



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:	
	:	
<b>DAVID MARSHALL, Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. AP 2010-0015</b>
	:	
<b>NESHAMINY</b>	:	
<b>SCHOOL DISTRICT, Respondent</b>	:	

### INTRODUCTION

David Marshall (the “Requester”) submitted a request to Neshaminy School District (“School District”) seeking leases, appraisals and reports pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The School District denied access under Section 708(b)(22) and (b)(10). The Requester timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Requester’s appeal is **granted in part and denied in part**, and the School District is required to take further action as directed.

### FACTUAL BACKGROUND

On November 19, 2009, the Requester submitted a right-to-know request seeking records concerning Neshaminy Middle School in Langhorne, PA:

- (1) All building and/or site leases since January 2004;
- (2) All building and/or site appraisals since January 2004;
- (3) All documents and records concerning all building and/or site initial sales listing prices since January 2004;
- (4) All documents and records concerning all building and/or site current sales listing prices since January 2004.

(the “Request”).

After invoking the thirty-day extension for legal review, Joseph Paradise, the Open Records Officer (ORO), timely responded by providing leases and denying access to the remaining records under Section 708(b)(10) and (22) (the “Denial”).

The Requester timely appealed. In support, he argues that the School District did not establish that either of the cited exceptions applies. He contends that the predecisional deliberative exception does not apply to materials prepared by a third-party, and that leases and sales listings cannot be protected under (b)(10) because they are not internal. The Requester also argues that (b)(22) does not apply because appraisals can only be protected before a decision has been made.

The School District supplemented the record with a letter explaining that it had granted Parts 1, 3 and 4 of the Request, and that only the appraisals sought in Part 2 had been withheld. The School District advises that it has an appraisal prepared by Lagreca & Quinn Real Estate Services, Inc., dated July 6, 2009, (“Appraisal”) and two summary appraisal reports from interested purchasers, prepared by Leonard J. Patcella, Jr. on May 19, 2009, and A.R. Hughes & Co. on August 12, 2009 respectively (“Reports”). The ORO submitted a notarized affidavit under penalty of perjury attesting that no decision regarding the lease, acquisition or disposition of real estate has been made, and that the School District is in negotiations with interested purchasers (“Affidavit”). Thus, he argues the Appraisal and Reports are protected as per *Baker v. PennDOT*, OOR Dkt. AP 2009-0692. He also attests that the records withheld reflect deliberations regarding possible lease and/or disposition of real property and that all other responsive records had been provided.

### **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 asserts the Appraisal and Reports are protected by Section 708(b)(10)(i)(A) and (b)(22). Under Section 708(a), the School District must show that its claimed exception applies by a preponderance of the evidence meaning by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001).

**1. Section 708(b)(22) Protects the Appraisal.**

The School District contends that Section 708(b)(22) protects the Appraisals and Reports at issue. Specifically, Section 708(b)(22)(i) protects:

contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations *made for or by an agency* relative to the following:

- (A) The leasing, acquiring or disposing of real property or an interest in real property.
- (B) The purchase of public supplies or equipment included in the real estate transaction.
- (C) Construction projects.

65 P.S. §67.708(b)(22)(i)(emphasis supplied). The Appraisal is expressly protected by this exception as there is no dispute that it is a real estate appraisal of the Middle School, and that it is made for the School District relative to disposition of real property. The Affidavit from the ORO attests that no decision regarding the disposition of the property has been made, and therefore the exception to (b)(22) at subsection (ii) does not apply.

The Reports, however, are not clearly protected. There are no facts of record to show that the Reports, which are “summary real estate appraisal reports” prepared for and submitted by purchasers, qualify for protection under (b)(22). There is no evidence of record to suggest that the Reports were *made by or for the agency* as is required for the protection to attach. *See Ali v. DCED*, OOR Dkt. AP 2009-0154 (construing “by or for an agency” in Section 708(b)(9)).

The facts submitted show the Reports were prepared for prospective purchasers. Therefore, the School District did not meet its burden to protect the Reports under this exception.

**2. The School District Did Not Prove that Section 708(b)(10) Applies.**

Section 708(b)(10)(i) protects records that reflect “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 consistently 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. *Com. v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999).

The Affidavit shows the Reports are “predecisional” but there is no evidence that they are “internal” as records prepared by the agency or one of its agents on its behalf and would therefore not be protected. *See Schmitz v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2009-0321. The School District likewise failed to establish that the Reports are “deliberative” in nature and actually reflect the deliberations being made by the agency. From the material submitted, the Reports, having been prepared by independent parties, and not on behalf of the agency, do not reflect the deliberations of the agency. A conclusory statement in an affidavit that the records reflect internal predecisional deliberations of an agency does not establish this exception given the lack of substantiated facts. Thus, the Reports are not properly protected under Section 708(b)(10), and failing to have established another exception, must be disclosed here.

**CONCLUSION**

For the foregoing reasons, the Requester’s Appeal is **granted in part and denied in part**. The School District may properly protect the Appraisal under Section 708(b)(22), but must disclose the Reports to the Requester 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 Bucks County Court of Common Pleas. 65 P.S. §67.1302(a). 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 as per Section 1303. This Final Determination shall be posted at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: February 5, 2010**



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**LUCINDA GLINN, ESQ.  
APPEALS OFFICER**

Sent to: David Marshall, Esq.; Joseph Paradise for School District