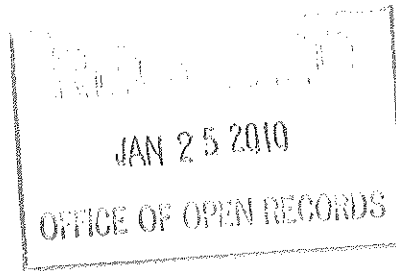


Via First Class Mail

January 20, 2010

Ms. Terry Mutchler
Executive Director
Office of Open Records
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400 North Front Street, 4th Floor
Harrisburg, PA 17120-0225



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James P. Testerman, *President*
Michael J. Crossey, *Vice President*
W. Gerard Oleksiak, *Treasurer*
John F. Springer, *Executive Director*

RE: Request for Advisory Opinion

Dear Ms. Mutchler:

As you are aware, the Pennsylvania State Education Association (PSEA) is a professional and labor organization with over 191,000 members, including professional and support professional employees of public school and public health entities in the Commonwealth. This letter relates to the disclosure, by school districts, of the names of employees who are paying either dues or fair share fees to PSEA.

PSEA does not object to any citizen learning the amount of union dues or fair share fees that are withheld from school employees' salaries and sent by a district to PSEA; however, PSEA believes that individuals' names should not be released. Individuals have a first amendment right to freedom of association (or non-association, as the case may be) which should be recognized by the Right-to-Know Law (RTK) and the Office of Open Records (OOR). PSEA respectfully requests that the OOR reconsider its position regarding the disclosure of individuals' names as union or non-union members in light of its recent decisions regarding the disclosure of voluntary contributions to other associations.

To date, the OOR has ordered the release of individual information relating to membership, or non-membership, in PSEA. In Campbell v. Berwick Area Sch. Dist., AP 2009-0212, and Campbell v. Susquehanna Twp. Sch. Dist., AP 2009-0342, the OOR held that union dues could not be redacted from individuals' W-2 forms, therefore requiring the release of the names of union members along with their individual dues payment amounts. The OOR has also ordered the disclosure of the contact information of identified fair share fee payers (in other words, non-members of a union) employed by a school district or other public agency. Campbell v. William Penn Sch. Dist., PA 2009-0475; Campbell v. York County, AP 2009-0434; Campbell v. Wayne County, AP 2009-0433; Campbell v. Cambria County, AP 2009-0430; Campbell v. Northumberland County, AP 2009-0411; Campbell v. Centre County, AP 2009-0373; Campbell v. Susquehanna County, AP 2009-0372. Notably, the agencies involved in those appeals did not challenge the appropriateness of identifying non-union members on an individual basis, and the OOR's determinations focused on the public or non-public nature of the contact information requested (i.e., email addresses and/or home addresses), or the appropriateness of RTK fees assessed by the agency.

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However, the OOR has since issued two final determinations which clarify the OOR's interpretation and application of the law, and in light of those determinations, PSEA believes that the OOR should revisit its earlier determinations.

In Campbell v. Montgomery County Community College, AP 2009-0540, the OOR concluded that payroll deductions for United Way contributions reflected on an employee's W-2 form constituted personal financial information and were excluded from disclosure because they reveal an employee's associations and beliefs:

In the instant matter, requiring the mandatory disclosure of an individual's participation with the United Way as evidenced by the appearance of that contribution on the W-2 form exposes a financial transaction that reveals information about the school employee's associations and beliefs – the choice to support a charitable organization.

Citing federal case law for the proposition that the freedom of association is infringed by the required disclosure of organizational memberships, the OOR concluded that the disclosure of United Way contributions would infringe upon an individual's freedom of association. The OOR specifically referenced the United States Supreme Court's decision in Shelton v. Tucker, 364 U.S. 479 (1960), wherein the Court held unconstitutional the mandatory disclosure of a teacher's association with "social, professional, political, avocational, or religious" organizations. Id. at 488.

Similarly, in Campbell v. Pocono Mountain Sch. Dist., AP 2009-0766, the OOR concluded that a record reflecting the name of an individual employee who makes a contribution to a political action committee (PAC) through payroll deduction is exempt from disclosure. The OOR concluded that the required disclosure of an individual's PAC contributions, like United Way contributions, would infringe on the employee's freedom of association. The OOR noted that there were less intrusive ways for the public to know whether the District was promoting a private entity through payroll deduction of contributions than by requiring the disclosure of identities of individual contributors. Accordingly, the OOR ordered the District to disclose the amounts contributed by individuals and the PACs receiving those contributions, without disclosing the individuals' identities.

In the case of school employees in local associations affiliated with PSEA/NEA, dues consist of three parts: dues to a local association which is certified as a labor organization by the PLRB, dues to PSEA which is incorporated as a non-profit entity under state law and has tax exempt status as a professional association under section 501(c)(6) of the Internal Revenue Code, and dues to NEA, the national affiliate which is incorporated as a non-profit entity under the laws of the District of Columbia and is a tax exempt labor organization under IRC section 501(c)(5). Perhaps even more so than charitable or political contributions, an employee's voluntary

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payment of union dues reveals an individual's personal choice to associate with a labor and professional organization and align him or herself with that organization's associational goals and activities. The reverse is also true, which is that the decision not to pay dues indicates a personal choice not to associate. Therefore, the required disclosure of union dues payments or fair share fee payments by individuals impermissibly infringes on individual employees' freedom of association. To deem union dues or fair share fees on an individual basis "public record" while shielding from disclosure other contributions to charitable or advocacy organizations would be an arbitrary and inequitable application of the Law.

PSEA respectfully asserts that the OOR's prior decisions (including Berwick and Susquehanna Township) are inconsistent with the more recently issued decisions in Montgomery County Community College and Pocono Mountain Sch. Dist., and that an individual's payment of union dues or a fair share fee should be considered "personal financial information" which is exempt from disclosure under RTK. As indicated in Pocono Mountain, the release of individual information would infringe on the employee's freedom of association and there are less intrusive ways for the public to know of the agency transactions in question than by requiring the disclosure of identities of union members or non-members. We suggest that the proper approach would be for districts to disclose the amounts withheld from salaries for dues or fair share fees, without disclosing the individuals' identities.

We are aware that the OOR has declined to issue advisory opinions regarding questions that have already been addressed through final determinations. However, PSEA urges the OOR to revisit the question of whether records reflecting an individual's payment of union dues or fair share fees should be exempt from disclosure under RTK. Given the existing final determinations regarding this issue, it is possible and probable that public employers will continue to release records of individual union membership status until some further guidance has been issued. A foreseeable lack of denials by agencies will allow this important issue to evade further review by the OOR, and lead to the unwarranted release of private information.

Thank you for your thoughtful consideration of PSEA's position. PSEA is unaware of pending litigation regarding this issue. Please do not hesitate to contact me for more information or if you have any questions about the above.

Sincerely,



Lynne L. Wilson
General Counsel

cc: James P. Testerman, PSEA President
John Springer, PSEA Executive Director



pennsylvania
OFFICE OF OPEN RECORDS

February 2, 2010

Lynne L. Wilson
General Counsel
Pennsylvania State Education Association
400 North Third Street
Harrisburg, PA 17105-2225

Re: Advisory Opinion Request Regarding Union Dues

Dear Lynne:

Thank you for writing to the Office of Open Records with your request for an Advisory Opinion pursuant to the Right-to-Know Law, 65 P.S. §§67.101, *et seq.*, ("RTKL").

You asked the OOR to reconsider its determination that union dues could not be redacted from W-2 forms, as well as its determination that the list of "fairshare feepayers" is a public record. You state that the Office of Open Records may have clarified its interpretation and application of the law. Namely, you reference *Campbell v. Montgomery County* OOR Dkt. AP 2009-0540 (United Way contributions reflected on a W-2 form are subject to redaction as this constitutes personal financial information) and *Campbell v. Pocono Mountain School District*, OOR Dkt. AP 2009-0766 (permissible redaction of the names of individuals who contribute to political action committees through payroll deductions as disclosure of that information would infringe upon the donors' First Amendment right of association). We note that in the latter determination, this office ordered the agency to disclose the amounts contributed and the PACs that received the money, allowing for redaction of the names of the contributors.

While you provide a very important and well-reasoned analysis in support of your position, the OOR has decided not to grant this request for an Advisory Opinion. Advisory opinions are not the appropriate vehicle for this analysis given the fact-specific nature and fact-specific complexity of your request. Please be advised however that we will review and consider the arguments presented in your request if and when these issues are presented in the context of an appeal of a denial of information under the RTKL.

Thank you for your inquiry. We will reflect this response on the OOR website.

Respectfully,


Terry Mutchler
Executive Director