



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>MARY ANN ZELDENRUST,</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. AP 2009-0305</b>
	:	
<b>POCONO MOUNTAIN</b>	:	
<b>SCHOOL DISTRICT,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Mary Ann Zeldenrust (“Citizen”) submitted a request to Pocono Mountain School District (“School District”) seeking documentation evidencing the taxes withheld for mileage reimbursement/automobile allowances for all School District Central Administrators<sup>1</sup> pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The School District considered the information “personal financial information” exempt from disclosure under section 708(b)(6)(i)(A) and denied the request. Citizen filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted** and the School District is required take further action as set forth below.

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<sup>1</sup> As discussed below, there was some uncertainty as to the records requested. This is not the language of the actual request, but rather the OOR’s interpretation of the request. Further, the term Central Administrators is never defined by the parties and is not at issue in this Appeal.

## FACTUAL BACKGROUND

On March 15, 2009, Citizen submitted a right-to-know request to the School District seeking multiple records including:

1. As a follow up to the previous request response that stated “Central Administrators receive a flat rate mileage reimbursement/automobile allowance as part of contractual benefits in which monthly [mileage] logs are not required”, please provide documentation regarding the taxation of posting on W2s [sic] for this monthly allocation for the 2007-2008 school year and 2008-2009 school year to date.
2. As a follow up to the previous request response that stated “Administrators do not use PMSD owned vehicles,” please provide:
  - a. Mileage logs for fleet vehicles (owned or leased) for the 2008-2009 school year
  - b. Vehicle use logs for fleet vehicles (owned or leased) for the 2008-2009 school year
  - c. Gasoline pump logs for fleet vehicles (owned or leased) for the 2008-2009 school year
  - d. Odometer logs for fleet vehicles (owned or leased) for the 2008-2009 school year

(“Request”).

Wendy Frable, Open Records Officer for the School District, responded by denying the request for the “taxation posted to individual W-2s for the monthly mileage reimbursement/automobile allowance.” The School District asserts that pursuant to Section 708(b)(6)(i)(A) of the RTKL “the specific financial information posted on W-2s . . . is personal financial information and not part of the public record.”

Also in support of the Denial, the School District refers to the Privacy Act and Paperwork Reduction Act notice attached to the W-2 form itself asserting as follows: “[T]ax returns and return information are confidential as required by §6103. The prohibition applies not only to employers, but also to the Internal Revenue Service (IRS) itself. The notice provides that §6103 provides a laundry list of proprietary disclosures. Other than that, disclosure is prohibited.”

(“Denial”). The School District provided a document listing the salaries, offered to provide a list of mileage reimbursement/automobile allowances and denied requests numbered 2a-2d because the records do not exist.

On March 20, 2009, the OOR received an appeal from Citizen in which she argues that §708(b)(5)(i)(A) does not apply to request number one (1) because the scope of her request is “limited to the taxation of public monies paid by tax-payers to the Central Administrators. The request does not ask for personal financial information outside of the publicly funded revenue.” (the “Appeal”). Citizen asserts that the School District’s response “did not provide information regarding the handling of the monthly flat rate mileage reimbursement/automobile allowance.” She further notes that “it is not clear from the response if the flat rate allowance is included or excluded from the annual salary.” Finally, Citizen points out that “[i]f the allowance is paid separately and, for instance, form 2106 is filed with the IRS, the vehicle use logs/mileage logs would need to be provided to the IRS which would mean that the vehicle use/mileage logs are maintained. If this is the case, these records should be available.” It is not clear by this statement whether Citizen intended to appeal the denial of requests 2a-2d.

The OOR asked each party to submit additional information to support their positions. Citizen did not respond. Deirdre J. Kamber, Esquire responded on behalf of the School District asserting that School District provided all the public documents that it believes are responsive to the request. The School District further stated:

“documentation ...[regarding] how these employees calculated his or her reimbursement: this is located on an individual’s W-2. As it is the employee who decides how much of this reimbursement should be deemed salary, and how much goes towards business expenses, it is up to each individual to decide when and if they want to declare these monies as taxable compensation. So, while [Citizen] did not directly ask for W-2s, but rather documentation relating to W-2s, the information that she seeks, apparently, may be the W-2s themselves. The W-2s and the information therein, we

believe, are confidential, exempt by law, and unavailable for release by the [School District]; therefore, the [School District] cannot provide W-2s to fulfill [Citizen's] still opaque request.”

The School District asserts sections 102 (by virtue of 26 U.S.C.S. §6103) and 708(b)(6)(i) of the RTKL as the legal basis for withholding the W-2s. The School District contends that 26 U.S.C.S. §6103 prohibits disclosure of the W-2 because the Privacy Act and Paperwork Reduction Act Notice, attached to the W-2 “provides a specific laundry list of proprietary disclosures; other than that, disclosure [of returns and return information] is prohibited.” The School District contends that none of the permitted disclosures are applicable to this request stating “[i]t is not disputed that the W-2 form itself, with no information provided, would be a public document.” It argues that by “the definition of ‘return’ and ‘return information’ the preclusion on sharing any tax information applies to the underlying tax information in addition to any tax returns submitted thereto.” The School District also advise that the legal principles of supremacy and specificity dictate that §6103 controls over the RTKL.

The School District contends that section 708(b)(6) of the RTKL which exempts “personal financial information” from disclosure also prohibits School District’s disclosure of the information requested. It explains that because employees are not required to maintain mileage logs the salary and flat mileage rate payment made to the Central Administrators are non-accountable plans. The School District provides the IRS Publication 463 definition of a non-accountable plan as a “reimbursement or an expense allowance arrangement that does not meet one or more of the three rules listed above for Accountable Plans.”

The School District adds that these non-accountable plans do not necessitate listing or a return of information by the employees. The School District asserts that it is “up to the employee solely to determine for himself or herself how much of that money paid to him or her is deemed

compensation, and what may be used for other tax purposes. This information is solely personal and . . . within the gambit of ‘personal financial information’ and must therefore be exempted by §708(b)(6)(1)(a).”

The School District raises a question of vagueness regarding the request; however, it acknowledges that the W-2 may contain the information responsive to the request. Therefore, a determination whether the request was vague is unnecessary. In addition, because Citizen did not clarify her request and the School District asserts that it provided all responsive records save the W-2, the sole issue on appeal is whether the requested posting on a W-2 is subject to disclosure. The School District raises two points for consideration in this appeal:

1. Whether the information on the W-2s is protected from disclosure by §102 of the RTKL by application of the confidentiality provisions in 26 U.S.C.S. §6103; and
2. Whether the W-2 is protected under §708(b)(6) of the RTKL 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. §§67.102 and 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 School District Does Not Establish That the Requested Information on the W-2s Is Protected From Disclosure By Application of the Confidentiality Provisions in 26 U.S.C.S. §6103.**

The Privacy Act and Paperwork Reduction Act Notice attached to a W-2 states: “Tax returns and return information are confidential as required by §6103.” According to 26 U.S.C.S. §6103(b), tax return and return information are defined as follows:

(1) Return. The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information. The term "return information" means--  
(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

The School District argues that the only permitted disclosure even remotely material is §6103(g) which provides for disclosure of a return of an individual to that individual or the spouse of that individual under specific conditions. *See* 26 U.S.C.S. §6103(g). The School District cites to several cases in support of its interpretation that “general requests including FOIA do not allow for the release of return information.” *See i.e.* 5 U.S.C.S.

§552; *Kanter v. IRS*, 478 F. Supp. 552 (N.D. Ill. 1979); *Tanoue v. IRS*, 904 F. Supp. 1161 (D. Haw. 995); *Western Ctr. For Journalism v. IRS*, 116 F. Supp. 2d 1 (D.D.C. 2000), *affd* 22 Fed Appx. 14 (D.C. Cir. 2001); *Fonzone v. Dept. of the Treasury*, 2002 U.S. Dist. LEXIS 15729 (E.D. Pa. 2002), *affd, motion denied* (2003, CA3 Pa) 64 Fed.Apppx. 850, 2003-1 USTC P 50389, 91 AFTER 2d 1727.

In *Kanter*, the records at issue were investigatory records that were reviewed *in camera*. The court makes a blanket statement that “to the extent that many of the documents remaining in dispute contain third party tax return information, they are exempt from disclosure under [§6103](b)(3).” 478 F. Supp. at 556-557. *Kanter*, therefore, is not helpful as the type of record is not revealed.

In *Tanoue*, the record at issue was a notice of a tax lien. The court found that “the information in a notice of tax lien is public information precisely because anyone can go down to the relevant agency and obtain a copy of the filed document. In other words, the information contained on the form is no longer confidential.” 904 F. Supp. at 1167. Similarly, the amount of the employee’s mileage reimbursement/allowance is public information. This is supported by the School District’s disclosure of that information in the form of a list provided to Citizen. Therefore, the same information contained on the W-2 is likewise not confidential.

At first glance, *Western Center for Journalism*, appears to support the School District’s position. There the court found confidential the information redacted from the tax audit and examination documents sought. The redacted information included “names, tax identification numbers, tax years under investigation, and other tax data of taxpayers other than the plaintiff.” 116 F. Supp. 2d at 11. However, what distinguishes *Western*

from the instant matter is that there and in *Fonzone* the records were in the possession of and requested directly from the IRS. In the instant case, the information is being sought from the employer. As was discussed in *Stokwitz v. United States*, 831 F.2d 893, 896 (9th Cir. 1987) “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.” 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 Defendant in each of the cases cited by the School District is the IRS. The School District provides no case law or other evidence to support its position that §6103 applies to W-2s in its possession.

Furthermore, the School District’s assertion that only a blank W-2 form is public and that such an “approach seems to encompass the advisory opinion of the OOR with respect to W-2 information” is disingenuous. The OOR has not issued an advisory opinion regarding W-2s. In fact, it has specifically declined to do so. In its explanation as to why an advisory opinion was not issued the OOR states: “The law defines a public record clearly and a W-2 form falls into that definition in that it documents a transaction of the agency. It is equally clear under the law that personal financial information and personal identification may be redacted pursuant to section 708(b)(6).” See March 8, 2009 letter from the OOR to PSEA (available at <https://www.dced.state.pa.us/public/oor/ao/W2Denial.pdf>). The OOR does not opine as to which, if any, of the W-2 information qualifies as personal financial information or personal identification information. That is left to be addressed if raised on appeal.

The OOR determines that 26 U.S.C.S. §6103 does not preclude disclosure of all W-2 information. Therefore, it is not necessary to discuss the School District's assertions of the legal doctrines of supremacy and specificity.

**2. The W-2 Itself Is Not Personal Financial Information Under §708(B)(6).**

The School District also argues that all of the information on a W-2 is “personal financial information.” Section 708(b)(6)(i) 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).

As the OOR determined in *Campbell v. Berwick Area School District*, OOR Dkt. AP 2009-0212 and reiterated in *Campbell v. Souderton Area School District*, OOR Dkt. AP 2009-0269, “when construed in accordance with its plain meaning, “personal finances” means “an individual’s monetary resources.” Information *relating to* an individual’s monetary resources has the capacity to be broad enough to encompass any financial information.” *Souderton*, p. 5. The School District’s contention that no information on a W-2 may be disclosed because it is all personal financial information has already been addressed and rejected by the OOR. The School District is referred to *Souderton* which provides a thorough discussion of this issue generally and specifically guidance as to redactions the OOR has determined to be permissible.

We find that the mileage reimbursement information on a W-2 is not confidential and is subject to disclosure. The School District argues that because the employee has discretion as to whether or not to deduct the reimbursement as a business expenses, such information is “personal financial information”. We find this argument without merit. As discussed in *Souderton*, not all information relating to an individual’s monetary resources rises to the level of

personal financial information. The OOR recognizes that certain financial transactions that “reveal ...much about a person’s activities, associations, and beliefs,” *Plante v. Gonzalez*, 575 F.2d 1119, 1129 (5<sup>th</sup> Cir. 1978), may be protected. However, a W-2 posting regarding mileage allowances/reimbursements does not reveal the employee’s personal financial decision. It only reveals the amount of reimbursement given by the public employer. School District itself points out by reference to an IRS example and answer that it is required to include this information on the W-2 as wages in any event. The employee must determine how much, if any, the employee will actually deduct as business expenses (and complete a Form 2106 or 2106-EZ to itemize these deductions if such deductions are made). Further, this dollar figure has already been publicly disclosed by the School District in the document listing each Central Administrator’s mileage reimbursement/automobile allowance provided to the Citizen. How the employee chooses to use that information when completing his or her tax return is not being revealed by disclosing the figure posted on the W-2. Therefore, the posting of the mileage allowance on the W-2 is not personal financial information, and therefore, must be disclosed.

### CONCLUSION

For the foregoing reasons, Citizen’s appeal is **granted**. The School District is directed to supply copies of the W-2s showing information regarding the posting of the mileage allowance/reimbursement within thirty (30) days. As to other information contained on the W-2 which is not at issue here, the OOR renders no opinion on this except to remind the School District that it may redact only information that has been previously determined as prohibited from disclosure or provide a description of and legal basis for the redaction. 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 Court of Common Pleas of Monroe County. 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 OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED: May 20, 2009**

A handwritten signature in black ink, appearing to read "Audrey Buglione", written in a cursive style.

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**AUDREY BUGLIONE, ESQ.  
APPEALS OFFICER**