



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**CAROLL TIGNALL,
Complainant**

v.

**DALLASTOWN AREA SCHOOL DISTRICT,
Respondent**

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Docket No. AP 2010-0869

INTRODUCTION

Carroll Tignall (the “Requester”) submitted a request to Dallastown Area School District (the “District”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”) seeking purchase orders/invoices for voter cards, names of meeting attendees and e-mails related to the November municipal election. The District provided an attestation of non-existence for the purchase order and attendees, and claimed the e-mails requested are not “records of” the District. The Requester timely appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied** and the District is not required to take further action.

FACTUAL BACKGROUND

On August 26, 2010, the Requester submitted a right-to-know request for

- (1) copies of the purchase order, invoice, payment authorization and payment transaction for the cost of printing the voter reminder cards distributed by the District in advance of the May 19, 2010 primary election;
- (2) names of all individuals that attended the may 2009 Parent Advisory Group meeting;
- (3) all e-mails sent or received by the individuals listed below between October 1, 2009 and November 4, 2009 that reference any topic related to the November Municipal Election: *i.e.*, Pay Athletics, Pay to Play, Pay Sports, Extracurricular Fees, School Board Election, School Director Election, General Election, Municipal Election, November Election, School Board Candidates, School Director Candidates, etc. (“E-mails”) (electronically)

followed by 21 names (the “Request”).

Lisa Kirby, Open Records Officer (ORO), timely responded stating that with respect to Parts 1 and 2, no responsive records exist, and denied E-mails sought in Part 3 because they are not records of the District and do not document a transaction or activity (the “Response”). In support of non-existence, the ORO submitted a notarized attestation (“Attestation”). Of the individuals listed, the District notes that they are not board members and do not have authority to conduct official District business, and that the subject-matter of the e-mails does not involve District business. The Requester timely appealed arguing that the records claimed to be non-existent should exist, the information sought should be separately provided, and e-mails are public record, and include as a sender recipient the Athletic Director, who conducts District business (“Appeal”).

The District supplemented the record with a letter arguing its position and an additional affidavit supporting the facts set forth in the Response (“Affidavit”). With regard to non-existence, the ORO explains that the records do not exist in any form and notes that there is no obligation to create responsive records or respond to questions in lieu of providing a record. The District explains that the Parent Advisory Group (PAG) is comprised of volunteers who meet periodically in a town-meeting style to discuss concerns and to allow the Superintendent to answer questions. The District clarifies that the PAG has no authority to conduct business for the District and no business occurs at the meetings, and no formal attendance is taken.

With regard to E-mails, the District attests that the individuals listed are or were District employees or coaches, all of them were or are issued e-mail addresses and were or are coaches for the District, other than Harvey, who is the Athletic Director. The District also attests that it does not conduct municipal elections and does not have a “pay to play” athletic program. The District argues that *In re Silberstein (MacNeal v. York Township)*, No. 2009-SU-004714-08 (York CCP

April 5, 2010)(on appeal), is controlling because the District is located in York County. The District asserts that the e-mails are not “records” as defined under the RTKL because they do not document a transaction, business or activity of the District. The District distinguishes *Dixon v. Mt. Lebanon School District*, OOR Dkt. AP 2010-0446, because the e-mails at issue in that case pertained to business of the district and were among the staff and governing body. By contrast, here, the e-mails are not of subjects within the business of the district, or among governing representatives and do not document District activities. Further, the District explains that since the District does not have pay athletic programs, and the senders/recipients lack authority to make policy, any discussion of those topics could not be considered “deliberation.”

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, neither party requested a hearing and the OOR has the requisite and necessary information and evidence, through sworn, written testimony, to properly adjudicate the matter.

The District is a local agency subject to the RTKL and required to disclose public records. *See* 65 P.S. §67.302. Records in possession 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). However, an agency cannot be compelled to produce records that do not exist.

The District substantiated by the Affidavit and its earlier Attestation that it does not possess responsive records to Parts 1 and 2 of the Request. The Affidavit is sufficient evidence to substantiate this fact. *See Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. 2010). Thus, the District met its burden with regard to Parts 1 and 2 and need take no further action.

With regard to Part 3, the District relies upon its argument that E-mails do not constitute records of the District. The District established that senders/recipients are or were employees, and have or had District e-mail addresses; to that extent, the E-mails are within the District's control. The District argues that it has no obligation to provide records based upon *Silberstein*. However, the Court's holding in *Silberstein* depended upon shifting the burden of proof to the requester who was required by the Court to demonstrate that e-mails are "records" of the Township, whereas the RTKL clearly places the burden of proof solely upon the agency to overcome the presumption of openness. The Commonwealth Court recognized as much in its cases, including *Jones v. OOR*, 993 A.2d 339 (Pa. Commw. 2010). Accordingly, *Siberstein* is not controlling as an appellate court has ruled otherwise regarding the burden of proof.

However, the District establishes that the E-mails do not pertain to or document a business, transaction, activity of the District because the subject-matter does not involve District business. The District established it does not have pay to play or pay athletics and does not conduct municipal elections, subjects identified by the Requester. Coaches have no authority to transact District business or create policy. The RTKL applies only to "records" of the District and information qualifying under Section 102. To the extent that coaches e-mailed each other

regarding the municipal elections, including for School Board or School Directors, the E-mails are not “records” of the District and there is no obligation to disclose them.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the York County Court of Common Pleas. 65 P.S. §67.1302(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. This Final Determination shall be posted on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: October 22, 2010



**LUCINDA GLINN, ESQ.
APPEALS OFFICER**

Sent to: Caroll Tignall; Lisa Kirby for District