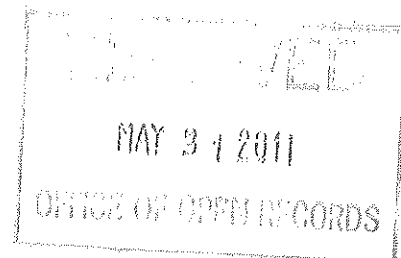


JOHN R. MERRICK
ATTORNEY AT LAW
117 SOUTH BROAD STREET
KENNETT SQUARE, PA. 19348
(610) 444-5060



May 26, 2011

Ms. Jennifer Breneman
941 Wheatland Avenue, Suite 402
Lancaster, PA 17603

Re: Kennett Consolidated School District v.
Jennifer Breneman and Office of Open Records
In the Court of Common Pleas
Chester County, Pennsylvania
No.

Dear Ms. Breneman:

I enclose a time-stamped copy of the Petition for Review (Appeal from Final Determination of the Office of Open Records in accordance with Section 1302 of the Right-to-Know Law), which I have filed in this matter. I also enclose copies of my Entry of Appearance and Certification of Service.

Sincerely,

A handwritten signature in cursive script that reads "John R. Merrick".

John R. Merrick

JRM/jb
PC w/enclosure: Terry Mutchler, Esquire



Chester County Court of Common Pleas Cover Sheet

Docket No: 11-05844

Plaintiff(s): (Name, Address) Kennett Consolidated School District 300 East South Street Kennett Square, PA 19348	Plaintiff <input checked="" type="radio"/> Appellant's Attorney (circle one) (Name, firm, address, telephone and attorney ID#) John R. Merrick 117 South Broad Street Kennett Square, PA 19348
---	---

Defendant(s): (Name, Address) Jennifer Breneman 941 Wheatland Avenue, Suite 402 Lancaster, PA 17603	Are there any related cases? Please provide case nos. NO <u>Office of Open Records</u> <u>Commonwealth Keystone Building</u> <u>400 North Street, 4th Floor</u> <u>Harrisburg, PA 17120-0225</u>
---	--

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

<input type="checkbox"/> Annulment <input type="checkbox"/> Custody - Conciliation Required <input type="checkbox"/> Custody - Foreign Order <input type="checkbox"/> Custody - No Conciliation Required <input type="checkbox"/> Divorce - Ancillary Relief Request <input type="checkbox"/> Divorce - No Ancillary Relief Requested <input type="checkbox"/> Foreign Divorce <input type="checkbox"/> Foreign Protection from Abuse <input type="checkbox"/> Paternity <input type="checkbox"/> Protection from Abuse <input type="checkbox"/> Standby Guardianship	<input type="checkbox"/> Writ of Certiorari <input type="checkbox"/> Injunctive Relief <input type="checkbox"/> Mechanics Lien Claim <input type="checkbox"/> Issuance of Foreign Subpoena <input type="checkbox"/> Name Change <input type="checkbox"/> Petition for Structured Settlement
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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.

Supreme Court of Pennsylvania

Court of Common Pleas Civil Cover Sheet

Chester County

For Prothonotary Use Only:

Docket No:

11-05844

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:

- Complaint Writ of Summons Petition Notice of Appeal
 Transfer from Another Jurisdiction Declaration of Taking

Lead Plaintiff's Name:

Kenneth Consolidated School District

Lead Defendant's Name:

Jennifer Brene man

Check here if you are a Self-Represented (Pro Se) Litigant

Name of Plaintiff/Appellant's Attorney:

John R. Merrick

Are money damages requested? : Yes No

Dollar Amount Requested: _____ within arbitration limits
(Check one) _____ outside arbitration limits

Is this a *Class Action Suit*? Yes No

SECTION B

Nature of the Case: Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

TORT (do not include Mass Tort)

- Intentional
 Malicious Prosecution
 Motor Vehicle
 Nuisance
 Premises Liability
 Product Liability (does not include mass tort)
 Slander/Libel/ Defamation
 Other: _____

CONTRACT (do not include Judgments)

- Buyer Plaintiff
 Debt Collection: Credit Card
 Debt Collection: Other _____
 Employment Dispute: Discrimination
 Employment Dispute: Other _____
 Other: _____

CIVIL APPEALS

- Administrative Agencies**
 Board of Assessment
 Board of Elections
 Dept. of Transportation
 Zoning Board
 Statutory Appeal: Other
 Appeal from Office of
 Open Records Final
 Determination
Judicial Appeals
 MDJ - Landlord/Tenant
 MDJ - Money Judgment
 Other: _____

MASS TORT

- Asbestos
 Tobacco
 Toxic Tort - DES
 Toxic Tort - Implant
 Toxic Waste
 Other: _____

REAL PROPERTY

- Ejectment
 Eminent Domain/Condemnation
 Ground Rent
 Landlord/Tenant Dispute
 Mortgage Foreclosure
 Partition
 Quiet Title
 Other: _____

MISCELLANEOUS

- Common Law/Statutory Arbitration
 Declaratory Judgment
 Mandamus
 Non-Domestic Relations Restraining Order
 Quo Warranto
 Replevin
 Other: _____

PROFESSIONAL LIABILITY

- Dental
 Legal
 Medical
 Other Professional: _____

UNIONVILLE-CHADDS FORD
SCHOOL DISTRICT,

Petitioner :

IN THE COURT OF COMMON PLEAS

CHESTER COUNTY, PENNSYLVANIA

v. :

CIVIL ACTION - LAW

JENNEIFER BRENEMAN

NO.

11-05844

And

OFFICE OF OPEN RECORDS,

Respondents :

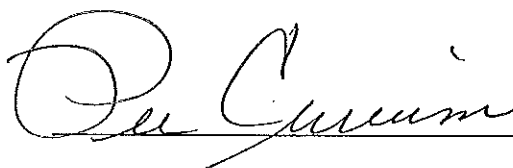
2011 MAY 26 PM 4: 21
OFFICE OF THE
PROFESSOR OF LAW
CHESTER COUNTY

ORDER

AND NOW, this *26* day of May, 2011, upon consideration of the within
Petition for Review, it is hereby ordered that:

1. A Rule is issued upon the respondents to show cause why the petitioner is not entitled to the relief requested;
2. The respondent Jennifer Breneman shall file an Answer to the Petition within twenty (20) days of service upon the respondent;
3. The Petition shall be decided under Pa.R.C.P. No. 206.7;
4. Depositions shall be completed within forty-five (45) days of the service upon petitioner of the Answer to the Petition;
5. Notice of the entry of this Order shall be provided to all parties by the petitioner.

BY THE COURT:



J.

John R. Merrick, Esquire
Attorney I.D. No. 04889
117 South Broad Street
Kennett Square, PA 19348
610-444-5060

Attorney for Petitioner

KENNETT CONSOLIDATED SCHOOL DISTRICT, : IN THE COURT OF COMMON PLEAS
Petitioner : CHESTER COUNTY, PENNSYLVANIA
v. : CIVIL ACTION – LAW
JENNIFER BRENEMAN : NO. 11-05844
And :
OFFICE OF OPEN RECORDS, :
Respondents :

PETITION FOR REVIEW
(Appeal from Final Determination
of the Office of Open Records
in accordance with Section 1302
of the Right-to-Know Law)

FILED
2011 MAY 25 PM 3:36
OFFICE OF THE
PROTECTOR OF
CHESTER COUNTY, PA.

1. Petitioner, Kennett Consolidated School District, (District) is a school district duly organized under the laws of the Commonwealth of Pennsylvania with an office at 300 East South Street, Kennett Square, PA 19348.
2. Respondent Jennifer Breneman (Ms. Breneman) is an individual whose address is 941 Wheatland Avenue, Suite 402, Lancaster, PA 17603.
3. Respondent Office of Open Records (OOR) is an office within the Commonwealth's Department of Community and Economic Development established by the Right-to-Know Law (65 P.S. § 67.101 *et seq.*) (RTKL). 65 P.S. § 67.1310. The

mailing address of the OOR is as follows: Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225.

4. By e-mail of February 11, 2011, Ms. Breneman submitted a "Standard Right-to-Know Request Form" (Request) to the District by which she requested copies of various documents pertaining to the District's Bancroft Elementary School Project.

5. Barry W. Tomasetti, the District's Superintendent, (Dr. Tomasetti) serves as its Open-Records Officer, in accordance with Section 502 of the RTKL (65 P.S. § 67.502).

6. By letter of February 18, 2011, Dr. Tomasetti notified Ms. Breneman that her Request was being reviewed, for the reasons that the nature and extent of the Request precluded a response within the required time period and a legal review was necessary to determine whether the records he sought were subject to access under the RTKL. Such review is authorized by Section 902 of the RTKL (65 P.S. § 67.902).

7. By letter of March 21, 2011, to Ms. Breneman, Dr. Tomasetti granted her Request in part and denied it in part.

8. On April 4, 2011, Ms. Breneman appealed the District's denial of her Request to the OOR (OOR Appeal).

9. A copy of the OOR Appeal (which contains copies of the Request and Dr. Tomasetti's letters) is attached as Exhibit A.

10. By letter of April 4, 2011, Terry Mutchler, Esquire, Executive Director of the OOR, informed Ms. Breneman and Dr. Tomasetti that Audrey Buglione, Esquire (Ms. Buglione) had been assigned as the Appeals Officer who would review the case. The letter also mentioned an "agency submission" with facts to be supported by an

affidavit that could be submitted within seven business days of the date of the letter (April 13, 2011) (Mutchler Letter).

11. By e-mail of April 13, 2011, the District's solicitor transmitted the District's submission to Ms. Buglione, which was followed by a brief e-mail to her of April 14, 2011, and a brief e-mail from her of April 15, 2011 (District Submission).

12. Copies of the Mutchler Letter and the District Submission are attached as Exhibit B.

13. On May 2, 2011, Ms. Buglione issued the OOR's Final Determination (Docket No.: AP 2011-0399) that granted Ms. Breneman's Appeal (Final Determination).

14. A copy of the Final Determination is attached as Exhibit C.

15. By its Final Determination, the OOR abused its discretion and committed errors of law as follows:

a. There was not sufficient or competent evidence to justify the Final Determination.

b. The OOR improperly imposed a burden upon the District to provide "a legal and factual basis for the denial of the request for record"; a "submission" that "should be supported by sufficient factual background and a detailed analysis"; and an affidavit made under penalty of perjury in support of statements of fact.

c. The OOR erred in failing to determine that the records sought that were not disclosed were exempt from disclosure

as "predecisional" records under the RTKL. See 65 P.S. § 67.708(b)(10)(i)(A).

d. The OOR erred in failing to apply the RTKL's "predecisional" exemption to records that were never presented to, or deliberated by, the District's Board or Superintendent. *Id.*

e. The OOR erred in failing to apply the RTKL's "facility security" exemption. See 65 P.S. § 67.708(b)(3).

WHEREFORE, Petitioner requests your Honorable Court to grant its Appeal and reverse the Final Determination of the Office of Open Records.

Respectfully submitted,

Date: May 26, 2011

John R. Merrick
John R. Merrick
Attorney for Petitioner

VERIFICATION

I, Barry W. Tomasetti, verify that I am the Superintendent of Kennett Consolidated School District, Petitioner in this action, and, as such, am authorized to execute this Verification on its behalf and that the facts set forth in the foregoing Petition for Review are true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: May 26, 2011



Barry W. Tomasetti

4. All correspondence between Stuebner and the School District or its representatives and/or consultants concerning the Project.

5. All minutes of meetings concerning the Project including construction meetings, job meetings, coordination meetings, progress meetings, Weekly Progress management Meetings and similar meetings.

("Request"). The District denied Parts 2, 4 and 5 pursuant to Section 708(b)(10)(i)(A). The District also denied records responsive to Part 5 as protected by Section 708(b)(3).

The Requester timely appealed, alleging the responsive records are not internal therefore not exempt. She further asserts Schedules responsive to Part 2 are not predecisional or deliberative. Finally, the Requester asserts the District has not met its burden to show disclosure of the minutes sought in Part 5 would be reasonably likely to result in harm to the safety or physical security of any building. The OOR invited the parties to supplement the record.

On April 13, 2011, the District submitted a legal brief without affidavits¹ to support its position. The District cites *East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496, 504 (Pa. Commw. Ct. 2010), *petition for allowance of appeal denied* No. 440 MAL 2010, 2011 Pa. LEXIS 622 (Pa. March 16, 2011), as support that third-party contractors are records of the District and therefore internal. The District also cites the deliberative process privilege, asserting it is codified by Section 708(b)(10). The District argues this exception ensures agencies are not required to operate in a "fishbowl," *Commonwealth ex rel. Unified Judicial System v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999) (plurality opinion) (if agencies were "forced to operate in

¹ The Requester's appeal indicates that she provided a copy of the appeal to the District via facsimile when it was submitted to the OOR on April 4, 2011. District counsel asserts the District does not provide affidavits because the District only received the OOR notice of the appeal - dated April 4, 2011 - on April 11, 2011, two days prior to the record closing. The District did not seek additional time to submit a response.

a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.”).

The District notes that budget booklets presented to a quorum of a school board and discussed, but upon which official action was not taken, were determined to be non-public, citing *Unionville-Chadds Ford School District v. Knauss*, No. 09-09003 (Rile, J., 6/30/2010). The District further set forth a series of hypothetical examples of allegedly nonpublic records such as a meeting notice with a typographical error, correspondence between employees regarding student thoughts regarding school lunch menus, emails from a third party construction company to a painter pertaining to the color to paint school cabinets. The School District argues that because none of those records, like none of the records sought in the Request, had been transmitted to school administrators or board members for deliberation, the records are “lower level” records not subject to public disclosure.

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.

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).

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.

The OOR has regularly interpreted 65 P.S. § 67.708(b)(10)(i) as protecting records shared between agency members and its advisors or consultants in discussing a proposed course of action. *See, e.g., Pearthree v. City of Philadelphia*, OOR Dkt. AP 2010-0777, 2010 PA O.O.R.D. LEXIS 754; *Timpone v. Office of the Budget*, OOR Dkt. AP 2010-0662, 2010 PA O.O.R.D. LEXIS 570; *see also* 65 P.S. § 67.506(d) (records in the possession of a party with whom the agency has contracted and which relate to the contract are records of the agency). Therefore, the records generated between the contractors, consultants and the District related to the building project are “internal” records of the agency.

However, the District failed to provide evidence indicating that Schedules, Schedule Updates or other progress reports (Part 2) or records responsive to Part 5 are both predecisional and deliberative. While Part 4 of the Request may seek records that reflecting predecisional deliberations between the contractor and the District regarding the project, the District did not provide sufficient evidentiary support establishing these required elements. Further, the District does not assert that the Request is insufficiently specific for it to identify the responsive records. The District is in possession of the records and has the burden to prove the records are exempt. The District identifies hypothetical records it claims would be exempt as “lower level” records not presented to administration. The District cites to no case law or provision in the RTKL that provides that records created by agency employees or contractors that have not been present to agency heads or board members are automatically exempt from public disclosure.

Therefore, because there is insufficient evidence that the records sought in Parts 2, 4 and 5 are predecisional or deliberative, the District has not met its burden to show Section 708(b)(10) applies. *See* 65 P.S. § 67.708(a)(1).

Finally, as to Part 5, Section 708(b)(3) requires an agency to show that release of a record would demonstrate a "reasonable likelihood of endangering the safety or physical security of a building." 65 P.S. § 67.708(b)(3). The District does not identify the records it deems exempt and provides no legal or factual support for application of Section 708(b)(3). Consequently, the District failed to meet its burden to prove the records exempt. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is granted and the District is required to provide all responsive records 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 Office of Open Records 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: May 2, 2011



APPEALS OFFICER
AUDREY BUGLIONE, ESQ.

Sent to: Jennifer Breneman, John Merrick, Esq.

John R. Merrick, Esquire
Attorney I.D. No. 04889
117 South Broad Street
Kennett Square, PA 19348
(610) 444-5060

Attorney for Petitioner

KENNETT CONSOLIDATED : IN THE COURT OF COMMON PLEAS
SCHOOL DISTRICT, :
Petitioner : CHESTER COUNTY, PENNSYLVANIA
v. : CIVIL ACTION – LAW
JENNIFER BRENEMAN : NO. 11-05844
And :
OFFICE OF OPEN RECORDS, :
Respondents :

CERTIFICATION OF SERVICE

This is to certify that in this case, assigned to Judge Griffith,
complete copies of all papers contained in the Petition for Review (Appeal from Final
Determination of the Office of Open Records in accordance with Section 1302 of the
Right-to-Know Law) have been served upon the following persons, by the following
means, and on the date stated:

<u>Name</u>	<u>Means of Service</u>	<u>Date of Service</u>
Ms. Jennifer Breneman 941 Wheatland Avenue Suite 402 Lancaster, PA 17603	Certified Mail	May 26, 2011 (Mailing Date)

Name

Means of Service


Date of Service

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

Certified Mail

May 26, 2011
(Mailing Date)

Date: May 26, 2011



John R. Merrick
Attorney for Petitioner
Attorney I.D. No. 04889
117 South Broad Street
Kennett Square, PA 19348
610-444-5060

John R. Merrick, Esquire
Attorney I.D. No. 04889
117 South Broad Street
Kennett Square, PA 19348
610-444-5060

Attorney for Petitioner

KENNETT CONSOLIDATED SCHOOL DISTRICT, : IN THE COURT OF COMMON PLEAS
Petitioner : CHESTER COUNTY, PENNSYLVANIA
v. : CIVIL ACTION – LAW
JENNIFER BRENEMAN : NO. 11 - 05844
And :
OFFICE OF OPEN RECORDS, :
Respondents :

FILED
2011 MAY 26 PM 3:45
OFFICE OF THE
PROTHONOTARY
CHESTER COUNTY, PA

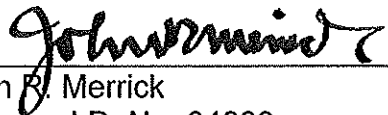
PRAECIPE FOR ENTRY OF APPEARANCE

To the Prothonotary:

Enter my appearance on behalf of Petitioner, Kennett Consolidated School District.

Papers may be served at the address set forth below.

Date: May 26, 2011



John R. Merrick
Attorney I.D. No. 04889
117 South Broad Street
Kennett Square, PA 19348
(610) 444-4060