



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<p><b>IN THE MATTER OF</b></p> <p><b>WARREN HOWELER AND THE</b> <i>MORNING TIMES,</i> <b>Requester</b></p> <p><b>v.</b></p> <p><b>SAYRE AREA SCHOOL DISTRICT,</b> <b>Respondent</b></p>	<p>:</p>	<p><b>Docket No.: AP 2016-1645</b></p>
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### INTRODUCTION

Warren Howeler, a reporter with the *Morning Times* (“Requester”), submitted a request (“Request”) to the Sayre Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a draft release and retirement agreement between the District and its former business manager. The District denied the Request, asserting that the document pertains to the discipline, demotion, or discharge of an agency employee. 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 not required to take any further action as directed.

### FACTUAL BACKGROUND

On September 13, 2016, the Request was filed, seeking:

The release and retirement AGREEMENT [(“Proposal”)] between the ... District and business manager Samuel Moore that was approved by the ... District Board

of Education on Sept. 12, 2016. Said [Proposal] was noted as having been presented to Mr. Moore by Dr. Griggs on Sept. 6, 2016.

On September 19, 2016, the District extended its deadline to respond to the Request by thirty days. *See* 65 P.S. § 67.902. On September 30, 2016, the District denied the Request, asserting that the Proposal pertains to the discipline, demotion, or discharge of an agency employee. *See* 65 P.S. § 67.708(b)(7)(viii).

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

On October 12, 2016, the District submitted a position statement, again arguing that the Proposal is exempt from disclosure under Section 708(b)(7)(viii) of the RTKL. The District also asserts for the first time that the Proposal is exempt from disclosure because it reflects the internal, predecisional deliberations of the District. *See* 65 P.S. § 67.708(b)(10)(i)(A).<sup>1</sup> Accompanying the submission was an attestation made under penalty of perjury by the District's Superintendent, Dr. Sherry Griggs. On October 23, 2016, in response to a request for clarification by the OOR, the District submitted the executed release and settlement agreement ("Agreement"), along with a general explanation of the differences between the Agreement and the Proposal.

## 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.*

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<sup>1</sup> The District is permitted to assert these new reasons on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

*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. 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the 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. *See* 65 P.S. § 67.3012. 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. 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. 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 Proposal relates to the discharge, discipline or demotion of an employee**

The District argues that the Proposal is exempt under Section 708(b)(7) of the RTKL because it pertains to the potential discharge of a District employee, is part of his personnel file and does not represent the final action of the District. Section 708(b)(7) exempts from disclosure certain “records relating to an agency employee,” including “[i]nformation regarding discipline, demotion or discharge contained in a personnel file[, ... with the exception of] the final action of an agency that results in demotion or discharge.” 65 P.S. § 67.708(b)(7)(viii). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *Bowling*, 990 A.2d at 824. As a result, subsections within Section 708(b)(7) only apply to records specifically mentioned therein, and do not protect a broad class of generic “personnel records.” *See American Federation of Teachers v. Sch. Dist. of Phila.*, OOR Dkt. AP 2016-0598, 2016 PA O.O.R.D. LEXIS 936 (internal citations omitted).

In the instant matter, Dr. Griggs attests to the following:

3. On September 6, 2016, I met with Samuel Moore, who then was the Business Manager of the ... District, and gave him [the Proposal] for his consideration, entitled a “Retirement and Release Agreement[.]”...

5. On September 27, 2016, a final Retirement and Release Agreement was signed and entered into between Samuel Moore and the ... District [(“Agreement”)].

6. The ... Agreement constituted the final action of the ... District with respect to the discipline and/or discharge of Samuel Moore.
7. There are textual differences between the ... Proposal and the ... Agreement; thus, they are not the same document.
8. On October 3, 2016, legal counsel for the ... District voluntarily sent a true and correct copy of the ... Agreement to the [Requester] without requiring a request under the [RTKL].
9. The ... Proposal regards the discipline or discharge of Samuel Moore and is contained in the personnel file of Samuel Moore, but it does not constitute the final action of the ... District with respect to Samuel Moore.

However, Dr. Griggs' assertion that the Proposal regards the discipline or discharge of Mr. Moore is belied by the District's explanation of the Agreement, along with the text of the Agreement itself. The Agreement discusses, among other items, the benefits to which Mr. Moore is entitled in exchange for agreeing to retire and forgo all legal claims against the District, memorializes mutual obligations pursuant to the Agreement and discusses dispute resolution. Though it discusses Mr. Moore's voluntary retirement, it does not discuss any discipline, demotion or discharge. The District explains that the Proposal is only "subtl[y]" different from the Agreement, and specifically, that "[t]erms used were defined or made more particular, the mutual nondisparagement clause was added, [and] provisions concerning the employee's pay were clarified." If the Agreement does not contain anything regarding discipline, demotion or discharge, it follows that the Proposal, which is admittedly substantially similar, does not either. Accordingly, the District has not demonstrated that the Proposal may be withheld on this basis. *Cf. Ellis v. City of Pittsburgh*, OOR Dkt. AP 2016-1351, 2016 PA O.O.R.D. LEXIS 1282.

**2. The District has not demonstrated that the exception to the exemption for internal, predecisional deliberations does not apply**

The District argues that the Proposal is exempt from disclosure under Section 708(b)(10) of the RTKL because it reflects internal, predecisional deliberations of the District. Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure a record that reflects:

[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, ... 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). However, based on the evidence in this case, the issue becomes whether the exception to the exemption applies. Section 708(b)(10)(ii) states that “[a] record that is not otherwise exempt from access under [the RTKL] and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 [relating to open meetings] shall be a public record.” 65 P.S. § 67.708(b)(10)(ii). Accordingly, two requirements must be met for the record to be subject to the exception to the exemption: (1) it must be presented to a quorum; and (2) for deliberation.

Dr. Griggs attests as follows:

4. At a public meeting held on September 12, 2016, the ... District Board of School Directors passed a resolution authorizing me to make any amendments to the [Proposal] as I may deem appropriate in my discretion, and to sign any agreement in its final form on behalf of the Board of School Directors.

On its face, the Request seeks the Proposal “that was approved by the ... District Board of Education on Sept. 12, 2016.” The District does not dispute that the Proposal was presented to a quorum and that this quorum ultimately approved the Proposal, with Dr. Griggs authorized to make amendments. As a result, the exception to the exemption applies, and the Proposal is a public record subject to disclosure under the RTKL.

## CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the District is required to provide the Proposal to the Requester 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 Bradford County Commonwealth Court of Common Pleas. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 31, 2016**

/s/ Blake Eilers  
Blake Eilers, Esq.  
Appeals Officer

Sent to: Warren Howeler (via e-mail only);  
Dr. Sherry Griggs (via e-mail only);  
Damian Rossettie, Esq. (via e-mail only)

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