



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**BARRY SENSEMAN,
Complainant**

v.

**MARPLE NEWTOWN SCHOOL DISTRICT,
Respondent**

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Docket No. AP 2010-1068

INTRODUCTION

Barry Senseman, (the “Requester”) submitted a request to Marple Newtown School District (the “District”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”) seeking weekly payroll certifications. The District provided records for one contractor with redactions under Section 708(b)(6)(i)(A). The Requester timely appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the District is required to take further action as directed.

FACTUAL BACKGROUND

On September 17, 2010, the Requester submitted a right-to-know request seeking “copies of weekly payroll certification for public works projects for contractor(s) and/or subcontractor(s) 1. Adams Property Services, 2. Gresco and Sons INC. and 3. Tamora Building Systems working on Project: Additions and Renovations to Marple Newtown High School; Award Agency [District]” (the “Request”). After invoking a thirty-day extension, Gregory Gerson, Esq., on behalf of the Open Records Officer (ORO), supplied the records of Adams Property Services, redacting personal

information under Section 708(b)(6)(i)(A) and did not address the other contractors (“Response”). The Requester timely appealed advising that the District only partially addressed his Request.

The District supplemented the record with an affidavit of ORO Joseph Driscoll attesting that the District files do not contain the payroll records for Gresko & Sons or Tamora Building Systems (“Affidavit”). The Requester advises that the Affidavit was insufficient because it did not address whether the contractor records are within the District’s control, and argues that the records are required for the Project.

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 before it to 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, 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. Here, the District did not assert any exemptions and asserts the records do not exist.

An agency cannot be compelled to disclose a record that “does not exist.” However, the District did not advise whether the certified payrolls are within its control. The RTKL provides that an agency is required to obtain and disclose public records “of” the agency that are within its control. *See Green v. City of Reading*, OOR Dkt. AP 2010-0840, 2010 Pa. O.O.R.D. LEXIS 822, citing *Bartholomew v. Smithfield Tp.*, OOR Dkt. AP 2010-0184 (holding agency affidavit insufficient because it did not show attempts to obtain telephone records from company). Because the District did not assert any exemptions or address its control over or lack thereof with regard to the two contractors, the District must obtain and provide the certified payrolls with redaction of personal identification information.

CONCLUSION

For the foregoing reasons, the Requester’s Appeal is **granted**, and the District is directed to disclose the remaining certified payroll records, with redaction, to the Requester within thirty (30) days. 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 Delaware 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: November 30, 2010



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Barry Senseman; Gregory Gerson, Esq. for District