

On April 29th, Wendy Frable, the Open Records Officer (“ORO”) for the School District, substantively responded, advising that the Request was granted in part, and denied in part. The School District supplied a blank W-2 form as its alleged “grant,” and denied access to the W-2 of Ms. Jaditz based upon an alleged statutory prohibition in 26 U.S.C. §6103, and as “personal financial information,” which is protected by Section 708(b)(6)(i)(A) (the “Denial”). The School District failed to include appeal instructions in its Denial as required by Section 903(5).

On May 12th, the OOR received an appeal from Citizen advising that he challenges the withholding of the record he sought based upon a statutory exemption because the statute cited does not apply in any other context than the tax-collection function (the “Appeal”). He notes that the W-2 should be produced because the law does not apply to release of financial information of a public employee by a public employer.

On May 19th, the OOR requested the School District to support its Denial in light of the OOR’s Final Determination in *Campbell v. Souderton Area School District*, OOR Dkt. 2009-0269, which found that W-2s issued by agency employers are public records from which limited personal financial information may be redacted. In response, the School District submitted a Letter Memorandum in which it advised that 26 U.S.C. §6103 is a federal statute that preempts the RTKL, and serves to prohibit release of tax returns and “return information,” which it argues includes the W-2 at issue. The School District also argued that “tax information” is protected from disclosure under the Local Tax Enabling Act, 53 P.S. §6913(V), (“LTEA”), and Local Taxpayers Bill of Rights, 53 Pa. C.S. §8437. With regard to the OOR’s decision in *Souderton*, the School District asserted that W-2s have been held to be protected as “personal financial information.” The School District also contends that the OOR should have conducted a balancing test for a privacy analysis in assessing whether information was “personal” or not.

The School District disagrees with the conclusion in *Souderton* and argues that mandatory tax deductions are predicated upon an employee's deductions for herself and family members, and are thus "personal." The School District also argues that the Flexible Spending Account (FSA) information "absolutely reflects" the medical usage of an individual, and must be protected as private facts, revealing health information, and possibly perception of a disability. However, no facts were submitted to show the alleged private nature of the FSA with regard to the W-2 at issue. Ultimately, the School District maintains that it cannot be compelled to violate the law, 26 U.S.C. §6103, and produce the W-2 in response to a right-to-know request.

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 "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. The School District contends that the W-2 in its entirety is protected from release by a federal statute, and secondarily argues that most of the boxes on a W-2 contain "personal financial information" protected by Section 708(b)(6)(i)(A).

1. The statutory exemptions the School District cites do not prohibit release of W-2s.

The School District contends that its disclosure of W-2s is prohibited by 26 U.S.C. §6103, a part of the Internal Revenue Code, and that the federal statute trumps the RTKL. The School District also cites, without analysis, *Juniata School District v. Wargo*, 797 A.2d 428 (Pa. Commw. 2002) in which the Commonwealth Court determined that "tax information" sought from earned income tax returns is protected from release under the RTKL because it is protected under the LTEA and the Local Taxpayers Bill of Rights.

In support of its conclusion that a federal statutory prohibition exists in 26 U.S.C. §6103, the School District cites a number of cases that are in the open records context under the Freedom of Information Act, 5 U.S.C. §552 (FOIA), all of which pertain to records requests served upon the IRS as a federal agency, for tax return information. The OOR has reviewed the cases cited by the School District and the statute and concludes that as a matter of law, 26 U.S.C. §6103 does not serve as a statutory prohibition applicable to non-IRS agencies production of an agency-issued and prepared W-2.

The School District's argument relies completely upon two predicates, neither of which have been established by the School District: (1) that the Internal Revenue Code provisions serve as a restraint upon disclosure by entities other than the Secretary of the IRS, in contexts other than a request served upon the IRS; and (2) that a W-2 issued by an agency employer qualifies as "return information" which is barred from release under 26 U.S.C. §6103. The School District's argument is fundamentally flawed because it assumes without analysis that a W-2 issued by an agency-employer, which is prepared and compiled by the agency-employer, is identical to "return information," which is defined in pertinent part as:

(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 [of the IRS] with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense...

Provision of the information to the IRS is an integral element to the definition of "return information," and one that is not addressed by the School District. Although the OOR recognizes that a W-2 may be submitted to the IRS and may reflect sources of income, it is not itself "return information" the production of which is forbidden by any agency, in any context.

The context of the IRS provision is clearly that of the governmental function of tax administration, whereby the return information is provided *to* a government agency by an individual or entity under compulsion of law for filing of taxes and proof of assets and liabilities. Such is not the case with regard to the W-2s at issue, which are agency-issued, and the source of the document itself is the agency that utilized government resources to prepare the document. The statute permits access to certain governmental bodies and others in specific contexts, and under such conditions and in such a manner as “prescribed by the Secretary,” 26 U.S.C. §6103(p), which shows that the statute contemplates release and disclosure solely by the IRS.

In support of its position, the School District cites a number of cases that hold the statute serves as a bar to disclosure of return information sought from the Internal Revenue Service (IRS), a federal agency subject to the FOIA. In each of the cases cited by the School District, the IRS was the agency from whom the “return information” was requested. None of the cases cited by the School District hold that a W-2 issued by an agency constitutes “return information” or that release of a W-2 by an agency other than the IRS is prohibited under 26 U.S.C. §6103.

The OOR’s research into this issue reflects that federal cases hold that “Section 6103 is clearly designed to protect the information flow between taxpayers and the IRS by controlling the disclosure by the IRS of information received from taxpayers.” *Stokwitz v. United States*, 831 F.2d 893 (9th Cir. 1987), and “while Section 6103 broadly defines ‘return information,’ it is restricted *to data obtained or prepared by the Secretary of the IRS.*” *See Ryan v. United States*, 74 F.3d 1161, 1163 (11th Cir. 1996)(emphasis supplied). The statute has been interpreted in accordance with its legislative history, “directed to controlling the distribution of information the IRS receives directly from the taxpayer -- information the taxpayer files under compulsion and the threat of criminal penalties.” *See United States v. Tabi*, 2007 U.S. Dist. LEXIS 13255

(S.D.N.Y. 2007)(citing *Stokwitz*). The OOR thus holds that 26 U.S.C. §6103 does not serve as a statutory prohibition to release of a W-2 issued by the School District, and the W-2 cannot be withheld on that basis. *See Zeldenrust v. Pocono Mountain Sch. Dist.*, OOR Dkt. AP 2009-0305 (holding statute does not apply to protect W-2 information).

The School District failed to cite applicable legal authority to support its assumption that protection of return information sought from the IRS equates to protection of a W-2 sought from a School District. None of the cases cited address a records request of an agency for the W-2 issued and prepared by the agency-employer which is the relevant scenario here. Therefore, as none of the cases cited show a W-2 is equivalent to “return information,” and the information requested is not learned or gathered by the School District based upon a tax return submitted to it, the situation is unlike that of *Juniata School District*, and that case does not apply. Therefore, the OOR concludes that the W-2 is not protected from disclosure under the LTEA or Local Taxpayers Bill of Rights, and is public unless otherwise exempt.

2. The School District does not establish that W-2s are protected as “personal financial information.”

The School District argues that a W-2 in its entirety qualifies as “personal financial information,” and should be protected *in toto* under Section 708(b)(6)(i). The School District represents that a series of cases cited on page 3 of its Letter Memorandum hold a W-2 qualifies as “personal financial information.” However, upon review, none of the cases so hold. In both *A.M. Maplin Corp. v. Hellmayer*, 203 F.R.D. 499 (D. Kan. 2001) and *Hilkin v. WD40 Co.*, 2006 U.S. Dist. LEXIS 69438 (D. Kan. 2006), the District Court of Kansas was ruling on relevance in the discovery context, and held W-2s were not relevant to the litigation. Also cited for the proposition that W-2s are “personal financial information,” *Conseco Financial Services Corp. v.*

NAMC, 381 F.3d 811 (8th Cir. 2004) held that W-2s as part of loan files qualified as trade secrets and did not analyze personal financial nature of the information at all. Contrary to the School District's assertions, none of the cases cited hold that W-2s are "personal financial information" that should be protected by balancing alleged privacy in the information against public interest in disclosure. The OOR has been presented with no applicable legal authority to challenge its holdings in *Campbell v. Berwick Area School District*, OOR Dkt. AP 2009-0212, or *Souderton*, that a W-2 qualifies as a public record from which limited information may be redacted.

The OOR has held that Boxes 1 through 20 contain public information, with the exception of Box 10, Dependent Care Benefits, and Box 12, life insurance assets, and may protect retirement assets not administered or paid by the agency. As the School District failed to assert any specific facts to support protecting any of Ms. Jaditz's W-2 information under a "privacy" analysis, the OOR finds that the School District failed to meet its burden of proving by the preponderance of the evidence the private nature of any of the Boxes on the W-2. Therefore, only the contents of Box 10, and life insurance assets, if included within Box 12, may be protected from disclosure; the remainder of the W-2 must be disclosed as a public record.

CONCLUSION

For the foregoing reasons, the Citizen's appeal **is granted**. The OOR concludes the School District did not show that a W-2 is not public based upon its asserted statutory exemptions or that a W-2 is protected in its entirety as "personal financial information." Consistent with its prior Final Determinations, the OOR directs the School District to supply a copy of Joan Jaditz's W-2, from which Social Security number, employee identification number, Box 10 contents, and Box 12 contents, to the extent it reveals life insurance assets, may be redacted with the remainder of the W-2 produced. The School District is directed to supply the W-2 with above approved redaction within thirty (30) days.

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: June 11, 2009



LUCINDA GLINN, ESQ.
APPEALS OFFICER