

FACTUAL BACKGROUND

Mr. Hardy covers education for the Newspaper and has written extensively about the Charter School. After Mr. Hardy published a news article in December, 2008, the Charter School and its owner, Vahan Gureghian, filed suit against Mr. Hardy and other individuals at the Newspaper for defamation, among other claims. This litigation is currently pending.

The Newspaper filed for bankruptcy on March 23, 2009. At an April 6, 2009 hearing, Judge Jean K. FitzSimon, Bankruptcy Judge in the United States Bankruptcy Court for the Eastern District of Pennsylvania, issued an order enjoining all parties from engaging in formal or informal discovery (the “Order”). As a result, an automatic stay was imposed regarding the civil suit between the Charter School and the Newspaper.

We note, however, that in issuing the Order, the Judge indicated that the Court was aware that Mr. Hardy had a Right-to-Know appeal pending before the OOR and stated, “Well, I’m not going to enjoin reporters from reporting. I will certainly instruct and direct the debtor not to engage as the debtor in discovery, either through its reporters or any other means on any of these actions while in this period. But I am not going to enjoin reporters from reporting. . . And if there is an issue that arises in this case and you need to bring it before me, you can do that. But for purposes of today, I am not enjoining reporters from reporting.” *See Transcript at Pages 102-103.*

In the Order, Judge FitzSimon refers to this appeal, which relates back to a Right-to-Know request filed by Mr. Hardy on January 30, 2009 with Charter School for a

number of financial records relating to the Charter School and CMSI.¹ Specifically, he sought:

1. For the fiscal year 1998-1999 (July 1, 1998 to June 30, 1999) and for all subsequent fiscal years to the present, records showing the names, titles and salaries and all other payments or expenses and benefits paid to all employees of CMSI. For the rest of the 2008-09 fiscal year, please provide other records showing projected salaries or other payments or expenses and benefits for all employees.
2. For the fiscal year 1998-1999 (July 1, 1998 to June 30, 1999) and for all subsequent fiscal years to the present, records showing the names, titles, and salaries and all other payments or expenses and benefits paid to all employees or contractors of Charter Choice Inc.
3. For the 1998-1999 fiscal year to the present, records showing the salaries and all other payments or expenses and benefits paid to Vahan H Guereghian, Marie P. Winnett, Steven Lee, Danielle Gureghian, Louise Vitiello, Robert C. Olivo, Dr. David E. Clark Jr. and Peter Idstein.
4. For June 30, 2006 to the present, records showing the “excess of revenues over expenditures” compensation to the CMSI made according to the terms of the June 2006 management agreement, as outlined on Page 13, Section 7.01

¹ The Charter School has contracted with CSMI to manage the Charter School pursuant to the terms of a management agreement.

5. For 2005 to the Present, all State Ethics Commission Statements of Financial Interests for all Charter School trustees.
6. For fiscal years 1999 to the present, records showing that all payments for professional services by Charter School, including the name and title of the person being paid.
7. Records showing the amount of rent paid to Vahan Gureghian by the Charter School for the 2007-08 school year.
8. All rental or lease agreements between Vahan Gureghian and the Charter School.
9. From the 1998-1999 fiscal years to the present, all Charter School bylaws for the board of trustees.

On February 4, 2009, the Charter School indicated that it would need an additional 30 days to respond to the request. Counsel for the Charter School sent a letter on March 6, 2009 to John Elliott, counsel to the Newspaper in the defamation litigation, which the OOR has deemed a partial denial for purposes of Mr. Hardy's Right-to-Know request. In its denial, the Charter School stated that certain records were provided to Mr. Hardy, but that the remaining requested records would not be provided because the request was an improper attempt to circumvent the Order. The Charter School's partial denial did not provide appeal information or reference any specific sections within the RTKL.

Nonetheless, Mr. Hardy appealed to the OOR. Mr. Hardy granted the OOR additional time to issue a Final Determination pursuant to 65 P.S. § 67.1101(b).

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). The Charter School is a local agency subject to the RTKL. See 65 P.S. § 67.302.

Section 102 of the RTKL, defines the term “record” as:

“Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document.”

The RTKL provides further clarity in defining a “public record” as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.”

65 P.S. §67.102.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions. Specifically:

(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); see also Commonwealth. v. Brown, 567 Pa. 272, 786 A.2d 961 (2001)(holding preponderance of the evidence means “greater weight of the evidence”).

The Charter School raises several arguments in support of its position that the requested records are completely exempt under the RTKL. They are addressed as follows:

1. Mr. Hardy’s right to know request is an improper attempt to conduct discovery in violation of the Bankruptcy Court’s order.

The Charter School asserts that Mr. Hardy’s appeal should be quashed because he is conducting discovery in violation of the Order. First, the underlying Right-to-Know request was filed with the Charter School well in advance of the Newspaper’s filing for bankruptcy protection. The Charter School’s partial denial was issued 30 days before Judge FitzSimon issued the temporary restraining order. The Judge acknowledged this appeal in remarks at the hearing at which the Order was issued and emphasized that the purpose of the Order was not to restrict reporters from reporting. The OOR does not interpret the Order as applying to this appeal.

The sole issue before the OOR is whether Mr. Hardy is entitled to the requested records under the RTKL.

2. Mr. Hardy’s request lacks sufficient information to enable the Charter School to fulfill the requests and assess whether the information is subject to disclosure.

The Charter School references 65 P.S. § 67.703 in support of its argument that Mr. Hardy’s request lacked specificity. The Charter School claims that Mr. Hardy’s request for names, titles, salaries and all other payments or expenses and benefits paid to all employees of CMSI is overly broad. The OOR disagrees. Mr. Hardy’s request was

for very specific financial information limited to a finite period. Equally sufficient is the request for rental and lease information.

The Charter School notes that Mr. Hardy's request will require an exhaustive, unreasonable and overly burdensome search. A request for voluminous records or records that may be difficult to locate does not automatically mean the request is non-specific, nor does it mean that the records are not public. The OOR recognizes the sometimes significant burden that certain Right-to-Know requests may place upon an agency already struggling with a heavy workload.

However, the fact that a request would result in the provision of voluminous public records does not relieve the agency of its obligation to produce them. Moreover, the Legislature considered this balancing of a requestor's rights under the RTKL with an agency's ability to comply with the RTKL and determined that the law had a presumption of openness.

3. The documents requested are not records of the local agency and are not public.

The Charter School claims that the requested records belong to CSMI, a private management corporation, and that as such they are not subject to disclosure. However, Section 506 of the RTKL provides that an agency cannot avoid its obligation to provide public records because the records are held by a private entity, or even created by that private entity. Section 506(d) states in pertinent part:

- (1) a public record that is not in possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record *of the agency* for purposes of this act. (Emphasis supplied.) ...

- (2) A request for a public records in possession of a party other than the agency [*i.e.*, receiving agency] shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee ... and upon collection shall remit the fee to the party in possession of the record if the party duplicated the record.

Under these circumstances, the burden is on the agency denying access to prove that the records sought are truly unrelated to a governmental function and are exempt. Here, the Charter School concedes that it is an agency and that CSMI provides management services to it pursuant to a “Management Agreement”, that provides that CSMI has the sole right to “supervise, manage, operate, control and direct the performance of educational services under this Agreement.” CSMI, among other duties, also maintains student records, develops education plans, enforces rules and regulations, and provides a complete educational program for the Charter School. Further, all personnel working at the Charter School are employees of CSMI. CSMI provides teaching services, records keeping, and operates and controls the educational program at the Charter School.

CSMI has contracted with the Charter School to provide what is otherwise a governmental function, the provision of educational services, on behalf of and for the Charter School. Therefore, any records it maintains in performance of or directly related to that function are public records and must be provided to Mr. Hardy subject to the redaction of any personal security information.

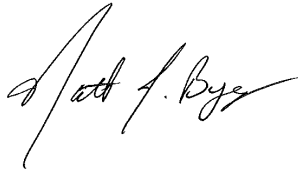
4. The documents requested contain trade secrets and other proprietary information.

The Charter School claims that the requested records contain trade secrets and proprietary information and that release of that information is precluded under the Management Agreement. However, the Charter School fails to demonstrate how the requested records contain information that if generally known will harm any competitive position that the Charter School or CSMI holds. The Charter School bears the burden of proving that such records are exempt as under Section 708(b)(11) of the RTKL and has failed to meet this burden.

CONCLUSION

For the foregoing reasons, Mr. Hardy's appeal is **granted**. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Court of Common Pleas in Delaware County. 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>

FINAL DETERMINATION ISSUED May 8, 2009



NATHANAEL J. BYERLY, Esq.
Appeals Officer