



FINAL DETERMINATION

IN THE MATTER OF: :
 :
TRACEY WITMER, : **Docket No.: AP 2010-0109**
Complainant, :
 :
v. :
 :
SHAMOKIN AREA SCHOOL DISTRICT, :
Respondent :

INTRODUCTION

Ms. Tracey Witmer, (the “Requester”), filed a right-to-know request pursuant to the Right to Know Law, 65 P.S. §67.101, *et. seq.* (“the RTKL”) with the Shamokin Area School District (the “District”) seeking all correspondence regarding a Pennsylvania Department of Education (“PDE”) fine. The District provided certain records, but denied the request for those it considered exempt under section 708(b)(7). The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the District is required to take further action as directed below.

FACTUAL BACKGROUND

On January 26 and 29, 2009, the Requester submitted requests to the District for the following:

January 26, 2010: “copy of section 7, subsection F and section 9.”

January 29, 2010: “At the board meeting on 1/19/10 I was reading a memo from Mr. Zack to Mr. Curran re: PDE fine on RSI grant and fine. I would like a copy of memo and email regarding the same. Again, all correspondence re: RSI grant and fine.”

On February 1, 2010, Stephen C. Curran, the District’s Agency Open Records Officer (“AORO”), denied the request for the memo as a “written criticism of a district employee” exempt pursuant to section 7, letter f of the administrative regulation. The District denied the request for the email stating that it “has become part of a grievance and it was a management directive to one of its employees” thus exempt by “Section 7, letter g, Grievance material [and] section 9, Predecisional Drafts...”

On February 4, 2010 the Requester appealed the denial of the memo to the OOR.

In support of her appeal she states:

At the board meeting of said school district, on 1/19/10, during the motion of approving the bill list, on a question, I proceeded to ask about a fine from PDE. After Mr. James Zack, Superintendent of the District, proceeded to dance around my question, he asked where I got this information from. It was on my bills in question, I responded. He then asked what I was reading from, which I responded it was a memo from you (Mr. Zack). He then argued with me that it was a personal issue and could not be discussed. BUT he wanted for me to approve this fine along with all the other bills included. I voted no. He proceeds to inform me I was not privileged to that information.

Both parties were invited to submit information in support of their position and that “[a]ll facts relied upon must be supported by an affidavit made under penalty of perjury by a person with actual knowledge.” On February 16, 2010 the Requester submitted a statement as follows:

The following records are exempt from *public* access by a requester in accordance with the Right-to-Know Law. {Please Note: I am not the *public*, I am an elected member of SASD and refusal to provide me information hinders my ability to govern}

The information which I had requested was attached and referenced at a regular public meeting as an invoice back up for a \$500.00 expenditure to PA Dept. of Education (PDE)

On February 16, 2009 the District responded to the appeal by providing a copy of its administrative regulations, a copy of a page from the RTKL, and the denial letters that had been previously sent to the Requester.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The District is a local agency subject to the RTKL. *See* 65 P.S. § 67.102. Records of an 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 notes first that the appeal is limited to the denial of the memo as nowhere in her appeal did the Requester reference the email requested. Further, the OOR notes that the Requester’s status as an elected member of the District has no bearing on whether the requested memo is a public record subject to disclosure under the RTKL. *See e.g., Durkee v. Cranberry Township*, OOR Dkt. AP 2009-0627, pg. 4. (“the identity of the requester does not determine the public or non-public status of the information.”).

In support of denial the District points to its own regulations exempting the record as a criticism of an employee. The referenced section mimics language in section 708(b)(7) of

the RTKL. However, the District provided no factual support, in its original denial or subsequent to the appeal, for its assertion that the requested memo constitutes “written criticism of an employee.” Therefore, there is no evidence to find the memo exempt from disclosure. Thus, because the District failed to meet its burden of proof, the OOR has no choice but to direct the release of the memo, subject to redaction of any nonpublic information. Any redactions must be identified and supported by an affidavit signed under penalty of perjury providing the legal and factual grounds for the redactions.

CONCLUSION

For the foregoing reasons, this appeal is **granted** and the District is required to take further action. The parties are advised that this is a final determination. Within thirty (30) days of the mailing date of this determination, it may be appealed to the Northumberland County Court of Common Pleas. In the event of an appeal for judicial review, all parties must be served with notice of the appeal. The Office of Open Records shall be served notice in accordance with Section 1301 and have an opportunity to respond to any appeal for judicial review. The parties are advised that this Final Determination will be posted on the Office of Open Records website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED ON: MARCH 8, 2010



APPEALS OFFICER
AUDREY BUGLIONE, Esq.

Sent to: Tracey Witmer, Stephen Curran