

LAMB | M c E R L A N E <sup>PC</sup>

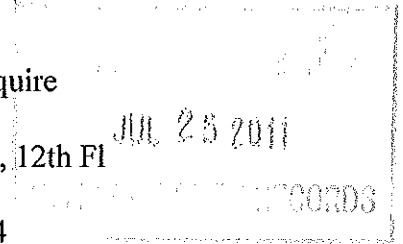
ATTORNEYS AT LAW

Tracy L. Keller  
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July 21, 2011

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

Vincent L. Champion, Esquire  
Rhoads & Sinon, LLP  
One South Market Square, 12th Fl  
P.O. Box 1146  
Harrisburg, PA 17108-114




Re: *McClintock v. Office of Open Records and Coatesville Area School District*,  
Chester County Court of Common Pleas No. 2011-07578-MJ

Dear Ms. Mutchler and Mr. Champion:

Enclosed please find a Rule to Show Cause in the above captioned matter, which was filed with the Court today.

Very truly yours,

LAMB MCERLANE PC

By:   
Tracy L. Keller,  
Paralegal

Enclosure

cc: Brian H. Leinhauser, Esquire  
Robert T. McClintock, Esquire







# Chester County Court of Common Pleas Cover Sheet

Docket No:  
**11-07578**

**Plaintiff(s): (Name, Address)**  
Robert T. McClintock  
24 East Market Street  
West Chester, PA 19381

**Plaintiff's/Appellant's Attorney (circle one)**  
(Name, firm, address, telephone and attorney ID#)  
Brian H. Leinhauser ID 203945 LAMB MCERLANE PC  
Robert T. McClintock ID 206782 610-430-8000  
24 E. Market Street Box 565, West Chester, PA 19381

**Defendant(s): (Name, Address)**  
Office of Open Records, 400 N. Street, 4th Floor,  
Harrisburg, PA 17120-0225 AND  
Coatesville Area School District, 545 East Lincoln  
Highway, Coatesville, PA 19320

Are there any related cases? Please provide case nos.

Defendants who are proceeding without counsel are strongly urged to file with the Prothonotary a written statement of an address AND a telephone number at which they can be reached.

If this is an appeal from a Magisterial District Judgment, was appellant  Plaintiff or  Defendant in the original action?

Jury Trial Demanded  Yes  No

Nature of case if not on previous cover sheet – Please choose the most applicable

- Annulment
- Custody - Conciliation Required
- Custody - Foreign Order
- Custody - No Conciliation Required
- Divorce - Ancillary Relief Request
- Divorce - No Ancillary Relief Requested
- Foreign Divorce
- Foreign Protection from Abuse
- Paternity
- Protection from Abuse
- Standby Guardianship

- Writ of Certiorari
- Injunctive Relief
- Mechanics Lien Claim
- Issuance of Foreign Subpoena
- Name Change
- Petition for Structured Settlement

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 OFFICE OF THE  
 PROTHONOTARY  
 CHESTER CO., PA

**Arbitration Cases Only**  
 Arbitration Date   
 Arbitration Time   
 Defendants are cautioned that the scheduling of an arbitration date does not alter the duty of the defendant to respond to the complaint and does not prevent summary disposition from occurring prior to the arbitration date.  
 This matter will be heard by a Board of Arbitrators at the time and date specified but, if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial *de novo* on appeal from a decision entered by a judge.

**Notice of Trial Listing Date**  
 Pursuant to C.C.R.C.P. 249.3, if this case is not subject to compulsory arbitration it will be presumed ready for trial twelve (12) months from the date of the initiation of the suit and will be placed on the trial list one (1) year from the date the suit was filed unless otherwise ordered by the Court.  
  
 To obtain relief from automatic trial listing a party must proceed pursuant to C.C.R.C.P. 249.3(b), request an administrative conference and obtain a court order deferring the placement of the case on the trial list until a later date.

**File with:** Chester County Justice Center, Prothonotary Office, 201 W. Market St., Ste. 1425, PO Box 2746, West Chester, PA 19380-0989

These cover sheets must be served upon all other parties to the action immediately after filing.  
Submit enough copies for service.

Brian H. Leinhauser  
Attorney I.D. No. 203945  
Robert T. McClintock  
Attorney I.D. No. 206782  
LAMB McERLANE PC  
24 E. Market Street, Box 565  
West Chester, PA 19381-0565  
(610) 430-8000

*Attorneys for Plaintiff,  
Robert T. McClintock*

**IN THE COURT OF COMMON PLEAS  
OF CHESTER COUNTY, PENNSYLVANIA**

ROBERT T. MCCLINTOCK,

Petitioner

v.

OFFICE OF OPEN RECORDS, and  
COATESVILLE AREA SCHOOL DISTRICT,

Respondents

No. 2011- 07578

OFFICE OF THE  
PROTHONOTARY  
CHESTER CO., PA.

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FILED

**ENTRY OF APPEARANCE**

TO THE PROTHONOTARY:

Please enter our appearance for Robert T. McClintock, Plaintiff in the above-captioned matter.

LAMB McERLANE PC

By: 

Brian H. Lienhauser  
Atty. I.D. Nos. 203945  
Robert T. McClintock  
Atty. I.D. Nos. 206782  
24 E. Market Street, Box 565  
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*Attorney for Petitioner  
Robert T. McClintock*

Brian H. Leinhauser  
Attorney I.D. No. 203945  
Robert T. McClintock  
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*Attorneys for Plaintiff,  
Robert T. McClintock*

**IN THE COURT OF COMMON PLEAS  
OF CHESTER COUNTY, PENNSYLVANIA**

ROBERT T. MCCLINTOCK,

Petitioner

v.

OFFICE OF OPEN RECORDS, and  
COATESVILLE AREA SCHOOL DISTRICT,

Respondents

No. 2011- 07578

OFFICE OF THE  
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CHESTER CO., PA

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**PETITION FOR REVIEW OF  
OFFICE OF OPEN RECORDS FINAL DETERMINATION**

Petitioner, Robert McClintock, on his own behalf and by and through his counsel, Lamb McErlane PC hereby submits this Petition for Review from the Final Determination of Respondent, Office of Open Records, mailed June 8, 2011, at Docket No.: AP 2011-0309, granting in part and denying in part Petitioner's request for public records from Respondent, Coatesville Area School District, under the Right-to-Know Law, 65 P.S. §§67.101, *et seq.* In support of his Petition for Review, Petitioner avers as follows:

**I. INTRODUCTION**

1. Petitioner, Robert McClintock is an adult individual with an address of 24 East Market Street, West Chester, PA 19381.
  
2. Respondent, Coatesville Area School District, is a public school established under the School Code of the Commonwealth of Pennsylvania, with a business address of 545 East Lincoln Highway, Coatesville, PA 19320 ("CASD").
  
3. Respondent, Office of Open Records, is a Commonwealth agency created under the Right to Know Law.

## II. JURISDICTION

4. The Right-to-Know Law requires appeals of Final Determination issued by the Office of Open Records from a local agency's denial or deemed denial of a request for public records be appealed to the Court of Common Pleas in the County where the local agency is located. 65 P.S. §§67.1302.
  
5. The Right-to-Know Law includes public schools in the definition of a "local agency". 65 P.S. §67.102.
  
6. CASD is a local agency under the Right-to-Know Law.

7. CASD is located within Chester County and the jurisdiction of this Court is granted under the Right-to-Know Law.

### III. FACTUAL BACKGROUND

8. On March 9, 2011 Petitioner submitted by facsimile four (4) separate open record requests to the designated Open Records Officer of CASD, Ken Lupold, attached as Exhibit "A".<sup>1</sup>

9. The Right-to-Know Law requires local agencies to respond within five (5) business days from receipt of a records request or the request is deemed denied. 65 P.S. §67.901.

10. CASD failed to respond to any of the Petitioner's requests for public records and pursuant to the Right-to-Know Law, the requests were deemed denied as of March 17, 2011.

11. On March 18, 2011, Petitioner filed four separate appeals with the Office of Open Records for each of the deemed denied public records requests, attached as Exhibit "B".

12. On March 21, 2011, the Office of Open Records issued notices for each appeal to both parties.

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<sup>1</sup> Petitioner's requests were submitted after the close of business on March 9, 2011. For purposes of timing under the Right-to-Know Law, CASD received the requests on March 10, 2011.

13. The notices of March 21, 2011 from the Office of Open Records did not state which appeal of the deemed denied was assigned the docket number provided on the notice.

14. On March 28, 2011, CASD filed a letter in support of a denial for docket number AP-2011-0307.

15. On April 4, 2011, CASD filed a supplemental document with the Office of Open Records supplementing CASD's reasons for denial of access to the public records for docket number AP-2011-0307.

16. On or about April 8, 2011, the Office of Open Records with the consent of Petitioner consolidated all four (4) appeals under Docket No. AP 2011-0309 and provided a briefing schedule and the following comprehensive list of requested documents ("Records List"):

1. All correspondence regarding Graystone Academy Charter School between the Superintendent and/or Assistant Superintendent and the School Board of Directors;
2. All records prepared by School personnel during, after, or in conjunction with School personnel's visits to Graystone Academy Charter School;
3. All records regarding Graystone Academy Charter School provided to the School Board of Directors for their review in preparing for any public meeting;

4. All records regarding the renewal of Graystone Academy Charter School's charter;
5. All 2010 School Board minutes that included references to Graystone Academy Charter School;
6. All tapes or recording of 2010 School Board meetings that reference Graystone Academy Charter School;
7. All approved 2011 School Board minutes;
8. All tapes or recordings of 2011 School Board meetings;
9. All draft minutes of 2011 School Board meeting minutes where the minutes have not been approved by the School Board and another School Board meeting has taken place.

17. On April 15, 2011, CASD filed a Brief in Opposition to Appeal Pursuant to the Pennsylvania Right-to-Know Law, for the denial of access to items 2, 3, and 4 of the Records List ("CASD Brief").

18. In the CASD Brief, CASD stated access to the public records listed as items 5 through 9 of the comprehensive list would be made available to Petitioner.<sup>2</sup>

19. In the CASD Brief, CASD further stated that it did not hold any documents meeting the criteria of item 1 of the comprehensive list of requested public records.

20. On April 29, 2011, Petitioner filed a Reply-Brief to the CASD Brief.

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<sup>2</sup> Petitioner and counsel for CASD are currently coordinating providing the requested records to Petitioner.

21. On June 8, 2011, the Hearing Officer assigned by the Office of Open Records issued a written Final Determination denying in part, granting in part and dismissing as moot in part Petitioner's requests for public records ("Final Determination"), attached hereto as Exhibit "C".<sup>3</sup>

22. The Final Determination held Petitioner's request for items 5 through 9 of the Records List moot, as CASD offered to provide access to these public records.

23. The Final Determination held that CASDs' claim that records satisfying the criteria of item 1 of the Records List are not in the possession of CASD was insufficient to meet CASD's burden, and required CASD to provide a written affidavit to support the allegation or provide the records meeting the criteria of item 1 of the Records List.

24. CASD has not submitted the affidavit required to the Office of Open Records or to Petitioner.

25. The Final Determination held CASD meet its burden of proof to exempt certain records requested under items 2 and 4 of the Records List as noncriminal investigative material under Section 708(b)(17) of the Right-to-Know Law.

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<sup>3</sup> Under the Right-to-Know Law, the Office of Open Records has 30-days from the receipt of an appeal to issue a final determination. 65 P.S. §67.1101(b). Petitioner granted the Office of Open Records an extension to issue the Final Determination until June 8, 2011.

26. The Final Determination held CASD meet its burden of proof to exempt certain records requested under item 3 of the Records List as predecisional deliberation records under Section 708(b)(12) of the Right-to-Know Law.<sup>4</sup>

IV. **Office of Open Records abused its discretion by allowing CASD to claim exemptions under the Right-to-Know Law.**

27. The Office of Open Records improperly allowed CASD to submit grounds for denial of Petitioner's requests.

28. By falling to respond within the statutory limits CASD is prohibited from claiming any of the exemptions provided under Section 708 of the Right-to-Know Law on the following grounds:

a) Under the Right-to-Know Law, CASD is prohibited from claiming new grounds for the denial of access to public records on appeal. See: Signature Information Solutions, LLC v. Aston Township, 995 A.2d 510 (Pa. Cmwlth. 2010) and Office of Open Records' notice of appeal letters, attached as Exhibit "B",

b) Allowing new grounds for denial of access to public records on appeal of a deemed denial makes Section 901 and 902 of the Right-to-Know Law, 65 P.S. §§67.901 and 902, obsolete in violation of the Statutory Construction Act, 1 Pa.C.S. § 1501, et al.,

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<sup>4</sup> In Section 5 of the Final Determination, the Hearing Office denied CASD allegations the documents requested are protected by the Attorney-Client Privilege. Petitioner appeal of the Final Determination does not include Sections 1 and 5.

c) By failing to respond to records requests in the time prescribed under the Right-to-Know Law, CASD waived its right to allege grounds for denial.

29. For the forgoing reasons, the Final Determination should be reversed and Petitioner granted access to the following requested records:

- 1) All records prepared by School personnel during, after, or in conjunction with School personnel's visits to Graystone Academy Charter School;
- 2) All records regarding Graystone Academy Charter School provided to the School Board of Directors for their review in preparing for any public meeting;
- 3) All records regarding the renewal of Graystone Academy Charter School's charter;

c) And any other remedy as deemed appropriate by the Court.

V. **Office of Open Records abused its discretion in the application of the exemption for Noncriminal Investigation Exemption to Petitioner's records requests.**

30. The Office of Open Records improperly applied the exemption for noncriminal investigation material of the Right-to-Know Law, 65 P.S. §67.708(b)(17)(ii), for the following reasons:

a) The Office of Open Records applies an overly broad interpretation of the noncriminal investigation exemption under the Right-to-Know Law that would exempt the majority of records held by local agencies prohibiting the intent of the Right-to-Know Law to be fulfilled;

b) The Office of Open Records improperly interprets and applies the Commonwealth Court's holding in Department of Health v. OOR, 4 A.3d 803 (Pa. Cmwlth. 2010), to Petitioner's requests for records;

c) The Commonwealth Court's holding in Department of Health, is overly broad exempting the majority of public records held by local agencies prohibiting the intent of the Right-to-Know Law to be fulfilled;

d) CASD failed to meet its burden of proof that the records requested are exempt under the noncriminal investigation material exemption of the Right-to-Know Law as required under Section 708(b) of the Right-to-Know Law. 65 P.S.: §67.708(b).

e) CASD has acted on the documents requested.

31. For the forgoing reasons, the Final Determination should be reversed and access to Items 2 and 4, as defined in the Final Determination, shall be granted to Petitioner by CASD.

- 1) All records prepared by School personnel during, after, or in conjunction with School personnel's visits to Graystone Academy Charter School;
- 3) All records regarding the renewal of Graystone Academy Charter School's charter;

**VI. Office of Open Records abused its discretion in the application of the exemption for Noncriminal Investigation Exemption to Petitioner's records requests.**

32. The Office of Open Records improperly applied the exemption for predecisional deliberation, 65 P.S. §67.708(b)(10), for the following reasons:

a) CASD failed to meet its burden of proof that the records requested are exempt under the predecisional deliberation exemption of the Right-to-Know Law as required under Section 708(b) of the Right-to-Know Law;

b) During the time of the appeal, CASD took formal action on April 26, 2011, to revoke Graystone Academy Charter School's charter, removing all the requested records from the exception of predecisional deliberation exemptions and making them records acted upon by a quorum of the governing body which are no longer predecisional deliberation material. 65 P.S. §67.708(b)(10)(ii).

34. For the forgoing reasons, the Final Determination should be reversed and Petitioner granted access to all records regarding Graystone Academy Charter School provided to the School Board of Directors for their review in preparing for any public meeting in the possession of CASD.

**VII. CONCLUSION**

WHEREFORE, for the foregoing reasons, Petitioner, Robert T. McClintock, respectfully requests that this Court:

- (i) GRANT this Petition for Review;
- (ii) REVERSE the June 8, 2011 Final Determination of the Office of Open Records and grant Petitioner access to the requested public records;
- (iii) ESTABLISH a briefing schedule before this Honorable Court; and
- (iv) GRANT such further relief as may be just under the circumstances.

LAMB McERLANE PC

Dated: July 8, 2011

By: 

Brian H. Lienhauser  
Atty. I.D. Nos. 203945  
Robert T. McClintock  
Atty. I.D. Nos. 206782  
24 E. Market Street, Box 565  
West Chester, PA 19381-0565  
(610) 430-8000

*Attorney for Petitioner  
Robert T. McClintock*

Brian H. Leinhauser  
Attorney I.D. No. 203945  
Robert T. McClintock  
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(610) 430-8000

*Attorneys for Plaintiff,  
Robert T. McClintock*

IN THE COURT OF COMMON PLEAS  
OF CHESTER COUNTY, PENNSYLVANIA

ROBERT T. MCCLINTOCK,

Petitioner

v.

OFFICE OF OPEN RECORDS, and  
COATESVILLE AREA SCHOOL DISTRICT,

Respondents

No. 2011- 07598 -

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CHESTER CO., PA.

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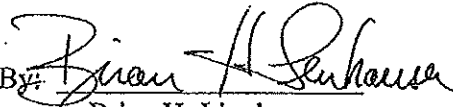
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CERTIFICATE OF SERVICE

This is to certify that in this case, complete copies of all papers contained in the foregoing pleading have been served upon the following persons, by the following means and on the date(s) stated:

<u>Name:</u>	<u>Means of Service:</u>	<u>Date of Service:</u>
Terry Mutchler, Executive Director Commonwealth of Pennsylvania Office of Open Records Commonwealth Keystone Building 400 North Street, 4th Floor Harrisburg, PA 17120-0225	First Class Mail	July 8, 2011
Vincent L. Champion, Esquire Rhoads & Sinon, LLP One South Market Square, 12th Fl P.O. Box 1146 Harrisburg, PA 17108-114 <i>Counsel for Coatesville Area School District</i>	First Class Mail	July 8, 2011

LAMB McERLANE PC

By: 

Brian H. Lienhauser  
Atty. I.D. Nos. 203945  
Robert T. McClintock  
Atty. I.D. Nos. 206782  
24 E. Market Street, Box 565  
West Chester, PA 19381-0565  
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*Attorney for Petitioner,  
Robert T. McClintock*

*District*

**LAMB McERLANE PC**

By: 

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Atty. I.D. Nos. 203945  
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24 E. Market Street, Box 565  
West Chester, PA 19381-0565  
(610) 430-8000

*Attorney for Petitioner,  
Robert T. McClintock*



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>ROBERT MCCLINTOCK,</b>	:	
<b>Complainant</b>	:	
	:	<b>Docket No.: AP 2011-0309</b>
<b>v.</b>	:	
	:	
<b>COATESVILLE AREA</b>	:	
<b>SCHOOL DISTRICT,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Robert McClintock (the “Requester”) filed a right-to-know request with the Coatesville Area School District (“District”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), seeking records related to Graystone Academy Charter School (“Graystone”). The District failed to respond and the Requester timely appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part, granted in part** and **dismissed as moot in part** and the District is required to take further action as directed.

**FACTUAL BACKGROUND**

On March 10, 2011, the Requester submitted four separate requests for records. The District did not respond to the requests. The requests that are the subject of the appeal are as follows:

1. All correspondence regarding Graystone ... between the Superintendent and/or Assistant Superintendent and the School Board of Directors;
2. All records prepared by School personnel during, after, or in conjunction with School personnel's visits to Graystone ...;
3. All records regarding Graystone ... provided to the School Board of Directors for their review in preparing for any public meeting;
4. All records regarding the renewal of Graystone['s] ... charter;
5. All 2010 School Board minutes that included references to Graystone ... ;
6. All tapes or recording of 2010 School Board meetings that reference Graystone ...;
7. All approved 2011 School Board minutes;
8. All tapes or recordings of 2011 School Board meetings;
9. All draft minutes of 2011 School Board meetings where the minutes have not been approved by the School Board and another School Board meeting has taken place.

("Requests").

On March 21, 2011, the Requester timely appealed the District's lack of response to all four requests to the OOR. The appeals were consolidated into one docket. On March 28, 2011, the District asserted the records requested in Items 2, 3, and 4 are protected for the following reasons: 1) the attorney client privilege because the records contain a review and analysis relative to whether Graystone's charter should be renewed; 2) noncriminal investigation exemption because disclosure would reveal the District's progress in investigating whether Graystone's charter should be renewed and would hinder the District's ability to secure an administrative sanction stemming from the investigation; and 3) the records contain discussion held in executive session of the School Board. On April 15, 2011, the District advised that it would provide access to Items 5 through 9 subject to redaction of information protected by FERPA or other state and federal law. It asserted documents responsive to Item 1 do not exist, but did not provide an affidavit to support this assertion.

As to Items 2 and 4 the District supplemented its response, citing *Department of Health v. Office of Open Records*, 4 A.3d 803, 810 (Pa. Commw. Ct. 2010). As to Item 3, the District limited its grounds for denial to Section 708(b)(10)(i)(A) and the attorney-client privilege and cited *East Stroudsburg Area School District v. Felder and Office of Open Records*, No. 5024-CIVIL (C.P. Monroe Oct. 13, 2009) (finding “board packets” exempt from public disclosure). The District provided factual background, which is not disputed, regarding the subject of the Request, summarized as follows:

Graystone is a charter school located within the District. Graystone’s initial charter was granted to begin in the 2001-2001 school year for a five year period and renewed by the Board on September 26, 2006 for another five year period. The Board is statutorily required to ensure that charter schools within the District are in compliance with their respective charters, the Charter School Law and the applicable provisions of the Pennsylvania Public School Code of 1949. See 24 P.s. §§ 17-1728-A, 17, 1729-A. As a result of receiving correspondence that Graystone intended to seek a renewal of its charter, the Board, through designated agents, began to conduct the required review of Graystone. After evaluating the results of the review, the Board determined that there existed causes for nonrenewal or termination of the Graystone charter and issued a Notice of Revocation of Charter listing the reasons for revocation and scheduling a public hearing.

The District provided the Affidavit of Dr. Angelo Romaniello, Jr., Assistant Superintendent and Administrative Liaison to the Board of School Directors stating as follows:

1. In September 2010, I was directed by the Board to assist with conducting a comprehensive review of [Graystone].

2. The purpose of this comprehensive review was to assist the Board with making the decision whether to renew or terminate the charter of [Graystone] pursuant to the Pennsylvania Charter School Law.
3. On five separate occasions, I, along with other members of the review team, personally visited Graystone for the purposes of conducting the comprehensive review on behalf of the Board. I compiled all information collected by the team of reviewers from the District.
4. The dates of my site visits to Graystone were September 15, 2010; October 6, 2010, October 28, 2010; December 20, 2010; and February 17, 2011.
5. On each of my visits, I took notes of my observations, which were recorded in a memorandum distributed to the Board for their review.
6. I also took notes when I interviewed Graystone's principal ... on February 17, 2011, which were shared with the Board members as part of their predecisional process regarding the Graystone charter.
7. My notes and memoranda were not shared with any individual or agency other than the Board.

The Requester was provided the opportunity to respond. Regarding Items 5 through 9, he notes that he has not yet been provided the records. He challenges the District's failure to provide an affidavit to support its position that no records responsive to Item 1 exist, citing *Pohlman v. Middle Smithfield Township*, OOR Dkt. AP 2011-2088, 2010 PA O.O.R.D. LEXIS 268. As to Items 2, 3 and 4, he contends the District waived its right to claim any exemptions as it failed to timely respond to the Request, citing *Signature Information Solutions, LLC v. Aston Township*, 995 A.2d 510 (Pa. Commw. Ct. 2010) and *Dept. of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010). He argues that allowing an agency to assert grounds for denial on appeal of a deemed denial renders Section 901 of the RTKL obsolete and allows an agency to not respond to requests for records until the requester files an appeal with no repercussion. He contends such an interpretation allows the agency additional weeks to formulate a response. He argues that even if the agency takes the allowable thirty day extension, it could let that time expire without addressing the request until an appeal is filed. He

contends that allowing an agency to state its grounds for denying access if an appeal of a deemed denial is filed contradicts the Commonwealth Court's reasoning in *Signature* where the Court noted "permitting an agency to set forth reasons for a denial at the appeal level does not allow for an expeditious resolution of the dispute." *Signature*, 995 A.2d at 513.

In the alternative, he argues the District has not met its burden to prove the records are nonpublic. He contends Section 708(b)(17) does not apply because most of a local agency's routine course of business requires the type of inquiry into noncriminal matters identified by the Commonwealth Court in *Department of Health*. He argues the Court did not intend a broad application of its holding that would nullify the openness of local agency records simply by asserting the noncriminal investigation exemption. As to application of Section 708(b)(10), he asserts the District fails to establish that each of the records requested are not purely factual and that financial records, audit reports and the original charter that the District may have relied upon in making its decision are factual records and not opinions. He notes that the Monroe County Court of Common Pleas decision relied upon by the District is not precedential to this appeal as the District resides in Chester County. He contends exempting the records which the District uses to reach its decision prohibits the public from adequately participating in the charter renewal process that permits the public thirty days to comment on the renewal or nonrenewal of a charter. 24 P.S. § 17-1729-A. Finally, the Requester asserts the District has not demonstrated that the attorney-client privilege applies because the District "merely alleges" that all the requested records are made in anticipation of litigation, citing *Schenk*

*v. Township of Center*, 975 A.2d 591, 598 (Pa. 2009). The Requester asked the OOR to conduct an *in camera* review of the documents.

### 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. Ct. 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 necessary, requisite information and evidence before it to properly adjudicate the matter. After reviewing the relevant materials in this matter, the OOR determined that an *in camera* review is not necessary.

The District is a local agency required to disclose public records. 65 P.S. § 67.102; 65 P.S. § 67.302. Records in possession of a local or 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). 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)(1) states: “[t]he 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. Deemed Denial and Raising Grounds on Appeal**

“[S]ection 1102(a) of the Law does not permit an agency that has given a specific reason for a denial to assert a different reason on appeal. Section 1102(a) of the Law permitted [an agency] only to submit documents in support of its stated position.”

*Signature*, 995 A.2d at 514. In *Signature*, the Commonwealth Court held as follows:

If an agency could alter its position after the agency stated it and the requester addressed it in an appeal, then the requirements in sections 903(2) and 1101(a)(1) of the Law would become a meaningless exercise. An agency could assert any improper reason for the denial of a right-to-know request and would not have to provide an arguably valid reason unless and until the requester filed an appeal. Such a reading of section 1102(a) of the Law would make a mockery of the process set forth in the Law. ... Furthermore, section 1102(b)(3) of the Law states that, “[i]n the absence of a regulation, policy or procedure governing appeals under this chapter [Chapter 11], the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute.” It is not fair or just to a requester to allow an agency to alter the reason given for a denial after the requester has taken an appeal based on the stated reason. Moreover, permitting an agency to set forth additional reasons for a denial at the appeal level does not allow for an expeditious resolution of the dispute.

*Id.* at 514. In the instant matter, the District did not alter its grounds for denial, as it did not initially set forth any reason for denying access to responsive records as required by 65 P.S. § 67.903(2). Although it failed to timely respond to the Request, the District set forth grounds during the appeal that the Requester had the opportunity to address.

## **2. Item 1: No Affidavit of Nonexistence**

Under the RTKL, a sworn affidavit may serve as sufficient evidence of the nonexistence of responsive records. *See Sherry v. Radnor Twp. Sch. Dist.*, No. 265 C.D. 2010, 2011 Pa. Commw. LEXIS 156 at \*13-15 (Pa. Commw. Ct. Apr. 4, 2011); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the present case, the District did not provide either a sworn statement or statement signed under penalty of perjury attesting that the records do not exist. As a result, the OOR finds that the District failed to provide sufficient evidentiary support demonstrating that no responsive records exist with respect to Item 1.

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records sought in Item 1. Absent an agency’s provision of a sufficient evidentiary basis as to whether any responsive records exist in the first place, however, the OOR will order the disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schaefer v. Delaware County*, OOR Dkt. AP 2010-0752, 2010 PA O.O.R.D. LEXIS 735.

## **3. Items 2 and 4: The Noncriminal Investigation Exemption**

The RTKL provides that “investigative materials, notes, correspondence and reports” that relate “to a noncriminal investigation” may be withheld as exempt from public access. *See* 65 P.S. § 67.708(b)(17)(ii). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Department of Health v. OOR*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Based on the underlying

purpose of the RTKL, however, “exemptions from disclosure must be narrowly construed.” *Bowling*, 990 A.2d at 824.

In the present case, the District offered the sworn affidavit of Dr. Romaniello attesting that he conducted a comprehensive review of Graystone in order to gather information as part of observations and investigations conducted to determine whether to renew Graystone’s charter. Based on the evidence presented, the OOR finds that the District satisfied its burden under 65 P.S. § 67.708(b)(17) by establishing that a “comprehensive review” was conducted regarding a noncriminal matter with respect to records responsive to Items 2 and 4. *See, e.g., Harris v. Dept. of Corrections*, OOR Dkt. AP 2010-0830, 2010 PA O.O.R.D. LEXIS 781; *Barkley v. Greensboro Borough*, OOR Dkt. AP 2010-0714, 2010 PA O.O.R.D. LEXIS 704; *Michak v. Pennsylvania Dept. of State*, OOR Dkt. AP 2010-0715, 2010 PA O.O.R.D. LEXIS 705.

**4. Item 3: The Predecisional Deliberations Exemption**

The RTKL provides that records reflecting the “internal, predecisional deliberations” of an agency are exempt from public access. *See* 65 P.S. § 67.708(b)(10)(i)(A). In order for this exemption to apply, three elements must be satisfied: 1) the deliberations reflected must be “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 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. Section 708(b)(10) provides for an exception to permissible withholding where the subject record is presented to a quorum for deliberation during a public meeting. 65 P.S. § 67.708(b)(10)(ii).

The evidence and supporting affidavit demonstrates that the notes and memorandum created in preparation and for presentation to the Board are “internal” and have not been shared with anyone outside the agency. The notes and memorandum records are predecisional as they were created and/or utilized prior to the District making a decision regarding the Graystone charter and are deliberative in that they pertain to the proposed action of renewal or nonrenewal of the charter. Therefore, the predecisional exemption in Section 708(b)(10)(i)(A) applies to the notes and memorandum. The Requester does not assert that the exception to the exemption applies, therefore, the OOR will not consider applicability of the exception to the memorandum and notes prepared by Dr. Romaniello. However, the factual information provided to the Board for deliberation identified by the Requester, above, as financial records, audit reports and the original charter are not deliberative, but rather factual records and thus not exempt by Section 708(b)(10).

**5. Item 3: Attorney-Client Privilege**

The District does not provide sufficient evidence to demonstrate that the attorney-client privilege applies to the financial records, audit reports and the original charter. The RTKL excludes records subject to privilege from its definition of “public records.” *See* 65 P.S. § 67.102. The RTKL defines “privilege” as “[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.” *Id.*

The OOR has previously addressed application of the attorney-client privilege to records under the RTKL in a number of Final Determinations. *See, e.g., Romig v.*

*Macungie Borough*, OOR Dkt. AP 2010-0674, 2010 PA O.O.R.D. LEXIS 573; *Staley v. Pittsburgh Water & Sewer Authority*, OOR Dkt. AP 2010-0544, 2010 PA O.O.R.D. LEXIS 466; *Fikry v. Retirement Board of Allegheny County*, OOR Dkt. AP 2009-1149, 2010 PA O.O.R.D. LEXIS 19. In order for the attorney-client privilege to apply, an agency must affirmatively demonstrate 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). The evidence submitted on appeal does not support a finding that these records reflect communications between the District and its attorney for the purpose of securing or providing legal advice.

#### **6. Items 5 through 9**

The District agreed to provide responsive records to Items 5 through 9. Therefore, the appeal as to those Items is dismissed as moot because the Requester has been granted access. *See generally Scheidt v. Phoenixville School District*, OOR Dkt. AP 2010-0654, 2010 PA O.O.R.D. LEXIS 716.

### **CONCLUSION**

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part, and dismissed as moot in part** and the District is required to take further action. It is required to provide the records responsive to Item 1 as well as the financial records,

audit reports and the original charter responsive to Item 3 within thirty (30) days. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Chester County Court of Common Pleas. *See* 65 P.S. § 67.1102(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: June 8, 2011**



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APPEALS OFFICER  
AUDREY BUGLIONE, ESQ.

Sent to: Robert McClintock, Esq.; Jill Weikert, Esq.