



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
AMERICAN CIVIL LIBERTIES	:	
UNION OF PENNSYLVANIA,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-1021
	:	
SCHOOL DISTRICT OF	:	
LANCASTER,	:	
Respondent	:	
	:	
and	:	
	:	
THE CAMELOT SCHOOLS OF	:	
PENNSYLVANIA, L.L.C.,	:	
Direct Interest Participant	:	

INTRODUCTION

Molly Tack Hooper, on behalf of the American Civil Liberties Union of Pennsylvania (“Requester”), submitted a request (“Request”) to the School District of Lancaster (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records pertaining to District teachers and student placement. The District partially denied the Request, arguing, among other reasons, that it does not possess some of the requested records. 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, denied in part** and **dismissed as moot in part**, and the District is required to take further action as directed.

FACTUAL BACKGROUND

On May 20, 2016, the Request was filed, seeking:

1. Any records that identify District employees or contractors involved in student placement by name, title, and/or salary;
2. Any records reflecting District policies, procedures, and criteria for new student placement;
3. Any records reflecting District policies, standards, and criteria for student placement at (a) the McCaskey Campus, or (b) Phoenix Academy;
4. Any records that describe the English as a Second Language (ESL) curriculum at (a) the McCaskey Campus, or (b) Phoenix Academy;
5. Any records that describe how English Language Learner (ELL) students' progress is measured or assessed at (a) the McCaskey Campus, or (b) Phoenix Academy;
6. Any records that describe the International School program or International School curriculum at the McCaskey Campus;
7. Any student handbooks, manuals, or reference guides for Phoenix Academy;
8. Any employee handbooks, manuals, or reference guides for District Employees;
9. Any records that reflect current salaries of ESL teachers at (a) the McCaskey Campus, or (b) Phoenix Academy;
10. Any records that reflect the certification, or teaching certificates obtained by ESL teachers at (a) the McCaskey Campus, or (b) Phoenix Academy;
11. Any records that reflect the employment history of ESL teachers at (a) the McCaskey Campus, or (b) Phoenix Academy, including but not limited to resumes...

On June 24, 2016, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b), the District partially denied the Request. For Items 2, 3, 6, 7, and 10, the District directed the

Requester to publicly accessible websites. 65 P.S. § 67.704(a). Additionally, the District provided responsive records for Items 3, 4, 5, 7, 8 and 9. However, the District denied Item 1, arguing that it was insufficiently specific, 65 P.S. § 67.703, and portions of Items 9, 10 and 11, arguing that the District did not possess responsive records. Finally, the District denied the portion of Item 11 seeking records pertaining to ESL teachers at the McCaskey Campus, arguing that the information constitutes personal identification information, 65 P.S. § 67.708(b)(6), and information contained in a personnel file, 65 P.S. § 67.708(b)(7).

On June 10, 2016, 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 this appeal. *See* 65 P.S. § 67.1101(c).

On July 25, 2016, the District submitted a position statement, along with the affidavits of Arthur W.C. Abrom, Director of Student Services, and David M. Walker, Esq., Solicitor for the District. The District also provided a copy of an Operating Agreement between itself and The Camelot Schools of Pennsylvania, L.L.C. (“Camelot”) to operate the Phoenix Academy (“Phoenix”).

On August 2, 2016, Camelot requested to participate in the appeal and provided a position statement and the affidavit of Monica Willis, Senior Vice President of Camelot. Because the Request seeks records of Camelot employees working at Phoenix, this request to participate was granted on August 11, 2016, and Camelot’s submission has been made part of the record before the OOR.

On August 9, 2016, the Requester submitted a response to Camelot’s submission. However, because this response was submitted after the record in this matter had closed and is

largely duplicative of arguments made in the Requester's appeal, the response was not included in the record before the OOR. *See* 65 P.S. § 67.1102(a)(2).

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; however, 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. § 67.302. 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. 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 *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. Item 1 of the Request is sufficiently specific

The District argues that Item 1 of the Request is insufficiently specific because various individuals are involved in student placement decisions. *See* 65 P.S. § 67.703. Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” *Id.* When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n.*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813). In determining whether a particular request under the RTKL is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013).

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep’t of Educ.*, 119 A.3d at 1125. In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting timeframe to be sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d at 367. Second, the scope of the request must identify a discrete group of documents (*e.g.*, type or recipient). *See Pa. Dep’t of Educ.*, 119 A.3d at 1125. Finally “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise a short timeframe will not transform an overly broad request into a specific one. *Id.*

In support of the District’s assertions, Mr. Abrom attests, in relevant part:

5. Student placement determinations are made on a case-by-case basis for each individual student, based upon the student’s individual and particular needs.
6. Any number of ... District employees and contractors may be involved in a particular student’s placement determination, and that group of employees and contractors may vary from one student to the next, depending on the circumstances presented by any particular student. However, the Central Office administrative personnel involved in student placement determinations are Jacques Blackman, Marsha Riddick and/or Amber Hilt.

Item 1 of the Request identifies the type of information requested (name, title, and/or salary) and a subject matter (District employees or contractors involved in student placement). Item 1 does not contain a timeframe; however, it is reasonable to assume that the Item seeks information about employees currently (at the time of the Request) involved in student placement. As a result of the information provided in the Request, the District has identified three administrative personnel who are involved in student placement determinations.

See Easton Area. Sch. Dist. v. Baxter, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012) (“[T]he request was obviously sufficiently specific because the school district has already identified potential records included within the request”). While the circumstances of student placement may make it difficult to determine every individual involved, agencies are required under the RTKL to conduct a good faith search for responsive records. 65 P.S. § 67.901. Therefore, there is no requirement that a request be worded in such a way so that an agency is able to locate every responsive record; instead, a request is required to include enough specificity for the agency to conduct a good faith search. *See* 65 P.S. § 67.703; 65 P.S. § 67.901. In the present case, Item 1 of the Request provided enough specificity to enable the District to conduct a good faith search for responsive records. As a result, Item 1 is sufficiently specific.

2. The District is not required to obtain records from Phoenix

The District claims that it does not possess records responsive to the portions of Items 9, 10, and 11 the Request that pertain to Phoenix. In support of this assertion, Attorney Walker attests that the District “does not possess, nor does it have the contractual authority to access or possess, any salary information or employment files for any Camelot employees.” Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support for 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). In the absence of any competent evidence that the District acted in bad faith or that the records exist, “the averments in [the statement] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based upon the evidence provided, the District has met its burden of proving that it does not possess the requested records.

However, the Requester argues that these records are subject to disclosure because they are public records in the possession of a third party government contractor. *See* 65 P.S. § 67.506(d)(1). Under the RTKL, two groups of records are accessible: records in an agency’s actual or constructive possession reached directly under Section 901 of the RTKL, and records that are only in the possession of third parties that are indirectly accessible through Section 506(d) of the RTKL. *See Pa. Dep’t of Pub. Welfare v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014). Section 506(d)(1) states that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this action, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1); *see also Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011) (holding that records “in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency” are presumptively public records subject to public access, “so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL”).

Here, it is undisputed that the District has contracted with Camelot to perform a governmental function: the operation of Phoenix. Therefore, the question becomes whether the records directly relate to the governmental function. “[T]o satisfy the ‘directly relates’ prong, the records must relate to the performance of the governmental function.” *Eiseman*, 86 A.3d at 940. In determining whether records directly relate to a third party’s governmental function, the Commonwealth Court has consistently looked to whether the records are relevant to the third party’s performance of its governmental function. *See Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010); *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 615 (Pa. Commw.

Ct. 2011) (“[A third party contractor’s] independent contractor agreements with interpreters who have not actually performed translation services under the contract are indirectly related to the contract because of the possibility that the interpreters might perform services under the contract”).

The portions of the Request at issue seek salaries, employment history, and teacher certification information. Attorney Walker attests that:

Under the terms of the Agreement, the ... District has no authority: to direct individual Camelot employees; to hire, discipline, promote or terminate Camelot employees; to establish the amount of compensation for any Camelot employees; or to access the payroll or personnel records of any Camelot employees.

Likewise, Ms. Willis attests:

4. Phoenix’s teachers are not employees of the [District]; they are employees of Phoenix.
5. The District has no control or authority over Phoenix’s teachers or other employees.
6. Phoenix alone controls all matters pertaining to its teachers and other employees.
7. Phoenix exclusively controls the pay and benefits for its teachers and other employees.
8. Phoenix exclusively controls the records relating to the employment of its teachers and other employees.
9. The District does not have actual possession or control of the employment records of Phoenix’s teachers and other employees.

Additionally, Section 10.3 of the Master Operating Agreement between the District and Camelot states:

Camelot shall be an independent contractor and, subject to the terms of this Agreement, shall have the sole right to supervise, manage, operate, control and direct the performance of the services under this Agreement. The personnel and staff of Camelot are employees of Camelot and shall not, for any purposes, be considered employees or agents of the ... District....

While the Operating Agreement contains various reporting requirements in regard to students enrolled at Phoenix, there are no apparent reporting requirements regarding Phoenix’s employees.

In the present matter, the salaries and employment histories of the teachers employed at Phoenix are indirectly related to Camelot’s performance of its governmental function. This information does not directly pertain to Camelot’s governmental function of providing education to students at Phoenix. *See Buehl*, 6 A.3d at 31 (“[W]hat [a third party contractor] paid for the items is beyond the parameters of its contract with the Department — it does not directly relate to performing or carrying out this governmental function”); *Allegheny County Dep’t of Admin. Svcs. v. Parsons*, 61 A.3d 336, 345 (Pa. Commw. Ct. 2013) (finding that “[t]he ‘directly relates’ test ... focuses on *what* services are performed and *how* they are performed, not *who* performs them”). As a result, this information is not available under Section 506(d) of the RTKL.

On appeal, and in response to Item 10 of the Request, Camelot identified its two ESL teachers at Phoenix and provided information pertaining to their teacher certifications. The Requester has not objected to the sufficiency of this information. As a result, the appeal is dismissed as moot as to the portion of Item 10 pertaining to Phoenix, and the OOR need not determine whether this information is available under Section 506(d) of the RTKL.

3. Teacher certifications for McCaskey Campus are subject to access

In response to Item 10 of the Request, the District directed the Requester to a publicly accessible website containing teacher certifications. *See* 65 P.S. § 67.704(a). However, on appeal, the Requester argues that the information on the website is out-of-date and only “contains the names of teachers with any kind of teaching certification (not just ESL-related certifications) and there is no filter to enable a searcher to identify those with ESL certifications.”

In response, the District argues that “[the] Request did not include any date-range limitations” and that it “is not obligated ... to provide records in a format most convenient for [the] Requester to allow them to filter, search or manipulate the information in the manner they desire, particularly when the Request is silent as to any such requirements.”

As explained above, without an expressly stated timeframe, it is reasonable to assume in the context of the Request that the Requester sought current information, as of the date of the Request. Further, Item 10 sought information about only ESL teachers. The District has not provided any evidence that this information does not exist in its possession or that it is otherwise exempt from disclosure. As a result, it is subject to public access. *See* 65 P.S. § 67.708(a)(1).

4. Resumes for ESL teachers at the McCaskey Campus are subject to access

Finally, the District argues that the employment histories of ESL teachers at the McCaskey Campus, including resumes, are exempt from disclosure under Section 708(b)(7) of the RTKL. Section 708(b)(7) exempts from disclosure certain enumerated “records relating to an agency employee, including:

- (i) A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual....
- (ii) A performance rating or review.
- (iii) The result of a civil service or similar test administered by a Commonwealth agency, legislative agency or judicial agency[, along with t]he result of a civil service or similar test administered by a local agency ... if restricted by a collective bargaining agreement....
- (iv) The employment application of an individual who is not hired by the agency.
- (v) Workplace support services program information.
- (vi) Written criticisms of an employee.
- (vii) Grievance material, including documents related to discrimination or sexual harassment.
- (viii) Information regarding discipline, demotion or discharge contained in a personnel file....
- (ix) An academic transcript.

65 P.S. § 67.708(b)(7). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *Bowling*, 990 A.2d at 824. As a result, subsections within Section 708(b)(7) only apply to records specifically mentioned therein, and do not protect a broad class of generic “personnel records.” *See American Federation of Teachers v. Sch. Dist. of Phila.*, OOR Dkt. AP 2016-0598, 2016 PA O.O.R.D. LEXIS 936.

The District does not explain how records reflecting employment histories, including resumes, are exempt from disclosure under Section 708(b)(7). *Cf. Wuertenberg v. Franklin County*, OOR Dkt. AP 2013-2162, 2014 PA O.O.R.D. LEXIS 26 (holding that the resumes of *unsuccessful* applicants are not subject to access under Section 708(b)(7). As a result, the District has not met its burden of proof.

Resumes and employment-related records are generally public records subject to access under the RTKL. *See* 65 P.S. § 67.708(b)(6)(ii) (“Nothing ... shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee”); *Esack and The Morning Call v. Pa. Office of the Budget*, OOR Dkt. AP 2012-0745, 2012 PA O.O.R.D. LEXIS 807 (finding that the Budget Secretary’s resume is a record of the agency and subject to access). However, as argued by the District, it may redact any personal identification information from the responsive records. *See* 65 P.S. § 67.708(b)(6)(i)(A) (listing types of personal identification information, including personal phone numbers and e-mail addresses). Further, as there is no evidence that the ESL teachers have been provided notice and an opportunity to object to the Request, the District is enjoined from disclosing these teachers’ home addresses. *See Pa. State Educ. Ass’n v. Office of Open Records*, 110 A.3d 1076 (Pa. Commw. Ct. 2015).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part, denied in part and dismissed as moot in part**, and the District is required to provide all records responsive to Item 1 of the Request, along with the portions of Items 10 and 11 of the Request pertaining to the McCaskey Campus, subject to the redactions identified above, 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 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. 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 11, 2016

/s/ Kyle Applegate

APPEALS OFFICER
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Sent to: Molly Tack-Hooper (via e-mail only);
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¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).