



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:	
	:	
<b>JIM JURIC,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No: AP 2022-2875</b>
	:	
<b>WEST CHESTER AREA SCHOOL</b>	:	
<b>DISTRICT,</b>	:	
<b>Respondent</b>	:	
	:	
<b>and</b>	:	
	:	
<b>THOMAS STECHER &amp; ASSOCIATES,</b>	:	
<b>INC.,</b>	:	
<b>Direct Interest Participant</b>	:	

### **FACTUAL BACKGROUND**

On November 8, 2022, Jim Juric (“Requester”) submitted a request (“Request”) to the West Chester Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

All records from the Resonance Education SEL Implementation Audit [(“Audit”)] for each school between September 2021 and spring 2022 including the (1) district administrative review survey, (2) building administrator survey, (3) teaching staff survey, (4) climate and culture walk-throughs, and the (5) SEL Implementation Audit. Records include but are not limited to documents, reports, handouts, surveys, survey responses, checklists, written exercises, activity sheets, powerpoint slides, videos, presentations, notes, agenda and syllabi.

On December 15, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the District denied the Request, arguing that the records consist of confidential and proprietary information, 65 P.S. § 67.708(b)(11).

On December 30, 2022, the Requester appealed to the Office of Open Records (“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. 65 P.S. § 67.1101(c). On January 3, 2023, the District notified Thomas Stecher and Associates (“Stecher”), a third party contractor, of the pendency of the appeal. On January 9, 2023, the District notified Resonance Educational Consulting (“Resonance”), a third party subcontractor, of the pendency of the appeal.

On January 12, 2023, the District submitted a position statement reiterating its grounds for denial. In addition, the District argues that, to the extent it is determined that all or some of the records are not fully exempt under Section 708(b)(11) of the RTKL, then certain records are protected by the constitutional right to privacy. The District further argues that some records contain personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), that the records contain exempt employment information, 65 P.S. §§ 67.708(b)(7)(ii) and (vi), that information in the records consists of personal notes and working papers, 65 P.S. § 67.708(b)(12), and that some categories of records do not exist. In support of its position, the District submitted the attestations made subject to the penalty of perjury pursuant to 18 Pa.C.S. § 4904, of Carol DeLuca, the Open Records Officer, Michael Wagman, the District’s Director of Information Technology, Kalia Reynolds, the District’s Assistant Superintendent, the supplemental affidavit of Dr. Krista Leh, owner of Resonance and the affidavit of Thomas Stecher, President of Stecher & Associates, Inc.

On January 12, 2023, the Requester submitted a statement in support of the appeal, disputing the District's argument that records consist of information that is unique and, therefore consists of confidential or proprietary information. The Requester asserts that the program fails to meet the six factors of a "trade secret," as defined in Section 102 of the RTKL, 65 P.S. § 67.102. The Requester includes a copy of the sample of the "Report on the Implementation of Social Emotional Learning" tool he asserts is found for free on the Resonance website. The Requester states that he would agree to extend the Final Determination deadline for the purpose of conducting an *in camera* review of the relevant records, if it is deemed necessary.

On January 24, 2023, with the Requester's agreement to extend the Final Determination deadline, the OOR set a supplemental submission schedule to permit the Requester to address exemptions raised in the District's appeal submission that had not previously been raised and to address the District's claim that the constitutional right to privacy applies to information contained in the records.

On January 27, 2023, the Requester submitted a supplemental statement reiterating the argument that the District has not presented proof to satisfy its claim that the records are exempt under Section 708(b)(11) of the RTKL. The Requester also asserts that, in line with the OOR's Final Determination in *Conroy-Smith v. Haverford Twp. Sch. Dist.*, OOR Dkt. AP 2021-1182, 2021 PA O.O.R.D. LEXIS 1497, the survey records can be de-identified by removing certain demographic information and that, based on the District's position statement, it appears that counsel would be agreeable to such redaction. The Requester further asserts that the District has not demonstrated that the survey statements rise to the level of a written criticism, such that the information would be exempt from disclosure under Section 708(b)(7)(vi).

On February 3, 2023, the District provided a supplemental submission, stating that counsel had reviewed the Requester's supplemental submission dated January 27, 2023, and asserts that the Requester "appears to agree that, should the survey response data not be found exempt from access as confidential and proprietary information, it would be appropriated to de-identify the data, as set forth in [the District's] correspondence of January 12, 2023." The District detailed certain categories of information contained in the requested surveys that it asserts would address the privacy concerns argued in its initial submission, if the information were redacted from the records. The District further asserts that the redactions of the categories of demographic information would also "alleviate" the exemption claimed pursuant to Section 708(b)(7) of the RTKL.

Also, on February 3, 2023, counsel for Thomas Stecher and Associates, Inc., submitted a Request to Participate in the appeal pursuant to 65 P.S. § 67.1101(c). Stecher argues that he is the owner of personal notes that are exempt from disclosure under Section 708(b)(12) of the RTKL, 65 P.S. § 67.708(b)(12). Along with the Request to Participate form, counsel provided a position statement, arguing that in the event it is determined that none of the bases for exemption asserted by the District apply, "the personal notes made by Thomas Stecher's researcher in connection with the Climate and Culture Walk Throughs (requested item #4) ... the notes are nevertheless *still* exempt under 708(b)(12)" and Thomas Stecher's affidavit submitted by the District provides the factual basis for the application of the personal notes exemption. (Emphasis in original). On February 7, 2023, the OOR granted the request to participate.

On February 21, 2023, the Requester clarified that he is not agreeable to receiving de-identified survey response records.

On March 1, 2023, the District and Stecher provided supplemental submissions in response to the OOR's request for clarification. The District confirmed that the copy of the contract between Stecher and the District the Requester attached to the appeal is a full copy of the contract. The District also confirmed that the contract at issue in OOR appeal *Smith v. West Chester Area Sch. Dist., and Thom Stecher and Assoc., Inc.*, OOR Dkt. AP 2022-1555, 2022 PA O.O.R.D. LEXIS 2216, is the same contract that is at issue in the present appeal, but that the relevant responsive materials are different in the two appeals. The District further clarified that the documents at issue in this matter are, the following:

- A power point.
- Eighteen reports (one for each [D]istrict school and one for the [D]istrict as a whole).
- Two building walk through tools.
- A walk through comparison document.
- A [D]istrict administrator survey.
- A teacher survey.
- Raw data from the [D]istrict administrator, building administrator and teacher surveys.
- Personal notes for the walk through.

The District's supplemental submission was supported by a second DeLuca attestation.

Stecher submitted the supplemental affidavit of Thomas Stecher in response to the OOR's request for clarification. Stecher also clarifies the distinctions between *Smith v. West Chester Area Sch. Dist., and Thom Stecher and Assoc., Inc.* and this appeal, asserting that the Requests seek different records. Stecher argues that in *Smith v. West Chester Area Sch. Dist., and Thom Stecher and Assoc., Inc.* the requester sought training, instruction and guidance materials provided to the District and in this matter, the Request sought the SEL Audit itself. Stecher also provided further detail regarding the composition of the SEL Audit records.

## LEGAL ANALYSIS

The District is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the District is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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 District has demonstrated that certain records do not exist within its possession**

The District argues that certain categories of requested records do not exist within the District’s possession. More specifically, the District states that “documents, written exercises, activity sheets, videos, presentations, agenda, or syllabi do not exist.” In support of the District’s position it presents the DeLuca Attestation, which provides the following:

5. Upon receipt of the Request, I examined the records in the District’s possession, custody, and control.

6. I inquired with relevant District personnel to determine whether the District possessed records responsive to the Request....

10. After conducting a good faith search of the District’s records and inquiring with pertinent District personnel and contractors, the following documents were identified:

- a. district administrative survey and survey responses
- b. building administrative survey and survey responses
- c. teaching staff survey and survey responses
- d. climate and culture walk-throughs and a tally sheet, and
- e. SEL Implementation Audit, which included reports, a power point and a hand out.

11. Stecher advised it had notes related to a climate and cultural walk-through. These notes were not in the actual possession of the District.

12. No documents, written exercises, activity sheets, videos, presentations, agenda, or syllabi exist.

Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidentiary support. *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). In the absence of any evidence that District has acted in bad faith or that additional responsive records exist, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

In addition to the DeLuca attestation, the District submitted the Reynolds and Wagman attestations and both state that they were advised of the of the Request. Reynolds Attestation, ¶ 2; Wagman Attestation, ¶ 2. Further, DeLuca was able to describe the records that were identified as a result of the search. The Requester does not argue or present evidence that any responsive “documents, written exercises, activity sheets, videos, presentations, agenda, or syllabi” do in fact exist in the District’s possession, custody or control. Therefore, we determine that the District has demonstrated that it does not possess responsive “documents, written exercises, activity sheets, videos, presentations, agenda, or syllabi. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search has been conducted by an agency when it “contact[ed] the Bureau most likely to possess responsive records, ... explain[ing] why that Bureau is most likely to possess those records”); *see also Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

## **2. The District, Resonance and Stecher have not proven that all responsive records are confidential and proprietary**

The District explains that Resonance is Stecher's subcontractor and is also the entity that conducted the Audit. The District argues that 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). The following terms are defined in Section 102 of the RTKL as follows:

"Confidential proprietary information." 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 [entity] that submitted the information....

65 P.S. § 67.102 (emphasis added). An agency must establish that both elements of the two-part test is met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). 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), *rev'd in part*, *Pa. Dep't of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). "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.*<sup>1</sup>

In support of the District's argument, the DeLuca attestation provides that a search for records resulted in the determination that responsive records were related to a contract the District

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<sup>1</sup> While the Requester's submissions include arguments that the District has not proven that the requested records are trade secrets, a review of the District's final response shows that the denial was based on the grounds that the records are confidential and proprietary information. As such, the issue of whether the records consist of trade secrets will not be addressed. Further, the District's argument only asserts that the records are confidential and proprietary.



had with Stecher and that Stecher advised the District that Resonance was its subcontractor. DeLuca Attestation, ¶¶ 5-9. The DeLuca attestation states that the documents identified as responsive are: a. district administrative survey and survey responses; b. building administrative survey and survey responses; c. teaching staff survey and survey responses; d. climate and culture walk-throughs and a tally sheet; and, e. SEL Implementation Audit, which included reports, a Power Point and a hand out. DeLuca Attestation, ¶ 10. The DeLuca attestation further states that no documents, written exercises, activity sheets, videos, presentations, agenda, or syllabi exist, and that Stecher had notes related to a climate and cultural walk-through, which the District did not possess. DeLuca Attestation, ¶¶ 11-12. The DeLuca attestation also states that Stecher and Resonance advised the District that all documents were confidential and proprietary information and that the cultural and climate walk-throughs, the audit reports, and the audit handout are all marked on the face of the documents as subject to copyright. DeLuca Attestation, ¶¶ 13, 20-21.

In support of the District’s argument that the requested records are confidential and proprietary information, Stecher and Resonance provided the District with affidavits and the District included the affidavits in its appeal submission. The Resonance affiant is Dr. Leh and the affidavit states, the following:

1. I am the owner and founder of Resonance Educational Consulting (“Resonance Education”).
2. In 2018, I founded Resonance Educational Consulting.
3. I have nearly 25 years of experience in education and in supporting educators through professional learning opportunities that develop an awareness of and growth in social emotional learning competencies; engage educators in robust pedagogical dialogue around SEL, diversity, and equity; introduce innovative strategies to embed SEL in your culture through experiential learning; and empower staff to create and sustain social emotional learning communities that promote academic success.

4. Resonance Education's SEL Implementation Audit and all programs and trainings developed by Resonance Education are highly specialized and uniquely tailored to meet the growing need that educators, administrators, and school districts face and enable them to provide Social Emotional Learning in connection with traditional academic learning.
5. Thus, Resonance Education's business model and system for education delivery depend on its proprietary educational methods, course materials, content, physical training, and support tools.
6. Resonance Education has gained a competitive advantage through its unique and proprietary educational programs, methods, and materials.
7. If Resonance Education's confidential and proprietary materials and content are made public, Dr. Krista Leh would be stripped of the competitive advantage needed to operate successfully.
8. Resonance Education does not share its proprietary and confidential educational training content and the materials relating thereto with the public and certainly not any of its competitors in the marketplace.
9. If the substance of the SEL Implementation Audit and instructional materials were to become available to Resonance Education's competitors, it would cause a severe economic disadvantage to Resonance Education and jeopardize its standing in the marketplace that Dr. Krista Leh has worked for decades to achieve.
10. Specifically, if Resonance Education's competitors can obtain copies of or see Resonance Education SEL Implementation Audit, including the (1) district administrative survey, (2) building administrator survey, (3) teaching staff survey, (4) climate and culture walk-throughs, and the (5) SEL Implementation Audit including documents, reports, handouts, surveys, survey responses, checklists, written exercises, activity sheets, slide decks, videos, presentations, notes, agendas and syllabi, they can create their own training programs and educational courses to compete with Resonance Educational Consulting, without having to research effective SEL techniques or spend the time and money Dr. Krista Leh has spent in curating and combining the most successful SEL teaching strategies and methods, which make its courses and programs so effective and well-regarded within the industry.
11. For promotional purposes, Resonance Education has made certain samples of their SEL Implementation Audit available to the public as free downloads to market the product.
12. Unlike these samples that are available to the public, the SEL Implementation Audit, including surveys, district administrative, building administrator, teaching staff, and climate and culture walk-throughs, reports, and instructional content

Resonance Education provided to [the District] are not available publicly, nor are the details as to how that SEL Implementation Audit is presented, facilitated, and applied, or how the instructional content is combined with other content and tools.

13. All of these aspects are trade secrets and confidential proprietary information and uniquely tailored to [the District] (as it would be for each of Resonance Education's clients) and not shared publicly on social media or online.

14. The SEL Implementation Audit, instructional content, and materials Dr. Krista Leh provided to [the District] were tailored to the audience on particular days as requested by District, such that Dr. Krista Leh provided different presentations to administrators and other educational specialists, which was tailored to be different in substance and form from the instructional programs and content provided to classroom teachers.

15. The substance of the instructional programs and the materials Resonance Education provided to [the District] is unique to [the District] and neither publicly available nor available to Resonance Educational Consulting's other clients.

16. Because of the criticality of its programs and these materials, Resonance Education, its employees, and its industry competitors go to great lengths to protect this information.

The Stecher affidavits further clarify the nature of the records and the process utilized by Stecher and Resonance to provide the services under the agreement with the District. The Stecher affidavit states that its "contractor ("the Researcher") visits each of the [District] school buildings and collects raw data, which is in turn supplied to Resonance. Resonance then reviews and analyzes the raw data and compiles the Audit for [the District]." Stecher Affidavit, ¶ 5. In Stecher's supplemental affidavit, the process is further explained, as follows:

17. The purpose of the SEL Audit is to assist [Stecher] in formulating its recommendations to its customers for their selection of SEL training courses. As such, the SEL Audit is not designed to be utilized by [the District] nor are the SEL Audit documents included a part of any training, instruction or guidance materials [Stecher] provided to [the District]....

19. Although it is true that [Stecher] shared portions of the SEL Audit in its report and as a part of its presentation when it made its recommendations to [the District] on what types of SEL training would be most appropriate and beneficial in February 2022, [Stecher] provides these portions of the SEL Audit and report for illustrative

purposes and to give insight to [the District] as to why [Stecher] is recommended the type and nature of SEL training that it recommended....

21. As described at least in part in my initial [a]ffidavit and in the affidavits provided by Dr. Leh and those in support of [the District's] submissions, the SEL Audit is comprised of the collection of raw data through:

- (i.) climate and culture walk-throughs of each of the district schools,
- (ii.) teacher survey
- (iii.) building administrator survey, and
- (iv.) the district administrator survey.

22. The process for conducting the climate and culture walk-throughs was described more fully in my initial affidavit, but consists of [Stecher's] Researcher visiting each of the [the District] school buildings and collecting raw data with regard to each building.

23. [Stecher's] Researcher's collection of raw data is guided by the SEL Implementation Tool ("SEL Tool"), which directs the Researcher generally how to conduct the walk-through, and importantly, provides guidance to the Researcher as to what observations are important to make and how to accurately record and reflect the current climate and culture in each school.

24. In this case, although not required by the SEL Implementation Tool, as a part of her visit to each [District] school, the Researcher made personal notes for herself of her observations and impressions to assist her recollection of the physical and social environment in the school building that day, as well as the provide context for the raw data collected that day ("Personal Notes").

25. Once the Researcher has submitted its raw data collected in the walk-throughs to Resonance, Resonance summarizes the raw data in a spreadsheet format (sometimes referred to as a "Walk-through Data Spreadsheet")....

29. In sum, the Survey Response Spreadsheets clearly identify personal data from the respondents[.]

30. In addition, each Survey Response Spreadsheet for each respondent group reflects the questions asked on the survey of that respective respondent group.

31. As described in the initial affidavit provided by Dr. Leh submitted with [the District's] response in this matter, the survey questions contained in the Survey Response Spreadsheets are not publicly available, are confidential and proprietary in that the questions, and the combination of questions as to each respondent group, have been carefully designed, formulated, curated and selected to provide insight into the emotional climate and culture in each school and the district as a whole.

32. Likewise the SEL Tool used to guide and direct the Researcher in conducting the walk-throughs is not publicly available and is confidential and proprietary in that it is through Dr. Leh's considerable work and experience in the SEL, that Resonance was able to design and develop the SEL Tool to direct[] the Researcher in such a way as to be able to record the observable aspects of the school - and the degree to which those aspects exist or do not exist - in such a way as to accurately reflect and provide insight into the current culture and emotional climate of each building. The development of this SEL Tool, and its constant updating and refinement, has considerable value in that it enables [Stecher] to accurately assess the current culture and emotional climate of each school to recommend SEL training that is best suited to [the District's] needs.

33. Finally, as I have described above, once the walk-throughs are complete and the survey responses collected and consolidated into the Walk-through Data Spreadsheet and the respective Survey Response Spreadsheets, Resonance compiles that raw data into an audit report ("Audit Report") (some of it summarized and some directly lifted from its underlying source and containing specific data), which was provided in connection with the February recommendations to [the District] as to what SEL training is best for the District.

The Requester's submissions state that a sample of the SEL Implementation Audit tool is available to download. However, the Leh attestation acknowledges this fact, but also establishes that the tools and materials provided to the District are not publicly available and that the course materials and content were "tailored to the audience on particular days as requested by [the District] ..." and that the sample tool is not what was presented to the District.

Regarding confidentiality and proprietary information, the Requester argues that the Leh attestation is conclusory and, therefore, Resonance has not proved the required elements of proving that the materials sought are proprietary and confidential under Section 708(b)(11). We agree that, as to some of the responsive records, the evidence presented by the District and Stecher does not demonstrate that the requested records are fully exempt under Section 708(b)(11) of the RTKL. Stecher's position statement provided with its request to participate specifically states that, "the bulk of the requested documents were created and belong to Resonance, not Thomas Stecher." Dr. Leh's attestation is conclusory in that it fails to prove "actual competition in the relevant market

and a likelihood of substantial competitive injury if the information were released.” *Eiseman, supra*. Under the RTKL, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (en banc); *see also Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 6385, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)). Stecher and Resonance each assert that their entity’s materials are kept confidential to prevent access from competitors, but the evidence does not include any details on what measures are taken internally or while dealing with the District to ensure confidentiality and secrecy. *See, e.g., Walker and LPN Media Group, Inc., v. Pa. State Police*, OOR Dkt. AP 2022-0712, 2022 PA O.O.R.D. LEXIS 1402 (finding the evidence conclusory and not sufficient to prove that data used to produce Hate Crime Report is confidential and proprietary or a trade secret); *cf. Davis v. Pa. Dep’t of Health and Planned Parenthood Keystone*, OOR Dkt. AP 2022-2716, 2023 O.O.R.D. LEXIS 1 (finding that Planned Parenthood demonstrated that the abortion telehealth protocols were maintained and guarded in a manner to conclude that they are exempt confidential proprietary information and trade secrets). In addition, a review of the contract between Stecher and the District shows that it

does not contain a confidentiality clause and the Stecher affidavit establishes that the Audit report was shared with the District. Further, the survey questions that are claimed to be confidential and proprietary were clearly distributed to the District’s administration and teachers for the purpose of completing the survey. Once again, there is no evidence that confidentiality requirements were relayed to the respondents related to the completion of the survey.

Additionally, the Requester attached a sample copy of a SEL Audit report, obtained from the Resonance website, and the survey questions or categories are very general. Stecher claims “the survey questions contained in the Survey Response Spreadsheets are not publicly available, are confidential and proprietary in that the questions, and the combination of questions as to each respondent group, have been carefully designed, formulated, curated and selected to provide insight into the emotional climate and culture in each school and the district as a whole”; however, such an assertion does not show how a subset of a larger pool of questions reveals the proprietary methods used to choose such questions and, again, the questions were distributed to the District administration and teachers without confidentiality restrictions. As stated in *Eiseman*, “[c]ompetitive harm analysis ‘is limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position.’ The word “substantial” appears in the statute to characterize the degree of injury needed to apply this exception.” 85 A.3d at 1128 (citing *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1195 (9th Cir. 2011) (citation omitted)). The evidence simply does not detail the claimed “substantial” competitive harm.

However, regarding the SEL Implementation Tool, Stecher explains it is utilized by its Researcher to conduct the climate and culture walk-throughs and obtain the observational data later provided to Resonance for analysis, in the form of a walk-through data spreadsheet. Based

on a review of the evidence, the Stecher affidavit establishes that the Tool was designed and developed by Resonance to direct and guide the Researcher to “record the observable aspects of the school – and the degree to which those aspects exist or do not exist – in such a way as to accurately reflect and provide insight into the current culture and emotional climate of each building.” Unlike the other responsive records in the District’s possession, such information is not publicly shared in this format; rather the affidavit demonstrates that the Researcher’s raw data is compiled by Resonance into the “walk through spreadsheet,” which is later analyzed to develop the Audit Report. Accordingly, we determine that the SEL Implementation Tool portion of the SEL Audit records is confidential and proprietary, under Section 708(b)(11). However, with respect to the “walk through spreadsheet” and the “survey spreadsheet,” the evidence presented does not demonstrate how a compilation of raw data, as compared a tool that guides and directs and individual on how to collect the data, is confidential or proprietary, especially in light of the fact that information from the spreadsheets may be included in the Audit Report.

In sum, except for the SEL Implementation Tool, the District, Resonance and Stecher have not proven that the records identified as responsive to the Request are exempt under Section 708(b)(11) of the RTKL.

**3. The District has proven that some information in the survey records is protected by the constitutional right to privacy**

The District also argues that, to the extent it is determined that Section 708(b)(11) does not apply to the responsive records, certain demographic information must be redacted from the survey responses to protect the identity of the respondents and their constitutional right to privacy in their individual personal opinions. The District argues that to answer a particular question, the respondent must identify the school building in which they work most frequently and, depending on the category of respondent – administrator or teacher – the answer to that question would narrow



the pool of individuals to such an extent, the identity of the individual respondent would be revealed. The District further asserts that in some instances, a single individual meets the survey criteria. The District argues that the Requester has not articulated a sufficient public interest in knowing the survey respondents' identities and opinions that would outweigh their individual right to privacy and, further, redaction would provide access to the survey responses, without jeopardizing individual privacy, thereby balancing both parties' interests.

The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 158-59 (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 *Pennsylvania 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).

The District submits the Reynolds attestation in support of its privacy argument. The Reynolds attestation sets forth facts the District asserts supports the position that certain demographic information found in the survey responses such as, building location, school level, grade level and content area taught would narrow down the pool of individuals to permit the personal identification of the respondent. Reynolds Attestation, ¶¶ 7-20, 23-25. The Reynolds attestation further states that the "survey responses contain a unique respondent identification number assigned to each individual respondent." The District included a copy of a graph showing the locations, position titles and number of teachers that hold the position for each District school

building during 2021-2022, school year, to illustrate that, in some cases, a single individual falls within a category. District Submission, Exh. K.

The Stecher attestation also provides support for the District's privacy argument:

26. The surveys are distributed electronically to the teachers, building administrators and district administrator, and the responses from each group are compiled into a spreadsheet for that group (each, a "Survey Response Spreadsheet"). Importantly, these three spreadsheets do not contain summarized data, they simply compile the survey responses and reflect the identifying information for the respondent captured in the survey response itself. For example, the spreadsheet containing teacher's survey responses includes the school where the teacher teaches, the grade level and subject area. Therefore, utilizing publicly available information, it is relatively easy to link each specific survey response to the identity of the teacher.

27. It is even easier to identify the individuals in the building and district administrator Survey Response Spreadsheets and link their responses to the survey questions because the numbers of respondents is fewer.

28. In the surveys, [District] employees are asked to reveal their private and personal opinions and beliefs about [the District]and its SEL training, support and environment, including criticisms. Not only is the preservation of the respondent's confidentiality important from a legal perspective as described in [the District's] submissions, but - contrary to Respondent's argument that we "need not be concerned about a constitutional right to privacy for the individuals involved." In addition, protecting the respondent's confidentiality [it] also is imperative for TSA, Resonance and [the District] in order to be able to obtain candid responses to these interviews as a part of the SEL Audit process.

In the Requester's supplemental submission, he notes that the District's alternative argument is that survey responses can be de-identified and notes that the District cites *Conroy-Smith v. Haverford Twp. Sch. Dist.* OOR AP Dkt. 2021-1182, 2021 PA O.O.R.D. LEXIS 1497.

Regarding this argument, the Requester states, the following:

Counsel ... says "the survey responses cannot be released without the redaction of certain demographic information in order to protect the identity of the respondents and their constitutional right to privacy." Thus, counsel has offered to de-identify the dat[a] and redact the demographic info and release it...

The District replied to the Requester's supplemental submission, stating the following:

The Requester appears to agree that, should the survey response data not be found exempt from access as confidential and proprietary information, it would be appropriate to de-identify the data, as set forth in my correspondence of January 12, 2023. Specifically, in regard to the building administrator survey, the two categories of information that reveal the administrator respondents' building, and in regard to the building teacher survey, the four categories of information which reveal the teacher respondents' school building, school level, grade level and content area taught, would be redacted. In the event the District is directed to release the survey response data, such redaction address the privacy concern raised in the District's response. The District further notes the Requester has not articulated a reason to know the identity of the respondents.

Nevertheless, the Requester subsequently clarified that he is not agreeable to receiving redacted survey records. While the District cites *Conroy-Smith* to argue that the survey records should be redacted, the instant matter is distinct from the survey at issue in that matter, as the survey in *Conroy-Smith* survey was not completed by public District employees. In addition, the Requester in *Conroy-Smith*, expressly sought de-identify records. 2021 PA O.O.R.D. LEXIS 1497, \*1.

The District argues that four pieces on information on the survey records must be redacted to protect the respondents' right to privacy in their respective survey responses: 1) school building most frequently worked in; 2) school level worked in; 3) grade level worked in; and 4) content area taught. In *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, the Court applied the analysis set forth in *Pennsylvania State Education Association v. Commonwealth of Pennsylvania, Department of Community and Economic Development*, 637 Pa. 337, 148 A.3d 142 (Pa. 2016) (PSEA III), to determine that a tax assessment list was not sufficiently "personal" to trigger the balancing test. 172 A.3d 1173 (Pa. Commw. Ct. 2014). Specifically, the Court stated:

When the type of information is not categorically protected, privacy analysis consists of two steps. The first step is assessing whether the information at issue is sufficiently personal in nature to trigger protection as a privacy interest. The second step is weighing an individual's privacy interest in nondisclosure against an interest in disclosing the personal information.... [B]efore reaching the balancing test, we must first discern a cognizable privacy interest in the information at issue....

... [A]ppellate decisions teach us that certain factors are constant when evaluating a privacy interest in information. One is an individual's reasonable expectation that the information is of a personal nature.... When information is public as a matter of statute, it is unreasonable for a person to expect that it is of a personal nature.... Another factor is how the agency obtained the information; when an individual voluntarily submits information, it may be disclosed...; whereas, information obtained by an agency premised on statutory confidentiality is protected.... Also, the context holds additional significance, as does whether the information is an essential component of a public record....

172 A.3d at 1182-84 (citations omitted). The District explains the privacy interest, as follows:

In the surveys, [D]istrict employees are asked to provide their private and personal opinions and information and, in some cases, criticism of the [D]istrict's social emotional learning programs and school leaders. These individuals have a right to privacy in their individual opinions and information, which does not outweigh the public's interest in disclosure, particularly when, as here, demographic information can be redacted to permit the Requester to view the disaggregated data without identifying the individual respondents.<sup>1</sup>

As a general rule, our courts have found that there is generally no privacy interest in a public employee's name and here, none of the information implicated is personal demographic information such as a personal address. *Pa. State Univ. v. State Emples. Ret. Bd.*, 935 A.2d 530, 534 (Pa. 2007) (holding that there is no privacy interest in a public employee's name, service history and salary, but public employees do enjoy right to privacy as to their address, telephone numbers and social security numbers). A factor that bears upon the expectation of privacy in this matter is that the surveys were completed as part of the individuals' employment with the District, and there has been no evidence presented to demonstrate that the respondents were informed that survey responses would be kept confidential. However, a factor that may lead to the employees' expectation of privacy is that the evidence does demonstrate efforts were made to ensure the anonymity of the respondents, in that each respondent was assigned an individual identification number, as compared to providing a name on the survey. Such actions may have suggested to the respondents that their identities would not be linked to the responses.

Furthermore, based on a review of the personnel chart submitted by the District, coupled with evidence presented, it is reasonable to understand how an individual could combine the four elements the District seeks to redact to ascertain the identity of the respondent and vitiate the purpose of the individual identification number. For example, the chart shows that there is one instrumental music teacher at Glen Acres Elementary School. If the records contain the building (Glen Acres), school level (elementary), grade level (K-5), and content area taught (instrumental music), and there is only one music teacher at the school, a person could easily go to the school website to determine who the individual respondent is and how they answered the survey questions. The Requester has not asserted a public interest in fully unredacted records; rather, even though the Requester backed away from the suggested course of action, in the January 27, 2023, position statement, he suggested that if the demographic information were to be redacted from the survey responses, then the District would no longer have to be concerned with the individuals' privacy rights. Nevertheless, the Requester did not proffer a public interest in knowing what individual District employees provided each survey response and the OOR cannot discern such an interest. Even if we were to infer the public interest as being the manner in which the District is spending taxpayer money or how the District is developing programs or curriculum, on balance, redacted survey responses provides the information to the public to satisfy these concerns. "There has been no demonstration that there is no less intrusive alternative means to accomplish this purported public benefit." *Pa. Liquor Ctrl. Bd. v. Beh*, 215 A.3d 1046, 1057 (citations omitted) (concluding "the disclosure of the city, state, and zip code of the applicants' and/or licensees' residential addresses, and the years of residency, are the least intrusive means of vindicating the asserted public interest in ensuring an applicant's and/or licensee's fitness for a license under the relevant provisions of the Liquor Code" when balanced against revealing

personal identifiable street address). Accordingly, we conclude that, on balance, the redaction of the “school building [respondent] most frequently work[s] in” and “the content area taught” will sufficiently protect the identity of individuals that likely had not expected to be identified in regards to the survey, while at the same time, providing the requested information related to the SEL Audit.

**4. The District has not proven that the records contain exempt employment information under 708(b)(7)**

The District argues that certain information should be redacted as it consists of performance reviews and written criticisms that are exempt from disclosure under Sections 708(b)(7)(ii) and (vi), 65 P.S. §§ 67.708(b)(7)(ii); (vi). Under Section 708(b)(7), the following records “relating to an agency employee[,]” are exempt from disclosure “[a] performance rating or review” and “[w]ritten criticisms of an employee. 65 P.S. §§ 67.708(b)(7)(ii); (vi). In support of the District’s argument, the Reynolds attestation states that, “[i]n the surveys, District employees are asked to provide their private and personal opinions and information and, in some cases criticism of the District’s social emotional learning programs and school leaders.” Reynolds Attestation, ¶5. The Reynolds attestation further provides, “[s]ome questions in the teacher survey ask respondents to evaluate their building leader on certain activities” and “[s]ome response options include negative or critical responses[,]” which, when coupled with the identification of the school building in which the teacher and administrator work, would “identify the building administrator and provide a performance rating and written criticism of a [D]istrict employee.” Reynolds Attestation, ¶¶ 21-24.

The District’s evidence falls short of establishing that survey responses on a topic that is applicable to the entire school District’s administrators and teachers amounts to a performance review of an administrator mentioned in a survey response and it does not establish that the

responses provided in the context of an SEL Audit for the entire District are written criticisms. Nevertheless, as suggested by the District, because we have concluded that certain survey response information may be redacted to protect individual identities, the response information cannot be linked to the individuals that may be the subject of negative responses.

#### **6. IP addresses are not records of the agency**

The District explains that, because some employees completed surveys using personal, non-District computers, the records collected individual personal IP addresses. The District asserts that the constitutional right to privacy applies to prevent the release of personal IP addresses because the information could be used to identify individuals and their home addresses. However, we must first determine whether, in this context, an IP address is a record of the District. Section 102 of the RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency”; and, if so, 2) was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency.” *Id.* “Documents” means “proves, supports [or] evidences.” *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011) (*en banc*).

The District submitted the Wagman attestation in support of its argument that personal IP addresses should be redacted from the records. The Wagman attestation explains that the responsive survey responses “collected the respondents’ IP addresses” and, in some cases, “respondents completed the surveys outside of the District’s IP address.” 3 Wagman Attestation,

¶¶4, 7. The Wagman attestation provides that, while the survey responses are potentially responsive to the Request, “[r]espondents were not asked to provide an IP address in the survey.” Wagman Attestation, ¶¶ 3, 5.

The Request expressly seeks the surveys and survey responses related to District’s SEL Audit; however, nothing in the Request language implicates records of the method by which respondents submitted the survey response. Therefore, the IP addresses are arguably non-responsive. Nevertheless, in addition to the issue of responsiveness, when applying the two-part test to determine whether a document or information is the record of an agency, a *personal* IP address is not a “material” that “documents “transaction or activity of [a school district]” and no evidence has been presented to demonstrated that it is a record of the District. *Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d at 1034-35; *see also Jones v. Pa. Dep’t of Cmty. and Econ. Dev.*, OOR Dkt. AP 2022-0080, 2022 PA O.O.R.D. LEXIS 1493 (holding that a portion of an email discussing personal and family matters was not a record of the agency). Accordingly, the District is not required to disclose personal IP addresses that were gathered in the course of receiving the survey responses.

**7. The District has not proven that the respondent identification numbers are exempt from disclosure under Section 708(b)(6)(i)(A)**

The District explains that the survey responses contain “unique respondent identification number[s] which were assigned to each individual respondents.” The District argues that the identification numbers are exempt from disclosure pursuant to Section 708(b)(6)(i)(A) and, therefore, must be redacted. The Reynolds attestation states, “[t]he survey responses contain a unique identification number assigned to each individual respondent.” Reynolds Attestation, ¶26.

Section 708(b)(6) of the RTKL exempts from disclosure certain “personal identification information,” such as “a person's Social Security number; driver’s license number; personal



financial information; home, cellular or personal telephone numbers; personal e-mail addresses; employee number or other confidential personal identification number[,]” 65 P.S. § 67.708(b)(6)(i)(A). The only evidence submitted by the District in support of this claim is the single sentence in the Reynolds attestation and such evidence does not demonstrate how the identification number would lead to the release of an individual names. As set forth above, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Scolforo*, 65 A.3d at 1103. Furthermore, as we have already determined that redactions to the survey records will serve to de-identify them, releasing the “unique identification number” does not reveal any additional information other than what we have determined is public under the RTKL.

**8. The District may redact the Researcher’s personal notes under Section 708(b)(12)**

The District and Stecher argue that the Researcher made personal notes while conducting the culture and climate walk through and that the notes may be redacted as personal notes. The District explains that the personal notes are not in its possession, but Stecher addresses the argument in the affidavits submitted as a direct interested party.

Section 708(b)(12) exempts from disclosure “[n]otes and working papers prepared by or for a public official of agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.” 65 P.S. 67.708(b)(12). The records must be for the specific employee’s own personal use and not distributed outside of their office, *City of Phila. v. Phila. Inquirer*, 52 A.3d 456, 461 (Pa. Commw. Ct. 2012); *Glunk v. Pa. Dep’t of State*, 102 A.3d 605 (Pa. Commw. Ct. 2014); *Pa. Dep’t of Labor & Indus. v. Tabor*, 2016 Pa. Commw. Unpub. LEXIS 251 (Pa. Commw. Ct. 2016). The Commonwealth Court has held that:

“Personal” within this definition does not mean that it has to involve a public official’s personal affairs--a message slip that his wife called--because those types of documents are not covered by the RTKL; it covers those documents necessary for that official that are “personal” to that official in carrying out his public responsibilities.

*Smith ex rel. Smith Butz, LLC v. Pa. Dep’t of Env’tl. Prot.*, 161 A.3d 1049, 1066-67 (Pa. Commw.

Ct. 2017). In support of Stecher’s argument, first Stecher affidavit states, as follows:

6. As part of the Researcher’s visit to each [District] school, the Researcher made personal notes of observations and impressions to assist in recollection of the physical and social environment of the school building that day (“Personal Notes”).

8. The Personal Notes were made by the Researcher for the Researcher’s exclusive use and deliberative process, and not for the use of ... Stecher, Resonance, or [the District], in any respect.

9. Neither ... Stecher nor Resonance requested that the Researcher create the Personal Notes.

10. The Researcher was not asked to and did not provide the Personal Notes to ... Stecher or Resonance in connection with the Audit or any other work Thom Stecher performed for [District].

11. The Personal Notes were not utilized by Resonance in connection with the Audit, or by .... Stecher in connection with any work it performed for [District].

12. The Personal Notes were never relayed to or otherwise provided to [the District].

The Stecher affidavit demonstrates that, while the notes made by the Researcher were made during the climate and culture walk through portion of the District’s SEL assessment, the information was not utilized by Resonance for the business purposes underlying the reasons the District retained Stecher and, in turn, Resonance. Accordingly, the District may redact the Researcher’s personal notes under Section 708(b)(12) of the RTKL.

**9. The District has proven that certain documents are only available by inspection under the Copyright Act**

The District argues that, to the extent certain records are determined not to be confidential or proprietary, some are protected by copyright and, under the Copyright Act, 17 U.S.C. §§ 106, 501, the records may only be accessed by inspection. The District relies on *Ali v. Philadelphia City Plan. Comm'n*, 125 A.3d 92, 99–100 (Pa. Commw. Ct. 2015). In *Ali v. Philadelphia City Planning Commission*, the Commonwealth Court held that the Copyright Act does not “exempt [] materials from disclosure under the RTKL”; instead, it “limits the level of access to a public record only with respect to duplication, not inspection.” 125 A.3d at 101-05. In *Ali*, the Commonwealth Court further explained:

Because we lack jurisdiction under federal law to resolve the question of whether a local agency’s disclosure of copyrighted material pursuant to the RTKL without the owner’s consent constitutes infringement under the Copyright Act, where a local agency has refused to duplicate a public record in response to a RTKL request by invoking the Copyright Act, our review must be confined to determining whether the local agency has met its burden of proving facts sufficient to show that forced duplication of copyrighted material under the RTKL implicates rights and potential liabilities arising under the Copyright Act that can only be resolved by the federal courts.

... we hold that where a local agency invokes the Copyright Act as a basis to limit access to a public record to inspection only, the absence of consent by the copyright owner to duplication in response to a RTKL request should be presumed.

125 A.3d at 104-05.

The District submitted the DeLuca attestation in support of its argument and the attestation provides, “[t]he cultural and climate walk throughs, the audit reports, and the audit handout are all marked on the face of the documents as subject to copyright.” DeLuca Attestation, ¶ 21. The Requester attached a copy of the sample “Report on the Implementation of Social Emotional Learning” obtained from the Resonance website. A review of the document shows that in the footer of each page there is a 2022 copyright mark for Resonance Educational Consulting. The Requester has not presented any evidence to dispute that the report portion of the SEL Audit is

protected by copyright. In the absence of any competent evidence that the District acted in bad faith, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Therefore, the SEL Audit Report may only be accessed by inspection. In addition, the Requester has not provided evidence to dispute that the cultural walk through records, the audit report and the audit handout are marked with a copyright; however, as set forth above, it has been determined that the SEL Tool is exempt from disclosure under Section 708(b)(11). In addition, the Resonance website indicates a 2023 copyright on each explanatory and resource page.<sup>2</sup> Accordingly, while the Request indicated that the Requester sought electronic copies, the audit report and audit handouts may only be accessed by way of inspection.

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the District is required to provide all responsive survey records in electronic format and redacted as directed in this Final Determination. In addition, the District shall make arrangements for the inspection of copyrighted materials. The District’s actions must occur 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 Chester 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

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<sup>2</sup> See e.g., <https://www.resonanceed.com/resonance-educational-consulting-landing-page-2021-12022>; <https://www.resonanceed.com/sel-services>; <https://www.resonanceed.com/sel-implementation-framework> (last accessed March 13, 2023).

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: March 17, 2023**

*/s/ Kelly C. Isenberg*

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SENIOR APPEALS OFFICER  
KELLY C. ISENBERG, ESQ.

Sent via email to: Jim Juric; Amanda Sundquist, Esq.; Carol DeLuca; Monica Reynolds, Esq.

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