



**pennsylvania**  
OFFICE OF OPEN RECORDS

**DETERMINATION UPON  
PETITION FOR RECONSIDERATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>SHERIDAN KIRKPATRICK,</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. AP 2009-0422</b>
	:	
<b>DEPARTMENT OF</b>	:	
<b>PUBLIC WORKS, Respondent</b>	:	

**INTRODUCTION**

Sheridan Kirkpatrick (the “Requester”) filed a right-to-know request (the “Request”) with the Department of Public Works (the “DPW”), pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.* seeking written interview summaries and scoring matrices concerning the management job selections at Polk Center. The DPW denied access based upon various exceptions under the RTKL. The Requester filed a timely appeal with the Office of Open Records (“OOR”). For the reasons set forth below, the appeal is **denied** and the DPW is not required to take any further action.

**FACTUAL BACKGROUND**

On April 1, 2009, the Requester submitted three right-to-know requests to the DPW seeking access to review records. He did not request copies. The third request, which is the only one subject to this appeal, sought access to the “written interview summaries and scoring matrices utilized to determine the rank order and final outcome of the selection process involved in selecting candidates for the positions of (1) Director of Clinical Services – Non Medical and (2) Director of Program Services in the recent management job selections at Polk Center.” (the “Request”).

On May 8, 2009, after extending the deadline to respond, the DPW provided access to a blank version of the scoring matrices, but denied access to records that “set forth the evaluations of the individual candidates. . .” The DPW cited several provisions of RTKL Section 708(b) including 7(vi) (excluding written criticisms), 7(iii) (excludes the results of a civil service or similar test), 7(ii) (excludes performance rating or review), 7(iv) (excludes employment application of persons not hired), and (b)(10) (predecisional deliberations). The DPW also denied the request on the grounds of protecting the constitutional rights of privacy and reputation. The Requester timely appealed to the OOR.

The Requester argues that the denial prohibits him from discovering his own rank scoring in comparison to the selected candidate. The Requester asserted that he has “the right to view the outcome of my own scoring and written comments and my appeal is based on that” and asks the OOR to consider release of the records “for his own personal review.” On June 1, 2009 the OOR asked the Requester if he intended to appeal the denial based on section 708(b). The Requester responded that he was “not equipped to fully respond to that question without the benefit of Legal Counsel.” On June 4, 2009,

Leonard W. Crumb, Esquire, Senior Legal Counsel for the DPW provided information in support of DPW's position. DPW provided a summary of the interview process surrounding applications for the Polk Center positions. The process of evaluating each candidate was described and the DPW provided a blank copy of the "interview form" used for each candidate, a redacted version of the final scoring matrix, and the sworn affidavit of Kathi Bryan.

The DPW stated that the Requester's standing as an employee or applicant has no bearing on his rights under the RTKL "regardless of the availability of some alternative avenue by which access may be had. *See, e.g. Hawkins v. Department of Labor and Industry*, OOR Dkt. AP 2009-0139 and *Rech v. Pennsylvania Department of Education*, OOR Dkt. AP 2009-0034. The DPW also argues that because the Requester did not appeal the denial of access based on section 708(b)(7) "the OOR must affirm DPW's denial of access." The DPW contends that where the appellant fails to raise an issue, the issue is waived. *See e.g. S.T. v. Department of Public Welfare*, 681 A.2d 853, 857 (Pa. Cmwlth 1997)." Further, the DPW argues that the OOR was "barred from raising the issue *sua sponte*, unless the issue goes to the tribunal's subject matter jurisdiction." *See, e.g., Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa. Cmwlth. 2009)."

In the alternative, the DPW argues that its denial based upon section 708(b) was proper. The DPW asserts that the completed interview forms and scoring matrix "represent an inherent judgment regarding each employee's skills, both in absolute terms and with respect to the other candidates" and are therefore "written criticisms of an employee." In addition, the interview form and scoring matrix contain standard questions and evaluation criteria to evaluate the candidates. The DPW acknowledges that the

withheld documents may not constitute a formal “performance evaluation,” the documents do, however, “result in the formulation of judgments regarding each candidate’s communication skills, interpersonal skills, and judgment.” DPW added that “the documents were completed by persons higher in the ODP hierarchy than the candidates . . . [and] provide a snapshot into the way that each candidate was perceived by members of [Office of Disability Programs (“ODP”)] management team.”

Finally, the DPW addresses its arguments that the records are exempt from disclosure under its second ground, Constitutional protection of reputation and privacy. It argues that the Pennsylvania Constitution grants a right of privacy to residents and “agencies have a constitutional duty to avoid violating it.” The DWP acknowledges that the word “privacy” does not appear in the Pennsylvania Constitution, however, asserts that “the Pennsylvania Supreme Court has held that the Constitution does grant a right of privacy to persons, and that that right extends to information about those persons.” See, e.g., *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979). The DPW argued that *Marvel v. Dalrymple*, 393 A.2d 494 (Pa. Cmwlth 1978), although decided under the old RTKL, is persuasive because it involved an unsuccessful candidate’s request to review the rating sheets and evaluations from the interview process. In that case, the DPW points out, the Commonwealth Court required the agency to release the scores of the candidates, but not the rating sheets or written evaluations by the superiors. The DPW argues that although, unlike the old RTKL, the current RTKL does not provide protection for records affecting a person’s reputation, the Pennsylvania Constitution does. DPW asks the OOR to perform a balancing test between the “reputational interests” of the raters and other applicants and the interest in access.

The OOR issued a final determination on June 19, 2009 granting access to the successful candidate's application, but denying access to all other requested records. (the "Final Determination"). The DPW filed a Petition for Reconsideration on July 6, 2009 asking the OOR to reconsider its Final Determination ("Petition for Reconsideration"). The DPW argued that the OOR had *sua sponte* raised and addressed the issue of the successful candidate's application because the Requester did not submit a request for access to the successful candidate's application. The DPW contended that because there was no denial of such a request to appeal the OOR lacked jurisdiction to consider the issue, citing 65 P.S. §67.1101(a)(1), (2) and *Lukes*, 976 A.2d 609. The OOR granted the petition on July 17, 2009 and issues this Determination upon Petition for Reconsideration, denying the appeal in its entirety.

### **LEGAL ANALYSIS**

The Office of Open Records is authorized to entertain petitions for reconsideration pursuant to Pennsylvania's General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.241. In its Petition for Reconsideration, the DPW contends that the Final Determination contained an error of law by *sua sponte* granting access to a record that was not requested.

In its initial Final Determination the OOR agreed with the DPW's assertion that Section 708(b)(7) of the RTKL applies. Section 708(b)(7)(iv) excludes "the employment application of an individual who is not hired by the agency." The RTKL does not define the word "application." The OOR determined that the requested records were surrounding materials of each candidate's "application" for employment and therefore exempt. *See Kirkpatrick v. DPW*, OOR Dkt. AP 2009-0422, p. 6-7. *Kirkpatrick*, p. 7.

However, pursuant to §708(b)(iv) the OOR granted access to the application of the candidate who was hired (the “successful candidate”) as the provision expressly excludes only the applications of those individuals who were *not* hired. The OOR did not consider whether any of the other stated grounds for denial applied.

In its Petition for Reconsideration the DPW asked the OOR to reconsider only its grant of the “successful candidate’s application” asserting that the Requester did not seek access to the “successful candidate’s application” and that therefore the OOR erred by requiring the DPW to provide him with it. Upon reconsideration, the OOR finds that it erred in granting access to the “successful candidate’s application.”

Further, in the Final Determination the OOR considered “written interview summaries and scoring matrices” to be included within the definition of “applications” and found that section 708(b)(7) applied. Also upon reconsideration the OOR determines that this was in error.

We must now consider whether the DPW asserted other grounds sufficient to uphold its denial of access to the requested records. Only the denial of access to the Requester’s and the successful candidate’s written interview summaries and scoring matrices will be considered as the Requester did not appeal the denial of access to every record requested but only the denial of his own and the successful candidate’s.

In its original denial letter dated May 8, 2009 in addition to the 708(b)(7) basis for denial, the DPW also cited 708(b)(10). This exemption allows agencies to withhold records reflecting the “internal, predecisional deliberations of an agency... or predecisional deliberations between agency members, employees or officials...”. 65 P.S. §67.708(b)(10)(i)(A). The OOR has held that to establish this exception, an agency must

show the communication is: (1) *internal* to the agency, including representatives, (2) *predecisional*, meaning it was made before a decision was made; and (3) *deliberative in character* in that it makes recommendations or expresses opinions on legal or policy matters, and is not purely factual in nature. *See Com. v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999).

In its Memorandum dated June 4, 2009, the DPW counsel explained that the Interview Forms “set forth the raters’ judgments regarding the candidates’ success or failure in satisfying the stated criteria.” DPW asserted that the Scoring Matrix “sets forth numerical scores for each candidate in the categories of ‘Communications,’ ‘Experience,’ ‘Interpersonal Skills,’ and ‘Judgment,’ [and] those scores represent an inherent judgment regarding each employee’s skills, both in absolute terms and with respect to the other candidates.” The Requester acknowledges that the requested records are those that were “utilized to determine the rank order and final outcome of the selection process involved in selecting candidates...” *See*, Kirkpatrick Request dated April 1, 2009. There is no dispute that the records were created internally by DPW management and before a decision was made regarding which of the candidates would be hired. Therefore, the DPW properly asserted section 708(b)(10) as grounds for denying access to the written interview summaries and scoring matrix.

Finally, the status of the Requester as the subject of the record or participant in the interview process is not considered in an appeal because only records accessible pursuant to the RTKL are "public records" available to all citizens regardless of personal status or stake in the requested information. *See Rech v. Dept. of Education*, OOR Dkt. AP 2009-0034 and *Hawkins v. Pa. Dept. of Labor & Industry*, OOR Dkt. AP 2009-0139.

## CONCLUSION

For the foregoing reasons, we vacate the Final Determination dated June 19, 2009 and hereby **deny** the Appeal in its entirety. The DPW is not required to take any further action. This Determination upon Petition for Reconsideration is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Commonwealth Court. 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. §67.1301. 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>

**DETERMINATION ISSUED AND MAILED: February 19, 2010**



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**APPEALS OFFICER  
AUDREY BUGLIONE, ESQUIRE**



7. Moreover, at pages 7-8 it purports to grant Mr. Kirkpatrick access to a DPW record to which Mr. Kirkpatrick has never sought access.

### **RELEVANT FACTS and PERTINENT AUTHORITIES**

All of the relevant facts are set forth in the OOR's Final Determination. The legal bases for this Petition for Reconsideration are set forth in the Right to Know Law (RTKL). 65 P.S. § 67.101 et seq.

The requester is Sheridan Kirkpatrick, a DPW employee. As correctly stated in the OOR's Final Determination, Mr. Kirkpatrick "submitted three [written] right-to-know requests to DPW ... The third request, which is the only one subject to this appeal, sought access to the '*written interview summaries and scoring matrices* utilized [by DPW] to determine the rank order and final outcome of the selection process involved in selecting candidates for'" two supervisory positions within DPW. Kirkpatrick v. DPW, at 1-2 (emphasis added).

DPW denied this request. Mr. Kirkpatrick appealed to the OOR, which held "that the DPW properly withheld the ... records sought in the Request ...." Kirkpatrick v. DPW, at 7. For purposes of this Petition, DPW takes no exception to that holding, which resolved the appeal in its entirety.

In this Petition for Reconsideration, DPW takes exception to the OOR's pronouncement that Mr. Kirkpatrick "is granted access to *the successful candidate's application.*" Kirkpatrick v. DPW, at 7-8 (emphasis added). As set forth above, Mr. Kirkpatrick did not ask DPW for access to "the successful candidate's application," nor did DPW ever deny any such request, nor did Mr. Kirkpatrick's appeal to the OOR include any such request. Kirkpatrick v. DPW, at 1 – 8. By raising and addressing this issue *sua sponte*, the OOR violated at least three provisions of the RTKL, and violated that rule – cited in its own opinion – that where a litigant has failed to raise an issue, the administrative tribunal is barred from raising the issue *sua sponte*, unless the issue goes to the tribunal's subject matter jurisdiction.

Section 7082 of the RTKL states that, in order for a person to have a cognizable right of "access" to a "public record" in the possession of an agency, the Right to Know Law (RTKL) requires that the person submit a "request" to the agency, asking for access to that record. Id. Further, in order for a requester to be entitled to "*the relief and remedies provided for in this act,*" including the right to relief from the OOR, the requester must submit a "*written request.*" Id. (emphasis added). In this case, Mr. Kirkpatrick did not submit any request, written or otherwise, for "the successful candidate's application."

Section 1101(a)(1) of the RTKL grants jurisdiction to the OOR to hear appeals involving RTKL requests that are either “denied or deemed denied.” 65 P.S. §§ 702; 1101(a)(1). In as much as Mr. Kirkpatrick never *asked* DPW for “the successful candidate’s application,” it follows that DPW never made any denial of any such request. Therefore, because no denial has ever occurred, the OOR lacked any jurisdiction to consider the issue. 65 P.S. § 67.1101(a)(1).

The rule is exceedingly well established that, when a litigant commences an issue before an administrative tribunal, and the litigant has failed to raise an issue, the tribunal is barred from raising the issue *sua sponte*, unless the issue must be resolved in order to establish that the tribunal has subject matter jurisdiction to hear the appeal. Lukes v. DPW, \_\_\_ A.2d \_\_\_ (slip op. at 6 (Pa.Cmwlth Ct. June 3, 2009)). In this case, there was no doubt that the OOR had jurisdiction to hear the only issue actually raised by Mr. Kirkpatrick. Therefore, it was patent error for the appeals officer to raise *sua sponte* the issue of “the successful candidate’s application.”<sup>1</sup>

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<sup>1</sup> In its response letter to Mr. Kirkpatrick, DPW set forth two grounds for denying his request. See Kirkpatrick v. DPW, at 2. In his appeal letter, Mr. Kirkpatrick stated “that his appeal [was] based on the second ground for denial ....” Id. The Final Determination then states that, “[o]n June 1, 2009, the OOR asked the Citizen if he intended to appeal the denial based on

Finally, section 1102(a)(2) confines the powers of the appeals officer to the “issue[s] in dispute.” 65 P.S. § 67.1102(a)(2). As explained above, access to “the successful candidate’s application” was not an “issue in dispute” in this appeal. Therefore, the appeals officer was without power to require that DPW provide Mr. Kirkpatrick with access to that document.

In summary, and for all of the reasons set forth above, the OOR was without power, authority and jurisdiction to *sua sponte* declare that the DPW must provide Mr. Kirkpatrick with access to ‘the successful candidate’s application.’”

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section 708(b),” i.e., based on the first ground. DPW was never informed of this contact, and nothing in this Petition for Reconsideration is intended as an endorsement of it. Such conduct is contrary to the OOR’s obligation to function as a neutral adjudicator, and to refrain from conduct that contains even an appearance of impropriety, such as bias on behalf of a party. See, e.g., Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992). Indeed, the OOR’s attempt to assist Mr. Kirkpatrick in the framing of his appeal is especially egregious in light of the fact that, on the date that this conduct occurred, the deadline for Mr. Kirkpatrick to raise any such issue had already expired.

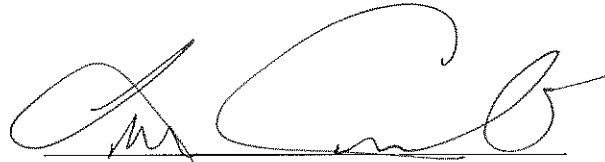
## REQUESTED RELIEF

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

1. At pages 7 – 8 of the Final Determination, the “Conclusion” should be amended to state that Mr. Kirkpatrick’s appeal is denied in its entirety, and the third and fourth sentences of the “Conclusion” (together with the intervening citation) should be removed.
2. At page 1, the second paragraph of the “Introduction” likewise should be amended to state that Mr. Kirkpatrick’s appeal is denied in its entirety.
3. At page 7, the final two sentences of the “Legal Analysis” section should be removed.

WHEREFORE, the DPW respectfully requests that the OOR grant DPW'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,

A handwritten signature in black ink, appearing to read 'L. Crumb', written over a horizontal line.

Leonard W. Crumb  
Senior Assistant Counsel  
Department of Public Welfare  
Health and Welfare Building –  
Third Floor West  
P.O. Box 2675  
Harrisburg, PA 17105-2675

Date: July 6, 2009

cc: Mr. Kirkpatrick

COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF OPEN RECORDS

IN THE MATTER OF: FITZPATRICK v. DPW  
Docket No. AP 2009-0422

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document(s) upon all parties of record in this proceeding in accordance with the requirements of § 33.32 (relating to service by a participant).

July 6, 2009



Counsel for DPW's RTKL Office  
Phone: (717)783-2800  
Health & Welfare Building, Rm 234  
P.O. Box 2675  
Harrisburg, PA 17105  
[ra-dpwrtkl@state.pa.us](mailto:ra-dpwrtkl@state.pa.us)



VIA EMAIL AND FIRST CLASS US MAIL

July 17, 2009

Leonard W. Crumb, Esquire  
Senior Assistant Counsel  
Department of Public Welfare  
PO Box 2675  
Harrisburg, PA 17105-2675

RE: Petition for Reconsideration filed July 6, 2009

Dear Mr. Crumb:

We are in receipt of your Petition for Reconsideration filed July 6, 2009 in connection with the Office of Open Records' Final Determination in *Kirkpatrick v. Department of Public Welfare*, OOR Dkt. AP 2009-0422. We hereby grant your petition.

We note here that until the formal promulgation of guidelines through the Independent Regulatory Review Commission, which we estimate to be completed in 2010, this office will follow the procedures set forth in Pennsylvania's General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241 regarding petitions for reconsideration.

Please contact me if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "m w" followed by a long horizontal stroke.

Corinna V. Wilson  
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records  
Sheridan Kirkpatrick



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SHERIDAN KIRKPATRICK,	:	
Complainant	:	
	:	
v.	:	Docket No. AP 2009-0422
	:	
DEPARTMENT OF	:	
PUBLIC WORKS, Respondent	:	

## INTRODUCTION

Mr. Sheridan Kirkpatrick (the “Citizen”) submitted a right-to-know request to the Department of Public Work (the “DPW”) seeking written interview summaries and scoring matrices concerning the management job selections at Polk Center pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The DPW denied access based upon various exceptions under the RTKL. The Citizen filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Citizen’s appeal is **granted in part and denied in part** and the DPW is not required to take any further action.

## FACTUAL BACKGROUND

On April 1, 2009, the Citizen, an employee at DPW, submitted three right-to-know requests to the DPW seeking access to review records. He did not request copies. The third request, which is the only one subject to this appeal, sought access to the “written interview

summaries and scoring matrices utilized to determine the rank order and final outcome of the selection process involved in selecting candidates for the positions of (1) Director of Clinical Services – Non Medical and (2) Director of Program Services in the recent management job selections at Polk Center.” (“Request”). On April 9, 2009 the DPW open records officer, Kathi Bryan, invoked a 30-day extension to respond in order to redact records, retrieve records from a remote location, and conduct a legal review. On May 8, 2009, the DPW responded by denying access to the records sought in the third request. The DPW stated that the Citizen could have access to a blank version of the scoring matrices, but denied access to records that “set forth the evaluations of the individual candidates. . .” The DPW cited several provisions of RTKL Section 708(b) including 7(vi) (excluding written criticisms), 7(iii) (excludes the results of a civil service or similar test), 7(ii) (excludes performance rating or review) and 7(iv) (excludes employment application of persons not hired). The DPW also denied the request on the grounds of protecting the constitutional rights of privacy and reputation. The DPW properly advised the Citizen of his rights to appeal by providing a comprehensive “Notice of RTKL Appeal Rights “and the Citizen timely appealed to the OOR.

In his May 19, 2009 appeal letter the Citizen states that his appeal is based on the second ground for denial where the DPW states as follows: “Because requested records result in a ranking of the candidates from lowest to highest, their contents are inherently disparaging to all but the top rated candidate and, as a result, necessarily impugn the reputations of the others by declaring , in effect, that the other are in some sense ‘inferior.’” The Citizen argues that such a statement appears to prohibit him from discovery his own rank scoring in comparison to the selected candidate. The Citizen did not say he disputes the grounds for denial based on 708(b), but does say he has “the right to view the outcome of my own scoring and written comments and

my appeal is based on that” and asks the OOR to consider release of the records “for his own personal review.”

On June 1, 2009 the OOR asked the Citizen if he intended to appeal the denial based on section 708(b). The Citizen responded that he was “not equipped to fully respond to that question without the benefit of Legal Counsel.” On June 4, 2009, Leonard W. Crumb, Esquire, Senior Legal Counsel for the DPW provided information in support of DPW’s position. DPW provided a summary of the interview process surrounding applications for the Polk Center positions. It described the process of evaluating each candidate, provided a blank copy of the “interview form” used for each candidate, a redacted version of the final scoring matrix, and a sworn affidavit of Kathi Bryan. The DPW argued that the Citizen’s standing as an employee or applicant has no bearing on his rights under the RTKL “regardless in the availability of some alternative avenue by which access may be had. *See, e.g. Hawkins v. Department of Labor and Industry*, OOR Dkt. AP 2009-0139 and *Rech v. Pennsylvania Department of Education*, OOR Dkt. AP 2009-0034 (RTKL is not the proper method of acquiring access to personnel records).”

The DPW also argues that because the Citizen did not appeal the denial of access based on section 708(b)(7) “the OOR must affirm DPW’s denial of access.” The DPW contends that the “rule is well established that, in an administrative appeal, the burden is on the appellant to identify the issues under appeal and, where the appellant fails to raise an issue, the issue is waived. *See e.g. S.T. v. Department of Public Welfare*, 681 A.2d 853, 857 (Pa. Cmwlth 1997).” Further, the DPW argues, “where a litigant has failed to raise an issue, the administrative tribunal hearing the matter is barred from raising the issue *sua sponte*, unless the issue goes to the tribunal’s subject matter jurisdiction. *See, e.g., Lukes v. Department of Public Welfare*, \_\_\_\_ A.2d \_\_\_\_, slip op. at 6 (Pa. Cmwlth Ct. June 3, 2009).”

In the alternative, the DPW argues that its denial under section 708(b) was proper. The DPW asserts that the completed interview forms and scoring matrix “represent an inherent judgment regarding each employee’s skills, both in absolute terms and with respect to the other candidates” and are therefore “written criticisms of an employee” bared from disclosure under § 708(b)(7)(vi). In addition, the interview form and scoring matrix contained standard questions and evaluation criteria to evaluate the candidates. Therefore, DPW argues, the completed materials “set forth the results of a ‘test’ used to fill a civil service position” and are barred from disclosure under § 708(b)(7)(iii). Finally, the DPW argues that the records are exempt under § 708(b)(7)(ii) as a performance rating or review. The DPW acknowledges that the withheld documents may not constitute a formal “performance evaluation,” the documents do, however, “result in the formulation of judgments regarding each candidate’s communication skills, interpersonal skills, and judgment. Moreover, these documents were completed by persons higher in the ODP hierarchy than the candidates. Consequently, these documents do provide a snapshot into the way that each candidate was perceived by members of [Office of Disability Programs (“ODP”’s)] management team.” The DPW asks that the OOR read the preceding sections together with the Commonwealth Court’s decision in *Marvel v. Dalrymple*, 393 A.2d 494 (Pa. Cmwlth 1978) as “evidence of general legislative intent that opinions rendered by agency managers regarding the absolute or relative worthiness of agency employees are not to be a matter of ‘public record.’”

Finally, the DPW addresses its arguments that the records are exempt from disclosure under its second ground, Constitutional protection of reputation and privacy. It argues that the Pennsylvania Constitution grants a right of privacy to residents and “agencies have a constitutional duty to avoid violating it.” The DWP acknowledges that the word “privacy” does not appear in the Pennsylvania Constitution, however, asserts that “the Pennsylvania Supreme

Court has held that the Constitution does grant a right of privacy to persons, and that that right extends to information about those persons.” See, e.g., *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979). The DPW argued that *Marvel*, although decided under the old RTKL, is persuasive because it involved an unsuccessful candidate’s request to review the rating sheets and evaluations from the interview process. In that case, the DPW points out, the Commonwealth Court required the agency to release the scores of the candidates, but not the rating sheets or written evaluations by the superiors. The DPW argues that although, unlike the old RTKL, the current RTKL does not provide protection for records affecting a person’s reputation, the Pennsylvania Constitution does. It asks the OOR to perform a balancing test between the “reputational interests” of the raters and other applicants and the interest in access.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). The DPW is a Commonwealth agency subject to the RTKL that is required to disclose public records. See 65 P.S. §67.301. Records of a Commonwealth agency are presumed to be “public” unless: (1) the record is exempt under Section 708(b); (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. 65 P.S. §67.305.

The RTKL is clear that “the burden of proving that a record of a ...local agency is exempt from public access shall be on the... local agency receiving a request 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.” *Commonwealth v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). The OOR finds that the DPW meets its burden to withhold the records at issue.

The DPW argues that the OOR has no authority to review the validity of the denial based on Section 708(b)(7) because it asserts the OOR is prohibited from raising an issue *sua sponte*. The OOR disagrees. The OOR is not raising the issue; DPW raised it in its denial and thoroughly addressed it in its brief and supporting affidavit. Furthermore, the Agency, not the Citizen, carries the burden to overcome the presumption that a record is public. The Citizen, who does not bear the burden of proof, was inartful in how he challenges the denial by DPW.

The DPW's reliance on *S.T. v. Department of Public Welfare*, 681 A.2d at 857 is confusing. In that case the appellant sought judicial review of an agency's final determination. *Id.* at 854. The court barred the appellant from raising issues that had not been raised during the agency proceeding below and prior to the final determination. *Id.* at 857. In instant case, the Citizen did raise the issue on appeal – the denial of requested records – prior to the issuance of the OOR Final Determination. At first glance it appears that the Citizen contests only the denial of the records based on the DPW's second ground (Constitutional right to privacy). However, he later states that his appeal is based on his “right to view the outcome of my own scoring and written comments” which the OOR reads as a general challenge to any basis for the denial of access. Therefore, the OOR is authorized to review the propriety of the denial regardless of basis.

That being said, the OOR agrees with the DPW's assertion that Section 708(b)(7) of the RTKL applies. Section 708(b)(7) expressly exempts from disclosure “[t]he following records relating to an agency employee: . . .(ii) A performance rating or review; (iii) The result of a civil service or similar test administered by a Commonwealth agency; (iv) The employment application of an individual who is not hired by the agency . . . [and] (vi) Written criticisms of an employee.”

His status as an agency employee is irrelevant here because the record is exempted as an employment application pursuant to section 708(b)(7)(iv). The Citizen, in this appeal, stands in

the same position as any other applicant that vied for this position and whose applications and surrounding materials would be similarly protected -- unless they were ultimately hired to fill the positions.

The OOR does not need to evaluate the remaining § 708(b)(7) exceptions cited, or whether a Constitutional<sup>1</sup> right to “reputational privacy” applies to the requested records under the new RTKL, because we have already concluded that the records are exempt as employment applications. While the OOR understands the Citizen’s desire to have access to those records that apparently have negatively affected his promotional opportunities with the DPW, the RTKL expressly exempts certain records relating employment applications from public access. As we found in *Rech v. Borough of Penn del*, OOR Dkt. AP 2009-0034, under the RTKL there is no distinction made for requests for one’s own records. The OOR finds that the DPW correctly cited an applicable exemption and the Citizen’s appeal is denied. However, under the Right-to-Know Law, the Citizen is entitled to access to the successful candidate’s application. §708(b)(7)(iv). However, the DPW may redact information as permissible under any applicable sections of the RTKL.

## CONCLUSION

For the foregoing reasons, the Citizen’s appeal is **granted in part and denied in a part**. The OOR concludes that the DPW properly withheld the Citizen’s records sought in the Request because the records were protected by Section 708(b)(7)(iv). The Citizen is granted

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<sup>1</sup> The OOR notes, however, that it has addressed and rejected Constitutional privacy interest arguments regarding names and addresses in several Final Determinations, including *Green v. Pocono Mountain School District*, OOR Dkt. AP 2009-0103 (rejecting arguments that State or Federal Constitution support redaction of names, home addresses, and tax exemptions); *Green v. Bethlehem Area School District*, OOR Dkt. AP 2009-0061 (discussing whether the State Constitution’s “privacy right” protects private employee home addresses and determining it does not); *Green v. Quakertown Community School District*, OOR Dkt. AP 2009-0041 (finding that names are not exempt from disclosure on certified payroll). See also, *Greater Pennsylvania Regional Council of Carpenters v. Pocono Mountain School District*, OOR Dkt. AP 2009-0166; *Pry v. Indiana University of Pennsylvania*, OOR Dkt. AP 2009-0119; *Pry v. Butler County Community College*, OOR Dkt. AP 2009-0070.

access to the successful candidate's application. §708(b)(7)(iv). However, the DPW may redact information as permissible under any applicable sections of the RTKL. 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 Commonwealth Court. 65 P.S. §67.1301(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. This Final Determination shall be placed on the website at <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED: June 19, 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**