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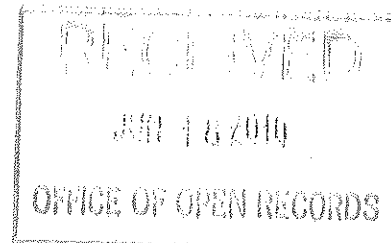
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FAX TRANSMITTAL SHEET



TO: Lucinda Glimm, Esq.
Office of Open Records
FAX NO. 717-425-5343
FILE NO. 0030339.0000

FROM: Timothy S. Wachter, Esq.

DATE: June 18, 2010

RE: Daniel Anderson v. Millcreek Township School District

NO. OF PAGES INCLUDING THIS PAGE: 14

MESSAGE:

Hard copy to follow by regular U.S. mail

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June 18, 2010

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Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

RE: In the Matter of:
Daniel Anderson v. Millcreek Township School District
Docket No.: AP 2010-0413

Dear Attorney Glinn:

Enclosed please find Motion for Reconsideration of the Respondent,
Millcreek Township School District for filing with your office.

If you should have any questions, please do not hesitate to contact me.
I remain,

Very truly yours,

KNOX McLAUGHLIN GORNALL &
SENNETT, P.C.

By: Timothy S. Wachter /llk
Timothy S. Wachter, Esq.

TSW:llk
902287.v1
Enclosure

cc: Daniel Anderson
242 Harbor Road
Erie, PA 16511

BEFORE THE OFFICE OF OPEN RECORDS

IN THE MATTER OF:)	
)	Docket No.: AP 2010-0413.
DANIEL ANDERSON)	
Complainants)	
vs.)	
)	
MILLCREEK TOWNSHIP)	
SCHOOL DISTRICT,)	
Respondent)	

MOTION FOR RECONSIDERATION OF THE RESPONDENT, MILLCREEK TOWNSHIP SCHOOL DISTRICT

The Petitioner, the Respondent, the Millcreek Township School District, files this Motion for Reconsideration under the General Rules of Administrative Practice and Procedure, 1 Pa. Code. Section 35.241, and respectfully represents:

1. On June 4, 2010, the Pennsylvania Office of Open Records ("OOR") issued and mailed a Final Determination in the above-captioned appeal, a true and correct copy of which is attached hereto and made a material part hereof as Exhibit "A."

2. The Final Determination affects the interests of the Millcreek Township School District (the "School District").

3. On March 22, 2010, the School District received a request under the Right-to-Know Law ("RTKL") from Mr. Daniel J. Anderson ("Anderson") requesting the following:

All money paid either by the Millcreek Township School District or their Insurance carrier but not limited to Law Firms, Lawyers, transcription services, coping services, private investigators, depositions, deductibles, hotels, restaurants in the Districts defense of the legal action to defend against the lawsuit brought forth by Dr. Maryann Anderson. (cont)

Law firms to include but not limited to:

Knox McLaughlin Gornall Sennett	Maiello Brungo Maiello
McDonald Illig Jones Britton	Andrew Price
Quinn Buseck Leemhuis	

Lawyers to include but not limited to:

Art Martinucci	Rich Perhac
Matt McCullough	Tim Sennett
Dave Bloom	Mark Kuhar
John Smart	Rich Lanzello
Neil Devlin	

Transcription services to include but not limited to:

Ferguson Holdnak reporting
Wawrzyniak reporting

4. Anderson further noted that he "want[s] the money to be listed by a weekly basis noting the date which firm or service and the particular individual where applicable received the money." The requested information included a timeframe of January 1, 2007 through present.

5. The School District partially denied the request on April 22, 2010, citing Section 705 of the RTKL, 65 P.S. §67.705, claiming that the School District does not currently maintain or format the requested information in the format that Anderson desired.

6. Although the School District denied the format of the request, the School District did provide the total amount of money paid to each responsive entity by either the School District or the insurance carrier.

7. Anderson appealed the partial denial to the OOR, claiming that the School District's response was not complete, that costs were omitted and that the data was available on the accounting software of the District. Anderson requested that the OOR "suggest to the school district that they surrender to [Anderson] a more detailed summary of the information I have requested."

8. Pursuant to the Appeal, the School District provided a sworn Affidavit of Mrs. Linda Sitter, the School District's Open Records Officer and Board Secretary, testifying that, to the best of her knowledge, information and belief, that the response provided "completely represents a recitation of the money paid by either the District or the District's insurer, School Claims Service, pursuant to the request."

9. On May 10, 2010, the OOR submitted correspondence to the parties to the appeal stating that "All facts relied upon **must be supported by an Affidavit made under penalty of perjury** by someone with personal knowledge." (emphasis in original).

10. Via correspondence submitted by Anderson dated May 18, 2010, Anderson stated, in an unsworn submission and through the provision of printouts of the School District's YTD Transaction Report that it would be no burden for the School District to "query their data base and supply [Anderson] with a printout showing the vendor name, date and amount paid for all transactions related to the lawsuit in question."

11. Following the May 18, 2010 correspondence from Anderson, the School District provided a sworn Supplemental Affidavit of Mrs. Sitter testifying that:

Affiant states that she has inquired with the Business Office of the Millcreek Township School District and has been informed that the Millcreek Township School District's computer based financial tracking system cannot accommodate the format of the request as the Millcreek Township School District's computer system has not been set up to maintain nor compile the requested and applicable expenditures in the manner requested.

12. The OOR, in the Final Determination, found that the School District is not obligated to create a list that shows the requested expenditures in the requested format as the School District's Affidavit represents that the records maintained do not provide a weekly list of expenditures.

13. The OOR granted Anderson's appeal and ordered the School District to disclose the source records detailing the expenditures/payments to the identified vendors during the prescribed timeframe.

14. In ordering as such, the OOR refashioned Anderson's request to be a request for records and required that the School District provide the source records.

15. The OOR refashioned the request as being a request for records even though Anderson never requested the actual source records but instead requested a listing of money paid and then further requested, upon appeal, that the OOR "suggest to the school district that they surrender to [Anderson] a more detailed summary of the information I have requested."

16. The OOR relied upon Signature v. Aston Township, No. 1311 CD 2009 (three-judge panel, Pa. Commw. May 26, 2010) for the proposition that the "mere assembly of a

separate record from a series of existing records is not creation of a document under Section 705,” and drew the conclusion that the Commonwealth Court found that “if the record of printouts of a database exist, they must be provided whether on one screen or multiple screens.”

17. Signature v. Aston Township is distinguishable from the instant appeal in that in Signature, the requester requested “printouts,” and in the instant matter, Anderson never requested records, but instead requested the creation of a new form, and then later refined his request upon appeal for a more detailed summary.

ERRORS ASSIGNED

18. The Respondent, the School District, asserts the following errors of law:

A. The OOR erred in refashioning Anderson’s request as a request for records.

(1) Anderson never requested specific records. The request was for the creation of a form showing certain expenditures in a certain format that did not exist. Upon appeal, Anderson requested a more detailed summary of the information supplied.

(2) The OOR, in the Final Determination, erroneously refashioned the request and ordered that the School District “disclose the records showing the expenditures/payments to the identified vendors from January 1, 2007 to March 22, 2010, in whatever form they currently exist, within thirty (30) days.”

(3) The OOR’s refashioning of the request is contrary to the Pennsylvania Commonwealth Court’s determination in Pennsylvania State Police v. Office of

Open Records, ____ A.2d ____, 2010 Pa. Commw. LEXIS 259 (Pa. Commw. May 26, 2010), that found under the RTKL:

the requester tells the agency what records he wants, and the agency responds by either giving the records or denying the request by providing specific reasons why the request has been denied. The requester can then take an appeal to the OOR where it is given to a hearing officer for a determination. Nowhere in this process has the General Assembly provided that the OOR can refashion the request. Id. (emphasis supplied)

(4) The OOR's Final Determination erroneously refashioned the request for discrete items of information supplied in a particular format as a request for specific records.

B. The OOR erred in relying upon Anderson's unsworn testimony as to the ability of the School District's financial database to provide the requested information.

(1) The OOR erroneously relied upon an unsworn submission by Anderson as to the ability of the School District's financial database to provide the requested information.

(2) The School District supplied a sworn Affidavit of Mrs. Sitter, the Open Records Officer and the School District Board Secretary, which provided that

Affiant states that she has inquired with the Business Office of the Millcreek Township School District and has been informed that the Millcreek Township School District's computer based financial tracking system cannot accommodate the format of the request as the Millcreek Township School District's computer system has not been set up to maintain nor compile the requested and applicable expenditures in the manner requested.

(3) The OOR's reliance upon unsworn testimony of Anderson over the sworn testimony of the Open Records Officer was in error as the OOR itself requires submissions of testimony to be made via sworn testimony in the form of an Affidavit.

(4) The RTKL requires that an agency prove that a record is exempt from access by a preponderance of the evidence. 65 P.S. §67.708(a)(1). The preponderance of the evidence standard has been consistently interpreted by the OOR as requiring sworn testimony as to the facts of the existence of a record. see *Jelsma v. McNett Township*, Dkt. AP – 2009-0994.

(5) The OOR should have applied the same standard, that of reliance of sworn testimony as fact, as to the ability of the computer database system to compile or maintain the requested and applicable expenditures.

C. The OOR erred in relying upon the holding of the Commonwealth Court in *Signature v. Aston Township*, No. 1311 CD 2009 (three-judge panel, Pa. Commw. May 26, 2010) for the proposition that the provision of source records or printouts is required where no records were requested.

(1) In *Signature*, the requester requested specific records and the Commonwealth Court found that where one record is not responsive to a certain request, multiple records can be provided, and that a printout of a computer screen is not the creation of a record.

(2) *Signature* does not require that records be produced where none are requested.

(3) *Signature* is distinguishable from the instant matter as Anderson never requested records, but instead requested a listing of “all money paid” and further requested a more detailed summary of such money.

(4) The OOR additionally erred in its reliance upon *Signature* as it was decided after the partial grant/partial denial of the School District.

WHEREFORE, the Petitioner, the Respondent, the Millcreek Township School District, respectfully requests that the Office of Open Records grant reconsideration of its Final Determination, issued on June 4, 2010, and, thereafter, reverse its decision and deny the appeal of Anderson.

Respectfully submitted,

KNOX McLAUGHLIN GORNALL &
SENNETT, P.C.

BY: 

Timothy S. Wachter, Esquire
120 West Tenth Street
Erie, Pennsylvania 16501
(814) 459-2800

Attorneys for Petitioners, Respondents
Millcreek Township School District

901855.v1

BEFORE THE OFFICE OF OPEN RECORDS

IN THE MATTER OF:)	
)	Docket No.: AP 2010-0413
DANIEL ANDERSON)	
Complainants)	
vs.)	
)	
MILLCREEK TOWNSHIP)	
SCHOOL DISTRICT,)	
Respondent)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of June, 2010, a copy of the within document was served on the Office of Open Records and Mr. Daniel J. Anderson as follows:

via U.S. Mail
 Lucinda Glinn, Esq.
 Office of Open Records
 Commonwealth Keystone Building
 400 North Street, 4th Floor
 Harrisburg, PA 17120-0225

via facsimile 717-425-5343

via U.S. Mail
 Mr. Daniel J. Anderson
 242 Harbor Road
 Erie, Pennsylvania 16511



 Timothy S. Wachter



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

DANIEL ANDERSON,
Complainant

v.

MILLCREEK TOWNSHIP
SCHOOL DISTRICT, Respondent

Docket No. AP 2010-0413

INTRODUCTION

Daniel Anderson, (the "Requester") submitted a request to Millcreek Township School District (the "District") pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, ("RTKL") seeking the expenditures for the defense of a specific lawsuit. The District partially denied access under Section 705 asserting that the request required compilation in a specific format. The Requester timely 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.

FACTUAL BACKGROUND

On March 22, 2010, the Requester submitted a right-to-know request seeking:

all monies paid either by the [District] or their Insurance carrier but not limited to Law Firms, Lawyers, transcription services, copying services, private investigators, depositions, deductibles, hotels, restaurants in the District's defense of the legal action to defend against the lawsuit brought by Dr. Maryann Anderson for named service providers from January 1, 2007 to the present, and specified "I want the money to be listed by a weekly basis noting the date which firm or service" and the recipient

(the "Request").



After invoking a 30-day extension, Linda Sitter, the District's Open Records Officer (ORO), timely provided the requested information but denied the Request, based upon Section 705, to the extent that it sought a specific format ("Response"). Instead of providing responsive records, the District created two charts of expenditures, one showing amounts and years of payments by the District and its insurer, and one showing amount paid by the insurer only. The District advised that it "does not currently maintain or format the requested information in the format that you have requested" and is not required under the RTKL to organize its records in a manner it does not maintain.

The Requester appealed asserting that the District did not include certain expenditures in its charts and improperly denied the detailed information on invoices in its possession ("Appeal").

The District supplemented the record with a Memorandum from its counsel explaining the records sought do not currently exist in a format showing "weekly" expenditures. The District contends that providing the charts exceeded its obligations under the RTKL, and cites *Chen v. Tredyffrin/ Easttown School District*, OOR Dkt. AP 2009-0887 as support for its denial of the source records. The District submitted an affidavit of the ORO attesting that its charts represent the complete amounts of monies paid as per the Request, and that the records are not maintained in the requested format ("Affidavit").

In response to the OOR's request for clarification from the District as to whether the information existed in any format, the Requester supplemented the record with examples of "printouts" from the District's financial database showing that such records exist electronically. He advises that he does not believe it is a burden for the District to query its database and supply a printout showing the vendor name, date and amounts paid for transactions related to the lawsuit. The District advised that the records request was not sufficiently specific as he did not seek existing records like invoices, but admitted that "individual records do exist" relating to invoices for the services.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The District qualifies as a local agency subject to the RTKL. *See* 65 P.S. §67.102, §67.302. Records in possession of a local agency are presumed to be public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §67.305. The District denied the records sought in the Request based upon Section 705 because the Requester stated he wanted the expenditures listed in a weekly basis.

Section 705 clearly provides that “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 a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. §67.705. The OOR agrees that the District was not required to create the charts of total expenditures for the Requester here. Further, since the Affidavit represents that the records maintained do not show a weekly list of expenditures, the District is not obligated to create a list that shows the expenditures on a weekly basis.

The Request was sufficiently specific in that it enabled the District to discern that it was for certain expenditure records over a discrete timeframe. *See* 65 P.S. §67.703. Notably, the District admitted when asked to clarify whether responsive records exist that “[w]hile separate and individual records do exist in the records of the District relating to invoices received from the various law firms and vendors, no compilation of said information exists in the format requested.” Thus the District was not required to “create” a record.

The District provided no grounds for withholding source records from which it compiled the charts provided. As explained in the Final Determination the Commonwealth Court recently reinstated in *Signature v. Aston Township*, No. 1311 CD 2009 (three-judge panel, Pa. Commw.

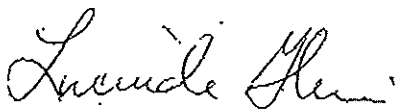
May 26, 2010), "mere assembly of a separate record from a series of existing records is not creation of a document under Section 705," so if the record of printouts of a database exist, they must be provided whether on one screen or multiple screens. Contrary to the District's characterization, this case is not similar to *Chen*, in which compilation of statistics were sought. Here, the records showing the monies spent exist and can be provided without further manipulation. The Requester's submission shows that records exist electronically on the District's financial database. The fact that the Requester prefers a form showing monies paid weekly does support a conclusion that the District fulfilled its duties in providing only dollar figures rather than the source records it maintains.

CONCLUSION

For the foregoing reasons, the appeal is **granted** and the District is required to disclose the records showing the expenditures/payments to the identified vendors from January 1, 2007 to March 22, 2010, in whatever form they currently exist, 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 Erie County Court of Common Pleas. 65 P.S. §67.1302(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 as per Section 1303. This Final Determination shall be posted on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: June 4, 2010



**LUCINDA GLINN, ESQ.
APPEALS OFFICER**

Sent to: Daniel Anderson; Timothy Wachter, Esq. for District



pennsylvania
OFFICE OF OPEN RECORDS

July 12, 2010

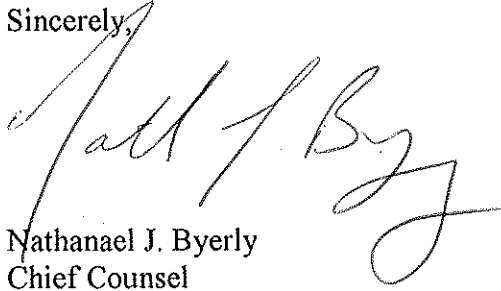
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Knox McLaughlin Gornall & Sennett
120 West Tenth Street
Erie, PA 16501-1461

RE: Petition for Reconsideration received June 18, 2010, OOR Dkt. AP 2010-0413

Dear Mr. Wachter:

We are in receipt of your Petition for Reconsideration dated June 18, 2010 that was received by this office on the same day in connection with the Office of Open Records Final Determination in *Anderson v. Millcreek Township School District*, OOR Dkt. AP 2010-0413. We hereby deny your Petition.

Sincerely,


Nathanael J. Byerly
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Daniel Anderson
File