



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
A. FELDER,	:	
Complainant	:	
	:	Docket No.: AP 2009-0262
v.	:	
	:	
	:	
EAST STROUDSBURG AREA SCHOOL	:	
DISTRICT,	:	
Respondent	:	
	:	

## INTRODUCTION

A. Felder (“Mr. Felder”) filed a right-to-know request with the East Stroudsburg Area School District (“District) pursuant to the Right-to-Know Law, 65 P.S. § 67.101, *et. seq.* RTKL), seeking unrestricted electronic copies of any and all communications between school officials from January 1, 2009 to the present. The District denied the request stating that the reports are exempt from public release as part of internal pre-decisional communications between the administration and the School Board. Mr. Felder filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, Mr. Felder’s appeal is **granted** and the District is required to take further action as provided below.

## **FACTUAL BACKGROUND**

On March 18, 2009, Mr. Felder filed a right to know request with the District. Specifically, he stated that at School Board meetings, the East Stroudsburg Area School District Superintendent references "board packets" ("Board Packets). Mr. Felder believes that members of the School Board discuss these Board Packets prior to the School Board meetings. Mr. Felder requested unrestricted electronic copies of any records reflecting Board communication about the Board Packet from January 1, 2009 to the present, including any emails by and between the Superintendent, the administrative staff and the members of the School Board.

In an undated letter, Eric Forsyth, Open Records Officer for the District, denied the request and referred Mr. Felder to the District Web site where the District has posted other public documents so that they are available for access and review. Additionally, he stated that e-mails are exempt as internal, pre-decisional deliberations of an agency pursuant to § 708(b)(10)(i).

The District did not advise Mr. Felder of his right to appeal to the OOR. Regardless, Mr. Felder filed an appeal to the OOR on April 3, 2009. Mr. Felder subsequently granted the OOR additional time to issue a Final Determination.

In additional information submitted to the OOR, the District reiterated that any communications regarding the matter of Mr. Felder's inquiry are exempt under § 708(b)(10)(i). The District gave no additional information demonstrating how these communications were exempt under § 708(b)(10)(i).

## **LEGAL ANALYSIS**

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

Section 102 of the RTKL, defines the term “record” 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. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document.”

The RTKL provides further clarity in defining 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.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions and it is not the role of the OOR to identify potential areas of exemption.

Specifically, § 708 in pertinent part states:

(a) Burden of proof. —

(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

65. P.S. § 67.708.

Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8<sup>th</sup> ed. West 2004). See also Commonwealth v. Williams, 615 A.2d 716 (PA. 1992).

As a procedural matter, the District failed to comply with the basic requirements for denying a Right-to-Know request as set forth in Section 903 of the RTKL. The District is advised that it must comply with all requirements of the RTKL in its future denials

In its denial, the District cited the predecisional deliberation exception under Section 708(b)(10) to protect the information sought in the request. Section 708(b)(10)(i)(A) provides that “a record that reflects the internal, predecisional deliberations of an agency... relating to a...contemplated or proposed policy or course of action or any research, memos, or other documents used in the predecisional deliberations” are protected from disclosure. See 65 P.S. §67.708(b)(10)(i)(A). To qualify for protection under this exception, a record must reflect an agency’s deliberations, and relate to a proposed policy or course of action for the agency. Therefore, the exception applies to protect records pertaining to agency business and specifically, discussions about policies and future actions or decisions.

“Internal predecisional deliberations” have been defined in case law interpreting the “deliberative process privilege” as those deliberative aspects of decision-making that reflect policy-making, recommendations, or work-product. LaValle v. OGC, 564 Pa. 482, 496, 769 A.2d 449, 458 (2001). The Supreme Court imposed three conditions for the privilege to apply: (1) the communication must have been made before the deliberative process was completed; and (2) the communication must be deliberative in character in that it makes recommendations or expresses opinions on legal or policy matters; and (3) the information cannot be purely factual in nature. Com. v. Vartan, 557 Pa. 390, 733 A.2d 1258 (1999).

Here, Mr. Forsyth generally states that all the requested e-mails relate to internal predecisional deliberations of the District.<sup>1</sup> The OOR notes that the pre-decisional deliberation

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<sup>1</sup> The OOR notes that Mr. Felder’s records request could be interpreted as unlimited and that an opened ended nebulous request for any and all e-mails can be denied for lacking specificity. However, the District did not raise that exception here.

exception set forth in Section 708(b)(10) of the RTKL could be used, if interpreted broadly enough, to frustrate the intent of this new RTKL – enhanced access to government records. Once again, the burden is on the agency denying access to prove that the records sought are truly pre-decisional and deliberative and not merely factual or otherwise.

The OOR's concern with the District's defense is that it may imply that the elected members of the School Board, who are bound by the public access provisions of the Pennsylvania Sunshine Act, are subverting the principles of that law by engaging in e-mail exchanges to avoid their obligation to deliberate in public. The OOR is required under Section 1310 of the RTKL to provide training on both the RTKL and the Sunshine Act. It cannot therefore support any interpretation of the pre-decisional deliberation exception of the RTKL that provides elected boards with a mechanism to avoid the public scrutiny otherwise required by the Sunshine Act. The OOR believes that such an interpretation would subvert the letter and the spirit of *both* of these critical open government laws.

While it's possible that much of the information in the requested documents may be properly characterized as pre-decisional deliberations, the OOR finds it highly unlikely that all the requested records are predecisional deliberative communications. In fact, the OOR finds it implausible that the records do not include some purely factual information or observations. By simply making a blanket denial on the basis of the pre-decisional deliberative exception, the District here failed to meet its burden of proof to show that every single aspect of every single record is exempt. Records or portions of records that contain information that is purely factual that is not otherwise exempt from disclosure in nature are public and must be provided to Mr. Felder.

Under the plain language of the RTKL, an “agency may not deny access to the record if the information which is not subject to access is able to be redacted.” 65 P.S.

§67.706. As such, the District is directed to provide copies of the requested records to Mr. Felder with any nonpublic information redacted.

**CONCLUSION**

For the foregoing reasons, this appeal is **granted** and the District is required to release the records requested with any nonpublic information redacted. The parties are advised that this is a Final Determination and is binding on the parties. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Court of Common Pleas in Monroe or Pike County. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1302.

FINAL DETERMINATION ISSUED: May 8, 2009



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APPEALS OFFICER  
NATHANAEL J. BYERLY, Esq.