



2. In addition, please remit any information regarding North Korea in the curricula and/or classroom lesson-plans, as well as any testing of knowledge thereof.<sup>1</sup>

On July 14, 2016, the District invoked a thirty day extension to respond to the Request. *See* 65 P.S. § 67.902. On August 11, 2016, the District denied the Request claiming that responsive records are examinations, and, therefore, exempt from disclosure, 65 P.S. § 67.708(b)(15).

On August 15, 2016, the Requester appealed to the OOR challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 27, 2016, the District submitted a position statement reiterating its grounds for denial, claiming that the portion of the Request seeking “assessment of student knowledge” is insufficiently specific because there is no subject matter. 65 P.S. § 67.703. The District, however, identifies records responsive to the Request, but asserts that the records are exempt under the RTKL, 65 P.S. § 67.708(b)(15), and confidential pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g. The District also states that the records contain the identification information of minors, 65 P.S. § 67.708(b)(30). The District also submitted a statement made under the penalty of perjury from Dr. James Melchor, Assistant Director of Curriculum for the District, in support of its submission.

On September 27 and 28, 2016, the Requester submitted two position statements arguing, among other things, that other states have held proficiency tests given to high school seniors as public records. Additionally, the Requester states that his Request is sufficiently specific to

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<sup>1</sup> On September 29, 2016, the Requester indicated that he is not appealing the District’s denial of Item 2. Accordingly, the Requester has waived any objections regarding the sufficiency of the responsive information provided by the District. *See Dep’t of Corrections v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

ascertain the records being sought, as the District has identified responsive records. He also provides information on curricula instituted in schools on the subjects of “Holocaust, Genocide and Human Rights.”

On September 29, 2016, the OOR sought clarification on whether a statement made in the Requester’s submission was intended to limit his appeal of the District’s denial of certain records. On September 30, 2016, the Requester indicated that he did not intend to limit his appeal.<sup>2</sup>

### LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence

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<sup>2</sup> The Requester has made numerous submissions to the OOR after the record closed in this matter. As these submissions were received after the record closed, they were not considered. *See* 65 P.S. § 67.1102(b)(3). Even if the Requester’s submissions were timely, the submissions were not relevant or probative to the issue of whether or not the records are subject to public disclosure.

testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Requester sought *in camera* review of the responsive records; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. 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)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

## **1. The Request is sufficiently specific**

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

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep’t of Educ.*, 119 A.3d at 1125. In the instant matter, the Request seeks assessments of students and testing regarding a specific subject matter, namely the three facets of Act 70: Holocaust, Genocide and Human Rights Violations. Second, the scope of the request must identify a discrete group of documents (*e.g.*, type or recipient). *See Pa. Dep’t of Educ.*, 119 A.3d at 1125. Here, the Request does not identify any specific record types, other than oral and written testing. However, Dr. Melchor attests that assessments of student knowledge in grades 4-12 includes homework, classwork, quizzes... unit tests, midterm exams, and final exams. Finally “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Pa. Dep’t of Educ.*, 119 A.3d at 1126. Here, the Requester

limited the timeframe to the 2015-2016 academic school year. Additionally, the fact that the District concluded that responsive records exist suggests that the District understands which records the Requester is seeking. *See Easton Area. Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012) (“[T]he request was obviously sufficiently specific because the school district has already identified potential records included within the request”). Accordingly, the Request, as written, is sufficiently specific to enable the District to ascertain which records are sought.

**2. The requested records are exempt under Section 708(b)(15) of the RTKL**

Although the District has interpreted the Request as seeking two groups of records: “assessments of student knowledge” and “oral and written tests,” it has identified all responsive records as homework, classwork, tests, quizzes, unit tests, midterm exams and final exams. Section 708(b)(15) exempts from public disclosure, “academic transcripts” and “examinations, examinations questions, scoring keys or answers to examinations, [including] examinations given at primary and secondary schools....” This includes information of grading, such as grades and score sheets of individuals. *See Hoyer v. Pa. State Police*, OOR Dkt. AP 2013-1038, 2013 PA O.O.R.D. LEXIS 0565; *Hoyer v. Pa. State Police*, OOR Dkt. AP 2011-1374, 2011 PA O.O.R.D. LEXIS 1067. As such a request seeking records assessing students, that includes homework and various examinations, which are measurements of a student’s proficiency on a particular subject, are records exempt under Section 708(b)(15) as an academic transcript, examination, grade and/or score. Therefore, these records are not accessible under the RTKL.

Given the ruling above, the OOR need not address the District’s denial under FERPA and Section 708(b)(30) of the RTKL.

## CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the District is not required to take any further action. 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 Montgomery County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 11, 2016**

/s/ Jill S. Wolfe

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