



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

:

:

JACK DETWILER,  
Requester

:

:

:

:

v.

:

Docket No.: AP 2015-2838

MANHEIM CENTRAL SCHOOL  
DISTRICT,  
Respondent

:

:

:

:

### INTRODUCTION

Jack Detwiler (“Requester”) submitted a request (“Request”) to Manheim Central School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking engineering reports related to the Doe Run Elementary School building. The District partially denied the Request, stating that certain records are related to a noncriminal investigation and other records reflect the District’s internal, predecisional deliberations. 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 further action as directed.

### FACTUAL BACKGROUND

On November 2, 2015, the Request was filed, seeking:

A hard copy of ... the Engineer’s Report, relative to the existing conditions as reported at the[] Doe Run Elementary School Building, by: Engineer, Larry

Baker. In addition I am requesting any and all documented statements and photographs by this Engineer, (Larry Baker) relative to the reported existing conditions at the [ ]Doe Run building.

Further, I am requesting a copy of the follow-up report by ... the firm of[ ] Gwin, Dobson & Foreman.

On November 3, 2015, the District invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On December 2, 2015, the District provided the Requester with a 21-slide PowerPoint presentation that was prepared by Larry Baker and presented by its Solicitor during a public meeting. The District denied access to all other records, stating that certain records reflected the District's internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), and other record are related to a noncriminal investigation, 65 P.S. § 67.708(b)(17).

On December 16, 2015, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On December 18, 2015, the District notified Baker Ingram and Associates, and Gwin, Dobson & Foreman, Inc. of the appeal. On January 5, 2016, the District provided a position statement reiterating its reasons for denying access and also arguing that the records are protected under Pa.R.C.P. 4003.5 as communications with experts; the federal Copyright Act, 17 U.S.C. §§ 101 *et seq.*; and that disclosure would threaten infrastructure security, 65 P.S. § 67.708(b)(3).<sup>1</sup> In an attestation signed under penalty of perjury from its Open Records Officer, the District identifies the responsive records as follows:

2. The records which are responsive to Mr. Detwiler's request set forth in Items #1 and #2 above consist of the following:

---

<sup>1</sup> The District is permitted to raise these additional reasons for denying access on appeal. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

- a. A 4-page initial assessment dated September 16, 2014 and reported to the District's architect, E.I. Associates, by Lawrence R. Baker, Jr., PE, President of Baker, Ingram & Associates, a structural engineering firm, with regard to Doe Run Elementary School ("September 2014 Baker Report").
- b. A[] 3-page supplemental assessment of the Doe Run Elementary School dated October 17, 2014 and reported to the District's architect, E.I. Associates by Mr. Baker, on behalf of Baker, Ingram & Associates ("October 2014 Baker Report").
- c. A 42-slide PowerPoint presentation given to the Board of School Directors in executive session by Larry Baker in October 2014 which contains analysis, opinions, and conclusions regarding the original school building construction and defects discovered in the building's current condition. ("Baker PowerPoint Presentation").
- d. A PowerPoint presentation consisting of 21-slides prepared by Larry Baker and presented by Carl Beard at the October 27, 2014 meeting of the Manheim Central School District Board of School Directors ("Board Meeting Presentation") addressing the recent evacuation of the Doe Run Elementary School. This Board Meeting Presentation was released to the requester and enclosed with the District's Final Response dated December 2, 2015.
- e. A November 25, 2014 Report addressed to District Superintendent Norman Hatten from Larry Baker, summarizing a conference held between himself and the District's other consulting engineers for purposes of addressing options for potential repair of the Doe Run Elementary building and containing opinions and analysis of options for addressing and potentially remediating the building's structural issues known as of that time, along with estimated costs.
- f. A Masonry Crack Survey of Doe Run Elementary School dated June 29, 2015 intended to serve as portion of an overall Forensic Assessment of the building, submitted by Larry Baker on behalf of Baker, Ingram & Associates to the District's Solicitor Carl P. Beard ("June 2015 Baker Report").

3. Records responsive to Mr. Detwiler's Request #3 as identified above, consists of the following:

- a. A November 25, 2014 Investigative Report on the Doe Run Elementary School, completed by Gwen Dobson & Foreman, Inc., consulting engineers, which includes, a structural investigation preliminary assessment reported November 14, 2014 and analysis, opinions, and conclusions regarding the original school building construction, and its relationship to the building's current condition ("GDF Report").

The District's Open Records Officer further affirms that, after the discovery of cracks in the building's interior and exterior walls, the District retained Baker, Ingram & Associates to conduct an investigation of the cause of the cracks and to provide an "assessment of any safety concerns they posed to the Doe Run Elementary School building." Based on safety concerns, the building was evacuated on October 17, 2014. The Open Records Officer also affirms that:

Based on information obtained to date in its ongoing investigation, the Board of School Directors is very seriously considering commencing legal action against the Architect and Engineer who were responsible for the original construction of the building and who previously rendered an opinion on the cracks in the exterior and interior walls and the building's structural integrity prior to the events arising in 2014.

The District also provided an attestation signed under penalty of perjury from its Solicitor, who attests:

1. In my capacity as School District Solicitor I have been significantly involved in efforts to investigate and assist the Board in determining a course of action to be taken with respect to ongoing issues with the structural integrity and safety of the District's Doe Run Elementary School building, and specifically the question of whether to commence litigation as a result of the defects and problems with the building identified in 2014.
2. The June 2015 Masonry Crack Survey completed by Larry Baker on behalf of Baker, Ingram & Associates was submitted directly to me for purposes of my review in relation to potential litigation and strategy to be pursued in regard to litigation the District may decide to commence against the Architect and Engineer involved in the original construction of the Doe Run Elementary Building.
3. The June 2015 Report submitted to me by Larry Baker consists of two volumes, with Volume 1 consisting entirely of School District classroom floor plans and drawings, and Volume II consisting entirely of exterior, interior and additional area photographs.
- ....
5. Larry Baker, Baker, Ingram & Associates, is a potential expert witnesses who may be called to testify on behalf of the School District in the event the District commences litigation against the Architect and Engineer involved in the original construction of the Doe Run Elementary Building.
6. The Reports submitted by Larry Baker and Baker, Ingram and Associates are potential expert reports and/or portions thereof that may be relied upon in the event the District commences litigation against the Architect or Engineer involved in the original construction of the Doe Run Elementary Building.

In order to permit the OOR to conduct an *in camera* review of the requested records, the Requester agreed to an indefinite extension of time for the OOR to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1). On February 4, 2016, the OOR ordered the District to provide the withheld records for an *in camera* review. The District provided the records on March 1, 2016, and the OOR conducted an *in camera* review of these records.

### 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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing, and the OOR has the necessary, requisite 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. § 67.301. Records in 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 clearly 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). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

On appeal, the District argues, among other things, that the records are protected from public access under Rule 4003.5 of the Pennsylvania Rules of Civil Procedure, as the records constitute draft expert reports and communications with experts concerning potential litigation surrounding the Doe Run Elementary School building. Rule 4003.5(a) states:

(4) A party may not discover the communications between another party’s attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) or from whom discovery is permitted under subdivision (a)(3) regardless of the form of the communications, except in circumstances that would warrant the disclosure of privileged communications under the Pennsylvania law. **This provision protects from discovery draft expert reports and any**

**communications between another party's attorney and experts relating to such drafts.**

Pa.R.C.P. 4003.5(a)(4) (emphasis added); *see also Adler v. Southwestern Pennsylvania Water Authority*, OOR Dkt. AP 2015-1629, 2015 PA O.O.R.D. LEXIS 1935 (holding that certain records were protected under Pa.R.C.P. 4003.5(a)(4)). The attestations provided by the District demonstrate that the District is considering litigation related to the Doe Run Elementary School building and that it is considering using the engineers identified in the Request as experts in potential litigation.

The OOR has conducted an *in camera* review of the withheld records. Based on this *in camera* review, the District has demonstrated that the majority of the withheld records are protected as draft expert reports and communications with experts and that the engineering firms may provide expert testimony. In its submission, the District also provided a copy of the 21-slide Board Meeting Presentation, which it provided to the Requester in response to the Request. Upon the OOR's *in camera* review, slides from the Board Meeting Presentation are also present within the 42-slide Baker PowerPoint Presentation that was presented during an executive session. Although the District has demonstrated that the remainder of the Baker PowerPoint Presentation is protected under Pa.R.C.P. 4003.5(a)(4), the District, to the extent that the Requester wishes to receive a duplicate copy of the records already provided, is required to provide access to all slides contained within the Baker PowerPoint Presentation that are identical to the slides within the Board Meeting Presentation.

Based on this holding, the OOR need not consider the District's alternative reasons for denying access to these records.

## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the District is required to provide the Requester with all slides contained within the Baker PowerPoint Presentation that are identical to the slides within the Board Meeting Presentation<sup>2</sup> within 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 Lancaster Commonwealth Court of Common Pleas. 65 P.S. § 67.1301(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. 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 19, 2016**

/s/ J. Chadwick Schnee, Esq.

---

APPEALS OFFICER/ ASSISTANT CHIEF COUNSEL  
J. CHADWICK SCHNEE, ESQ.

Sent to: Jack Detwiler (via e-mail only);  
Elizabeth Benjamin, Esq. (via e-mail only)

---

<sup>2</sup> As noted above, the District must provide these duplicate copies only to the extent that the Requester wishes to receive them.

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