

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY CIVIL DIVISION

DARREN LAUSTSEN,

Petitioner

v.

PENNRIDGE SCHOOL DISTRICT,

Respondent

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:
:
:

No. 2023-01022

ORDER

AND NOW, this _____ day of _____ 2023, it is ORDERED that Pennridge School District has met its burden to show that this appeal is moot and that no further records responsive to Petitioner’s Request exist, and the OOR’s Final Determination is AFFIRMED.

BY THE COURT:

J.

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY CIVIL DIVISION

DARREN LAUSTSEN, :
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 Petitioner :
 :
 v. : No. 2023-01022
 :
 PENNRIDGE SCHOOL DISTRICT, :
 :
 Respondent

RESPONDENT’S BRIEF IN OPPOSITION

Respondent, Pennridge School District (“Respondent” or the “District”), files this Brief pursuant to Bucks County Rule of Civil Procedure 208.3(b)(2)(iii) in opposition to Petitioner’s Praecipe and accompanying Brief submitted by Petitioner, Darren Laustsen.

I. HISTORY OF THE CASE

On October 19, 2022, Petitioner submitted a request (“Request”) to the District pursuant to the Right-to-Know-Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* seeking the following:

Seeking a report that should be available from the [D]istrict’s electronic library system (Follet Destiny). *See* attached pages for screenshots. Specifically requesting a ‘Library-> titles’ report exported to either Excel or XML. The report should include all titles checked out by those patrons that are NOT [s]tudents. No personal information specifically identifying an individual patron is required. The report can be limited to Pennridge High School.

The District inadvertently failed to respond within five business days and the Request was therefore deemed denied. The District provided responsive records during this Appeal, but Petitioner was not satisfied with the District’s response despite the District’s repeated attempts to work with Petitioner to further understand what Petitioner was seeking and attempted to work cooperatively with Petitioner to resolve his request.

The OOR issued a Final Determination holding that the District met its burden of proof by showing that no further responsive records exist and that the appeal was moot because the records provided by the District during the appeal process. Following the OOR Decision, Petitioner filed a verified Petition for Review with this Court. This Court issued a Rule to Show Cause, instructing the District to file an Answer. The District filed a Verified Answer with New Matter. Mr. Laustsen filed an Answer to the New Matter. On or about April 6, 2023, the OOR filed the certified record in this matter which contains the District's submissions and evidence.

Petitioner filed a Praecipe for Disposition and accompanying Brief with this Court to bring this matter to resolution. The District now files this Brief in Opposition.

II. QUESTIONS INVOLVED

1. Whether Petitioner's appeal is moot because the responsive records have already been provided by the District?

ANSWER: Yes.

2. Whether the District has met its burden to show that no other records exist that are responsive to the Request?

ANSWER: Yes.

3. Whether Petitioner improperly modified his Request during the appeal process?

ANSWER: Yes.

4. Whether the Request is sufficiently specific for purposes of the RTKL?

ANSWER: No.

5. Whether Petitioner may recover attorney fees and costs of litigation?

ANSWER: No.

III. ARGUMENT

A. THIS MATTER IS MOOT

In its January 27, 2023 Final Determination, the OOR determined that Petitioner's Request is moot because the District provided all responsive records in its possession. *See* Petition, Ex. A, at 5. The OOR correctly determined the matter is moot because the District provided Petitioner with the responsive reports it was capable of generating. As such, the OOR's decision should be affirmed.

The District provided Petitioner with two types of reports that it has the capability of generating related to non-student account check-in and check-out activity. Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission. By way of background, the District utilizes an electronic library system called Follet Destiny ("Destiny"). The Destiny system has the capability of generating certain kinds of reports. While Petitioner attached screenshots purporting to demonstrate Destiny's "report building" search functions, the District's Destiny "report building" functions do not align directly with the samples provided by Petitioner. Certified Record, Ex. 8, Position Statement, at 2; Bolton Affidavit at ¶ 8; Respondent Answer, at ¶ 53. Indeed, as attested to by Dr. Bolton, the District contacted a Destiny technician through its help line to determine how it could run the requested reports and what kind of reports the District could create from its system to respond to the request. Certified Record, Ex. 8, Bolton Affidavit, at ¶8. In any event, through repeated attempts to work with Petitioner and provide responsive records, the District was able to generate reports consistent with the Request and Petitioner's subsequent modifications of his Request during the Appeal process, and it provided the reports to Petitioner.

More specifically, the Request sought a report of (1) titles (2) checked-out (3) by patrons who are not students (4) at Pennridge High School. Petitioner failed to provide a time frame for

the check-out report, so the District sought clarification regarding the time frame as part of its efforts to resolve this Appeal.

As it relates to non-student account check-outs, the District's Destiny system can generate two types of reports: (1) a current status report ("Status Report"); and (2) a report detailing the transactions during a specified time period ("Transactions Report").

(1) A Status Report can be run as the current date only and creates a report of book titles that are presently – on that date – checked out of the system of the system by non-student patron accounts. A Status Report cannot be run for prior specific dates nor can it be run for a prior specified time period; rather, a Status Report can only be run for a single day and the current date.

(2) A Transactions Report can be run for a specified time period and captures check-out and check-in activity during that specified time period. Meaning, the Transactions Report shows activity occurring within that specified time period and would not capture activity outside that specified time period. For example, if a book is checked-out prior to the report run date, the check-out would not show on the report but if it was checked back in during the report run date, then the check-in would show up on the report.

See Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission (Bolton Affidavit, at ¶ 11) and January 13, 2023 Supplemental Submission.

As part of the OOR Appeal process, the District provided Petitioner with two separate Status Reports – 1) a Status Report generated on October 28, 2022, and 2) a Status Report generated on November 17, 2022. The Status Reports contained the following data columns: Call Number, Barcode, and Title/Description. The District also provided Petitioner with a Transactions Report for the time period from September 28, 2022 through October 31, 2022 based on discussions with Petitioner's legal counsel. The Transactions Report contained the following data columns: TransType (checked out/in), Date; Title, Barcode, and ISBN. All reports were provided in EXCEL format as requested by Petitioner.

Critically, the District's Follett Destiny report builder system does not have the ability to generate a report that will yield only a list of book titles checked out by non-students (**as individuals**). *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶¶ 2-4).

Rather, the reports the District is capable of generating show the activity of student and non-student accounts, *i.e.*, the patron status assigned to the account. *Id.* As repeatedly explained by the District, non-students utilize student account designations/patron statuses to check-in/check-out books for various reasons in the District's system (this practice pre-existed the request here). *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission (Bolton Affidavit, at ¶ 22) and January 13, 2023 Supplemental Submission. In other words, books may be checked-out by non-students (as individuals) but such books will not show up under the non-student reports (both Status and Transactions) because such books are checked out by non-students under student accounts. *Id.* Thus, that non-student activity would only show up on a report reflecting student account activity. Further, the reports do not show, and are not capable of showing, only those books that are specifically checked out by non-students (as individuals). *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶ 6).

Simply, Petitioner does not like the way in which the District used its system and is demanding that the District hand create a report which the system is not capable of creating in order to answer a specific question he has concerning the District's review of books in its libraries. It is well-settled that the District is not required to create a record that does not exist, nor is it required 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. As explained

more fully below, this is precisely what Petitioner seeks to do in this Appeal. He is attempting to force the District to maintain, compile, format, and organize its records in a manner that he prefers, but which is not presently the District's practice.

Petitioner focuses heavily on his unsupported speculation concerning the reports being incomplete through reference to his comparing the non-student account reports with the publicly accessible online card catalog database. Petitioner contends that he identified books that were "checked out" on the online card catalog but did not appear on the non-student account reports.

While Petitioner did not provide the District with any specific instances to investigate during the District's repeated attempts to resolve this matter during the OOR appeal process, the obvious explanation that the District could, and did, provide is that the books were checked out under student accounts such that they would not appear on the non-student account reports. *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission (Bolton Affidavit, at ¶ 22) and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶ 4). Indeed, the reports provided to Petitioner only concerned non-student account activity – as he specifically requested. In short, the non-student account reports provide only a subset of information. However, the publicly available online District eLibrary to which Petitioner refers does not provide a subset or distinction between books checked out by student accounts and books checked out by non-student accounts. *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶¶ 7-11). As such, the response to Petitioner's speculation regarding the undefined books is that those books marked as checked out on the online card catalog, but which are not present on the check-out report for non-student accounts, are checked out under student accounts.

Simply, no other responsive reports exist or can be generated other than the reports already provided to Petitioner. *See* Certified Record, Exs. 8 & 13, District’s November 30, 2022 Submission and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶ 12). The OOR properly determined that “based on a review of the report and the Bolton Attestation, the District has demonstrated that it produced records that are responsive to the Request.” Pet. Ex. A, OOR Final Determination, at 5. Accordingly, the District requests that the OOR’s Final Determination that this matter is moot be affirmed.

B. THE DISTRICT PROVED THAT NO ADDITIONAL RECORDS RESPONSIVE TO THE REQUEST EXIST.

The Pennsylvania Commonwealth Court has held that an agency cannot be made to create a record that does not exist. *See Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In its Final Determination, the OOR concluded that the District met its burden of proof to show that no additional records responsive to the Request exist. Pet. Ex. A, OOR Final Determination, at 11. The OOR correctly determined that no other records responsive to the Request exist, and the District has no obligation to create a new record or to format or modify a record to satisfy Petitioner’s Request.

Under the RTKL, an attestation or statement made under the 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). In the absence of any evidence that the District has acted in bad faith or that additional responsive records exist, “the averments in [the supplemental attestation] should be accepted as true.” *See McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 1095, 1103 (Pa. Commw. Ct. 2012).

To support its position that no further responsive records exist, the District submitted affidavits from District Superintendent, Dr. David Bolton. *See* Certified Record, Exs. 8 & 13,

District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission. Dr. Bolton's affidavits, as recognized by the OOR, clearly demonstrate that the reports the District can create do not show and are not capable of showing only those books that are specifically checked out by non-students (as individuals). *Id.* Moreover, the District does not maintain a list of titles checked out by those patrons that are not students. *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶¶ 6, 14). Rather, the District only has the capability to run reports that show those books that are checked out by non-student accounts. *Id.* at Bolton Supplemental Affidavit, at ¶ 3. And, the District did run those reports and provided those reports to Petitioner.

The District provided Petitioner with a November 17, 2022 Status Report containing all of the book titles that the system generated as being checked out on that date by non-student accounts. *Id.* at Bolton Supplemental Affidavit, at ¶¶ 5-6. The District also provided a Transactions Report to Petitioner showing all book titles that the system generated as being checked out/in by date by non-student patron accounts. *Id.* Ultimately, these reports provided by the District to Petitioner are the most responsive record the District can provide. Otherwise, the District does not maintain a list of titles checked out by those patrons that are not students (as individuals), and the District has no burden to create a new record that did not previously exist to respond to Petitioner's Request.

In its Final Determination, the OOR properly compared this matter to *Gingrich v. Pa. Game Comm'n.* *See* No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, (Pa. Commw. Ct. 2012). In *Gingrich*, a petitioner sought information relating to Pennsylvania's annual deer harvest, habitat programs, and related financial information. Regarding the request seeking "Deer Totals," the court determined that, while the request sought information from the Game Commission's Deer

Harvest database, the Commission demonstrated that it does not retain deer harvest data separating antlerless and “button bucks” in its database. Because the Court determined that the particular records did not exist, pursuant to 65 PS. § 67.705, the Game Commission was not required to create a record in order to respond to the RTKL request. *See also Dept. of Environmental Protections v. Cole*, 52 A.3d 541 (Pa. Cmwlth. 2012) (“Specifically, we held [in *Gingrich*] that an agency can be required to draw information from a database, **although the information must be drawn in formats available to the agency.**”) (emphasis added).

Here, the District did draw information from a database, and it did so in the format available to the District. Similar to *Gingrich*, the District’s database does not maintain data separating students and non-students (as individuals), and, rather, only separates that data by patron account designation. Petitioner was provided with the reports by reference to patron account designation such that it has provided Petitioner with the information it is able to extract from its database and in the format available to the District. Petitioner, however, is seeking a modification of the format of the existing information and the manual creation of a report in a manner that has never existed and is not capable of being generated within the Destiny system. Like *Gingrich*, this Court should find that the District has acted in good faith in trying to accommodate the Request, but the District should not have to create a new record following Dr. Bolton’s affidavit that no further responsive records exist.

On similar grounds, and more recently, the OOR found that an agency did “not maintain race and ethnicity data in the format requested....” *Lee, et al v. Pa. Dep’t of Human Services*, OOR Dkt. AP 2022-2807, at 10, 2023 WL 3073419 (OOR April 20, 2023). Because the specific request would require “the manual manipulation of data to try to accommodate categories different from those the system currently captures,” the OOR recognized that the data was not maintained by the

agency in the manner requested. *See also Baublitz v. York Cnty.*, OOR Dkt. AP 2022-2396, 2022 PA O.O.R.D. LEXIS 2822 (determining that the County was not required to create or compile a list of numbers to create a document responsive to the request). Again, this is precisely what Petitioner seeks here. Petitioner seeks to require the District to manually manipulate the reports/data to try to accommodate categories different from those the system currently captures. Specifically, Petitioner seeks a manual manipulation of data through the District's reference to additional data sets existing outside the report builder system to accommodate the category of non-student (as individuals) when the systems only currently capture the category of non-student accounts (by non-student account designation). Pursuant to *Lee* and *Gingrich*, such an action constitutes the creation of a record and the District is not required to do so.

And, in *Volk v. City of Philadelphia Law Dep't*, the OOR made clear that an agency "is not obligated to create a record to compile the information in its possession **to fit the specifications of the Request, even if the information sought may collectively exist within its possession.**" OOR Dkt. No. AP 2023-0766, at 6, 2023 WL 4051774 (OOR June 13, 2023) (emphasis added). Indeed, like Petitioner here, the OOR rejected the notion that simply because "Requester contends that the responsive information must be within the Department's possession, this assertion does not prove that the records exist **without the need for creating them.**" *Id.* at 6 (emphasis added). For this reason, Petitioner's bald assertions that the District can, or should, take other information available to it outside the database, compare it to the report its capable of generating, and then manipulate and modify that report in order to fit the specification of the particular request must be rejected. Simply, the Petitioner is arguing for the creation of a record that does not currently exist as well as the compiling, maintaining, formatting, and organizing of a record in a manner which

the District does not presently do so all in violation of the plain language of the statute and case law interpreting same. 65 P.S. § 67.705.

Moreover, Petitioner’s reliance on redaction cases is entirely misplaced. By its plain language, Section 706 concerning redaction applies to “information which is not subject to access.” 65 P.S. § 67.706. Petitioner here is not seeking redaction of the record as it relates to “information which is not subject to access.”¹ Rather, Petitioner here is seeking redaction to have the record manually manipulated such that it is compiled in a specific manner to fit the specifications of the Request as well as manipulated to alter the formatting and organization of the record to fit the specifications of the Request. In short, Petitioner seeks that redaction be used as a tool to remove exempt and non-exempt information by reference to data outside the database to create a report that answers a specific question that the report builder system is not capable of answering independently.

In addition, Petitioner makes assumptions not supported by evidence regarding the District’s report generating capabilities. Preliminarily, the District has submitted evidence that “the District’s Destiny report builder functions do not align directly with the samples provided by Requester” in relation to the report builder guide provided by Petitioner.² Certified Record, Ex. 8, Position Statement, at 2; Bolton Affidavit at ¶ 8; Respondent Answer, at ¶ 53. And, importantly, the District’s report builder system is not populated with all of the information necessary to

¹ Petitioner here does appear to concede that patron names are inaccessible under 24 Pa.C.S. § 9375, but indicates that the request does not seek patron names despite suggesting in his Petition that the District could omit only student names before providing a report. Petition, at ¶ 54. In any event, the redaction Petitioner seeks is not redaction to address patron names; rather, it is redaction to manipulate the report in a manner to fit the specifications of the request.

² Petitioner asserts the District did not deny that the online help guide is applicable to it in Paragraph 53 of its Answer. Petitioner’s paragraph 53, however, did not call for any such specific denial. And, in any event, the District plainly denied paragraph 53 in its entirety and has repeatedly stated that the samples provided do not align directly with them.

generate results based on the criteria proffered by Petitioner and some of the information that is populated is partial or incomplete. Answer, at ¶¶ 51, 56-58. In any event, none of Petitioner’s proposed alternative methods of report running get the result he seeks; that is, a report of books checked out by those patrons who are not students (as individuals). See Certified Record, Exs. 8 & 13, District’s November 30, 2022 Submission and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶ 6).

Instead, it is well-settled that an agency is not required to create a list or spreadsheet containing the requested information; “the information . . . must simply be provided to request[e]rs in the same format that it would be available to agency personnel.” *Cole*, 52 A.3d at 549 n.12. That is precisely what the District did in this case.

Between the District’s good faith effort to comply with Petitioner’s Request and the District’s Affidavits demonstrating that it does not have the capability to create the exact report that Petitioner seeks, the District has sustained its burden to show that no further responsive records exist. Accordingly, the District requests that this Court affirm the OOR’s conclusion that the District has complied with Petitioner’s request and that no additional records responsive to the request exist.

C. PETITIONER’S REQUEST IS NOT SUFFICIENTLY SPECIFIC.

A written [RTKL] request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested. . .” See 65 P.S. § 67.703. Here, the Request is not sufficiently specific for lack of a time frame.

In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep’t of Educ v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372

(Pa. Commw. Ct. 2013). Specifically, the OOR examines to what extent the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the time frame for which records are sought. *Pa. Dep't of Educ.*, 119 A.3d at 1124-25.

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Id.* at 1125. In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting timeframe to be sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d 467. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See Pa. Dep't of Educ.*, 119 A.3d at 1125. “The timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overboard; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

In his RTKL Request submitted to Respondent on October 19, 2022, Petitioner requested records from Respondent as follows:

Seeking a report that should be available from the district’s electronic library system (Follet Destiny). See attached pages for screenshots. Specifically requesting a ‘Library -> Title’ report exported to either Excel or XML. The report should include all titles checked out by those patrons that are NOT Students. No personal information specifically identifying an individual patron is required. The report can be limited to Pennridge High School.

In evaluating this Request, it is well-settled that a requester may not modify, explain or expand a request on appeal. *See Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water and Sewer Authority*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (“A requester may not modify the original request as

the denial, if any, is premised upon the original request as written”). The OOR’s review on appeal is confined to a request as written, and any modifications of the request on appeal are not considered. *See Brown v. Pennsylvania Turnpike Comm'n*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998. As such, only the request as written, **not** Petitioner’s subsequent modifications and explanations, should be considered.

Petitioner’s Request is not sufficiently specific as it lacks a time frame entirely. In his Brief, Petitioner asserts that the Request is seeking a report that “shows **current** checkouts by nonstudents” and that the request has an “implied timeframe (**the present**, as defined by the date the request was filed.” Petitioner’s Brief, at 9 (emphasis added). Nothing in the Request, however, makes any reference or implication as to current checkouts or the present date or the timing of the report at all, and one cannot be inferred based on the Request as written. Indeed, from the outset, the District has indicated that a time frame was necessary and repeatedly worked with Petitioner during its attempt to resolve this matter to understand the time frame for which Petitioner sought records. *See* Certified Record, Ex. 4. What is clear based on Petitioner’s assertions throughout this matter is that he was not seeking simply a report of only the books checked out by non-students on the single date that he submitted the Request, as he alleges for the first time in his Brief.

Instead, nothing about Petitioner’s Request, as written, implies a necessary period of time which would allow Respondent to narrow its search for responsive records. Further, Petitioner’s Request is not seeking a single specific document of which only a limited number per year could be created. The District has used the Destiny library system for approximately 20 years. *See* Certified Record, Exs. 8 & 13, District’s November 30, 2022 Submission (Bolton Affidavit, at ¶ 27) and January 13, 2023 Supplemental Submission. There is an infinite number of transaction

reports that could potentially be generated during this time frame and for various time periods.³ *Id.* Without the Request itself providing an actual time frame, the Request is not sufficiently specific.

Accordingly, the District respectfully requests that this Court find Petitioner's Request to not be sufficiently specific and dismiss Petitioner's appeal.

D. PETITIONER IMPROPERLY MODIFIED ITS REQUEST ON APPEAL.

As noted above, it is well-settled that a petitioner may not modify, explain, or expand a request on appeal. *See Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010). The OOR's review on appeal is confined to a request as written, and any modifications of the request on appeal are not considered. *See Brown v. Pennsylvania Turnpike Comm'n*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998.

As fully explained herein, the District does not have the ability to create a report or list of "all titles checked out by those patrons that are NOT students" as originally requested. Petitioner must comprehend to some degree this fact and distinctions put forth by the District regarding what is sought versus its report generating capabilities, and argued below that the, "District could simply inquire with their faculty, determine which books are being reviewed, and then provide that list to the [Petitioner]." *See* Petitioner's November 30, 2022 submission to OOR, at p. 6.

Now, Petitioner argues that he is not modifying his Request, just simply suggesting different places to look for keys. Petitioner's Brief, at 6. Petitioner, however, is not simply suggesting different places to look for keys as alleged. Petitioner is arguing that the District is required to create a new key because it has other keys but those keys are not the exact key he is looking for. And, of course, as explained above, even if Petitioner's analogy could be rationalized,

³ As discussed above, a status report can only be run on the present date.

which it cannot, the District's database is not populated with the information necessary to generate the results for those "places to look" subsequently identified by Petitioner.

In any event, even this method would not create the desired report because the District, as it explained numerous times, cannot generate a list of books checked out by non-student *individuals*; only non-student *accounts*. Regardless, Petitioner's ever-changing and evolving Request is improper.

Instead, as conceded by the Petitioner, the District is not under an obligation to create a record that does not exist or to maintain its records in any particular way for the purposes of the RTKL. As has been established, the District does not have the particular report or list Petitioner seeks, nor does Petitioner have the ability to create such a report or list from its existing database. Petitioner may not continuously modify his original Request to suggest different ways for the District to create a record that simply does not exist.

Just as the OOR was not permitted to consider Petitioner's subsequent modifications to his Request on appeal, this Court should not consider such modifications. Accordingly, Respondent requests that this Court affirm the OOR's Final Determination dismissing the appeal.

E. PETITIONER SHOULD NOT BE GRANTED ATTORNEY FEES AND COSTS.

Awards of attorney fees in RTKL proceedings are authorized by 65 P.S. §67.1304. Section 1304(a) provides:

§ 67.1304. Court costs and attorney fees

(a) Reversal of agency determination. If a court reverses the final determination of the appeals officer or grants access to a record after a request for access was deemed denied, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a *Petitioner* if the court finds either of the following:

(1) the agency receiving the original request willfully or with wanton disregard deprived the *Petitioner* of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or

(2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.

The Pennsylvania Supreme Court later clarified the interpretation of Section 1304, holding that 1304(a)(1) “permit[s] recovery of attorney fees when the receiving agency determination is reversed, and it deprived a *Petitioner* of access to records in bad faith.” *See Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 663 Pa. 545, 571, 243 A.3d 19, 34 (2020).

Here, Petitioner seeks attorney fees and costs because of the District’s “conduct.” However, there is no merit to Petitioner’s request for fees and costs because Petitioner’s claims of bad faith misrepresent the District’s repeated, good faith attempts to satisfy Petitioner’s Request, are entirely speculative, and are based in misunderstanding. Without evidence of actual bad faith on the part of the District, there is no viable claim for fees and costs.

The District has already conceded that it inadvertently missed the original deadline to respond to Petitioner’s Request. However, aside from that initial inadvertent accident, the District has gone above and beyond to attempt to accommodate Petitioner’s Request, including making several efforts to provide all plausibly responsive reports that could be created with by the Destiny system and seeking clarification from Petitioner regarding his Request, despite Petitioner’s improper modifications to his Request.

Despite the District’s numerous attempts to accommodate Petitioner, Petitioner’s only allegations of “bad faith” are that the District failed to perform a search for responsive records in good faith because he believes the District can create a report using other available information by compiling information outside the report builder system, then comparing that information to the report the system is capable of generating, and then manually modifying the system generated

reported to create a new report that answers a particular question (*i.e.*, build him a new key). Essentially, Petitioner contends that the District has acted in bad faith for failing to create a record that does not exist despite the plain language of the statute and well-settled precedent establishing that the District has no such obligation.

Petitioner's allegations of bad faith are not supported by any facts whatsoever and the District's position is based on reasonable interpretations of the law. The OOR's Final Determination fully outlines the lengths to which the District has gone to respond to the Request. *See* Pet. Ex. A, OOR Final Determination. Moreover, the District, through its Superintendent, Dr. Bolton, submitted affidavits under the penalty of perjury, regarding the type of reports the District can and cannot generate using the Destiny system. *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission.

The District has acted in good faith and demonstrated that it conducted a good faith search for records and provided the records it was capable of generating to Petitioner. As discussed above, Petitioner's unsupported speculation concerning the reports being incomplete through reference to his comparing the non-student account reports with the publicly accessible online card catalog database are wrong and do not support a finding of bad faith. *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission (Bolton Affidavit, at ¶ 22) and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶¶ 7-11).

Likewise, Petitioner's erroneous assumptions that books checked out for longer periods of time (as evidenced in the online card catalog) are not checked out under student accounts was also addressed below as incorrect. The District demonstrated, with evidence, that books in the online card catalog with longer check out periods, including periods of more than 250 days, can be, and are at times, books that are checked out by student accounts. *See* Certified Record, Exs. 8 & 13,

District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶ 1); Answer, at ¶ 42. Check out times of this length also exist for non-student accounts. *Id.* Simply, the check out time period in the online card catalog is not an indication of whether the book is checked out by a student or non-student account as alleged by Petitioner.

Essentially, Petitioner wants the District to answer a specific question and create a specific record to answer that question, despite the District's evidence demonstrating that its report builder system cannot generate a report to provide that exact piece of information based on the information in the system. The District has submitted sufficient evidence that no report can be generated showing books checked out by non-student *individuals*. The District is not required to create such a record to satisfy Petitioner's particular request. Nonetheless, the District worked with Petitioner to provide him with the most responsive report it could generate.

Accordingly, the District respectfully requests that this Court deny Petitioner's request for attorney fees and costs.

F. RELIEF SOUGHT

Petitioner asserts that this Court can issue its ruling on this case without additional fact finding. Respondent agrees.

As recognized by the OOR, the District has met its burden of proof and demonstrated that the District provided Petitioner with the responsive records it was capable of generating and that no additional records exist. This decision can, and should be, affirmed on the basis of the existing record evidence which includes two sworn Affidavits from the District's Superintendent. *See* Certified Record, Exs. 8 & 13, District's November 30, 2022 Submission and January 13, 2023 Supplemental Submission.

Contrary to Petitioner’s assertions that the District refused to address factual gaps in front of the OOR, Respondent did address Petitioner’s claims with evidence. Indeed, Petitioner claims that the District refused to address the student check-out time period allegation raised below but the evidence demonstrates that the District did, in fact, directly address this allegation and provided evidence that student accounts can reflect check-out time periods for greater than 250 days. *See* Certified Record, Exs. 8 & 13, District’s November 30, 2022 Submission and January 13, 2023 Supplemental Submission (Bolton Supplemental Affidavit, at ¶ 1; Answer, at ¶ 42. Petitioner’s baseless assertions and speculation are not evidence and should be rejected.

As such, the District requests that the Court affirm the OOR’s Final Determination based on the existing record.

IV. CONCLUSION

Respondent, Pennridge School District, has met its burden to show that this appeal is moot and that no further records responsive to Petitioner’s Request exist, and the OOR’s Final Determination should be affirmed.

Date: July 28, 2023

Respectfully submitted,

/s/ Tricia S. Springer

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2023, a true and correct copy of the foregoing BRIEF IN OPPOSITION was served upon the following via this Court's electronic filing system, which service satisfies the Pennsylvania Rules of Civil Procedure:

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