



After invoking the thirty-day extension, on September 14<sup>th</sup>, Eric Forsyth, the Open Records Officer (“ORO”) for the School District, advised that records of communications and legal invoices/payments regarding the alleged letter of reprimand did not exist, and that other records are protected under Section 708(b)(17) (the “Denial”). The School District advised that a noncriminal investigation was launched as a result of the January 21, 2009, Board Meeting at which Mr. Day alleged that Mr. Heath confronted him (the “Meeting”). The School District advised that the investigation was undertaken to determine whether certain unidentified members of the public complied with Policy #903, “Public Participation at Board Meetings” (“Policy”). The School District contends that the release of any correspondence related to incidents at the Meeting is protected as a record that would reveal the institution or progress of a noncriminal investigation protected by subsection (17)(vi)(A).

The Requester timely appealed to the OOR on September 17<sup>th</sup>. In support, he states that he received a letter of reprimand related to his behavior at the January 21, 2008 Meeting. He claims that acting Superintendent Sharon Lavurdure advised him that Mr. Heath also received a similar letter of reprimand. Mr. Day sought of a copy of that letter. Further, Mr. Day contends that an invoice and payment related to a letter of reprimand to Mr. Heath should exist

The School District submitted an affidavit from the ORO to substantiate that communications do not exist among the School District administrators and Board members authorizing letter of reprimand to Mr. Heath and of legal invoices/payments as a result of the letter of reprimand (the “ORO Affidavit”). The ORO Affidavit is notarized and attests under penalty of perjury that the requested records do not exist. The ORO Affidavit did not specifically acknowledge whether a letter of reprimand exists.

However, the School District also submitted an affidavit of the Acting Superintendent, Sharon Laverdure. Her affidavit identifies the records requested as “The letter of reprimand.” She attested under penalty of perjury that she instituted a non-criminal investigation into several incidents related to a January 21, 2009 Board meeting (“Laverdure Affidavit”). As part of that investigation, she said letters were sent to individual members of the public involved in that Board meeting, and that those letters disclosed the results of the investigation as it related to each of those individuals. She further attests that the correspondence “does not reveal the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit registration, certification or similar authorization issued by” the School District.

In reply, the Requester contended that he does not believe the ORO was thorough in a search for communications among the Board regarding authorization for any alleged letter of reprimand to Mr. Heath.

### **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. *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 asserted a single exception, the noncriminal investigative exception, as to the letter of reprimand, and attested that other requested records do not exist. Both grounds for the Denial are addressed.

**1. The School District Established that Certain Requested Records Do Not Exist.**

The School District submitted an affidavit from its ORO, in which the ORO attested under penalty of perjury that communications authorizing a letter of reprimand issued to Mr. Heath did not exist. The ORO further attested that he is responsible for the records and conducted a thorough search showing that no such records existed. He also attested that no invoices or payment records related to an attorney “as a result of the letter of reprimand” exist. In its Denial, the School District advised that a “letter of reprimand” to a member of the public does not require authorization of administration or board members. The ORO Affidavit was consistent with the Denial in which the School District advised that the records requested did not exist. The OOR has consistently held that an agency cannot be compelled to produce a record that does not exist. Thus, the School District satisfied its obligations under the RTKL and showed that the records requested related to the letter of reprimand to Mr. Heath do not exist in its custody or control.

**2. Section 708(b)(17) Protects the Letter of Reprimand from Disclosure.**

Section 708(b)(17) provides that records “relating to a noncriminal investigation” are protected from disclosure, including...

(vi) A record that, if disclosed, would do any of the following:

(A) *Reveal the institution, progress or result* of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit registration, certification or similar authorization issued by an agency...

65 P.S. §67.708(b)(17)(vi)(A)(emphasis supplied). The School District claims that the letter sought by the Requester would be protected as revealing the progress or “result” of its investigation into the conduct of the participation at the January 21, 2009 School Board meeting.

The parties do not dispute that a noncriminal investigation was conducted. The parties also do not dispute that Acting Superintendent Laverdure conducted the investigation and that letters were issued as a result. To substantiate its claim that letters were issued to members of the public as a result of incidents involving the public at the Meeting, the School District submitted the Laverdure Affidavit in which the investigator and Ms. Laverdure attests that a noncriminal investigation was conducted in response to incidents at the Meeting; that the purpose of the investigation was to determine whether members of the public violated its Policy; and that letters were created as a result of the investigation. The letters disclosed to each recipient reveal the result of the investigation as it related to him or her. [See *Laverdure Affidavit* at (c).]

The School District bears the burden of proving the exception's application by a preponderance of the evidence, 65 P.S. §67.708(a), meaning "greater weight of the evidence." *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Here, the School District satisfied its burden that the exception applies. The School District established that a noncriminal investigation was conducted into the behavior by attendees at the Meeting, and that letters were created as a result. The letter sought by the Requester is therefore a record that would reveal the progress or result of the School District's investigation, and is protected by Section 708(b)(17), and the School District's Denial as applied to the letter was proper on that basis.

### **CONCLUSION**

For the foregoing reasons, the Requester's Appeal is **denied**. The School District established that certain records sought in the Request did not exist, and that any letter of reprimand related to the noncriminal investigation is protected under Section 708(b)(17). Therefore, the School District is not required to take any further action.

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 of the RTKL. This Final Determination shall be placed on the website: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: October 19, 2009**



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**LUCINDA GLINN, ESQ.  
APPEALS OFFICER**

Sent to: Devin Day; Eric Forsyth, ORO for School District