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OFFICE OF OPEN RECORDS

Law Offices of Raymond P. Wendolowski
By: RAYMOND P. WENDOLOWSKI, ESQUIRE
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P.O. Box 1313
Wilkes-Barre, Pennsylvania 18703-1313
Telephone No.: 570/270.9180
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WILKES-BARRE AREA SCHOOL
DISTRICT,

Petitioner and Direct
Interest Participant
vs.

KIMBERLY BORLAND, ESQUIRE,

Respondent

and

CITY OF WILKES-BARRE,

Nominal Respondent

: IN THE COURT OF COMMON PLEAS
: OF LUZERNE COUNTY

: No. 2016-8668
: NOTICE OF APPEAL/PETITION
: FOR JUDICIAL REVIEW

: CIVIL ACTION - LAW

FILED
PROthonDARY
LUZERNE COUNTY
2016 AUG 18 PM 4:07

NOTICE OF APPEAL/PETITION FOR REVIEW

Wilkes-Barre Area School District (the "District") files this appeal and petitions this Honorable Court by and through its Solicitor, Raymond P. Wendolowski, Esquire, for review of the Final Determination issued by the Commonwealth Pennsylvania Office of Open Records (the "OOR"), and in support thereof avers as follows:

I. PARTIES

1. The District, Petitioner herein, is a school district duly organized and existing under the laws of the Commonwealth of Pennsylvania, having an address of 730 S. Main Street, Wilkes-Barre, Pennsylvania, 18702 and was a Direct Interest Participant in OOR Docket No. AP-2016-0497.

2. Respondent, Kimberly Borland, Esquire, is an adult individual with a business address of 69 Public Square, 11th Floor, Wilkes-Barre, Pennsylvania, 18702 (the "Requester").

3. Nominal Respondent, the City of Wilkes-Barre ("the City") is a political subdivision of the Commonwealth of Pennsylvania, 40 East Market Street, Wilkes-Barre, Pennsylvania, 18711.

II. JURISDICTION

4. This Notice of Appeal/Petition for Review is being filed pursuant to Section 1302(a) of the RTKL (65 P.S. § 67.1302(a)).

III. FACTUAL AND PROCEDURAL BACKGROUND

5. On February 8, 2016 Requester submitted a RTKL request to the City. A true and correct copy of the Request is attached hereto as Exhibit A.

6. Requester's RTKL Request sought, in pertinent part:

All applications with attachments, for permits by Panzitta Enterprises, and/or subcontractors of Panzitta Enterprises, and by or on behalf of the Wilkes-Barre Area School District for or related to any work performed at or about Mackin School, 13 Hillard Street, Wilkes-Barre, for all periods from January 1, 2014 through the present, and all permits issued.

7. On February 16, 2016 the City purportedly granted the Request, providing two pages of responsive records.

8. On March 8, 2016 the Requester filed an appeal with the OOR, asserting that not all of the responsive records were provided. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

9. On March 10, 2016 the City notified the District of the instant appeal.

10. On March 18, 2016 the City submitted a position statement and provided additional responsive records regarding the requested City permits and contracts.

11. The City also stated that it was not providing the requested building plans based upon the District's objection to the release of these records. Additionally, the City provided the sworn Affidavit of Attilio Frati, the City's Operations Director.

12. On March 18, 2016 the District submitted a request to participate in this matter claiming that the Request is seeking plans and specifications regarding a renovation project that was recently completed by the District.

13. The District also submitted a position statement arguing that the requested plans and specifications are exempt from disclosure because disclosure would threaten the personal security of an individual, as well as the physical security of the building. *See* 65 P.S. §67.708(b)(1)(ii); 65 P.S. § 67.708(b)(3)(iii). The District further argued that the requested plans and specifications are exempt from disclosure because they involve confidential proprietary information. *See* 65 P.S. § 67.708(b)(11).

14. OOR accepted the District as a direct interest participant on March 23, 2016.

15. On March 18, 2016 the District submitted a position statement supporting the City's reasons for denial. A copy of the District's position statement is attached hereto as Exhibit B. As noted in the position statement, the District is a respondent in OOR Docket No. AP-2016-0120 in which the requester in this appeal requested the very same Plans and Specifications for the renovation of Mackin School. In Docket No. AP-2016-0120 the District denied the request upon the personnel security exemption 65 P.S. §67.708(b)(1)(ii); the building plan, an infrastructural record exemption under 65 P.S. §67.708(b)(3)(iii); as well as the confidential proprietary information exception under 65 P.S. §67.708(b)(11).

16. The Requester's request in this appeal involves the very same documents requested in OOR Docket No. AP-2016-0120.

17. On June 21, 2016 OOR issued and mailed a final determination in OOR Docket No. AP-2016-0120 which ignored the plain language of the statute; failed to follow prior OOR precedent placed an unreasonable burden of proof on the District and granted Requester's appeal.

18. The District perfected a timely appeal of the OOR Final Determination in OOR Docket AP-2016-0120 and that appeal is docketed with this Court at No. 2016-7654.

19. On July 19, 2016 OOR issued and mailed a final determination in the present appeal, a copy of which is attached hereto as Exhibit C.

20. The final determination in this matter substantially mirrors the erroneous OOR Final Determination in OOR Docket AP-2016-0120.

21. Accordingly, in support of its appeal of the erroneous OOR determination in this case, the District incorporates by reference its Notice of Appeal/Petition for Review filed to Docket No. 2016-7654. A copy of this Notice of Appeal/Petition for Review is attached hereto as Exhibit D.

22. The District respectfully requests that this matter be consolidated with Docket No. 2016-7654 for the purpose of judicial economy and in order to avoid the potential for inconsistent results.

WHEREFORE, for the reasons set forth in the District's Notice of Appeal/Petition for Review in Case No. 2016-7654, the decision of the OOR in this case is erroneous and should be overturned by this Honorable Court.

Respectfully submitted,

Date: 8/18/16

BY: 
Raymond P. Wendolowski, Esquire
Solicitor-Wilkes-Barre Area School District

VERIFICATION

I, Leonard Przywara, hereby state that I am the Open Records Officer of the Wilkes-Barre Area School District, the Petitioner herein, and am authorized to make this Verification on its behalf. I further aver that the statements contained in the foregoing Notice of Appeal/Petition for Review are true and correct to the best of my knowledge, information and belief. I make this verification subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities.

Leonard B. Przywara
Leonard Przywara
Open Records Officer
Wilkes Barre Area School District

Law Offices of Raymond P. Wendolowski
By: RAYMOND P. WENDOLOWSKI, ESQUIRE
Identification No.: 40935
P.O. Box 1313
Wilkes-Barre, Pennsylvania 18703-1313
Telephone No.: 570/270.9180

WILKES-BARRE AREA SCHOOL DISTRICT,	:	IN THE COURT OF COMMON PLEAS
	:	OF LUZERNE COUNTY
	:	
Petitioner and	:	No. _____
Direct Interest Participant	:	NOTICE OF APPEAL/PETITION
vs.	:	FOR JUDICIAL REVIEW
	:	
KIMBERLY BORLAND, ESQUIRE,	:	CIVIL ACTION - LAW
	:	
Respondent	:	
	:	
and	:	
	:	
CITY OF WILKES BARRE,	:	
	:	
Nominal Respondent	:	

CERTIFICATE OF SERVICE

I, Raymond P. Wendolowski, Esquire, hereby certify that on the 13th day of AUGUST, 2016, I served a true and correct copy of the Notice of Appeal/Petition for Review via U.S. First Class Mail, addressed as follows:

Kimberly Borland, Esquire
Borland & Borland
69 Public Square, 11th Floor
Wilkes-Barre, PA 18702

and

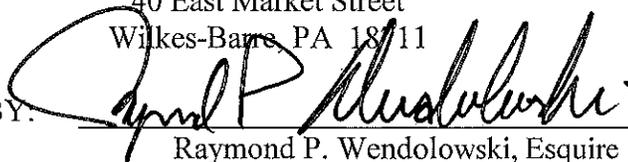
Magdalene C. Zeppos, Esquire
Appeals Officer
Office of Open Records

Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

and

Timothy Henry, Esquire
Solicitor-City of Wilkes-Barre
40 East Market Street
Wilkes-Barre, PA 18711

BY:



Raymond P. Wendolowski, Esquire

EXHIBIT "A"



pennsylvania
OFFICE OF OPEN RECORDS

STANDARD RIGHT-TO-KNOW REQUEST FORM

DATE REQUESTED: 2/4/16

REQUEST SUBMITTED BY: E-MAIL U.S. MAIL FAX IN-PERSON

REQUEST SUBMITTED TO (Agency name & address): Borland & Borland, LLP, 69 Public Square,
11th Floor Wilkes-Barre, Pa 18701

NAME OF REQUESTER: Kimberly D. Borland, Esquire

STREET ADDRESS: 69 Public Square, 11th Floor

CITY/STATE/COUNTY/ZIP (Required): Wilkes-Barre, Pa 18701

TELEPHONE (Optional): 570-822-3311 EMAIL (optional): kborland@borlandandborland.com

RECORDS REQUESTED: **Provide as much specific detail as possible so the agency can identify the information. Please use additional sheets if necessary*

See attached sheet.

DO YOU WANT COPIES? YES or NO

DO YOU WANT TO INSPECT THE RECORDS? YES or NO

DO YOU WANT CERTIFIED COPIES OF RECORDS? YES or NO

**** PLEASE NOTE: RETAIN A COPY OF THIS REQUEST FOR YOUR FILES ****
**** IT IS A REQUIRED DOCUMENT IF YOU WOULD NEED TO FILE AN APPEAL ****

FOR AGENCY USE ONLY

RIGHT TO KNOW OFFICER:

DATE RECEIVED BY THE AGENCY:

AGENCY FIVE (5) BUSINESS DAY RESPONSE DUE:

***Public bodies may fill anonymous verbal or written requests. If the requestor wishes to pursue the relief and remedies provided for in this Act, the request must be in writing. (Section 702.) Written requests need not include an explanation why information is sought or the intended use of the information unless otherwise required by law. (Section 703.)*

All applications, with all attachments, for permits by Panzitta Enterprises, and/or subcontractors of Panzitta Enterprises, and by or on behalf of the Wilkes-Barre Area School District for or related to any work performed at or about the Mackin School, 13 Hillard Street, Wilkes-Barre, for all periods from January 1, 2014 through the present, and all permits issued

EXHIBIT "B"

Law Offices

RAYMOND P. WENDOLOWSKI
P.O. Box 1313
Wilkes-Barre, Pennsylvania 18703

(570) 270-9180
Fax: (570) 270-9182
E-mail: ray@wendolowskilaw.com

March 18, 2016

Via E-Mail Only: mzeppos@pa.gov

Magdalene C. Zeppos, Esquire
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

RE: Docket No. AP 2016-0497

Dear Ms. Zeppos:

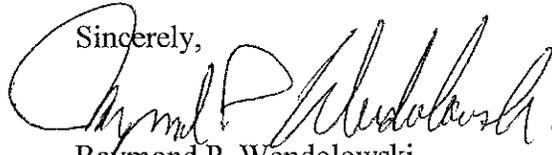
The undersigned is the Solicitor for the Wilkes-Barre Area School District ("WBASD"). WBASD is the Respondent in OOR Docket No. AP 2016-0120 in which the Requester in the above-referenced OOR appeal requested from WBASD the Plans and Specifications for the Mackin School Renovation Project recently performed by WBASD. WBASD denied that request primarily relying upon the personnel security exemption, 65 P.S. § 67.6708(b)(1)(ii) and the building plan and infrastructural record exception, 65 P.S. § 67.708(b)(3)(iii) and citing to the OOR the decision in *Knauss v. Unionville-Chadds Ford School District*, OOR Docket No. AP 2009-0332. That appeal is presently pending before Hearing Officer Kathleen Higgins, Esquire. The Requester, with the concurrence of WBASD, obtained an enlargement of time to respond to the Statement in Opposition to Release of Records Submitted on behalf of WBASD and Ms. Higgins' final determination is now due on or before April 19, 2016.

Attorney Borland's request to the City of Wilkes-Barre in this appeal involves the Plans and Specifications submitted by WBASD or its contractors to the City of Wilkes-Barre Planning Zoning and Building Permit Offices in order to obtain the necessary approvals and permits for the renovation of the Mackin School. The documents at issue in the appeal are a sub set of the documents at issue in OOR Docket No. AP 2016-0120 to be finally determined by OOR on or before April 19, 2016. Any determination in that appeal will resolve the issues in the present appeal pending before you. Accordingly, in support of the City of Wilkes-Barre's denial in this case, WBASD respectfully submits the Statement in Opposition and Exhibits submitted by WBASD in OOR Docket No. 2016-0120. WBASD submits that this Statement in Opposition and

Magdalene C. Zeppos, Esquire
Commonwealth of Pennsylvania
Office of Open Records
March 18, 2016
Page 2

Exhibits clearly establish that the requests for the Mackin Project Plans and Specifications should be denied under the above referenced exemptions in the RTKL.

Should you require anything additional from WBASD, please contact me at your convenience.

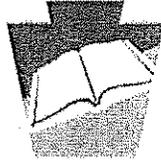
Sincerely,

Raymond P. Wendolowski
Solicitor-
Wilkes-Barre Area School District

RPW:je

Enclosures

c.c. Timothy Henry, Esquire, Solicitor for the City of Wilkes-Barre
(Via E-mail: thenry@wilkes-barre.pa.us)
Kimberly Borland, Esquire
(Via E-mail: kborland@borlandandborland.com)
Margaret Sharksnas, Open Records Officer, City of Wilkes-Barre
(Via E-mail: msharksnas@wilkes-barre.pa.us)
Kathleen Higgins, Esquire, Office of Open Records
(Via E-mail: kahiggins@pa.gov)
(ALL WITH ENCLOSURES)

EXHIBIT "C"



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
KIMBERLY BORLAND,	:	
Requester	:	
	:	
v.	:	Docket No. AP 2016-0497
	:	
CITY OF WILKES-BARRE,	:	
Respondent	:	
	:	
and	:	
	:	
WILKES-BARRE AREA SCHOOL	:	
DISTRICT,	:	
Direct Interest Participant	:	

INTRODUCTION

Kimberly Borland, Esq. (“Requester”) submitted a request (“Request”) to the City of Wilkes-Barre (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records regarding a Wilkes-Barre Area School District (“District”) construction project. The City purportedly granted the Request, providing two pages of responsive 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 City is required to take further action as directed.

FACTUAL BACKGROUND

On February 8, 2016, the Request was filed, seeking:

All applications, with all attachments, for permits by Panzitta Enterprises, and/or subcontractors of Panzitta Enterprises, and by or on behalf of the Wilkes-Barre Area School District for or related to any work performed at or about the Mackin School, 13 Hillard Street, Wilkes-Barre, for all periods from January 1, 2014 through the present, and all permits issued.

On February 16, 2016, the City purportedly granted the Request, providing two pages of responsive records.

On March 8, 2016, the Requester filed an appeal with the OOR, asserting that not all of the responsive records were provided. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On March 10, 2016, the City notified the District of the instant appeal.

On March 18, 2016, the City submitted a position statement and provided additional responsive records regarding the requested City permits and contracts. The City also stated that it was not providing the requested building plans based upon the District's objection to the release of these records. Additionally, the City provided the sworn affidavit of Attilio Frati, the City's Operations Director.

On March 18, 2016, the District submitted a request to participate in this matter, claiming that the Request is seeking plans and specifications regarding a renovation project that was recently completed by the District. The District also submitted a position statement, arguing that the requested plans and specifications are exempt from disclosure because disclosure would threaten the personal security of an individual, as well as the physical security of a building. *See* 65 P.S. § 67.708(b)(1)(ii); 65 P.S. § 67.708(b)(3)(iii). The District further argues that the requested plans and specifications are exempt from disclosure because they involve confidential proprietary information. *See* 65 P.S. § 67.708(b)(11). In support of its position, the District also submitted sworn affidavits from Kyle Kinsman, whose firm is the lead architectural firm for the District, as well as from Brian Lavan, the District's Director of Police Operations and Security,

and from Patrick Endler, whose architectural firm is a joint member of the District's design/consulting team. Based on the information submitted, the OOR accepted the District as a direct interest participant on March 23, 2016.

Due to a similar pending appeal involving the same parties, at OOR Dkt. AP 2016-0120, the OOR extended the submission deadline in this matter, and the Requester granted the OOR an extension of time to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1). On May 19, 2016, the District submitted the supplemental sworn affidavit of Kyle Kinsman, who attests to the number of drawings for the schools. Attached to Mr. Kinsman's affidavit is a Table of Contents for the specifications and the final construction drawings of the Mackin School project. The Requester did not submit any evidence on appeal.

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 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, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The City 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. 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 *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The City provided responsive records during the appeal

During the course of the appeal, the City provided the Requester with 239 pages of additional responsive records. As such, the appeal as to the records provided during the appeal is dismissed as moot.

2. The requested building plans and specifications are not exempt under Section 708(b)(1)(ii) of the RTKL

The District argues that the requested records are exempt from public access under Section 708(b)(1)(ii), which exempts from disclosure a record that “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corr.* OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

In support of its position that disclosure of the requested plans would threaten personal security, the District submitted the sworn affidavit of Kyle Kinsman, Architect for the District’s design team, who attests the following:

3. I have over 28 years’ experience in the design and construction of school facilities and my firm is currently the lead architectural firm for the Design Team of the Wilkes-Barre Area School District ... and I am intimately familiar with the Plans and Specifications
7. The public release of school building plans and specifications submitted in the course of the project design and PlanCon process creates an immediate and direct safety/security risk to the students, staff and facilities of [the District] or any other school entity whose documents might be released publicly.
8. When school buildings are designed, the building plans and specifications often consist of thousands of pages of material and contain numerous critical features: (1) location and dimensions of rooms; (2) location of entrances and exits; (3) access points to roof and subfloor area; (4) building site details; and (5) column support and load-bearing wall supports.

9. In addition, the plans and specifications also include important security details such as: (1) exact type of, and location of, all structural systems; (2) description of the type and location of mechanical systems; (3) description of the type and location of electrical systems; (4) description of the type and location of plumbing and wastewater systems; (5) description of the type and location of safety and security systems, including locations and operation of security cameras, and fire detection and suppression systems; and (6) description of the kinds of data and communication systems and the location of the hardware and connectivity of those systems; (7) any areas of shatterproof glass, whether exterior or interior; (8) the location of drop-down security gates and securable zones throughout the building in the event of a security situation. These systems are critical to maintaining or protecting the health and safety of the individuals within the school facility. These systems provide the life-maintaining water, air and heat for occupants of buildings. The plans and specifications also identify the storage of flammables and other potential explosives in the building or on the site; and describe the methods of sanitary sewage disposal.
10. The threat of domestic violence, international terrorism, and other types of violence against Pennsylvania school buildings that daily house millions of occupants is very real. An individual or terrorist organization with access to the information in the Mackin Project or High School Project Plans and Specifications could use this information to place explosive charges in order to maximize destruction and loss of life.
11. Each of the occupants of public school facilities are potential targets of domestic violence, domestic and international terrorism and other types of violence that have become national trends.
12. Knowledge of the school facility itself greatly assists the perpetrators of school violence in carrying out their horrific plans that always seem to catch the local community off-guard.
13. To assist in the prevention of further tragic incidents, all public access to floor and site plans for state-funded school construction projects should be strictly prohibited.

The District also submitted the sworn affidavit of Brian Lavan, Director of Police Operations and Security for the District, who attests the following:

2. I have been a School Resource Officer for [the District] since March 3, 2000. Prior to that I was a police officer for the City of Wilkes-Barre for eighteen years. Combined I have over thirty-four years in police and public safety experience....

4. As explained more fully below, the public release of school building plans and specification creates an immediate and direct safety and security risk of the students, staff, and facilities of any school entity whose documents might be released publicly.
5. Any action that establishes precedent for the release of the information contained in school building plans and specifications affect the future safety and security of students, staff, and visitors of the [District].
6. Public access to school building plans may represent the single greatest asset to one who would seek to inflict the greatest amount of harm to the largest number of students and staff.
7. School plan documents containing blueprints or drawings can yield insights into the structural integrity of the building as well as other structures used in escape or evacuation, such as stairways and elevators.
8. Illicit uses for plans of transport lines for flammable or hazardous liquids and noxious or explosive gases – otherwise part of a safe heating and cooling system, are also obvious risks to the safety of students, staff and building structures.
9. Public access to escape and evacuation routes open the possibility of secondary attacks.

While a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof under the RTKL, *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), conclusory statements are not sufficient to meet an agency's burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Here, the District has not offered any evidence other than conclusory statements to demonstrate that disclosure of the requested plans and specifications “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). Rather, Mr. Kinsman attests that there are “thousands of pages of material” and then lists general categories of building plans and

specifications. The District has described serious general concerns but does not address how disclosure of any specific records within these overall categories of records threaten the personal security of an individual. Furthermore, Mr. Kinsman's affidavit does not meet the established standard of showing that disclosure of the records would result in a "reasonable likelihood" of "substantial and demonstrable risk." Therefore, the District has not met its burden of proving that release of the requested records would threaten the personal security of an individual. *See* 65 P.S. § 67.708(a)(1); *see also* *Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency's conclusory affidavit was insufficient to sustain its burden of proof); *Borland v. Wilkes-Barre Area Sch. Dist.*, OOR Dkt. AP 2016-0120, 2016 PA O.O.R.D. LEXIS 887.

3. The requested building plans and specifications are not exempt from disclosure under Section 708(b)(3)(iii) of the RTKL

The District argues that the requested building plans and specifications are also exempt from access under Section 708(b)(3)(iii) of the RTKL, which exempts from disclosure, a record that:

the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include ... building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

65 P.S. § 67.708(b)(3)(iii); *see* *Crockett v. SEPTA*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under this

exemption); *but see Moss v. Londonberry Twp.*, OOR Dkt. AP 2009-0995, 2009 PA O.O.R.D. LEXIS 724 (holding that records related to the Three Mile Island nuclear power plant were not subject to public access). In order for this exemption to apply, “the disclosure of” the records — rather than the records themselves — must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including buildings and infrastructure. *See* 65 P.S. § 67.708(b)(3).

In support of this exemption, Mr. Kinsman further attests as follows:

14. The planning and construction documents that are necessary to design and build Pennsylvania’s public schools and administrative facilities provide extremely detailed information about the project buildings and their sites.
15. The school building plans and specifications for the Mackin project and those being developed for the new high school project include not only information regarding the location of rooms, entrances and exits, access to roof and subfloor areas, possible escape routes, etc., but also includes important security information such as the exact type of, and location of, all structural, mechanical, electrical, plumbing, data and communication systems.
16. Even the specific means of supplying life-maintaining water, air, and heat, as well as methods of sanitary sewage disposal systems, storage of flammables and other potential explosives, are also documented in the smallest and largest scale, for all on-and off-site systems.
17. These documents also indicate the critical absence of important system protections. This alone could reveal a facilities “Achilles heel” during an attack. Clearly, information this detailed does not need to be accessed by the building inhabitants or those who may harbor ill-will against them.

The District argues that this matter is similar to that of *Knauss v. Unionville-Chadds Ford School District*, where a school district established that disclosure of construction plans submitted to the Department of Education were exempt from disclosure pursuant to Sections 708(b)(1) and 708(b)(3) of the RTKL. OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238. In *Knauss*, the OOR found that the affidavits submitted by the school district “address disclosure of the Plans at issue in great length.”

In *Werner v. School District of Pittsburgh*, a school district submitted an affidavit containing conclusory statements that did not contain any substantive information, or establish how release of the requested records would be reasonably likely to endanger the safety and physical security of the school infrastructure under Section 708(b)(3) of the RTKL. OOR Dkt. AP 2015-0478, 2015 PA O.O.R.D. LEXIS 507. In *Werner*, the OOR held that while “the School District presented evidence that records may reveal the location of pipes, walls, lighting fixtures, exits and other information,” there was no evidence that the disclosure of these locations — the majority of which may already be publically known — would be reasonably likely to jeopardize the safety or physical security of any school district building or structure. *Id.*

Here, like in *Werner*, the District has submitted conclusory affidavits which describe serious general concerns but has not sufficiently established how disclosure of the requested records, including the locations that Mr. Kinsman attests to, “creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system.” 65 P.S. § 67.708(b)(3)(iii). As such, the District has not demonstrated that disclosure of the requested plans would threaten the security of a building. *See* 65 P.S. § 67.708(a)(1).

4. The requested building plans and specifications are not exempt from disclosure under Section 708(b)(11) of the RTKL

The District next argues that the requested plans and specifications are confidential proprietary information. Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). Confidential proprietary information is defined by the RTKL, as follows:

Commercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

65 P.S. § 67.102. An agency must establish that both elements of this two-part test are met in order for the exemption to apply. *See Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *see also Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011) (involving confidential proprietary information).

In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.”

Id.

In support of its argument, Mr. Kinsman attests as follows:

18. As a secondary matter, requiring [the District] to copy these planning and construction documents could create serious legal issues regarding the ownership of the intellectual property that these documents represent. When the creator of the documents, such as the Architect, Engineer, Hazardous Materials Consultant, etc., retains ownership of the copyright of the intellectual property, which is the case here, it could be illegal for [the District] to copy the documents and distribute them to others.
19. Additionally, the plans for the new high school project remain in the earliest development stages and are not even in a form to be submitted to PDE as part of the PlanCon process and this work in progress remains the intellectual property of the Design Team and is not property of the [District].

Additionally, Patrick Endler, licensed architect and Vice President of Borton-Lawson, a firm that is part of the design and consulting team for the District, attests that the requested records are “work-product and proprietary and the intellectual property of Borton-Lawson.” Mr.

Endler further attests that the plans are in the earliest development stages, are subject to change and are not property of the District.

Here, the District has not submitted evidence to establish the requisite “substantial harm to the [company’s] competitive position” necessary in order to establish that the requested records are exempt as confidential proprietary information. Consequently, the District has not demonstrated that the requested plans and specifications are confidential proprietary information. *See* 65 P.S. § 67.708(a)(1).

5. The City has demonstrated that no other responsive records exist in its possession, custody or control

The City argues that other than the records provided and the withheld building plans and specifications, no additional responsive records exist in the City’s possession, custody or control. In support of its position, the City presents the sworn affidavit of Attilio Frati, the City’s Operations Director, who attests to that he “directed [C]ity employees to perform a thorough review for any and all records which would be responsive to the [Request].” Operations Director Frati further attests that other than the documents provided and the withheld plans and specifications, the City has no other documents that are responsive to the Request. Based on the evidence provided, the City has met its burden of proving that other than the withheld building plans and specifications, it has provided the Requester with all responsive records in its possession, custody or control.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part, denied in part and dismissed as moot in part**, and the City is required to provide all responsive records 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 Luzerne 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 according to court rules 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: July 19, 2016

/s/ Magdalene C. Zeppos

APPEALS OFFICER
MAGDALENE C. ZEPPOS, ESQ.

Sent to: Kimberly Borland, Esq. (via e-mail only);
Raymond Wendolowski, Esq. (via e-mail only);
Timothy Henry, Esq. (via e-mail only)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

EXHIBIT "D"

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WILKES-BARRE AREA SCHOOL DISTRICT,	:	IN THE COURT OF COMMON PLEAS
	:	OF LUZERNE COUNTY
	:	
Petitioner	:	No. <u>2016-7654</u>
	:	NOTICE OF APPEAL/PETITION
vs.	:	FOR JUDICIAL REVIEW
	:	
KIMBERLY BORLAND, ESQUIRE,	:	
	:	
Respondent	:	CIVIL ACTION - LAW

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NOTICE OF APPEAL/PETITION FOR REVIEW

Wilkes-Barre Area School District (the "District") files this appeal and petitions this Honorable Court by and through its Solicitor, Raymond P. Wendolowski, Esquire, for review of the Final Determination issued by the Commonwealth Pennsylvania Office of Open Records (the "OOR"), and in support thereof avers as follows:

I. PARTIES

1. The District, Petitioner herein, is a school district duly organized and existing under the laws of the Commonwealth of Pennsylvania, having an address of 730 S. Main Street, Wilkes-Barre, Pennsylvania, 18702.

2. Respondent, Kimberly Borland, Esquire, is an adult individual with a business address of 69 Public Square, 11th Floor, Wilkes-Barre, Pennsylvania, 18702 (the "Requester").

II. JURISDICTION

3. This Notice of Appeal/Petition for Review is being filed pursuant to Section 1302(a) of the RTKL (65 P.S. § 67.1302(a)).

III. FACTUAL AND PROCEDURAL BACKGROUND

4. On December 2, 2015 Requester submitted a RTKL request to the District. A true and correct copy of the Request is attached hereto as Exhibit A.

5. Requester's RTKL Request sought, in pertinent part:

A. The plans and specifications for the Mackin School Project, which has now been completed and the renovated school being used by 9th and 10th grade students of the District;

B. The progress plans and specifications for the construction of the proposed consolidated high school on North Washington Street between Union and Market Streets.

6. On December 9, 2015 the District's Open Records Officer invoked the District's right to an additional 30-day period to respond to the Request and then issued a timely partial denial of the request on January 8, 2016. A true and correct copy of the District's denial is attached hereto as Exhibit B.

7. Requester appealed the District's denial to the Office of Open Records on January 29, 2016. A true and correct copy of the Requester's appeal is attached hereto as Exhibit C.

8. The OOR issued an Official Notice of the Requester's appeal and invited both parties to supplement the record. A true and correct copy of the OOR's Notice of Appeal is attached hereto as Exhibit D.

9. On February 29, 2016, the District submitted a Position Statement reiterating its reasons for denial. The District also submitted the sworn affidavit of Kyle Kinsman, Architect for the design team of the District, who attests, *inter alia*, that the release of school building plans and specifications creates a safety and security risk to students, staff and facilities of the District. The District also submitted the affidavit of Brian Lavan, Director of Police Operations and

Security for the District, who attests, *inter alia*, that release of the building plans would create increased vulnerability to mass attack/destruction and crime and violence. Finally, the District submitted the affidavit of Patrick Endler, Architect on the design/consulting team for the design/consulting team for the District, who attests, *inter alia*, that the plans and specifications for the new high school in development are proprietary. True and correct copies of the District's Position Statement which includes as Exhibits the Affidavits of Kinsman, Lavan and Endler are attached hereto as Exhibit E.

10. On February 29, 2016, the Requester submitted a position statement arguing that the District did not meet its burden establishing that the requested records are exempt from disclosure; the Requester also asked the OOR to conduct a hearing in this matter. A true and correct copy of the Requester's position statement is attached hereto as Exhibit F.

11. On April 28, 2016, the OOR reopened the record in this matter, and sought further evidence from the District regarding the specific records contained in the plans and specifications.

12. On May 19, 2016, the District submitted the supplemental sworn affidavit of Kyle Kinsman, who attests, *inter alia*, to the number of drawings for the schools. Attached to Mr. Kinsman's affidavit is a Table of Contents for the specifications and the final construction drawings of the Mackin School Project. A true and correct copy of the supplemental Kinsman Affidavit is attached hereto as Exhibit G.

13. On June 21, 2016 OOR issued and mailed a Final Determination which ignored the plain language of the statute; failed to follow prior OOR precedent; placed an unreasonable burden of proof on the District and granted Requester's appeal. A copy of the Final Determination is attached hereto as Exhibit H.

IV. ARGUMENT

DID OOR ERR WHEN IT DETERMINED THAT THE BUILDING PLANS AND SPECIFICATIONS FOR THE MACKIN SCHOOL AND THE PROPOSED NEW HIGH SCHOOL WERE NOT EXEMPT FROM DISCLOSURE UNDER THE PERSONAL SECURITY EXEMPTION 65 P.S. § 67.708(b)(1)(ii) AND THE BUILDING PLANS AND INFRASTRUCTURE EXEMPTION 65 P.S. § 67.708(b)(3)(iii) AND THAT THE PLANS, IN DEVELOPMENT FOR THE NEW HIGH SCHOOL, WERE NOT EXEMPT AS CONFIDENTIAL PROPRIETARY INFORMATION UNDER 65 P.S. § 67.708(b)(10)(i)(A) AND 65 P.S. § 67.708.(b)(ii)?

SUGGESTED ANSWER: YES.

14. A reviewing court exercising its appellate jurisdiction may “independently review the OOR’s Orders and may substitute its own findings of fact for that of the [OOR].” *Bowling v. OOR*, 990 A.2d 813, 818 (Pa. Cmwlth. 2010), app. Granted 15 A.3d 427 (Pa. 2011).

15. The Court’s decision “shall contain findings of fact and conclusions of law based upon the evidence as a whole.” 65 P.S. § 67.130(a).

16. The District is a local agency subject to the RTKL. 65 P.S. § 67.302.

17. Section 305(a) of the RTKL provides that records possessed by agencies are presumed to be public records, but this “presumption shall not apply if: (1) the record is exempt under Section 708; (2) the record is protected by privilege; or (3) the record is exempt from disclosure under any other Federal or State law, regulation or judicial order of decree.” 65 P.S. § 67.305(a).

Burden of Proof

18. In determining whether a record is exempt, the burden of proof is on the agency receiving the request to show that a record is exempt by a preponderance of the evidence. 65 P.S. § 67.708(a).

19. Proof by a preponderance of the evidence is the lowest degree of proof recognized in the administration of justice. *Hosey v. Margulies*, 70 A.2d 854 (Pa. Super. 1950). Preponderance of the evidence simply means that there is a greater than fifty (50%) percent

probability that “x” is true. See, *Wilson v. El-Daief*, 964 A.2d 354, 367, ftnt 14 (Pa. 2009). Accordingly, when a request is made, the scales of justice are evenly balanced and all the agency need do to meet the burden is to tip the scale slightly in its favor. See, *Korch v. Korch*, 885 A.2d 535 (Pa. Super. 2005).

20. In this matter, the District has denied Requestor’s requests primarily upon the personal safety exception (65 P.S. § 67.708(b)(1)(ii) and building plan and infrastructure record exception (65 P.S. § 67.708(b)(3)(iii)). In support of its denial, the District submits the Affidavits of Charles Kyle Kinsman, a licensed architect, who leads the District’s design team; Brian P. Lavan, the Director of Police Operations and Security of the District; and Patrick J. Endler, a licensed architect, and vice-president of Borton Lawson, a member of the District’s design team, copies of which are attached to the District’s Position Statement which is attached hereto as Exhibit E.

21. For the reasons fully discussed below, these Affidavits overwhelmingly support the District’s denials of Requester’s requests and the District has met its slight preponderance of the evidence, burden as to these denials, and the decision of the OOR must be reversed.

22. The issues raised by the current appeal have already been resolved by OOR in the case of *Knauss v. Unionville-Chadds Ford School District*, OOR Docket No. AP 2009-0332. In *Knauss* the requester sought the School District’s PlanCon D&E submissions and the school district denied the requests on the basis of the personal security exception (§ 708(b)(1)(ii) and the building plans and infrastructure record exemption (§ 708(b)(3)(iii)). In support of the denial, the district submitted affidavits (with the assistance of the Pennsylvania Department of Education) supporting the conclusion that the disclosure of school building plans and specifications creates a reasonable likelihood of harm and OOR held that the school district had met its burden supporting the denial of the disclosure of school construction plans and specifications.

23. In this case WBASD has submitted the affidavits of Brian P. Lavan and Charles Kyle Kinsman in support of its position that building plans and specifications are exempt from disclosure and these Affidavits are substantially similar to those submitted by the Unionville-Chadds Ford School District in the Knauss case.

24. Officer Lavan is the Director of Police Operations and Security for WBASD and has over 34 years of police and public safety experience (Lavan Affidavit ¶¶ 1&2). He has received extensive training in protecting the safety of school students, staff and buildings (*Id.* ¶ 3). Officer Lavan states that the public release of building plans and specifications creates an immediate and direct safety and security risk to the students, staff and facilities of WBASD. (*Id.* ¶¶ 4-16).

25. Charles Kyle Kinsman is a registered architect in the Commonwealth of Pennsylvania with over 28 years' experience in the design and construction of school facilities and his firm is the lead architectural firm for the Design Team of WBASD that performed the Mackin School renovation project and is currently in the process of developing plans and specifications for the District's proposed new high school to be constructed on Washington Street in the City of Wilkes-Barre. (Kinsman Affidavit ¶¶ 1 & 2).

26. Mr. Kinsman is likewise of the opinion that production of school plans and specifications creates an immediate and direct safety/security risk to the students, staff and facilities of WBASD (*Id.* ¶ 7).

27. The building plans and specifications for the projects involved reveal, among other things,

- location and dimensions of rooms;
- location of entrances and exits;

- access points to roof and subfloor areas;
- column support and load bearing wall supports; and
- building site details.

(Id. ¶ 8).

28. In addition, the plans and specifications also include important security details such as:

- exact type of, and location of, all structural systems
- description of the type and location of mechanical systems,
- description of the type and location of electrical systems,
- description of the type and location of plumbing and wastewater systems,
- description of the type and location of safety and security systems, including locations and operation of security cameras, and fire detection and suppression systems; and
- description of the kind of data and communication systems and the location of the hardware and connectivity of those systems.
- any areas of shatter proof glass, whether exterior or interior;
- the location of drop-down security gates and securable zones throughout the building in the event of a security situation.

(Id. ¶ 9).

29. These systems are all critical to maintaining or protecting the health and safety of the individuals within the school facility. They reveal the structural integrity of the building itself. Moreover, these systems:

- provide the life-maintaining water, air, and heat for occupants of the buildings;
- identify the storage of flammables and other potential explosives in the building or on the site; and
- describe the methods of sanitary sewage disposal.

Id.

30. Given the information contained in the Lavan and Kinsman Affidavits, it is not surprising that the General Assembly has provided an express exemption for "building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public

utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems." 65 P.S. §67.708(b)(3)(iii).

31. Officer Lavan and Mr. Kinsman have made it clear that the information contained in the building plans and specifications increase two distinct types of risk to human safety: (1) increased risk of attack on a facility perpetrated by those outside the building, particularly terrorists; and (2) increased risk of violence or other harm perpetrated by students or others who are users of the building.

Increased Vulnerability to Terrorist Attack

32. As we are all aware, American public facilities-including school buildings- have been the target of both international and domestic terrorists over the past several decades. Thus, making building plans and specifications available to *anyone* clearly increases the risk to the occupants of such buildings by exposing all the structural, mechanical, electrical, communications, and other features of the facility. These plans "may represent the single greatest asset to one who would seek to inflict the greatest amount of harm" to a large number of our most vulnerable citizens, our school children. (Lavan Affidavit ¶¶ 6-11).

33. By publicizing structural design details, there is increased risk to the entire physical structure of a building. The structural information contained in buildings plans "include[s] column support, and load bearing wall supports." (Kinsman Affidavit ¶ 8). An individual or a terrorist organization with access to such information "could use it to place explosive charges in order to maximize destruction and loss of life." (*Id.* ¶ 10).

34. The other operational systems of a building--which are found in either the plans or specifications or both--reveal other key aspects that keep a building safe and secure: how it is provided with power; its safety and security features (like security cameras and alarm systems); electronic access information; its communications systems; and the location of harmful materials (like fuel, or chemicals that are contained in heating or cooling systems). (*Id.* ¶¶ 8-17).

35. Publicizing these details creates multiple types of increased risk for an attack on a building. Individuals or groups with terroristic intent could:

- plot an attack with knowledge of entry points, exit strategies and potential hazardous material locations;
- identify a method to defeat safety alarm systems, fire alarms, security alarms, and electronic access control systems in order to harm personnel;
- facilitate the planning process of an attacker to pre-position supplies and weapons as well as gain proximity to assembly areas and afford a safe and convenient hiding place;
- mount an attack on the ventilation of a building by revealing details about and access points to the heating, ventilation and air conditioning system ("HVAC"), such as air intake locations and flammable fuel storage locations.

(See Lavan and Kinsman Affidavits).

36. Those who possess information about security monitoring equipment-like cameras-could be able to disconnect this equipment or monitor law enforcement or rescue responses, thereby multiplying the risks associated with an attack.

37. In addition, building plans and specifications also reveal the absence of certain features, for example system protections or security system features. These could reveal a facility's "Achilles heel" in preparation for or during an attack. (Kinsman Affidavit ¶ 17).

38. In summary, building plans and specifications contain detailed information enabling a wrongdoer to identify points of failures in key operational systems--e.g., electricity, water, fuel, etc.--that can be exploited with the right knowledge level and intent to cause harm.

Increased Vulnerability to Crime and Violence

39. Building and security coverage diagrams often reveal areas where surveillance is difficult. These weaknesses can increase the risk of many times of illegal activity:

- these areas may be used for drug-selling, fighting, sexual misconduct or other illicit activities;
- they also may allow individuals to hide themselves until such time as they may have unencumbered access to the school's valuables; and
- they may reveal hiding places for weapons contraband.

(Lavan Affidavit ¶ 12).

40. As described above, revealing information about security systems increases the risk that those systems can be overridden or compromised. This can allow an individual or group access to the facility to steal property or otherwise cause damage to the facility or its systems.

41. Finally, schools' information systems and networks house vast quantities of operational and personal information. Making public information about the location and functioning of a school's network lines creates vulnerability for school's computer network. (*Id.* 14).

42. The District respectfully submits that OOR erred when it found that the Affidavits submitted by the District were conclusory and not sufficiently specific to the

establish that the records request are exempt from disclosure under both 65 P.S. § 67.708(b)(1)(ii) and 65 P.S. § 67.708 (b)(3)(iii).

43. Additionally, this Honorable Court should find that OOR has placed an unreasonable burden on the District in requiring specifics of the potential harm to structures as the plain reading of the statutory exemption at issue (65 P.S. § 67.608(b)(3)(iii)) dictates that any document which constitutes building plans or infrastructure records that expose or create vulnerability through disclosure of location, configuration, or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, waste water, sewage and gas systems are exempt.

44. Under the Statutory Construction Act of 1972, words and phrases in a statute generally are to be construed according to rules of grammar and their common approved usage. 1 Pa.C.S.A. §1903(a).

45. The purpose of Pennsylvania's Rules of Statutory Construction is to ascertain legislative intent, which is controlling. When the words of the statute are unambiguous, the letter is not to be disregarded under pretext of pursuing the spirit of the law and when they are ambiguous, legislative intent may be ascertained by considering, among other things, "(3) The object to be attained...[and] (6) The consequences of a particular interpretation. 1 Pa.C.S.A. §1921. The General Assembly does not intend a result that is absurd or unreasonable and it intends the entire statute to be effective and certain. 1 Pa.C.S.A. §1922.

46. By enacting 65 P.S. §67.708(b)(iii), the legislature intended to ensure the safety and security of facilities and infrastructure. In considering the plain meaning of the

words of this exception, one can turn to their ordinary, dictionary usage. For something to be “reasonable,” it must be agreeable to sound judgment, logical, and not exceed the limits prescribed by reason. *See, “reason”* <http://dictionary.com/browse/reason> (July 20, 2016). For it to be “likely” there must be a probability or chance of something. For it to be “likely,” there must be a probability or chance of something. *See, “likely”* <http://dictionary.com/browse/likely> (July 20, 2016). To endanger is to “expose to danger or peril; imperil,” *See, “endanger”* <http://dictionary.com/browse/endanger> (July 20, 2016). “Safety” is “the state of being safe; freedom from the occurrence or risk of injury, danger or loss. *See, “safety”* <http://dictionary.com/browse/safety> (July 20, 2016). “Security” is freedom from danger or risk. *See, “security”* <http://dictionary.com/browse/security> (July 20, 2016).

47. Thus, the legislature has said that if, within the limits of sound reason there is a chance or probability that various kinds of facilities and infrastructure will be exposed to danger such that the freedom from the occurrence or risk of injury, danger or loss has been created, a record is exempt.

48. The legislature goes on to exemplify some of the things which fall within such a standard, including that set forth in 65 P.S. §708(b)(3)(iii) (“Subsection iii”) which talks about building plans or infrastructure records in general, then notes the kinds of records which expose or create vulnerability when they are disclosed.

49. “Expose” means to lay open to danger, attack, harm or to lay open to something specified...” *See, “expose”* <http://dictionary.com/browse/expose> (July 20, 2016). “Vulnerability” means “capable of or susceptible to being wounded or hurt”. *See, “vulnerability”* <http://dictionary.com/browse/vulnerability> (July 20, 2016).

50. Subsection iii indicates building plans and infrastructure records could meet the exception. It then plainly indicates that those building plans or infrastructure records which specifically disclose the “location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems” by their nature lay facilities and infrastructure open to danger, attack or harm or render them susceptible to being wounded or hurt.

51. The District submits that the legislature’s manifest purpose of including these examples is to demonstrate that records such as those listed in Subsection iii are per se exempt because their disclosure, by statutory pronouncement, is reasonably likely to endanger the safety or physical security of a building, public utility, resources, infrastructure, facility or information storage system.

52. Put another way, building plans or infrastructure records which do **not** expose the “location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems” **might** be exempt and would require a case by case analysis to determine whether disclosure creates a reasonable likelihood of endangering the safety or physical security of the building, public utility, resources, infrastructure, facility or information storage system.

53. By the plain language of the statute, once an entity can show a request is for records which fall within the items specified in Subsection iii, there is no need to further establish that such disclosure is reasonably likely to endanger the security of

safety of the building. The legislature did not intend such an absurd result when it exemplified the kinds of things which per se create such a danger.

54. Yet another way of illustrating this is to ask, “When would it be **reasonably unlikely** that the disclosure of the location, configuration or security of **critical** systems could endanger the safety or physical security of a public facility?” The District suggests the answer is “Never.”

55. Alternatively, the District submits that the quantum of proof necessary to show an exception applies has been overstated in this case and in the decision made by the Office of Open Records in *Vasys v. Plymouth Township*, AP 2009-150 (Pa. Office of Open Records, April 6, 2009) and *Werner v. School District of Pittsburgh*, AP 2015-0478, 2015 Pa. O.O.R. D. Lexis 507. In all these cases, the OOR has now held that an agency must show there is more than a potential for harm to prevail by offering factual examples of the harm which could arise from disclosure of the kinds of things specified in Subsection iii.

56. In determining whether a record is exempt, the burden of proof on the agency receiving the request to show a record is exempt by a *preponderance of evidence*. 65 P.S. § 67.708(a).

57. To suggest that each time an agency receives a request for records, which would disclose the location of those things specified in Subsection iii, it must independently establish that granting such request could lead to the possibility of danger to the security and safety of facilities and infrastructure holds agencies to a much higher standard than is reasonable or proper.

58. In interpreting a security provision under the prior Right-to-Know law, even when the agency had to establish by a preponderance of the evidence that an exception to disclosure applied, Pennsylvania's Commonwealth Court recognized that the detail required to apply the exception did not mandate the kind of specific response sought by the requester as to each cell phone number appearing on a public official's taxpayer paid cell phone bill:

Here, Appellants contend that the record establishes that they have shown that the requested telephone bills are public records and that Appellees have failed to satisfy their corresponding burden of showing that the reputation or personal security exception applied. More specifically, Appellants argue that the record is devoid of evidence that the possessors of the telephone numbers listed in the requested bills would suffer any impairment of their reputation or personal security, with the possible exception of one specific unnamed individual referred to by Council Member Bodack who had called the council member to complain about a neighboring house where drug trafficking was taking place.

Again, we agree with Appellants that they have shown that cellular telephone bills of an agency are, absent a statutory exception, public records subject to disclosure under the Right-to-Know Act. However, **we reject Appellants' argument that the statutory exception does not apply unless the agency establishes, with specific evidence as to each piece of information or data, that the exception has been met.** Quite simply, we have never held that the requisite balancing test is utilized only after the agency has established, through particular and item-specific evidence, that challenged information in an otherwise public record definitely meets one of the exceptions set forth at 65 P.S. § 66.1. On the contrary, if anything, our case law has recognized that there are certain types of information whose disclosure, by their very nature, would operate to the prejudice or impairment of a person's privacy, reputation, or personal security, and thus intrinsically possess a palpable weight that can be balanced by a court against those competing factors that favor disclosure. Private telephone numbers are one such type.

Tribune-Review Pub. Co. v. Bodack, 961 A.2d 110, 116 (Pa. Cmwlth. 2008).

59. The District respectfully submits that the Commonwealth Court's approach is the proper one to take with respect to what an agency must show to meet the preponderance of evidence standard in showing an exception applies.

60. With regard to building plans, once an agency demonstrates that the requested plans include the location of some specific items on the list of items found in Subsection iii, the exemption has been established. Preponderance of the evidence means that there is a greater than fifty (50%) percent probability that "x" is true. *See, e.g., Wilson v. El-Daief*, 964 A2d. 354, 367 F.N. 14 (PA 2009).

61. It is not required that an agency provide "clear and convincing" evidence nor prove "beyond a reasonable doubt" that a record is subject to an exemption.

62. Under the preponderance standard of proof, the scale is evenly balanced and, to establish an exception applies, the district need only provide such evidence as will tip the scale slightly to its position. The quantum of evidence required to meet its burden of proof need not be great. Merely establishing that an individual of reasonable mind would find disclosure of the records at issue exposes a facility or infrastructure to danger is sufficient.

63. The District has more than met its preponderance burden with the submitted affidavits and This Honorable Court should overrule the determination of the OOR and find that the records requested are exempt from disclosure under both 65 P.S. § 67.708(b)(1)(ii) and 65 P.S. § 67.708(b)(3)(iii).

The Plans and Specifications for the New High School Project Are in the Early Developmental Stage and Remain the Intellectual Property of the WBASD Design Team.

64. The Plans and Specifications for the New High School Project of the District are also not subject to production under the confidential proprietary information exception under 65 P.S. § 67-708(b)(ii) as this information is the work product, in development, of the District's Design Team. See, Affidavits of Patrick Endler ¶ 5-8. See also, Kinsman Affidavit ¶¶ 18-19.

65. As such, the information is not yet owned by the District and cannot be disclosed by District as it remains the intellectual property of the District's Design Team.
Id.

66. The District should not be required to produce work-in-progress plans and specifications which have never been tendered to the District and are not the property of the District and not in the possession of the District.

Conclusion

67. It is clear that releasing plans and specifications of an educational facility to the public is reasonably likely to pose a threat to such educational facilities and compromise infrastructure security and the security of students, staff and visitors.

68. In fact, the experts whose Affidavits are provided in this matter conclude that the release of such plans and specifications creates an immediate and direct safety risk for students, staff, and visitors in such buildings and the buildings themselves.

69. In conclusion, the District respectfully submits that it has overwhelmingly met its slight burden of proof in this case. The Affidavits of Brian Lavan, Charles Kyle Kinsman and Patrick Endler clearly establish that the records at issue are not subject to

disclosure under the Right to Know Law, and therefore, the decision of the OOR is erroneous and should be overturned by This Honorable Court.

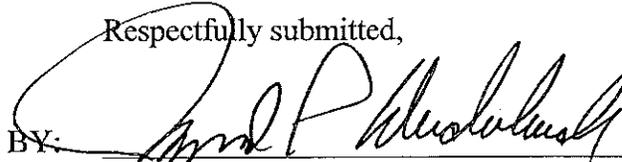
70. This Honorable Court has an opportunity to “stop the madness” imposed upon agencies by OOR when faced with requests for plans and specifications for public buildings as enumerated in 65 P.S. § 67.708(b)(3)(iii). School building plans in the Unionville-Chadds Ford School District, the School District of Pittsburgh, the Wilkes-Barre Area School District or any other school district contain the very same elements, such that those documents in the wrong hands, can lead to catastrophic tragedy. Will it take a terroristic attack, utilizing plans and specifications obtained as a result of an OOR ordered production to stop this madness? The District implores this Honorable Court to insure such tragedy never happens.

Respectfully submitted,

Date:

7/21/16

BY:



Raymond P. Wendolowski, Esquire
Solicitor-Wilkes-Barre Area School District

VERIFICATION

I, Leonard Przywara, hereby state that I am the Open Records Officer of the Wilkes-Barre Area School District, the Petitioner herein, and am authorized to make this Verification on its behalf. I further aver that the statements contained in the foregoing Notice of Appeal/Petition for Review are true and correct to the best of my knowledge, information and belief. I make this verification subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities.

Leonard B. Przywara
Leonard Przywara
Open Records Officer
Wilkes Barre Area School District

Law Offices of Raymond P. Wendolowski
By: RAYMOND P. WENDOLOWSKI, ESQUIRE
Identification No.: 40935
P.O. Box 1313
Wilkes-Barre, Pennsylvania 18703-1313
Telephone No.: 570/270.9180

WILKES-BARRE AREA SCHOOL : IN THE COURT OF COMMON PLEAS
DISTRICT, : OF LUZERNE COUNTY
:
Petitioner : No. _____
: NOTICE OF APPEAL/PETITION
vs. : FOR JUDICIAL REVIEW
:
KIMBERLY BORLAND, ESQUIRE, :
:
Respondent : CIVIL ACTION – LAW

CERTIFICATE OF SERVICE

I, Raymond P. Wendolowski, Esquire, hereby certify that on the 21st day of July, 2016, I served a true and correct copy of the Notice of Appeal/Petition for Review via U.S. First Class Mail, addressed as follows:

Kimberly Borland, Esquire
Borland & Borland
69 Public Square, 11th Floor
Wilkes-Barre, PA 18702

and

Kathleen A. Higgins, Esquire
Appeals Officer
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

FILED
PROTHONOTARY
LUZERNE COUNTY
2016 JUL 21 PM 3:55

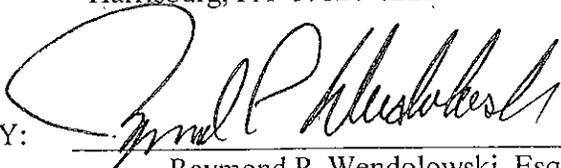
BY: 
Raymond P. Wendolowski, Esquire

EXHIBIT "A"

THE LAW OFFICES OF
BORLAND & BORLAND, L.L.P.
11TH FLOOR
69 PUBLIC SQUARE
WILKES-BARRE, PENNSYLVANIA 18701-2597

KIMBERLY D. BORLAND
RUTH BLAMON BORLAND
DAVID P. TOMASZEWSKI
JOSEPH C. BORLAND

TELEPHONE (670) 822-3311

FAX (670) 822-9884

kborland@borlandandborland.com
rborland@borlandandborland.com
dtomaszewski@borlandandborland.com
jborland@borlandandborland.com
sborland@borlandandborland.com

OF COUNSEL
SARAH L. BORLAND

December 2, 2015

WILKES BARRE AREA SCHOOL DISTRICT
730 SOUTH MAIN STREET
WILKES BARRE PA 18711

Re: Public Records Request
Our File: XX/86370

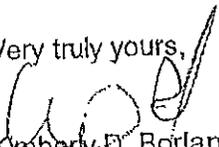
Dear Sir or Madam:

Enclosed are my requests for production of the described public records of the school district.

Please advise me of the cost of copying before making any copies.

Thank you for your consideration.

Very truly yours,


Kimberly D. Borland

KDB/jp
enclosures

VIA E-MAIL - lpzywara@wbasd@k12.pa.us AND
VIA FACSIMILE 570-819-5011 & REGULAR MAIL



pennsylvania
OFFICE OF OPEN RECORDS

STANDARD RIGHT-TO-KNOW REQUEST FORM

DATE REQUESTED: 12-2-15

REQUEST SUBMITTED BY: E-MAIL U.S. MAIL FAX IN-PERSON

REQUEST SUBMITTED TO (Agency name & address): Borland & Borland, LLP, 69 Public Square,
11th Floor Wilkes-Barre, Pa 18701

NAME OF REQUESTER: Kimberly D. Borland, Esquire

STREET ADDRESS: 69 Public Square, 11th Floor

CITY/STATE/COUNTY/ZIP(Required): Wilkes-Barre, Pa 18701

TELEPHONE (Optional): 570-822-3311 EMAIL (optional): kborland@borlandandborland.com

RECORDS REQUESTED: **Provide as much specific detail as possible so the agency can identify the information.
Please use additional sheets if necessary*

See attached sheet.

DO YOU WANT COPIES? (YES) or NO
DO YOU WANT TO INSPECT THE RECORDS? YES or NO
DO YOU WANT CERTIFIED COPIES OF RECORDS? YES or (NO)

**** PLEASE NOTE: RETAIN A COPY OF THIS REQUEST FOR YOUR FILES ****
**** IT IS A REQUIRED DOCUMENT IF YOU WOULD NEED TO FILE AN APPEAL ****

FOR AGENCY USE ONLY

RIGHT TO KNOW OFFICER:

DATE RECEIVED BY THE AGENCY:

AGENCY FIVE (5) BUSINESS DAY RESPONSE DUE:

***Public bodies may fill anonymous verbal or written requests. If the requestor wishes to pursue the relief and remedies provided for in this Act, the request must be in writing. (Section 702.) Written requests need not include an explanation why information is sought or the intended use of the information unless otherwise required by law. (Section 703.)*

1. The plans and specifications for the Mackin School construction project, currently being completed.
2. The progress plans and specifications for the construction of the proposed consolidated high school on North Washington Street between Union and Market Streets in Wilkes-Barre.
3. All correspondence between the Wilkes-Barre Area School District and the Pennsylvania Department of Education pertaining to the District's 2015 Plan Con A submission to the Department.
4. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding the educational impact of the planned consolidation of the Coughlin and Meyers High Schools.
5. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding the relative merits of the elementary/middle/high school model (Flood, etc./Solomon/Coughlin) in comparison to the elementary/combined junior-senior high school model (Kistler/Meyers & Heights/GAR).
6. The District's current and in-progress master educational plan.
7. The District's current and in-progress master educational plan
8. The District's contracts with any vendor for transportation services.
9. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding student population projections.
10. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding the demographic makeup of the current student population of the District, by school and grade.
11. All documents relating to the cost of demolition of Meyers High School.
12. All documents relating to the cost of preservation or mothballing of Meyers High School, if it is not in use as a high school.
13. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding the impact of consolidation of Coughlin and Meyers High Schools by means of a single building at the current Coughlin site on tax revenues for the District.
14. All documents establishing the benefits of and criteria for participation by students in the Young Scholars program and the roster of current student participants (with names redacted) by school and grade

EXHIBIT "B"

Wilkes-Barre Area School District

730 SOUTH MAIN STREET

WILKES-BARRE, PENNSYLVANIA 18711-0375

SUPERINTENDENT: (570) 826-7111 EXT. 1148 FAX: (570) 819-5010

BOARD SECRETARY: (570) 826-7111 EXT.1162 FAX: (570) 819-5011



Joseph A. Caffrey, President
Denise T. Thomas, Vice President
Dr. Bernard S. Prevuznak, Superintendent
Leonard B. Przywara, Secretary/Business Administrator

MEMBERS OF THE BOARD -
Joseph A. Caffrey
Ned J. Evans
Dino L. Galella
Jim Geiger

Christine A. Katsock
John R. Quinn
Dr. James F. Susek
Denise T. Thomas
Rev. Shawn Walker



January 8, 2016

Kimberly D. Borland, Esquire
Borland & Borland, L.L.P.
69 Public Square, 11th Floor
Wilkes-Barre, Pennsylvania 18701-2597

RE: Right to Know Request

Dear Attorney Borland:

In response to your request, dated December 2, 2015 for certain information as described below, we submit the following:

1. The request for the plans and specifications for the Mackin School construction project is denied. The request is denied pursuant to the personal security exemption, 65 P.S. § 708(b)(1)(ii), and building plan and infrastructure record exemption, 65 P.S. § 708(b)(3)(iii). See, *Knauss v. Unionville-Chadds Ford School District*, OOR Docket No. AP 2009-0332; See also *Harastl v. Pennsylvania Department of General Services*, OOR Docket No. AP 2009-0226.
2. The request for the progress plans and specifications for the construction of the proposed consolidated high school on North Washington Street between Union and Market Streets in Wilkes-Barre is denied. The request is denied pursuant to the personal security exemption, 65 P.S. § 708(b)(1)(ii), and building plan and infrastructure record exemption, 65 P.S. § 708(b)(3)(iii). See, *Knauss v. Unionville-Chadds Ford School District*, OOR Docket No. AP 2009-0332; See also *Harastl v. Pennsylvania Department of General Services*, OOR Docket No. AP 2009-0226. The request is also denied pursuant to the pre decisional deliberation exemption found at 65 P.S. § 708(b)(10)(i)(A). The request is also denied pursuant to the confidential proprietary information exemption under 65 P.S. § 708(b)(11), since the information requested is the proprietary information of the School District design team as they continue with their design work in progress.

The Wilkes-Barre Area School District will not discriminate in its educational programs, activities, or employment practices based on race, color, ancestry, national origin, gender, age, sexual orientation, religion, creed, familial status, handicap/disability, union membership, or any other legally protected classification.

Leonard B. Przywara, Section 504 Coordinator and ADA Coordinator, 570-826-7111
Dr. Bernard S. Prevuznak, Superintendent, Compliance Officer/Coordinator of Title IX of the Educational Amendments Act of 1972 and Title VI of the Civil Rights Act of 1964, 570-826-7111

Kimberly D. Borland, Esquire
January 8, 2016

Page 2

You have the right to challenge the denial of Items 1 and 2. To do so, you must file an appeal within fifteen (15) business days of the mailing date of this response. The appeal must state the grounds upon which you assert that the requested information and/or records is a public record subject to disclosure and should address any grounds stated by the School District in denying your request. This appeal may be submitted via email, FAX, or postal mail. The email address – openrecords@pa.gov; the FAX number - 717-425-5343; postal mail address – Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225.

3. All correspondence between the Wilkes-Barre Area School District and the Pennsylvania Department of Education pertaining to the District's 2015 Plan Con A submission to the Department.

See Right to Know Request File - #3

4. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding the educational impact of the planned consolidation of the Coughlin and Meyers High Schools.

See Right to Know Request Files - Various

5. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding the relative merits of the elementary/middle/high school model (Flood, etc./Solomon/Coughlin) in comparison to the elementary/combined junior-senior high school model (Kistler/Meyers & Heights/G.A.R.)

See Right to Know Request File – Various

6. The District's current and in-progress master educational plan.

See Right to Know Request File - #6 & #7

7. The District current and in-progress master educational plan.

Duplication of Request #6

8. The District's contracts with any vendor for transportation services.

See Right to Know Request File - #8

9. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding student population projections.

See Right to Know Request File – #9 & Various

Kimberly D. Borland, Esquire
January 8, 2016

Page 3

10. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding the demographic makeup of the current student population of the District, by school and grade.

See Right to Know Request File - #10 & Various

11. All documents relating to the cost of demolition of Meyers High School.

See Right to Know Request File - #11

12. All documents relating to the cost of preservation or mothballing of Meyers High School, if it is not in use as a high school.

No documents exist that are responsive to this request.

13. All studies by or for the Wilkes-Barre Area School District, completed or in progress, regarding the impact of consolidation of Coughlin and Meyers High Schools by means of a single building at the current Coughlin site on tax revenues for the District.

No documents exist that are responsive to this request.

14. All documents establishing the benefits of and criteria for participation by students in the Young Scholars programs and the roster of current student participants (with names redacted) by school and grade.

See Right to Know Request File - #14 & Various

Sincerely,

Leonard B. Przywara

Leonard B. Przywara
Open Records Officer

Enclosures

EXHIBIT "C"

THE LAW OFFICES OF
BORLAND & BORLAND, L.L.P.
11TH FLOOR
68 PUBLIC SQUARE
WILKES-BARRE, PENNSYLVANIA 18701-2597

KIMBERLY D. BORLAND
RUTH SLAMON BORLAND
DAVID P. TOMASZEWSKI
JOSEPH C. BORLAND

TELEPHONE (570) 622-3311

FAX (570) 822-8884

kborland@borlandandborland.com
rborland@borlandandborland.com
dtomaszewski@borlandandborland.com
jborland@borlandandborland.com
sborland@borlandandborland.com

OF COUNSEL
SARAH L. BORLAND

January 29, 2016

OFFICE OF OPEN RECORDS
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET
4TH FLOOR
HARRISBURG PA 17120-0225
VIA E-MAIL openrecords@pa.gov &
REGULAR MAIL & VIA FACSIMILE 717-425-5343

RECEIVED

JAN 29 2016

OFFICE OF OPEN RECORDS

Re: File: XX/86370

Dear Sir or Madam:

By this letter, I appeal from the January 8, 2016 denial by the Wilkes-Barre Area School District of items 1 and 2 of my request to it dated December 2, 2015.

Copies of my request and the denial are enclosed.

As to Item 1, the District's citation to *Knauss v. Unionville-Chadds Ford School District*, OOR Docket No. AP 2009-0332 is inapt because:

- 1) The District has published, and continues to publish, such plans as requested herein for Mackin and the proposed consolidated high school for its other existing schools on its website. The Unionville-Chadds Ford School District had removed such plans from its website.
- 2) Printed plans for both E. L. Meyers High School and Kistler Elementary School are made available by the District and are in the public domain.
- 3) Mackin has been made open to the public at large for inspection, which inspection would reveal the information which the District seeks to exempt from disclosure as would otherwise create a "reasonable likelihood of substantial and demonstrable risk of harm."

January 29, 2016

Page 2

- 4) The disclosure of plans and specifications for existing school buildings and proposed school buildings creates less risk of harm than the publication of student lunch menus, bus transportation routes, school schedules, identification of vendors and a myriad of other publicly disclosed matters pertaining to schools.
- 5) The District, which has the burden of proof, has put forth no evidence that disclosure of these requested plans and specifications would create a reasonable likelihood of endangering the safety or the physical security of the buildings. See *McDonald et al. v. Fox Township*, OOR Docket No. AP 2010-1095
- 6) To the extent that the safety of school children and the public at large is implicated in school construction, the balance favors public disclosure at the pre-construction stage, for purpose of public debate, particularly where, as here, the District proposes to build a school in the center of city on a plot of land less than 10% of the size deemed optimum by the Pennsylvania Department of Education. *22 Pa. Code Sec. 349.7 (a)*
- 7) *Knauss* was wrongly decided.
- 8) It is requested that requestor be given reasonable leave to amend this appeal and the support thereof in the course of its consideration and in response to the District's position.

The District's citation to *Harasti v. Pennsylvania Department of General Services*, OOR Docket No. AP 2009-0226 is inapt because:

- 1) The plans requested were for a quasi-judicial tribunal.
- 2) To arguments made regarding *Knauss* are incorporated herein.

As to Item 2, the arguments made with regard to the citation to *Knauss* and *Harasti* are incorporated herein.

Further, the citation to the pre-decisional deliberation exemption [65 P.S. Sec. 67.708(10)(i)(a)] is inapt because the District has already adopted what is known as PlanCon A, which was based upon the requested plans and specifications requested as to the proposed consolidated high school, so these documents are not pre-decisional. Furthermore, the plans and specifications themselves are not deliberative and do not come within the pre-decisional exemption and are themselves not internal to the Board, but rather constitute material presented to the Board. See *Carey v. Pennsylvania Dep't*

January 29, 2016
Page 3

of Corr., 61 A.3d 367 (Pa.Cmwlt. 2013) supplemented, 1348 C.D. 2012, 2013 WL 3357733 (Pa.Cmwlt. July 3, 2013)

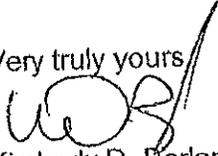
Further the citation to the trade secret or confidential proprietary information exemption [65 P.S. Sec. 67.708(11)] is inapt because there is no evidence that the plans and specifications are trade secrets. There exists no evidence that these requested plans and specifications are

Commercial or financial information received by an agency:(1) which is privileged or confidential; and(2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information. 65 P.S. § 67.102

See *Dep't of Corr. v. Maulsby*, 121 A.3d 585, 590 (Pa.Cmwlt. 2015)

Accordingly, this appeal must be granted and the District directed to provide the requestor with the subject records.

Very truly yours



Kimberly D. Borland

KDB/jp
enclosures

cc: Leonard Przywara (w/encl.)

EXHIBIT "D"



pennsylvania
OFFICE OF OPEN RECORDS

February 2, 2016

Via E-Mail only:

Kimberly Borland, Esq.
Borland & Borland, LLP
69 Public Square, 11th Floor
Wilkes-Barre, PA 18701
kborland@borlandandborland.com

Via E-Mail only:

Leonard Przywara
Open Records Officer
Wilkes-Barre Area School District
730 South Main Street
Wilkes-Barre, PA 18711
lprzywara@wbasd.k12.pa.us

RE: OFFICIAL NOTICE OF APPEAL – DOCKET #AP 2016-0120

Dear Parties:

Please review this information carefully as it affects your legal rights.

The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, *et seq.* on January 29, 2016. This letter describes the appeal process. A binding Final Determination will be issued pursuant to the timeline required by the RTKL. In most cases, that means within 30 calendar days.

OOR Mediation: This is a voluntary, informal process to help parties reach a mutually agreeable settlement on records disputes before the OOR. To participate in mediation, both parties must agree in writing. If mediation is unsuccessful, both parties will be able to make submissions to the OOR, and the OOR will have 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Note to Parties: Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Any factual statements or allegations submitted without an affidavit will not be considered. The agency has the burden of proving that records are exempt from public access (*see* 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.** The law requires the agency position to be supported by sufficient facts *and* citation to all relevant sections of the RTKL, case law, and OOR Final Determinations. An affidavit or attestation is required to show that records do not exist. Blank sample affidavits are available on the OOR’s website.

Submissions to OOR: Both parties may submit information and legal argument to support their positions by 11:59:59 p.m. seven (7) business days from the date of this letter. *Submissions sent via postal mail and received after 5:00 p.m. will be treated as having been received the next business day.* The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Include the docket number above on all submissions related to this appeal. Also, any information you provide to the OOR must be provided to all parties involved in this appeal. Information shared with the OOR that is not also shared with all parties will not be considered.

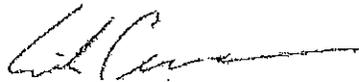
Agency Must Notify Third Parties: If records affect a legal or security interest of an employee of the agency; contain confidential, proprietary or trademarked records of a person or business entity; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice to the OOR within seven (7) business days from the date on this letter.** Such notice must be made by (1) providing a copy of all documents included with this letter; and (2) advising that interested persons may request to participate in this appeal (*see* 65 P.S. § 67.1101(c)).

Commonwealth Court has held that “the burden [is] on third-party contractors ... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)). Failure of a third-party contractor to participate in an appeal before the OOR may be construed as a waiver of objections regarding release of the requested records.

Law Enforcement Records of Local Agencies: District Attorneys must appoint Appeals Officers to hear appeals regarding criminal investigative records in the possession of a local law enforcement agency. If access to records was denied in part on that basis, the Requester should consider filing a concurrent appeal with the District Attorney of the relevant county.

If you have any questions about the appeal process, please contact the assigned Appeals Officer (contact information is enclosed) – and be sure to provide a copy of any correspondence to all other parties involved in this appeal.

Sincerely,



Erik Arneson
Executive Director

Enc.: Assigned Appeals Officer contact information
Entire appeal as filed with OOR

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

IF YOU ARE OBJECTING TO THE DISCLOSURE OF YOUR HOME ADDRESS, DO NOT PROVIDE THE OFFICE OF OPEN RECORDS WITH YOUR HOME ADDRESS. PROVIDE AN ALTERNATE ADDRESS IF YOU DO NOT HAVE ACCESS TO E-MAIL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- An employee of the agency
- The owner of a record containing confidential or proprietary information or trademarked records
- A contractor or vendor
- Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Kathleen Higgins, Esquire

CONTACT INFORMATION:

Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

PHONE:

(717) 346-9903

FACSIMILE:

(717) 425-5343

E-MAIL:

KaHiggins@pa.gov

Preferred method of contact
and submission of information:

EMAIL

Please direct submissions and correspondence related to this appeal to the above Appeals Officer. Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR.

The OOR website, <http://openrecords.pa.gov>, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.

EXHIBIT "E"

IN THE COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

In the Matter of:

Kimberly Borland, Esquire,	:	
	:	
Complainant	:	Docket No. AP 2016-0120
	:	
vs.	:	
	:	
Wilkes-Barre Area School District,	:	
	:	
Respondent	:	

**STATEMENT IN OPPOSITION TO RELEASE OF RECORDS SUBMITTED ON
BEHALF OF THE WILKES-BARRE AREA SCHOOL DISTRICT**

The Respondent, Wilkes-Barre Area School District (“WBASD”), opposes the public release of school building plans and specifications that were requested by Complainant, Kimberly Borland, Esquire (“Borland”), as the release of such plans and specifications are reasonably likely to pose a threat to building or infrastructure security and reasonably likely to expose or create vulnerability to security thereby increasing the risks to the life and health of students, staff and visitors in school buildings. Additionally, WBASD opposes the release of the plans and specifications that are in development for the construction of its new high school as that draft information remains the intellectual property of the architects and engineers employed by WBASD and are not documents in the possession of WBASD.

A. Introduction

On December 2, 2015 WBASD received a Right to Know Request from Borland which included requests for fourteen (14) categories of documents. On December 9, 2015 Leonard Przywara, the WBASD Open Records Officer, notified Borland, in writing, of the District’s need

for additional time to respond to the request. On January 8, 2016, WBASD responded, on the merits, to Borland's request of December 2, 2015 and provided all documents responsive to requests 3 through 14. The response denied Borland's requests 1 and 2 which requests are as follows:

- 1) The plans and specifications for the Mackin Construction Project, Currently being completed.
- 2) The progress plans and specifications for the construction of the Proposed consolidated high school on North Washington Street Between Union and Market Streets in Wilkes-Barre.

The WBASD response read as follows:

1. The request for the plans and specifications for the Mackin School construction project is denied. The request is denied pursuant to the personal security exemption, 65 P.S. § 708(b)(1)(ii) (*sic*), and building plan and infrastructure record exemption, 65 P.S. § 708(b)(3)(iii) (*sic*). See, Knauss v. Unionville-Chadds Ford School District, OOR Docket No. AP 2009-0332; See also Harasti v. Pennsylvania Department of General Services, OOR Docket No. AP 2009-0226.

2. The request for the progress plans and specifications for the construction of the proposed consolidated high school on North Washington Street between Union and Market Streets in Wilkes-Barre is denied. The request is denied pursuant to the personal security exemption, 65 P.S. § 708(b)(1)(ii) (*sic*), and building plan and infrastructure record exemption, 65 P.S. § 708(b)(3)(iii) (*sic*). See, Knauss v. Unionville-Chadds Ford School District, OOR Docket No. AP 2009-0332; See also Harasti v. Pennsylvania Department of General Services, OOR Docket No. AP 2009-0226. The request is also denied pursuant to the pre decisional deliberation exemption found at 65 P.S. § 708(b)(10)(i)(A) (*sic*). The request is also denied pursuant to the confidential proprietary information exemption under 65 P.S. § 708(b)(11) (*sic*), since the information requested is the proprietary information of the School District design team as they continue with their design work in progress.

You have the right to challenge the denial of items 1 and 2. To do so, you must file an appeal within fifteen (15) business days of the mailing date of this response. The appeal must state the grounds upon which you assert that the requested information and/or records is a public record subject to disclosure and should address any grounds stated by the School District in denying your request. This appeal may be submitted via email, FAX, or postal mail. The email address-openrecords@pa.gov; the FAX number – 717-425-5343; postal mail address – Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225.

On January 29, 2016 Borland filed an appeal from the January 8, 2016 denial by WBASD. With the gracious concurrence of Mr. Borland, the Appeals Officer granted the undersigned's

request for an enlargement of time until February 29, 2016 for the parties to make their submissions.

B. Argument

1. Burden of Proof

In determining whether a record is exempt, the burden of proof is on the agency receiving the request to show that a record is exempt by a preponderance of the evidence. 65 P.S. §67.708(a) Proof by a preponderance of the evidence is the lowest degree of proof recognized in the administration of justice. *Hosey v. Margulies*, 70 A.2d 854 (Pa. Super. 1950). Preponderance of the evidence simply means that there is a greater than fifty (50%) percent probability that “x” is true. See, *Wilson v. El-Daief*, 964 A.2d 354, 367, ftnt 14 (Pa. 2009). Accordingly, when a request is made, the scales of justice are evenly balanced and all the agency need do to meet the burden is to tip the scale slightly in its favor. See, *Korch v. Korch*, 885 A.2d 535 (Pa. Super. 2005).

In this matter, WBASD has denied Borland’s requests primarily upon the personal safety exception (65 P.S. § 67.708(b)(1)(ii)) and building plan and infrastructural record exception (65 P.S. § 67.708 (b)(3)(iii)). In support of its denial, WBASD submits the Affidavits of Charles Kyle Kinsman, a licensed architect, who leads the WBASD Design Team; Brian P. Lavan, the Director of Police Operations and Security of the WBASD; and Patrick J. Endler, a licensed architect, and vice-president of Borton Lawson, a member of the WBASD Design Team, copies of which are attached hereto as Exhibits “A” and “B” and “C”, respectively. For the reasons fully discussed below, these Affidavits overwhelmingly support the District’s denials of Borland’s requests and WBASD has met its slight, preponderance of the evidence, burden as to these denials.

2. School Building Plans and Specifications Are Not Subject to Disclosure Under the RTKL.

The issues raised by the current appeal have already been resolved by OOR in the case of *Knauss v. Unionville-Chadds Ford School District*, OOR Docket No. AP 2009-0332. In *Knauss*

the requester sought the School District's PlanCon D&E submissions and the school district denied the requests on the basis of the personal security exception (§ 708(b)(1)(ii)) and the building plans and infrastructure record exemption (§ 708(b)(3)(iii)). In support of the denial, the district submitted affidavits (with the assistance of the Pennsylvania Department of Education) supporting the conclusion that the disclosure of school building plans and specifications creates a reasonable likelihood of harm and OOR held that the school district had met its burden supporting the denial of the disclosure of school construction plans and specifications.

In this case WBASD has submitted the affidavits of Brian P. Lavan and Charles Kyle Kinsman in support of its position that building plans and specifications are exempt from disclosure.

Officer Lavan is the Director of Police Operations and Security for WBASD and has over 34 years of police and public safety experience (Lavan Affidavit ¶¶ 1&2). He has received extensive training in protecting the safety of school students, staff and buildings (**Id.** ¶ 3). Officer Lavan states that the public release of building plans and specifications creates an immediate and direct safety and security risk to the students, staff and facilities of WBASD. (**Id.** ¶¶ 4-16).

Charles Kyle Kinsman is a registered architect in the Commonwealth of Pennsylvania with over 28 years' experience in the design and construction of school facilities and his firm is the lead architectural firm for the Design Team of WBASD that performed the Mackin School renovation project and is currently in the process of developing plans and specifications for the District's proposed new high school to be constructed on Washington Street in the City of Wilkes-Barre. (Kinsman Affidavit ¶¶ 1 & 2).

Mr. Kinsman is likewise of the opinion that production of school plans and specifications creates an immediate and direct safety/security risk to the students, staff and facilities of WBASD

(Id. ¶ 7). The building plans and specifications for the projects involved reveal, among other things,

- location and dimensions of rooms;
- location of entrances and exits;
- access points to roof and subfloor areas;
- column support and load bearing wall supports; and
- building site details.

(Id. ¶ 8).

In addition, the plans and specifications also include important security details such as:

- exact type of, and location of, all structural systems
- description of the type and location of mechanical systems,
- description of the type and location of electrical systems,
- description of the type and location of plumbing and wastewater systems,
- description of the type and location of safety and security systems, including locations and operation of security cameras, and fire detection and suppression systems; and
- description of the kind of data and communication systems and the location of the hardware and connectivity of those systems.
- any areas of shatter proof glass, whether exterior or interior;
- the location of drop-down security gates and securable zones throughout the building in the event of a security situation.

(Id. ¶ 9).

These systems are all critical to maintaining or protecting the health and safety of the individuals within the school facility. They reveal the structural integrity of the building itself. Moreover, these systems:

- provide the life-maintaining water, air, and heat for occupants of the buildings;
- identify the storage of flammables and other potential explosives in the building or on the site; and
- describe the methods of sanitary sewage disposal.

Id.

Given the information contained in the Lavan and Kinsman Affidavits, it is not surprising that the General Assembly has provided an express exemption for "building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or

security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems." 65 P.S. §67.708(b)(3)(iii). Officer Lavan and Mr. Kinsman have made it clear that the information contained in the building plans and specifications increase two distinct types of risk to human safety: (1) increased risk of attack on a facility perpetrated by those outside the building, particularly terrorists; and (2) increased risk of violence or other harm perpetrated by students or others who are users of the building.

1. **Increased Vulnerability to Terrorist Attack**

As we are all aware, American public facilities-including school buildings- have been the target of both international and domestic terrorists over the past several decades. Thus, making building plans and specifications available to *anyone* clearly increases the risk to the occupants of such buildings by exposing all the structural, mechanical, electrical, communications, and other features of the facility. These plans "may represent the single greatest asset to one who would seek to inflict the greatest amount of harm" to a large number of our most vulnerable citizens, our school children. (Lavan Affidavit ¶¶ 6-11).

By publicizing structural design details, there is increased risk to the entire physical structure of a building. The structural information contained in buildings plans "include[s] column support, and load bearing wall supports." (Kinsman Affidavit ¶ 8). An individual or a terrorist organization with access to such information "could use it to place explosive charges in order to maximize destruction and loss of life." (*Id.* ¶ 10).

The other operational systems of a building--which are found in either the plans or specifications or both--reveal other key aspects that keep a building safe and secure: how it is provided with power; its safety and security features (like security cameras and alarm systems);

electronic access information; its communications systems; and the location of harmful materials (like fuel, or chemicals that are contained in heating or cooling systems). (Id. ¶¶ 8-17).

Publicizing these details creates multiple types of increased risk for an attack on a building.

Individuals or groups with terroristic intent could:

- plot an attack with knowledge of entry points, exit strategies and potential hazardous material locations;
- identify a method to defeat safety alarm systems, fire alarms, security alarms, and electronic access control systems in order to harm personnel;
- facilitate the planning process of an attacker to pre-position supplies and weapons as well as gain proximity to assembly areas and afford a safe and convenient hiding place;
- mount an attack on the ventilation of a building by revealing details about and access points to the heating, ventilation and air conditioning system ("HVAC"), such as air intake locations and flammable fuel storage locations.

(See Lavan and Kinsman Affidavits). Those who possess information about security monitoring equipment-like cameras-could be able to disconnect this equipment or monitor law enforcement or rescue responses, thereby multiplying the risks associated with an attack.

In addition, building plans and specifications also reveal the absence of certain features, for example system protections or security system features. These could reveal a facility's "Achilles heel" in preparation for or during an attack. (Kinsman Affidavit ¶ 17).

In summary, building plans and specifications contain detailed information enabling a wrongdoer to identify points of failures in key operational systems--e.g., electricity, water, fuel, etc.-that can be exploited with the right knowledge level and intent to cause harm.

2. Increased Vulnerability to Crime and Violence

Building and security coverage diagrams often reveal areas where surveillance is difficult. These weaknesses can increase the risk of many times of illegal activity:

- these areas may be used for drug-selling, fighting, sexual misconduct or other illicit activities;

- they also may allow individuals to hide themselves until such time as they may have unencumbered access to the school's valuables; and
- they may reveal hiding places for weapons contraband.

(Lavan Affidavit ¶ 12).

As described above, revealing information about security systems increases the risk that those systems can be overridden or compromised. This can allow an individual or group access to the facility to steal property or otherwise cause damage to the facility or its systems.

Finally, schools' information systems and networks house vast quantities of operational and personal information. Making public information about the location and functioning of a school's network lines creates vulnerability for school's computer network. (Id. 14).

C. Requester's Argument for Disclosure of School Plans and Specifications Are Without Merit

In his appeal, Borland argues that the denial of the Mackin Plans and Specifications and New High School Project Plans and Specifications should be reversed as the District purportedly published plans for other school facilities on its website and that such documents are in the public domain. Requester also argues that the Mackin School was the subject of an open house and therefore because the public was allowed into the building all the information in the plans and specifications for the Mackin renovation have been revealed.

Initially, WBASD has links on its website to the Feasibility Study performed by its Design Team and structural reports for Meyers and Coughlin High Schools. Included in the Feasibility Study are bare bones floor plans for all of the District's school buildings. These drawings remain available for review as they do not show any of the detail that is contained in construction plans and drawings. Included in the structural report for Meyers High School as Appendix A are some ancient drawings for the original design of this nearly 100-year old school and bare bones floor

plans. Clearly these drawings do not provide the detail that are at issue in Borland's requests and do not defeat the valid concerns clearly established by the Lavan and Kinsman Affidavits.

Assuming *arguendo* that the detail available on the District website is akin to construction plans and specifications (which they are not), then, the District has acted imprudently in not protecting these materials. However, whether the District published certain building plans does not control and should not even influence the outcome of this appeal. Clearly one wrong does not justify another. The personal security and structural security exemptions protect the disclosure of the Mackin Project and New High School Project plans and specifications. If OOR were to accept Borland's argument, then the logical conclusion would be that if the Commonwealth of Pennsylvania placed the plans for any single structure in the public domain then it would be required, under Borland's premise, to disclose the plans and specifications for **all** the property owned by the Commonwealth, including the Capitol Building and Governor's Mansion. Clearly, the law requires no such absurd result.

Likewise, allowing the public to walk through Mackin during an open house clearly does not give the public access to the key information contained in the Mackin Plans and Specifications as outlined in the Kinsman Affidavit. Again, following Borland's premise, would require the Commonwealth to produce the Plans and Specifications to the Capitol Building merely because it is open to the public. Clearly, the law requires no such absurd result.

D. The Plans and Specifications for the New High School Project Are in the Early Developmental Stage and Remain the Intellectual Property of the WBASD Design Team.

The Plans and Specifications for the New High School Project of the WBASD are also not subject to production under the confidential proprietary information exception under 65 P.S. § 67-708(b)(ii) as this information is the work product, in development, of the WBASD Design Team.

See, Affidavits of Patrick Endler ¶ 5-8. See also, Kinsman Affidavit ¶¶ 18-19. As such, the information is not yet owned by the WBASD and cannot be disclosed by WBASD as it remains the intellectual property of the WBASD Design Team. **Id.**

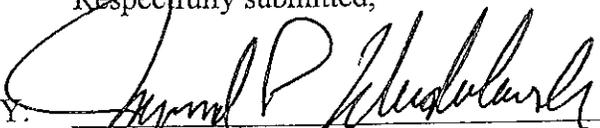
E. Conclusion

It is clear that releasing plans and specifications of an educational facility to the public is reasonably likely to pose a threat to such educational facilities and compromise infrastructure security and the security of students, staff and visitors. In fact, experts whose Affidavits are provided in this matter conclude that the release of such plans and specifications creates an immediate and direct safety risk for students, staff, and visitors in such buildings and the buildings themselves.

In conclusion, WBASD respectfully submits that it has overwhelmingly met its slight burden of proof in this case. The Affidavits of Brian Lavan, Charles Kyle Kinsman and Patrick Endler clearly establish that the records at issue are not subject to disclosure under the Right to Know Law.

Respectfully submitted,

Date: 2/29/16

BY: 
Raymond P. Wendolowski, Esquire
Solicitor-Wilkes-Barre Area School District

IN THE COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

In the Matter of:

Kimberly Borland, Esquire,	:	
	:	
Complainant	:	Docket No. AP 2016-0120
	:	
vs.	:	
	:	
Wilkes-Barre Area School District,	:	
	:	
Respondent	:	

CERTIFICATE OF SERVICE

I, Raymond P. Wendolowski, Esquire, hereby certify that on the 29th day of February, 2016, I served the foregoing Statement in Opposition to Release of Records Submitted on Behalf of the Wilkes-Barre Area School District in the above matter upon the following individual(s) via e-mail as follows:

Kathleen Higgins, Esquire
Commonwealth of Pennsylvania
Office of Open Records
E-mail: KaHiggins@pa.gov

and

Kimberly Borland, Esquire
Borland & Borland LLP
E-mail: kborland@borlandandborland.com

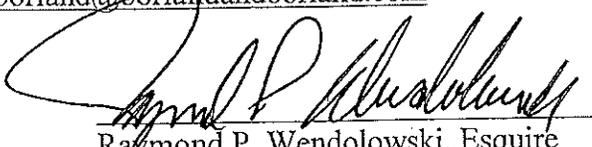

Raymond P. Wendolowski, Esquire

EXHIBIT "A"

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

AFFIDAVIT OF KYLE KINSMAN

I, Charles Kyle Kinsman, hereby swear and affirm, under oath, the following:

1. I am a licensed architect in the Commonwealth of Pennsylvania and am a principal in the firm of Williams Kinsman Lewis Architecture P.C. with offices at 82 South Main Street, Wilkes-Barre, PA, 18701.
2. I have over 28 years' experience in the design and construction of school facilities and my firm is currently the lead architectural firm for the Design Team of the Wilkes-Barre Area School District ("WBASD") and I am intimately familiar with the Plans and Specifications of the Mackin School Project and the ongoing process for the development of plans and specifications for the proposed new high school to be constructed on Washington Street in the City of Wilkes-Barre
3. The Pennsylvania Department of Education ("PDE") receives and maintains in its files plans and specifications for thousands of school buildings across the Commonwealth. 24 P.S. § 7-731(6).
4. The Division of School Facilities in the Division within PDE is responsible for reviewing and approving all plans and specifications for public school building projects.
5. "PlanCon"¹ is a multi-step process through which a public school district receives the statutorily-mandated PDE approval for a state-funded school construction project under Section 7-731(6) of the Public School Code. I am directly involved in the PlanCon process on behalf of the WBASD.
6. A school district does not receive final PDE approval of its plans and specifications until it has completed PlanCons A, B, C, D, E and F – Part F being the step at which detailed plans and specifications are ultimately approved by PDE.
7. The public release of school building plans and specifications submitted in the course of the project design and PlanCon process creates an immediate and direct safety/security risk to the students, staff and facilities of WBASD or any other school entity whose documents might be released publicly.

¹ PlanCon is an acronym for the Planning and Construction workbook provided to school districts by the Department. The Parts of PlanCon correspond with the letters of the alphabet.

8. When school buildings are designed, the building plans and specifications often consist of thousands of pages of material and contain numerous critical features: (1) location and dimensions of rooms; (2) location of entrances and exits; (3) access points to roof and subfloor areas; (4) building site details; and (5) column support and load-bearing wall supports.
9. In addition, the plans and specifications also include important security details such as: (1) exact type of, and location of, all structural systems; (2) description of the type and location of mechanical systems; (3) description of the type and location of electrical systems; (4) description of the type and location of plumbing and wastewater systems; (5) description of the type and location of safety and security systems, including locations and operation of security cameras, and fire detection and suppression systems; and (6) description of the kind of data and communication systems and the location of the hardware and connectivity of those systems; (7) any areas of shatterproof glass, whether exterior or interior; (8) the location of drop-down security gates and securable zones throughout the building in the event of a security situation. These systems are all critical to maintaining or protecting the health and safety of the individuals within the school facility. These systems provide the life-maintaining water, air and heat for occupants of the buildings. The plans and specifications also identify the storage of flammables and other potential explosives in the building or on the site; and describe the methods of sanitary sewage disposal.
10. The threat of domestic violence, international terrorism, and other types of violence against Pennsylvania school buildings that daily house millions of occupants is very real. An individual or terrorist organization with access to the information in the Mackin Project or High School Project Plans and Specifications could use this information to place explosive charges in order to maximize destruction and loss of life.
11. Each of the occupants of public school facilities are potential targets of domestic violence, domestic and international terrorism and other types of violence that have become national trends.
12. Knowledge of the school facility itself greatly assists the perpetrators of school violence in carrying out their horrific plans that always seem to catch the local community off-guard.
13. To assist in the prevention of further tragic incidents, all public access to floor and site plans for state-funded school construction projects should be strictly prohibited.
14. The planning and construction documents that are necessary to design and build Pennsylvania's public schools and administrative facilities provide extremely detailed information about the project buildings and their sites.
15. The school building plans and specifications for the Mackin project and those being developed for the new high school project include not only information regarding the location of rooms, entrances and exits, access to roof and subfloor areas, possible escape routes, etc., but

also includes important security information such as the exact type of, and location of, all structural, mechanical, electrical, plumbing, data and communication systems.

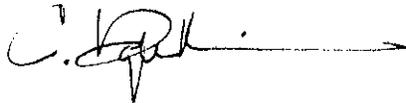
16. Even the specific means of supplying life-maintaining water, air, and heat, as well as methods of sanitary sewage disposal systems, storage of flammables and other potential explosives, are also documented in the smallest and largest scale, for all on-and off-site systems.

17. These documents also indicate the critical *absence* of important system protections. This alone could reveal a facilities "Achilles heel" during an attack. Clearly, information this detailed does not need to be accessed by the building inhabitants or those who may harbor ill-will against them.

18. As a secondary matter, requiring WBASD to copy these planning and construction documents could create serious legal issues regarding the ownership of the intellectual property that these documents represent. When the creator of the documents, such as the Architect, Engineer, Hazardous Materials Consultant, etc., retains ownership of the copyright of the intellectual property, which is the case here, it could be illegal for WBASD to copy the documents and distribute them to others.

19. Additionally, the plans and specifications for the new high school project remain in the earliest development stages and are not even in a form ready to be submitted to PDE as part of the PlanCon process and this work in progress remains the intellectual property of the Design Team and is not the property of the WBASD.

FURTHER AFFIANT SAYETH NOT.



Kyle Kinsman, AIA
Architect
Williams, Kinsman Lewis Architecture, P.C.
82 South Main Street
Wilkes-Barre, PA 18701

IN WITNESS WHEREOF, I set my hand and official seal.

Sworn to and signed before me, a Notary Public, this

29 day of Feb., 2016.



My Commission Expires:

APRIL 2, 2018

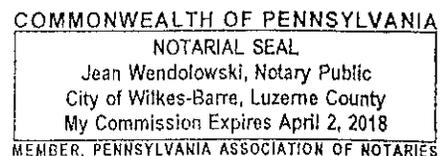


EXHIBIT "B"

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

AFFIDAVIT OF BRIAN P. LAVAN

I, Brian P. Lavan, hereby swear and affirm, under oath, the following:

1. I am the Director of Police Operations and Security and in charge of the School Resource Officers Program for the Wilkes-Barre Area School District ("WBASD"). Our School Resource Officers are responsible for the day-to-day safety of WBASD students, staff and buildings.
2. I have been a School Resource Officer for WBASD since March 3, 2000. Prior to that I was a police officer for the City of Wilkes-Barre for eighteen years. Combined I have over thirty four years in police and public safety experience.
3. I have received training in protecting the safety of School students, staff and buildings as follows: PA State Police Academy, Active Shooter Training, Rapid Deployment of Police Officers Training, Quick Action Deployment of Police Officers Training, Prince George's County Maryland SWAT Training, School Resource Officer Training, and many school violence seminars.
4. As explained more fully below, the public release of school building plans and specification creates an immediate and direct safety and security risk to the students, staff, and facilities of any school entity whose documents might be released publicly.
5. Any action that establishes precedent for the release of the information contained in school building plans and specifications affect the future safety and security of students, staff, and visitors of the WBASD.

Increased Vulnerability to Mass Attack/Destruction

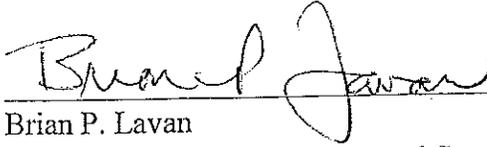
6. Public access to school building plans may represent the single greatest asset to one who would seek to inflict the greatest amount of harm to the largest number of students and staff.
7. School plan documents containing blueprints or drawings can yield insights into the structural integrity of the building as well as other structures used in escape or evacuation, such as stairways and elevators.
8. Illicit uses for plans of transport lines for flammable or hazardous liquids and noxious or explosive gases – otherwise part of a safe heating and cooling system, are also obvious risks to the safety of students, staff and building structures.

9. Public access to escape and evacuation routes open the possibility of secondary attacks.
10. Knowledge of HVAC routing and ducting can be used to facilitate entry of lethal gases as common as auto exhaust.
11. Information that water and sewage diagrams provide can render the fresh water systems vulnerable to cross flow from sewage as well as waterborne chemical or biological contamination.

Increased Vulnerability to Crime and Violence

12. Often building and security coverage diagrams reveal areas where surveillance is difficult.
 - a. Those areas may be used for drug-selling, fighting, sexual misconduct or other illicit activities.
 - b. They may also allow individuals to secrete themselves until such time as they may have unencumbered access to the school's valuables and simply leave through a one-way exit door – out.
 - c. Hiding places for weapons contraband may also be identified through the floor plans and diagrams.
13. Even where the goal is less of a threat to personal well-being, the same information afforded to a would-be vandal could increase his or her destructive capability many times over. Sabotage to services might cause costly interruptions, but as in the case of security systems, may also inadvertently place others in imminent danger.
14. One critical area of vulnerability is the school's computer network. Access to terminals and lines could put an entire school district system at risk as well as parents, teachers and administrators whose personal information is stored there.
15. Our schools are already considered targets by some. There are numerous examples of school attacks that include Columbine and Sandy Hook where significant loss of life occurred. Persons intending to do harm to large numbers of people more readily plan and carry out attacks if they have access to school building plans and specifications.
16. Schools offer targets where large groups of people move in predictable cycles to predictable locations for predictable durations. Access to building plans adds a key puzzle piece as to where they will be and how to most easily reach them. Our schoolchildren are the softest of targets. We cannot and should not make them more vulnerable without the most urgent of justifications.

FURTHER AFFIANT SAYETH NOT.



Brian P. Lavan
Director of Police Operations and Security
Wilkes-Barre Area School District
730 South Main Street
Wilkes-Barre, PA 18711

IN WITNESS WHEREOF, I set my hand and official seal.

Sworn to and signed before me, a Notary Public, this
29 day of Feb., 2016.

My Commission Expires:


Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Jean Wendolowski, Notary Public
City of Wilkes-Barre, Luzerne County
My Commission Expires April 2, 2018
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Jean Wendolowski, Notary Public
City of Wilkes-Barre, Luzerne County
My Commission Expires April 2, 2018
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

EXHIBIT "C"

AFFIDAVIT OF PATRICK J. ENDLER

COMMONWEALTH OF PENNSYLVANIA OFFICE OF OPEN RECORDS

I, Patrick J. Endler, hereby depose and say the following:

1. I am a licensed architect in the Commonwealth of Pennsylvania, and Vice President of Borton-Lawson, with our main office located at 613 Baltimore Drive, Suite 300, Wilkes-Barre, PA 18702.
2. I have over twenty-five years' experience in the design and construction administration of buildings, including school facilities, and my firm is currently a joint member of the Design/Consulting Team for the Wilkes-Barre Area School District. I have intimate knowledge of the Plans of the Mackin School Project, the ongoing process for the development of Plans for the proposed New High School (at the existing Coughlin site) and the additions/alterations to the Kistler Elementary School to be constructed by the District.
3. As a member of the Design Team, I am directly involved in the PlanCon process on behalf of the District. As a result of this process, a school district submits plans for completion of PlanCon A, B, C, D, E and F. Part F is the step at which detailed plans and specifications are submitted and ultimately approved by PDE.
4. At the present time, we have submitted preliminary designs to the District for a building addition at the Kistler Elementary School, and for a new building at the present site of the Coughlin High School. Some of those plans have been submitted to the Pennsylvania Department of Education for PlanCon. The Mackin Project has already been completed.
5. It is our position that the work we have performed for the District on Kistler and the High School Project at this time is preliminary, our work-product and proprietary and the intellectual property of Borton-Lawson. These Plans are still evolving and subject to many refinements and changes over the coming months. This work consists of site drawings, specifications for buildings and preliminary floor plans and are in the earliest development stages, not in a form to be submitted to PDE as part of the PlanCon process. It is not the property of the District.

6. Many of these sketches/renderings/concepts will be used to implement the final design and placement of buildings and parking, including the locations of stairwells, exits and emergency exits, mechanical systems, electrical systems and security plans. These planning and construction documents that are used to design and build a public school and ancillary facilities contain detailed information about the project buildings and their sites. The final plans for Mackin contain similar detailed information.

7. Because we retain the ownership of our work product and these documents, we restrict the use as a result of the ever-changing development of the design and site configuration. It would be premature for our plans to be used for anything but ongoing development of the building design by the District. This applies to both the High School and Kistler projects.

8. As stated earlier, the District is not the owner of these planning and construction documents, and the ownership of the intellectual property that these documents represent resides in the Design Team. As architects and engineers, we retain ownership of the copyright of this intellectual property and it should not be distributed anyone except those for which it is specifically intended.

AFFIANT SO HEREBY STATES.



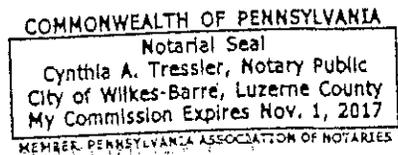
Patrick J. Ender, AIA, LEED-AP
 Vice President
 Borton-Lawson
 613 Baltimore Drive, Suite 300
 Wilkes-Barre, PA 18702

IN WITNESS WHEREOF, I set my hand and official seal.

Sworn to and signed before me, a Notary Public, this
29th day of February, 2016.

My Commission Expires: Nov 1, 2017

For Cynthia A. Tressler Notary Public



Commonwealth of Pennsylvania
 County of Luzerne

EXHIBIT "F"

Jean Evans

From: Raymond Wendolowski
Sent: Tuesday, March 01, 2016 8:26 AM
To: Higgins, Kathleen
Cc: Kimberly Borland; Jean Evans
Subject: Re: Kimberly Borland, Esq. v. WBASD (Docket # AP 2016-0120)

Ms Higgins:

I have no objection to Attorney Borland's request for 20 days or to an extension of the date for final determination. I do not believe a hearing is required on this rather straightforward issue. Thanks

Ray

Sent from my iPhone

On Mar 1, 2016, at 8:21 AM, Higgins, Kathleen <kahiggins@pa.gov> wrote:

Attorney Boland:

In order to grant your request for an additional 20 days to make a submission, I would ask that you extend the Final Determination date by 20 days. Please let me know if you agree to this. That would make the Final Determination due on or before April 19, 2016. A ruling regarding a hearing will then be made when all submissions are received.

Thank you,

<image001.jpg> **Kathleen A. Higgins | Attorney**
Office of Open Records
Commonwealth Keystone Building
400 North Street, Plaza Level
Harrisburg, PA 17120-0225
(717) 346-9903
kahiggins@pa.gov
<http://openrecords.pa.gov/> @OpenRecordsPA

Confidentiality Notice: This electronic communication is privileged and confidential and is intended only for the party to whom it is addressed. If received in error, please return to sender.

From: Kimberly Borland [<mailto:kborland@borlandandborland.com>]
Sent: Monday, February 29, 2016 6:12 PM
To: Jean Evans; Higgins, Kathleen
Cc: Raymond Wendolowski
Subject: RE: Kimberly Borland, Esq. v. WBASD (Docket # AP 2016-0120)

Dear Attorney Higgins:

What follows is my response to Mr. Wendolowski's submission of earlier this afternoon.

Additionally, I request a further period of 20 days to make a more comprehensive response and a hearing before the office to challenge the District's affidavits.

The affidavits of Messrs. Kinsman, Lavan and Endler are conclusory and utterly fail to demonstrate with data or any evidence whatsoever that disclosure "would be reasonably likely to

Mr. Endler's affidavit fails to provide the necessary evidence under 65 P.S. Sec. 67.702 that disclosure of this information would "cause substantial harm to the competitive position" of his office. That he prefers that they not be disclosed is neither surprising, nor legally sufficient. Mr. Endler and Mr. Kinsman have elected to compete, more or less, for the design of a public building. Moreover, the District cannot contract away its statutory obligations.

Mr. Kinsman's affidavit is, perhaps, the most ridiculous of all. Just as with Mr. Lavan, there is no quantification or objectification of the supposed risk. It is the District's burden to show "reasonable likelihood" of the risk of disclosure of these documents. These very things which he disingenuously argues should be kept secret now and forevermore are, in fact, the very things which both the students the public should know, in the event of an emergency: entrances and exits; escape routes, room locations, location of communication systems, *et al.*

Disingenuous because the District publishes this information for its other buildings. Disingenuous because hundreds of students attend Meyers High School daily, where the plans have been publicly disclosed, notwithstanding that the plans are "ancient," in the words of Mr. Wendolowski. The "ancient" status of Meyers makes its safety no less important than it would for more modern buildings. If it was "imprudent" of former Boards to publish such plans, then it was imprudent for this Board to republish them and for it to allow the presentation of such plans for a building (Times Leader) it intends to acquire. Meyers floor plans are posted throughout the school and freely distributed to visitors, as are floor plans for Kistler Elementary. The District has made no effort to recall these documents. Either the District wishes to put Meyers and Kistler students at risk or it is insincere in its present position. Insincerity is more "reasonably likely."

A simple internet search reveals floor plans for the Pennsylvania State Capitol and for what appears to be virtually all of the buildings of the Pennsylvania State University.

To the extent that the District believes some of its specifications should be shielded from the public, it should disclose all that is commonly available with regard to its other buildings and other publicly-owned buildings in the Commonwealth and let the remainder be resolved by this process.

Denial of these plans obstructs all public consideration of the propriety of the District's actions and cannot be legally sustained.

Thank you for your consideration.

Kimberly D. Borland, Esq.
Borland & Borland, LLP
11th Floor
69 Public Square
Wilkes-Barre, PA 18701
Phone 570-822-3311
Fax 570-822-9894
E-mail kborland@borlandandborland.com

From: Jean Evans [<mailto:jevans@wendolowskilaw.com>]
Sent: Monday, February 29, 2016 3:58 PM
To: KaHiggins@pa.gov; Kimberly Borland
Cc: Raymond Wendolowski
Subject: Kimberly Borland, Esq. v. WBASD (Docket # AP 2016-0120)

Dear Attorney Higgins and Attorney Borland: At the instruction of and on behalf of Attorney Wendolowski, attached to this e-mail in PDF format is the Statement in Opposition to Release the Records Submitted on Behalf of the Wilkes-Barre Area School District with attached Certificate of Service with regard to the above matter. Should you have any questions or concerns, please contact Attorney Wendolowski at your convenience. Thank you. Jean

Jean D. Evans
Law Offices of Raymond P. Wendolowski
PO Box 1313
Wilkes-Barre, PA 18703-1313
Telephone: 570-270-9180

EXHIBIT "G"

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

SUPPLEMENTAL AFFIDAVIT OF KYLE KINSMAN

I, Charles Kyle Kinsman, hereby swear and affirm, under oath, the following:

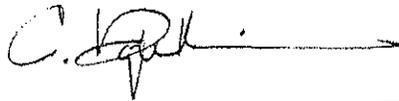
1. I am a licensed architect in the Commonwealth of Pennsylvania and am a principal in the firm of Williams Kinsman Lewis Architecture P.C. with offices at 82 South Main Street, Wilkes-Barre, PA, 18701.

2. I have over 28 years' experience in the design and construction of school facilities and my firm is currently the lead architectural firm for the Design Team of the Wilkes-Barre Area School District ("WBASD") and I am intimately familiar with the Plans and Specifications of the Mackin School Project and the ongoing process for the development of plans and specifications for the proposed new high school to be constructed on Washington Street in the City of Wilkes-Barre.

3. Attached to this Affidavit are the Table of Contents for the specifications for the Mackin Project completed by the Wilkes-Barre Area School District as well as a list of the final construction drawings for the Mackin Construction Project.

4. At the present time the design of the proposed new high school on the North Washington Street site continues and there are currently in existence the following drawings: (1) architectural: 97 sheets in progress; (2) structural: 27 sheets in progress; (3) civil: 17 sheets in progress. At the present time there are no technical specifications yet developed for the new high school project.

FURTHER AFFIANT SAYETH NOT.



Kyle Kinsman, AIA
Architect
Williams, Kinsman Lewis Architecture, P.C.
82 South Main Street
Wilkes-Barre, PA 18701

IN WITNESS WHEREOF, I set my hand and official seal.

Sworn to and signed before me, a Notary Public, this
19th day of May, 2016.

My Commission Expires:


Notary Public

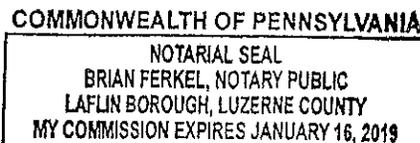


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EXHIBIT "H"



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

KIMBERLY BORLAND,
Requester

v.

WILKES-BARRE AREA SCHOOL
DISTRICT,
Respondent

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Docket No. AP 2016-0120

INTRODUCTION

Kimberly Borland, Esq. (“Requester”) submitted a request (“Request”) to the Wilkes-Barre School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking plans and specifications for District construction projects. The District partially denied the Request, asserting among other reasons, that disclosure of the requested records would likely result in harm to the personal security of an individual, as well as that of a building. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the District is required to take further action as directed.

FACTUAL BACKGROUND

On December 2, 2015, a 14-item Request was filed, seeking, in pertinent part:

1. The plans and specifications for the Mackin School project, currently being completed.
2. The progress plans and specifications for the construction of the proposed consolidated high school on North Washington Street between Union and Market Streets in Wilkes-Barre.

On December 9, 2015, the District invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On January 8, 2016, the District partially denied the Request, asserting that the requested plans and specifications are exempt from disclosure as records that would threaten the personal security of an individual, as well as the security of a building. *See* 65 P.S. § 67.708(b)(1)(ii); 65 P.S. § 67.708(b)(3)(iii). The District further denied the Request for the plans and specifications for the proposed consolidated high school as records of predecisional deliberations and confidential proprietary information. *See* 65 P.S. § 67.708(b)(10)(i)(A); 65 P.S. § 67.708(b)(11).

On January 29, 2016, the Requester filed an appeal with 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 February 29, 2016, the District submitted a position statement reiterating its reasons for denial. The District also submitted the sworn affidavit of Kyle Kinsman, Architect for the design team of the District, who attests that the release of school building plans and specifications creates a safety and security risk to students, staff and facilities of the District. The District also submitted the affidavit of Brian Lavan, Director of Police Operations and Security for the District, who attests that release of the building plans would create increased vulnerability to mass attack/destruction and crime and violence. Finally, the District submitted the affidavit of Patrick Endler, Architect on the design/consulting team for the District, who attests that the plans and specifications are proprietary.

On February 29, 2016, the Requester submitted a position statement arguing that the District did not meet its burden of establishing that the requested records are exempt from disclosure; the Requester also asked the OOR to conduct a hearing in this matter.

On April 28, 2016, the OOR reopened the record in this matter, and sought further evidence from the District regarding the specific records contained in the plans and specifications. On May 19, 2016, the District submitted the supplemental sworn affidavit of Kyle Kinsman, who attests to the number of drawings for the schools. Attached to Mr. Kinsman's affidavit is a Table of Contents for the specifications and the final construction drawings of the Mackin School project.

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 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, although the Requester requested that a hearing be held in the matter, because the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter, the request for a hearing is hereby denied.

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

- 1. The District has not demonstrated that the requested building plans and specifications would be reasonably likely to threaten the personal security of an individual**

The District argues that that the requested records are exempt from public access under Section 708(b)(1)(ii), which exempts from disclosure a record that “would be reasonably likely

to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corrections*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

In support of its position that disclosure of the requested plans and specifications would threaten personal security, the District submits the sworn affidavit of Kyle Kinsman, Architect for the District’s design team, who attests the following:

2. I have over 28 years’ experience in the design and construction of school facilities and my firm is currently the lead architectural firm for the Design Team of the Wilkes-Barre Area School District ... and I am intimately familiar with the Plans and Specifications
7. The public release of school building plans and specifications submitted in the course of the project design and PlanCon process creates an immediate and direct safety/security risk to the students, staff and facilities of [the District] or any other school entity whose documents might be released publicly.
8. When school buildings are designed, the building plans and specifications often consist of thousands of pages of material and contain numerous critical features: (1) location and dimensions of rooms; (2) location of entrances and exits; (3) access points to roof and subfloor area; (4) building site details; and (5) column support and load-bearing wall supports.
9. In addition, the plans and specifications also include important security details such as: (1) exact type of, and location of, all structural systems; (2) description of the type and location of mechanical systems; (3) description of the type and location of electrical systems; (4) description of the type and location of plumbing and wastewater systems; (5) description of the type and location of safety and security systems, including locations and operation of security cameras, and fire detection and suppression systems; and (6) description of the kinds of data and communication systems and the location of the hardware and connectivity of

those systems; (7) any areas of shatterproof glass, whether exterior or interior; (8) the location of drop-down security gates and securable zones throughout the building in the event of a security situation. These systems are critical to maintaining or protecting the health and safety of the individuals within the school facility. These systems provide the life-maintaining water, air and heat for occupants of buildings. The plans and specifications also identify the storage of flammables and other potential explosives in the building or on the site; and describe the methods of sanitary sewage disposal.

10. The threat of domestic violence, international terrorism, and other types of violence against Pennsylvania school buildings that daily house millions of occupants is very real. An individual or terrorist organization with access to the information in the Mackin Project or High School Project Plans and Specifications could use this information to place explosive charges in order to maximize destruction and loss of life.
11. Each of the occupants of public school facilities are potential targets of domestic violence, domestic and international terrorism and other types of violence that have become national trends.
12. Knowledge of the school facility itself greatly assists the perpetrators of school violence in carrying out their horrific plans that always seem to catch the local community off-guard.
13. To assist in the prevention of further tragic incidents, all public access to floor and site plans for state-funded school construction projects should be strictly prohibited.

The District also submits the sworn affidavit of Brian Lavan, Director of Police Operations and Security for the District, who attests the following:

2. I have been a School Resource Officer for [the District] since March 3, 2000. Prior to that I was a police officer for the City of Wilkes-Barre for eighteen years. Combined I have over thirty-four years in police and public safety experience....
4. As explained more fully below, the public release of school building plans and specification creates an immediate and direct safety and security risk of the students, staff, and facilities of any school entity whose documents might be released publicly.
5. Any action that establishes precedent for the release of the information contained in school building plans and specifications affect the future safety and security of students, staff, and visitors of the [District].

6. Public access to school building plans may represent the single greatest asset to one who would seek to inflict the greatest amount of harm to the largest number of students and staff.
7. School plan documents containing blueprints or drawings can yield insights into the structural integrity of the building as well as other structures used in escape or evacuation, such as stairways and elevators.
8. Illicit uses for plans of transport lines for flammable or hazardous liquids and noxious or explosive gases – otherwise part of a safe heating and cooling system, are also obvious risks to the safety of students, staff and building structures.
9. Public access to escape and evacuation routes open the possibility of secondary attacks.

While a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof under the RTKL, *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), conclusory statements are not sufficient to meet an agency's burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Here, the District has not offered any evidence other than conclusory statements to demonstrate that disclosure of the requested plans and specifications “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). Rather, Mr. Kinsman attests that there are “thousands of pages of material” and then lists general categories of building plans and specifications. The District has described serious general concerns but does not address how any specific records within these overall categories of records threaten the personal security of an individual and does not meet the established standard of showing that disclosure of the records

would result in a “reasonable likelihood” of “substantial and demonstrable risk.”¹ Therefore, the District has not met its burden of proving that release of the requested records would threaten the personal security of an individual. *See* 65 P.S. § 67.708(a)(1); *see also* *Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency’s conclusory affidavit was insufficient to sustain its burden of proof).

2. The District has not demonstrated that disclosure of the requested building plans and specifications would be reasonably likely to threaten the physical security of a building

The District argues that the requested records are also exempt from access under Section 708(b)(3)(iii) of the RTKL, which exempts from disclosure, a record that:

the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include ... building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

65 P.S. § 67.708(b)(3)(iii); *see* *Crockett v. SEPTA*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under this exemption); *but see* *Moss v. Londonberry Twp.*, OOR Dkt. AP 2009-0995, 2009 PA O.O.R.D. LEXIS 724 (holding that records related to the Three Mile Island nuclear power plant were not subject to public access). In order for this exemption to apply, “the disclosure of” the records — rather than the records themselves — must create a reasonable likelihood of endangerment to the

¹ The OOR reopened the record and presented the District with the opportunity to give more detail regarding the withheld records, and to establish how the cited exemptions specifically apply to such records. On May 19, 2016, the District submitted a supplemental sworn affidavit from Mr. Kinsman, who again generally attests to the number drawings that exist for the proposed high school project, while attaching a Table of Contents and list of final construction drawings for the Mackin School project.

safety or physical security of certain structures or other entities, including buildings and infrastructure. See 65 P.S. § 67.708(b)(3).

In support of this exemption, Mr. Kinsman further attests as follows:

14. The planning and construction documents that are necessary to design and build Pennsylvania's public schools and administrative facilities provide extremely detailed information about the project buildings and their sites.
15. The school building plans and specifications for the Mackin project and those being developed for the new high school project include not only information regarding the location of rooms, entrances and exits, access to roof and subfloor areas, possible escape routes, etc., but also includes important security information such as the exact type of, and location of, all structural, mechanical, electrical, plumbing, data and communication systems.
16. Even the specific means of supplying life-maintaining water, air, and heat, as well as methods of sanitary sewage disposal systems, storage of flammables and other potential explosives, are also documented in the smallest and largest scale, for all on-and off-site systems.
17. These documents also indicate the critical absence of important system protections. This alone could reveal a facilities "Achilles heel" during an attack. Clearly, information this detailed does not need to be accessed by the building inhabitants or those who may harbor ill-will against them.

The District argues that this matter is similar to that of *Knauss v. Unionville-Chadds Ford School District*, where a school district established that disclosure of construction plans submitted to the Department of Education were exempt from disclosure pursuant to Sections 708(b)(1) and 708(b)(3) of the RTKL. OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238. In *Knauss*, the OOR found that the affidavits submitted by the school district "address disclosure of the Plans at issue in great length."

In *Werner v. School District of Pittsburgh*, a school district submitted an affidavit containing conclusory statements that did not contain any substantive information, or establish how release of the requested records would be reasonably likely to endanger the safety and physical security of the school infrastructure under Section 708(b)(3) of the RTKL. OOR Dkt.

AP 2015-0478, 2015 PA O.O.R.D. LEXIS 507. In *Werner*, the OOR held that while “the School District presented evidence that records may reveal the location of pipes, walls, lighting fixtures, exits and other information,” there was no evidence that the disclosure of these locations — the majority of which may already be publically known — would be reasonably likely to jeopardize the safety or physical security of any school district building or structure. *Id.*

Here, like in *Werner*, the District has submitted conclusory affidavits which describe serious general concerns but has not sufficiently established how disclosure of the requested records, including the locations that Mr. Kinsman attests to, “creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system.” 65 P.S. § 67.708(b)(3)(iii). Therefore, the District has not demonstrated that disclosure of the requested plans and specifications would threaten the security of a building. *See* 65 P.S. § 67.708(a)(1).

3. The District has not demonstrated that the requested building plans and specifications constitute trade secrets or confidential proprietary information

The District next argues that the requested plans and specifications for the proposed high school are confidential proprietary information. Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). Confidential proprietary information is defined by the RTKL, as follows:

Commercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

65 P.S. § 67.102. An agency must establish that both elements of this two-part test are met in order for the exemption to apply. *See Sansoni v. Pennsylvania Housing Finance Agency*, OOR

Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *see also Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011) (involving confidential proprietary information).

In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.”

Id.

In support of its argument, Mr. Kinsman attests as follows:

18. As a secondary matter, requiring [the District] to copy these planning and construction documents could create serious legal issues regarding the ownership of the intellectual property that these documents represent. When the creator of the documents, such as the Architect, Engineer, Hazardous Materials Consultant, etc., retains ownership of the copyright of the intellectual property, which is the case here, it could be illegal for [the District] to copy the documents and distribute them to others.
19. Additionally, the plans for the new high school project remain in the earliest development stages and are not even in a form to be submitted to PDE as part of the PlanCon process and this work in progress remains the intellectual property of the Design Team and is not property of the [District].

Additionally, Patrick Endler, licensed architect and Vice President of Borton-Lawson, a firm that is part of the design and consulting team for the District, attests that the requested records are “work-product and proprietary and the intellectual property of Borton-Lawson.” Mr. Endler further attests that the plans are in the earliest development stages, are subject to change and are not property of the District.

Here, the District has not submitted evidence to establish the requisite “substantial harm to the [company’s] competitive position” necessary in order to establish that the requested

records are exempt as confidential proprietary information. Therefore, the District has not demonstrated that the requested plans and specifications are trade secrets or confidential proprietary information. *See* 65 P.S. § 67.708(a)(1).

4. The District has not demonstrated that the requested building plans and specifications for the proposed high school reflect the District's internal, predecisional deliberations

Finally, the District asserts that plans and specifications for the proposed consolidated high school reflect the internal, predecisional deliberations of the District. Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure records reflecting:

[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, legislative proposal, legislative amendment, contemplated or proposed policy 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); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *Sansoni v. Pa. Hous. Fin. Auth.*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. Pa. Dep't of Cmty. & Econ. Dev.*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310. 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 Envtl. Prot.*, 103 A.3d 374, 385-86 (Pa. Commw. Ct. 2014).

Here, the District has not submitted any evidence to demonstrate that the requested plans and specifications for the proposed high school are deliberative in nature, and therefore, the District has not demonstrated that the requested records reflect the District's internal, predecisional deliberations. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the District is required to provide all responsive records 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 Luzerne 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 according to court rules 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.² This Final Determination shall be placed on the OOR website: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 21, 2016

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Kimberly Borland, Esq. (via e-mail only);
Raymond Wendolowski, Esq. (via e-mail only)

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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**RE: Wilkes-Barre Area School District, Petitioner & Direct
Interest Participant vs. Kimberly Borland, Esquire, Respondent, and
City of Wilkes-Barre, Nominal Participant
(Appeal to OOR Docket No. AP-2016-0497)**

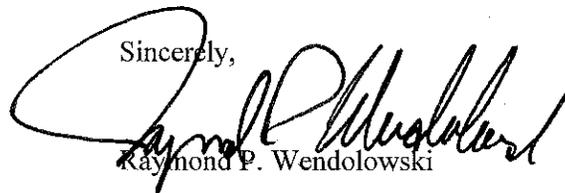
Dear Kim, Tim and Ms. Zeppos:

With regard to the above matter, I have enclosed with this correspondence a time-stamped copy of the Notice of Appeal/Petition for Judicial Review which was filed with this Court this date.

Please be guided accordingly.

Thank you.

Sincerely,



Raymond P. Wendolowski

RPW:je

Enclosure

c.c. Leonard Przywara, Open Records Officer, WBASD (w/encs.)