

FACTUAL BACKGROUND

On October 23, 2009, the Requester filed the Request. The parties involved in this matter are involved in ongoing litigation. The Requester sought the following records.:

1. Records of the investigation, negotiation and or purchase of the Davis Property, including records reflecting appraisals and valuations form 2004 to the present.
2. Records of Dr. Noyes' involvement in the investigation and purchase of the Davis property and his personnel file.
3. Records of any attorneys retained by Phoenixville Area School District (PASD) beginning in 2003, including retainer letters, bills, invoices, correspondence, e-mails and reports regarding the Davis Property.
4. Records of Communications by, between and or among past or present PASD board members relating to (a) the Davis Property (including the decisions to purchase property and subsequent decision to abandon its development) and or (b) Dr. Noyes, including minutes of any meetings in which the Davis Property and/or Dr. Noyes were discussed.
5. Records of Act 34 hearings held since 2004, including but not limited to any minutes and/or transcript of such hearings, including without limitation the hearing regarding Michelle Diekow.
6. Records of communications by, between or among PASD, any of PASD's representatives, and any experts including but not limited to environmental specialists and/or architects, such as Synergy Inc., in connection with Davis Property.
7. The complete Ohio Casualty Insurance Policy no CBP 9604380 issued to Phoenixville Area School District for the July 1, 2008 – July 1, 2009 period.

The District did not respond and the Request was deemed denied on October 29, 2009. The Requester filed a timely appeal with the OOR on November 18, 2009.

In response to the appeal, the District stated that it had not received the Request, but that it would respond to it. The Requester subsequently provided evidence that the Request had been submitted to a solicitor for the District.

The parties then began discussing ways for the District to provide the requested records. The Requester granted several lengthy extensions to allow the District time to review and provide the records requested.

In a letter dated March 9, 2010, the District notified the OOR that it was going to provide the Requester with copies of the responsive documents. In a letter dated March 23, 2010 to the OOR, the District stated that it had provided the Requester with the responsive documents. The Requester subsequently disagreed stating that there were deficiencies in the production of documents.

In an April 9, 2010 letter, the District informed the OOR that it had provided complete access to the Requester to make copies and that it is unaware that the Requester was refused access to any of the documents requested. The District also states that with respect to the ongoing litigation, the District has provided copies of the same documents on multiple occasions.

The same day, the OOR requested that the District provide the OOR with an affidavit, made under penalty of perjury by a person with first hand knowledge, stating that the District has provided the Requester with all responsive records. In response, the District provided the affidavit of Leonard Kresefski, the District's Open Records Officer. He affirmed under the penalties of 18 Pa. C.S.A. § 4904 that all documents or things required to be produced pursuant to the RTKL have been provided to the Requester. The affidavit noted that two appraisals had been withheld pursuant to 65 P.S. 67.708(b)(22).

The Requester countered by again arguing that all records have not been provided. The Requester also submitted a transcript of a deposition where Mr. Kresefski stated that he had not seen "the whole universe of documents and materials that have produced in response to [the] documents requests," but had only seen portions of it. He stated that the Request at issue here was "turned over to the lawyers for response" and that they made the decision as to what documents would be provided.

LEGAL ANALYSIS

The Office of Open Records 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. § 67.302.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions by a preponderance of the evidence. See 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).

While the Requester argues that outstanding records exist and have not been provided, the District states that it has provided unlimited access for the Requester to copy all the documents requested and that it is not aware of any other responsive documents. The District provided the affidavit of its Open Records Officer stating that all responsive records, with the exception of two appraisals, had been provided. The District also notes that as part of the ongoing litigation the same documents have been requested and provided multiple times. However, the District provided insufficient factual support for these assertions. The affidavit provided to the OOR was not from an individual with first hand knowledge that all documents were provided. As the deposition transcript demonstrates, while Mr. Kresefski may have had knowledge of some of the documents provided, the attorneys overseeing the District's response to the Request had first hand knowledge of what was provided.

The law requires objective indicia that an exemption is applicable. The District has not provided sufficient legal and factual support that all the requested records have

been provided. Therefore, it fails to meet its burden of proving that the records are exempt from disclosure.

CONCLUSION

For the foregoing reasons the Requester's appeal is **granted**. The parties are advised that this is a Final Determination. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Chester County Court of Common Pleas. All parties must be served with notice of any appeal. In addition, the Office of Open Record shall be served notice of any appeal and have an opportunity to respond according to court rules. 65 P.S. §67.1302. Please also be advised that a copy of this Final Determination will appear on our website at <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED AND MAILED June 9, 2010



APPEALS OFFICER
NATHANAEL J. BYERLY, Esquire

Final Determination Sent To:
Gale White, Esquire
Ronald Williams, Esquire