



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SIMON CAMPBELL,	:	
Complainant	:	
	:	
v.	:	Docket No. AP 2009-0342
	:	
SUSQUEHANNA TOWNSHIP	:	
SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Simon Campbell (the “Citizen”) submitted a request to Susquehanna Township School District (the “School District”) seeking union dues information on a W-2 for two school employees pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The School District denied the request. The Citizen filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Citizens appeal is **granted**.

FACTUAL BACKGROUND

On March 10, 2009, the Citizen submitted a right-to-know request to the School District seeking the following:

1. A copy of the 2007 and 2008 W-2s sent by [School District] to employee Andrea Lacy with all information redacted except for the employee’s name and the amount of voluntary union dues listed in Box 14. If my requested redactions include redacting public

information then I hereby waive my right to receive that public information for this request.

2. A copy of the 2007 and 2008 W-2s sent by [School District] to former employee Ryan Mellinger with all information redacted except for the employee's name and amount of involuntary union dues (fair share fees) listed in Box 14. If my requested redactions include redacting public information then I hereby waive my right to receive that public information for this request.

(the "Request")(emphasis in original). On March 11, 2009 the School District invoked a 30-day extension for legal review. On April 8, 2009, Mr. Matthew J. Malinowski, the Open Records Officer for the School District, responded by denying the request. The School District contends that because the IRS does not require information to appear in Box 14 of a W-2 the information in the Box 14 is not a transaction of the agency and therefore not a "record."

The School District argues in the alternative that if the requested information is deemed a "record," it is not a "public record." The School District contends as follows:

Section 102 of the Act defines the term "public record" as a record, including a financial record that is not exempt under Section 708. The term financial record is defined as an account, voucher or contract dealing with: . . . the salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee. The requested information does not constitute a salary or other payment or expense paid to an office or employee of the agency, bur rather, represents a voluntary listing on the W-2 of deductions from an employee's salary or compensation.

The School District also asserts that the information is exempt under § 708(b)(6)(i) as personal financial information. The School District argues that the information "voluntarily included in block 14 is not salary, actual compensation or other payments or expenses paid to an agency employee, but rather evidences personal information about the individual employees, i.e. whether or not the employee is a union member." ("Denial").

On April 29, 2009, the OOR received an appeal from the Citizen who cites the OOR decision *Campbell v. Berwick Area School District*, OOR Dkt. AP 2009-0212 (issued April 24,

2009) as the basis for his appeal. The OOR requested supplementation from the School District to supply the legal and factual grounds in support of its Denial in light of the recent OOR determination in *Berwick* or advise the OOR if intended to release the records. The School District did not provide any further response.

However, on May 14, 2009 the OOR received correspondence from counsel for the PSEA, Richard Burrige, Esquire who submitted information on behalf of Andrea Lacy in support of the School District, and requested the information be accepted as from a party with a direct interest. The OOR agrees there is a direct interest as Ms. Lacy's W-2 was one of the W-2s requested, and accepted the material submitted as permitted under Section 1101(c). The PSEA submitted the following arguments which echo the arguments PSEA made in *Campbell v. Berwick Area School District*:

1). The W-2 is not a record of a transaction or activity of an agency, but rather a personal confidential tax record prepared by law as a record of and for the individual.

2). The W-2 is not a "financial record" under the RTKL because it does not document a "disbursement" of funds by an agency, and does not accurately express the salary paid to the employee.

3). The W-2 is not a public financial record pursuant to 26 U.S.C. § 6103 which requires that tax returns and related information be confidential. The PSEA acknowledges that several courts have "emphasized that 'return' and 'return information' under [§ 6103] is limited to that information which has 'passed through the IRS.'" Nonetheless, PSEA cites several Pennsylvania statutes that it considers as statutory protection for the requested W-2 information, including 72 P.S. § 3402-506(C), 72 P.S. § 7353(f) and 53 P.S. § 6913(V)(f),(IX)(c). PSEA also asserts a public policy argument that the Internal Revenue Code establishes an "air of confidentiality"

surrounding tax documents, citing *Hrubec v. Nat'l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995) and *Federal Savings and Loan Ins. Corp. v. Krueger*, 55 F.R.D. 512 (N.D. Ill. 1972 (opining that there is a “valid public policy against disclosure of income tax returns)).

4). The “amount of union dues in box 14, if entered by the agency – is a report of disbursements of the individual’s personal financial assets” and exempt as personal financial information pursuant to 65 P.S. § 67.708(b)(6(i)(A). PSEA argues that “[a]mounts on a Form W-2 (or any agency-produced document, including an agency’s payroll report) that report disbursement or allocation of any portion of salary already accrued to an employee as a personal asset of that person, is a report of that individual’s personal finances: the amount reports ‘personal financial information.’” PSEA continues, “[i]t is not relevant whether the individual’s personal funds reported on the document were directed to an employee organization as voluntary dues paid by the employee (as in this matter), or to a public or private entity as voluntary charitable contributions paid by the employee.” This amount, PSEA argues, reports “the direction of the individual’s own personal assets” and not “disbursement of an agency’s funds.”

In response to the PSEA’s submission, the Citizen submitted additional argument contradicting PSEA’s assertions that the W-2 and union due information is not public and reemphasizing that the OOR has already issued a Final Determination on this issue.

The OOR also received a brief statement from Mr. Mellinger who asserts that he is a person with a direct interest as the former employee who is the subject of the second W-2 information request. Mr. Mellinger supports the Citizen’s position that the requested information is a public record subject to disclosure. He argues that Box 14 does not reflect personal financial information. He declares that: “The figures reflect coerced financial information. These involuntary dues were seized from my paycheck, against my wishes, as a condition of my

employment. I was not a member of the teachers' union because I did not want their representation. Union representation and the payment of dues was forced upon me as terms of my employment if I wanted to keep my job.”

The issues presented for this Final Determination are whether voluntary placement of information on a W-2 form is a record of an agency and whether union dues are protected from disclosure as “personal financial information.”

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 obligations of mandatory disclosure. *See* 65 P.S. §67.102, §67.302. Records of a local agency are presumed to be “public” unless: (1) the record is exempt under Section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §67.305. Accordingly, the records sought in the Request are presumed by law to be public unless the School District asserts one of these three grounds for withholding the record.

The agency bears the burden of proving the application of its cited exception to the information at issue by a preponderance of the evidence. 65 P.S. §67.708(a). To prove by “preponderance of the evidence” means to prove by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001).

1. The Union Dues Information Posted On A W-2 Is A Transaction Or Other Record Of An Agency.

A record is defined as “information, regardless of physical form or characteristics, that documents a transaction or activity of an agency *and* that is created, received, or retained pursuant to law *or* in connection with a transaction, business or activity of the agency.” 65 P.S. §

67.102 (emphasis added). The School District contends that it is not mandated by law to put the requested information on the W-2 form and therefore is not a record of or for the agency. The OOR disagrees.

There is no requirement in the RTKL that the record *must* be one created, received or retained pursuant to law in order to qualify as a record. The definition of record includes “information created, received or retained pursuant to law” as well as “information in connection with a transaction business or activity of the agency.” The fact that the School District voluntarily created the record by putting the information on the W-2 form does not remove it from the purview of the RTKL. There is absolutely nothing in the RTKL or in relevant case law suggesting that an agency’s voluntary creation of a record removes it from public scrutiny. This office categorically rejects an agency’s attempt to create a new and radically more stringent definition of public record that flies in the face of the new and expanded definitions and reversed presumption that the new RTKL provides. Therefore, the W-2 form and the contents of Box 14 are a public record, subject only to redaction of the information determined to be non-public, if any.

The School District then argues that the W-2 information is not a “financial record.” However, it is not necessary to determine whether the W-2 information is a financial record of the agency because the definition of public record, as stated above, is not limited to *only* a financial record, but rather a “record, including a financial record” that does not fall into one of the three exemptions provided by the RTKL. The W-2 information is a record.

2. The Requested Information On The W-2s Is Not Protected From Disclosure By Application Of The Confidentiality Provisions In 26 U.S.C.S. §6103 Or Any Pennsylvania Statutes.

PSEA contends that the IRS Code and 72 P.S. § 3402-506(C), 72 P.S. § 7353(f) and 53 P.S. § 6913(V)(f),(IX)(c) expressly prohibits disclosure of the requested record. The OOR disagrees. As we discussed in *Zeldenrust v. Pocono Mountain School District*, OOR Dkt. 2009-0305 “nothing in [§6103] or its legislative history suggests an intention to protect a taxpayer’s financial data from any potential risk of disclosure except that arising from the filing of the taxpayer’s return with the IRS” quoting *Stokwitz v. United States*, 831 F.2d 893, 896 (9th Cir. 1987). Further, that court found “Section 6103 was not designed to provide the only means for obtaining tax information; it simply provides the only means for acquiring such information **from the IRS.**” *Id.* at 897 (emphasis supplied). The Pennsylvania laws cited by PSEA all refer to tax returns. A W-2 is not a tax return. PSEAs public policy argument regarding the “air of confidentiality” surrounding a W-2 is understandable. However, a feeling or emotional response associated with a record does not make it non-public. Therefore, because there are no federal or state laws that prohibit disclosure of the W-2 information requested, the School District had no basis to withhold the information.

3. The School District Does Not Establish That Union Dues Deductions Are Personal Financial Information.

Furthermore, to the extent the School District and PSEA argue that union dues information is exempt as “personal financial information” the OOR reminds the School District that this issue had also already been decided in *Campbell v. Berwick Areas School District*, OOR Dkt. 2009-0212. Furthermore, neither the School District nor PSEA raise any novel legal arguments that were not already addressed in *Berwick*. Therefore, the School District had no legal basis for denying the Citizen’s request. The discussion and holding of *Berwick* is summarized and partially restated as follows:

The RTKL defines “personal financial information” as: “An individual’s personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account of PIN numbers and *other information relating to an individual’s personal finances.*” 65 P.S. §67.102 (emphasis supplied). Nowhere in this definition does the phrase “union dues” appear; however, the definition applies to protect “other information relating to an individual’s personal finances,” changing the focus to the meaning of “personal finances.” In its most basic definition, “personal finances” means an individual’s monetary resources.

All the types of information that have been deemed to be included within “personal financial information,” by statute, regulation and decisional law, are the types of information that show the assets, net earnings from all sources, and debts of an individual. *See, e.g., O’Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976). Union dues do not qualify amongst that category of information because it does not reveal an individual’s financial status. . . . Union dues are not of the same character of information as that information which has been held to be “personal financial information” under other disclosure laws, and OOR declines to extend the definition to protect disclosure of “union dues deductions” here.

Union dues deductions do not reveal personal facts about the finances of [an employee], they do not show his types of investments, his non-agency sources of income, his assets, all of which have been deemed to be “personal financial information” in which courts have found a basis for protection. . . . Neither PSEA nor the School District cites any legal authority holding that union dues or fair share deductions constitute “personal financial information.” Absent any legal support for applying this exception to this type of information, the OOR declines to construe the term “personal financial information” to cover a union dues deductions so unlike

recognized types of “personal financial information” revealing an individual’s monetary resources, in terms of assets and liabilities.

Therefore, as in *Berwick*, the OOR concludes the union dues deduction should not have been redacted under Section 706 as it does not qualify as “personal financial information” protected under the RTKL.

CONCLUSION

For the foregoing reasons, the Citizen’s appeal is **granted**. The OOR concludes the School District did not meet its burden of proving that the information requested was not a public record and is required to produce the requested information on the W-2s. The School District is directed to supply the information 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 Dauphin 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 of the RTKL. This Final Determination shall be placed on the website: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED: May 29, 2009



AUDREY BUGLIONE, ESQ.
APPEALS OFFICER