



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

JAMIE WALKER,
Requester

v.

CENTRAL BUCKS SCHOOL
DISTRICT,
Respondent

:
:
:
:
:
:
:
:
:
:
:
:

Docket No.: AP 2020-2287

INTRODUCTION

Jamie Walker (“Requester”) submitted a request (“Request”) to the Central Bucks School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking emails between certain named individuals. The Request was deemed denied. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part**, and the District is required to take additional action as directed.

FACTUAL BACKGROUND

On September 24, 2020, the Request was filed, seeking:

All emails between and among John Kopicki, Tracy Suits, Beth Darcy, Karen Smith, John Gamble, Dana Hunter, Leigh Vlasblom, Lorraine Scuito-Ballasy, Sharen Collopy, Jodi Schwartz, Nadine Garvin, Abram Lucabaugh, and Erin Corrigan from March 1, 2020 to June 1, 2020. Keywords for this search are to include: health and safety, lunch, mask, hybrid, spectator, contact tracing, Dr. Damsker, modified quarantine, quarantine, school closure, CDC, CBEA, and PSEA. It is understood that any emails resulting from this search is to be included

only if the context of the email pertains to the current school closure and pandemic planning conducted by the district.¹

On October 1, 2020, the District invoked a thirty-day extension to respond. 65 P.S. § 67.902(b). The District did not respond after invoking an extension of time to respond, and the Request was, therefore, deemed denied on November 2, 2020. 65 P.S. § 67.902(b)(2).

On November 9, 2020, the Requester appealed to the OOR, stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 24, 2020, the District submitted a position statement. The District claims that certain redactions were required for information that constitutes a record of an individual's medical history (*see* 65 P.S. § 67.708(b)(5)); personal identification information (*see* 65 P.S. § 67.708(b)(6)); and the name, home address or date of birth of a child (*see* 65 P.S. § 67.708(b)(30)). Likewise, the District denied access in whole to emails that included questions, suggestions, and edits relating to the District's Health, Safety, and Instructional plan pursuant to the internal predecisional deliberative exemption (*see* 65 P.S. § 67.708(b)(10)); emails containing written criticisms of agency employees or performance feedback (*see* 65 P.S. § 67.708(b)(7)); emails containing drafts of the District's Health, Safety, and Instructional plan (*see* 65 P.S. § 67.708(b)(9)); emails containing working notes (*see* 65 P.S. § 67.708(b)(12)); and an email containing the health information of a student (*see* 65 P.S. § 67.708(b)(5)).

¹ The original written Request filed with the District did not include keywords or a subject matter. On September 24, 2020—the same day the original Request was filed—the District and the Requester agreed by telephone to amend the Request to include these keywords and subject matter to enable the District to perform a tailored search. The District and the Requester memorialized these amendments in writing.

² The Requester granted the OOR an additional thirty days to issue a Final Determination in this appeal. *See* 65 P.S. § 67.1101(b)(1).

In support of its position, the District submitted the affidavit of Angela Linch, its Open Records Officer. On December 23, 2020, the District provided an index of records withheld.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “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. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. 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. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65

P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The District has established that some emails are exempt under the internal predecisional deliberative exemption

The District has identified the following emails as exempt under the internal, predecisional, deliberative exemption:

- a. An email dated June 8, 2020 consisting of "[f]eedback for internal consideration on the draft of the district's health and safety plan."
- b. An email dated June 22, 2020 consisting of "[w]orking group feedback for internal instructional planning for health, safety and instructional plan."
- c. An email dated July 8, 2020 consisting of "[c]onsiderations for internal planning and consideration in developing the instructional plan to be approved by the board."
- d. An email dated July 10, 2020 consisting of "[c]onsiderations for instructional plan to be approved by the board."
- e. An email dated July 12, 2020 consisting of "[q]uestions from a Board member on preparation of health and safety plan."

- f. Two emails dated July 15, 2020 consisting of “[s]uggested language for future communication drafts related to the health and safety plan” and “feedback for internal consideration in preparation of the district’s health and safety plan.”
- g. An email dated July 15, 2020 consisting of “[q]uestions from a Board member on preparation of health and safety plan.”
- h. An email dated July 20, 2020 consisting of “[c]onsiderations related to the drafting of the district’s health and safety plan.”
- i. An email dated July 29, 2020 consisting of “[c]omments for the administration’s consideration in developing the health, safety, and instructional plan to be approved by the board.”
- j. An email dated August 15, 2020 consisting of “[c]onsiderations for the revision of the health and safety plan.”
- k. An email dated August 26, 2020 consisting of “[c]onsiderations for the revision of the health and safety plan.”
- l. An email dated September 18, 2020 consisting of “[d]raft substitute plans for internal consideration.”

Section 708(b)(10)(i)(A) exempts from public disclosure a record that reflects:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, ... or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

To establish that records are deliberative, an agency must show that the information relates to the deliberation of a particular decision. *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 378-88 (Pa. Commw. Ct. 2014). The term “deliberation” is generally defined as “[t]he act of carefully considering issues and options before making a decision or taking some action...”

BLACK’S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep’t of Cmty.*

& Econ. Dev., OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, aff'd No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014).

To be deliberative in nature, a record must make recommendations or express opinions on legal or policy matters and cannot be purely factual in nature. *Kaplin*, 19 A.3d at 1214. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014). However, factual material can still qualify as deliberative information if its "disclosure would so expose the deliberative process within an agency that it must be deemed excepted"; or in other words, when disclosure of the factual material "would be tantamount to the publication of 'the [agency's] evaluation and analysis.'" *Id.* at 387-88 (citing *Trentadue v. Integrity Communication*, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

The District has provided the names of all individuals privy to the emails it seeks to withhold, all of which are District personnel or representatives. Accordingly, these emails are "internal" for purposes of Section 708(b)(10)(i)(A). Moreover, District has established by its exemption log that these emails pertain to "future drafts," "revisions," "preparation" of plans, "feedback on drafts" and the development of future plans. As such, they are predecisional. Finally, the District's log explains that the emails consist of "comments," "questions," "feedback," and "considerations," all of which appear to be deliberative in character, in the nature of expressions of opinion on a proposed plan. As such, the District may withhold these emails.

2. The District has not established that some emails are exempt as policy drafts

The District has claimed that the following emails are exempt as drafts of agency policy:

- a. An email dated June 14, 2020 consisting of "[d]raft of the district's health and safety plan."
- b. An email dated June 15, 2020 consisting of a "[c]onfidential draft of county health department reopening guidance."

- c. An email dated June 21, 2020 consisting of a “[d]raft of the district’s athletic health and safety plan, and feedback for consideration in the final document.”
- d. An email dated July 15, 2020 consisting of a “[h]ealth and safety plan draft....”
- e. An email dated July 29, 2020 consisting of “[d]raft comments later not delivered at a Board meeting.”
- f. An email dated September 9, 2020 consisting of “[d]raft substitute plans for internal consideration.”
- g. An email dated September 9, 2020 consisting of “[d]raft bell schedules for coming school year.”

Section 708(b)(9) of the RTKL exempts from disclosure “[t]he draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.” 65 P.S. § 67.708(b)(9). This exemption, however, covers only drafts that fall into the categories identified by the statute. *See, e.g., Public Interest Legal Foundation v. City of Phila. Office of City Commissioners*, OOR Dkt. AP 2018-0256, 2018 PA O.O.R.D. LEXIS 562 (drafts of transcripts do not meet the categories identified by the exemption).

None of the identified categories of drafts clearly fall into the categories enumerated in Section 708(b)(9). Previously, the OOR has held that drafts of “district pandemic plans” and “online learning plans” are available for public access, unless a district presents evidence that such drafts qualify as one of the types of record expressly delineated in Section 708(b)(9). *See Bugay v. Downingtown Area School District*, OOR Dkt. AP 2020-1832, 2020 PA O.O.R.D. LEXIS 3012, *10. In reviewing the District’s evidence, we can discern no distinction between a draft “health and safety plan” relating to the pandemic, and a “district pandemic plan,” which we have held to be available in prior cases—absent additional evidence. *See id.* Accordingly, the District has not met its burden of proving that such draft records are exempt under Section 708(b)(9) of the RTKL. *See Campbell v. Bellefonte Area Sch. Dist.*, OOR Dkt. AP 2019-0483, 2019 PA O.O.R.D. LEXIS 474.

3. The District has not established that some emails are exempt as written criticisms or performance reviews of employees

The District has claimed that the following emails are exempt as drafts of agency policy:

- a. An email dated July 19, 2020 consisting of “[c]omments about an agency employee.”
- b. An email dated July 29, 2020 consisting of “[d]raft comments later not delivered at a Board meeting.”
- c. An email dated August 12, 2020 consisting of “[c]omments among two Board members related to an agency employee.”

Section 708(b)(7)(vi) exempts from disclosure “records relating to an agency employee” including “[a] performance rating or review” and “[w]ritten criticisms of an employee.” 65 P.S. § 67.708(b)(7)(ii, vi); *see also Perrine v. Lakeview Sch. Dist.*, OOR Dkt. AP 2009-0374, 2009 PA O.O.R.D. LEXIS 239; *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 4. (Pa. Commw. Ct. 2012) (Section 708(b)(7) applies whenever there is criticism of individuals who are employees of the agency).

However, there is nothing in the exemption log—aside from the recitation of the claimed legal exemption—to support the claim that these comments relating to Board members consisted of criticism. *See, e.g., Overton v. Phila. Police Dep't*, OOR Dkt. AP 2015-0471, 2015 PA O.O.R.D. LEXIS 512 (“The Department has failed to provide any evidence regarding the nature or content of the complaints sufficient to prove that the responsive records contain written criticisms”); *Bhaya v. Central Bucks School Dist.*, OOR Dkt. AP 2014-0319, 2014 PA O.O.R.D. LEXIS 372 (holding that affidavit stating that withheld records included records ‘received from parents of students...which were critical of [a coach] and constituted complaints’ did not include a statement that the records were “written criticisms” to substantiate the application of Section 708(b)(7)(vi)); *see also* 65 P.S. § 67.706 (“The agency may not deny access to the record if the information which is not subject to access is able to be redacted”).

Likewise, there is nothing in the record to support the claim that the withheld records rate or review the performances of any agency personnel. Accordingly, these items may not be withheld.

4. The District may redact the medical history of students from responsive emails

The District argues that certain emails are exempt as they contain the medical history of a student. Section 708(b)(5) of the RTKL exempts from disclosure:

A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

65 P.S. § 67.708(b)(5). In support of withholding the emails, the District provides the attestation of Ms. Linch, who attests, in part: “[a]ccess to a[n] email from a parent that contained student health information was denied....”³ Under the RTKL, an affidavit made under the penalty of perjury may serve as sufficient evidentiary support of the nonexistence of records. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Accordingly, the District may redact the email containing student health information.

³ In its Notice of Appeal issued on November 12, 2020, the OOR ordered the District to notify all third parties with a legal interest in this appeal. The District has not presented any proof that it notified the parent of the student implicated by this appeal as directed.

CONCLUSION

For the foregoing reasons, the appeal is the appeal is **granted in part and denied in part**, and the District is required to provide responsive records in accordance with this decision in thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks 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 as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 15, 2021

/s/ Joy Ramsingh

APPEALS OFFICER
JOY RAMSINGH

Sent to: Jamie Walker (via email only);
Angela Linch (via email only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).