



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
TIMOTHY ANDREKOVICH,	:	
Complainant	:	
	:	Docket No.: AP 2009-0980
v.	:	
	:	
BELLWOOD-ANTIS	:	
SCHOOL DISTRICT	:	
Respondent	:	

INTRODUCTION

Mr. Timothy Andrekovich (the “Requester”) filed a right-to-know request with the Bellwood-Antis School District (“District”) pursuant to the Right-to-Know Law, 65 P.S. § 67.101, *et. seq.* (the “RTKL”), seeking records reflecting the amount of grant money received by the District, the names of the employees who wrote the grants and the amount received by employees for writing grants. The District denied access stating that the records did not exist. The Requester filed a timely appeal with the Office of Open Records (the “OOR”).

For the reasons set forth in this Final Determination, the Requester’s appeal is **granted in part** and **denied in part**.

FACTUAL BACKGROUND

On November 3 and 5, 2009 the Requester filed right-to-know request with the District seeking the following:

- A. Weekly updates to the Board from Jan. 1 – Dec. 31, 2008;
- B. The amount of grant money that the District received in 2004, 2005, 2006, 2007, 2008 and 2009;
- C. Any and all documents that will show the names of the employees who wrote the grant for the years above; and
- D. All documents that will show the amount of money that any employee received as a result of writing a grant for years stated above.

(the “Request”). The District denied the Request stating that it does not maintain a record of the information requested and is not required to compile, maintain, format or organize a record in a manner which the District does not currently use. The District failed to provide the Requester with instructions regarding his right to appeal as required under section 903 of the RTKL. On November 16, 2009, the Requester appealed the denial.

A. Weekly Updates:

On November 20, 2009 Dr. G. Brian Toth, Superintendent and Open Records Officer, responded asserting that the Weekly Updates are exempt under section 708(b)(10)(i). He also asserted that they are similar if not identical to “board packets” and thus denied as predecisional deliberative records pursuant to *East Stroudsburg Area School District v. A. Felder and OOR*, No. 5204 Civil 2009. On December 23, 2009, Elizabeth Benjamin, Esquire responded further on behalf of the District providing the affidavits of

Superintendent Toth and the affidavit of Debra Sitman, Secretary to Superintendent Toth. The District maintained its position that the Weekly Updates contain predecisional deliberations citing *LaValle v. OGC*, 564 Pa. 482, 496, 769 A.2d 449, 458 (2001); *Com. v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999); and *Kyle v. DCED*, OOR Dkt. AP 2009-0801. Attorney Benjamin identified the information in the Weekly Updates as “internal memorandums for the entire Board, in anticipation of upcoming meetings and decisions to be made . . . about proposed policies or courses of action with regard to particular topics, such as collective bargaining negotiations, ongoing litigation, and/or matters of internal operations about which the Superintendent expressed an opinion.” She further noted that the Weekly Updates related to “eventual, future courses of action to be taken regarding a change in the meeting location, for example, or confidential matters pertaining to an ongoing issue with a grievance recently filed.” She explained that the Weekly Updates were “distributed only internally and used solely for the Board’s edification and or reference in informal review prior to Board meetings.” Mr. Toth identified the type of information found in the Weekly Updates as follows:

- a. “Information, reports, opinions, and recommendations from myself, the solicitor, and/or other administrators related to matters and/or decisions to come in the future, as well as other information regarding internal operations and proposed courses of action to be taken by the District in the future.”
- b. “Factual information such as reminders and dates of District events and meetings, awards issued to neighboring Districts, the number of applications received for an advertised position, and other similar information that did not reflect an official transaction or activity of the District.”

See Toth Affidavit, December 23, 2009, ¶9a,b. He further stated as follows:

“weekly updates are not communicated to Board members for the purpose of rendering a decision at that time or within the communication itself. The weekly updates are a form of internal memoranda sent to the Board

members for their preparation prior to Board meetings and to keep them apprised of ongoing matters and recommendations that may be brought before them in the future.”

See Toth Affidavit, December 23, 2009, ¶ 8.

The District’s counsel also advised that the Weekly Updates contained information exempt by the attorney-client privilege; negotiations strategy, citing 708(b)(8); and work papers, citing 708(b)(12) “prepared by (the Superintendent) and for public officials (Board Members) solely for each of the Board members’ and the Superintendent’s personal use, review and edification prior to Board meetings.” The District cites *Shields v. City of Philadelphia*, OOR Dkt. AP 2009-0787 in support of its assertion of 708(b)(12).

The District also asserted that it maintains the Weekly Updates in electronic format only. (Sitman Affidavit, ¶ 6)¹, and that “over 1,000,000 emails pass through our server” which “cannot be generally searched for specific documents.” Toth Affidavit, November 24, 2009, ¶ 6. It argues that “to find these documents, another undue burden would be placed on the district.” *Id.*

The Requester advised that he had received copies of the Weekly Updates for July through October 2009 in which grievance information was redacted. He also read copies of January through June 2009 Weekly Updates on the District’s website. He inquired as to why the 2008 Weekly Updates were different than 2009’s. He provides email correspondence from Mr. Toth wherein Mr. Toth states “[I]f you cannot handle my opinions, then do not read my updates, as I will continue to provide them. Yes, as a

¹ Ms. Sitman states in her affidavit, ¶ 6 “I do not otherwise keep or maintain a hard copy of any weekly update emails.”

resident, you are permitted to request the information and receive it.” Toth Email to Requester, dated October 1, 2009.

B. The amount of grant money that the District received in 2004, 2005, 2006, 2007, 2008 and 2009:

The District asserts that “the amount of grant money” the District received . . . is a request for information and not a proper request for a public record, citing §705.

C. Names of Employees:

The District asserted that documents reflecting the names requested do not exist because the District “does not maintain any records listing, tracking or otherwise identifying the names [of] employees who wrote grants in a given year.” Toth Affidavit November 24, 2009 , ¶ 2. The District asserts it would have to research, compile, create, and format information in order to identify the employees. *Id.* The Requester asserts that only three to four employees in the District receive grant writing money.

D. Amounts Paid:

The Request for the “amounts paid. . .” was denied because the District “does not maintain records tracking the amounts paid to employees for grant writing.” Toth Affidavit, December 23, 2009, ¶ 3. Superintendent Toth asserted that “[a]ny amount is paid through payroll and identified as a grant stipend, but the employees receiving the stipend are not identified.” *Id.* On behalf of the District, Toth advised that it would have to research and compile information from approximately 30,000 payroll records. . . [and that] the records cannot be electronically searched.” *Id.*

LEGAL ANALYSIS

Pursuant to section 67.503(a), the OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). There is no dispute that the

District is a local agency subject to the RTKL, 65 P.S. §67.302. A record in the possession of an agency is presumed to be a public record 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 (emphasis added), 65 P.S. 67.305. The RTKL provides that agencies bear the burden of proving the applicability of any exceptions.. 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 (8th ed. West 2004). *See also Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992).

A. Weekly Updates Must Be Released with any Nonpublic Information Redacted

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. “Internal predecisional deliberations” have been defined in case law (prior to the enactment

of the current RTKL) 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; (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, the District generally states that all of the requested Weekly Updates relate to internal pre-decisional deliberations of the District. 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. While some information in the requested documents may be properly characterized as pre-decisional deliberations, Superintendent Toth acknowledged that non-exempt information is also contained therein, characterizing the updates to include “[f]actual information such as reminders and dates of District events and meetings, awards issued to neighboring Districts, the number of applications received for an advertised position, and other similar information.” The District failed to meet its burden of proof to show that every aspect is exempt in the 2008 Weekly Updates.

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 the Requester with any nonpublic information redacted and the reason for redaction identified and accompanied by an affidavit if facts are relied upon to support legal conclusions. Such redacted information may include information that the District attests, under penalty of perjury, was

actually used in predecisional deliberations or is protected by the attorney-client privilege, 708(b)(8) or other applicable provisions of the RTKL. The OOR holds that section 708(b)(12) is not a valid basis for denying access to the information.

Section 708(b)(12) protects the following records from public disclosure:

(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

65 P.S. §67.708(b)(12) (emphasis added). The District cites *Shields v. City of Philadelphia*, OOR Dkt. AP 2009-0787 as support for its position. However, *Shields* determined that to “qualify for protection under this exception, the records at issue *must not be maintained for an official purpose.*” *Id.* at pg. 5 (emphasis added). There, the public status of the mayor's daily schedule was at issue. The agency argued that it was protected by §708(b)(12). The OOR found that “information maintained in the notes or work papers does not need to be ‘personal’ in nature, like a reminder of a doctor's appointment, but must be purely personal in use.” *Id.* There the daily schedule was “accessible by the public officials' offices, staffs, and in the Mayor's case, security detail, to keep track of the public officials' daily activities.” *Id.* In the instant matter, the Mr. Toth prepares the Weekly Updates as part of his role as the Superintendent for the District to communicate with the Board Members. The Weekly Updates therefore have an official purpose and do not qualify as papers used solely for one's own personal use. *See also Mezzacappa v. West Easton Borough*, OOR Dkt. AP 2009-0673.

Regarding the District's contention that the Weekly Updates are maintained only in electronic format, that 1,000,000 emails pass through the system every day and that it cannot be searched for specific documents, it has not established that these records cannot

be located and retrieved. The OOR notes that the volume of records that the District may be required to search is not a valid basis for denial, nor is the fact that the records cannot be electronically searched

The OOR further notes the while it gives deference to the Monroe County Court of Common Pleas' decision in *East Stroudsburg Area School District v. Felder and OOR* it is not binding in this appeal as the District is not within the jurisdiction of the Monroe County Court of Common Pleas.

B. Request for the Amount of Grant Money the District Received is a Request for Information not a Record.

The District states in its initial denial that this sub-request as stated seeks information and not records. In accordance with the RTKL, written requests must “identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested...” (65 P.S. § 67.703). Agencies are only required to supply access to records that exist: “[w]hen responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record...” (65 P.S. § 67.705). Unlike the other requests which sought “documents that will show” this request is phrased as a question. The RTKL does not require the District to provide answers, only records. As such, the District is not required to take any action in response to this request.

C. Documents Showing Names of Employees who Wrote Grants must be Released.

The District asserted that documents reflecting names of grant writers do not exist because the District “does not maintain any records listing, tracking or otherwise

identifying the names [of] employees who wrote grants in a given year.” (Toth Affidavit) November 24, 2009, ¶ 2. The District has provided the sworn affidavit of its Superintendent attesting that no record exists identifying the names of “all the employees” who wrote grants for the identified years but that it would have to research, compile, create, and format information in order to identify the employees. The RTKL does not require an agency to create or compile a record in response to an RTKL request. 65 P.S. §67.705.

However, this sub-request does not seek a single document, list or log identifying the names of the employees who wrote the grants but rather *records* that show the names. The definition of “record” is “information regardless of physical form...” Therefore, to the extent that multiple records exist that, together, reflect names of any employees who wrote grants, they must be provided. The District, through affidavit, stated that money was paid through payroll and identified as a grant stipend and the OOR finds that the information can therefore be identified and retrieved. Likewise, if the District possesses internal memoranda identifying or directing an employee to write grants, a copy of the grant itself with the writer identified, etc., these records would be responsive to the request and must be produced. These are provided as examples and not a comprehensive list of record types that may reveal the information sought. If no records exist that either collectively or individually identify the employee(s) who wrote grants the District is required to provide an affidavit attesting to such and sworn under penalty of perjury. Again, the OOR notes that the volume of records that the District may be required to search is not a valid basis for denial, nor is the fact that the records cannot be electronically searched.

D. Records Reflecting Dollar Amounts Received by Employees for Grant Writing in 2004-2009 shall be Released.

The District does not deny that the disbursement of grant funds is tracked and reflected on payroll records and in fact acknowledges that the “amount is paid through payroll and identified as a grant stipend, but the employees receiving the stipend are not identified.” (Toth Affidavit November 24, 2009, ¶ 3). The District argues that it would have to research and compile the information in a different manner that it currently compiles the information. As stated above, the District is not required to compile the information differently than it currently compiles it; however, it is required to search and provide records that reflect the information requested. The fact that the District may have to search through a voluminous number of records is not a permissible basis for denying access to the information. Therefore, it must produce the information even if production requires multiple records that require compilation by the Requester.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part** and the District is required to take further action as set forth above. In summary the Appeal is granted in part and denied in part as follows:

- A. Weekly Updates: **Granted in part, denied in part.** The District is required to release the records with redaction of any nonpublic information. The grounds for any redactions must be identified and accompanied by an affidavit signed under penalty of perjury if facts are relied on to support legal conclusions.
- B. Amount of Grant Money: **Denied.** This is not a request for a record.

C. Names of Employees Who Wrote Grants: **Granted.** The District is required to produce records reflecting this information or supply an affidavit signed under penalty of perjury that no such records exist.

D. Dollar Amounts Received By Employees for Writing Grants: **Granted.** The District is required to produce records reflecting this information or supply an affidavit signed under penalty of perjury that no such records exist.

The parties are advised that this is a Final Determination. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Blair County Court of Common Pleas. 65 P.S. §67.1302. All parties must be served with notice of the appeal. The OOR shall be served notice and have an opportunity to respond according to court rules. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED AND E-MAILED: January 19, 2010



APPEALS OFFICER
AUDREY BUGLIONE, ESQ.

Sent to: Timothy Andrekovich, Elizabeth Benjamin, Esquire, G. Brian Toth