

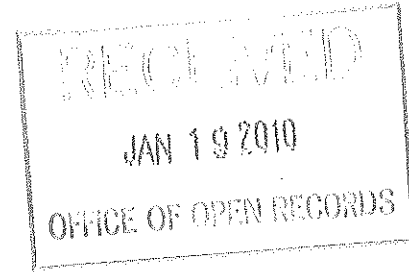


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January 15, 2010



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**RE: Docket Number AP2009-0926, Acton/Trib Total Media v.
Fort Cherry School District ("School District")
Petition for Reconsideration**

Dear Ms. Mutchler:

Enclosed please find a Petition for Reconsideration of the December 31, 2009 Final Determination in the above matter issued by Appeals Officer Lucinda Glinn.

Please notify my office when the Petition for Reconsideration is granted and thereafter, what, if any, additional information your office requires in order to rule upon the Petition.

Thank you for your attention to this matter.

Very truly yours,

Falco A. Muscante

FAM/cg

Enclosure

cc: Paul R. Sroka, Open Records Officer (w/ enclosure)
David A. Strassburger, Esquire (w/ enclosure)



pennsylvania
OFFICE OF OPEN RECORDS

VIA FIRST CLASS US MAIL

January 25, 2010

Falco A. Muscante, Esq.
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RE: Petition for Reconsideration received January 15, 2010, OOR Dkt.
AP 2009-0926

Dear Mr. Muscante:

We are in receipt of your Petition for Reconsideration dated January 15, 2010 in connection with the Final Determination issued by the Office of Open Records in *Acton/Trib Total Media v. Fort Cherry School District*, OOR Dkt. AP 2009- 0926. We hereby deny your Petition.

Sincerely,

A handwritten signature in black ink, appearing to read 'CW' with a long, sweeping flourish extending to the right.

Corinna V. Wilson
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
David A. Strassburger, Esq.

1. On page 2 of the Final Determination, OOR indicates that the Requester appealed "the Denial challenging the estimated fee." This is factually incorrect. To the contrary, the October 28, 2009 Appeal filed on behalf of Ms. Acton and Trib Total Media identified only one issue on appeal, specifically that "we are refiling this appeal to challenge the correctness of the statement that the electronically stored documents are incapable of being copied into another electronic medium, such as a CD, .zip file, .pdf file or .xls (excel) file or that Fort Cherry is not required to do so." There was no challenge to the estimated fee by the School District, and therefore, this reference to the estimated fee should be removed from the Final Determination.

2. On page 4 of the Final Determination, OOR indicates that "School District argues that the RTKL does not require it to download the data into Excel and redact it electronically." This interpretation by OOR of the School District's position is inaccurate. To the contrary, the School District at no time in its submission to OOR makes any reference whatsoever to the "download" of data. To the contrary, it is the School District's position that, pursuant to Section 705 of the RTKL, it is not required "to compile, maintain, format or organize a record" in a manner in which it does not currently do so. It is the School District's position that the RTKL, based upon Section 705, does not require it to format data in Excel when it does not otherwise format its data in Excel. This reference on page 4 of the Final Determination should be revised accordingly.

3. On page 5 of OOR's Final Determination, OOR again paraphrases and misconstrues the issue raised by the School District on Appeal when it states that "the Appeal is limited to whether the School District may defend its denial as to parts 1 and 4 based upon Section 705, due to its alleged inability to copy the electronic records into an electronic medium given the need for redaction." This is not the position as stated by the School District in its submission to OOR. Rather, the School District's position was that based upon Section 705 of the RTKL, it is unable to provide access to the requested records in an electronic medium on the

basis that the School District is unable to electronically redact non-public information utilizing the current format of the data and can only do so by re-formatting the records into formats which the School District does not utilize. Therefore, the statement of the issue on appeal contained on page 5 of the Final Determination should be revised accordingly.

4. Reconsideration is sought of the application and interpretation of the term "format" as identified by OOR on page 6 of the Final Determination. OOR indicates that since the term is not defined within the RTKL, it will rely upon the dictionary definition of the term which it references from the American Heritage Dictionary, 2nd Edition. In the context of a "computer format" which is at issue in this Appeal, a more relevant definition is that contained in the Merriam Webster On-Line Dictionary in which format is defined as "a method of organizing data." The proper definition of this term is critical for an appropriate analysis of the arguments raised by the School District. Although OOR provides a dictionary definition of "format," it then fails to apply that definition in its analysis of the issues raised by the School District. It is requested that OOR reconsider its decision based upon the above definition provided by Merriam Webster On-Line Dictionary as it relates to the "computer format" of data. As indicated in the School District's Position Statement filed with OOR, the "method of organizing data" in the computer context takes on a myriad of formats, including .pdf, .xls, .doc, .vsc, .rpt, ASCII, delimited text files and many others. Each of these formats is a different "method of organizing data" within the electronic medium.

5. "Format" as identified in Section 705 of the RTKL is not equivalent to the "download" of data, which term nowhere appears in the RTKL. Merriam Webster On-Line Dictionary defines "download" as the "transfer (as data or files) from a usually large computer to the memory of another device (as smaller computer)." While it may be appropriate to reference the "download" of the School District's electronic data to a paper medium, the term "download" is inapplicable when referring to the re-formatting of data from the MUNIS/Pentamation databases maintained by the District into another computer format, whether it be a delimited text file or

Excel format, neither of which are utilized by the School District to currently format its data. The attempted interchangeability of the terms "format" and "download" is improper and an incorrect application of Section 705 of the RTKL which specifically does not require the School District to change the "format" of a record into a "format" which it does not currently utilize. Reconsideration is requested based upon this distinction.

6. "Format," as provided in Section 705 of the RTKL, is also not equivalent to the term "export" which again nowhere appears in the RTKL. Merriam Webster On-Line Dictionary defines "export" as "to carry or send to some other place." In the context of this analysis, the records contained on the MUNIS/Pentamation databases may be "exported" to a printed paper copy as there is no "re-formatting" of the data. To the contrary, the records maintained in the MUNIS/Pentamation format are not "exported" to a delimited text file, .pdf or .xls format. Rather, the records are "re-formatted" into the respective formats. Again, Section 705 of the RTKL does not require the School District to format the records maintained in the MUNIS/Pentamation format into any other format, such as a delimited text file, .pdf or .xls format, none of which it currently utilizes for the records in question. The terms "format" and "export" are not interchangeable as the Final Determination seems to indicate. Therefore, reconsideration is sought to properly apply the appropriate definition of "format" as indicated above.

7. The reference at pages 6-7 by OOR in its Final Determination regarding "queries" of databases is inapplicable to the issues raised by the School District in its Position Statement to OOR. Therefore, reconsideration is requested to remove these references completely from the Final Determination.

8. On page 7 of the Final Determination, OOR asserts that the act of redacting records does not constitute the "creation of a record" or "compilation" of a record as prohibited by Section 705 of the RTKL. However, the analysis does not end at that point. Rather, it is important for OOR to recognize that Section 705 of the RTKL is prefaced by the clause "when responding to a request for access." The response to a request for access includes the

necessary redaction of non-public information under Section 706. Therefore, in complying with the redaction requirements of Section 706 in response to a request for access, the School District is not required to re-format its records into a format not currently utilized by the School District. In this specific instance, and as argued by the School District in its Position Statement to OOR, the School District is not required to re-format the records contained in the MUNIS/Pentamation format into any other electronic format not currently used by the School District such as a delimited text file, .pdf or .xls format. The District recognizes that it would not be creating a record or re-formatting a record in fulfilling its redaction responsibilities by printing out a paper copy to complete the necessary redaction, or if possible, electronically redacting information in the MUNIS/Pentamation format without re-formatting the records into a delimited text file, .pdf or .xls format. As admitted even by the Requester's own expert, this is not possible and re-formatting into a delimited text file, .pdf and/or .xls format through a process of reverse engineering is necessary. Sections 705 and 706 of the RTKL do not require this reverse engineering/re-formatting. Reconsideration is sought based upon this analysis.

9. Based upon the issues raised in this Petition for Reconsideration, it is requested that the reference by OOR on page 7 that "the School District must provide the records in the medium in which they exist, as well as redact only the protected portions" should be either deleted in its entirety or adjusted accordingly based upon the issues raised in this Petition.

10. The reference by OOR on page 8 of the Final Determination that the School District's position is that "electronic redaction is not required by the RTKL" is not accurate. To the contrary, it is the School District's position that electronic redaction may be required by the RTKL as indicated on page 9 of the Final Determination, but only when the process of redaction under Section 706 of the RTKL, when responding to a request for access under Section 705 of the RTKL, does not require the School District to re-format a record in a manner in which the School District does not currently format that record. The District has always indicated its position in response to the Requester's request for access that if the MUNIS/Pentamation

formats permitted electronic redaction, the School District would perform the electronic redaction in the MUNIS/Pentamation formats and provide the electronically redacted records in an electronic medium to the Requester. However, as indicated above, such electronic redaction is not possible absent the re-formatting of the records into a format not currently utilized by the School District. Therefore, reconsideration is requested to accurately reflect the School District's position on electronic redaction.

11. On page 9 of the Final Determination of OOR, OOR again attempts to substitute the terms "export" and "download" to require the School District to engage in these functions, and thereby not violate the "re-formatting" prohibitions of Section 705 of the RTKL. However, reconsideration should be granted to address the above arguments that the MUNIS/Pentamation formatted records cannot be redacted unless the records are re-formatted into a delimited text file format and/or into an Excel format through a process of reverse engineering, none of which the School District is required to perform under Section 705 of the RTKL. In contrast, no re-formatting is necessary when the MUNIS/Pentamation records are "downloaded" and/or "exported" onto paper copies. This distinction is critical and requires reconsideration by OOR.

12. Similarly, the above distinction is critical as OOR relies upon the ability to "export" a MUNIS/Pentamation record into a delimited text file on page 10 of the Final Determination, as well as the ability to electronically "download into Excel" to perform redaction. Again, in both instances, the act which is occurring, through a process of reverse engineering, is the re-formatting of the records maintained in the MUNIS/Pentamation format into a delimited text file format and then an Excel format. This is not required by Section 705 of the RTKL and requires reconsideration by OOR.

13. Contrary to the statement made by OOR on page 10 of its Final Determination, the relevant inquiry is not whether electronic redaction is feasible, but rather whether electronic redaction is possible without re-formatting records into formats which are not currently utilized by

the School District. Merely because electronic redaction may be "feasible" or possible, is in no manner an indication that it is required under the RTKL, especially when it can only occur by re-formatting records into formats not currently utilized by the School District.

14. Of great concern is the apparent complete disregard of the prohibitions of Section 705 of the RTKL when OOR, on page 11 of its Final Determination, indicates that "the electronic format of the information may be presented in a manner that would maximize security of the redacted information, even if that entails the School District saving and supplying the data in another computer program such as .pdf." By use of the term "program" OOR again attempts to mask what it is actually suggesting, namely that the School District would be required to provide records electronically, even if it can only do so, because of security concerns, by re-formatting the record into a format which it does not currently utilize and may not even have the capability to accomplish. Reconsideration is sought to delete this reference from page 11 of the Final Determination.

15. Again, on page 11 of the Final Determination, OOR requires the electronic redaction of records merely because it is "feasible" rather than properly analyzing the issue based upon the requirements of Section 705 of the RTKL. Feasibility is not the issue. The issue in the analysis should be focused upon whether electronic redaction is possible in the format currently utilized by the School District or whether electronic redaction is only possible by re-formatting the records. If re-formatting the records is necessary, Section 705 of the RTKL does not require it.

16. Further, on page 11 of the Final Determination, OOR again substitutes the term "downloaded" and "downloading" and indicates that "downloading ... does not constitute creation of a record." While this statement, in and of itself, is not incorrect, it is premised upon a correct interpretation of the term "downloading." "Format" and "downloading" are not equivalent as indicated by the previous application of the common meaning from the dictionary terms.

While "downloading" may not constitute creation of a record, the re-formatting of a record into a different format is not required under Section 705 of the RTKL.

17. On page 12 of the Final Determination, OOR references its decision in *Commonwealth Education Organization v. Department of Education*, OOR Docket AP 2009-0488. However, OOR's decision in that case is internally inconsistent with the Final Determination in this matter. Reconsideration should be granted to reconcile the inconsistencies in the two decisions, specifically as follows:

- a. The *Commonwealth Education Organization* in that case contended that the Department of Education was capable of formatting information in a manner in which hyperlinks are removed and student's specific data is protected. OOR held that the fact that the Department of Education was "capable of creating a website or programming a data maintenance system so as to be utilized by the public without compromising student information does not mean that the Department is required ... to re-format its database to permit public access." (See page 8-9 of Final Determination at Docket AP 2009-0488). In the within case, OOR is requiring the School District to re-format its records maintained in a MUNIS/Pentamation format into other formats such as delimited text files, .xls and/or .pdf formats, to permit electronic redaction and therefore electronic access; and
- b. Further, on page 10 of the Final Determination in the *Commonwealth Education Organization* decision, OOR held that it found "persuasive the Department's assertion that saving each page reached on the database into a different format, i.e., a pdf, is not required by the RTKL, and would qualify as "creation of a record" under Section 705 as the records are not maintained in pdf. The Department is not required to save the information in a format that is most conducive to CEO's review ... although CEO requested the electronic access received by Superintendents, the only access to which CEO is entitled is copies." Contrary to these findings, in the within matter, OOR is now requiring that the School District be required to re-format thousands of pages of records in a process of reverse engineering into a different format, namely a delimited text file, .pdf and/or .xls formats, all of which OOR held was not required and would be in violation of Section 705 of the RTKL in the *Commonwealth Education Organization* decision. In the within matter, OOR is now requiring electronic access regardless of the re-formatting that is required rather than only providing access by paper copy as it held in the *Commonwealth Education Organization* decision.

18. On page 12 of the Final Determination, OOR again substitutes the word "exported" to support its position that the School District must provide electronic redacted

records by "re-formatting" its Pentamation records into a delimited text format and then into an Excel format, neither of which formats the records are currently maintained. Based upon all of the foregoing, reconsideration should be granted to delete this requirement.

19. On page 13 of its Final Determination, OOR determines that "the School District maintains the records electronically, and thus may either export the records to a printer to be manually redacted, or export the records to Excel to be electronically redacted. The School District has no basis for refusing to export the records to Excel." Again, OOR substitutes the term "export" to avoid the prohibitions against re-formatting as provided under Section 705 of the RTKL. The use of the term "export" is appropriate when the records maintained in the Pentamation format are printed onto paper copies. However, the term "export" is not appropriate in describing the act necessary to re-format the data from the Pentamation format to an Excel format. This constitutes re-formatting which is not required under Section 705 of the RTKL. The basis for the School District's refusal to re-format the records in Excel is because it would require the School District to format records in a format which it does not currently utilize.

In summary, and for all of the reasons set forth above, OOR was without power, authority and/or jurisdiction to require the School District to format the records maintained in the MUNIS/Pentamation format into any other format not used by the School District, including formatting in delimited text files, .pdf or .xls formats.

REQUESTED RELIEF

The School District respectfully requests that OOR grant the School District's Petition for Reconsideration, and thereafter, that it modify the Final Determination as follows:


1. At page 13 of the Final Determination, the "Conclusion" should be amended to state that Requester's appeal is denied in its entirety and the second, third and fourth sentences of the conclusion should be removed and replaced with "the records requested for the 2006-2007, 2007-2008, 2008-2009 and 2009-2010 school years need not be provided in electronic form, and may be provided in hard copy, with appropriate redaction, for the approved per page fee."
2. At page 1, the second paragraph of the "Introduction" likewise should be amended to state that Requester's appeal is denied in its entirety.

3. Appropriate revisions should be made throughout the Final Determination as indicated in the separate items set forth above.

WHEREFORE, the School District respectfully requests that the OOR grant the School District's Petition for Reconsideration in the above-captioned matter, and that the OOR modify its Final Determination in the manner set forth above.

Respectfully submitted,

Date: January 15, 2010



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