



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
CHRISTIE BUTTERFIELD,	:	
Complainant	:	
	:	Docket No.: AP 2010-1022
v.	:	
	:	
DOVER AREA SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Christine Butterfield (the “Requester”) submitted two requests (the “Requests”) to the Dover Area School District (“District”) seeking various records related to employee benefits pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The District denied the Requests on a variety of grounds and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part** and **dismissed as moot in part** and the District is required to take further action as set forth herein.

FACTUAL BACKGROUND

On October 6, 2010, a request was filed (“First Request”), seeking

[A] spreadsheet that shows the retroactive salaries and salary adjustments for 2009-2010 for Act 93 administrators at Dover, approved by the Board on Monday, October 4, 2010.... Please be so kind as to email me a copy of that document or those documents, including any supporting

documentation for the basis upon which the Board calculated those increases and adjustments.

The District did not respond within five business days of receiving the First Request and, consequently, it was “deemed denied.” *See* 65 P.S. § 67.901.

On October 18, 2010, another request (“Second Request”) was filed, seeking

[1] Documents showing salary increases, stipends, and adjustments for newly added Act 93 members for 2009—10 prior to being added to Act 93.

[2] All supporting documentation for the basis upon which the Board calculated all increases and adjustments for all Act 93 members for 2009-10 and 2010-11.

[3] Years of service listed for new Act 93 members, consistent with listing for other administrators.

[4] Clarification/documentation/policy of basis for Act 93 members receiving stipends.

[5] Clarification of disparity between Board approval of salary increases on Oct. 4, 2010 and statement by Superintendent regarding no increase for 2010-2011.

[6] Copy of compensation plan including health benefits, sick days, vacation days, etc. under which we have been operating since July 2009.

On October 22, 2010, the District denied the Second Request, stating:

Request One Denied based on the Right to Know Act Section 706, redaction of record is not required and or required in the format of your request.

Request Two Denied based on ... Section 708. Records reflecting internal, predecisional deliberations of an agency, its members, employees or officials is an exempt and therefore not subject to release.

Request Three Denied on two accounts: Section 705, creation of record and Section 902 extension of time in terms of redaction.

Request Four Denied based on record does not exist in accordance with Section 708.

Request Five Denied, no record exists.

Request Six Denied based on Section 902 in which would require additional time, 30 days in terms of redaction.

On October 26, 2010, the Requester appealed the Requests to the OOR, alleging that the District’s responses to Items 2, 3, 4 and 6 of her Second Request were improper.

The appeals were consolidated into one docket under the above docket number. The

OOR invited both parties to supplement the record. On November 5, 2010, the District provided two unsworn position statements from its solicitor corresponding to each request. Subsequently, the District provided two attestations signed under penalty of perjury from its Open Records Officer affirming that no responsive records exist in response to Items 4 through 6 of the Second Request and that no responsive records exist related to “supporting documentation” in relation to the First Request. On November 9, 2010, the Requester also provided two position statements challenging the District’s response, and, on November 10, 2010, submitted an affidavit signed under penalty of perjury in support of her position.¹

LEGAL ANALYSIS

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. 2010). 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 request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here,

¹ In these additional submissions, Requester alleged that the District’s response to Items 1 and 5 of the Second Request was incomplete. As Requester did not challenge the response to Items 1 and 5 of the Request within her October 26, 2010 appeal but did specifically address the District’s responses to Items 2, 3, 4 and 6 of the Second Request, the OOR finds that the Requester did not appeal the District’s response to Items 1 and 5 of the Second Request. *See* 65 P.S. § 67.1101(a)(1) (requiring Requester to “state the grounds upon which the [R]equester asserts that the record is a public record”); *see also* 65 P.S. § 67.1102(b)(3) (“[T]he appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”)

neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The District is a local agency required to disclose public records. *See* 65 P.S. § 67.302. Records in possession, custody, or control of a local 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).

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 “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

1. The District failed to meet its burden with respect to Item 2 of the Second Request

The RTKL provides that records reflecting the “internal, predecisional deliberations” of an agency may be withheld from public access. *See* 65 P.S. § 67.708(b)(10). In order for this exemption to apply, three elements must be satisfied: 1) the deliberations reflected are “internal” to the agency; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to proposed action. *See Martin v. Warren City Sch. Dist.*, OOR

Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *PHFA v. Sansoni*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. DCED*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310.

In the present case, the District offered the following unsworn statement from its solicitor in support of this exemption:

As the OOR held in Martin ... records containing deliberations which are internal to the agency, made before a decision on an action, and pertain to proposed action or policymaking are exempt from disclosure under Section 708(b)(10)(i)(A). Supporting documentation reflecting the basis on which salary increases and adjustment are made clearly meet these criteria as such documents would detail the District's internal decision-making prior to the awarding of salary adjustments.

The District provided no other factual or legal support of this exemption.

The OOR finds the conclusory statements offered by the District fail to provide a sufficient factual basis with which the OOR may assess whether this exemption applies to responsive records. As the OOR and courts have recognized, affidavits may serve as sufficient evidence under the RTKL "where the affidavit is more than conclusory." *American Civil Liberties Union v. Pennsylvania State Police*, OOR Dkt. AP 2010-0586, 2010 PA O.O.R.D. LEXIS 507; *see, e.g., Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. 2010). The OOR has noted, however, that a "conclusory statement in an affidavit that the records reflect internal predecisional deliberations of an agency does not establish this exception given the lack of substantiated facts." *Marshall v. Neshaminy School District*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67; *see also Lynch v. Locust Twp.*, OOR Dkt. AP 2010-0420, 2010 PA O.O.R.D. LEXIS 394; *Laigle v. City of New Castle*, OOR Dkt. AP 2010-0287, 2010 PA O.O.R.D. LEXIS 260. In the present case, the unsworn statement provided by the District merely asserts that the exemption

applies to responsive records, without providing sufficient detail as to how all of these records are “internal,” “predecisional” and/or deliberative in character. As a result, the OOR finds that the District failed to meet its burden of establishing that the exemption under 65 P.S. § 67.708(b)(10) applies to these particular records. *See* 65 P.S. § 67.305; *see, e.g., Marshall*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67.

On appeal, the District also alleged that the exemption under 65 P.S. § 67.708(b)(7) applies to the requested records. The Commonwealth Court, however, has repeatedly held that an agency cannot “set forth additional reasons for a denial at the appeal level.” *See Signature Solutions, LLC v. Aston Township*, 995 A.2d 510, 514 (Pa. Commw. Ct. 2010); *DOT v. Office of Open Records*, No. 2259 C.D. 2009, 2010 Pa. Commw. LEXIS 575 at *16 (Pa. Commw. Ct. Nov. 1, 2010). Consequently, the OOR need not consider this exemption.

The District did, however, provide an attestation from its Open Records Officer affirming under penalty of perjury that no responsive records exist in relation to “supporting documentation” in the First Request. Because this Request overlaps with Item 2 of the Second Request with respect to the information for 2009-2010, the OOR finds that the attestation provides sufficient factual evidence of the nonexistence of response supporting documentation for the year 2009-2010 of the Requests. *See Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010); *Treichler v. Washington Township Municipal Authority*, OOR Dkt. AP 2010-0680, 2010 PA O.O.R.D. LEXIS 578; *Anderson v. Dept. of State*, OOR Dkt. AP 2010-0642, 2010 PA O.O.R.D. LEXIS 552.

2. Item 3 of the Second Request and the spreadsheet

In its initial denial letter, the District alleged that a response to Item 3 of the Second Request would impermissibly require the creation of a record pursuant to 65 P.S. § 67.705.² On appeal, the District stated that

As of the date of the request, the District maintained no document(s) which simply listed the years of service for Act 93 members. This information may be inferred based on the hiring dates listed in each individual member's personnel files but such files would have required redaction, as least in terms of home address. Searching, retrieving and redacting those documents would have required significant time. Nevertheless, in response to yet another subsequent [RTKL] request, the District has since created and provided a document which lists the years of service for the new Act 93 members; thus, the District respectfully submits that his appeal be dismissed as moot. The District created a spreadsheet for the Requester even though it had no obligation to do so under Section 705.

While the District correctly points out that the RTKL does not require agencies to create records in response to a request under 65 P.S. § 67.705, an agency may not withhold responsive source records, absent a requester's consent, and instead create a new record to fulfill a request. In the present case, the District acknowledges that responsive records exist in individual personnel files, and provided a spreadsheet summarizing responsive information to Requester. The Requester, however, noted that this spreadsheet was not entirely responsive to her Second Request, as it "did not provide years of service in education as were listed with all Act 93 members."

The OOR is sympathetic to the District's attempt to save time and resources by creating a new record rather than culling through and redacting multiple personnel files. As the Requester, however, appeals the District's response, and the District provided no

² The District also stated that it "denied" Item 3 under 65 P.S. § 67.902 because an extension of time was required for redaction. The OOR notes that an agency may only invoke a thirty day extension of time to respond for the specific reasons cited in 65 P.S. § 67.902(a) and that an extension does not serve as a denial under the RTKL.

factual or legal basis for withholding responsive portions of individual personnel files, the OOR must hold that the District did not meet its burden of demonstrating that responsive records contained within individual personnel files should be withheld from public access. *See* 65 P.S. § 67.305; *see, e.g., Peterson v. East Stroudeburg Area Sch. Dist.*, OOR Dkt. AP 2010-1016, 2010 PA O.O.R.D. LEXIS ____.

This spreadsheet, however, is responsive to the First Request. The District alleged that it provided Requester with the spreadsheet, and the Requester acknowledged receiving this spreadsheet. As a result, the remainder of the First Request is dismissed as moot.

3. The District established that no responsive records exist related to Items 4 and 6 of the Second Request

The District denied Item 4 of the Second Request, stating that no responsive records exist. On appeal, the Requester alleged that responsive records should exist pursuant to 24 P.S. § 11-1164 (“Act 93”). As the OOR stated in *Troupe v. Borough of Punxsutawney*, “[w]hile ... evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record] – the OOR may only determine whether a responsive record does, in fact, exist.” OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731.

In the present case, the District provided an attestation affirming under penalty of perjury that a search for responsive records was conducted and that no responsive records exist related to Item 4. Such an attestation serves as sufficient evidence of the nonexistence of responsive records under the RTKL. *See Moore*, 992 A.2d at 909; *Treichler*, OOR Dkt. AP 2010-0680, 2010 PA O.O.R.D. LEXIS 578; *Anderson*, OOR Dkt. AP 2010-0642, 2010 PA O.O.R.D. LEXIS 552. Consequently, the OOR finds that

the District demonstrated that no responsive records exist related to Item 4 of the Second Request.

Similarly, the District stated that it “denied” Item 6 of the Second Request “based on Section 902 in which would require additional time, 30 days in terms of redaction.”³ Assuming that this statement qualifies as “a specific reason for a denial” as envisioned by the Commonwealth Court in *Signature Solutions*, the District, on appeal, provided an attestation signed under penalty of perjury stating that no responsive records exist in relation to Item 6 of the Second Request. *See* 995 A.2d at 514. As noted above, the Commonwealth Court has ruled that an agency may not alter its original grounds for denying access to a record on appeal to the OOR. *See id.* Despite this holding, however, “it would be an absurd result for the OOR to direct the release of a record that does not exist.” *See Whalen v. West Goshen Police Department*, OOR Dkt. AP 2010-0556, 2010 PA O.O.R.D. LEXIS 521; *Varley v. Beaver County*, OOR Dkt. AP 2010-0582, 2010 PA O.O.R.D. LEXIS 505. Consequently, the OOR finds that the District is not required to provide responsive records related to Item 6.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part** and the District is required to provide responsive records, with redactions for home addresses of public school employees and pursuant to 65 P.S. § 67.708(b)(6), related to Items 2 and 3 of the Second Request within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Court of Common Pleas of York County. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also

³ *See* Note 2, *supra*.

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: November 18, 2010



APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Christie Butterfield, D.Ed.; Philip Spare, Esq.