



FINAL DETERMINATION

IN THE MATTER OF

**GERARD GREGA,
Requester**

v.

**WEATHERLY AREA SCHOOL
DISTRICT,
Respondent**

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Docket No: AP 2020-0136

INTRODUCTION

Gerard Grega (“Requester”) submitted a request (“Request”) to the Weatherly Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking electronic communications related to memoranda of understanding and memoranda of agreement. The District denied the Request, arguing that the records pertain to strategy or negotiations relating to labor relations or collective bargaining. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the District is required to take additional action as directed.

FACTUAL BACKGROUND

On December 17, 2020, the Request was filed, seeking:

[F]ull electronic COPIES of all district E-mails and/or TEXT communications (using her personal Cell Phone #xxxxxxxxxx) to/from/between Mrs. Teresa Young,

WASD Supt. and Mrs. Margaret McAndrew, President of the WEA,¹ pertaining to any/all topics and subject matter relevant to Memorandum of Understandings (MOU), and/or Memorandum of Agreements (MOA) which were or were still not APPROVED by the WASD School Board during the 2019-2020 school year and/or current 2020-21 school year. (Emphasis in original).

Following a thirty-day extension, 65 P.S. § 67.902(b), on January 21, 2021, the District denied the Request, arguing that the requested records pertain to strategy or negotiations relating to labor relations or collective bargaining, 65 P.S. § 67.708(b)(8)(i).

On January 22, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 29, 2021, the District submitted a position statement reiterating its grounds for denial.

On February 1, 2021, the Requester submitted two position statements in reply to the District's submission. The Requester disputes that the requested records facially relate to labor negotiations or collective bargaining. The Requester also asserts that his status as a District School Board Member and the existence of a District policy addressing Board requests for information does not prevent him from requesting records under the RTKL as a private citizen.

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,

¹ In response to the OOR's request for clarification, the Requester explained that the acronym stands for the Weatherly Education Association, which is the professional staff union in the District.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011)

(quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The identity of the Requester is irrelevant

The District notes that in the appeal, the Requester states that he is an elected District School Board member and that he asserts, based on his position, that he is authorized to receive internal emails. While not clearly arguing that the instant RTKL Request is improper in some way, the District asserts that Board Policy No. 011.1, which is attached to its submission, establishes the District procedures to be followed by Board Members when requesting information from the District. The District asserts that the Requester's multiple RTKL requests were made in an attempt to circumvent the District policy. The District expresses its disapproval regarding the disruption the requests are causing and the money expended to respond. Although the District does not explicitly argue that the appeal should be denied for these reasons, we note that the OOR and reviewing courts have consistently held that a requester's identity or motivation for making a request is not relevant to determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, whether the document is accessible is based only on "whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b) [of the RTKL]." *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*).

2. The District has not proven that the records are exempt under Section 708(b)(8)

The District asserts that the requested communications pertain to negotiations relating to labor relations and, thus, are exempt under Section 708(b)(8)(i) of the RTKL, 65 P.S. § 67.708(b)(8)(i). The District relies on *McGuire v. Lewistown Borough*, to argue that the Request facially seeks communications between the District and the President of the WEA and, therefore, those records “fall squarely within the ‘negotiations relating to labor relations exemption....” Based on its position, the District argues that, “[a]s there are no factual matters in dispute in the instant appeal, [the District] is not submitting an affidavit/attestation in support of [its] submission.” OOR Dkt. AP 2020-0260, 2020 PA O.O.R.D. LEXIS 1672.

The Requester asserts that during the timeframe set forth in the Request, a contract with the WEA was in effect, so there were no labor negotiations taking place. The Requester further asserts that because the emails sought are those exchanged between the District Superintendent and the WEA, rather than the School Board or the Board’s negotiation team and the WEA, the emails do not facially relate to labor negotiations or labor relations.

Section 708(b)(8)(i) of the RTKL exempts from disclosure a “record pertaining to strategy or negotiations relating to labor relations or collective bargaining[.]” 65 P.S. § 67.708(b)(8)(i). The District argues that it is clear from the face of the Request that the Requester seeks exempt records. However, the District’s position statement does not set forth the subject matter of any MOUs or MOAs discussed in the responsive emails, and the subject matter of the agreements could relate to topics other than a labor agreement. Instead, the District asserts that because the communications may involve discussions about MOUs or MOAs between a District official and the WEA, the discussions must necessarily pertain to “strategy or negotiations” relating to labor relations or collective bargaining. While the Commonwealth Court has held that an affidavit may be unnecessary when an exemption is clear from the face of the record, *Pa. Game Comm’n v.*

Fennell, 149 A.3d 101 (Pa. Commw. Ct. 2016); *Office of the Governor v. Davis* 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (*en banc*), in this instance the necessary elements of the exemption are not clear and uncontradicted from the face of the record.

The District relies on *Maguire*, to argue that the Section 708(b)(8)(i) exemption “is **not limited** to records which ‘pertain ... to strategy or negotiations **relating to collective bargaining....**’”[;] Section 708(b)(8)(i) **also** exempts records which ‘pertain ... to strategy or negotiations relating **to labor relations.**’” (Emphasis in original). The District references the portion of the analysis in *Maguire*, wherein the Black’s Law Dictionary definitions of “negotiations” and “labor relations” are cited, and quotes the Request language to assert the conclusion that the Request facially seeks records exempt from disclosure under Section 708(b)(8)(i). *Maguire*, 2020 PA O.O.R.D. LEXIS at *8. However, as compared to the instant matter, the agency in *Maguire* presented the sworn affidavit of its open records officer to establish factual support for its claim of exemption.

Here, the District chose not to submit an affidavit to support its claim of exemption. The District’s evidence consists of the conclusory position statement of the District’s solicitor that fails to lay any factual foundation on which to make a threshold finding that the responsive communications about MOUs and MOAs consist of “strategy or negotiations” relating to labor relations or collective bargaining. While an affidavit may serve as sufficient evidence in support of an exemption from public access, *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), unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence); *City of Phila.*

v. Juzang, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City’s counsel is a legal brief, it cannot be ... evidence at all”). Accordingly, the District has failed to carry its burden of proving that the requested emails pertain to the strategy or negotiations relating to labor negotiations or collective bargaining. *See* 65 P.S. § 67.708(b)(i); 65 P.S. § 67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the District is required to provide all responsive communications 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 Carbon 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 22, 2021

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Gerard Grega (via email only);
Jeffrey Rockman, Esq. (via email only);
Teresa Barna (via email only)

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).