access to the

Implementation Plan and destroying all “non-essential copies” of the records. Further, Securus has demonstrated that there is a competitive market to provide telephone services to inmates, and that disclosure of the Implementation Plan would allow competitors to gain insight into Securus’ business model and ultimately simulate how it conducts its business. Therefore, Securus has met its burden of proving that the Implementation Plan constitutes a trade secret and is not subject to public access.

b. JPay Contract

The Department and JPay also argue that portions of their contract constitute trade secrets. Mr. Feldman, on behalf of JPay, attests, in relevant part, regarding the records redacted or withheld by the Department:

5. Facility Descriptions and Screenshots: The above-listed facility descriptions and screenshots ... were redacted pursuant to Section 708(b)(11) of the RTKL because they constitute ... trade secrets. The facility system descriptions and screenshots are descriptions of the system, products and processes and actual snapshots of computer program screens marketed by JPay to provide the underlying services requested by the [Department]. The facility system and screenshots set forth in the redacted materials describe JPay’s proprietary methods and processes for providing its e-commerce services to the [Department]. JPay has taken a number of steps to maintain the confidentiality of its system and interface depicted in the screenshots, and each client logs into the system with personal login credentials. Clients and JPay employees are the only individuals having access to this information. As such information is not generally available to the public, disclosure of this information would result in substantial economic harm as JPay’s competitors would have access to JPay’s proprietary information. JPay competes in a niche market by providing certain services, including e[-]commerce, communication and financial services to prison systems. Provision of this information to JPay’s competitors will allow them to simulate those processes, or otherwise impede JPay’s ability to compete for the same market share.... Furthermore, JPay has expended considerable financial resources developing the methods and techniques embodied in the redacted information. JPay currently has a pending patent on all of its applications and the related Intel system which is fully integrated with each individual service offered by JPay to the [Department]. This patent-pending system is accessible via the online interface described in the facility descriptions and screenshots JPay is seeking to protect.

6. Electronic Payment Flow Chart: The above-listed electronic payment flow chart ... is proprietary information and is considered a trade secret. This chart reflects JPay's proprietary method for processing a funds transfer which is central to one of JPay's main services offered to the [Department] and its inmates. Such information is not generally available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to this confidential information.
7. Implementation Plan: The above-listed implementation plan ... is a trade secret. The implementation plan reflects JPay's proprietary method, technique and process to install and operate its patent-pending system. Such information is generally not available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to such confidential information.
8. Customer List: The above-listed customer list ... was redacted pursuant to Section 708(b)(11) of the RTKL because it is a trade secret. The definition of trade secret as set forth in the law specifically identifies customer lists as exempt information. Such information is not generally available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to such confidential information....

Based on the above evidence, the Department and JPay have demonstrated that the facility descriptions and screenshots are subject to efforts to maintain their secrecy, as only clients and employees of JPay have access to it. Further, the Department and JPay have demonstrated that disclosure of this information will allow competitors in the market to simulate JPay's processes, ultimately resulting in harm to the competitive position of JPay. Therefore, the Department and JPay have met their burden of proving that this information constitutes a trade secret.

Additionally, the Department and JPay have demonstrated that the withheld customer list constitutes a trade secret, as it is specifically defined as a type of trade secret, and subject to efforts to maintain its secrecy. Likewise, the Department and JPay have demonstrated that the electronic payment flow chart and the implementation plan are trade secrets. These records constitute a "method" or "technique" regarding how JPay processes funds and how it installs and operates its system to provide services to inmates. Additionally, the information is not generally

available to the public, and pertains to key components in how JPay performs its business. As a result, JPay has demonstrated that the release of this information would cause competitive harm to its business. Accordingly, this information constitutes a trade secret under the RTKL, and is not subject to access. *See Overby v. Pa. Dep't of Corr.*, OOR Dkt. AP 2010-1014, 2010 PA O.O.R.D. LEXIS 978 (holding that the same information is exempt from disclosure as a trade secret).

c. GTL contract

The Department and GTL argue that portions of their contract contain trade secrets. Mr. Montanaro attests:

5. This Declaration addresses ... [f]inancial information submitted to the Department for both contracts [regarding inmate telephone services and kiosks, respectively] to demonstrate GTL's financial capability as a prospective contractor, as well as the same information of GTL's predecessor-in-interest and GTL's subcontractor....
6. [A]s to GTL's financials, the redaction numbered 29 by [the Requester] covers the financial information that GTL provided to the Department, at the Department's request, in connection with the request for proposal process for the kiosk contract, in order to demonstrate GTL's economic capability.
7. Redaction 45 covers the same information that GTL's predecessor-in-interest supplied respecting the telephone contract.
8. These two redactions cover information that is highly confidential to GTL.
9. The redacted information includes audited financial statements for GTL over several years, including information about GTL's assets, income, cash on hand, receivables, expenses, licenses, taxes, property, goodwill, and other assets and liabilities.
10. Each page of the redacted documents is stamped "CONFIDENTIAL."
11. This redacted information is maintained by GTL with the highest degree of confidence, both internally and externally.
12. Were this information to be disclosed, it would be highly damaging to GTL, a non-public company....
21. Competitors in this industry keep the subject information confidential.
22. GTL takes steps to limit access to this information internally and externally.
23. This information has independent economic value because, if disclosed, it could be used by a competitor as part of an effort to win business away from GTL.
24. Substantial time and effort was invested to generate this information subject to the redactions.

Based on the evidence provided, GTL has demonstrated that it considers the withheld information as confidential, but does not explain the efforts to maintain its secrecy other than stamping records as “CONFIDENTIAL.” Notwithstanding the foregoing, however, GTL does not explain how the withheld information has independent economic value or how the information could be used to “win business away from GTL.”³ As a result, the Department and GTL have not met their burden of proving that this information constitutes trade secrets. *See Eiseman*, 85 A.3d at 1126-27.

d. Other contracts

Finally, the Department generally argues that the Scotlandyard contract contains trade secrets. However, other than the conclusory declaration of Mr. Illgenfritz, the Department has not provided any evidence in support of this assertion. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency's conclusory affidavit was insufficient). Additionally, Scotlandyard has not sought to participate in this matter nor has it submitted any evidence. As a result, the Department has not met its burden of proving that either of these contracts contain trade secrets. *See* 65 P.S. § 67.708(a)(1).

4. The release of some information would threaten personal security or public safety

³ While the evidence provided by JPay did not specifically explain how disclosure of the information would cause competitive harm, the records at issue pertain to how JPay conducts its business. Here, the records identified by GTL are strictly financial records, and GTL does not explain how disclosing this information would cause competitive harm.

The Department argues that certain information is protected under Section 708(b)(1) of the RTKL, which exempts from public disclosure “[a] record the disclosure of which ... would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Delaware County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *16 (Pa. Commw. Ct. 2012) (“The RTKL must be construed to maximize access to government records”).

In the context of a correctional institution setting, a correctional facility need not demonstrate specific prior examples of physical harm to personal security to meet the agency's burden of proof under 65 P.S. § 708(b)(1)(ii). *See, e.g., Mele v. Monroe County*, OOR Dkt. AP 2011-1230, 2011 PA O.O.R.D. LEXIS 1358; *Bernstein v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-1603, 2011 PA O.O.R.D. LEXIS 1295 (holding that prison inmate policy manuals are exempt from disclosure); *Rizzuto v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2010-0916, 2010 PA O.O.R.D. LEXIS 900 (records of prison staff observations, opinions, and impressions of inmates and inmates' behavior exempt from disclosure); *Chance v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-0539, 2011 PA O.O.R.D. LEXIS 726; *Erdley v. Pa. State Empl. Ret. Sys.*, OOR Dkt. AP

2010-0705, 20110 PA O.O.R.D. LEXIS 701; *Viney v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009- 60666, 2009 PA O.O.R.D. LEXIS 125 (first names exempt from disclosure); *Lancaster Newspapers, Inc. v. Lancaster County*, OOR Dkt. AP 2011-0407, 2011 PA O.O.R.D. LEXIS 652 (knowledge of emergency response techniques could be exploited by inmates); *Blom v. Pa. Dep't of Corr.*, OOR Dkt. AP 2010-1075, 2010 PA O.O.R.D. LEXIS 888 (mental health information likely to be used by inmates to exploit other inmates to the detriment of institutional security); *see also ACLU v. City of Pottsville*, OOR Dkt. AP 2010-0231, 2010 PA O.O.R.D. LEXIS 322 (prior knowledge of response procedures would expose police officers to physical harm). The OOR finds credible the professional opinion of individuals assessing the risks of security and will not substitute its judgment for that of those with far more familiarity with the issues involving personal security. *See Knauss v. Unionville-Chadds Ford Sch. Dist.*, OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238.

The Department also argues that the records are protected under Section 708(b)(2) of the RTKL, which exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, an agency must show: (1) the records at issue relate to a law enforcement or public safety activity; and (2) disclosure of the records would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Dep't of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

a. GTL contract

Mr. Montanaro, on behalf of GTL, attests, in relevant part:

16. The [Investigative Management System (“IMS”)] tool, as well as other similar tools, are at the Department’s disposal in order to detect and obtain intelligence respecting otherwise hidden activities, which it then uses to prevent prison violence and other violations and to otherwise foster institutional security.
17. If details about IMS or similar investigative tools were to be publicly disclosed, then inmates and others could use that information to circumvent the Department’s investigations, thus exposing prison institutions to increased risk of violence.

Meanwhile, the Major Mirarchi, on behalf of the Department, attests in relevant part:

6. In accordance with Department Policy DC-ADM 818, “Automated Inmate Telephone System (“AITS”) Procedures Manual,” every inmate telephone call is subject to interception, recording, and disclosure, except those placed to or from an attorney representing an inmate.
7. Electronic surveillance of inmate telephone calls is conducted by the Department in connection with its official law enforcement function of supervising the incarceration of inmates to, inter alia, ensure institutional security by assisting the Department in the detection of illicit or criminal activity by inmates or others and to investigation allegations of wrong-doing made against inmates or others.
8. Correspondingly, records of inmate telephone conversations are maintained by the Department in connection with its official law enforcement function of supervising the incarceration of inmates for the same reasons.
9. Fifty-nine pages entitled “Investigative Reports” have been redacted from the subject contract, from the section entitled “Value Added Communications,” because these pages contain the investigative tools of the Inmate Telephone System that provide facility staff with the capability to generate reports for purposes of, inter alia, criminal and noncriminal investigations undertaken by the Department in accordance with the monitoring of inmate telephone calls.
10. At Section 2 – Inmate Telephone Services, RFP No. 2005-081-011 – Technical Proposal – Tab 6 (“Technical Requirements”), language has been redacted from pages 61 through 63, page 104, and pages 173 through 175 and at Tab 3 (“Management Summary”), language has been redacted from page 12 because this language describes the [IMS], an investigative tool/application that the Department employs to identify and detect inmates involved in illicit and/or criminal activities.
11. Divulgence of the redacted portions of the contract would provide inmates with the necessary knowledge to take steps to circumvent the capabilities of the AITS, and undetected illicit, criminal and dangerous activities would proliferate within the institution placing the lives and safety of inmates, officers and others at risk.
12. The disclosure of the redacted portions of the contract would threaten public safety and the Department’s public protection activities in maintaining safe and secure correctional institutions by allowing inmates and others to access

information that can be used to undermine the Department's security procedures.

Based upon the foregoing evidence, the Department and GTL have demonstrated that the release of the withheld information regarding the IMS would allow inmates engaging in criminal activities to circumvent the IMS, and ultimately undermine the safety and security of the Department's institution. As the Department and GTL have demonstrated that the release of this information would be reasonably likely to threaten the personal security of Department staff and inmates, this information is exempt from disclosure under Section 708(b)(1)(ii) of the RTKL.

b. Securus contract

Major Mirarchi attests, in relevant part, that portions of the Securus contract, referred to as the "Security Information" are exempt from disclosure because their release would threaten personal security and public safety.⁴ Specifically, Major Mirarchi attests:

7. The Contract was developed to provide the Department with an innovative, state of the art, "hosted" solution for inmate telephone service and call monitoring and recording system which will provide inmates confined to the Department's institutions with a highly reliable, high quality service to call family and friends and give the Department the capability to perform oversight and monitoring of inmate telephone calls.
8. The Security Information provisions of the Contract define the investigative and intelligence processes and procedures for the recording and monitoring of inmate calls as well as the detection of cellular telephone usage by inmates.
9. The Security Information processes and procedures in the Contract are an integral and critical component of the Department's efforts to perform investigations and safely and securely monitor inmate calls.
10. The Security Information provisions are part of the Department's law enforcement functions and duties in connection with its legal responsibility for the care, custody and control of offenders committed to the Department's custody.
11. The Security Information is confidential because it contains security-sensitive information regarding the recording and monitoring of inmate telephone calls....

⁴ In its submission, Securus does not address any security concerns. Instead, it focused on the confidential proprietary nature of its information.

15. Many inmates are sophisticated enough that even the disclosure of seemingly innocuous information would be used by the inmate population to the detriment of institutional security.
16. The more the inmate population knows about the Department's telephone system and monitoring processes, the better prepared the inmates will be to use such information to cause disruptions, risking the lives of staff, other inmates, vendors, suppliers, the general public and other[s] who might be present at or near the institution.
17. Inmates could easily manipulate the Security Information contained in the Contract to circumvent the Department's call monitoring and investigation intelligence gathering and hinder the Department's ability to detect illicit calls and monitor the calls in the pursuit of appropriate administrative sanctions and/or criminal charges.
18. Knowledge of the contents of the Security Information provisions will allow inmates to take precautions to prevent the detection of illicit phone conversations by providing them with information to allow them to circumvent the tools used by the Department to monitor the calls.

Based on the foregoing evidence, the Department has demonstrated that the Security Information contains "investigative and intelligence processes and procedures" regarding the Department's law enforcement function, that if disclosed, would allow inmates to circumvent Department monitoring. The Department has also demonstrated that the release of this information would threaten institutional security. Based on this evidence, the Department has met its burden of proving that this information is exempt under Section 708(b)(2) of the RTKL.

c. Scotlandyard contract

Section 708(b)(3) of the RTKL exempts from disclosure "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system...." 65 P.S. § 67.708(b)(3). The exemption includes "building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems...." 65 P.S. § 67.708(b)(3)(iii). In regard to the contract between the Department and Scotlandyard, the Department redacted a page referenced as a "Building Plan."

Mr. Ilgenfritz, on behalf of the Department, attests that this information “was redacted in accordance with several exemptions of the RTKL, specifically, [the] building security exemption, which excludes records that create a reasonable likelihood of endangering the safety or physical security of a building, such as, the physical security of Scotlandyard’s location for video visitation.” However, conclusory affidavits or statements made under penalty of perjury are insufficient to meet an agency's burden of proof. *See Scolforo*, 65 A.3d at 1103. The Department has not demonstrated *why* the release of the Building Plan would be reasonably likely to endanger the physical security of a building.⁵ Therefore, it has not met its burden of proving that this record is exempt under Section 708(b)(3) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

Likewise, the Department also argues that the release of the Building Plan “would reveal proprietary information and trade secrets which Scotlandyard has spent considerable time and effort in protecting,” and “would jeopardize the Department’s interests in safely and securely delivering video visitation for inmates.” However, these conclusory statements are insufficient to meet the Department’s burden of proof, as there is no explanation of why the information is a trade secret, or why the release of the Building Plan would pose a safety risk. Therefore, the Department has not met its burden of proving that the Building Plan is exempt from disclosure.

5. The Department has not met its burden of proving that signatures are exempt from disclosure

The Department also argues that various signatures are exempt from disclosure under Section 708(b)(1)(ii) because their release would threaten individuals’ personal security. However, other than conclusory affidavits merely stating that the signatures are exempt from

⁵ Notably, the Department’s Chief of Security, Major Mirarchi, attests to security risks regarding portions of the GTL and Securus contracts; however, Major Mirarchi does not address the Department’s claim that the release of the Building Plan also poses a security risk.

disclosure, the Department has not provided any competent evidence establishing that the release of the signatures would threaten individuals' personal security. *Cf. Governor's Office of Admin. v. Purcell*, 35 A.3d 811 (Pa. Commw. Ct. 2011). As such, the Department has not met its burden of proving that this information is exempt from disclosure.

6. The Department has proven that records contain personal identification information

Finally, the Department argues that it redacted six pages of resumes that were attached to the JPay contract because they contained the personal or cellular telephone numbers of JPay personnel. Section 708(b)(6) of the RTKL exempts from disclosure "personal identification information," including "home, cellular or personal telephone numbers." *See* 65 P.S. § 67.708(b)(6)(i)(A). Accordingly, the Department has met its burden of proving that the information redacted from the resumes is exempt from disclosure under Section 708(b)(6) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part** and, subject to the redaction of tax information, trade secrets and personal identification information, the Department is required to provide the Requester with copies of the records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 12, 2015



APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Paul Wright (via e-mail only);
Valerie Janosik-Nehilla, Esq. (via e-mail only);
Andrew Filkosky (via e-mail only);
Karl Myers, Esq. (via e-mail only);
Grainger Bowman, Esq. (via e-mail only)

Attachment 6

From: [Janosik-Nehilla, Valerie](#)
To: [Lance Weber](#)
Cc: [Carrie Wilkinson](#); [Paul Wright](#); [Filkosky, Andrew](#)
Subject: FW: Follow-up on RTKL Tracking #524-15/Pennsylvania Office of Open Records Docket No.: AP 2015-0909
Date: Tuesday, March 15, 2016 3:16:46 PM
Attachments: [031516 Ltr to PA DOC re RTKL Docs.pdf](#)
[201603151440.pdf](#)

Dear Mr. Weber,

I am in receipt of your letter dated March 15, 2016 addressed to Andrew Filkosky. As you are most likely aware, Global Tel*Link has filed an appeal to the Office of Open Records Final Determination for AP 2015-0909. Please see the attached Docket Sheet for your reference. Global Tel*Link's Appeal has stayed the release of the records granted in OOR's Final Determination for AP 2015-0909. Until that Appeal is resolved, the Department of Corrections will not be releasing any records granted in AP 2015-0909.

Sincerely,

Valerie Janosik-Nehilla | Assistant Counsel
Department of Corrections | Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050
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From: Carrie Wilkinson [<mailto:cwilkinson@humanrightsdefensecenter.org>]
Sent: Tuesday, March 15, 2016 2:30 PM
To: CR, DOC Right to Know <RA-docrighttoknow@pa.gov>
Cc: Paul Wright <pwright@prisonlegalnews.org>; Lance Weber <lweber@humanrightsdefensecenter.org>
Subject: Follow-up on RTKL Tracking #524-15/Pennsylvania Office of Open Records Docket No.: AP 2015-0909

Attn: Andrew Filkosky

Please see attached correspondence from Lance T. Weber, General Counsel, Human Rights Defense Center.

Thank you.

Carrie Wilkinson
Sr. Litigation Paralegal
Human Rights Defense Center
801 Second Ave., Suite 800
Seattle, WA 98104
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Attachment 7

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1678 CD 2015

GLOBAL TEL*LINK CORPORATION,

Petitioner,

v.

PAUL WRIGHT
AND PRISON LEGAL NEWS,

Respondents.

**BRIEF OF PETITIONER,
GLOBAL TEL*LINK CORPORATION**

On Petition for Review of the Final Determination of the
Office of Open Records, at Docket No. 2015-0909,
issued and mailed August 12, 2015

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Petitioner, Global Tel*Link Corporation (“GTL”), hereby submits this brief in support of its petition for review in this matter. For the reasons set forth below, GTL submits that this Court should reverse the August 12, 2015 Final Determination of the Office of Open Records as to its determination respecting the GTL Financial Information (defined below), and further order that no further action must be taken by the Pennsylvania Department of Corrections with respect to the GTL Financial Information.

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter as a petition for review within its appellate jurisdiction, pursuant to: Article 5, Section 9 of the Constitution of Pennsylvania; sections 763 and 5105 of the Judicial Code (42 Pa.C.S. §§763 & 5105); section 1301 of the Right-to-Know Law (65 P.S. §67.1301); and Pennsylvania Rule of Appellate Procedure 1501, *et seq.*

II. DETERMINATION IN QUESTION

The determination in question is the Final Determination of the Office of Open Records issued on August 12, 2015, at OOR Docket

No. 2015-0909, as to its determination respecting the GTL Financial Information (defined below). The Final Determination concludes:

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part** and, subject to the redaction of tax information, trade secrets and personal identification information, the Department is required to provide the Requester with copies of the records within thirty days....

(*Exhibit A* at 20; R. 187a.) This decision is unreported. A copy of the Final Determination is attached hereto as *Exhibit A*, and is included in the Reproduced Record at R. 168a-188a.

III. STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

The standard and scope of review applicable in Right-to-Know Law proceedings reflect that this Court owes absolutely no deference to the Office of Open Records. The Supreme Court definitively held in Bowling that this Court's standard of review under the Law is *de novo* and its scope of review is plenary. See Bowling v. Office of Open Records, 75 A.3d 453, 477 (Pa. 2013) ("We hold that the Commonwealth Court correctly held that its standard of review is *de novo* and that its scope of review is broad or plenary when it hears appeals from determinations made by appeals officers under the

RTKL.”). This Court therefore is not bound by any of the findings of the OOR, and instead may independently review the decision below and substitute its own findings for those of the OOR. See Brown v. Dep’t of State, 123 A.3d 801, 804 n.6 (Pa. Commw. 2015); Scott v. Delaware Valley Reg’l Planning Comm’n, 56 A.3d 40, 43 n.3 (Pa. Commw. 2012). Indeed, a “*de novo* standard of review permits the court to determine the case *anew*, including matters pertaining to testimony and other evidence.” Bowling, 75 A.3d at 466 n.14 (emphasis in original).

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Should this Court reverse the Office of Open Records for ordering disclosure of the GTL Financial Information, which was submitted during Commonwealth procurements to demonstrate GTL’s economic capabilities, given section 708(b)(26) of the Right-to-Know Law specifically exempts those documents from disclosure?

(Suggested answer: Yes.)

2. Should this Court reverse the OOR for deciding, *sua sponte*, that the GTL Financial Information constitutes “contracts” and hence “financial records” not qualified for the Law’s exemptions pursuant to sections 102 and 708(c) of the Law?

(Suggested answer: Yes.)

3. Should this Court reverse the OOR for ordering disclosure of the GTL Financial Information, given GTL presented un rebutted evidence that such constitutes “confidential proprietary information” exempt under section 708(b)(11) of the Law?

(Suggested answer: Yes.)

V. STATEMENT OF THE CASE

A. The Right-to-Know Request

This case arises under the Right-to-Know Law, 65 P.S. §§67.101 to 67.3104. It began when Paul Wright and *Prison Legal News*¹ (collectively, “Requester”) submitted a request to the Department of Corrections on March 27, 2015 (the “Request”). (R. 17a-20a.) The Request sought twenty-four different categories of documents pertaining to the Department’s contracts with outside contractors for the following services: (a) inmate telephone services; (b) video visitation; (c) electronic mail or messaging; (d) electronic funds transfers; (e)

¹ Mr. Wright is Editor of *Prison Legal News*, a publication of the Human Rights Defense Center, where he serves as Executive Director. The Center is a Florida-based group that advocates on behalf of those incarcerated in the United States.

money transfer services; (f) commissary or canteen services; (g) prisoner package services; and (h) book ordering services. (R. 17a-19a.)

B. The Department's Response

The Department granted the Request in part and denied it in part on May 12, 2015, by way of a detailed, five-page response. (R. 22a-26a.) In its response, the Department granted Requester access to the vast majority of the materials he sought. Requester acknowledges that the Department produced 3,195 pages to him. (R. 9a.)

Among the many documents produced to Requester by the Department were two that relate to GTL:

- (1) the inmate telephone services contract between GTL and the Department (contract no. 4600012527); and
- (2) the kiosk services contract between GTL and the Department (contract no. 4400013765).

With respect to the inmate telephone services contract, the Department produced 1,146 pages, constituting the entire document minus a few redactions. The contract, as provided to Requester, depicts the telephone rates charged to the inmates, as well as the terms of

GTL's compensation and the commissions to be paid by GTL to the Department.² (R. 22a.) This document also discloses to Requester the scope of services GTL agreed to provide, and the specifics of how GTL would provide those services.³ Included among the few redactions from this contract were five pages showing GTL's⁴ internal financial information. (R. 38a) (Redaction No. 45). There is no dispute that GTL submitted that information to the Department in confidence, at the Department's request, to demonstrate it is fiscally able to carry out the inmate telephone services contract.

As to the 608-page kiosk contract, the Department produced this entire document to Requester, once again subject to a few redactions. Like the telephone contract, the version of the kiosk contract disclosed to Requester also shows the rates charged to the

² Both the inmate telephone and kiosk contracts are commission-based contracts, meaning the Department does not pay any public funds under those arrangements. To the contrary, those contracts actually generate revenue for the Commonwealth, because GTL pays the Department a share of the revenue.

³ This contract, as produced to Requester, is publicly available on the Department of Treasury website at the following location: <http://contracts.pat treasury.gov/View2.aspx?ContractID=125566>

⁴ Although the financial information in question related to GTL's predecessor in interest, for ease of reference it will be referenced as GTL's own.

inmates, as well as the terms of GTL's compensation and the commissions to be issued by GTL to the Department. (R. 23a.) This document also discloses to Requester the scope of services GTL agreed to provide, and the specifics of how GTL would provide those services.⁵ Of the 608 pages produced, twenty-three were redacted to shield GTL's confidential financial information. (R. 37a) (Redaction No. 29). There is no dispute that GTL submitted this information to the Department in confidence, at the Department's request, to demonstrate its fiscal capability to deliver the services required under the kiosk contract.

The above-referenced confidential financial information redacted from the inmate telephone services contract and kiosk contract is referenced in this brief as the "GTL Financial Information."

C. Requester's Appeal to the OOR

Apparently dissatisfied with the Department's response, Requester took an appeal to the Office of Open Records on June 3, 2015. (R. 9a-15a.) In relevant part, Requester complained that the

⁵ This contract, as produced to Requester, is publicly available on the Department of Treasury website at the following location: <http://contracts.patreasury.gov/View2.aspx?ContractID=285767>

Department had been insufficiently specific in asserting that the exemptions found in sections 708(b)(26) (pertaining to financial information of a bidder or offeror) and 708(b)(11) (pertaining to confidential proprietary information) applied to preclude disclosure. (R. 12a-13a, 13a.)

In the Department's merits submission, filed on June 19, 2015, it supplied the specifics underlying its invocation of these two exemptions, as well as the other exemptions it had raised. (R. 56a-117a.) The Department's 62-page submission, which included eight different witness declarations, explains in detail why the GTL Financial Information is exempt under sections 708(b)(26) and (11). (R. 65a-66a, 71a, 92a, 112a.)

GTL, for its part, also made a timely merits submission on June 19, 2015, after it was notified of Requester's appeal to the OOR. (R. 122a-134a.) GTL explained in even greater detail than the Department why the section 708(b)(26) and (11) exemptions applied, and supplied factual support by way of an affirmation by a GTL Vice President. (R. 126a-127a, 129a, 131a-134a.)

Requester did not make any submission to the OOR in response to either the Department or GTL. Requester therefore supplied no legal argument or facts to counter these submissions.

D. The OOR's Final Determination

The OOR issued the Final Determination on August 12, 2015. (*Exhibit A*; R. 168a-188a.) There, the OOR granted the appeal in part and denied it in part, and directed the Department to take further action. In pertinent part, the OOR held that the GTL Financial Information constitutes “contracts” and hence “financial records” as defined by section 102 of the Law. According to the OOR, by operation of section 708(c), this meant the exemptions found in sections 708(b)(26) and (11) were totally inapplicable. (*Exhibit A* at 5; R. 172a.) Requester never made this “contracts” and “financial records” argument; OOR conjured it on its own. And because this rationale first appeared in the OOR’s decision, neither the Department nor GTL were ever given an opportunity to address it below.

GTL timely petitioned this Court for review on September 11, 2015, and now timely files this merits brief. Requester has not

cross-appealed, and therefore the conclusions reached in the Final Determination other than those challenged by GTL are now final.

VI. SUMMARY OF ARGUMENT

This Court should reverse the OOR's decision as to disclosure of the GTL Financial Information. Those materials are plainly and indisputably within the ambit of the section 708(b)(26) exemption of the Right-to-Know Law. But the OOR effectively gutted the protection afforded by that exemption (and several others, including section 708(b)(11)) by deciding, *sua sponte*, that contractor financials like GTL's are "contracts" that are totally ineligible for exemption. The OOR's decision, if upheld by this Court, threatens multitudes of government contractors with automatic disclosure of their confidential financials, proprietary information, and trade secrets. The determination below also absurdly construed the Law by undermining the requirement that government contractors submit their financial information to procuring agencies, and simultaneously failed to honor the purpose of the Law's "financial records" language. Accordingly, for these reasons, as explained in detail below, this Court should reverse the OOR as to the GTL Financial Information and order that the

Department need not take any further action with respect to the GTL Financial Information.

VII. ARGUMENT

A. **The GTL Financial Information constitutes “financial information of a bidder or offeror” exempt from disclosure under the Law.**

This Court should hold that the GTL Financial Information is exempt from disclosure under section 708(b)(26) of the Right-to-Know Law. That statute mandates the following items are exempt from access by a requester:

A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; *financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability*; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. §67.708(b)(26) (emphasis added).

The General Assembly’s language is plain and unmistakable. It is designed to ensure that when a bidder or offeror discloses its confidential financial information to an agency in order to show it is

fiscally able to carry out a contract, it can do so with complete confidence that the financial disclosures will remain under wraps.⁶ The OOR’s own decisions acknowledge as much. See, e.g., Smith v. Spring Cove Sch. Dist., No. 2011-0805, 2011 WL 3097860, *4 (OOR July 20, 2011) (noting that “the General Assembly also made clear that it intended to provide protection to certain financial information contained in proposals” and “[i]t would be a direct contradiction of legislative intent for the OOR to order the release of an expressly exempt record”).

1. GTL demonstrated the exemption applies.

Here, both the Department and GTL – the parties to the inmate telephone and kiosk contracts at issue – conclusively proved that the GTL Financial Information is entitled to the protection section

⁶ This provision is consistent with other legislative pronouncements that require prospective contractors’ proposals to be kept in confidence. See, e.g., 62 Pa.C.S. §513(f) (Procurement Code requirement of confidentiality of offerors’ submissions); 65 P.S. §67.102 (defining “public record” to exclude records exempt pursuant to other laws); see also Department of General Services, *Procurement Handbook*, Part I, Chapter 50 (Public Access to Procurement Information), at ¶C(3)(c) (“Any financial information that a bidder or offeror is required to provide in its bid, proposal, or prequalification document to demonstrate the bidder’s or offeror’s capability to fully perform the contract requirements is exempt from disclosure, and should not be released to the public.”).

708(b)(26) affords. Both counterparties to those contracts provided evidence and supporting argument demonstrating that the GTL Financial Information is, in fact, “financial information of [GTL] requested in an invitation for bid or request for proposals to demonstrate [GTL’s] economic capability.”⁷ 65 P.S. §67.708(b)(26); Id., §67.708(a) (specifying preponderance of evidence as burden of proof for exemptions). There is no debate about this, as the Department’s and GTL’s submissions never have been rebutted in any fashion by Requester. Nor could they be, as the GTL Financial Information is indisputably of the type that squarely falls within this statutory exemption. Accordingly, GTL was, and is, entitled to the protection provided by the section 708(b)(26) exemption.

⁷ See, e.g., (R. 65a-66a, 71a) (Department’s argument); (R. 92a at ¶14) (Affirmation by Department witness that “[t]he above[-]listed financial information was redacted pursuant to section 708(b)(26) of the RTKL because it is GTL’s] financial information ... submitted in response to the request for proposals to demonstrate GTL’s] economic capability to perform services for the Department”); (R. 112a) (same); (R. 126a-127a) (GTL’s argument); (R. 132a at ¶¶6-12 (Affirmation by GTL witness that the redacted information “covers the financial information that GTL provided to the Department, at the Department’s request, in connection with the request for proposal process ... in order to demonstrate GTL’s economic capability”).

The importance of this statutory exemption to government contractors like GTL cannot be overstated. GTL, a non-public company, operates in an intensely competitive industry. It has an absolute need to protect its internal financial information from damaging disclosures. GTL's competitors always are looking for ways to obtain GTL's internal and sensitive information for creative exploitation in an effort to win business away from GTL or undermine its current contracts.⁸ Because of that risk, GTL always is careful to protect its financials, including by marking all such documents "CONFIDENTIAL" and maintaining them in the highest degree of confidence, both internally and externally. (R. 132a-133a at ¶¶8-12, 19-24.)

2. OOR invoked the "financial records" provision *sua sponte* to deny GTL the protection to which it is entitled.

Notwithstanding the plain import of section 708(b)(26)'s statutory exemption and its underlying purpose, as well as the

⁸ The redacted information here includes audited financial statements for GTL over several years, including information about GTL's assets, income, cash on hand, receivables, expenses, licenses, taxes, property, goodwill, and other assets and liabilities. (R. 132a ¶9.) It is not difficult to see how a competitor could conjure a (baseless) argument that GTL lacks financial fitness, such as by "spinning" GTL's fiscal picture in comparison to the competitor's own.

unrebutted facts and legal arguments presented by the Department and GTL, the OOR nevertheless held the GTL Financial Information must be given to Requester. This conclusion is based on a surprising rationale that was purely of OOR's own creation, given Requester never made this argument to the OOR.

The OOR – dropping any pretense of serving as neutral arbiter, and instead assuming the mantle of Requester's advocate – claimed that GTL's financials, once they were later attached to the inmate telephone services and kiosk services contracts, suddenly became "contracts" and, consequently, the Commonwealth's "financial records" under section 102 of the Law.⁹ After transforming GTL's

⁹ Section 102 of the Law defines a "financial record" thusly:

"Financial record." Any of the following:

- (1) Any account, voucher or contract dealing with:
 - (i) the receipt or disbursement of funds by an agency; or
 - (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.
- (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.

(footnote continued on next page)

internal company financials into the government's own "financial records," the OOR then held that section 708(c)¹⁰ defeated any attempt to apply any of the claimed exemptions. (*Appendix A* at 5; R. 172a.) The OOR thus mandated that GTL's internal financials were not entitled to coverage under any exemption of the Law. The OOR did not cite a single case decided by any tribunal supporting this construction of the Law. The net result of OOR's unprecedented and unsupported reading is that records unquestionably constituting contractor financials that are plainly covered by the section 708(b)(26) exemption must be disclosed anyway.

(footnote continued from previous page)

(3) A financial audit report. The term does not include work papers underlying an audit.

See 65 P.S. §67.102.

¹⁰ Section 708(c) provides:

Financial records. — The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17). An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.

See 65 P.S. §67.708(c).

a. The OOR's decision conflicts with its own prior decisions.

GTL is unaware of any prior decision by this Court, the Supreme Court, or even the OOR reaching that conclusion. To the contrary, the OOR's own prior decisions conflict with the decision it reached here. In particular, in Hodges v. Pennsylvania Department of Corrections, No. 2015-0241, 2015 WL 1431794 (OOR Mar. 23, 2015), the OOR was faced with a situation identical to this one, but reached the exact opposite result. There, as here, the requester sought from the Department of Corrections materials that a contractor had submitted during a procurement process. Id. at *1. The materials in question included the contractor's confidential financial information. Those financials were later appended to the contract between the Department and the contractor – the exact scenario presented here. Id. at *5. But in Hodges, unlike this case, the OOR held the contractor's financials were exempt under section 708(b)(26).¹¹ Id.

¹¹ There are numerous OOR cases with similar facts, and all of them have been decided the same way as Hodges. See, e.g., Smith v. Spring Cove Sch. Dist., No. 2011-0805, 2011 WL 3097860, *3-*4 (OOR July 20, 2011) (holding contractor's financials submitted during procurement process exempt under section 708(b)(26), even though agency never asserted this exemption); Grant v. City of

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b. This Court already has rejected the OOR's approach.

More importantly, the OOR's decision in this case is inconsistent with this Court's reading of section 708(c). In this Court's recent decision in West Chester University v. Schackner, 124 A.3d 382 (Pa. Commw. 2015), the requester sought a copy of a contract between an agency (West Chester University) and a contractor (a lobbyist hired by the University). Id. at 385. The OOR held, as it did here, that no exemptions could be claimed for any portion of the contract because section 708(c) mandated that the entirety of the contract had to be disclosed. Id. at 387. This Court, however, disagreed with the OOR that the information contained within the contract had to be disclosed "just because it is part of the contract."¹² Id. at 392.

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Allentown, No. 2013-0459, 2013 WL 1737033, *5-6 (OOR Apr. 18, 2013) (holding contractor's financials submitted during procurement process exempt under section 708(b)(26)); Larson v. Cheltenham Twp. Sch. Dist., No. 2014-0256, 2014 WL 1284527 (OOR Mar. 13, 2014) (same). The Hodges decision also echoes a prior decision, Maulsby v. Pennsylvania Department of Corrections, No. 2014-1480 (OOR Nov. 25, 2014), where the OOR reached the same decision based on a request for the same contract. Id. at 8-9. To GTL's knowledge, neither this Court nor the Supreme Court has been asked to address a case like this one.

¹² The Court's remaining rationale in Schackner – that the contractor had failed to meet its burden to prove the exemption at issue applied – is inapplicable here.

c. The OOR's reading of the Law is absurd and unreasonable.

This Court had good reason in Schackner not to endorse the OOR's unprecedented reading of section 708(c), as doing so will lead to the absurd result that the section 708(b)(26) exemption, and a number of others, will be totally eviscerated in almost every procurement scenario. See 1 Pa.C.S. §1922 (in ascertaining legislative intent, it must be presumed "[t]hat the General Assembly does not intend a result that is absurd ... or unreasonable"). This is because documents showing financial information, trade secrets, confidential proprietary information, and other kinds of exempt information are commonly attached to agency contracts.¹³ If the OOR's reading of section 708(c) is sustained here, then every document with sensitive contractor information that happens to be attached to a contract with an agency automatically will be subject to disclosure. This outcome could have

¹³ The *Procurement Handbook* contemplates that attachments to an agency contract will include the contractor's proposal (which itself will include the contractor's financials) and the agency's request for proposals. See Department of General Services, *Procurement Handbook*, Part I, Chapter 43 (Contract Provisions) at ¶B (suggesting order of preference of contract, proposal, and then RFP in the event of a conflict between documents attached to the contract).

catastrophic consequences for almost every contractor doing business with the Commonwealth.¹⁴

The OOR's reading of the Law also undermines the purpose of requiring government contractors to submit company financials.

Those documents are required in order to satisfy the agency that the contractor has the financial strength to carry out the contract.¹⁵ The

financials are attached to the contract so the agency can rely on and

enforce the contractor's representations. Cf. Westinghouse Elec. Co. v.

Murphy, Inc., 228 A.2d 656 (Pa. 1967) (attachment referenced in

¹⁴ One can select contracts almost at random to find examples where contractor financials have been attached to contracts. See, e.g., Department of Labor and Industry Contract No. 4300450013 (available at: <http://contracts.patreasury.gov/View2.aspx?ContractID=306500>) (contractor's submission attached to contract, but redacted to remove company financials and other proprietary information). These contractors, like GTL, obviously entered into contracts with the Commonwealth before the OOR's new section 708(c) rubric was announced, and many even entered into those contracts prior to enactment of the new Right-to-Know Law. All of these contractors will be blindsided with a potential retroactive mandate of disclosure of all attachments to their contracts – that is, if the OOR's decision here is upheld.

¹⁵ See 62 Pa.C.S. §513 (providing for selection of “responsible offeror” for contracting as a result of competitive sealed bidding process); 62 Pa.C.S. §103 (defining “responsible offeror” as an offeror “that possesses the capability to fully perform the contract requirements in all respects”); Department of General Services, *Procurement Handbook*, Part I, Chapter 6 (Methods of Awarding Contracts) at ¶B(10)(e)(b) (“the issuing office must determine that the submitted and gathered financial and other information of the offeror demonstrates that the offeror possesses the financial and technical capability, experience and qualifications to assure good faith performance of the contract”).

contract held to be enforceable as between the contracting parties). Attaching a contractor's financial representations to the contract therefore is an easy and effective way for the agency to ensure the contractor lives up to its promise of fiscal fitness.

But if the OOR's reading of the Law is sustained, then contractors inevitably will begin to insist that their financial information, trade secrets, and other information must not be attached to the contracts. This will make it harder for the agencies to ensure compliance. The General Assembly could not have intended the "financial records" provision in section 708(c) the Law to be read in a way that limits the ability of agencies to ensure contractor fitness.¹⁶

Indeed, the purpose behind the "financial records" language in sections 102 and 708(c) has nothing at all to do with disclosure of confidential contractor information. Rather, the obvious purpose of those companion provisions is to ensure that the public has access to

¹⁶ The OOR's decision, if sustained, also would create the inconsistency that a contractor's financials would be disclosed, but the agency's materials reflecting its evaluation of those very financials would *not* be disclosed. See, e.g., Kane v. Dep't of Pub. Welfare, No. 2009-1104, 2010 WL 2128711, *5 (OOR Feb. 1, 2010) (holding evaluation materials relating to financial capabilities of contractor exempt).

documents showing how public money is spent. But the public can learn absolutely *nothing* about how public money is spent by reading a private contractor's confidential financial statements.

The OOR's reading of the Law therefore is nothing short of absurd and unreasonable. As such, it must be rejected. While the OOR claimed, without citing any support, that the attachments to the contracts here "are part and parcel of the contracts," a more appropriate reading of the undefined term "contract" in the section 102 definition of "financial records" is more narrow. In this context, a suitable reading of "contract" is that it covers only the actual terms and conditions found in the contract documents themselves – not the ancillary appendices and attachments that are prepared prior to and separately from the contract, and serve mainly as cross-references for statements contained in the contract documents.¹⁷

¹⁷ This reading is consistent with the prior law on this subject. See 1 Pa.C.S. §1921(c)(5) (prior law to be considered when interpreting statutes). The section 708(b)(26) exemption previously was found in section 106 of the Procurement Code, 62 P.S. §106 (superseded), which was deleted by section 3102(2)(iii) of Act 3 of 1998 – the enactment that brought about the new Right-to-Know Law (and the 708(b)(26) exemption). Section 106 of the Procurement Code, in language that was later parroted in section 708(b)(26), exempted financial information of a bidder or offeror, but provided no means to defeat that exemption if the financial information was attached to a contract.

Applying this reading here, there is no question that the GTL Financial Information falls outside the concept of a “contract” in this context. As such, GTL is entitled to claim that material as exempt under section 708(b)(26) – just as the General Assembly intended when it enacted that statutory provision. Accordingly, the Court should reverse the OOR as to the GTL Financial Information, and should further order that the Department need not take any further action with respect to the GTL Financial Information.

B. The GTL Financial Information constitutes “confidential proprietary information” exempt from disclosure under the Law.

Similarly, and in addition, this Court can and should hold that the exemption for “confidential proprietary information” found in section 708(b)(11) of the Law also applies – and is not automatically defeated simply because the GTL Financial Information was attached to the inmate telephone and kiosk contracts.

Under the Right-to-Know Law, a record that “constitutes or reveals” “confidential proprietary information” is exempt from disclosure. 65 P.S. §67.708(b)(11). “Confidential proprietary information” is defined by the Law as:

Commercial or financial information received by an agency:

- (1) which is privileged or confidential; and
- (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

65 P.S. §67.102 A document therefore is exempt from disclosure under this provision if it is shown, by a preponderance of the evidence, that the two elements of (1) confidentiality and (2) competitive harm are present.

Here, as discussed above in section VII.A.1, the Department and GTL submitted un rebutted evidence demonstrating these two elements in the form of witness affirmations. (See, e.g., R. 131a-132a at ¶¶8, 10-12, 19-23.) Compare Giurintano v. Dep't of Gen. Svcs., 20 A.3d 613, 615-17 (Pa. Commw. 2011) (holding “confidential proprietary information” exemption satisfied based on witness affirmation); Colgate-Palmolive Co. v. Pa. Ins. Dep't, No. 2013-1631, 2014 WL 930154 (OOR Mar. 7, 2014) (holding financial projections and forecasts exempt under this exemption based on submitted affirmations); Nixon v. Pa. Ins. Dep't, No. 2013-0729, 2013 WL 2949126 (OOR June 11, 2013) (holding report containing sensitive private company information

exempt under this exemption). Accordingly, in addition to the section 708(b)(26) exemption, GTL also is entitled to the protection of the section 708(b)(11) exemption for “confidential proprietary information.” As such, the OOR should be reversed for ordering disclosure of the GTL Financial Information.

VIII. CONCLUSION

For the foregoing reasons, petitioner, Global Tel*Link Corporation, respectfully requests that this Honorable Court reverse the August 12, 2015 Final Determination of the Office of Open Records as to its determination respecting the GTL Financial Information, and further order that no further action must be taken by the Pennsylvania Department of Corrections with respect to the GTL Financial Information.

Respectfully submitted,

Dated: December 29, 2015

/s/ Karl S. Myers

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CERTIFICATE OF COMPLIANCE

I, Karl S. Myers, certify that this brief complies with the length limitation of Pa.R.A.P. 2135 because this brief is less than 30 pages and contains 4,882 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135.

/s/ Karl S. Myers

Karl S. Myers

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing via
the Court's electronic filing system upon the person indicated below:

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A

FACTUAL BACKGROUND

On March 27, 2015, the Request was filed, seeking contracts between the Department and various service providers, including those providing telephone services, video visitation services, electronic messaging services, money transfer services, commissary services, and book ordering services to inmates. The Request also sought various financial records. On March 31, 2015, the Department invoked a thirty-day extension of time to respond to the Requests pursuant to 65 P.S. § 67.902. On April 20, 2015, the Requester granted the Department time until May 20, 2015 to respond to the Request. *See* 65 P.S. § 67.902(b)(2). On May 12, 2015, the Department partially denied the Request, providing redacted copies of records. The Department argued, among other reasons, that these redactions were necessary because the release of certain information would threaten personal security and public safety, 65 P.S. § 67.708(b)(1)(ii)-(2), or constitutes the financial information of a bidder, 65 P.S. § 67.708(b)(26), contains communications between an agency and its insurance carrier, 65 P.S. § 67.708(b)(27), contains personal identification information, 65 P.S. § 67.708(b)(6), or contains confidential proprietary information or trade secrets, 65 P.S. § 67.708(b)(11). The Department also argued that certain records do not exist.

On June 3, 2015, the Requester appealed to the OOR, challenging only the Department's redactions and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c). On June 10, 2015, the Department confirmed that it notified all "directly interested parties" of the appeal.

On June 18, 2015, after receiving additional time to make its submission, the Department submitted a position statement, along with the declarations made under the penalty of perjury of

Steven Hilbish, Chief of Support Services in the Administrative Services Division of the Department's Bureau of Administration ("Bureau"), Major Victor Mirarchi, Chief of Security, Robert Illgenfritz, Administrative Officer in the Bureau, Anthony Miller, Director of Correctional Industries, Michael Knaub, Accountant 3 in the Fiscal Management Division of the Bureau, and Errol Feldman, Chief Administrative Officer of JPay, Inc ("JPay").¹ On June 19, 2015, Global Tel*Link Corporation ("GTL") submitted a request to participate in this appeal, which was granted on June 22, 2015. Along with its request to participate, GTL also submitted a position statement and the declaration made under penalty of perjury of Steve Montanaro, Vice-President of Sales and Marketing Operations for GTL. On June 26, 2015, Securus Technologies, Inc. ("Securus") also submitted a request to participate in the appeal, which was granted on June 29, 2015. Along with its request to participate, Securus also submitted a position statement and the sworn affidavit of Steven Cadwell, Senior Account Executive – DOC, West Region.

LEGAL ANALYSIS

"The 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).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the

¹ JPay did not seek to participate as a party with a direct interest pursuant to 65 P.S. § 67.1101(c); instead, Mr. Feldman affirms that JPay consulted with the Department regarding redactions.

request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal; however, the decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither of the parties requested a hearing, and the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The contracts at issue are financial records

The RTKL defines “financial records” to include “[a]ny account, voucher or *contract* dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) an agency’s acquisition, use or disposal of services, supplies, materials, equipment or property.” 65 P.S. § 67.102 (emphasis added). Section 708(c) of the RTKL states that “[t]he exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (16), or (17).” 65 P.S. § 67.708(c).

Here, the records at issue constitute various portions of contracts that the Department has entered into with service providers. The contracts are financial records under the RTKL, as they involve the Department’s acquisition of services and equipment. *See* 65 P.S. § 67.102. While some of the information at issue in this appeal is contained in attachments to the contracts, these attachments are part and parcel of the contracts. As the contracts are financial records, they may be redacted only pursuant to certain exemptions under the RTKL. *See* 65 P.S. § 67.708(c). The Department, GTL, Securus, and JPay argue that the contracts contain bidder financial information that is exempt from disclosure under 65 P.S. § 67.708(b)(26) and confidential proprietary information and trade secrets that are exempt from disclosure under 65 P.S. § 67.708(b)(11). Likewise, the Department argues that the PA Prison Society contract contains a certificate of liability insurance that is exempt from disclosure under 65 P.S. § 67.708(b)(27). However, pursuant to 65 P.S. § 67.708(c), the Department may not redact information on these bases. Accordingly, Sections 708(b)(11), 708(b)(26) and 708(b)(27) of the RTKL do not apply because the contracts at issue are financial records.²

² While the OOR has previously held that government contracts may be redacted pursuant to Section 708(b)(11), *see e.g., Maulsby v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1480, 2014 PA O.O.R.D. LEXIS 1268, the appropriate legal reason for withholding trade secrets within a contract or other financial record lies under the Pennsylvania Uniform Trade Secrets Act. *Commonwealth v. Eiseman*, 85 A.3d 1117, 1124 (Pa. Commw. Ct. 2014).

However, Section 306 of the RTKL states that “[n]othing in [the RTKL] shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.” 65 P.S. § 67.306. As a result, “Section 708(c) cannot dilute operation of another law that provides an independent statutory bar to disclosure.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1124 (Pa. Commw. Ct. 2014).

2. The Department may redact confidential tax return information

The Department explains that it redacted federal employer identification numbers from the Securus, GTL, PA Prison Society, and Scotlandyard contracts, and a one-page tax return that was attached to the JPay contract. Meanwhile, Mr. Montanaro, on behalf of GTL, attests that the redacted information includes federal tax returns submitted by GTL’s subcontractor, Mid Atlantic Consultants.

Section 6103(a) of the Internal Revenue Code (“Code”) prohibits disclosure of “returns” and “return information.” 26 U.S.C. § 6103(a); *see also Fort Cherry Sch. Dist. v. Coppola*, 37 A.3d 1259 (Pa. Commw. Ct. 2012) (finding that W-2 forms constitute confidential “return information”); *Office of the Budget v. Campbell*, 25 A.3d 1318 (Pa. Commw. 2011) (same). Therefore, the OOR has held that confidential return information may be redacted from the contracts. *See Kerns v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2013-0959, 2013 PA O.O.R.D. LEXIS 592.

Here, the above-referenced tax returns are explicitly confidential under the Code. *See* 26 U.S.C. § 6103(b)(1) (defining “return”). Further, federal employer identification numbers are confidential “return information” under the Code. *Id.* § 6103(b)(2)(A) (defining “return information” to include “a taxpayer’s identity ... or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return....”); *see also*

Kerns, OOR Dkt. AP 2013-0959, 2013 PA O.O.R.D. LEXIS 592 (allowing the redaction of tax identification numbers). Therefore, the Department may withhold the tax returns and redact the tax return information pursuant to the Code.

3. Some of the redacted information constitutes trade secrets under the Pennsylvania Uniform Trade Secrets Act (“Act”)

The Department and the direct interest participants argue that certain information constitutes trade secrets. While the parties cite to Section 708(b)(11) of the RTKL as the basis for withholding these alleged trade secrets, the “Act [i]s a separate statutory defense” separate from Section 708(b)(11). *See Eiseman*, 85 A.3d at 1125. The Act 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.

12 Pa.C.S. § 5302; *see also* 65 P.S. § 67.102 (defining “trade secret” for purposes of Section 708(b)(11) of the RTKL). The Act protects against “misappropriation” of trade secrets. *See* 12 Pa.C.S. § 5302; *Parsons v. Pa. Higher Ed. Assistance Agency*, 910 A.2d 177 (Pa. Commw. Ct. 2006).

“Whether information qualifies as a ‘trade secret’ is a highly fact-specific inquiry that cannot be distilled to a pure matter of law.” *Eiseman*, 85 A.3d at 1126. Pennsylvania courts confer “trade secret” status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of

the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. Ct. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS § 757 (1965)). To constitute a “trade secret,” it must be an “actual secret of peculiar importance to the business and constitute competitive value to the owner.” *Parsons*, 910 A.2d at 185. The most critical criteria are “substantial secrecy and competitive value.” *Crum*, 907 A.2d at 585.

a. Securus contract

The Department and Securus argue that a portion of their contract known as the “Implementation Plan” is exempt from disclosure because it constitutes a trade secret. Mr. Cadwell, on behalf of Securus, attests, in relevant part:

7. Proposals submitted in response to a request for proposals are, by their nature, competitive. Each closely guards their confidential information to limit a competitor’s ability to review and to use this confidential information against the creator in future procurements.
8. With respect to the RFP, each of the competitors in this procurement, Securus, CenturyLink and GTL, has engaged in procurement competitions against one another in numerous jurisdictions throughout the United States. In many cases, the competitions are very close and each competitor looks for any advantage to be selected for the contract....
10. In this case, Securus submitted a proposal in response to the RFP that included several categories of confidential information that Securus takes great pains to ensure that its confidentiality is protected[, including] ... Securus’ implementation plan for providing the telephone services under the contract (“Implementation Plan”).
11. Securus provided the [Implementation Plan] to [the Department] with the understanding that the information would remain confidential. At the time of the submission, Securus marked the documents as confidential and provided a written statement to [the Department] that the records contain a trade secret or confidential proprietary information.
12. Securus took other substantial and remarkable measures to protect the confidentiality of the [Implementation Plan]. Securus closely restricted access to the documents submitted with its proposal to only those employees

- essential to preparation of Securus' response to the RFP. Securus provides confidentiality training to its employees. In addition, Securus has not otherwise disclosed the documents or confidential information to any other party except for [the Department]. Finally, Securus destroyed all non-essential copies of the documents submitted to [the Department] in order to further ensure no additional dissemination of this information....
14. The Implementation Plan contains Securus' proprietary methods and processes for providing telephone services to inmates under the contract. Securus developed this unique Implementation Plan to, among other things, differentiate Securus and its operations from competitors like CenturyLink and GTL. The Implementation Plan was developed for exclusive use by Securus.
 15. Securus has made a considerable financial investment in the Implementation Plan in order to develop the unique methods and techniques. One of the goals of this investment was to provide a system to correctional agencies that is both efficient and effective.
 16. Securus competes in a highly-competitive niche market by providing telephone services to inmates within prison systems....
 17. [I]f the Implementation Plan is disclosed to the public, this disclosure would afford Securus' competitors insight into Securus' proprietary methods and processes for providing such telephone services for [the Department]. Securus' competitors would gain insight into how Securus' system operates, what its components are, how Securus manages the inmate calling process and how Securus generates revenues and incurs costs. Securus' competitors would know exactly how to identify and to address both the strengths and weaknesses of the Securus' system for use in future procurement competitions.
 18. This information could be utilized by the competitors to tailor and to structure their systems and implementation plan to the competitive disadvantage of Securus.
 19. The Implementation Plan derives independent economic value to Securus because it is not known by Securus' competitors and is not reasonably ascertainable by proper means. Disclosure of this information to Securus' competitors will allow them to simulate the processes that Securus developed for its own use or otherwise impede Securus' ability to compete on future procurements.

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Based upon the above evidence, Securus has demonstrated that it took various measures to protect the Implementation Plan's secrecy, including limiting the employees who have access to the

Implementation Plan and destroying all “non-essential copies” of the records. Further, Securus has demonstrated that there is a competitive market to provide telephone services to inmates, and that disclosure of the Implementation Plan would allow competitors to gain insight into Securus’ business model and ultimately simulate how it conducts its business. Therefore, Securus has met its burden of proving that the Implementation Plan constitutes a trade secret and is not subject to public access.

b. JPay Contract

The Department and JPay also argue that portions of their contract constitute trade secrets. Mr. Feldman, on behalf of JPay, attests, in relevant part, regarding the records redacted or withheld by the Department:

5. Facility Descriptions and Screenshots: The above-listed facility descriptions and screenshots ... were redacted pursuant to Section 708(b)(11) of the RTKL because they constitute ... trade secrets. The facility system descriptions and screenshots are descriptions of the system, products and processes and actual snapshots of computer program screens marketed by JPay to provide the underlying services requested by the [Department]. The facility system and screenshots set forth in the redacted materials describe JPay’s proprietary methods and processes for providing its e-commerce services to the [Department]. JPay has taken a number of steps to maintain the confidentiality of its system and interface depicted in the screenshots, and each client logs into the system with personal login credentials. Clients and JPay employees are the only individuals having access to this information. As such information is not generally available to the public, disclosure of this information would result in substantial economic harm as JPay’s competitors would have access to JPay’s proprietary information. JPay competes in a niche market by providing certain services, including e[-]commerce, communication and financial services to prison systems. Provision of this information to JPay’s competitors will allow them to simulate those processes, or otherwise impede JPay’s ability to compete for the same market share.... Furthermore, JPay has expended considerable financial resources developing the methods and techniques embodied in the redacted information. JPay currently has a pending patent on all of its applications and the related Intel system which is fully integrated with each individual service offered by JPay to the [Department]. This patent-pending system is accessible via the online interface described in the facility descriptions and screenshots JPay is seeking to protect.

6. Electronic Payment Flow Chart: The above-listed electronic payment flow chart ... is proprietary information and is considered a trade secret. This chart reflects JPay's proprietary method for processing a funds transfer which is central to one of JPay's main services offered to the [Department] and its inmates. Such information is not generally available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to this confidential information.
7. Implementation Plan: The above-listed implementation plan ... is a trade secret. The implementation plan reflects JPay's proprietary method, technique and process to install and operate its patent-pending system. Such information is generally not available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to such confidential information.
8. Customer List: The above-listed customer list ... was redacted pursuant to Section 708(b)(11) of the RTKL because it is a trade secret. The definition of trade secret as set forth in the law specifically identifies customer lists as exempt information. Such information is not generally available to the public and disclosure of such information would result in substantial economic harm as JPay's competitors would have access to such confidential information....

Based on the above evidence, the Department and JPay have demonstrated that the facility descriptions and screenshots are subject to efforts to maintain their secrecy, as only clients and employees of JPay have access to it. Further, the Department and JPay have demonstrated that disclosure of this information will allow competitors in the market to simulate JPay's processes, ultimately resulting in harm to the competitive position of JPay. Therefore, the Department and JPay have met their burden of proving that this information constitutes a trade secret.

Additionally, the Department and JPay have demonstrated that the withheld customer list constitutes a trade secret, as it is specifically defined as a type of trade secret, and subject to efforts to maintain its secrecy. Likewise, the Department and JPay have demonstrated that the electronic payment flow chart and the implementation plan are trade secrets. These records constitute a "method" or "technique" regarding how JPay processes funds and how it installs and operates its system to provide services to inmates. Additionally, the information is not generally

available to the public, and pertains to key components in how JPay performs its business. As a result, JPay has demonstrated that the release of this information would cause competitive harm to its business. Accordingly, this information constitutes a trade secret under the RTKL, and is not subject to access. *See Overby v. Pa. Dep't of Corr.*, OOR Dkt. AP 2010-1014, 2010 PA O.O.R.D. LEXIS 978 (holding that the same information is exempt from disclosure as a trade secret).

c. GTL contract

The Department and GTL argue that portions of their contract contain trade secrets. Mr. Montanaro attests:

5. This Declaration addresses ... [f]inancial information submitted to the Department for both contracts [regarding inmate telephone services and kiosks, respectively] to demonstrate GTL's financial capability as a prospective contractor, as well as the same information of GTL's predecessor-in-interest and GTL's subcontractor....
6. [A]s to GTL's financials, the redaction numbered 29 by [the Requester] covers the financial information that GTL provided to the Department, at the Department's request, in connection with the request for proposal process for the kiosk contract, in order to demonstrate GTL's economic capability.
7. Redaction 45 covers the same information that GTL's predecessor-in-interest supplied respecting the telephone contract.
8. These two redactions cover information that is highly confidential to GTL.
9. The redacted information includes audited financial statements for GTL over several years, including information about GTL's assets, income, cash on hand, receivables, expenses, licenses, taxes, property, goodwill, and other assets and liabilities.
10. Each page of the redacted documents is stamped "CONFIDENTIAL."
11. This redacted information is maintained by GTL with the highest degree of confidence, both internally and externally.
12. Were this information to be disclosed, it would be highly damaging to GTL, a non-public company....
21. Competitors in this industry keep the subject information confidential.
22. GTL takes steps to limit access to this information internally and externally.
23. This information has independent economic value because, if disclosed, it could be used by a competitor as part of an effort to win business away from GTL.
24. Substantial time and effort was invested to generate this information subject to the redactions.

Based on the evidence provided, GTL has demonstrated that it considers the withheld information as confidential, but does not explain the efforts to maintain its secrecy other than stamping records as “CONFIDENTIAL.” Notwithstanding the foregoing, however, GTL does not explain how the withheld information has independent economic value or how the information could be used to “win business away from GTL.”³ As a result, the Department and GTL have not met their burden of proving that this information constitutes trade secrets. *See Eiseman*, 85 A.3d at 1126-27.

d. Other contracts

Finally, the Department generally argues that the Scotlandyard contract contains trade secrets. However, other than the conclusory declaration of Mr. Illgenfritz, the Department has not provided any evidence in support of this assertion. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency's conclusory affidavit was insufficient). Additionally, Scotlandyard has not sought to participate in this matter nor has it submitted any evidence. As a result, the Department has not met its burden of proving that either of these contracts contain trade secrets. *See* 65 P.S. § 67.708(a)(1).

4. The release of some information would threaten personal security or public safety

³ While the evidence provided by JPay did not specifically explain how disclosure of the information would cause competitive harm, the records at issue pertain to how JPay conducts its business. Here, the records identified by GTL are strictly financial records, and GTL does not explain how disclosing this information would cause competitive harm.

The Department argues that certain information is protected under Section 708(b)(1) of the RTKL, which exempts from public disclosure “[a] record the disclosure of which ... would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Delaware County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *16 (Pa. Commw. Ct. 2012) (“The RTKL must be construed to maximize access to government records”).

In the context of a correctional institution setting, a correctional facility need not demonstrate specific prior examples of physical harm to personal security to meet the agency's burden of proof under 65 P.S. § 708(b)(1)(ii). *See, e.g., Mele v. Monroe County*, OOR Dkt. AP 2011-1230, 2011 PA O.O.R.D. LEXIS 1358; *Bernstein v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-1603, 2011 PA O.O.R.D. LEXIS 1295 (holding that prison inmate policy manuals are exempt from disclosure); *Rizzuto v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2010-0916, 2010 PA O.O.R.D. LEXIS 900 (records of prison staff observations, opinions, and impressions of inmates and inmates' behavior exempt from disclosure); *Chance v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2011-0539, 2011 PA O.O.R.D. LEXIS 726; *Erdley v. Pa. State Empl. Ret. Sys.*, OOR Dkt. AP

2010-0705, 20110 PA O.O.R.D. LEXIS 701; *Viney v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009- 60666, 2009 PA O.O.R.D. LEXIS 125 (first names exempt from disclosure); *Lancaster Newspapers, Inc. v. Lancaster County*, OOR Dkt. AP 2011-0407, 2011 PA O.O.R.D. LEXIS 652 (knowledge of emergency response techniques could be exploited by inmates); *Blom v. Pa. Dep't of Corr.*, OOR Dkt. AP 2010-1075, 2010 PA O.O.R.D. LEXIS 888 (mental health information likely to be used by inmates to exploit other inmates to the detriment of institutional security); *see also ACLU v. City of Pottsville*, OOR Dkt. AP 2010-0231, 2010 PA O.O.R.D. LEXIS 322 (prior knowledge of response procedures would expose police officers to physical harm). The OOR finds credible the professional opinion of individuals assessing the risks of security and will not substitute its judgment for that of those with far more familiarity with the issues involving personal security. *See Knauss v. Unionville-Chadds Ford Sch. Dist.*, OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238.

The Department also argues that the records are protected under Section 708(b)(2) of the RTKL, which exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, an agency must show: (1) the records at issue relate to a law enforcement or public safety activity; and (2) disclosure of the records would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Dep't of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

a. GTL contract

Mr. Montanaro, on behalf of GTL, attests, in relevant part:

16. The [Investigative Management System (“IMS”)] tool, as well as other similar tools, are at the Department’s disposal in order to detect and obtain intelligence respecting otherwise hidden activities, which it then uses to prevent prison violence and other violations and to otherwise foster institutional security.
17. If details about IMS or similar investigative tools were to be publicly disclosed, then inmates and others could use that information to circumvent the Department’s investigations, thus exposing prison institutions to increased risk of violence.

Meanwhile, the Major Mirarchi, on behalf of the Department, attests in relevant part:

6. In accordance with Department Policy DC-ADM 818, “Automated Inmate Telephone System (“AITS”) Procedures Manual,” every inmate telephone call is subject to interception, recording, and disclosure, except those placed to or from an attorney representing an inmate.
7. Electronic surveillance of inmate telephone calls is conducted by the Department in connection with its official law enforcement function of supervising the incarceration of inmates to, inter alia, ensure institutional security by assisting the Department in the detection of illicit or criminal activity by inmates or others and to investigation allegations of wrong-doing made against inmates or others.
8. Correspondingly, records of inmate telephone conversations are maintained by the Department in connection with its official law enforcement function of supervising the incarceration of inmates for the same reasons.
9. Fifty-nine pages entitled “Investigative Reports” have been redacted from the subject contract, from the section entitled “Value Added Communications,” because these pages contain the investigative tools of the Inmate Telephone System that provide facility staff with the capability to generate reports for purposes of, inter alia, criminal and noncriminal investigations undertaken by the Department in accordance with the monitoring of inmate telephone calls.
10. At Section 2 – Inmate Telephone Services, RFP No. 2005-081-011 – Technical Proposal – Tab 6 (“Technical Requirements”), language has been redacted from pages 61 through 63, page 104, and pages 173 through 175 and at Tab 3 (“Management Summary”), language has been redacted from page 12 because this language describes the [IMS], an investigative tool/application that the Department employs to identify and detect inmates involved in illicit and/or criminal activities.
11. Divulgence of the redacted portions of the contract would provide inmates with the necessary knowledge to take steps to circumvent the capabilities of the AITS, and undetected illicit, criminal and dangerous activities would proliferate within the institution placing the lives and safety of inmates, officers and others at risk.
12. The disclosure of the redacted portions of the contract would threaten public safety and the Department’s public protection activities in maintaining safe and secure correctional institutions by allowing inmates and others to access

information that can be used to undermine the Department's security procedures.

Based upon the foregoing evidence, the Department and GTL have demonstrated that the release of the withheld information regarding the IMS would allow inmates engaging in criminal activities to circumvent the IMS, and ultimately undermine the safety and security of the Department's institution. As the Department and GTL have demonstrated that the release of this information would be reasonably likely to threaten the personal security of Department staff and inmates, this information is exempt from disclosure under Section 708(b)(1)(ii) of the RTKL.

b. Securus contract

Major Mirarchi attests, in relevant part, that portions of the Securus contract, referred to as the "Security Information" are exempt from disclosure because their release would threaten personal security and public safety.⁴ Specifically, Major Mirarchi attests:

7. The Contract was developed to provide the Department with an innovative, state of the art, "hosted" solution for inmate telephone service and call monitoring and recording system which will provide inmates confined to the Department's institutions with a highly reliable, high quality service to call family and friends and give the Department the capability to perform oversight and monitoring of inmate telephone calls.
8. The Security Information provisions of the Contract define the investigative and intelligence processes and procedures for the recording and monitoring of inmate calls as well as the detection of cellular telephone usage by inmates.
9. The Security Information processes and procedures in the Contract are an integral and critical component of the Department's efforts to perform investigations and safely and securely monitor inmate calls.
10. The Security Information provisions are part of the Department's law enforcement functions and duties in connection with its legal responsibility for the care, custody and control of offenders committed to the Department's custody.
11. The Security Information is confidential because it contains security-sensitive information regarding the recording and monitoring of inmate telephone calls....

⁴ In its submission, Securus does not address any security concerns. Instead, it focused on the confidential proprietary nature of its information.

15. Many inmates are sophisticated enough that even the disclosure of seemingly innocuous information would be used by the inmate population to the detriment of institutional security.
16. The more the inmate population knows about the Department's telephone system and monitoring processes, the better prepared the inmates will be to use such information to cause disruptions, risking the lives of staff, other inmates, vendors, suppliers, the general public and other[s] who might be present at or near the institution.
17. Inmates could easily manipulate the Security Information contained in the Contract to circumvent the Department's call monitoring and investigation intelligence gathering and hinder the Department's ability to detect illicit calls and monitor the calls in the pursuit of appropriate administrative sanctions and/or criminal charges.
18. Knowledge of the contents of the Security Information provisions will allow inmates to take precautions to prevent the detection of illicit phone conversations by providing them with information to allow them to circumvent the tools used by the Department to monitor the calls.

Based on the foregoing evidence, the Department has demonstrated that the Security Information contains "investigative and intelligence processes and procedures" regarding the Department's law enforcement function, that if disclosed, would allow inmates to circumvent Department monitoring. The Department has also demonstrated that the release of this information would threaten institutional security. Based on this evidence, the Department has met its burden of proving that this information is exempt under Section 708(b)(2) of the RTKL.

c. Scotlandyard contract

Section 708(b)(3) of the RTKL exempts from disclosure "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system...." 65 P.S. § 67.708(b)(3). The exemption includes "building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems...." 65 P.S. § 67.708(b)(3)(iii). In regard to the contract between the Department and Scotlandyard, the Department redacted a page referenced as a "Building Plan."

Mr. Ilgenfritz, on behalf of the Department, attests that this information “was redacted in accordance with several exemptions of the RTKL, specifically, [the] building security exemption, which excludes records that create a reasonable likelihood of endangering the safety or physical security of a building, such as, the physical security of Scotlandyard’s location for video visitation.” However, conclusory affidavits or statements made under penalty of perjury are insufficient to meet an agency's burden of proof. *See Scolforo*, 65 A.3d at 1103. The Department has not demonstrated *why* the release of the Building Plan would be reasonably likely to endanger the physical security of a building.⁵ Therefore, it has not met its burden of proving that this record is exempt under Section 708(b)(3) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

Likewise, the Department also argues that the release of the Building Plan “would reveal proprietary information and trade secrets which Scotlandyard has spent considerable time and effort in protecting,” and “would jeopardize the Department’s interests in safely and securely delivering video visitation for inmates.” However, these conclusory statements are insufficient to meet the Department’s burden of proof, as there is no explanation of why the information is a trade secret, or why the release of the Building Plan would pose a safety risk. Therefore, the Department has not met its burden of proving that the Building Plan is exempt from disclosure.

5. The Department has not met its burden of proving that signatures are exempt from disclosure

The Department also argues that various signatures are exempt from disclosure under Section 708(b)(1)(ii) because their release would threaten individuals’ personal security. However, other than conclusory affidavits merely stating that the signatures are exempt from

⁵ Notably, the Department’s Chief of Security, Major Mirarchi, attests to security risks regarding portions of the GTL and Securus contracts; however, Major Mirarchi does not address the Department’s claim that the release of the Building Plan also poses a security risk.

disclosure, the Department has not provided any competent evidence establishing that the release of the signatures would threaten individuals' personal security. *Cf. Governor's Office of Admin. v. Purcell*, 35 A.3d 811 (Pa. Commw. Ct. 2011). As such, the Department has not met its burden of proving that this information is exempt from disclosure.

6. The Department has proven that records contain personal identification information

Finally, the Department argues that it redacted six pages of resumes that were attached to the JPay contract because they contained the personal or cellular telephone numbers of JPay personnel. Section 708(b)(6) of the RTKL exempts from disclosure "personal identification information," including "home, cellular or personal telephone numbers." *See* 65 P.S. § 67.708(b)(6)(i)(A). Accordingly, the Department has met its burden of proving that the information redacted from the resumes is exempt from disclosure under Section 708(b)(6) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part** and, subject to the redaction of tax information, trade secrets and personal identification information, the Department is required to provide the Requester with copies of the records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 12, 2015



APPEALS OFFICER
KYLE APPLGATE, ESQ.

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Attachment 8

In the Commonwealth Court of Pennsylvania

No. 1678 CD 2015

GLOBAL TEL*LINK CORPORATION,

Petitioner,

v.

**PAUL WRIGHT
AND PRISON LEGAL NEWS,**

Respondents.

On Petition for Review of the Final Determination of the Office of Open Records,
Docket No. AP 2015-0909, issued and mailed August 12, 2015

**BRIEF OF RESPONDENTS PAUL WRIGHT
AND PRISON LEGAL NEWS**

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Respondents Paul Wright and Prison Legal News, through their undersigned counsel, submit this brief in opposition to petitioner Global Tel*Link Corporation's petition for review. For the reasons more fully explained below, Mr. Wright and Prison Legal News submit that the Office of Open Records ("OOR") correctly concluded that financial information included in the contracts with the Pennsylvania Department of Corrections ("DOC") constitute financial records that should be produced to further the Right-to-Know Law's goal of opening governmental contracts to public scrutiny. Here, that policy is expressly implicated because the contracts at issue pay money to the DOC in the form of commissions, and those commissions derive from exorbitant fees that Global Tel*Link charges by providing telephone and other services to prisoners and their families in a monopolistic setting—literally a captive market. Further, Mr. Wright and Prison Legal News respectfully submit that the OOR correctly determined that the DOC and Global Tel*Link failed to demonstrate that the financial information, much of which may be more than ten years old, was in the nature of trade secrets or confidential proprietary information that would harm Global Tel*Link if disclosed. Accordingly, Mr. Wright and Prison Legal News request that this Court affirm the August 12, 2015 Final Determination of the OOR.

I. COUNTER-STATEMENT OF JURISDICTION

Mr. Wright and Prison Legal News (“PLN”) concur with Global Tel*Link’s statement of the basis of this Court’s appellate jurisdiction to hear this petition for review with the exception of Global Tel*Link’s invocation of 65 P.S. § 67.1301, which is not an appropriate jurisdictional basis for this appeal. Global Tel*Link (“GTL”) is neither a requester nor a governmental agency—it is an interested third party under section 1101 of the Right-to-Know Law (“RTKL”)—and no requester or governmental agency filed a petition for review here. *See* 65 P.S. § 67.1301; *see also West Chester Univ. v. Schackner*, 124 A.3d 382, 390-91 (Pa. Cmwlth. 2015) (citing *Allegheny Co. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1032 (Pa. Cmwlth 2011)). Accordingly, GTL’s right to appeal does not arise under section 1301. *See* 65 P.S. § 67.1301; *Schackner*, 13 A.3d at 391.

II. COUNTER-STATEMENT OF DETERMINATION IN QUESTION

Mr. Wright and PLN concur with GTL’s statement of the determination in question.

III. COUNTER-STATEMENT OF STANDARD AND SCOPE OF REVIEW

The standard of review is *de novo* and the scope of review is plenary. *See Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013). This Court may adopt the findings and legal conclusions of the OOR when appropriate. *See id.* at 474.

IV. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Was the financial information at issue made part of contracts that constitute agency “financial records,” as defined in section 102, subject to disclosure under the RTKL, such that statutory exemptions from disclosure set forth in section 708(b)(11) and (b)(26) do not apply by operation of section 708(c)?

(Answer Below: the OOR agreed.)

2. Assuming, *arguendo*, that potential application of the exemption in section 708(b)(11) of the RTKL was not precluded by the status of the financial information as financial records, did the OOR correctly determine that GTL and the DOC failed to establish via a preponderance of the evidence that the financial information at issue, much of which is from a predecessor company and at least ten years old, constitutes proprietary information that would cause competitive harm to GTL if disclosed?

(Answer Below: the OOR did not address this question because it found that the information was part of a financial record not subject to this statutory exemption and instead found that GTL failed to establish that disclosure of the information would cause it competitive harm under the separate statutory defense of the Uniform Trade Secrets Act.)

3. Assuming, *arguendo*, that potential application of the exemption for bidder or offeror financial information in section 708(b)(26) of the RTKL was not

precluded by the inclusion of the financial information in financial records, did GTL fail to demonstrate that the exemption should apply?

(Answer Below: the OOR did not address this question because it found the information to be part of a financial record not subject to the exemption.)

V. **COUNTER-STATEMENT OF THE CASE**

A. **The Right-to-Know Request**

This case involves a request for information concerning the DOC's contracts with providers of various services to prison inmates, including inmate telephone services, under which the service providers pay commissions to the DOC in exchange for access to a captive market. To obtain such information, Mr. Wright and PLN¹ submitted the request to DOC on March 27, 2015, under the RTKL, 65 P.S. §§ 67.101 to 67.3104 (the "RTKL Request"). (R. 17a-20a.)

B. **The DOC's Response**

The DOC granted the request in part and denied it in part on or about May 12, 2015. (R. 22a-26a.) Without specifying which pages certain exemptions purportedly applied to, the DOC's letter broadly claimed that some materials were

¹ Paul Wright is the editor of PLN and executive director and founder of the Human Rights Defense Center, a 501(c)(3) non-profit organization that advocates on behalf of the human rights of people held in U.S. detention facilities. Human Rights Defense Center publishes PLN and also maintains a website for its Prison Phone Justice campaign. The Prison Phone Justice campaign website is viewable at <https://www.prisonphonejustice.org/>.

withheld from disclosure because of the RTKL's exemptions set forth at 65 P.S. §§ 67.708(b)(11) and (b)(26). (R. 26a.) Section 708(b)(11) provides that "[a] record that constitutes or reveals a trade secret or confidential proprietary information" is exempt from disclosure. Section 708(b)(26) provides that certain bid information is exempt from disclosure:

A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

Among other responsive materials that are not at issue here, the DOC provided redacted versions of two contracts between itself and GTL:² (1) an inmate telephone services contract³ and (2) a kiosk services contract.⁴ The DOC's letter

² GTL is the nation's largest vendor of technological services to correctional institutions, with approximately 1.3 million of the nation's inmates covered by its contracts with correctional agencies running more than 2,400 facilities in the United States. See <http://www.gtl.net/about-us/company-profile/>.

³ The inmate telephone services contract was awarded in 2006 to GTL's predecessor company, MCI Worldcom Communications, Inc. As the DOC's letter responding to the RTKL Request stated, the redacted contract is available online as a public record at <http://contracts.patreaury.gov/view2.aspx?ContractID=125566>.

did not specifically identify to what materials in each contract the exemptions in sections 708(b)(11) and (b)(26), among others not at issue here, purportedly applied.

C. Mr. Wright's and PLN's Appeal to the OOR

Because the DOC's letter did not provide any explanation or facts justifying the purported application of various provisions exempting materials from disclosure, including redactions in the GTL contracts, Mr. Wright and PLN filed an appeal with the OOR on June 3, 2015. (R. 9a-15a.) In pertinent part, Mr. Wright and PLN challenged the DOC's invocation of the exemptions in sections 708(b)(11) and (b)(26), which the DOC relied on in part to redact information in the GTL contracts. (R. 12a-13a.)

The DOC submitted a merits response on or about June 19, 2015. In pertinent part, the DOC contended that the material redacted from the GTL contracts constituted "financial information regarding GTL." (R. 65a-66a (kiosk contract), 71a-72a (inmate telephone service contract).) Although some of the information at issue was nearly ten years old at the time, the DOC claimed that

Continued from previous page

⁴ The kiosk services contract was awarded to GTL in 2014. The redacted contract is available online as a public record at http://contracts.patreaury.gov/Admin/Upload/285767_Corrected%20Treasury%20Contract%20Link%204400013765%20Kiosk%20RFP.pdf.

GTL submitted that information “to demonstrate its economic capability” to perform the contracts and that its disclosure would “cause substantial harm to Global Tel*Link’s market position.” (R. 66a, 71a.) The DOC therefore claimed that the “financial information” was exempt from disclosure pursuant to sections 708(b)(11) and (b)(26). (R. 66a-67a, 71a.)

In support of its position, the DOC provided declarations of Anthony Miller and Steven Hilbish.⁵ Mr. Miller stated that the financial information at issue from the kiosk contract was redacted pursuant to section 708(b)(26) “because it is GTL’ financial information and the financial information of the identified SDB submitted in response to request for proposals to demonstrate GTL’ economic capability to perform services for the Department.” (R. 92a.) Mr. Hilbish stated that the financial information at issue from the inmate telephone services contract was redacted pursuant to section 708(b)(26) “because it is GTL’ financial information submitted in response to request for proposals to demonstrate GTL’ economic capability to perform services for the Department.” (R. 112a.) Neither the Miller

⁵ The Miller and Hilbish declarations were made on penalty of perjury pursuant to 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities. (R. 90a, 109a.)

nor Hilbesh declaration provided any explanation or justification for the DOC's application of the trade secrets exemption in section 708(b)(11).⁶

Pursuant to 65 P.S. § 67.1101(c), GTL filed a submission on or about June 19, 2015, in response to the OOR's notice to interested parties. (R. 122a-134a.) In pertinent part, GTL announced it was filing its request to participate to protect

GTL's confidential, internal, and proprietary financial information, which was submitted to the Department for both contracts to demonstrate GTL's financial capability as a prospective contractor, as well as the same information of a predecessor and subcontractor

(R. 125a.)

Pertinent to this proceeding, GTL argued that the redacted information in the GTL contracts constituted financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability and also that it constituted "confidential and secret

⁶ Without specifically invoking the trade secrets exemption, Mr. Miller and Mr. Hilbesh both further stated in conclusory fashion that the "disclosure of the redacted portions of the Contract would result in substantial harm to GTL as it would reveal proprietary information and trade secrets which GTL has spent considerable time and effort in protecting." (R. 92a, 112a.) Mr. Miller and Mr. Hilbesh, employees of the DOC, did not provide any foundation to explain how they know what measures GTL took to protect the information or that harm would result to GTL if it were disclosed.

information” that would injure GTL competitively if disclosed. Accordingly, GTL claimed the redactions were proper pursuant to sections 708(b)(11) and (b)(26).

In support of its submission, GTL offered a statement from Steve Montanaro, GTL’s Vice-President of Sales and Marketing Operations. (R. 131a-134a.) Mr. Montanaro’s statement, styled a “declaration,” is neither sworn nor made on penalty of perjury pursuant to 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

In pertinent part, Mr. Montanaro explained that the redacted information in the GTL contracts concerned GTL financials that GTL and its predecessor-in-interest (MCI Worldcom Communications, Inc. (“MCI Worldcom”)) provided to DOC in order to demonstrate their economic capability. (R. 132a. at ¶¶ 6-7.)⁷ Mr. Montanaro claimed that the redacted information “includes audited financial statements for GTL over several years, including information about GTL’s assets, income, cash on hand, receivable, expense, licenses, taxes, property, goodwill, and other assets and liabilities.” (*Id.* at ¶ 9.) Mr. Montanaro also claimed that the financial information constitutes confidential and proprietary information and trade secrets of GTL. (R. 133a.) In conclusory fashion, Mr. Montanaro stated that the

⁷ Mr. Montanaro also addressed a redaction of subcontractor information GTL submitted in connection with the kiosk contract, allegedly consisting of two quarterly tax returns. (R. 132a.)

information is treated by GTL as confidential and that its disclosure would harm GTL's competitive position. (*Id.*)

After obtaining consent to a thirty-day extension to issue its final determination from Mr. Wright, the OOR advised Mr. Wright that it was not necessary for him to respond to the submissions of DOC and GTL. (R. 139a.) Accordingly, Mr. Wright and PLN did not file a response to the submissions of DOC and GTL.

D. The Final Determination of the OOR

The OOR issued its Final Determination on August 12, 2015, granting the appeal in part and denying it in part. (R. 168a-188a.) The OOR also directed the DOC to take further action, including producing the financial information of GTL and MCI Worldcom that was made part of the GTL contracts that DOC had redacted. (R. 187a.)

In pertinent part, DOC held that the GTL financial information had been made part of a contract that constitutes a "financial record" of a governmental agency within the definition in 65 P.S. § 67.102 because it involved the DOC's acquisition of services and equipment. (R. 172a.) Accordingly, because the GTL information had become part of a financial record, OOR concluded that only limited statutory exemptions to disclosure could apply, citing 65 P.S. § 67.708(c),

and ruled that the exemptions under 65 P.S. § 708(b)(11) and (b)(26) did not apply. (*Id.*)

The OOR further held that, although the confidential proprietary information and trade secret exception set forth in section 708(b)(11) did not apply because the information was part of a financial record, information could still be withheld if it was in the nature of trade secrets protectable under the Pennsylvania Uniform Trade Secrets Act, 12 Pa. C.S. § 5302, citing *Commonwealth v. Eiseman*, 85 A.3d 1117 (Pa. Cmwlth. 2014), *rev'd*, 125 A.3d 19 (Pa. 2015).⁸ (R.180a.) In doing so, the OOR distinguished its prior decision in *Maulsby v. Pennsylvania Department of Corrections*, OOR Dkt. AP 2014-1480, 2014 PA O.O.R.D. LEXIS 1268, explaining that redactions of trade secrets in a contract or other financial record are justified under the Pennsylvania Uniform Trade Secrets Act, not under statutory exemptions set forth in section 708(b). (R. 172a n.2.)

However, the OOR concluded that GTL nevertheless failed to offer sufficient evidence to explain the efforts it makes to maintain the secrecy of the

⁸ On October 27, 2015, after the OOR issued its final determination in this matter, the Supreme Court of Pennsylvania rejected this Court's approach in *Eiseman*, which held that the Uniform Trade Secrets Act protected information from disclosure even when such information was attached to financial records to which the statutory exemption in section 708(b)(11) expressly does not apply. *Eiseman*, 125 A.3d at 32.

information. (*Id.*) The OOR further concluded that GTL did not provide sufficient evidence of how the financial information has independent economic value or how it could be used to harm GTL competitively if disclosed. (*Id.*)

GTL filed its petition for review of the OOR Final Determination on or about September 11, 2015.

VI. SUMMARY OF ARGUMENT

This Court should affirm the OOR's Final Determination with regard to disclosure of the GTL's and its predecessor's financial information. The OOR correctly determined that the GTL information at issue was made part of contracts that constitute "financial records" of an agency such that the statutory exemptions in section 708(b)(11) and (b)(26) do not apply. The term "financial records," which expressly includes contracts with an agency, must be broadly construed to effect the salutary purpose of the RTKL to effect governmental transparency. *See Commonwealth v. Eiseman*, 125 A.3d 19, 24-25 (Pa. 2015). Further, the General Assembly knew what it was doing when it limited the statutory exemptions applicable to financial records in order to advance the law's policy of increasing access to information to "prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." *Id.* at 32.

Assuming, *arguendo*, that the GTL information is not part of a financial record by virtue of being made part of the contracts with the DOC, GTL still failed

to present sufficient evidence to justify application of the proprietary and trade secret information exemption of section 708(b)(11). In addition, the exemption for financial information of an offeror or bidder in section 708(b)(26) must be narrowly construed, and GTL, which is contractor not a mere bidder, did not establish that the financial information at issue was limited solely to that establishing its capacity to perform.

VII. ARGUMENT

The OOR's Final Determination should be upheld with regard to the GTL financial information, which is part of a contract that pays revenues to the DOC based on excessive fees that GTL charges to members of a captive population and their families wishing to stay in touch with each other.

By way of background, this case unfolds in the context of governmental contracting practices in which providers of services to prison inmates, including inmate telephone services, pay "commissions" to the DOC in exchange for guaranteed monopolies in the provision of those services. The Prison Phone Justice campaign run by Human Rights Defense Center focuses on providing information to the public concerning the exorbitant rates that service providers such as GTL charge for telephone and other services, rates that benefit the governmental agencies that contract with the providers in the form of

“commissions.”⁹ These so-called commissions are arguably kickbacks from the providers to the governmental agencies, and they are paid for by the excessive rates the providers are able to charge to the inmates and their families, literally a captive market with no provider choice. Presumably, the governmental agencies benefit by awarding contracts to service providers that pay the biggest commissions.

The problems and injustices created by a contract model that provides kickbacks to governmental agencies based on those agencies granting sanctioned inmate telephone service monopolies are the subject of recent Federal Communication Commission (“FCC”) scrutiny. *See generally In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.¹⁰ The FCC has determined that the inmate telephone services market is a “prime example of market failure” in which there are excessive rates and where there is *no competitive pressure to reduce rates*: “With respect to the consumers who pay the

⁹ GTL acknowledges that the contracts at issue involve payments to the DOC because “GTL pays the [DOC] a share of the revenue [generated by charging inmates for telephone and other services].” (Pet. Br. at 6 n.2.)

¹⁰ The Court may take judicial notice of the FCC proceedings and filings therein as matters of public record. *See In the Interest of F.B.*, 726 A.2d 361, 366 n.8 (Pa. 1999); *Hill v. Dep’t of Corrections*, 64 A.3d 1159, 1165 n.3 (Pa. Cmwlth. 2013); *Commonwealth v. United States Steel Corp.*, 311 A.2d 170, 172 (Pa. Cmwlth. 1973).

bills, [inmate telephone service] providers operate as unchecked monopolists.” *See Rates for Interstate Inmate Calling Services*, Second Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, para. 2 (released Nov. 5, 2015). The FCC has taken note that the users of inmate telephone services (*i.e.*, prisoners and their families) are not party to the contracts and do not have any choice in service provider; instead, working from a position of self-interest, the state agencies agree to amounts that they are willing to let the service provider charge, a portion of which is then paid to the state agency as a “commission.” *See id.* para. 2 n.9. These commissions exceed the direct and reasonable costs incurred by correctional facilities and “disrupt and even invert the competitive dynamics of the industry.”¹¹ *Id.*

Ultimately, the FCC imposed rate caps on various inmate telephone services to address the injustice that service providers and correctional institutions perpetrate by charging exorbitant rates to inmates and their families who desire to remain in contact. *See id.* at para. 9.¹²

¹¹ Contrary to the express findings of the FCC, GTL claims without citing any evidence that the inmate telephone services industry is “intensely competitive.” (*See, e.g.*, Pet. Br. at 14 (“GTL . . . operates in an intensely competitive industry.”).)

¹² GTL filed a petition for review of the FCC’s order on or about December 18, 2015, which has been docketed as *Global Tel*Link, et al. v. Federal*

...Continued

Thus, the RTKL Request for materials pertaining to various inmate services from the DOC is part of Mr. Wright's and PLN's ongoing effort to shed light and public scrutiny on the self-interested dealings of the DOC with service providers like GTL that pay commissions in exchange for the opportunity to exploit some of the most vulnerable members of our society for grossly excessive profits. In part, Mr. Wright and PLN are seeking disclosure of any provider financials that demonstrate just how excessive the providers' rates are in light of their actual costs and financial standing. Such information will enhance their efforts to seek reform of contracting in this area and to protect inmates and their families who wish to stay in touch during the inmates' period of incarceration. Thus, there is compelling public interest in reviewing and scrutinizing the materials constituting the relationship between GTL and the DOC, just as, on the other hand, GTL would most probably desire to avoid such scrutiny.

A. The OOR Correctly Determined That the Financial Information at Issue Is Part of a Financial Record to Which Neither of the Asserted Exceptions Applies

The OOR correctly concluded that the financial information at issue is part of a "financial record" as defined in section 102 to which the exemptions set forth

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Communications Commission, et al., No. 15-1461 (D.C. Cir.). Those proceedings are ongoing.

in section 708(b)(11) and (26) do not apply by virtue of section 708(c). The financial information should be disclosed to further the policy goals of the RTKL.

The RTKL must be liberally construed “to effectuate its salutary purpose of promoting ‘access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.’” *Eiseman*, 125 A.3d at 29 (quoting *Levy v. Senate*, 65 A.3d 361, 381 (Pa. 2013)). Consistent with the “goal of promoting governmental transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed.” *West Chester Univ. v. Schackner*, 124 A.3d 382, 393 (Pa. Cmwlth. 2015) (quoting *Pennsylvania Dep’t of Educ. v. Bagwell*, 114 A.3d 1113, 1122 (Pa. Cmwlth. 2015)). Additionally, the law contains a presumption of openness of any records within a defined agency’s possession: the burden is on the party seeking to apply an exemption from disclosure to establish by a preponderance of the evidence that the material is protected from disclosure. *See id.*

In pertinent part, the RTKL defines a “financial record” as:

- (1) ***Any*** account, voucher or ***contract dealing with***
 - (i) ***the receipt*** or disbursement ***of funds by an agency; or***
 - (ii) ***an agency’s acquisition, use or disposal of services***, supplies, materials, equipment or property.

65 Pa. C.S. § 67.102 (emphasis added). If a record sought by a requester is part of a financial record, it is subject only to a narrow, limited subset of the statutory exemptions set forth in section 708(b). *See* 65 Pa. C.S. § 67.708(c). Reflecting the General Assembly’s goal to increase transparency and disclosure, that subset does not include any exemption for confidential proprietary information, trade secrets, or financial information of a bidder or offeror as set forth in section 708(b)(11) and (b)(26).

1. The Contracts Are Financial Records

Here, both the inmate telephone service contract and the kiosk contract are by GTL’s own admission within the definition of “financial records” because they are indisputably contracts that deal with the receipt of funds by an agency, the DOC, which receives payment under the contracts of a percentage of the fees GTL charges to inmates and their families. (*See* Pet. Br. at 6 n.2.) Further, there can be no dispute that the contracts also deal with the DOC’s acquisition of services within the scope of the RTKL’s definition of financial records.

2. The Financial Information Has Been Made Part of the Contracts

Construing the language of the RTKL “financial records” definition broadly to effect the law’s goals of access and disclosure, the GTL financial information is logically considered part of the contracts. It is significant that GTL and DOC voluntarily appended the GTL financial information at issue to the contracts even

though there was no legal requirement that they do so.¹³ In fact, GTL itself suggests that financial information such as that at issue is attached to contracts so that “the agency can rely on and *enforce* the contractor’s representations.” (Pet. Br. at 20-21 (emphasis added).) In other words, the financial information attached to appendices to the contracts is material to GTL’s obligations and performance under both of the contracts. It is difficult to see how such information relevant to the performance of a contract that pays funds to a state agency could be treated as anything other than a financial record under the RTKL. To be sure, information material to the performance of a contract that generates payment of funds to the government and to which that information is attached is undoubtedly “part and

¹³ Unable to point to any legal requirement that the financial information be attached to the contract, GTL claims that the *Procurement Handbook* “contemplates” that an agency contract will attach the contractor’s proposal, including financials. (See Pet. Br. at 19 n.13.) That provision of the *Procurement Handbook* simply states that, with regard to contract interpretation, it is *suggested* that the contract should specify an order of precedence for the meanings of terms in the contract and documents incorporated by reference, with a preferred order of precedence. See Dep’t of Gen. Servs., *Procurement Handbook*, Part I, Ch. 43 at ¶ B. The *Procurement Handbook* does not say that the contractor’s proposal and the RFP are necessarily attached to every contract. It simply says that a preferred order of precedence for contractual interpretation would be contract, then proposal, then RFP.

parcel” of the contract, as the OOR concluded, and of particular interest to the public and the Commonwealth’s taxpayers.

Treating the financial information as part of a financial record that is subject to few exemptions also is consistent with the Supreme Court of Pennsylvania’s recent decision in *Eiseman*. There, the court instructed that the definition of “financial records” must be read broadly to encompass records “dealing with” the disbursement of funds and acquisition of services. *Eiseman*, 125 A.3d at 29. The Supreme Court held that materials submitted to a governmental agency for approval, even though not themselves contracts with the government, constituted “financial records” because they were pertinent to a contract dealing with disbursement of public money or governmental acquisition of services. *Id.* Like the materials in *Eiseman*, the materials that GTL provided to DOC in their proposal were submitted for approval and are pertinent to a contract dealing with the receipt of funds by the agency and its acquisition of services.

Accordingly, because the materials GTL provided are properly viewed as part of the contracts dealing with receipt of money and acquisition of services by the DOC, they are financial records that, by virtue of section 708(c), are not subject to exemptions set forth in 708(b)(11) or (26).

GTL’s arguments to the contrary are unavailing. In the main, GTL relies on OOR decisions that applied section 708(b)(26) to prevent disclosure of financial

information submitted in connection with RFPs. (*See* Pet. Br. at 17 & n. 11.)

However, none of the cases GTL cites concerns a contract that pays money to a governmental agency in exchange for a sanctioned monopoly. And none of those cases discusses whether the materials at issue were made part of a contract and, therefore, financial records not subject to the exemption set forth in section 708(b)(26). Indeed, the main case GTL relies on dealt with a RTKL request for a response to a request for quotations, which standing alone is not a contract (or, therefore, a financial record), and which yielded no discussion or analysis of whether a document attached to a contract that pays money to the governmental agency constitutes a financial record. (*See id.* at 17 (citing *Hodges v. Pennsylvania Dep't of Corrections*, No. 2015-0241, 2015 PA O.O.R.D. LEXIS 320 (OOR Mar. 23, 2015)).)

GTL also contends that this Court has previously rejected the OOR's reading of 708(c) to bar the application of the section 708(b) exemptions at issue, citing *Schackner*. However, *Schackner* did not reject the approach taken by the OOR here, and GTL misreads the case. The OOR here concluded that the GTL financial information was part of the contract and therefore a financial record not subject to the exclusions set forth in 708(b)(11) or (26) in light of 708(c)'s unquestionable directive that those exclusions do not apply to financial records. *Schackner*, on the other hand, concerned two separate requests for information. In response to an

appeal from the first request, the OOR determined that certain enumerated exceptions to disclosure in 708(b)(10) and (11) did not apply to a contract because the agency and interested parties had failed to offer sufficient evidence to justify application of those exceptions. *Schackner*, 124 A.3d at 387. Curiously, only after rejecting the specific enumerated exemptions did the OOR say that the contract had to be produced in its entirety as a “financial record.” *Id.* at 387. With regard to the second request, the issue of financial records did not come up at all. *Id.* at 387-90.

This Court said nothing in *Schackner* concerning the OOR’s apparent determination that the contract was a financial record or concerning the curtailment of exceptions to disclosure under section 708(c). To be sure, this Court did not consider that issue at all. Instead, with regard to the first request, *Schackner* simply considered the applicability of the exemption in 708(b)(11). Like the OOR in that case, this Court held that the petitioner had failed to supply sufficient evidence to justify application of the (b)(11) exemption and left it at that. It did not discuss financial records or section 708(c)’s prohibition on the application of that exclusion to financial records. In addition, *Schackner* was decided prior to the Supreme Court’s decision in *Eiseman*, which countenanced a broad reading of the RTKL’s definition of financial records and the application of 708(c) to bar

invocation of the confidential proprietary information exemption of section 708(b)(11). Thus, *Schackner* is not instructive here.

In any event, although GTL criticizes the OOR's reading of the plain text of section 708(c) as "absurd and unreasonable" (Pet. Br. at 19), it is significant that GTL does not offer any alternative reading of section 708(c). On the other hand, the reading the OOR gave to section 708(c) is the same reading of its plain terms that the Supreme Court gave it in *Eiseman*. See *Eiseman*, 125 A.3d at 32. If the General Assembly had wished for contractor financials and confidential proprietary information in financial records to be withheld from disclosure, it would have specifically included those exemptions in section 708(c). *Id.*

Section 708(c) could not be more clear. Consistent with the reading given to it by the OOR and Supreme Court, it expressly states that the exemptions from disclosure set forth in 708(b) do not apply to financial records, subject to limited exceptions that do not apply here. Under well-known and longstanding rules of statutory construction, the clear statutory text of section 708(c) must be given effect as expressing the intent of the General Assembly. See 1 Pa. C.S. § 1921(b). If information is contained in a financial record, as here, it simply cannot be shielded from disclosure under section 708(b)(11) or (26). See, e.g., *Eiseman*, 125

A.3d at 32 n.12 (“[C]onfidential proprietary information within financial records is subject to public disclosure under the [Right-to-Know] Law.”).¹⁴

Finally, GTL contends that the OOR should have read the term “contract” in section 102’s definition of “financial records” narrowly to mean only the express terms in the contract document. However, as GTL itself explains, the attachments to contracts, including the contractor’s financial information, are instrumental in ensuring proper performance of those contracts. Thus, financial information of a contractor is quite different from financial information of an unsuccessful bidder or offeror, which do not relate to the performance of an actual awarded contract. Reading the term “contracts” narrowly as GTL urges would run contrary to the policies to be furthered by this remedial law, which must be construed liberally in favor of disclosure.¹⁵ And, while GTL says that the financial information in the

¹⁴ Significantly, the Supreme Court rejected this Court’s application of the Uniform Trade Secrets Act to financial records where the statutory exemption in section 708(b)(11) does not apply, further reinforcing the fact that section 708(c) must be given broad application. *See Eiseman*, 125 A.3d at 32.

¹⁵ While GTL points to prior law in an attempt to justify its narrow construction of the term “contracts” (Pet. Br. at 22 n.17), it ignores the fact that the RTKL fundamentally altered the rules of disclosure—including introducing the concept of financial records—to vastly increase disclosure. *See Bowling v. Office of Open Records*, 75 A.3d 453, 457 (Pa. 2013) (“In 2008, the General Assembly enacted the RTKL, which replaced the [Right-to-Know Act] and **provided for significantly broadened access to public records.**”) (emphasis added). Thus, the prior law is not instructive here.

attachments to the contract would not be useful to anyone seeking to scrutinize the relationship it has with the DOC, to which it pays commissions in exchange for a monopoly on providing telephone and kiosk services to inmates, there has been no independent review of that information by a disinterested party: the OOR did not review it *in camera* to ensure that the unsworn declaration of GTL's officer that was not made subject to the penalty of perjury is accurate.

The parade of horrors that GTL offers with regard to the purported chilling effect this approach to financial records might have on future bidding ignores the fact that there is no legal requirement that such information be made part of the contract. Thus, parties that desire to have their financial information or confidential information preserved will be free to bargain for its omission from the contract documents. And, to the extent that GTL's ostensible concern for governmental agencies' abilities to monitor a contractor's compliance with its obligations, the parties are free to include such language as they believe necessary to achieve that goal in the body of the contract instead of by attaching financial information.

Considering all of these factors, it is GTL's reading of section 102 and section 708(c) of the RTKL that is absurd because it flies in the face of the express language and purpose of the statute. Any contractor that does not wish to have its financial information disclosed is certainly free to reach agreements with a

contracting government agency not to attach such information to, or otherwise make it part of, the contract.

B. Assuming, Arguendo, That Section 708(c) Does Not Apply, GTL Has Not Established That the Exemptions from Disclosure in 708(b)(11) and (26) Apply

Even if the GTL financial information in the contracts somehow is not part of a financial record, GTL has not established that the narrowly-construed exemptions of 708(b)(11) or (26) apply here. GTL and the DOC failed to offer sufficient evidence to demonstrate that either exemption from disclosure applies. As the OOR noted, the conclusory statements in the statement of GTL's officer—which is unsworn and not made on penalty of perjury—are insufficient under this Court's precedent to justify the application of the confidential proprietary information exemption. Either sworn statements or affirmations made on penalty of perjury may serve as evidentiary support. *See, e.g., Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Cmwlt. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlt. 2010).

Further, construing the financial information exemption of section 708(b)(26) narrowly, as the Court must, there are at least two reasons it does not apply. First, the exemption in 708(b)(26) speaks only in terms of the information of bidders or offerors, not actual contracting parties. While there may be valid policy reasons to protect the information of unsuccessful bidders and offerors, the

public has a much greater interest in disclosure of the information of the parties that are awarded contracts. Second, the only evidentiary valid statements concerning the financial information—those submitted by DOC—make conclusory claims that the information was submitted during the proposal process to demonstrate GTL’s, and its predecessor MCI Worldcom’s, capability to perform the contracts. But those declarations do not describe what information GTL and MCI Worldcom submitted. They merely parrot the terms of the exemption. Such conclusory claims are insufficient to justify the application of a statutory exemption from disclosure. *See Schackner*, 124 A.3d at 393; *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (noting that a “generic determination or conclusory statements are not sufficient to justify the exemption of public records”).

1. GTL Failed To Establish That the Confidential Proprietary Information Exemption of Section 708(b)(11) Applies

To establish that the confidential proprietary information exemption of section 708(b)(11) applies, one seeking to avoid disclosure must produce competent evidence that the information is (1) privileged or confidential; and (2) that its disclosure would cause “substantial harm to the competitive position of the person who submitted the information.” 65 P.S. § 67.102; *see also Eiseman*, 85 A.3d at 1128. Generalized or conclusory statements cannot satisfy this burden. *See Schackner*, 124 A.3d at 393.

Here, the OOR properly observed that the statement GTL submitted was conclusory and insufficiently detailed to justify application of the exemption, principally because “GTL does not explain how the withheld information has independent economic value or how the information could be used to ‘win business away from GTL.’” (R. 180a.) Indeed, even if Mr. Montanaro’s unsworn statement not made on the penalty of perjury were proper evidence, which it is not, it does not explain how disclosure of the information at issue—some of which is approximately ten-years old—could possibly harm GTL. Instead, it simply states that “Were this information to be disclosed, it would be highly damaging to GTL, a non-public company.” (R. 132a at ¶ 12.)

As this Court has held, such conclusory allegations of purported competitive harm are insufficient. *See Schackner*, 124 A.3d at 393 (“[G]eneralized assertions do not provide the necessary specific factual basis upon which this Court could conclude that the record in question is exempt from disclosure under Section 708(b)(11) as . . . confidential proprietary information.”); *Eiseman*, 85 A.3d at 1129-30; *compare* R. 133a ¶¶ 18-24 *with Hodges*, 2015 PA O.O.R.D. LEXIS 320 at *8-*11 (quoting the detailed allegations made in a statement *made under penalty of perjury* about exactly how harm would result from disclosure). Here, the only details about the competitive harm GTL would suffer are offered for the first time in its merits brief, go far beyond Mr. Montanaro’s unsworn and

unverified statement, and cannot be considered in any event. *See, e.g., Commonwealth v. Wrecks*, 931 A.2d 717, 722 (Pa. Super. 2007) (noting that “assertions that appear only in briefs . . . are **not** to be considered”) (emphasis in original).

Finally, GTL’s recent financial information is already in the public domain to some extent. *See, e.g.,* <http://www.prisonpolicy.org/phones/financials/> (including GTL consolidated financial statements).¹⁶ Information that has already been disclosed publicly is by definition no longer confidential or proprietary.

Accordingly, even if the confidential proprietary exemption in section 708(b)(11) could apply here, which it cannot by virtue of 708(c), GTL has not carried its burden to justify application of that exemption from disclosure.

2. GTL Failed To Establish That the Exemption From Disclosure in Section 708(b)(26) Pertaining to Materials of a Bidder or Offeror Applies

GTL fares no better with the exemption in section 708(b)(26), which provides that the following are exempt from disclosure if it applies:

A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a *bidder or offeror*

¹⁶ The financial information was apparently produced in response to a RTKL-type request made to a state agency in another jurisdiction.

requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's *economic capability*; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. § 67.708(b)(26) (emphasis added). GTL has not demonstrated that this application should shield the information at issue from disclosure.

First, this exemption must be given a narrow construction in order to promote the policies to be advanced by the RTKL. *See Schackner*, 124 A.3d at 393. On its face, the exemption applies only to proposals prior to the award of a contract (or the rejection of all offers) and, once a contract has been awarded (or all offers are rejected), only to the information of a *bidder* or *offeror* to demonstrate that party's economic capability. The exemption does not state that it applies to the information of the party that is awarded the contract—the *contractor*—but only to the information of bidders and offerors. There is a significant distinction to be drawn here: the definition of “financial record” in section 102, as well as the limited roster of exemptions that can apply to such a record, in conjunction with section 708(b)(26), demonstrates an intent on the part of the General Assembly that the actual awarded contract and information of the contractor performing it are *not* subject to this exemption. If the General Assembly had intended this exemption to apply to the actual contract and contractor's information, it would have used different language in 708(b)(26) and included the term “contractor” instead of just

“bidder or offeror.” Instead, by the terms of the statute, the party performing the contract does not receive the same scope of protections from disclosure as those who merely bid for the contract.¹⁷ *See, e.g.*, 1 Pa. C.S. § 1921(b).

While GTL cites some OOR decisions that have applied the exemption to financial information attached to contracts, none of those prior decisions considered whether such documents were “financial records,” as the OOR did here, let alone undertook any analysis of whether the terms “bidder or offeror” include the successful contractor who is awarded the contract. The award of a contract is a transformative event, as demonstrated both by the inclusion of contracts in the definition of financial records and by the language of section 708(b)(26) itself, which only prohibits access to bid information prior to the award (or non-award) of a contract. The successful contractor’s information is of greater interest to the public because it is germane to the performance of a contract involving the disbursement or receipt of funds by an agency, especially when the parties attach

¹⁷ In this regard, it is significant that the Supreme Court determined in *Eiseman* that rate schedules that might otherwise enjoy protection from disclosure as confidential proprietary information that could have substantial effects on the managed care industry were subject to public review because they were related to the performance of a contract within the ambit of section 102’s definition of financial records. *See Eiseman*, 125 A.3d at 31-32. The Court recognized and gave effect to the General Assembly’s policy in favor of disclosure even of putatively sensitive information when it relates to the performance of public contracts.

that information to the contract. Given that the General Assembly intended the RTKL to vastly increase access to information to promote governmental transparency, it is reasonable to construe the exemption narrowly to apply only to the information of those bidders and offerors who were unsuccessful in their attempt to win the contract. GTL cites no opinion of this Court to the contrary.

Second, even if the exemption applies to the financial information of a successful contractor, GTL has not established that the financial information at issue is limited to information necessary to demonstrate its capability. The declarations submitted by the DOC do not reveal what kind of information was submitted or how it was submitted, only that it is “financial information . . . submitted in response to request for proposals to demonstrate GTL’s economic capability to perform services for the [DOC].” (R. 92a at ¶ 14; 112a at ¶ 14.) These conclusory statements simply mirror the language of the statute and do not describe what kind of information was submitted or how it purportedly demonstrates GTL’s capability.¹⁸ Thus, they are not sufficient to justify the application of the exemption.

¹⁸ GTL’s “capability” here arguably means its financial wherewithal to pay the largest commissions to the DOC in exchange for the award of a monopoly on the provision of telephone and other services to inmates, whom it charges fees far in excess of reasonable costs according to the FCC, as noted above.

In addition, the statement GTL offered from Mr. Montanaro does not demonstrate that the exclusion should apply. Mr. Montanaro's statement is not sworn or made on penalty of perjury and, thus, is not sufficient to constitute evidence. *See Sherry*, 20 A.3d at 520-21.

Mr. Montanaro says that the redacted information “*includes* audited financial statements for GTL over several years, including information about GTL's assets, income, cash on hand, receivables, expenses, licenses, taxes, property, goodwill, and other assets and liabilities.”¹⁹ (R. 132a at ¶ 9 (emphasis added).) Significantly, Mr. Montanaro does not explain whether the totality of the information is composed merely of financial statements, only that it *includes* such statements. Further, he does not explain whether the information GTL supplied is limited only to information that demonstrates GTL's “economic capability,” which is the only information that could be shielded on a strict construction of the exemption, assuming it applies at all in the first place. If there is any information included in the submission that goes beyond the minimum required to establish

¹⁹ GTL asserts that Mr. Wright and PLN did not rebut Mr. Montanaro's statement in this regard. (*See, e.g.*, Pet. Br. at 13.) Given that the OOR advised Mr. Wright that he did not have to respond to GTL's statement, and given that Mr. Wright and PLN have no way of rebutting claims about the nature of information that is *being withheld from them*, the fact that there is not a statement from Mr. Wright contradicting Mr. Montanaro does not somehow make Mr. Montanaro's statement accurate or render it competent evidence.

GTL's economic capability, the exemption should not be broadly construed to exempt such information from disclosure.

In the final analysis, the contracts at issue pay millions of dollars to the DOC in exchange for the award to GTL of monopolies in the provision of telephone and kiosk services to inmates in the DOC's custody. No disinterested party has reviewed the information at issue to guarantee that DOC and GTL are accurately representing it. Given the clear policy goals of the RTKL to advance governmental transparency and prevent agencies from keeping their dealings secret from the public, the OOR's grant of the RTKL Request for access to this information should be upheld.

VIII. CONCLUSION

For the forgoing reasons, respondents Paul Wright and PLN respectfully request that the Court affirm the OOR's Final Determination.

Respectfully submitted,

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Attachment 9

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1678 CD 2015

GLOBAL TEL*LINK CORPORATION,

Petitioner,

v.

PAUL WRIGHT
AND PRISON LEGAL NEWS,

Respondents.

**REPLY BRIEF OF PETITIONER,
GLOBAL TEL*LINK CORPORATION**

On Petition for Review of the Final Determination of the
Office of Open Records, at Docket No. 2015-0909,
issued and mailed August 12, 2015

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Petitioner, Global Tel*Link Corporation (“GTL”), hereby submits this reply brief in further support of its petition for review. As discussed below, and in its principal brief, GTL submits that this Court should reverse the August 12, 2015 Final Determination of the Office of Open Records as to its determination with respect to the GTL Financial Information (defined in GTL’s opening brief), and further order that no further action must be taken by the Pennsylvania Department of Corrections with respect to the GTL Financial Information.

I. SUMMARY OF ARGUMENT

Requester’s brief fails to move the needle, as that submission does not give this Court any reason to affirm. Instead, for the reasons laid out previously by GTL, the OOR should be reversed. The GTL Financial Information, ordered disclosed by the OOR, is plainly and indisputably within exemption 26 of the Right-to-Know Law. That exemption is specifically designed to protect internal financials that are submitted by a contractor to an agency to demonstrate the contractor’s fiscal fitness to carry out the contract. That is exactly what the GTL Financial Information is, and exactly why it was submitted to the Department of Corrections. Witnesses from both the Department and

GTL specifically attested to those points. Requester fails to muster any real rebuttal to this essential thrust of GTL's appeal. Instead, he offers a series of collateral arguments and non-sequiturs that have no merit. Because GTL has demonstrated it is entitled to relief, and requester has offered no real response, this Court should reverse the OOR.

II. ARGUMENT

A. **The GTL Financial Information is protected by exemption 26 of the Right-to-Know Law.**

Exemption 26 of the Right-to-Know Law, which protects a bidder's financial information from disclosure, is the centerpiece of GTL's opening merits brief. One would not know it from reading Requester's brief, however. Requester does not address that exemption until page 29 of his brief. Requester buries the lede because it presents him with an uncomfortable truth: that the GTL Financial Information is *precisely* the material that the General Assembly sought to protect from public disclosure when it enacted exemption 26. The Legislature wanted government contractors to divulge their financials to show they could fulfill their contractual obligations. In return for those disclosures, the General Assembly made an iron-clad guarantee: the financials never would see the light of day.

Here, the GTL Financial Information falls comfortably within exemption 26. The Department and GTL proved that the GTL Financial Information: (1) constituted the financial information of GTL; (2) was requested by the Department; (3) and was requested from GTL to demonstrate its economic capability. (R. 92a at ¶14, R. 112a at ¶14; R. 132a at ¶¶6-12.) Proof of these elements automatically entitles GTL to the protection of exemption 26. No further showing – such as a showing of competitive harm – is necessary.¹ Accordingly, because GTL has demonstrated exemption 26 applies, the OOR must be reversed.

1. Exemption 26’s protections extend to *all* bidders, not just the unsuccessful ones.

In his brief, requester does not offer any response to the Department’s and GTL’s unequivocal evidence that the GTL Financial Information falls within exemption 26. That is because he cannot do so. Instead, requester resorts to nibbling at the edges by way of collateral arguments – including some contentions that are downright bizarre.

¹ Requester tries to misdirect the court’s attention solely to exemption 11, pertaining to confidential proprietary information. Unlike that exemption, however, GTL has no burden to prove competitive harm with regard to exemption 26. Rather, its protections are automatic once the material is shown to fall within that category.

Foremost among them is requester's insistence that exemption 26 protects only the bidders who are *not* chosen to contract with the government – i.e., the *unsuccessful* bidders. (Br. at 30-31.) According to requester, a bidder suddenly becomes ineligible for exemption 26 the moment that bidder enters into a contract with the Commonwealth.

There is no support anywhere in the language of exemption 26 (or anywhere else in Pennsylvania law, for that matter) for such a nonsensical reading. The language of the exemption speaks broadly in terms of *all* bidders or offerors. It is not limited solely to *unsuccessful* bidders or offerors. The statute simply does not draw the line that requester wishes it would draw. Nothing in the statute indicates any intent on the part of the Legislature to deprive successful bidders of the protection of exemption 26. Requester's notion that contracting with the Commonwealth therefore is a "transformative event" changing the exemption 26 dynamics is a made-up notion with no basis in law.

Indeed, just because GTL succeeded in landing the contracts in question does not mean that it lost its status as bidder. GTL remained a bidder. While it also could be described at that point as the *successful* bidder, it remained a bidder nonetheless. It is possible to

walk and chew gum at the same time. So too is it possible to be both a contractor and a bidder. The two concepts are not mutually exclusive.

While requester relatedly claims that the public has an interest in prying into a successful bidder's financials, he omits that an inverse proposition is true: that a successful bidder has a stronger claim to exemption 26 than an unsuccessful bidder. A successful bidder is much more vulnerable if its financials are disclosed. Competitors who lose out have a keen interest in obtaining as many of the successful bidder's documents as possible, perhaps to support a bid protest. Unsuccessful bidders do not face such threats. The successful bidders therefore have the greatest interest of all bidders in obtaining the shelter provided by exemption 26.

2. There is no evidence the GTL Financial Information includes other material.

Requester also claims the Department and GTL did not demonstrate the financial information at issue is "limited" only to the material necessary to demonstrate GTL's economic capabilities. (Br. at 32-34.) But the Department's and GTL's evidence shows that the GTL Financial Information *was* limited to just that type of information, and that the material claimed as exempt was submitted *exclusively* for the

purpose of demonstrating GTL's fiscal fitness. There is not a shred of evidence anywhere in the record suggesting that anything other than financial information is contained within the GTL Financial Information. The detailed witness attestations expressly state that the subject material shows only financial information for GTL. The witnesses did not suggest the presence of non-financial information. (R. 92a at ¶14, R. 112a at ¶14; R. 132a at ¶¶6-12.) Requester's paranoid suggestion of some kind of nefarious conspiracy between the Department and GTL to stuff secret non-financial information into GTL's financials is pure fantasy.

3. The Department and GTL submitted wholly sufficient evidence to trigger exemption 26.

Perhaps requester's most desperate argument is that GTL's attestation was not signed in front of a notary. (Br. at 33.) This classic form-over-substance argument fails because requester cites to no case – and GTL is aware of none – holding that Right-to-Know Law attestations have to follow a set of formality rules. And the only two cases requester cites in support of this argument, Sherry and Moore, do not impose any such requirement.

In Sherry, the Court held merely that “we perceive no error on OOR’s part to the extent that it relied upon the affidavits in rendering its final determination.” Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 521 (Pa. Commw. 2011). So Sherry merely stands for the proposition that affidavits are *permitted* as a form of proof in Right-to-Know proceedings. The Court certainly did not hold that sworn affidavits are the *exclusive* method for a party to prove its position.

As for Moore, far from supporting requester’s claim of a formality requirement, that case actually is the basis for the *opposite* rule: that Right-to-Know burdens may be satisfied “with *either* an *unsworn* attestation ... *or* a sworn affidavit.” Hodges v. Dep’t of Health, 29 A.3d 1190, 1192 (Pa. Commw. 2011) (emphasis added; citing Moore v. OOR, 992 A.2d 907, 908-09 (Pa. Commw. 2010)). Moore therefore indicates that unsworn statements are permitted in this context.

Neither case cited by requester supports his claim that formalities were required for the Department’s and GTL’s attestations. Those submissions were properly prepared, and are wholly sufficient for the Department and GTL to be entitled to the protection of exemption

26.² Although requester claims these submissions lack detail, GTL's attestation specifically states that the GTL Financial Information

includes^[3] audited financial statements for GTL over several years, including information about GTL's assets, income, cash on hand, receivables, expenses, licenses, taxes, property, goodwill, and other assets and liabilities.

(R. 132a at ¶9.) GTL's statement was plenty detailed. In fact, it is hard to see how GTL's witness could have given any further detail without providing the numbers that GTL was trying to protect.

B. GTL's internal financial documents are not the government's "financial records."

Instead of addressing exemption 26 head-on, requester instead seizes on the *sua sponte* rationale of the OOR: that the GTL Financial Information actually constitutes the government's own

² It also bears noting that the Department's and GTL's attestations were, and are, subject to the criminal sanctions provided by section 4904 of the Crimes Code, see 18 Pa.C.S. §4904, which punishes unsworn falsification to authorities. The witnesses also no doubt understood their statements were being submitted to a tribunal, and that they knew the seriousness of their undertakings as a consequence. In short: the witnesses had sufficient incentive to be truthful.

³ While requester nitpicks at the word "includes," (Br. at 33), he misunderstands its import. That word indicates that the witness was describing the financial information contained in the redacted materials, and that the document may have contained other *financial* information. That word does not indicate the presence of non-financial information outside the scope of exemption 26.

“financial records” under section 708(c) of the Right-to-Know Law.⁴ As GTL previously demonstrated, OOR’s conclusion is simply wrong, and none of requester’s attempts to backfill that decision hold any water.

1. Disclosure of the GTL Financial Information will not help hold the government accountable.

First, requester repeatedly contends that the “financial record” provision must be “broadly construed.” (Br. at 12.) Obscured in requester’s presentation, however, is the nuance that the broad construction principle in Right-to-Know cases is linked to the underlying purpose of ensuring government accountability. Requester even admits that this principle is connected to the Law’s policy of increasing access to “scrutinize actions of public officials” and “make public officials accountable for their actions.” (*Id.*) Our courts have never held, however, that the Right-to-Know Law must be blindly applied in as broad a manner as possible in every case and as to every provision of the Law, regardless of the underlying interests. Rather,

⁴ Requester offers no defense for OOR’s indefensible decision to raise the “financial records” provision *sua sponte* and without offering GTL any chance to address that issue before OOR ambushed GTL with it in OOR’s decision.

the broad construction principle is harnessed to the interest in monitoring government actions.

Here, the broad construction principle is not implicated, because broadly construing section 708(c) to reach the GTL Financial Information does nothing to help scrutinize government actions or hold officials accountable. Requester offers no argument in support of the notion that disclosing a *private contractor's* internal financial information can possibly help hold the *government* accountable.

Given the drastic consequences involved for government contractors, the “financial record” provision should be given a more tempered reading when it comes to private contractor financials. Such a reading would be consistent with the language of that very provision, which expressly provides it is limited in application to documents depicting the “*agency's* acquisition, use, or disposal of services.” 65 Pa.C.S. §67.102. In other words, “financial record” is intended to reach the agency’s internal financial records, not those of a private contractor. Such a construction is completely sensible, given the General Assembly, in enacting the Right-to-Know Law, mandated a specific exemption that was designed to preclude access to exactly those materials. Put another

way, the same government that decided to require transparency for an agency's "financial records" simultaneously decided that there must be *no* transparency of a private contractor's internal financials.

Requester offers no rejoinder to the point that disclosure of the GTL Financial Information does not serve the purpose of government accountability. He instead offers a non-sequitur, suggesting that the Department's and GTL's submissions should not be trusted, and that there needs to be some kind of "independent review" of their claims. (Br. at 25.) This Court, however, has never required such statements to be "independently reviewed" *in camera* by the OOR whenever a requester has a feeling that something is fishy.

2. Financials *actually* are attached to agency contracts – regardless of legal requirements.

Requester also tries to cling to the OOR's misapplication of the "financial record" provision by pointing out that contractor financials are not legally required to be attached to agency contracts. (Br. at 18-19, 25.) This is a straw-man argument. GTL never argued attachment is required. GTL's point – to which requester offers no response – is that contractor financials are *universally* attached to government contracts in this Commonwealth. It is a fact of life,

regardless of legal requirements. The practice is widespread, and is the recommended process set forth in the *Procurement Handbook*, which is the go-to contracting manual for all agencies. This reality underscores just how impossible it is to believe that the Legislature could have intended the meaning of the “financial record” provision that the OOR and requester now ascribe to it.

Requester also apparently agrees that a ruling in his favor will result in the automatic – and devastating – disclosure of a host of existing and former government contractors’ financials, since he does not deny that is the result here if he prevails. But he lays the blame for this on the contractors, who he says “voluntarily” agreed to allow attachment and were “free to bargain for [the financials’] omission.” (Br. at 18-19, 25.) But the contractors, including GTL, had no way of knowing their financials would be subject to automatic disclosure by way of a future ruling of the OOR. They contracted with the Commonwealth on the basis of then-existing law, which (until the OOR’s new approach) protected their financials from disclosure. They had no need or reason to “bargain for [their] omission” before. The OOR’s decision to put the contractors’ financials at risk is a new

development. Requester's blame of the contractors thus is no different than criticizing them for not owning time machines or crystal balls.

Whatever the case, requester's argument cannot be taken seriously.⁵

3. Requester is wrong about *Eiseman*.

Throughout his brief, requester misapplies the Eiseman case. (Br. at 12, 20.) That decision does not, as requester claims, stand for the proposition that the "financial record" provision always must be broadly construed. The Supreme Court never rendered any such holding in that case. Requester's discussion betrays a misunderstanding of the context and holding of that case.⁶

As the Supreme Court acknowledged in Eiseman, that case presented a highly unique, fact-specific issue with "deeply mixed" policy considerations. Dep't of Pub. Welfare v. Eiseman, 125 A.3d 19, 31 (Pa. 2015). The case necessarily has narrow application outside of the

⁵ Even if the Court somehow decides to endorse OOR's rationale, given the retroactive risks created for contractors, the Court should make any such decision operable on a forward-looking basis, so as to protect the contracting community from the unfair surprise of a retroactive decision mandating disclosure of their financials. A forward-looking decision also is appropriate because the OOR's naïve approach would require a radical alteration in the Commonwealth's contracting practices across all agencies.

⁶ The undersigned was counsel for two of the parties to Eiseman.

context in which it was decided. There, the Court held that the “financial record” provision applied with respect to certain rates of payment in the HealthChoices program. The Court gave two reasons for that decision: (1) because the documents in question were required to be submitted for government approval; and (2) the documents in question depicted rates of payment that could be traced to government funds. Id. at 30-32.

Neither of these two key determinative factors in Eiseman are at play here. First, there was no legal requirement for the GTL Financial Information to be submitted for agency approval – a fact requester has made exceedingly clear. So instead of showing Eiseman’s relevance, requester actually has given the Court a reason to distinguish it.

Second, the GTL Financial Information does not have anything to do with the payment of government money, and hence never could be characterized as a government “financial record” (i.e., a document showing how government money is being spent). The GTL Financial Information shows only GTL’s internal financial picture. In fact, neither of the relevant contracts between the Department and GTL

involve the payment of government money. Both contracts are commission-based contracts that *generate* revenue for the Commonwealth. Neither contract involves spending any government money.

The Eiseman case therefore is inapplicable here, and thus it does no support requester's argument.

4. **Requester also is wrong about *Schackner*.**

Requester is similarly off-base in his convoluted characterization of West Chester University v. Schackner, 124 A.3d 382 (Pa. Commw. 2015). (Br. at 21-23.) Contrary to requester's claim, this Court *did*, in fact, reject the OOR's approach to section 708(c) in Schackner. The OOR has attempted to perpetuate that same approach in this case. Since the Court rejected it in Schackner, it should do so here as well.

In Schackner, the requester sought a copy of a contract between a lobbying firm, Bravo, and its client, West Chester University. Id. at 385. Bravo's proposal with regard to its legislative strategy was attached to that contract. Id. at 387. Bravo claimed that proposal was protected by Right-to-Know Law exemption 11, which covers trade

secrets and confidential proprietary information. Id. at 386. The OOR held, among other things, that the proposal was “part of the contract” and hence “must be disclosed in its entirety as a financial record under section 708(c).” Id. Bravo appealed to this Court.

This Court reversed the OOR on the section 708(c) issue, explaining that “we disagree with the OOR that information regarding a legislative strategy must be disclosed just because it is part of the contract.” Id. at 392. Because the “financial record” provision therefore did not apply to defeat Bravo’s claimed exemption, the Court continued on to analyze whether Bravo had satisfied its burden of proof under exemption 11. Ultimately, the Court held Bravo had failed to do so.

In sum, then, Schackner can only be understood as rejecting the OOR’s approach to section 708(c), which it applied again here. Indeed, had the Court endorsed the OOR’s reading of section 708(c), then it would not have analyzed Bravo’s claimed exemption. Instead, the Court would have concluded that the Bravo proposal was “part and parcel of the contracts” (just as the OOR concluded here) and then stopped its analysis at that point (just as the OOR did here), since Bravo could not have claimed the exemption in that event.

5. GTL *did* offer an appropriate reading of 708(c).

Finally, requester claims “GTL does not offer any alternative reading of section 708(c).” (Br. at 23.)⁷ Not true. On page 22 of its opening brief, GTL offered this construction of the term “contract” in the “financial record” provision:

[A] suitable reading of “contract” is that it covers only the actual terms and conditions found in the contract documents themselves – not the ancillary appendices and attachments that are prepared prior to and separately from the contract, and serve mainly as cross-references for statements contained in the contract documents.

In other words, GTL suggests that “contract” in this context should be limited to the actual terms and promises made between the parties.

The concept should exclude the ancillary attachments and materials prepared in advance of contract formation, including the due diligence materials shared between the parties, like the contractor’s financials.⁸

⁷ Oddly, on the very next page of his brief, right after claiming GTL does not offer a construction of section 708(c)... requester criticizes GTL’s construction of section 708(c).

⁸ While requester insists that a contractor’s financials should be disclosed because they are “instrumental” or “germane” to contract performance, (Br. at 31), these materials are only back-up material for the actual promises contained in the contract document itself. Requester fails to explain why it is necessary to obtain

(footnote continued on next page)

This application of the term “contract” fully harmonizes the competing interests. Agencies will be able to continue their time-honored contracting practices, which enable them to enforce contractor obligations. The contractors, for their part, will remain able to protect their financials under exemption 26 (as well as their confidential information under exemption 11) – even if they are attached to the contract by agency requirement or request. And the requesters will be able to obtain the actual contract terms, thus fulfilling the Right-to-Know Law objective of empowering the public to scrutinize government actions by showing the essential terms agreed upon by an agency.

The balance of these competing interests already has been achieved in this case. The Department produced 3,195 pages to requester, and provided him with every material contract term for each of the inmate telephone and kiosk contracts that interest him.

Requester does not claim – and could never claim – that he has been deprived of a material term of either contract, or that he is missing

(footnote continued from previous page)

the back-up material for a contractual promise when the document showing the promise already is subject to disclosure.

information necessary to understand how these contracts operate. At the same time, to this point, GTL has been able to protect its sensitive financials. This Court therefore should preserve the current state of affairs. It can, and should, do so by reversing the OOR's order for disclosure of the GTL Financial Information.

C. This is not the place for a crusade.

Finally, a brief note is warranted in response to requester's repeated *ad hominem* attacks on GTL in his brief, as well as his repeated reference to matters outside of the record, all of which plainly violate the Rules of Appellate Procedure. Requester's angry brief is loaded with inflammatory and unnecessary commentary aimed at prejudicing the Court against GTL. Perhaps the worst of these is the over-the-line accusation that GTL pays "kickbacks" to governments. This of course is an accusation that GTL is engaged in criminal activity.

Requester's tactics are surprising, as GTL has been careful in this case to describe requester in respectful terms. In any event, as the Court is well aware, requester's distracting commentary has no place in a Right-to-Know Law case. The analysis does not turn on how

effectively one can demonize his adversary. Requester knows this. But he took this tact anyway.

With respect to requester's many improper references to matters outside the record,⁹ it will suffice to say simply that GTL vigorously disputes the notion that there is anything untoward about the method of contracting the Department employed for the inmate telephone and kiosk contracts. These contracts were formed as a result of Department-initiated processes seeking competing bids using a business model of the Department's choosing. These open procurement processes were conducted in compliance with applicable laws, regulations and procedures. No contractor had the power to dictate to the Department the structure and terms of the contracts.

GTL was selected as the Department's counterparty because it offered terms that were in the Commonwealth's best interests. And

⁹ For example, requester carefully selects portions of certain FCC proceedings in an effort to turn the Court against GTL, even though he admits that GTL has challenged aspects of those proceedings, and that those proceedings are ongoing. (Br. at 14-15 & n.12.) Requester apparently believes it is acceptable to present the Court with a slanted picture of incomplete collateral proceedings. Requester also appears to make some type of reference to purported public disclosure of GTL's alleged financials from some other source. Even assuming the truth of that extra-record assertion, it has no impact on the analysis here, and thus can be safely ignored by the Court.

GTL charges Department-approved rates that are consistent with prevailing rates at similar institutions across the country.

In short: there is nothing inappropriate in how the Department chose to procure inmate telephone or kiosk services, in how the Department chose to contract with GTL, or in how GTL carried out its obligations under the contracts.

In the end, requester's repeated, prejudicial attacks say more about the merits of requester's legal position than they do about GTL. Requester, apparently recognizing the weakness of his legal arguments, must have felt it necessary to resort to name-calling. Whatever the case, GTL simply wishes to remind the Court that requester's unfortunate commentary must be ignored.

IV. CONCLUSION

For the foregoing reasons, as well as those in its principal brief, petitioner, Global Tel*Link Corporation, respectfully requests that this Honorable Court reverse the August 12, 2015 Final Determination of the Office of Open Records as to its determination with respect to the GTL Financial Information, and further order that no further action must be taken by the Pennsylvania Department of Corrections with respect to the GTL Financial Information.

Respectfully submitted,

Dated: April 18, 2016

/s/ Karl S. Myers

Karl S. Myers

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CERTIFICATE OF COMPLIANCE

I, Karl S. Myers, certify that this brief complies with the length limitation of Pa.R.A.P. 2135 because this brief contains 4,190 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135.

/s/ Karl S. Myers

Karl S. Myers

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing via
the Court's electronic filing system upon the person indicated below:

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Counsel for Respondents

Dated: April 18, 2016

/s/ Karl S. Myers
Karl S. Myers

Attachment 10

- [Services](#)
- [Facilities](#)
- [Blog](#)
- [Help](#)
- [Contact Us](#)

- [Create Account](#)
- [Sign In](#)



Frequently Asked Questions

Below is a list of frequently asked questions about common services and features on [ConnectNetwork.com](#).

+ Account Management

+ Payments & Billing

- Phone & Messaging Services

AdvancePay

Q: What is AdvancePay Phone?

A: AdvancePay Phone is a prepaid phone account that is established on your telephone number that allows you to receive calls from jails or correctional facilities serviced by ConnectNetwork. Phone calls will be received based on the available balance attached to your phone number. To learn more our AdvancePay service, visit the [AdvancePay](#) page. To find out if your location offers AdvancePay, visit our [Facilities](#) page.

Q: How do I set up my AdvancePay Phone account?

A: To set up a new AdvancePay Phone account on [ConnectNetwork.com](#), sign in to your ConnectNetwork account and ensure that you have added a facility to your account that offers the AdvancePay service. Once available, the AdvancePay service will be available via the Dashboard and the left menu.

The first time you click either link, you will automatically be taken through the setup process. You will be required to enter a phone number, select a variety of preferences, and choose the State/Facility that will be able to call the phone number.

Q: Can I have more than one AdvancePay Phone account setup on my ConnectNetwork account?

A: You may set up as many AdvancePay accounts as you would like. You may be required to fund each AdvancePay account separately, depending on the facility.

Q: *Can I use a cell phone to receive calls?*

A: Each facility has different rules regarding calls made to cell phones. Check with your facility to confirm that this option is available. If your facility approves the use of cell phones, you may add the number to your AdvancePay account. Custom ringback tones (the sound heard by the calling party when they dial your number) may prevent your call from being received and could possibly put a block on your phone number. It is advised that you remove all custom ringback tones on your phone.

Q: *Can I call an inmate?*

A: No, you can only receive calls.

Q: *Can I block incoming calls from an inmate?*

A: Yes. You may block your phone number from an inmate and/or facility by listening to the prompts on the line and pressing the corresponding number to have the inmate and/or facility blocked.

You can also request your number to be blocked by printing a copy of your phone bill and mailing it to us. The copy of the bill must show that you are the owner of the phone line by including the page with your name, address, and the phone number. On your bill, you will need to write: "I want my calls blocked from _____ facility". Then sign and date your request before mailing it to: PO Box 2868, Mobile, AL 36652.

If you want multiple phone numbers blocked from a specific facility, you must send a copy of each phone bill for each phone number you want blocked.

To contact us via phone, please call the appropriate number for the division that provides the correctional phone service to only block that division of GTL:

- **GTL:** +1 (877) 650-4249
- **VAC:** +1 (800) 913-6097
- **DSI:** +1 (888) 949-3303

Note: If you request a block to your phone number via postal mail, it will be blocked from receiving calls from all facilities served by ConnectNetwork, GTL, DSI, and VAC.

Q: *Why are my calls being blocked? How do I unblock my phone number?*

A: If you already have an AdvancePay account and calls are not being received, check to make sure you have sufficient funds in the account. If there are insufficient funds in your account to pay for a 5-minute call, then the call will not be completed. To ensure you meet the minimum requirement, check the rates by clicking Rates and Fees at the bottom of the page when you sign in to your ConnectNetwork account.

If you have enough money on your AdvancePay account and your calls are still being blocked, please contact Customer Service to request your number be unblocked. They will determine the reason for the block. If it is the result of a customer requested block, in order to unblock your phone number, we will need your account password, as well as the name and address listed on the account. Your phone number will be unblocked within one business day. If the block is a result of a technical problem, it may take a few business days to resolve.

If you intentionally blocked your phone number from an inmate and/or a facility, and you now want it unblocked, you will need to mail a copy of your phone bill to us. Include the page of the bill that shows you are the owner of the phone with your name, address, and phone number on it. On the bill, you will need to write: "I want to unblock calls from _____ facility". Sign and date the request before mailing it to: PO Box 2868, Mobile, AL 36652.

If your number was blocked by the facility, please contact [Customer Service](#) to request your number be unblocked. Customer Service may email the facility to make an inquiry on your behalf. The facility may decide that the block can be removed or that the line owner must contact them to have your number unblocked. This process may vary from facility to facility.

To contact us via phone, please call the appropriate number for the division that provides the correctional phone service to only unblock that division of GTL:

- **GTL:** +1 (877) 650-4249
- **VAC:** +1 (800) 913-6097
- **DSI:** +1 (888) 949-3303

Note: If you request to unblock to your phone number via postal mail, it will be unblocked from receiving calls from all facilities served by ConnectNetwork, GTL, DSI, and VAC.

Q: *I have set up my AdvancePay account on ConnectNetwork, but I am unable to receive calls. What now?*

A: First, make sure there are enough funds in your AdvancePay phone account to receive calls. If the phone number is blocked and you now want to receive inmate calls, contact our call center at +1 (877) 650-4249. If you did not request a block and believe that your phone could be blocking your calls, it could be your phone service or the status of your account with your phone service provider. If you are still unable to receive calls after following these steps, contact [Customer Support](#) for assistance.

Q: *How do I make a deposit to my AdvancePay Phone account on ConnectNetwork?*

A: Once your AdvancePay account is set up and you are signed in to your ConnectNetwork account, you can make a deposit by clicking the Add Funds button in the

AdvancePay area on your Dashboard. You may also click AdvancePay from the left menu and select the button for Add Funds to begin the process of making a deposit.

Q: How do I find my AdvancePay account balance?

A: You can check your account balance two ways. Call our automated system by dialing +1 (800) 483-8314 and select the option to check your balance **OR** sign in to your ConnectNetwork account and view the balance directly on your Dashboard.

Q: Do you offer a monthly or unlimited plan for calls?

A: We do not offer monthly or unlimited plans. However, our automated system allows you to store a credit card on your secure account that can automatically reload your balance when it reaches a pre-determined threshold. Using this method, your account will always be available to accept calls.

Q: I have money on one telephone number, but I have added other numbers to my ConnectNetwork account. Will the money cover calls to these other numbers?

A: Each phone number that you add to your [AdvancePay](#) account is managed separately and therefore you will need to deposit separate funds for each one. You may, however, use the same phone number for multiple facilities. In this circumstance, depending on the facility, you may not need separate [AdvancePay](#) accounts.

Q: What happens to my AdvancePay account when the inmate who calls me is moved from one ConnectNetwork facility to another?

A: Ordinarily, the same account remains active so there should be no interruption in service. However, in some cases, contracts can be incompatible (i.e. a facility not serviced by GTL). When this occurs, account holders must close the former account, obtain a refund for any unused funds, and open a new account for the new location. Call +1 (877) 650-4249 to speak to a representative if you have questions or concerns.

Q: How do I close my AdvancePay Phone account?

A: Closing an AdvancePay account online is available for select facilities. Sign in to your account and select Close Account from the within the AdvancePay page. Follow the prompts to confirm you'd like your account closed. If there is an unused balance in your account, we are happy to issue you a refund. You will need to confirm your address to receive your refund check in the mail. If the address listed is not correct, please update it before you close your account. [Learn more about refunds.](#)

Q: I am an international customer and want to accept inmate calls on an international telephone number. Is this allowed? How do I get set up?

A: International accounts—where +011 must be dialed prior to entering a phone number—can be funded through Western Union or by wire transfer. Please contact our International Customer Service Department at AdvancePayInternational@GTL.net to verify if the facility you need to receive calls from offers International Calling. Visit our [International Calling](#) page for more details.

Q: What if my call is cut off or disconnected?

A: If your call is cut off or disconnected prematurely, less than 5 minutes after you were connected, you can contact [Customer Support](#) to request an investigation. You will need to identify the date/time of the call as well as the facility and the inmate's first and last name.

During the investigation, we will review the phone call and determine the issue. If the disconnection is not due to a fault on the phone lines, you will NOT be credited for the call and you will be charged a \$5.00 investigation fee. Investigations will not be made on any calls longer than 5 minutes or calls made to a cell phone.

There are NO refunds for calls that are cut off or disconnected prematurely, or for calls with poor voice quality, made to cell phones, or processed through any type of call forwarding service or a movable (nomadic) Internet-based telephone service (such as Google Voice or MagicJack). All other refund requests will be evaluated on a case-by-case basis.

Q: My call was disconnected for initiating a three-way call, but I did no such thing. How can this be prevented in the future? Can I get credit for this type of disconnect?

A: Sophisticated software monitors every call and looks for indications that a 3-way call—or other disallowed call types—are taking place. When such an indication occurs, the call is disconnected. It is possible that inadvertent events such as call waiting tones, clicks on the line, extraneous keypad entries, etc., might trigger a false reading. Should this occur, credit will be given for all billing in excess of what would be appropriate for time spent in active conversation.

Q: What are the fees and rates associated with inmate phone calls?

A: Rates vary by correctional facility and are governed by contract and regulation. Rates for AdvancePay can be estimated prior to the conducting a call by clicking the Rates and Fees link available at the bottom of the website when you sign into your ConnectNetwork account. Taxes and regulatory fees also apply and vary by facility.

Q: In addition to the cost of an AdvancePay Phone call, what other fees may apply?

A: ConnectNetwork's [AdvancePay](#) Phone service is a regulated telecommunications service that is required to remit payments to both state and federal government agencies to help fund the general agency oversight of all of the telecommunications industry. ConnectNetwork is required to submit to the federal government a percentage of the money it receives from completing calls to support the Universal Service Fund. The amount of mandatory contribution is determined by the federal government and changes every quarter. This fluctuating percentage is applied to the cost of every call. The FCC also requires telecommunications carriers to contribute to the Local Number Portability fund that enables people to keep their phone number while switching phone services. Contributions are also required to the fund that ensures that phone service is available to those with hearing disabilities. Many states maintain their own Universal Service Fund, which is separate from the federal USF, and the mandatory contribution into state funds fluctuates, as well. In addition to the federal and state universal service funds, ConnectNetwork files mandatory payments at the state level to help the states fund their operations. Where permitted by the pertinent agency, ConnectNetwork assesses a fee to recoup the cost of these contributions and the expense invested in complying with these requirements. State and federal taxes that are collected are marked as such on a paper bill, or deducted from the balance of prepaid accounts on a per-call basis in the form of a percentage of the cost of the call. Federal USF charges are marked as such, and apply in the same manner as taxes. The recoupment of the administrative cost of complying with the federal USF program appears separately on a paper bill, as does the line for recoupment of state regulatory administrative compliance. In states that require tariffs, these state charges are authorized by the state public utility agency, and they appear in ConnectNetwork's tariffs. For accounts that are paperless, the fee is calculated as a percentage of the cost of a call, which percentage will fluctuate as the various fees assessed by agencies fluctuate, but will not exceed 5%. Calls to cell phones may be assessed a surcharge of 4% of the cost of the call, exclusive of taxes and fees.

NOTICE TO FRIENDS AND FAMILY OF NEW YORK STATE INMATES

Unisys Corporation, and Value Added Communications (VAC) through a contract with the New York State Department of Correctional Services provide an inmate telephone system at each state operated facility within New York State.

The calling rate is less than a nickel (\$.048) per minute for all calls terminating within the United States, Canada, and US Territories (American Samoa, Federated states of Micronesia, Guam, Midway Islands, Puerto Rico, and US Virgin Islands) and there are no additional call set-up or connect fees. A card transaction fee will apply. The chart below shows the calling rate for the average twenty-minute call.

<i>Description</i>	<i>New Rate</i>
Set-up fee per call	\$0.00
Charge per minute	\$.048
Cost of a 20 minute call	\$0.96

In 2007, the New York State legislature passed a law that permanently eliminates commissions paid to the State for inmate calls. This law further stipulates that the phone contract must allow for collect and pre-paid calling services. Both of these services are included in the calling service contract. *Note: Historical data indicates that the average call lasts twenty minutes in length. The maximum call duration allowed is determined by the facility. Most facilities allow each call to last thirty minutes.*

Note: The Department of Corrections does not provide inmate-paid debit calling at this time. Check your [facility](#) to see what is allowed.

The first time an inmate calls each of the numbers on their allowed list, the calling system will attempt to complete the call and bill it as a collect call on the called party's phone bill. If the call cannot be completed because there is no billing arrangement with the called party's telephone company or for some other restriction, an automated system will prompt the called party to set up a pre-paid account with ConnectNetwork.

Effective Jan 1, 2014, calls from inmates to cell phones will be allowed, as long as the cell phone is associated with an [AdvancePay](#) Phone account which has complete name and address information.

If there are any problems or questions you can contact ConnectNetwork at +1 (800) 777-2522 or online. Friends and families can deposit funds online or over the phone. You can also set-up or fund pre-paid accounts via a credit card or by mailing in a Money Order or Cashier's Check to: ConnectNetwork. Dept. #2548, PO Box 122548, Dallas, TX 75312-2548. In the memo line, input the ten-digit phone number that you would like the funds to be placed on in order to receive pre-paid calls.

Messaging

Q: What is Messaging?

A: At facilities that have authorized the Messaging service, ConnectNetwork offers either 1-way or 2-way email messaging between inmates and their family and friends. To learn more about our Messaging service, visit the [Messaging](#) page.

Q: How do I know if a particular facility offers the Messaging service?

A: By visiting the [Facilities](#) page, you can search for a facility and see a list of services that are available. In addition, if a facility offers the Messaging service, once you create a ConnectNetwork account and add the facility, Messaging will appear as a navigation option on the left-hand-side of your Dashboard.

Q: Can an inmate reply to my messages?

A: It depends. Some facilities offer 2-way Messaging, which allows an inmate to respond to your messages from within his/her account. At locations with 1-way Messaging, the inmate is not able to respond electronically and will respond through direct mail instead.

Q: What is the difference between 1-way and 2-way Messaging?

A: At facilities with 1-way messaging enabled, the inmate will receive a printed copy of the messages sent by family and friends, and if they choose to respond, they must do so by sending a letter in the mail. At facilities with 2-way messaging enabled, messages will be electronically delivered to inmates and any responses can be delivered electronically back to the family and friends via Messaging

Q: *Can I send a picture?*

A: No, not at this time. Messaging does not currently allow pictures, videos, additional files, or any kind of attachments.

Q: *What is the inmate's email address?*

A: The inmate does not have an email address. Messages can only be sent and received within ConnectNetwork.com.

Q: *What is my email address?*

A: Within the Messaging, ConnectNetwork users and inmates do not communicate using email addresses. For the purposes of receiving messages, the email address that you entered on the Settings page will be where you receive information. You can change your email address there. You will need a valid email address to receive notifications of message purchases and sent message confirmations.

Q: *Can anyone at the facility read my messages?*

1. All messages sent through ConnectNetwork are subject to review by facility staff, who are responsible for approving or rejecting each message. Once approved, messages are delivered to the intended inmate.

Q: *How long does it take for the inmate to receive each message?*

A: Message delivery times are determined according to the policies of each individual facility. You will need to contact your particular facility for this information.

Q: *How will I know when my inmate receives my message?*

A: Due to correctional facility security requirements, at this time there is no notification provided as to the status of whether an inmate has received a sent message. However, if a message were to be rejected by the facility, you would be notified in your Messaging inbox.

Q: *Why was my message rejected?*

A: All messages received by the facility are subject to review and approval by the participating facility staff. Inappropriate content, determined by the facility, could cause the message to be rejected.

Q: *Can I view my previously sent messages?*

A: You can view the messages that were sent by clicking the Sent folder from within the Messaging section (must be signed in to your ConnectNetwork account).

Q: *Why hasn't my inmate replied to my message?*

A: If your inmate is in a facility with 1-way Messaging, the inmate must write a letter and send it through the mail to reply to a message. Depending on the facilities mail policies, it may take a while to get a response back. The facility will decide when they will deliver your message to the inmate. If you have not received a response back from the inmate (through the mail), they may not have received your message yet.

Q: *Where are all of my old Email credits?*

A: As part of the conversion process from the Email Center to Messaging, available credits have been converted to Message Credits. Email credits were each worth a penny but Message Credits are worth a set rate at each correctional facility. Balances were converted based on the price of each message at the correctional facility where your inmate is housed, and any uneven credit balances were rounded up in order to fully benefit your Messaging account. For example, if you had 240 email credits worth a penny each, and a message credit cost \$1 or 100 credits, this conversion would result in you having 2 messages with 40 remaining credits rounded up by ConnectNetwork to give you 3 messages. *Note: There was no additional cost to you for this change.*

Q: *Can I receive a refund for unused Message Credits?*

A: No. There will be no refunds given for the cash value of your unused Message Credits.

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