



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>RICH LORD and</b>	:	
<b><i>PITTSBURGH POST-GAZETTE</i></b>	:	
<b>Complainants</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2009-0775</b>
	:	
<b>CITY OF PITTSBURGH</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Mr. Rich Lord, on behalf of the *Pittsburgh Post-Gazette* filed a right-to-know request (the “Request”) with the City of Pittsburgh (the “City”) seeking copies of payrolls and pension eligibility lists pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (the “RTKL”). The Request specifically sought dates of birth and home addresses. The City granted partial access to the records, but denied the request for date of birth and home addresses. Mr. Lord (the “Requester”) filed a timely appeal with the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the Requester’s appeal is **granted in part and denied in part**, and the City is directed to take further action as set forth below.

## FACTUAL BACKGROUND

On July 14, 2009, the Requester filed a request for copies of the records as follows:

Any paper or, preferably, electronic records, including but not limited to payrolls, pension eligibility lists, or most recent pay records, reflecting, for all current Bureau of Fire employees:

- 1) Full names
- 2) Job titles
- 3) Current salaries
- 4) Start dates of employment with the city
- 5) Home addresses
- 6) Dates of birth

Kate DeSimone, Open Records Officer for the City responded on July 21, 2009, and provided all of the information requested except for items (5) and (6). The City invoked a 30-day extension of time for legal review related to dates of birth and home addresses and, on August 21, 2009, issued a final response denying access to that information citing *Pennsylvania State Education Association, et al v. Office of Open Records, et al*, No. 396 M.D. 2009 (the “PSEA case”) (for home addresses) and *Purcell v. City of Philadelphia*, OOR Dkt. AP 2009-0263 (for dates of birth) noting that it had been appealed to the Philadelphia Court of Common Pleas. The City stated in its response that the *Purcell* case was fast-tracked and asked that the Requester consent to an extension of time pending a decision on dates of birth. With respect to home addresses, the City referred to the Advisory issued by OOR Executive Director Terry Mutchler “wherein she stated that the OOR's policy will be to withhold the home addresses of ALL public employees pending the resolution of the Commonwealth Court matter. Copies of both of these documents are enclosed herein. Should the Commonwealth Court refuse to

make Judge Friedman's order permanent, we will of course provide an updated payroll with addresses.”

On September 2, 2009 the OOR received a timely appeal. In support thereof, the Requester stated: “[t]he items requested qualify as public records as per the Office of Open Records Final Determination in case AP 2009-0263” (*Purcell*).

The City responded to the appeal in part as follows:

On July 28, 2009, Judge Friedman of the Pennsylvania Commonwealth Court entered a temporary restraining order (footnote omitted) in the case of *The Pennsylvania State Education Association et al v. Commonwealth of Pennsylvania Department of Community and Economic Development et al*, (hereafter the "PSEA case"), No. 396 M.D. 2009. In that case, a group of state employees sought a restraining order against the Office of Open Records, preventing the OOR from ordering the release of home addresses of union members. On July 30, 2009, Executive Director Terry Mutchler of the OOR entered an advisory (footnote omitted) which held that the OOR would not differentiate between classes of employees, and that pending the final resolution of the PSEA case the OOR would decline to order the release of any employee home addresses.

With the issue of home addresses temporarily resolved, the City of Pittsburgh turned its attention to the issue of birthdates. The City contacted counsel for Philadelphia in the case of *Purcell v. Philadelphia*, and ascertained that birth dates were an indispensable element in Philadelphia's appeal to Common Pleas Court, with the City's briefs due in early November. Accordingly, on August 21, 2009, the City of Pittsburgh issued its "thirty day" ruling (footnote omitted) to Mr. Lord. The City denied access to home addresses based on Judge Friedman's ruling in the PSEA case, and on Ms. Mutchler's OOR advisory. As to birthdates, the City issued a qualified denial, pending direction from the court in *Purcell*. The City's position was and remains that if the courts hold home addresses and/or birth dates to be matters of public record, this information will be promptly released to Mr. Lord.

The City also cited *Gribbin v. DCNR*, OOR Dkt. AP 2009-0341, currently on appeal.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The City is a local agency subject to the RTKL. *See* 65 P.S. § 67.302.

65 P.S. § 67.302. The RTKL defines a “public record” as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.” 65 P.S. §67.102

### **Date of Birth**

The City relies upon the PSEA case and the status of two OOR decisions, currently on appeal, for withholding dates of birth: *Purcell* and *Gribbin*. It argues that dates of birth would be subject to the same analysis as applied by Justice Friedman in the PSEA interim decision related to home addresses.

The PSEA case does not address dates of birth. In *Purcell*, the OOR found that no party had met the burden of proving that dates of birth are exempt under section 67.708(b)(1)(iii) (personal security exemption) or case law interpreting the Pennsylvania Constitution.

Absent proof of the applicability of an exemption, dates of birth are public record. See *Purcell*; *Parsons v. Port Authority of Pittsburgh*, OOR Dkt. AP 2009-008. No appellate court has issued a ruling to the contrary.

As the City has not cited an exemption in the RTKL, provided any evidence in support of its legal position, and relies entirely upon the PSEA case and the pending judicial appeals in *Purcell* and *Gribbin*, it has not met the burden of overcoming the presumption that dates of birth are public record.

### **Home Addresses**

The RTKL expressly protects only the home addresses of judges, law enforcement and minors. 65 P.S. §§67.708(b)(6)(C) and §708(b)(30).

The OOR has issued multiple final determinations regarding whether home addresses constitute public records under the RTKL or may otherwise properly be withheld: *Green v. Pocono Mountain School District*, OOR Dkt. AP 2009-0103 (rejecting arguments that Section 708(b)(1)(ii), (b)(6), and State or United States Constitution support redaction of third party contractors names, home addresses, and tax exemptions in request for certified payrolls); *Green v. Bethlehem Area School District*, OOR Dkt. AP 2009-0061 (discussing whether application of Section 708(b)(6) or the State Constitution protects private employee home addresses and determining that neither support redaction); *Gribbin v. Pennsylvania Dept. of Conservation and Natural Resources*, OOR Dkt AP 2009-341 (home addresses of private employees of third party contractors are not exempt under 708(b)); *Malley/Leet (Sheet Metal Workers) v. Office of the Budget*, OOR Dkt AP 2009-327 (names of private employees of third party contractor are not exempt under 708(b)(6)). *See also*, *Greater Pennsylvania Regional Council of Carpenters v. Pocono Mountain School District*, OOR Dkt. AP 2009-0166; *Pry v. Indiana University of Pennsylvania*, OOR Dkt. AP 2009-0119; *Pry v. Butler County Community College*, OOR Dkt. AP 2009-0070; *Campbell v. Berwick*; OOR Dkt. AP 2009-221; *Campbell v. Souderton Area School District*, OOR Dkt. AP 2009-269; *Campbell v. William Penn School District*, OOR Dkt. AP 2009-0475; *Purcell v. City of Philadelphia*, OOR Dkt. AP 2009-0263; *Agre v. DGS*, OOR Dkt. AP 2009-0371; and *Carroll v. Harrisburg School District*, OOR Dkt. AP 2009-0442.

In the instant matter, the City withheld home addresses based upon *Pa. State Educ. Ass'n v. Dep't of Cmty. & Econ. Dev.*, 2009 Pa. Commw. LEXIS 1325, 3-6 (Pa. Commw.

Ct. Aug. 6, 2009), a recent ruling of the Commonwealth Court enjoining the OOR from directing the release of home addresses for public school employees.

The OOR does not have a regulation, policy or procedure that governs a situation where information related to only one segment of public employees is exempt from disclosure pursuant to a temporary order. In the absence of a regulation, policy or procedure, 65 P.S. § 67.1102(b)(3) grants authority to the OOR to “rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute.” On July 30, 2009 the OOR posted on its website an advisory from its Executive Director, Terry Mutchler, stating that the OOR will make “no distinction between the protection of home addresses of public school employees and other employees” and “the Office of Open Records will issue no final determinations ordering the release of public employee home addresses only pending resolution of this matter by the Commonwealth Court.” *See, Advisory Regarding Home Addresses of Public Employees*, July 30, 2009, available at <http://openrecords.state.pa.us>.

Subsequent to the injunction the OOR received numerous appeals related to requests for the addresses of public employees. The OOR has asked each requester who filed such an appeal to extend the deadline for issuance of the final determination until after the Commonwealth Court issues a decision regarding the public status of school employee home addresses. The Requester holds the sole authority to extend the deadline for issuance of a final determination. 65 P.S. §67.1101(b)(1). On July 14, 2009 the Requester denied the OOR’s request for an extension of time to issue this final determination.

Accordingly, the OOR will not order the release of home addresses of City employees as stated in the Advisory referenced above. The Requester is not precluded from

submitting a new request when a final order is issued by the Commonwealth Court regarding the status of school employee home addresses.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part and denied in part**. The City is directed to release dates of birth as requested and is not required to release home addresses. 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 Allegheny Court of Common Pleas 65 P.S. §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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: October 2, 2009**



---

DENA LEFKOWITZ, Esq.  
Appeals Officer

Sent to: Rich Lord; Kate DeSimone, ORO