



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**ZACH MCDONOUGH AND FREEDOM  
FOUNDATION,  
Requester**

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:

:

**v.**

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**Docket No: AP 2022-2291**

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**CITY OF PITTSBURGH,  
Respondent**

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On August 16, 2022, Zach McDonough, on behalf of the Freedom Foundation (collectively, the “Requester”), submitted a request (“Request”) to the City of Pittsburgh (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[T]he following information for each [City] employee who is employed [sic] the union-represented bargaining unit of [American Federation of State, County and Municipal Employees (“AFSCME”)] Council 13:

1. First name, middle name, last name.
2. Birth year/ Age
3. Gender
4. Job title/position.
5. Hire date.
6. Work email address, or Email Naming Convention and Domain
7. Employer (department, board, commission, etc.).
8. Worksite address/location, or Zip Code
9. Name of the labor union representing their bargaining unit.

It is my preference to receive any responsive information electronically in an Excel/CSV format.

(emphasis in original). On the same day, the City invoked a thirty-day extension of time to respond. *See* 65 P.S. § 67.902(b). On September 14, 2022, the City denied the Request, asserting that individuals' union association is protected by the constitutional right to freedom of association.

On September 29, 2022, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.<sup>1</sup> The Requester argues that he does not seek individuals' union membership, but rather information regarding City employees who are in union-represented bargaining units. The Requester asserts that the City fails to identify any particular responsive record and much of the information is publicly available. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c). On October 12, 2022, the City submitted a position statement.

### **1. The City's interpretation of the Request was reasonable in part**

The City argues that the Request is ambiguous and the City interpreted it as seeking a list or a spreadsheet of City employees represented by AFSCME Council 13. An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Bradley v. Lehighon Area Sch. Dist.*, OOR Dkt. AP 2021-0333, 2021 PA O.O.R.D. LEXIS 715; *Ramaswamy v. Lwr. Merion Sch. Dist.*, OOR Dkt. AP 2019-1089, 2020 PA O.O.R.D. LEXIS 2095. When a request is subject to multiple reasonable interpretations, the OOR's task on appeal is to determine if the agency's interpretation was reasonable. *Ramaswamy*, 2020 PA O.O.R.D. LEXIS 2095.

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<sup>1</sup> In the appeal, the Requester granted the OOR an additional thirty days to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1).

The OOR has rejected as unreasonable agencies' interpretation of similar requests as seeking only a list or a spreadsheet. *See, e.g., Horan and Freedom Foundation v. Colonial Sch. Dist.*, OOR Dkt. AP 2021-2522, 2022 PA O.O.R.D. LEXIS 149. Here, the Requester does indicate a preference for a spreadsheet, but a preference for file type is not akin to requesting only that file type or a single record containing all the requested information.

Interpreting the Request as seeking a spreadsheet is not reasonable, especially in light of Section 705 of the RTKL, which provides that when responding to a request, "an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. § 67.705; *see also Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that an agency cannot be made to create a record that does not exist). "An agency need only provide the information in the manner in which it currently exists." *Commonwealth v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012). An agency is not required to create a list or spreadsheet containing the requested information; however, "the information ... must simply be provided to requestors in the same format that it would be available to agency personnel." *Id.* at 549, n.12.

In any case, the City argues that the Request seeks individuals' union affiliation. On appeal, the Requester argues that he does not seek the union membership status of any employee, but rather information about employees who are in positions that are represented by union-represented bargaining units. Employment in a union-represented position is not equivalent to union membership, he argues; therefore, the identification of these employees in those positions does not necessarily identify their union membership status.

However, a requester may not modify or expand upon a request on appeal. *See McKelvey v. Off. of the Att’y Gen.*, 172 A.2d 122, 127 (Pa. Commw. Ct. 2016); *Smith Butz, LLC v. Dep’t of Env’tl. Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016). Therefore, the OOR’s review on appeal is confined to the Request as originally written, and any modification or explanation of the Request on appeal will not be considered.

The Request seeks information about “each [City] employee who is employed [sic] the union-represented bargaining unit of AFSCME Council 13.” The City argues that the Request could be seeking information about City employees who are (1) employed *by* or *in* the bargaining unit of AFSCME Council 13 or (2) employed *by the City and affiliated with* the bargaining unit of AFSCME Council 13. The ambiguity of the Request is compounded by the fact that Item 9 seeks the name of the labor union representing employees’ bargaining units, when the Request identifies AFSCME Council 13 as the name of the union.

Regardless, the City interpreted the Request as seeking the union affiliation of employees. Given the omitted word(s) and confusing nature of the Request, the OOR concludes that the City reasonably interpreted the Request as seeking records that would necessarily disclose individuals’ union membership status.

**2. The Request seeks information that would infringe on individuals’ constitutional rights to freedom of association**

The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *See Pa. State Educ. Ass’n v. Commonwealth*, 148 A.3d 142 (Pa. 2016) (“PSEA”). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual’s interest in informational privacy with the public’s interest in disclosure and may release the personal information only when the public benefit outweighs the privacy

interest. *Id.*; see also *Pa. State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

It is well established that an employee's membership in a labor union is protected by the constitutional right to freedom of association; the United States Supreme Court has consistently held that it is a violation of an individual's right of freedom of association under the First Amendment of the U.S. Constitution for states to mandate the disclosure of an individual's association with any organization. See *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185 (2014); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). The Commonwealth Court has held that "the RTKL disclosure requirements are not distinguishable from other disclosure laws deemed violative of employees' rights to freely associate." *Pennsylvanians for Union Reform v. Pa. Office of Admin.*, 129 A.3d 1246, 1259 (Pa. Commw. Ct. 2015).

Here, the Requester argues that none of the RTKL's exemptions apply to the requested information; indeed, Section 708(b)(6)(ii) of the RTKL expressly provides that the names, positions, and lengths of service of public employees are publicly available. 65 P.S. 67.708(b)(6)(ii). Additionally, the Requester notes that he seeks to inform employees in union represented positions of their constitutional rights.

However, informing employees of their constitutional rights cannot not justify violating other constitutional rights. Additionally, whether or not a particular City employee is a member of a labor union is of no consequence to the public. The OOR has repeatedly found that employees' union membership is protected by the constitutional right to privacy. See, e.g., *Horan and Freedom Foundation v. Crawford Cnty.*, OOR Dkt. AP 2021-1079, 2021 PA O.O.R.D. LEXIS

2348; *Horan and Freedom Foundation v. Colonial Sch. Dist.*, OOR Dkt. AP 2022-2522, 2022 PA O.O.R.D. LEXIS 149; *Mandrusiak and Freedom Foundation v. York Cnty.*, OOR Dkt. AP 2021-1708, 2021 PA O.O.R.D. LEXIS 1947, *aff'd.*, 2021-SU-002505 (York CCP June 13, 2022), *appeal pending*, 735 CD 2022 (Pa. Commw. Ct.).<sup>2</sup> The OOR will not disturb its own reasoning as it relates to employees' union membership.

While many of the requested data points are normally public information, it is important to consider the context of the Request; as interpreted, the Request seeks to identify union members. Revealing information about employees represented by AFSCME Council 13 *necessarily* reveals the union membership of those employees. The OOR acknowledges that the disclosure of certain data points such as gender, hire date, position/title, employer or worksite address may not necessarily lead to the identification of an individual in contravention of that individual's freedom of association. However, it is not clear how the City can respond to the Request without potentially infringing upon the constitutional rights of these individuals, as these data points, when combined, are reasonably likely to lead to the identification of individuals. *Cf. Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 215-16 (Pa. Commw. Ct. 2012) (acknowledging that there may be cases where the disclosure of public records which are not facially exempt is highly likely to cause the very harm the exemption is designed to prevent). Further, as noted above, the Request is ambiguous as to the exact information being sought by the Requester.

Thus, in applying the *PSEA* balancing test, the employees' privacy interests in their union membership outweighs the Requester's proffered reasons why the disclosure of such information would benefit the public. *See Pennsylvanians for Union Reform*, 129 A.3d 1246 (Pa. Commw. Ct. 2015) (rejecting an argument that disclosure of public employees' payroll deductions relates to the

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<sup>2</sup> The OOR acknowledges that in these cases, it granted access to some of the information in response to very similar requests. However, the requests in these cases did not omit a word or reference AFSCME, as discussed above.

public interest in the Commonwealth's use of taxpayer resources). Accordingly, the City need not provide any information in response to the Request.<sup>3</sup>

### CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the City 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 Allegheny 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. 65 P.S. § 67.1303. 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>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 5, 2022**

*/s/ Blake Eilers*

Blake Eilers, Esq.  
Appeals Officer

Sent via email: Zach McDonough, Celia Liss, Esq. and Eileen Hotham

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<sup>3</sup> The Requester is not prohibited from seeking this information without relation to individuals' union membership.

<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).