



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**RACHIELE PETERS,
Requester**

v.

**LEBANON SCHOOL DISTRICT,
Respondent**

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Docket No: AP 2024-1247

FACTUAL BACKGROUND

On May 10, 2024, Rachiele Peters (“Requester”) submitted a request (“Request”) to the Lebanon School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking

[a]ll information pertaining to the creating of the new Physical Education/Health Position at the High School. Any data and information used to justify this position regarding class size and enrollment numbers, [t]imeline of [a]dvertising, how long the position was advertised or posted, [and] hiring and interviewing process. Contract information pertaining to official date of hire and benefit information when benefits began for this position. Also current enrollment numbers and class sizes in the Physical Education Department since the new position has been added.

On May 14, 2024, the District denied the Request, arguing that the requested records do not exist because no new Physical Education/Health teaching position at the High School had been created as referenced in the Request.¹

On May 14, 2024, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.² 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 May 22, 2024, the District filed a copy of District Policy Number 305, and a position statement reiterating its grounds for denial.

On May 23, 2024, the Requester filed two copies of the District’s Personnel Recommendations dated March 18, 2024, as well as the District’s School Board Minutes dated March 18, 2024.³

On May 29, 2024, in response to a request from the OOR to support an unsworn statement, the District filed an informal attestation authored by the District Superintendent, Nicole L. Malinoski, Ed. D. (“Malinoski Attestation”).

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

¹ The District previously communicated to the Requester that the position in question was approved as a long-term substitute (“LTS”) position in accordance with District Policy Number 305 – Employment of Substitutes. *See* District’s May 14, 2024 Written Denial; District’s May 09, 2024 Letter to Requester.

² The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

³ On May 29, 2024, the Requester filed copies of the District’s Personnel Recommendations dated January 15, 2024 and February 19, 2024, which are not being considered by the OOR as evidence because their relevance has not been established. *See* 65 P.S. § 1102(a)(2) (stating that “[t]he appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute”).

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)).

In response to a request for records, “... an agency shall make a good faith effort to determine ... whether the agency has possession, custody or control of the identified record[.]” 65 P.S. § 67.901. An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency’s records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

If the agency responding to the RTKL request determines that the record does not exist, it has “the burden of proving that the record does not exist.” *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011). “An agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.” *Id.*; *see Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) (finding that an unsworn attestation and a notarized affidavit swearing to the non-existence of a record were enough to satisfy the department’s burden of demonstrating the record’s non-existence). In the absence of any competent evidence that the agency acted in bad faith or that the agency records exist, “the averments in [the agency’s] affidavits should be accepted as true.” *McGowan v. Pennsylvania Department of Environmental Protection*, 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014).

Smith Butz, LLC v. Pa. Dep’t of Env’tl. Prot., 142 A.3d 941, 945 (Pa. Commw. Ct. 2016).

The District argues that responsive records do not exist because a new teaching position was not created; instead, a LTS position was temporarily approved.⁴ The Requester contends that the District’s March 18, 2024 School Board Minutes and Personnel Recommendations contradict the District’s argument. In support of the District’s position, the Malinoski Attestation provides in relevant part, as follows:

2. On or about March 18, 2024, the Board of Directors hired Tyler Pritchett (“Pritchett”) to serve as a [LTS] at the Lebanon High School Building and in a Health/Physical Education Position.
- ...
5. No *new* Physical Education/Health Teacher position has been created by the District.
- ...
6. In reference to the Personnel Recommendations dated March 18, 2024, and for which Requestor mistakenly relies upon in her submission, the term “New” is an internally used reference for Human Resources tracking.

Malinoski Attestation, ¶¶ 2, 5, 6 (emphasis in original).

An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Bradley v. Lehigh Area Sch. Dist.*, OOR Dkt. AP 2021-0333, 2021 PA O.O.R.D. LEXIS 715; *Ramaswamy v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2019-1089, 2020 PA O.O.R.D. LEXIS 2095. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010)). The OOR determines the reasonableness of the agency’s interpretation from the text and context of the request alone, as neither the OOR nor the requester are permitted to expand the request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Commw. Ct. 2010); *McKelvey v. Office of Attorney General*, 172 A.3d 122, 125

⁴ In its position statement, the District opines that the Requester may have mistakenly assumed a new position had been created.

(Pa. Commw. Ct. 2017) (“Once a RTKL request is submitted, the requester may not expand or modify the request on appeal.”). Further, agencies should rely on the common meaning of words and phrases. *See Gingrich*, 2012 Pa. Commw. Unpub. LEXIS 38 at *16.

Here, the Request states that the Requester is seeking “[a]ll information pertaining to the creating of the new Physical Education/Health Position at the High School.” However, the word “new” is defined as “having recently come into existence”, “having been ... used ... for a short time”, or “being other than the former or old”. *New*, MERRIAM-WEBSTER.COM, <https://www.Merriam-Webster.com/dictionary/new> (last visited June 6, 2024). Based on the text and context of the Request, it appears that the Requester was seeking records related to a Physical Education/Health position that the District intended to fill or intended to appoint a teacher to, which would include a temporarily approved LTS position such as the one identified in the instant matter. As such, the District’s interpretation of the Request was too narrow and unreasonable. Therefore, the District has failed to demonstrate that no responsive records exist because its search was based on an impermissibly narrow interpretation of the Request. Accordingly, the District is required to provide responsive records to the Requester that are associated with the LTS position for which Pritchett was appointed.⁵ However, this determination is limited to records that existed and were in the possession, custody or control of the District on May 10, 2024, when the Request was submitted.⁶

⁵ The District is required to conduct a good faith search for and provide the responsive records to the Requester within thirty days, or, in the alternative, a sworn affidavit or a statement made under the penalty of perjury demonstrating that the responsive records do not exist or that exemption(s) apply. A requester’s appeal rights to the OOR vest upon the requester’s receipt of documents. *See Buehl v. Pa. Dep’t of Corr.*, No. 198 C.D. 2015, 2015 Pa. Commw. Unpub. LEXIS 552, *3-5 (Pa. Commw. Ct. July 27, 2015).

⁶ *See* 65 P.S. § 67.705 (“When responding to a request for access, an agency shall not be required to create a record which does not currently exist ...”); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that the standard under Section 705 of the RTKL is whether the requested record was in existence and in the possession of the agency at the time of the right-to-know request); *Segelbaum and The York Daily Record v. York Cnty.*, OOR Dkt. AP 2021-1180, 2021 PA O.O.R.D. LEXIS 2098.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the District is required to provide all responsive records 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 Lebanon County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per 65 P.S. § 67.1303, but as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁷ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 10, 2024

/s/ Megan Burns

MEGAN BURNS
APPEALS OFFICER

Sent via electronic portal to: Rachiele Peters
Michael Bechtold, Esq.
Lebanon School District Open Records Officer
Nicole L. Malinoski, Ed. D.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).