



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>SIMON CAMPBELL and</b>	:	
<b><i>STOP TEACHER STRIKES, INC.,</i></b>	:	
<b>Complainant</b>	:	
	:	<b>Docket No.: AP 2010-0542</b>
<b>v.</b>	:	
	:	
<b>PENNSYLVANIA OFFICE OF</b>	:	
<b>THE BUDGET,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Mr. Simon Campbell and *Stop Teachers Strikes, Inc.* (collectively, the “Requester”), submitted a request to the Pennsylvania Office of the Budget (the “OB”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”) seeking a copy of a Office of Open Records employee's W-2 Wage and Tax Statements. The OB denied the request. The Requester timely appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the Requester’s appeal is **granted in part and denied in part.**

**FACTUAL BACKGROUND**

On June 3, 2010, the OB received a right-to-know request from the Requester stating “subject to any applicable redactions under the RTKL, please send me copies of

the 2009 W-2 Wage and Tax Statements issued and sent by the [OB] to all current or former employees of the [OOR].” (“Request”). On June 10, 2010 the OB denied the Request stating that the W-2 form is exempt from disclosure citing 26 U.S.C. Section 6103 (Federal income tax law); 72 P.S. § 7301 *et seq.*, (Tax Reform Code) and 53 P.S. § 6924.101 *et seq.* (Local Tax Enabling Act (“LTEA”). In the alternative, the OB contends that certain information is redactable pursuant to RTKL sections 708(b)(6)(i)(A) and (B). Specifically, the OB contends that the following is protected: the amount of Social Security and Medicare taxes paid; the amount of unemployment compensation tax paid; the amount of federal, state, and local income taxes paid; dependent care expenses; contributions to 457 plans or other deferred compensation programs which are the result of personal financial decisions by the employee; and, flexible spending account deductions. The OB also argues that the employee addresses are exempt by *Pennsylvania State Education Assoc. v. Commonwealth, Office of Open Records*, 2009 WL 2602198 (Pa. Cmwlth. , August 6, 2009).

The Requester appealed to the OOR on June 15 2010. He acknowledges that certain information may be redacted, but appeals the denial of information contained in box c (employer's name, address, and zip code), boxes e/f (employee's name, address and zip code), and the part of box 14 which shows payments for retirement contributions to the State Employees' Retirement System (“SERS”). On June 24, 2010 the OB submitted a Memorandum of Law in support of its position, including affidavits signed under penalty of perjury by Daniel Sharar and David Kessler. Mr. Sharar, assistant Agency Open Records Officer for the OB, discusses receipt of the request and the appeal but provides no substantive discussion related to the grounds for denial.

Mr. Kessler, Director of the OB's Bureau of Commonwealth Payroll Processing, states the following:

1. “[The Bureau of Commonwealth Payroll Operations (“BCPO”)] process the payroll and all payroll-related transactions for all of the agencies under the Governor's jurisdiction including the [OOR]...As part of its payroll processing, BCPO calculates the amount of compensation due Commonwealth employees and, the amount of federal, state, and local income tax due from each employee, withholds and remits those taxes as required by law, and annually produces and distributes IRS Forms W-2 to report the total federal, state, and local compensation paid to and the amounts withheld from each employee including the employees of the [OOR].” Affidavit, ¶ 3.

2. “All 2009 IRS Forms W-2 for all Commonwealth employees, including the persons employed by the [OOR], were delivered to Commonwealth employees on or before February 2, 2010, and were filed on behalf of the employees on or before March 2, 2010.” Affidavit, ¶ 4.

The OB asserts that by limiting the appeal to the denial of information in boxes c, e/f and 14 the Requester impermissibly amended his Request, citing *Welch v. East Hempfield Township*, OOR Dkt. AP 2009-1123 and *Brangan v. Buckingham Township*, OOR Dkt. AP 2010-0010. The OB acknowledged prior Final Determination directing the release of W-2 Forms, but argues that the “release of confidential tax information is prohibited by, and is a crime under, federal and Pennsylvania state laws, and OOR and the courts cannot order an agency or its personnel to commit such a crime in order [to] satisfy a RTKL request.” citing *McElfresh v. Commonwealth, Dept. of Transportation*, 963 A.2d 582 (Pa. Cmwlt. 2009); *Juniata Valley School District v. Wargo*, 797 A.2d 428 (Pa. Cmwlt. 2002); and *Scranton Times v. Scranton Single Tax Office*, 736 A.2d 711 (Pa. Cmwlt. 1999).

The OB asserts that the W-2 Form is a “type of tax information return which the Commonwealth, in its role as an employer, must produce and submit to the IRS to report the wages, salaries, and any other income paid by the Commonwealth to an employee. 26 U.S.C. § 6041(a) 26 C.F.R. § 1.6041-2.” Memorandum, pg. 6. It argues

that “there is no exception which permits a state to disclose that information in response to a RTKL request.”

### LEGAL ANALYSIS

“The [RTKL] is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010).

Under the RTKL, an appeals officer is required “to review all information filed relating to the request.” 65 P.S. 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. 65 P.S. 67.1102(a)(2). The law also states that an appeals officer *may* admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. 65 P.S. 67.1102(a)(2). Here, neither party requested a hearing.

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The OB qualifies as a Commonwealth agency subject to the RTKL and its obligations of mandatory disclosure. *See* 65 P.S. §67.102, §67.302. Records of a local agency are presumed “public” unless the record is: (1) exempt under Section 708(b); (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. An agency bears the burden of proving that a record is exempt. § 708(a).

As a threshold matter, a Requester may not amend the Request on appeal. See *Welch v. East Hempfield Twp.* OOR Dkt. AP 2009-0123 (on appeal requester not

permitted to change request from one for copies to one for inspection only); *Brangan v. Buckingham Twp.*, OOR Dkt. AP 2010-0010 (requester not permitted to seek additional records or clarify request). Here, the Request sought W-2 Tax Forms, “subject to any applicable redactions.” On appeal the Requester challenges only the withholding of information contained in boxes c, e/f and 14 of the requested document. A failure to challenge the denial of each piece of information sought is not an amendment of a request. In his Request, the Requester acknowledges that certain information on the W-2 form was properly redacted.. His appeal is limited to only that information which he considers improperly withheld and is not an amendment to his Request. Therefore, the appeal is properly before the OOR.

The OOR previously determined that W-2 tax forms are public records subject to release. See e.g. *Campbell vs. Berwick Area School District* AP 2009-0212, *Campbell vs. Souderton* OOR Dkt. 2009-0269, *Zeldenrust vs. Pocono Mountain Sch. District* OOR Dkt. 2009-0305, *Campbell vs. Souderton Area School District* OOR Dkt. 2009-0269, *Campbell vs. Colonial School District* OOR Dkt. 2009-0350, *Campbell vs. Boyertown School District* OOR Dkt. 2009-0230. The analysis and holding in those final determinations as to the application of other Federal, state or local laws is incorporated and adopted herein, except to the extent it conflicts with the analysis and holding below.

Here, the Requester challenges only the withholding of the information in boxes c, e/f and 14 which is the name and address of the employer (box c), the name and address of the employee (boxes e/f) and the retirement amount contributions to SERS (box 14). In its denial, other than by assertion that the entire W-2 Form is exempt, the OB does not challenge the public status of the name of the employee, the information in

box c or the SERS contribution in box 14. Therefore, only the public status of the address of the employee requires analysis.

In a recent final determination, *Campbell v. State Employees' Retirement System*, OOR Dkt. AP 2010-0568 the OOR held that the home addresses of public employees is exempt from disclosure pursuant to Senior Judge Friedman's Order in *Pa. State Educ. Ass'n v. Dep't of Cmty. & Econ. Dev.*, 981 A.2d 383, 386 (Pa. Commw. Ct. 2009).

The OOR found as follows:

Judge Friedman's Order, though a single-judge decision, is the only appellate guidance related to home addresses of public employees under the new law. "Pursuant to 210 Pa. Code § 67.55 (Commonwealth Court Internal Operating Procedure § 414), a single-judge opinion, even if reported, shall be cited for its persuasive value, not as binding precedent." *Hill v. Dep't of Corr.*, 992 A.2d 933, 937 (Pa. Commw. Ct. 2010). The Commonwealth Court relies on its own single-judge decisions in later opinions. *In re Nomination of Prendergast*, 673 A.2d 995, 997 (Pa. Commw. Ct. 1996)(Where there appears to be no controlling authority directly on point a single judge opinion was instructive.) As an administrative agency the OOR is required to look to appellate courts for guidance in deciding pending appeals before it. In the instant matter the OOR has no binding authority directly on point but for a temporary injunction order issued by the Commonwealth Court.

In issuing a preliminary injunction, the Commonwealth Court found a Constitutional right to privacy in the home address of every public school employee regardless of job title. It would be unreasonable to presume that the Court would protect some public employees' home addresses under a Constitutional right to privacy while not extending the same right to other public employees. The Court's ruling would be unlikely to change, for example, if the employee at issue is a county administrator as opposed to a school administrator. The Requester's proposed limited application of the Court's order would raise equal protection concerns because it would base a potential Constitutional right on a particular individual's profession.

While the OOR disagrees that a Constitutional right to privacy exists in a home address as evidenced by its appeal and brief to the Supreme Court in the *PSEA matter*, it nevertheless must abide by the temporary injunction and treat it as persuasive and instructive in determining how the Commonwealth Court would rule if the instant RTKL appeal were before it. The Commonwealth Court has preliminarily found a Constitutional privacy right exists in a public school employee's

home address. Accordingly, the OOR determines that the Court would extend the same right to public employees whether school employee or otherwise.

There is no dispute that the addresses sought here are public employee addresses. Therefore, pursuant to the holding and analysis in *Campbell v. SERS, supra*, the OB is not required to release the home addresses reflected on the requested W-2 Forms.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part and denied in part**. The OB is required to release the requested W-2 Forms but may redact all of the information except the name of the employer, the name of the employee and the SERS contribution reflected in box 14. 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 Commonwealth Court. 65 P.S. §67.1301(a). All parties must be served with notice of the appeal. The OOR shall be served notice and have an opportunity to respond according to court rules as per Section 1303. This Final Determination shall be posted at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: July 29, 2010**



APPEALS OFFICER  
AUDREY BUGLIONE, ESQ.

Sent to: Simon Campbell, Brian Zweiacher, Esquire