

A listing of all cellular telephones owned, leased, rented, etc. where the ESASD has paid an invoice distributed by and amongst the ESASD Board and its Central Administration for the period 2005 [through] present. Please include ...the distribution listing including the names and titles of all those who were issued phone, and all invoices for each of these units, inclusive of all monthly itemized invoices from each phone for the same referenced period.

(the "Request").

After invoking the thirty-day extension, on June 8th, Eric Forsyth, the Open Records Officer ("ORO") for the School District, advised that the cell phone invoices that reflect the information requested would be provided; however, the telephone numbers would be redacted (the "Denial"). The School District redacted the cell numbers of its employees' school-issued cell phones, (the "School-issued Cell Numbers"), based upon Section 708(b)(2). The School District explained that the records were being maintained in connection with law enforcement and implementation of the School District emergency plan, in which cellular telephones play an integral part. The School District explains that due to the emergency communication system implemented to minimize the effects of hazards and emergencies, cell phone numbers are different than office extensions, and their release could jeopardize student and staff safety. To support its redaction of the telephone numbers reflecting the numbers of people who called or were called by the school-issued cell phones, (the "Non-school Telephone Numbers"), the School District cited Section 708(b)(6). The School District supplied the Citizen with a sample invoice of the redactions (the "Sample Invoice").

On June 10th, the OOR received an appeal from Citizen to which his Request and the Sample Invoice were attached (the "Appeal"). The OOR requested the Citizen to support his Appeal in accordance with Section 1101 of the RTKL but he submitted nothing further.

In response to the OOR's request, the School District supplemented the record providing its legal grounds for its Denial in light of the OOR's Final Determination in *Schillinger v. Lackawanna County*, OOR Dkt. 2009-0169 ("Letter Memorandum"). The Solicitor for the

School District represents that the numbers redacted from the Non-school Telephone Numbers of those who called or were called by the school-issued cell phones were redacted under Section 708(b)(6) because they comprise the “personal telephone numbers of parents, students, etc.” With regard to Section 708(b)(2), the School District advises that the cellular telephones are issued to employees as part of emergency preparedness, which it alleges would be compromised if the public had access to the numbers because they could flood the lines at the time they are needed most. Cell phones are issued to School Police Officers who are appointed by the courts in Pike and Monroe Counties pursuant to Section 778 of the School Code, 24 Pa. C.S. §7-778, and use them in their law enforcement capacity and to perform their statutory public safety duties. Cell phones are also issued to district administration and other employees “should an emergency arise” as well as athletic directors who travel with student athletes off-campus.

The School District asked the OOR to revisit *Schillinger* because the school employees maintain the telephones with them at all times and to be accessible to parents 24 hours a day, 7 days a week would not be appropriate. He contends that the Legislature considered the danger in permitting the public 24-hour access to employees, and, for that reason, in Section 708(b)(6) decided to put the modifier “cellular” in addition to “personal” telephone numbers. He claims that due to their portability and 24-hour accessibility, cell phones, even if issued and paid for by the School District, are personal and should not be accessible by the general public. He adopts the statutory construction of the Solicitor in *Schillinger* to conclude that cell phone numbers for agency-issued cell phones should be comprised within the numbers protected by Section 708(b)(6).

ESASD Policy #717- Cell Phone Usage (the “Policy”), which cites staff and student safety as a purpose for the School District’s cell phone program, was submitted. The Policy does not expressly limit cell phone use to emergencies or preparedness systems. The School District

supplemented the record to include a redacted copy of the School District's Administrative Regulations for Coordinated Crisis Intervention Plan, demonstrating the need for efficient communication (the "Regulations"). The Emergency Plan, Board Policy #805.1 and a redacted internal memorandum entitled "Emergency Notes," which consists of emergency contact numbers were also submitted. The Regulations do not identify the roles of any employee as part of the Plan. The School District clarifies that the only individuals who possess a cell phone who are not listed in the Regulations are "athletic department individuals" due to their frequent travel.

To gain clarity on the actual usage of the cell phones, the OOR requested the School District to support its representation that the cell phones are issued for the purpose of emergency preparedness. On July 1st, the School District supplied an affidavit of the Superintendent, Rachael Heath, made under penalty of perjury, that she is personally acquainted with the assignment and use of cell phones by School District employees, and that cellular telephones are issued to "key personnel" ("Superintendent Affidavit"). She attests the cell phones are used in order to provide a safe environment for staff and students, and "certain ones" have been trained based on their role in the National Incident Management System and the School District Emergency Operations. She also attests that the employees to whom cell phones are issued are expected to be available to respond to emergencies involving the School District via cell phone 24 hours a day, seven days a week. She does not attest that every individual to whom a cellular telephone is issued is restricted to using it for only emergency preparedness. The Sample Invoice of a single month shows the costs for the cellular telephones to be \$2,225.2, including usage charges. The Sample Invoice also reveals the names of the individuals to whom the cellular telephones are issued and their usage by cost and minute usage. No emergency correlating to the usage for the period covered by the Sample Invoice was submitted. The

School District did not submit any facts to show that the usage charges, in one case as high as \$25.69, are related to public safety and/or preparedness. No other material was submitted.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The School District qualifies as a local agency subject to the RTKL and its duties of mandatory disclosure. *See* 65 P.S. §67.102, §67.302. Records of a local agency are presumed “public” unless the record is: (1) exempt under Section 708; (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §67.305. Here, the School District asserts two exceptions for redaction of telephone numbers: (1) Section 708(b)(6) for redaction of home, cellular or personal phone numbers, *i.e.*, the Non-School Telephone Numbers; and, (2) Section 708(b)(2) for redaction of the School-issued Cell Numbers assigned to school employees. The School District bears the burden of establishing its asserted exceptions by a preponderance of the evidence, meaning the “greater weight of the evidence.” *See Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Each exception is addressed in turn.

1. Section 708(b)(6) permits redaction of telephone numbers on invoices.

The School District redacted the telephone numbers that called or were called by the school-issued cell phones reflected in the Sample Invoice under Section 708(b)(6). The Non-School Telephone numbers are stated to represent calls to or from parents and/or students, and thus represent “personal, cellular or home telephone numbers” that are expressly protected by the personal identification information exception. The OOR finds that the telephone numbers contained on the invoices are properly redacted because the exception expressly protects all telephone numbers that are non-public numbers. Further, the Pennsylvania Supreme Court has

determined that a right in maintaining the privacy of one's telephone number exists, and outweighs the public interest in disclosure of that telephone number in *Tribune Review Publishing v. Bodack*, 599 Pa. 256, 961 A.2d 110 (2008).

The OOR declines to reconsider its decision in *Schillinger v. Lackawanna County*, OOR Dkt. AP 2009-0169 under this exception as its reasoning remains strong and accounted for the issues raised by the School District. The OOR held that County-issued cell numbers did not qualify as "personal identification information" because they were assigned to employees for their employment. Moreover, because the cell numbers were paid for with public funds in order to provide a service to the public, and belonged to the agency rather than the individual, the information cannot be deemed "personal" in nature. Likewise, the School-issued Cell Numbers are paid with School District funds, and used for School District business only. As such, they are not personal identification information of the school employees to whom they are assigned.

2. The Public Safety Exception does not protect all the School-issued Cell Numbers.

The School District argues that Section 708(b)(2), the public safety exception, protects all of the School-issued Cell Numbers of the cell phones the School District issued its employees. Section 708(b)(2) applies to "a record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity." 65 P.S. §67.708(b)(2). The School District contends that the School-issued Cell Numbers are maintained by the School District in connection with its "law enforcement and other public safety activity." To demonstrate that the cellular telephone numbers are necessary for public safety, the School District submitted the Superintendent Verification, its Policy and Regulations regarding the use of cellular telephones for emergency preparedness at the schools.

Section 708(b)(2) requires an agency to demonstrate that the record at issue is maintained in connection with law enforcement or public safety activity or preparedness, *and* “that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity.” 65 P.S. §67.708(b)(2). The School District submitted argument and facts to establish that the cellular telephone numbers were maintained in connection with its public safety and emergency preparedness measures. However, the OOR concludes from the facts presented as a whole that the School District did not meet its burden of establishing that this exception applies to protect the School-issued Cell Numbers for all of its employees.

First, the School District did not establish that the cellular telephone numbers redacted constituted a record maintained by it in connection with its emergency preparedness plan. The School District showed that the cellular telephones are used by its employees in order to maintain a safe school, students and staff. The Policy and the Superintendent Verification state that “individuals use cellular telephones in the course of conducting School District business in order to provide a safe environment for staff and students while both at work and while away from school facilities.” [*See Superintendent Verification.*] Although the Superintendent attests that employees have been trained in their respective roles in incident management and emergency operations, she does not attest that the cell phone use and assignment is integral to those processes, and that the cell phones numbers are maintained in order to perform public safety and/or emergency preparedness functions.

The Policy contemplates that “Cell Phone Use” must relate to School District business, but does not limit cell phone usage to emergency preparedness or planning, or public safety activities. The only employees who are described as providing a purely law enforcement and safety function for the School District to whom cell phones are assigned are the School Police.

The other employees to whom cellular telephones are issued are not shown to be integral to the public safety or emergency preparedness plan. Moreover, the cell phones are clearly used for non-emergency, and non-public safety/preparedness purposes by school administrators and members of the Athletic Department due to their “travel off-campus.”

Second, the School District did not submit any facts to show that the disclosure of the School-issued Cell Numbers would be “reasonably likely” to threaten public safety or a public protection activity. The OOR finds the School District’s argument that concerned parents may use the cellular telephone numbers to call the school employees during an emergency compelling. The OOR finds the threat that a number of parents armed with cell numbers for key school personnel may cause to emergency preparedness, which is asserted to rely upon cell phones for communication as both credible and real. However, the likelihood that parents may call school administrators during a time of crisis on their cell phones does not show that the disclosure of all School-issued Cell Numbers must be protected under this exception.

The exception requires *two* elements, one being that the record is maintained by the agency in connection with its law enforcement or other public safety activity. The School Police perform law enforcement and public safety activities on behalf of the School Districts—they are appointed by the Courts in accordance with the Public School Code to do so. Because the School Police provide that function, there is no question that their cell phone numbers are maintained as part of performing that function. The threat is not as tenable for all other school employees, for whom the inconvenience of being accessible 24 hours a day was raised as a basis for protecting their cell numbers. The OOR rejects that School-issued Cell Numbers should be protected to prevent school employees from being contacted at inopportune times as that does not relate to public safety or emergency preparedness, as is essential for this exception to apply.

The OOR finds that the threat posed by inundation of the cell phone lines due to panicked parents calling in the event that a school emergency occurs is real and could jeopardize the safety of the schools that the School Police are charged with protecting. Thus, the OOR concludes that the cell numbers assigned to School Police are properly redacted under Section 708(b)(2). The OOR concludes that other than for School Police, School-issued Cell Numbers of school employees are not properly redacted under this exception, and must be disclosed.

CONCLUSION

For the foregoing reasons, the Citizen's Appeal is **granted in part and denied in part**. The OOR concludes that the School District established that its redactions of Non-school Telephone Numbers under Section 708(b)(6) were appropriate. The OOR also concludes that the redaction of School-issued Cell Numbers of School Police who serve in a law enforcement and court-designated public safety capacity under 24 Pa. C.S. §7-778 may be redacted under Section 708(b)(2). For all other employees, the School District has not supported the redactions under the personal safety exception and their cell numbers must be disclosed 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 Monroe 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 at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: July 10, 2009



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Michael Meachem
Thomas F. Dirvonas, Esq., Solicitor for ESASD