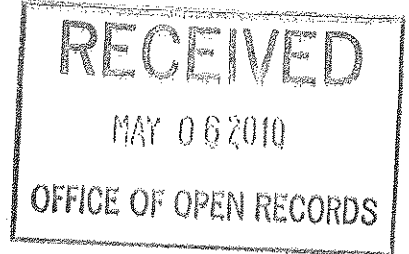




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and U.S. FIRST CLASS MAIL
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Pennsylvania Office of Open Records
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Harrisburg, PA 17120-0225

NORTH HILLS
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WEXFORD, PA 15090
TEL: 724-935-6990

**RE: Docket Number AP2010-0248, Susan Coppola v.
Fort Cherry School District ("School District")
Petition for Reconsideration**

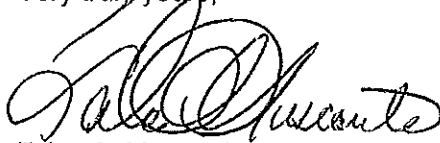
Dear Ms. Mutchler:

Enclosed please find a Petition for Reconsideration of the April 21, 2010 Final Determination in the above matter issued by Appeals Officer Nathanael J. Byerly.

Please notify my office when the Petition for Reconsideration is granted and thereafter, what, if any, additional information your office requires in order to rule upon the Petition.

Thank you for your attention to this matter.

Very truly yours,


Falco A. Muscante

FAM/cg

Enclosure

cc: Paul R. Sroka, Open Records Officer (w/ enclosure)
Susan Coppola (w/ enclosure)

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

IN THE MATTER OF

SUSAN COPPOLA,

Complainant,

v.

FORT CHERRY SCHOOL DISTRICT,

Respondent.

Docket No. *AP 2010-0248*

PETITION FOR RECONSIDERATION

The Fort Cherry School District (School District), by and through its attorneys and pursuant to Rules 35.241 and 35.17 of the General Rules of Administrative Practice and Procedure, 1 Pa.Code §§ 35.241 and 35.17, hereby petitions the Office of Open Records (OOR) for reconsideration of the OOR Final Determination of April 21, 2010 in the above-referenced matter.

SCHOOL DISTRICT'S INTEREST

The School District is the Respondent in the above-captioned matter. The Final Determination grants the appeal of the Requester and requires the School District to turn over the W-2s that were requested by the Requester, Ms. Coppola. Also, the OOR requires the School District to provide an affidavit made under penalty of perjury establishing that the 1099s requested by Ms. Coppola do not exist. As such, the School District has a direct interest in seeking the relief requested in this Petition for Reconsideration.

FINDINGS AND CONCLUSIONS FOR WHICH RECONSIDERATION IS SOUGHT

The School District requests reconsideration, based upon the provisions of the Right to Know Law (RTKL) and other authorities as indicated, with regard to the various findings, legal

analysis and conclusions as determined by the Office of Open Records (OOR) in its April 21, 2010 Final Determination as follows:

1. The OOR erred because it did not address the reasoning of President Judge Vican from Monroe County, Pennsylvania. Judge Vican wrote opinions in the *Campbell v. Pocono Mountain School District*, 6384 Civil 2009 (Ct. Com. Pl. Monroe County, Oct. 2, 2009) and in the *Zeldenrust v. Pocono Mountain School District*, 5263 Civil 2009 (Ct. Com. Pl. Monroe County, Oct. 2, 2009) in which he held that an employee's W-2 form was protected from disclosure under the RTKL. The Judge held that the entire W-2 form was not subject to release under the RTKL and that it was inappropriate even to release a W-2 that had been redacted. In support of his Opinions, Judge Vican cited sections of the Internal Revenue Code. The legal analysis of Judge Vican was advanced by the School District, in its Response to Requester's Appeal filed with OOR, as an independent basis in support of its denial of the request for copies of W2s. OOR erred by failing to give any consideration to these arguments. Judge Vican held and the School District argued independently that the Internal Revenue Code states that "return information" is confidential, and should not be released unless authorized under the Internal Revenue Code. 26 U.S.C. § 6103(a). "Return information" is defined as:

[A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

26 U.S.C. § 6103(b)(2)(A).

Judge Vican found and the School District argued that W-2s are return information, and that even the release of redacted W-2s is inappropriate. The U.S. Supreme Court in *Church of Scientology of California v. IRS*, 484 US 9 (1987) held that "as with the return itself, removal of

identification from return information would not deprive it of protection under § 6103(b). Since deletion would not make otherwise protected information discloseable, [agency] has no duty under the [Freedom of Information Act] to undertake such redaction." Even though some of the information contained in a W-2 may be released if contained in other formats (e.g. the employee's name), the entire W-2 is not a public record based upon federal law. Judge Vican held and the School District argued that: "If the U.S. Supreme Court is unwilling to allow non-identifying information to be released under § 6103 via request under the FOIA, we cannot justifiably release what we consider to be personal financial information in a W-2 form prepared by employer for its employee for the purpose of filing personal taxes." *Campbell*, Memorandum Opinion at 8.

2. OOR erred by ruling that it would not be bound by the *Campbell* and *Zeldenrust* Opinions by Judge Vican of Monroe County as binding precedent applicable to OOR. Contrary to OOR's position, these are decisions of a court that has jurisdiction to take appeals from the OOR's final determinations. Under the RTKL, OOR has the opportunity to participate in appeals of its final determinations if it wishes to do so. 65 P.S. § 67.1303(a) states that "[a]n agency, the requestor and the [OOR] or a designated appeals officer shall be served with notice of actions commenced in accordance with section 1301 or 1302 and shall have an opportunity to respond in accordance with applicable court rules." The OOR chose not to participate in the *Campbell* and *Zeldenrust* appeals in the Court of Common Pleas; thus, Judge Vican's Opinions are binding on the OOR. Otherwise, OOR would apply the RTKL in a different manner based upon the individual decisions of each of the 60 judicial districts in Pennsylvania, and conceivably have to potentially abide by a different decision in each district. In any case, OOR does not have the discretion to ignore the Opinion of a judge who has appellate review of OOR decisions. The RTKL states that public records are "a record, including a financial record of a Commonwealth or local agency that . . . is not exempt from being disclosed under any . . . *judicial order or decree . . .*" 65 P.S. § 67.102 [emphasis added]; see also 65 P.S. § 67.305(a)(3). The express

language of the RTKL requires that W-2s cannot be released because of Judge Vican's Opinions and Orders in the *Campbell* and *Zeldenrust* cases.

3. The OOR erred by holding that its own past decisions were binding in this matter. In its Final Determination, the OOR stated that it had found that W-2 tax forms were public records subject to release in the final determinations of *Campbell v. Berwick Area School District*, AP 2009-0212, *Campbell v. Souderton Area School District*, AP Docket 2009-0269, *Zeldenrust v. Pocono Mountain School District*, AP Docket 2009-0305, *Campbell v. Colonial School District*, AP Docket 2009-0350 and *Campbell v. Boyerton School District*, AP Docket 2009-0230. However, all of these final determinations were released prior to Judge Vican's October 2, 2009 Opinions and Orders. Thus, while the OOR might have considered these OOR final determinations to be binding precedent before, it is certainly inappropriate to now consider them binding precedent. Furthermore, none of the final determinations identified by OOR address the legal arguments and IRS Code provisions raised by either Judge Vican or the School District. Furthermore, it was clear error for the OOR to cite its own final determination in the *Zeldenrust* matter because it was reversed by Judge Vican in *Zeldenrust v. Pocono Mountain School District*, 5263 Civil 2009 (Ct. Com. Pl. Monroe County, Oct. 2, 2009). The other OOR final determinations cited by OOR do not even address the issues involving the IRS Code raised by both Judge Vican and the School District. In the matter of *Campbell v. Berwick Area School District*, AP 2009-0212, the Requester asked for the W-2s of certain employees and the W-2s were provided. However, on one of the W-2s, the school district redacted whether there was a reduction for union dues and the school district claimed that union dues were personal financial information. However, the OOR reversed that agency determination holding that whether union dues are taken out does not reveal the personal financial status of the employee; thus the union dues should not be redacted. In the second case, *Simon v. Souderton Area School District*, AP 2009-0269, the school district again supplied the W-2s. However, there were many redactions made. Only the boxes for the name, address, zip code of the employer,

employee, the employer's ID number, social security wages, Medicare wages, local wages and locality were shown. All of the other information was redacted. In that case, the OOR again justified its final determination based upon past OOR decisions. In the *Campbell v. Boyertown Area School District*, AP 2009-0230, the W-2 of the School Superintendent was requested. The W-2 was provided but it was redacted to remove the withholding in box 14 of the W-2, which was the flexible spending account information. The OOR determined that the amount withheld for the flexible spending account should be available because the mere amount does not provide any specific information about personal finances and thus is not subject to any exception under the RTKL. Finally, in the *Campbell v. Colonial School District and Montgomery County Intermediate Unit*, AP 2009-0350 and AP 2009-0351, the issue was whether the requested W-2s of certain employees could be redacted so that the contributions to the 403(b) retirement plan were not shown. The OOR held that the 403(b) contributions could be redacted because that amount is not administered by the Commonwealth. Thus, any contribution amount that employee makes does not have to be disclosed. However, the School District must disclose whether the employee actually contributes to the 403(b) plan.

It is evident that the final determinations relied upon by the OOR in this case are not relevant as none of them discuss the IRS Code, and in the case of the *Zeldenrust* final determination, it had been reversed by the Court of Common Pleas months before the April 21, 2010 Final Determination had been released in this case. Therefore, the previous final determinations are not precedential.

4. Finally, the OOR found that the Requester, Ms. Coppola, requested certain 1099s. The School District replied that the 1099s could not be provided because they did not exist. However, the OOR held that the School District did not follow the RTKL because the School District did not provide an affidavit made under penalty of perjury establishing the fact that the 1099s do not exist. However, 65 § 67.705, "creation of a record," states that "[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 the manner in which the agency does not currently compile, maintain, format or organize the record." Thus, there is no requirement in the RTKL itself that the statement that an agency does not have a certain record must be made under the penalty of perjury. The "Office of Open Records appeals Process—Interim Guidelines" also do not state that a denial must be made in an affidavit under penalty of perjury. Thus, the OOR's determination that the School District did not follow the RTKL was unfounded and in error.

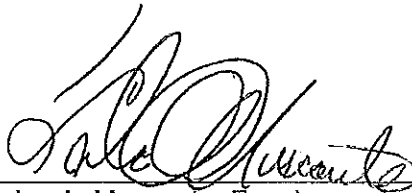
REQUESTED RELIEF

The School District respectfully requests that OOR grant the School District's Petition for Reconsideration, and thereafter, that it modify the April 21, 2010 Final Determination as follows:

1. The Final Determination should be amended to read that W-2s are return information under the Internal Revenue Code, 26 U.S.C. § 6103(b)(2) and are therefore protected from disclosure. The Right to Know Law states that public records are "a record, including a financial record of a Commonwealth or local agency that: is not exempt under Section 708; is not exempt from being disclosed under any other federal or state law regulation or judicial order or decree; or is not protected by privilege." 65 P.S. § 67.102. Thus, since W-2s are considered return information under the IRS Code and are therefore confidential under federal law, W-2s cannot be released as public records under the RTKL.
2. The Final Determination should be further amended to state that the School District did not violate the RTKL by not providing an affidavit under penalty of perjury stating that the 1099 information does not exist.

WHEREFORE, the School District respectfully requests that the OOR grant the School District'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,



Falco A. Muscante, Esquire
Attorney for Respondent Fort Cherry School District

Date: May 6, 2010

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Firm #515
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Pittsburgh, PA 15235
(412) 242-4400
fam@mbm-law.net

cc: Susan Coppola

Brawley, Maryanne

From: Falco Muscante [fam@mbm-law.net]
Sent: Thursday, May 06, 2010 4:55 PM
To: DC, OpenRecords
Cc: Byerly, Nathanael
Subject: Petition for Reconsideration in AP 2010-0248

Attachments: ECOPYPC_EXCHANGE_05062010-165049.PDF



ECOPYPC_EXCHAN
E_05062010-1650..

Ms. Mutchler-

Attached is the Petition for Reconsideration in AP 2010-0248 which will also be faxed and mailed.

Thank you for your attention to this matter.

Falco A. Muscante



May 10, 2010

Falco Muscante
Maiello Brungo & Maiello, LLP
One Churchill Park
3301 McCrady Road
Pittsburgh, PA 15235

RE: Petition for Reconsideration received May 6, 2010, OOR Dkt. AP
2010-0248

Dear Mr. Muscante:

We are in receipt of your Petition for Reconsideration dated May 6, 2010 that was received by this office on May 6, 2010 in connection with the Office of Open Records Final Determination in *Coppola v. Ft. Cherry School District*, OOR Dkt. AP 2010-0248. We hereby deny your Petition.

Respectfully,

A handwritten signature in black ink, appearing to read "Terry Mutchler", written over a horizontal line.

Terry Mutchler
Executive Director

cc: Susan Coppola