



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**LARRY FIEBER,
Complainant**

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Docket No: AP 2013-1020

v.

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**NEW HOPE-SOLEBURY SCHOOL
DISTRICT,
Respondent**

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INTRODUCTION

Larry Fieber (“Requester”) submitted a request (“Request”) to New Hope-Solebury School District (“District”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”) seeking records related to a settlement agreement and contract referenced in District School Board meeting minutes. The District denied the Request claiming that the requested information was protected by Family Educational and Privacy Rights Act, 20 U.S.C. § 1232 (“FERPA”) and that the disclosure of the requested record would result in the loss of federal or state funds. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied** and the District is not required to take any further action.

FACTUAL BACKGROUND

On May 20, 2013, the Request was filed seeking:

- [1.] Agreement and release approved at May 6, 2013 school board meeting in the amount of \$45,000, plus fees of \$7,500 found on board agenda under Finance, Item 7.
- [2.] Agreement in lieu of [Free Appropriate Public Education (“FAPE”)] ... approved at April 15, 2013 school board meeting found on board agenda under Finance, Item 4.
- [3.] Contract with Rock Brook School found on April 15, 2013 board agenda under Finance, Item 5.

On June 3, 2013, after extending the response period pursuant to 65 P.S. § 67.902, the District denied access to the requested information claiming that it was protected by FERPA and the requested information was exempt under the RTKL because the disclosure of the requested records would result in the loss of federal or state funds. *See* 65 P.S. § 67.708(b)(1)(i). 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 pursuant to 65 P.S. § 67.1101(c).

On June 20, 2013, the District submitted a position statement reiterating its grounds for denial. In support of its position, the District submitted the affidavit of Gregory Hogg, the District Open Records Officer, attesting that “[e]ach of the requested records in an education record that addresses the provision of services to a student.” Mr. Hogg further attests that “[t]he Requester is a former president of the Board of School Directors” and, in a recent letter to the editor in a local newspaper, the Requester “purported to know that a current Board member’s child was the subject of litigation with the District as well as an award of ‘thousands of dollars for special education services for her child.’” The District also submitted a copy of a May 16, 2013 letter to the editor from the *Bucks County Herald* cosigned by the Requester.

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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *appeal granted* 15 A.3d 427 (Pa. 2011).

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 or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The District asserts that the requested record is exempt from disclosure pursuant to FERPA. FERPA protects “personally identifiable information” contained in “education records” from disclosure and financially penalizes school districts “which [have] a policy or practice of permitting the release of education records ... of students without the written consent of their parents.” 20 U.S.C. § 1232g(b)(1). The OOR has held that settlement agreements are education records that are subject to public access under the RTKL so long as the record may be “de-identified” through the redaction of personally identifiable information. *See, e.g., Andren v. West Shore School District*, OOR Dkt. AP 2010-1084, 2010 PA O.O.R.D. LEXIS 90. Regulations implementing FERPA define “personally identifiable information” as:

- (a) The student’s name;
- (b) The name of the student’s parent or other family members;
- (c) The address of the student or student’s family;
- (d) A personal identifier, such as the student’s social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3. While the RTKL does not require an evaluation of the circumstances surrounding a request for records, FERPA does. *See* 34 C.F.R. § 99.3(g).

In the present case, the OOR finds that the identity of a student cannot be withheld through redaction. On appeal, the District submitted the affidavit of Gregory Hogg, the District Open Records Officer, attesting that “[e]ach of the requested records in an education record that addresses the provision of services to a student.” Mr. Hogg further attests that “[t]he Requester is a former president of the Board of School Directors” and, in a recent letter to the editor in a local newspaper, the Requester “purported to know that a current Board member’s child was the subject of litigation with the District as well as an award of ‘thousands of dollars for special education services for her child.’” The District has provided sufficient evidence regarding its inability to sufficiently remove all personally identifiable information, taking into account the circumstances of the Requester’s involvement with the District as FERPA requires. Therefore, even if the student’s name is redacted from the requested settlement agreement, the student’s identity will still be known to the Requester. *See Deegan v. Saucon Valley School District*, 2012-0048, 2012 PA O.O.R.D. LEXIS 350; *Hahn v. Methacton School District*, OOR Dkt. AP 2009-0153, 2009 PA O.O.R.D. LEXIS 285. As such, while settlement agreements are generally subject to public disclosure, *Lord v. Allegheny County*, OOR Dkt. AP 2013-0849, 2013 PA

O.O.R.D. LEXIS 427; *Bowling v. Allegheny County*, OOR Dkt AP. 2013-0583, 2013 PA O.O.R.D. LEXIS 425, redaction of the student's name will not protect the student's identity as required by FERPA. Thus, the OOR finds that the requested record is exempt from disclosure in its entirety under FERPA. Consequently, the District has met its burden of proving that the record is exempt from disclosure under the RTKL. *See* 65 P.S. § 67.708(a)(1).

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 (30) days of the mailing date of this Final Determination, any party may appeal to the Bucks 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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: July 11, 2013



APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Larry Fieber (via e-mail only);
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Gregg Hogg, (via e-mail only)