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Supreme Court of Pennsylvania

Court of Common Pleas
Civil Cover Sheet

Centre County

For Prothonotary Use Only:	TIME STAMP
Docket No: 2019-2167	

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:
☐ Complaint ☐ Writ of Summons ☒ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

RECEIVED
JUN 18 2019
CENTRE COUNTY RECORDS

Lead Plaintiff's Name: Bellefonte Area School District	Lead Defendant's Name: Simon Campbell
Are money damages requested? ☐ Yes ☒ No	Dollar Amount Requested: (check one) ☐ within arbitration limits ☐ outside arbitration limits
Is this a *Class Action Suit?* ☐ Yes ☒ No	Is this an *MDJ Appeal?* ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney: Carl P. Beard and Elizabeth A. Benjamin (Beard Legal Group)

☐ Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

SECTION B

Nature of the Case: Place an "X" to the left of the ONE case category that most accurately describes your *PRIMARY CASE*. If you are making more than one type of claim, check the one that you consider most important.

TORT *(do not include Mass Tort)*
- ☐ Intentional
- ☐ Malicious Prosecution
- ☐ Motor Vehicle
- ☒ Nuisance
- ☐ Premises Liability
- ☐ Product Liability *(does not include mass tort)*
- ☒ Slander/Libel/ Defamation
- ☐ Other:

MASS TORT
- ☐ Asbestos
- ☐ Tobacco
- ☐ Toxic Tort - DES
- ☐ Toxic Tort - Implant
- ☐ Toxic Waste
- ☐ Other:

PROFESSIONAL LIABILITY
- ☐ Dental
- ☐ Legal
- ☐ Medical
- ☐ Other Professional:

CONTRACT *(do not include Judgments)*
- ☐ Buyer Plaintiff
- ☐ Debt Collection: Credit Card
- ☐ Debt Collection: Other
- ☐ Employment Dispute: Discrimination
- ☐ Employment Dispute: Other
- ☐ Other:

REAL PROPERTY
- ☐ Ejectment
- ☐ Eminent Domain/Condemnation
- ☐ Ground Rent
- ☐ Landlord/Tenant Dispute
- ☐ Mortgage Foreclosure: Residential
- ☐ Mortgage Foreclosure: Commercial
- ☒ Partition
- ☐ Quiet Title
- ☐ Other:

CIVIL APPEALS
Administrative Agencies
- ☐ Board of Assessment
- ☐ Board of Elections
- ☐ Dept. of Transportation
- ☒ Statutory Appeal: Other Right to Know Law Appeal of OOR Determination
- ☐ Zoning Board
- ☐ Other:

MISCELLANEOUS
- ☐ Common Law/Statutory Arbitration
- ☐ Declaratory Judgment
- ☐ Mandamus
- ☐ Non-Domestic Relations Restraining Order
- ☐ Quo Warranto
- ☐ Replevin
- ☐ Other:

Updated 1/1/2011

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

BELLEFONTE AREA SCHOOL DISTRICT, 318 North Allegheny Street Bellefonte, PA 16823 Plaintiff, v. SIMON CAMPBELL, 668 Stony Hill Road, #298 Yardley, PA 19067 Defendant.	CIVIL ACTION – LAW No. 2019-2167 **Type of Document:** Petition for Review of Decision of the Office of Open Records – OOR Appeal No. 2019-0483 **Counsel for Defendant:** Carl P. Beard, Esquire Pa I.D. No. 33479 Elizabeth A. Benjamin, Esquire Pa I.D. No. 206994 Beard Legal Group, P.C. 3366 Lynnwood Drive P.O. Box 1311 Altoona, PA 16603-1311 814-943-3304 Fax: 814-3-3430 cbeard@beardlegalgroup.com ebenjamin@beardlegalgroup.com

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

BELLEFONTE AREA SCHOOL DISTRICT, 318 North Allegheny Street Bellefonte, PA 16823	:	CIVIL ACTION – LAW
Plaintiff,	:	No. 2019-2167
v.	:	
SIMON CAMPBELL, 668 Stony Hill Road, #298 Yardley, PA 19067	:	
Defendant.	:	

PETITION FOR REVIEW OF DECISION OF THE OFFICE OF OPEN RECORDS

AND NOW comes the Bellefonte Area School District, by and through its counsel, Carl P. Beard, Esquire, Elizabeth A. Benjamin, Esquire, and Beard Legal Group, P.C., and files this Petition for Review of Decision of the Office of Open Records (OOR Appeal No. 2019-0483), pursuant to 65 P.S. § 67.1302, averring the following in support thereof:

INTRODUCTION

1. This Petition for Review sets forth a partial appeal of Final Determination issued by the Pennsylvania Office of Open Records ("OOR") in the matter of Simon Campbell v. Bellefonte Area School District, Docket No. AP 2019-0483, dated May 17, 2019 ("Final Determination"). A true and correct copy of the Final Determination is attached to this Petition as Exhibit "A" and is incorporated herein by reference as part of the record on appeal. The portions of the OOR Final Determination being appealed before this Honorable Court are as follows:

a. Part 3(a) of the OOR Final Determination regarding the release of attachments to and certain factual information within email items deemed to be protected by attorney-client privilege and/or to constitute Attorney Work Product (Ex.A, P. 16). This portion of the appeal pertains solely to the grant of access to attachments to and certain factual information within emails identified as protected by attorney-client privilege and/or under Attorney Work Product doctrine.

b. Section 6 of the OOR Final Determination finding that the District has not proven that certain emails responsive to Items 3, 5 and 7 are exempt from disclosure under the Pennsylvania Right to Know Law, and specifically subparts (a), regarding exempt employee information, and (d), regarding internal, predecisional deliberations included within that Section (Ex. A, P. 21-24 and 26-28.)

PARTIES

2. The Appellant, Bellefonte Area School District, is a Centre County School District and a local agency under the Pennsylvania Right-to-Know Law. It has a business address of 318 North Allegheny Street, Bellefonte, PA 16823.

3. The Appellee, Simon Campbell, is an adult individual with an address of 668 Stony Hill Road, #298, Yardley, PA 19067.

STATEMENT OF BASIS FOR JURISDICTION OF THE COURT

4. This Court has jurisdiction over this matter pursuant to Chapter 13 of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.1301 et seq. ("RTKL") which provides for judicial review of final determinations of the Pennsylvania Office of Open Records ("OOR")

5. Venue is proper within Centre County because the Bellefonte Area School District is located in Centre County and pursuant to RTKL Section 1302(a), 65 P.S. § 67.1302(a) it is provided as follows:

> [w]ithin 30-days of the mailing date of the final determination of the Appeal's Officer relating to a decision of a local agency… a requestor of local agency may file a petition for review or other document as required by rule of Court with the Court of Common Pleas for the County where the local agency is located.

STANDARD OF REVIEW

6. Under the Right-to-Know Law, the standard of review for appeals involving local agencies such as the Bellefonte Area School District is *de novo* and the "scope of [the Courts] review is broad, or plenary. *Bowling v. Office of Open Records*, 75 A.3d 453, 474-477 (Pa. 2013). As such the record may be expanded. *Id.* (noting that the Court of Common Pleas has the "broadest scope of review" including the authority to expand the record to fulfill its statutory role as the finder of fact).

FACTUAL AND PROCEDURAL BACKGROUND

7. On February 4, 2019 the requestor Mr. Campbell submitted a Right-to-Know Request to the Bellefonte Area School District seeking, in pertinent part, the following:

> **Item 3**[:] All emails and/or email attachments sent or received between the dates of October 10, 2017 and the present that have the work email address (kvancas@basd.net) of Benner Elementary School Principal Kristopher Vancas in any; of the following e-mail address fields: From:; To:; CC:; Bcc:; … **and** which have any or all of the following work e-mail addresses in the From:; To:; Cc:; Bcc:; fields: [list of 11 Benner Elementary teachers' email addresses, the District Human Resource Officer's email address and a PSEA regional representative's email address] … **and** which, in part or in whole, relates to (a) the workplace duties, expectations, behaviors or performance of Benner Elementary teacher Lynn Kipp, and/or (b) any complaint or other allegation of workplace wrongdoing made against Mrs. Kipp by any employee or representative of the … District.
> **Item 5**[:] All emails and/or email attachments went or received between the dates of October 10, 2017 and the present that have the work email address (msimpson@basd.net) of Human Resources Director Michelle [Simpson] in any of the following e-mail address fields: From:; To:; Cc:; Bcc:; … **and** which have

any or all of the following work e-mail addresses in the From:; To:; Cc:; Bcc:; fields: [list of 11 Benner Elementary teachers' email addresses, the PSEA regional representative's email address and three attorney's email addresses] ... **and** which, in part or in whole, relates to (a) the workplace duties, expectations, behaviors or performance of Benner Elementary teacher Lynn Kipp, and/or (b) any complaint or other allegation of workplace wrongdoing made against Mrs. Kipp by any employee or representative of the ... District. (*See Ex. A.*)

Item 7[:} All emails and/or email attachments sent or received between the dates of January 1, 2018 and the present that have the work email address (cbeard@beardlegalgroup.com) of Carl Beard, legal representative of the ... District, in any of the following e-mail address fields: From;; To:; Cc:; Bcc:; ... **and** which have any or all of the following work e-mail addresses in the From:; To:; Cc:; Bcc:; fields; [list of two Benner Elementary teachers' email address and nine District School Board Directors' email addresses] ... **and** which, in part or in whole, relates to (a) the workplace duties, expectations, behaviors or performance of Benner Elementary teacher Lynn Kipp, and/or (b) any complaint or other allegation of workplace wrongdoing made against Mrs. Kipp by any employee or representative of the ... District.

8. On March 15, 2019 after extending its time to respond by thirty (30) days pursuant to Section 902 of the RTKL, the District issued a final response which partially granted and partially denied the request, and in pertinent part, specifically denied Items 3, 5, and 7 of the request on a number of grounds identified within the final response.
9. On March 29, 2019 the requestor Mr. Campbell filed an appeal with the OOR, challenging the District's denial of Items 3 through 9 of the request.
10. On April 17, 2019 the District submitted a position statement reiterating its grounds for partial denial and in support thereof submitted attestations of the undersigned Legal Counsel, District Elementary School Principal Kristopher Vancas, the District's Human Resource Director Michelle Simpson, the District's Director of Fiscal Affairs Kenneth Bean, and the Director of the District's Physical Plant, Aaron Barto.
11. Within the District's position statement and supporting attestations, the District argued, in pertinent part, that the request set forth at items 3, 5, and 7 of the request

seeking emails exchanged between certain individuals and other District staff members which in part or in whole relate to the workplace duties, expectations, behaviors, or performance of a specific Benner Elementary School Teacher Lynn Kipp, and/or any complaint or other allegation of workplace wrongdoing made against Ms. Kipp by any employee or representative of the Bellefonte Area School District was insufficiently specific.

12. In the alternative, the District also asserted that even if the request was deemed sufficiently specific, the requests within Items 3, 5, and 7, on their face, seek information that is expressly deemed exempt under Section 708(b) of the Right-to-Know Law including subsection 7 addressing exempt employee information as including an agency employee's performance rating review, written criticisms of an employee, grievance material and information regarding discipline, demotion or discharge, as well as Section 708(b) 17 of the Right-to-Know Law relating to records of a non-criminal investigation, including, but not limited to, complaints submitted to an agency and related investigative materials which would reveal the institution, progress, or result of an agency investigation and/or constitute an unwarranted invasion of privacy. (*See 65 P.S. § 708(b)(7) and (17).*)
13. The OOR is permitted to determine that a request, on its face, or as worded, seeks exempt records and may affirm a denial asserted on that basis.
14. The Office of Open Records is also able to order the release of records and further provide for the redaction of information such as attorney-client privileged information, Attorney Work Product, employee criticisms, and complaints, on the

basis that such information is deemed expressly exempt under the Right to Know Law.

15. In one portion of the final determination, relative to records requested under Item 7, the Office of Open Records did in fact require release but provided a caveat that any exempt information inclusive of employee criticisms and complaints, for example, should be redacted. (*See page 24 of Final Determination, addressing paragraph 32 of Benjamin Attestation*).

16. The Office of Open Records failed to provide any such caveat or exception allowing for the redaction of exempt and/or privileged information with respect to the other items addressed in order for release within its decision, as further detailed bellow.

17. As an alternative to the foregoing arguments regarding exempt status of the records that was evident from the face of, or basic wording of their request, the District nonetheless proceeded to conduct a good faith search, to the best of its ability, to identify emails potentially responsive to items 3, 5 and 7.

18. As a result the District identified within its position statement and supporting attestations, that 113 email items (excluding duplicates and emails within email threads below) were deemed to be potentially responsive to Item 3 of the request, that 177 emails were deemed to be responsive to Item 5 of the request, and that 9 email items were deemed to be responsive to Item 7 of the request.

19. Prior to issuing its Final Determination, the OOR requested that the due date of the Final Determination be extended so that the OOR could order the District to produce an exemption log and have sufficient time to review the log and/or determine whether

it would be appropriate to order production of documents for *in-camera* review. The requester declined this request.

20. As a result, the OOR did not conduct an *in-camera* review of the records that it ordered to be released.

21. Within its Position Statement and supporting Attestation submitted to the OOR, the District identified 2 of the 113 email items responsive to Item 3, 58 of the 177 email items responsive to Item 5, and 2 of the 9 responsive email items identified as responsive to Item 7 as being protected by attorney-client privilege and/or consisting of Attorney Work Product exchanged between Attorney Carl Beard, Attorney Scott Etter, and representatives of the District.

22. Within its May 17, 2019 Final Determination, the Office of Open Records determined that all of the email items identified in the foregoing paragraph were sufficiently demonstrated as being protected by attorney-client privilege, that said attorney-client privilege was properly invoked and that the requester had not proven that the District waived the privilege. The District agrees with this portion of the decision and it is not subject to the Appeal set forth herein.

23. However, the Office of Open Records Appeals Officer ordered the District to release any emails within the email threads that contained "solely proposed dates for hearings and meetings." (*See Page 15 of Exhibit A*).

24. The Office of Open Records Appeals Officer also found that the District failed to address whether the responsive emails have attachments and whether the material attached is privileged and granted access to any attachments to the emails identified

as protected by attorney-client privilege to the extent that they exist. (*See Page 16 of Exhibit A*).

25. In relation to this portion of the Decision set forth at Section 3(a) of the Final Determination, the Office of Open Records Appeals Officer did not explicitly address the District's assertion that the emails likewise constituted, consisted of, and/or otherwise provided Attorney Work Product.

26. The District's Position Statement and supporting Attestation specifically identified the relevant email items asserted as subject to attorney-client privilege and/or protection under the Attorney Work Product Doctrine as forwarding confidential client information, providing legal advice and opinions as well as Attorney Work Product in response, and specifically identified email items as referring to an email produced within a Microsoft Outlook Data File, and not including any duplicates of said email or other emails within an email thread appearing below it. This delineation of the District's reference to "email items" did not exclude any attachments to the email items.

27. Approximately 25 of the privileged emails include attachments.

28. The majority of the attachments consist of legal opinions, draft documents that constitute Attorney-Work Product, and reflect the attorney strategy and/or revisions and/or drafting proposed documents for the client's review, and/or other documents which were identified elsewhere within the District's Position Statement and supporting Attestations and deemed to be exempt as records of a non-criminal investigation.

29. The District respectfully submits that the OOR Appeals Officer's interpretation of email items as not including or expressly addressing any attachments to same was in error.

30. The OOR Appeals Officer failed to provide any caveat providing for or otherwise allowing for or otherwise allowing the redaction of privileged information, Attorney-Work Product, and/or otherwise exempt employee information and/or non-criminal investigative information from any of the attachments released.

31. The District respectfully asserts that the OOR erred in failing to include a provision for the redaction of attorney-client privileged information and/or Attorney Work Product.

32. The District further asserts that the release of the attachments would result in a violation of important and fundamental rights held by the District to maintain the privacy and confidentiality of its communications exchanged with its attorney(s) under Attorney-Client Privilege and Attorney Work Product Doctrine.

33. The District further asserts that a release of the attachments can result in a violation of rights of not only the District but employees who are referenced or otherwise identified as having made complaints in the course of a non-criminal investigation and/or employee criticisms, and/or related employee grievance material contained within the attachments of the emails.

34. The District has contractual rights and obligations relative to its employees that could potentially be violated by releasing the attachments and/or releasing them without appropriate redaction, and said employees likewise have privacy rights relative to their own personal employment information.

35. Within Section 6 of the Final Determination the Office of Open Records found that the District did not meet its burden in establishing that certain records identified as potentially responsive to Items 3, 5, and 7 were exempt from disclosure because they contain exempt employee information consisting specifically of records relating to an agency employee, including grievance material under Section 708(b)(7) of the Right to Know Law. (*See Final Determination, Ex. A at Page 21-22*).

36. As a result, the Final Determination ordered the School District to release 7 of 113 email items identified as potentially responsive to Item No. 3 and pertaining to grievance material, 8 of 177 email items found responsive to Item No. 5 identified as likewise addressing a pending grievance, grievance appeal, and grievance proceedings; and 7 of 9 email items found responsive to Item No. 7 of the request and consisting of discussions or attaching grievance material such as correspondence regarding a pending grievance by specific employee about discipline, and related notices and responses which constitute information pertaining to discipline and include allegations consisting of written criticisms of the employee as well as references to complaints made by other employees.

37. The OOR did not conduct an *in-camera* review of these records.

38. The terms of the Final Determination require the District to provide the emails to the requester within thirty (30) days.

39. The Final Determination at the same time acknowledges that the withheld materials may potentially be exempt grievance material.

40. However, the Final Determination fails to allow the School District to redact the emails identified as responsive to Items 3 and 5 of the Right to Know Request, at

paragraphs 12 and 27 of the School District's supporting Attestation. (*See Final Determination at Page 21-22*).

41. Similarly, within Section 6 the OOR determined that the District failed to present non-conclusory evidence that the material contained in 40 emails identified as responsive to Item 3, and 4 emails responsive to Item 5 contain discussions of exempt employee information in the form of an employee performance review, related specifically to a teacher identified as Lynn Kipp, issues underlying Ms. Kipp's Performance Evaluation and related proposed courses of action.

42. The Final Determination acknowledges that the material contained in the emails may potentially be used to measure or evaluate an employee's performance and/or otherwise discuss the employee. (*See Final Determination at Page 23-24, addressing paragraphs 14 and 26 of the District's supporting Attestation*).

43. The Final Determination requires the District to provide the emails to the requester within thirty (30) days without redaction.

44. The Final Determination failed to allow the School District to redact the information addressing the employee's Performance review or other criticisms, complaints, etc. in compliance with state and federal law.

45. Furthermore, the District respectfully asserts that the Final Determination failed to address and/or incorrectly determined that the requested documents were not exempt under Section 65 Pa. C.S. § 67.708(b)(7).

46. Additionally, the Final Determination held that the email records identified as responsive to Items 3, 5, and 7 and addressing the District's supporting Attestation at Paragraphs 12-14, 26-28, and 32 are not established as exempt pursuant to Section

708(b)(10) of the Right to know Law addressing internal predecisional deliberation that were not presented to a quorum of the School Board.

47. In this respect, the Final Determination found that the records were internal to the Agency and predecisional but that the School District's assertions relative to the deliberative nature of the emails were merely conclusory.

48. The Final Determination required the District to provide these emails to the requester within thirty (30) days, unredacted.

49. The Final Determination failed to allow the School District to redact any information that is deemed internal, predecisional, and deliberative in compliance with state and federal law.

50. The Final Determination also failed to address and/or incorrectly determined that the requested documents were not exempt under section 65 Pa. C.S. § 67.708(b)(10).

51. The School District maintains that the withheld documents addressed herein are in fact privileged, and/or otherwise exempt pursuant to Section 708 of the Pennsylvania Right to Know Law and intends to supplement the record, in timely accordance with any Order issued to that effect, to provide a more descriptive privilege and/or exemption log to verify the facts asserted in this Petition and within the District's original response submitted to the Office of Open Records.

52. The District has addressed the Court's direction for OOR to file a Certified Copy of the Appeal Case Record underlying the instant action via separate motion filed with this Petition for Review.

53. The District further hereby requests that in conjunction with the issuance of an Order directing the filing of the Certified Copy of the Appeal Record by OOR, or otherwise,

that the Court issue an Order providing for a Scheduling Order addressing a period of time in which the parties will have the opportunity to supplement the Certified Record once filed and/or otherwise file a written request for an Evidentiary Hearing, to be followed by a briefing schedule, as appropriate.

54. Accordingly, the School District currently submits this timely Petition for the Court's consideration pursuant to Right to Know Law Section 1302, and for further proceedings in relation to same.

55. To the extent the Final Determination likewise ordered the release of "factual information" included within otherwise privileged and/or exempt emails identified therein, such as correspondence scheduling emails and/or other purely factual information contained within email threads, the District respectfully asserts that the OOR failed to address the question of whether such information satisfies the definition of a public record under the Right to Know Law.

56. The District respectfully asserts that the Final Determination fails to address and/or otherwise incorrectly determined that such information must be released or otherwise disclosed to the requester.

57. For all of the foregoing reasons, the Bellefonte Area School District believes and therefore avers that the pertinent parts of the Final Determination appealed herein should be reversed.

58. Pursuant to 65 P.S. § 67.1302(b), this Petition shall serve as a stay for the release of information addressed under the portions of the Final Determination appealed herein, until such time as this Honorable Court has rendered a decision.

WHEREFORE, the Appellant, Bellefonte Area School District, respectfully requests that this Honorable Court enter an order reversing the decision of the Office of Open Records at the Sections identified herein, and granting any other such further relief as the Court deems just and fair.

Date: June 17, 2019

Respectfully submitted:

Elizabeth A. Benjamin, Esquire
Pa I.D. 206994
Carl P. Beard, Esquire
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BEARD LEGAL GROUP, P.C.
3366 Lynnwood Drive, P.O. Box 1311
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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

BELLEFONTE AREA SCHOOL DISTRICT, 318 North Allegheny Street Bellefonte, PA 16823	:	Civil Action Law
Plaintiff,	:	No. 2019-2167
v.	:	
SIMON CAMPBELL, 668 Stony Hill Road, #298 Yardley, PA 19067	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I, Elizabeth A. Benjamin, hereby certify that a true and correct copy of the Petition for Review of Decision of the Office of Open Records (OOR Appeal No. 2019-0483) has been served on the following parties by U.S. First Class Mail and/or email on this 17th day of June, 2019:

Via US First Class Mail and Email:
Simon Campbell
668 Stony Hill Road # 298
Yardley, PA 19067
psbahorror@gmail.com

Via Email Only:
Pennsylvania Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
RA-OpenRecords@pa.gov

By: Elizabeth A. Benjamin

Elizabeth A. Benjamin, Esquire
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cbeard@beardlegalgroup.com

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

BELLEFONTE AREA SCHOOL DISTRICT, 318 North Allegheny Street Bellefonte, PA 16823	:	CIVIL ACTION – LAW
Plaintiff,	:	No. 2019-2167
v.	:	
SIMON CAMPBELL, 668 Stony Hill Road, #298 Yardley, PA 19067	:	
Defendant.	:	

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted on behalf of Defendant:

By: Elizabeth A. Benjamin

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

BELLEFONTE AREA SCHOOL DISTRICT, 318 North Allegheny Street Bellefonte, PA 16823	:	CIVIL ACTION – LAW
Plaintiff,	:	No. 2019-2167
v.	:	
SIMON CAMPBELL, 668 Stony Hill Road, #298 Yardley, PA 19067	:	
Defendant.	:	

VERIFICATION

I, Michelle Saylor, hereby state that on behalf of the Bellefonte Area School District, I serve as Superintendent of Bellefonte Area School District, verify that the statements made in the foregoing Petition for Review are true and correct to the best of my knowledge, information, and belief.

I understand that the statements therein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

Date: 6-17-19

Michelle Saylor, Superintendent of
Bellefonte Area School District

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SIMON CAMPBELL,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2019-0483**
	:	
BELLEFONTE AREA SCHOOL DISTRICT,	:	
Respondent	:	

Simon Campbell ("Requester"), submitted an eleven-Item request ("Request") to the Bellefonte Area School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking various records related to District employees including detailed cellular phone billing records, emails and texts regarding a named teacher and a surveillance video. The District partially denied the Request arguing, among other things, that portions of the Request are insufficiently specific. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part**, and the District is required to take additional action as directed.

FACTUAL BACKGROUND

On February 4, 2019, the Request was filed, seeking, among other things:

> Item 3[:] All emails and/or email attachments sent or received between the dates of October 10, 2017 and the present that have the work email address (kvancas@basd.net) of Benner Elementary School Principal Kristopher Vancas in any of the following e-mail address fields: From:; To:; Cc:; Bcc:; … **and** which have any or all of the following work e-mail addresses in the From:; To:; Cc:; Bcc:

fields: [list of 11 Benner Elementary teachers' email addresses, the District Human Resource Officer's email address and a PSEA regional representative's email address] ... **and** which, in part or in whole, relates to (a) the workplace duties, expectations, behaviors or performance of Benner Elementary teacher Lynn Kipp, and/or (b) any complaint or other allegation of workplace wrongdoing made against Mrs. Kipp by any employee or representative of the ... District.

Item 4[:] Any and all detailed cell phone bills for the taxpayer-funded cell phone of Benner Elementary School Principal Kristopher Vancas between the dates of October 10, 2017 and the present. "Detailed cell phone bills" means itemized details of all calls and texts (this information should be available online from the cell phone provider).

Item 5[:] All emails and/or email attachments sent or received between the dates of October 10, 2017 and the present that have the work email address (msimpson@basd.net) of Human Resources Director Michelle [Simpson] in any of the following e-mail address fields: From:; To:; Cc:; Bcc:; ... **and** which have any or all of the following work e-mail addresses in the From:; To:; Cc:; Bcc: fields: [list of 11 Benner Elementary teachers' email addresses, the PSEA regional representative's email address and three attorneys' email addresses] ... **and** which, in part or in whole, relates to (a) the workplace duties, expectations, behaviors or performance of Benner Elementary teacher Lynn Kipp, and/or (b) any complaint or other allegation of workplace wrongdoing made against Mrs. Kipp by any employee or representative of the ... District.

Note: Item 5 records are requested in their original format, with metadata, consistent with the attached ruling of the Court of Common Pleas of Philadelphia County.

Item 6[:] Any and all detailed cell phone bills for the taxpayer-funded cell phone of Human Resources Director Michelle Simpson between the dates of October 10, 2017 and the present. "Detailed cell phone bills" means itemized details of all calls and texts (this information should be available online from the cell phone provider).

Item 7[:] All emails and/or email attachments sent or received between the dates of January 1, 2018 and the present that have the work email address (cbeard@beardlegalgroup.com) of Carl Beard, legal representative of the ... District, in any of the following e-mail address fields: From:; To:; Cc:; Bcc:; ... **and** which have any or all of the following work e-mail addresses in the From:; To:; Cc:; Bcc: fields: [list of two Benner Elementary teachers' email addresses, the PSEA regional representative's email address, two attorney email addresses and nine District School Board Directors' email addresses] ... **and** which, in part or in whole, relates to (a) the workplace duties, expectations, behaviors or performance of Benner Elementary teacher Lynn Kipp, and/or (b) any complaint or other

allegation of workplace wrongdoing made against Mrs. Kipp by any employee or representative of the … District.

Note: Item 7 records are requested in their original format, with metadata, consistent with the attached ruling of the Court of Common Pleas of Philadelphia County.

Item 8[:] Video surveillance showing (at a minimum) footage between the hours of 11:00 am to 12:00 pm on October 13, 2018 as recorded by any and all video cameras installed at the Benner Elementary School [("Benner")], and which shows footage of any or all of the following persons:

- Barbara Potter, Secretary, [Benner]
- Kristopher Vancas, Principal, [Benner]
- Lynn Kipp, Teacher, [Benner]
- Michelle Simpson, Human Resources Director for the school district.

Item 9[:] All written correspondence exchanged between … [D]istrict officials/representatives and union officials/representatives between the dates of January 1, 2018 and the present, that relate to the "Meet and Discuss" requirements of Article 7 of the collective bargaining agreement between the … [D]istrict and the Bellefonte Education Association.

On March 15, 2019, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the District partially denied the Request by providing certain records, withholding others, and, claiming that portions of the Request are insufficiently specific. 65 P.S. § 67.703. The District also asserted that portions of the Request do not document a transaction or activity of the District and certain records are personnel records, 65 P.S. § 67.708(b)(7), contain personal identification information, 65 P.S. § 67.708(b)(6), reflect internal predecisional deliberations, 65 P.S. § 67.708(b)(10), pertain to strategy or negotiations relating to labor relations, 65 P.S. § 67.708(b)(8), are notes and working papers of a public official or employee, 65 P.S. § 67.708(b)(12),[1] relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17), and are protected by the right to privacy, attorney-client privilege and attorney work-product doctrine.

[1] However, the District has not advanced this argument on appeal.

On March 29, 2019, the Requester appealed to the OOR,[2] challenging the District's denial of Items 3-9 of the Request. The OOR invited the parties to supplement the record and directed the District to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On April 15, 2019, the District provided notice to Brian Landis, of PSEA[3] UniServ of the pendency of this appeal. Neither Mr. Landis nor PSEA requested to participate on appeal.

On April 17, 2019,[4] the District submitted a position statement reiterating its grounds for denial. In support of its position, the District submitted the attestations, made under penalty of perjury, of Elizabeth Benjamin, Esq., legal counsel to the District, Kristopher Vancas, the District's Elementary School Principal, Michelle Simpson, the District's Human Resource Director, Kenneth Bean, the District's Director of Fiscal Affairs and Aaron Barto, the Director of the District's Physical Plant.

On April 23, 2019, the Requester submitted a position statement disputing the veracity of the District's attestations, arguing that the assertions made in the District's affidavits are conclusory and that the District has not met its burden of proving the claimed exemptions.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets,

[2] The Requester granted the OOR an extension of time to issue a final determination in this matter until May 20, 2019. 65 P.S. § 67.1101(b)(1).
[3] Pennsylvania State Education Association.
[4] The OOR granted the District an extension of time to make a submission until April 17, 2019. *See* 65 P.S. § 1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an 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. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the

Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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)). Likewise, "[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. Items 3, 5 and 7 of the Request are sufficiently specific

The District argues that Items 3, 5 and 7 of the Request are insufficiently specific. Section 703 of the RTKL states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as 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*, 990 A.2d 813). 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 timeframe for which records are sought. *Pa. Dep't of Educ.*, 119 A.3d at 1124-25. Finally, "[t]he fact that a request is burdensome does

not deem it overbroad, although it may be considered as a factor in such a determination." *Pa. Dep't of Envtl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012).

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 367. 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 overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

Items 3, 5 and 7 of the Request seek email communications between Mr. Vancas (Benner Principal), Ms. Simpson (District Human Resources Director) and Carl Beard, Esq. (District legal representative) and a specific list of senders and recipients each identified by an email address. Items 3, 5 and 7 further describe two topics specifically related to teacher Lynn Kipp that should be contained in the emails.

Seeking all records related to a topic or topics does not necessarily make a request insufficiently specific; however, a request must provide enough specificity in its scope and timeframe to help guide the agency in its search for records. *See Office of the Governor v. Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016) (holding that "although [the] keyword list is lengthy and in some respects broad, in consideration of the narrow timeframe and scope of

the [request].... [the] request, on balance, meets the specificity requirement..."); *cf. Montgomery County v. Iverson*, 50 A.3d 281 (finding that a request with no timeframe, a broad scope, and some "incredibly broad" keywords was insufficiently specific).

Here, Items 3, 5 and 7 of the Request provide the names and email addresses of the senders and recipients of the requested emails, thereby identifying a discrete group of documents. Items 3, 5 and 7 also describe the subject matter of the records sought ("(a) the workplace duties, expectations, behaviors or performance of Benner Elementary teacher Lynn Kipp, and/or (b) any complaint or other allegation of workplace wrongdoing made against Mrs. Kipp by any employee or representative of the ... District") and the topics include potential keywords that may be used to facilitate a search for records. The Request also establishes a finite timeframe (October 10, 2017 or January 1, 2018 to the date of the Request). In addition, Attorney Benjamin attests that the District's IT staff member, Eric Funk, conducted a good faith search of the District's email server utilizing potentially responsive search terms that produced 987 emails of which, 113 emails were responsive to Item 3, 177[5] emails were responsive to Item 5, and 9 emails were responsive to Item 7. *See Easton Area School Dist. v. Baxter,* 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012) (noting that "the request was obviously sufficiently specific because the School District has already identified potential records included within the request"). Taken as a whole, Items 3, 5 and 7 of the Request are sufficiently specific to enable the District to conduct a search for records. *See Iverson*, 50 A.3d at 284 (holding that "the specificity of a request must be construed in the request's context, rather than envisioning everything the request might conceivably encompass"); *Legere*, 50 A.3d at 264-265 (holding that, because a request delineated "a clearly-defined universe of

[5] There appears to be a typographical error in paragraph 17 of Attorney Benjamin's attestation, in that she states that the District uncovered 117 responsive emails, while in the remaining paragraphs of the attestation, 177 responsive emails are referenced.

documents[,]" there was no need to make a judgment call as to whether any records were related to the request); *St. Hilaire v. Camp Hill Borough*, OOR Dkt. AP 2017-0416, 2017 PA O.O.R.D. LEXIS 465 (finding that a request for all emails and text messages to and from police officers, employees and council members regarding RTKL requests in 2016 was sufficiently specific).

2. Item 9 of the Request is insufficiently specific

Item 9 seeks written correspondence exchanged between "district officials/representatives and union officials/representatives… that relate to the 'Meet and Discuss' requirements of Article 7 of the collective bargaining agreement between the … [D]istrict and the Bellefonte Education Association." Item 9 contains a finite timeframe, January 1, 2018 to the date of the Request. While Item 9 provides a general subject matter, the "Meet and Discuss" requirements, based on a review of District Board policy 427, the purpose of the "Meet and Discuss" process encompasses "matters of concern impacting wages, hours, terms and conditions of employment not required to be bargained" and, in the event that a "Meet and Discuss" is requested, the items to be considered "shall be submitted to the Board in writing by the Association to the [District] Superintendent's office." Accordingly, as worded, Item 9 of the Request could encompass many different matters which may be addressed by the process. More importantly, however, Item 9, unlike the other Items, does not identify any sender(s) or recipient(s) of the written communications. The scope of potential District "employees/representatives" is very broad and may potentially include numerous third parties outside of the District, including legal counsel.

Therefore, based upon the factors enunciated in *Pa. Dep't of Educ.*, without a more refined scope, Item 9 of the Request is insufficiently specific. *See also Iverson,* 50 A.3d 281 (holding that a request was not sufficiently specific because it was not limited by sender or recipient); *Petrarca v. Pa. Dep't of Transp.*, OOR Dkt. AP 2017-1042, 2017 PA O.O.R.D. LEXIS 1408 (finding that

a request for reports, correspondence or other communications regarding "alleged, or founded, incidents of racism in District 12" over a period of five years, without identifying the senders or recipients, is insufficiently specific).[6]

3. The District has proven that certain emails responsive to Items 3, 5 and 7 are exempt from disclosure under the RTKL

Item 3 of the Request seeks emails and attachments between the Mr. Vancas, eleven school teachers, Ms. Simpson and a PSEA regional representative regarding the "workplace duties, expectations, behaviors or performance of [District] teacher Lynn Kipp, and/or any ... complaint or other allegation of wrongdoing made against Mrs. Kipp" by an employee or a representative of the District.

Item 5 of the Request seeks emails and attachments between the Ms. Simpson, eleven school teachers, a PSEA regional representative and three attorneys regarding the "workplace duties, expectations, behaviors or performance of [District] teacher Lynn Kipp, and/or any ... complaint or other allegation of wrongdoing made against Mrs. Kipp" by an employee or a representative of the District.

Item 7 of the Request seeks emails and attachments between the District's legal representative, Carl Beard, Esq. and two school teachers, the PSEA regional representative, two attorneys, and nine District School Board Directors, regarding the "workplace duties, expectations, behaviors or performance of [District] teacher Lynn Kipp, and/or any ... complaint or other allegation of wrongdoing made against Mrs. Kipp" by an employee or a representative of the District.

[6] However, the Requester is not precluded from filing a new request with the District to include additional details to guide the District's search for responsive records.

The District withheld all 299 of the emails identified as responsive to Items 3, 5 and 7 of the Request. The District argues that these records are exempt from disclosure because they are protected by attorney-client privilege; are records relating to an agency employee, including "a letter of reference or recommendation," "a performance rating or review," "written criticisms of an employee," and "[g]rievance material, including documents related to discrimination or sexual harassment[,]" 65 P.S. §§ 67.708(b)(7)(i), (ii), (vi), (vii); are records "pertaining to strategy or negotiations relating to labor relations or collective bargaining[,]" 65 P.S. § 67.708(b)(8)(i); are draft documents, 65 P.S. § 67.708(b)(9); reflect internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A); and relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17).

a. Attorney-Client Privilege and Attorney Work Product Doctrine

The RTKL defines "privilege" as "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102. Privileged records are not public records under the RTKL. *Id.*

For the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139

("Simply invoking the phrase 'attorney-client privilege' or 'legal advice' does not excuse the agency from the burden it must meet to withhold records"). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client's goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001). The Commonwealth Court has confirmed that, after an agency establishes the privilege was properly invoked under the first three prongs outlined above, the party challenging invocation of the privilege must prove waiver under the fourth prong. *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

The attorney-work product doctrine, in turn, prohibits disclosure "of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa.R.C.P. 4003.3. The Pennsylvania Supreme Court has explained that the attorney-work product doctrine "manifests a particular concern with matters arising in anticipation of litigation." *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that "[t]he 'work product rule' is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation"); *see also Heavens v. Pa. Dep't of Envtl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) ("[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked").

In support of the District's position, Attorney Benjamin attests that she is an attorney who is licensed to practice law in the Commonwealth of Pennsylvania, is employed by the Beard Legal Group, P.C., which serves as special legal counsel to the District, and that she is a member in good

standing with the Pennsylvania Bar. Attorney Benjamin attests that Carl Beard, Esq. ("Attorney Beard") is likewise a licensed attorney in good standing with the Bar of Pennsylvania.

Regarding Item 3, Attorney Benjamin attests the following:

> 11. Two of the 113 email items[7] consist of an email exchange between Attorney ... Beard, [Mr.] Vancas, Tammy Burnaford [("Ms. Burnaford")],[8] Superintendent Michelle Saylor, and ... [Ms.] Simpson in which the District Staff Members are forwarding information to Attorney Beard in which they comment on said information and ask for legal advice relative to a grievance and materials related to said grievance, and in which Attorney Beard responds providing legal advice and opinions, as well as attorney work product in response to the client's communication. The only persons who received or sent these emails, aside from Attorney Beard and his legal assistant Regina Fisher, were ... District employees.

Under the RTKL, an attestation 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); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the District has acted in bad faith, "the averments in [the attestations] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)).

Based on the evidence presented, as well as the nature of the Request, in that the subject matters of the communications sought relate to an employment matter and complaint allegations regarding Ms. Kipp, which one may reasonably infer could result in the filing of a grievance, the District has demonstrated that the attorney-client privilege was properly invoked for two of the 113 emails that are responsive to Item 3 of the Request. Moreover, the Requester has not proven

[7] In footnote 1 of Attorney Benjamin's attestation, the District explains that "[e]mail items refer to an email produced within Microsoft Outlook data files and not any duplicates of said email or other emails within an email thread appearing below it."

[8] While not specifically identified by the District, a review of the District's letterhead on its Final Response indicates that Ms. Burnaford is the District's Assistant Superintendent.

that, the District waived the privilege. While the Requester argues that Attorney Benjamin may not argue attorney-client privilege because she is not the holder of the privilege, here, the District asserted the privilege in its denial letter and Attorney Benjamin is advancing the argument on *behalf of* the District, not on her own behalf. Accordingly, the District has demonstrated that the two responsive emails referenced in ¶ 11 of Attorney Benjamin's attestation are protected by the attorney-client privilege.[9] *See* 65 P.S. § 67.102. Accordingly, the District has demonstrated that the two responsive emails are protected by the attorney-client privilege. *See* 65 P.S. § 67.102.

Regarding Item 5, Attorney Benjamin attests that 58 of the 117 responsive emails consist of email items "addressed to or from, or otherwise forwarding email items to or from the … Beard Legal Group … and specifically[,] Attorney … Beard[]" and that the emails were exchanged solely with District employees including Ms. Simpson, Mr. Vancas, Ms. Burnaford and Leslie Elder ("Ms. Elder").[10] Attorney Benjamin further attests, in pertinent part, that:

> 21. With the exception of certain email items contained within threads that address solely proposed dates for hearings and meetings, all of the emails sent to Attorney Beard were relaying information for purposes of securing legal advice and/or review, and all of the emails issued in response to or otherwise from Attorney Beard consist of communications made for the purposes of providing legal advice, or otherwise consists of attorney work product, impressions, and/or strategy relative to inquiries about the confidential client information relayed.
>
> 22. Additionally, the content of the attorney-client communications … discussed proposed courses of action relative to employee discipline and investigations of internal employee complaints, as well as grievance and arbitration matters.
>
> 23. Additionally, 1 email produced consists of an email in which the … District Solicitor Scott Etter provides legal advice on a grievance matter to…[Ms.]

[9] The District does not identify the responsive emails in a more detailed fashion, *i.e.* by Bates number, date, author or recipient. In addition, the Requester declined a request from the OOR to extend the due date of this final determination so that the OOR could order the District to produce an exemption log and have sufficient time to review the log and/or determine whether it would be appropriate to order production of records for *in camera* review. As a result, we are constrained to address the responsive emails by referring to the applicable paragraph in Attorney Benjamin's attestation.

[10] Ms. Elder is the District's Open Records Officer.

> Simpson, [Ms.] Saylor, [Mr.] Bean, and Board President Rodney Musser and includes no other individuals on the email.
>
> 24. Based on information and belief, it is my understanding that [Attorney] Etter serves as the Solicitor for the ... District, is a practicing attorney, and is a member in good standing with the Bar of Pennsylvania.

Again, as the subject matter of Item 5 is nearly identical to Item 3, based on the evidence presented, as well as the nature of the Request, the District has demonstrated that the attorney-client privilege was properly invoked for emails responsive to Item 5, as referenced in ¶¶ 19-24 of Attorney Benjamin's attestation. Moreover, the Requester has not proven that the District waived the privilege.

However, the District acknowledges that emails within the email threads contain "solely proposed dates for hearing and meetings." Courts have held that general or factual information through which no legal advice is sought, or records that do not reveal any information that is protected by the attorney-work product doctrine or consist of routine responsibilities associated with the operations of the District, such as scheduling meetings, are subject to public access. *See Scarcella v. City of Sunbury*, OOR Dkt. AP 2015-2895, 2016 P.A. O.O.R.D. LEXIS 450 (holding that the factual content of a report prepared for an attorney and withheld under the attorney-client privilege and attorney-work product doctrine was subject to public access); *Office of the Governor v. Davis*, 122 A.3d 1185 (Pa. Commw. Ct. 2015) (citing *Gillard*, 15 A.3d at 52 n.8 (Pa. 2011)). Additionally, neither privilege protects facts. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981) (privilege extends only to communications and not to underlying facts); *Philadelphia v. Westinghouse Electric Corp.*, 2015 F. Supp. 830, 831 (E.D. Pa. 1962) (the protection of the privilege only extends to communications and not to facts). Therefore, the "threads that address solely proposed dates for hearings and meetings" are subject to access.

Regarding Item 7, the District asserts that 2 of the 9 responsive emails are protected by the attorney-client privilege. Attorney Benjamin attests the following, in pertinent part:

> 34. Two other emails of the 9 responsive items consist of emails from Michelle Simpson and Tammie Burnaford, respectively, to Attorney Carl Beard providing information and requesting legal advice on said information. No other persons other than Attorney Beard and other employees of the District are included in these two emails.

Again, as the subject matter of Item 7 is nearly identical to Item 3, based on the evidence presented, as well as the nature of the Request, the District has demonstrated that the attorney-client privilege was properly invoked for 2 of the 9 emails responsive to Item 7 referenced in ¶ 34 of Attorney Benjamin's attestation.

Finally, the Request also seeks email attachments and the District fails to address whether the responsive emails have attachments and whether the material is privileged. Because the District has failed to prove that any attachments to the privileged emails are also protected by the attorney-client privilege, to the extent that they exist, the OOR is constrained to grant access to any attachments to the emails responsive to Items 3, 5 and 7. *See* 65 P.S. § 67.708(a)(1).

b. Noncriminal Investigations – Section 708(b)(17) of the RTKL

The District argues that 58 of the 113 emails responsive to Item 3, and 105 of the 177 emails responsive to Item 5 of the Request are exempt from disclosure because they relate to a noncriminal investigation regarding a claim of harassment involving Ms. Kipp. *See* 65 P.S. § 67.708(b)(17). The District asserts that the emails are exempt from disclosure because they "expressly seek[] any complaints or allegations of workplace wrongdoing made against [Ms. Kipp] which would and do pertain to a non-criminal investigation." The District further asserts that the 58 responsive emails consist of or relate to, among other things, issues that were "made part of or a record of a non-criminal investigation pertaining to complaints of harassment and other

workplace-based complaints directed to or otherwise relayed among Principal Vancas and the other employees listed within the ... Request" as well as records of discipline and complaints that resulted in discipline, records of other District staff members that resulted in the noncriminal investigations and records that identify minors under the age of 17 and the names of their parents making complaints about District employees.

Section 708(b)(17) of the RTKL exempts from disclosure "[a] record of an agency relating to a noncriminal investigation, including ... [c]omplaints submitted to an agency... [and i]nvestigative materials, notes, correspondence and reports" or a record that, if disclosed, would "[c]onstitute an unwarranted invasion of privacy." 65 P.S. §§ 67.708(b)(17)(i)-(ii); 65 P.S. § 67.708(b)(17)(vi)(C). To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe must be "conducted as part of an agency's official duties." *Id.* at 814. An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep't of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

In *Chawaga*, the Commonwealth Court held that a performance audit was not part of the Department's legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department's public assistance services. 91 A.3d at 259. Pursuant to *Chawaga*, the OOR has noted that "[n]ot all agency fact-finding constitutes a 'noncriminal investigation' subject to the protections of the RTKL." *Hopey v. Pa. Dep't of Corr.*, OOR Dkt. AP 2014-1739,

2014 PA O.O.R.D. LEXIS 1318; *see also Katz v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2014-1572, 2014 PA O.O.R.D. LEXIS 1338.

In support of the District's position, Ms. Simpson attests, in pertinent part, as follows:

> 5. [A]n internal Human Resource Department investigation was conducted relative to complaints regarding the identified subject matter of Item 5 of the ... Request, i.e., the workplace performance and behavior/conduct of Lynn Kipp, and that the allegation to conduct said investigation arises as a part of my duties as the Human Resource Director and Board Policy identifying and establishing that investigations will be conducted and that complaints of the nature made.

In further support of the District's position, Attorney Benjamin attests regarding Item 3 of the Request the following:

> 15. ... 58 of the 113 email items consist of matters that relate to and underly issues that were made part of or are records of a non-criminal investigation and discipline issued to a ... District employee including records of said discipline, anecdotal information supporting said discipline, the complaints that led to the investigation which resulted in said disciplinary process and the responses of the employee addressing the same.
>
> 16(a). 3 of the 58 email items consist of administrators discussing proposed course[s] of action relative to the administration of said discipline and draft disciplinary documents[.]
>
> 16(b). 11 of the 58 email items consist of or otherwise discuss complaints made to the District ... by parents of District students which would serve to identify the elementary students and the parents making said complaints, as well as responses from the teachers regarding those complaints[.]
>
> 16(c). 44 of the 58 email items consist of emails exchanged regarding proposed courses of actions for scheduling to discuss disciplinary matters, complaints from other staff member that resulted in the non-criminal investigation supporting said discipline issued and/or pursued against the employee, and the disciplinary process pertaining to the same, as well as the responses of the accused employee regarding the issues resulting in said discipline, these emails contain written criticisms of various employees and constitute records of a non-criminal investigation as well as anecdotal information in support of the District's internal disciplinary process.
>
> They likewise discuss proposed courses of action and/or otherwise contain information purely factual in nature such as an email confirmation confirming what time a meeting is taking place.

Regarding Item 5 of the Request, Attorney Benjamin attests the following:

> 25. 78 of the 177 emails pertain to complaints relayed to…[Ms.] Simpson, and/or her responses to regarding a proposed course of action or other information relevant to the investigation of said complaints, including written criticisms of employees as well as discussions of proposed courses of action between employees within the…District. The Complaints at issue within these email items pertain to intended actions and information for consideration within investigations of assertions of unlawful harassment and complaints about or pertaining to specific employees, and/or the forwarding of email items addressing said matters, and/or scheduling of meetings regarding said matters.
>
> 29. 27 of the 177 email items consist of emails forwarded or authored to or from … Ms. Simpson regarding matters for consideration of a proposed course of action relative to employee discipline and/or potential investigation of complaints that involved deliberation over how to handle said complaints and/or disciplinary matters and/or otherwise attached documents underlying or relevant to investigation and discipline to be imposed against specific employees and/or for purposes of receiving…Ms. Simpson's input on said actions pertaining to employees.

The Pennsylvania Public School Code of 1949 ("Code"), provides that school districts are authorized to "adopt and enforce reasonable rules and regulations as it may deem necessary, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers and other appointees or employes during the time they are engaged in their duties to the [D]istrict." 24 P.S. § 5-510. In addition, the Code also provides that schools "are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of this act." 24 P.S. § 2-211. Further, a review of the District's School Board policies show that it has adopted Policy No. 417 "Professional Employees -- Disciplinary Procedures," which provides:

> All professional employees are expected to conduct themselves in a manner consistent with appropriate and orderly behavior. Effective operation of district programs requires the cooperation of all employees working together under a system of policies and rules applied fairly and consistently. The orderly conduct of the district's functions requires compliance with these policies and rules, and consistent penalties and disciplinary procedures for violations.

Additionally, Board Policy 426 provides that "[i]t is the Board's intent to establish reasonable and effective means of resolving conflicts among employees, to reduce potential areas of complaints, and to establish and maintain recognized two-way channels of communication between supervisory personnel and professional employees for situations not covered by the terms of a collective bargaining agreement." Board Policy 426 includes Guidelines outlining the District complaint process.[11]

The Requester argues that the District has failed to present evidence of "any lawful noncriminal investigation." The Requester also asserts that the "HR director conducted an unlawful inquiry into the workplace performance and behavior/conduct of Lynn Kipp" and Ms. Simpson's attestation does not provide a lawful basis for an investigation. However, the Code and District Board policies provide the legal authority to the District and more particularly, Ms. Simpson and other District staff, to conduct a noncriminal investigation of District employees and related complaints. Based upon the express language of Items 3 and 5, that seek, among other things, records of "any complaint or other allegation of workplace wrongdoing made against Mrs. Kipp," portions of the Request facially seek internal investigative records that were generated during the noncriminal investigation conducted by the District. *See Pa. Game Comm'n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal materials when determining whether an exemption applies). Accordingly, the District has demonstrated that the emails addressed in Ms. Simpson's attestation at ¶5, and Attorney Benjamin's attestation at ¶¶15-16, 25 and 29 are exempt from disclosure pursuant to 65 P.S. § 67.708(b)(17). *See* 65 P.S. § 67.708(a)(1); *see also Dismuke v. Reading Sch. Dist.*, OOR Dkt. AP 2015-1845, 2015 PA O.O.R.D. LEXIS 1841 (finding a complaint related to employee

[11] *See* https://go.boarddocs.com/pa/bellasd/Board.nsf/Public?open&id=policies#.

misconduct or harassment was exempt where the agency raised Section 708(b)(17) and proved that a noncriminal investigation was conducted in response to the complaint).

6. **The District has not proven that certain emails responsive to Items 3, 5 and 7 are exempt from disclosure under the RTKL**

a. Exempt employee information – Section 708(b)(7) of the RTKL

The District asserts that emails responsive to Items 3, 5 and 7 of the Request are exempt from disclosure because they contain exempt employee information. More specifically, the District asserts that the records contain grievance material pertaining to a specific employee, discussions between District staff members about the proposed course of action in connection with the grievance, information pertaining to potential discipline, notices and responses to potential discipline and written criticisms.

Section 708(b)(7) of the RTKL exempts from disclosure certain "records relating to an agency employee," including "[g]rievance material, including documents related to discrimination or sexual harassment." 65 P.S. § 67.708(b)(7)(vii). The RTKL does not define "grievance material"; however, the OOR has stated that it "must be related to a grievance filed by an agency employee and includes a grievance filed related to the conduct of an individual agency employee, internal agency reviews of the basis of the grievance, and materials created during the grievance process on behalf of the agency or individual agency employee." *Wolf v. City of York*, OOR Dkt. AP 2014-1226, 2016 PA O.O.R.D. LEXIS 68.

In support of the District's argument, Attorney Benjamin attests, in pertinent part, the following:

> 12. 7 of the 113 email items relating to Item 3 pertain to discussions between Staff Members regarding a grievance and material related to said grievance, as well as proposed courses of action for addressing said grievance....

> 27. 8 of the 177 email items [relating to Item 5] pertain to a pending grievance, grievance appeal, and responses to said grievance proceedings, as well as emails regarding scheduling of meetings pertinent to the same....
>
> 32. 7 of the 9 email items [relating to Item 7] consist of discussions of or attach grievance material, i.e. correspondence regarding a pending grievance by a specific employee about discipline against that employee, and responses to said grievance, and/or Loudermill notices and responses regarding potential discipline of a specific employee, which constitute information pertaining to discipline and include allegations consisting of written criticisms of the employee as well as references [to] complaints made by other employees.
>
> 33. Two emails of the 7 emails items referenced above were authored by Lynn Kipp and copied the Board of School Directors and may have [been] intended by Ms. Kipp to be presented for purposes of deliberation over a grievance proceeding.

While an affidavit made under the penalty of perjury is competent evidence to sustain an agency's burden of proof, *see Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909, merely parroting the language of the exemption based upon which records are withheld from public access is not adequate to meet an agency's burden of proof. *See Scolforo v. Office of the Governor*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records").

Here, the withheld materials may potentially be exempt grievance material; however, the District has neither identified the grievance filed in any way, nor has it described, even in general terms, the contents of those records it is claiming to be "regarding a grievance." *Cf. Wolf, supra.* (records withheld as grievance material described with details such as grievance number, step in grievance process, draft settlement document). Further, with respect to the two emails identified as being authored by Ms. Kipp, the District is merely speculating that its purpose "*may have [been] intended* ... to be presented for purposes of deliberations over a grievance process." This assertion is merely conclusory. *Scolforo*, 65 A.3d at 1103. Therefore, based upon the evidence provided, the District has failed to demonstrate that the records responsive to Items 3, 5 and 7 addressed in

Attorney Benjamin's attestation at ¶¶ 12, 27, 32-33 are exempt from disclosure under Section 708(b)(7). *See Chirico v. Cheltenham School Dist.*, OOR Dkt. AP 2017-1984, 2018 PA O.O.R.D. LEXIS 27; 65 P.S. § 67.708(a)(1).

The District further asserts, through Ms. Benjamin's attestation at ¶ 13, that two of the six emails responsive to Item 3 attach a letter of recommendation for Ms. Kipp prepared by Mr. Vancas. In addition, the District asserts that the remaining emails addressed in ¶13 and one email responsive to Item 5 addressed in ¶28, are exempt from disclosure because they a consist of proposed courses of action and deliberations related to the letter of recommendation for Ms. Kipp. Section 708(b)(7)(i) expressly exempts "a letter of reference or recommendations...." 65 P.S § 67.708(b)(7)(i). Accordingly, the actual recommendation letter attached to the two emails responsive to Item 3 are exempt from disclosure under Section 708(b)(7)(i). However, as the emails themselves do not constitute letters of reference, they are subject to public disclosure. The District also asserts that the emails themselves reflect internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A). This portion of the District's argument be will be addressed below.

The District also argues that 40 emails responsive to Item 3, addressed in ¶14 of Attorney Benjamin's attestation, and 4 emails responsive to Item 5, addressed in ¶26, consist of exempt employee information. More specifically, the District asserts that the emails contain discussions among District Staff of issues underlying Ms. Kipp's performance evaluation and related proposed courses of action. Employee performance reviews are expressly exempt from disclosure under Section 708(b)(7)(ii). *See* 65 P.S. 67.708(b)(ii). However, the District has failed to present non-conclusory evidence that the material contained in the emails themselves are part of the actual performance review record. Although the material contained in the emails may potentially be used to measure or evaluate an employee's performance, no evidence has been presented to demonstrate

that the emails constitute Ms. Kipp's *performance review*. *Golla v. Pennsylvania Dep't of Corr.*, OOR Dkt. AP 2013-1747, 2013 PA O.O.R.D. LEXIS 1017 ("Although the records may eventually be reviewed as part of an employee's performance review, the records themselves are not a "performance review" or rating") (citing *Kurutz and The Murraysville Star v. Franklin Reg. Sch. Dist.*, OOR Dkt. AP 2012-1178, 2012 PA O.O.R.D. LEXIS 1125). *But cf. Grove v. Penns Valley Area Sch. Dist.*, OOR Dkt. AP 2018-1926, 2018 PA O.O.R.D LEXIS 1536 (finding certain emails identified in an exemption log and supported by sworn factual evidence were a performance rating or review). Accordingly, the District has not demonstrated that the emails addressed in ¶¶14 and 26 of Attorney Benjamin's attestation are an exempt employee performance review. *See* 65 P.S. § 67.708(a)(1).

The District also argues that the emails responsive to Item 7, addressed in ¶32 of Attorney Benjamin's attestation, are exempt from disclosure because they contain written criticisms of an employee. *See* 65 P.S. § 67.708(b)(7)(vi). Section 708(b)(7) of the RTKL exempts from disclosure certain records relating to an agency employee, including "[w]ritten criticisms of an employee," 65 P.S. § 67.708(b)(7)(vi), and the purposes of the request are not relevant to that determination. *See Perrine v. Lakeview Sch. Dist.*, OOR Dkt. AP 2009-0374, 2009 PA O.O.R.D. LEXIS 239; *Johnson v. Pa. Convention Ct. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012) (Section 708(b)(7) applies whenever there is criticism of individuals who are employees of the agency). Attorney Benjamin's attestation indicates that the grouping of emails discussed in ¶32 includes, "allegations consisting of written criticisms of the employee as well as references [to] complaints made by other employees." To the extent that the emails addressed in ¶32 contain non-exempt material subject to disclosure, the employee written criticisms and formal complaints may be redacted from the emails that are provided to the Requester.

b. Records relating to labor relations or collective bargaining – Section 708(b)(8) of the RTKL

Regarding the records responsive to Items 3, 5 and 7 addressed in Attorney Benjamin's attestation at ¶¶ 12, 27, 32-33, the District also argues that these records may be withheld under Section 708(b)(8)(i) of the RTKL, which exempts from disclosure "[a] record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings." 65 P.S. § 67.708(b)(8)(i). However, similar to the District's claim based on Section 708(b)(7) of the RTKL, the conclusory evidence fails to establish that the responsive records pertain to any strategy or negotiation relating to the collective bargaining agreement ("CBA") or that District was negotiating or renegotiating the terms of the CBA at the time the unidentified grievance was filed. *Scolforo*, 65 A.3d at 1103; s*ee also Knowles v. Upper Perkiomen School Dist.*, OOR Dkt. AP 2018-1662, 2018 PA O.O.R.D LEXIS 1446; 65 P.S. § 37.708(a)(1). Accordingly, the District has not carried its burden of proving that the emails addressed in ¶¶ 12, 27, 32-33 of Attorney Benjamin's attestation are exempt labor relations or collective bargaining records. *See* 65 P.S. § 67.708(a)(1).

c. Draft policy – Section 708(b)(9) of the RTKL

The District argues that the emails responsive to Item 3, addressed in ¶13 of Attorney Benjamin's attestation relating to Ms. Kipp's letter of recommendation, are exempt as draft documents under 65 P.S. § 67.708(b)(9). Section 708(b)(9) exempts from disclosure "[t]he draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency." 65 P.S. § 67.708(b)(9). This exemption covers only drafts that fall into the categories identified by the statute. *See, e.g., Public Interest Legal Foundation v. City of Phila. Office of City Commissioners*, OOR Dkt. AP 2018-0256, 2018 PA O.O.R.D. LEXIS 562 (drafts of transcripts do not meet the categories identified by the exemption).

Here, the responsive records have been identified as emails. The District has not presented evidence that the emails qualify as one of the draft records expressly delineated in Section 708(b)(9) or that such an exempt record is an attachment to the responsive emails. Accordingly, the District has not met its burden of proving that the emails addressed in ¶13 are exempt draft records under Section 708(b)(9) of the RTKL. *See* 65 P.S. § 67.708(a)(1).[12]

d. Internal, predecisional deliberations – Section 708(b)(10)(i)(A) of the RTKL[13]

Section 708(b)(10)(i)(A) exempts from public disclosure a record that reflects:

> [t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, … or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

To establish that records are deliberative, an agency must show that the information relates to the deliberation of a particular decision. *McGowan* 103 A.3d at 378-88. The term "deliberation" is generally defined as "[t]he act of carefully considering issues and options before making a

[12] The District also asserted Section 708(b)(9) as an exemption with respect to the emails responsive to Item 5, addressed in Attorney Benjamin's attestation at ¶29. However, because we have determined that those materials are exempt as relating to a noncriminal investigation, 65 P.S. § 67.708(b)(17), it is not necessary to consider the additional grounds for denial asserted for this set of records.

[13] In addition to Section 708(b)(10)(i)(A), the District also cites *Nelle v. Penn-Delco School Dist.*, OOR Dkt. AP 2009-0478, for the proposition that internal communications among employees are not subject to disclosure. However, a review of *Nelle* reveals the OOR held that communications among employees in their *individual* capacities are not records of the agency because they do not involve an agency business or transaction, not that internal employee communications are generally exempt. Accordingly, as this matter is factually distinguishable from *Nelle*, it will not be considered.

decision or taking some action..." BLACK'S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep't of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, aff'd No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014).

To be deliberative in nature, a record must make recommendations or express opinions on legal or policy matters and cannot be purely factual in nature. *Kaplin*, 19 A.3d at 1214. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan*, 103 A.3d at 382-83. However, factual material can still qualify as deliberative information if its "disclosure would so expose the deliberative process within an agency that it must be deemed excepted"; or in other words, when disclosure of the factual material "would be tantamount to the publication of the [agency's] evaluation and analysis." *Id.* at 387-88 (*citing Trentadue v. Integrity Communication*, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

The District argues that the email records responsive to Items 3, 5 and 7 addressed in Attorney Benjamin's attestation paragraphs ¶¶ 12-14, 26-28, and 32 reflect internal, predecisional deliberations not presented to a quorum of the School Board.[14] The District asserts that the emails contain various proposed courses of internal action including those pertaining to a grievance, as well as the proposed disciplinary action and Ms. Kipp's performance evaluation.

The records were internal to the agency as only District employees identified by name or more generally as "Staff Members" sent or received them. The records were predecisional because they occurred before a decision was made. However, the affidavit contains only conclusory statements as to the deliberative nature of the emails identified in ¶¶ 12-14, 26-28 and 32, without

[14] The District also asserts that the material addressed in ¶29 of Attorney Benjamin's attestation reflects internal, predecisional deliberations; however, as we have already determined that the records are exempt because they relate to a noncriminal investigation, it is not necessary to consider this additional asserted basis for exemption.

any description of the purpose of the deliberations or deliberative content. Therefore, the District has not met its burden of proof. *See* 65 P.S. § 67.708(b)(10)(i)(A); *McGowan*, 103 A.3d at 378-88.

7. The District may redact personal telephone and email addresses

Items 4 and 6 seek the detailed cell phone bills for Mr. Vancas and Ms. Simpson. The District asserts that it has provided records responsive to Items 4 and 6 of the Request, but that it has redacted personal cellphone numbers, including District-issued numbers, pursuant to Section 708(b)(6) of the RTKL, 65 P.S. § 67.708(b)(6).

Section 708(b)(6) of the RTKL exempts from disclosure "a record containing ... home, cellular or personal telephone numbers [and] e-mail addresses...." 65 P.S. § 67.708(b)(6); *see also Office of the Lieutenant Governor v. Mohn*, 67 A.3d 123 (Pa. Commw. Ct. 2013) (finding that government-issued email addresses are "personal" under Section 708(b)(6)); *Office of the Governor v. Raffle*, 65 A.3d 1105 (Pa. Commw. Ct. 2013) (finding that government-issued telephone numbers are "personal" under Section 708(b)(6)) *abrogated in part on other grounds*, 148 A.3d 142 (Pa. 2016); *but see Pa. State Sys. of Higher Educ. v. Fairness Ctr.*, No. 1203 C.D. 2015, 2016 Pa. Commw. Unpub. LEXIS 245 (Pa. Commw. Ct. 2016) (holding that otherwise exempt email addresses held out to the public are subject to disclosure).

In support of the District's position, Mr. Vancas attests the following:

> I ... have personal knowledge and am familiar with the phone numbers included on the attached cell phone bills pertaining to calls and texts from my District-issued cell phone.
>
> ... I do not hold out or publicly disclose my cell phone number in any fashion, for purposes of contacting me via the public. For example, my cell phone number is not publicly disclosed on the...District website of in any directory made publicly available.

> I ... have reviewed unredacted versions of the relevant cell phone bills and can confirm that none of the numbers included therein are government-issued numbers which are publicly disclosed except those identified on the document attached to this Attestation. All numbers included thereon are personal numbers which I have contacted via phone call or text from my government-issued phone....

Ms. Simpson's attestation is substantively identical to Mr. Vancas' attestation.

Based on the evidence submitted, the phone numbers may be redacted under Section 708(b)(6) of the RTKL from Mr. Vancas' and Ms. Simpson's cell phone bills, including those found in the call and text detail. The Requester asserts that the District has failed to meet its burden of proving that the cellphone billing records redactions are proper. However, in the absence of any evidence that the District has acted in bad faith, "the averments in [the affidavits] should be accepted as true." *McGowan* 103 A.3d at 382-83. Accordingly, the District may redact personal telephone numbers from cellular phone billing records for District issued cellular phones. *See also Westerman v. Eastern York School Dist.*, OOR Dkt. AP 2015-1521, 2015 PA O.O.R.D. LEXIS 1307 (finding that District-issued personal telephone numbers may be redacted from cellular phone records).

The Requester also argues that within the cellphone billing records provided by the District, there are improper redactions of the last digit of the time of day. The Requester attached an electronic link to the redacted cellphone bills provided by the District. A review of the records reveals that these redactions may have occurred inadvertently during the redaction process. However, as the District has not addressed this issue, to the extent that any released cellphone records contain redactions of the last digit of the time of day, the redaction is inappropriate under Section 708(b)(6) and the information should be released.

8. **No additional cellular phone billing records exist within the District's possession, custody or control**

In Items 4 and 6 of the Request, the Requester defined "[d]etailed cell phone bills" [as the] itemized details of all calls and texts (this information should be available online from the cell phone provider)." The District asserts that all itemized details of calls and texts available in the cellular phone billing records were provided to the Requester and no additional records exist. In support of the District's position, Mr. Bean attests that he "contacted Verizon, the District's cell phone service provider, for purposes of obtaining detailed/itemized cell phone bills ... for [Ms.] Simpson and ... [Mr.] Vancas." Mr. Bean further attests that the "cell phone bills provided to [the Requester] with the District's ... response were the only itemized/detailed cell phone bills available for the phones issued to Ms. Simpson and Mr. Vancas[]" and there are no other responsive records to the Request within the District's possession, custody or control. Mr. Bean also attests that the copy of a March 4, 2019 email he received from Verizon indicating that "Verizon only captures the last 7 days of content" and that requests for text content must be obtained through legal process and only released to a judge or magistrate is a true and correct copy.

The Requester has not disputed the District's assertion that no additional responsive cell phone billing records exist. Accordingly, based on the evidence presented through Mr. Bean's sworn attestation, the District has demonstrated that a good faith search was conducted, and no additional responsive cell phone bills for Mr. Vancas or Ms. Simpson exist within its possession, custody or control. *Hodges*, 29 A.3d at 1192.

9. **The District has proven that records responsive to Item 8 of the Request do not exist**

Item 8 of the Request seeks video surveillance footage of specifically named individuals from surveillance cameras at Benner from 11:00 a.m. to 12:00 p.m. on October 11, 2018 and from 8:00 a.m. to 3:00 p.m. on October 13, 2109. The District argues that no records responsive to Item 8 of the Request exist within its possession, custody or control. In support of the District's position,

Mr. Barto attests that he has personal knowledge of and is familiar with the District's video surveillance cameras and the video footage that is retained in connection with same. Mr. Barton further attests the following:

> In connection with [the Request], I reviewed District records to determine if any video surveillance camera footage was available for the dates of October 11, 2018 and October 13, 2018[,] which reflected Barbara Potter, Kristopher Vancas, Lynn Kipp, and/or Michelle Simpson between the hours of 11:00 a.m. and 12:00 p.m. and 3:00 p.m., respectively.
>
> No such footage exists as described…within Item 8 of the…Request.

The Requester disputes the veracity of Mr. Barto's attestation and asserts that the District has not conducted a good faith search because Mr. Barto's attestation does not address the storage of video footage or if a contracted security company has the footage. While the RTKL does not define the term "good faith effort" as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court recently stated:

> As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession… When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors… After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under … the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted).

Here, Mr. Barto is the District's Director of the Physical Plant and he attests to his personal knowledge and familiarity with the District's video surveillance cameras and the records retained from the system. Based on the nature of a video surveillance system, one may reasonably infer that the Director of the Physical Plant would be the District staff member who is most familiar with its operations. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that an agency conducted a good faith search by "contact[ing] the [b]ureau

most likely to possess responsive records, and … explain[ing] why that Bureau is most likely to possess those records"). Accordingly, because Mr. Barto is the District official with responsibility for the physical plant and he attests in a sworn statement that the requested video does not exist, the District has carried its burden that no responsive records exist within its possession, custody or control that are responsive to Item 8.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the District is required to provide records responsive to the Request consistent with this Final Determination, as set forth above, 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 Centre County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.[15] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: May 17, 2019

Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Simon Campbell (via email only);
Elizabeth Benjamin, Esq. (via email only);
Leslie Elder (via email only);
Michelle Saylor, AORO (via email only)

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