

apply) with an executed WEA Contract pdf COPY, 2. A complete similar pdf COPY of all Act 93 Staff Annual Salaries as of his/her date of hire and progressing through the same school year intervals, as indicated (above) with their executed Act 93 Agreement pdf COPY, and 3. a complete pdf COPY of our Superintendent (T. Young) starting Annual Salary and all Annual Salaries since her March 2017 hire through 2020-21 with a pdf COPY of her complete executed current 5-year Contract.

[and]

[2] 1. [A] complete electronic (pdf) COPY of the Blue Care PPO Plan “contract” document reflecting all coverage specifics provided to WASD, as employer (or its successor program package, or its equivalent as provided by Blue Cross/Blue Shield) that is utilized by both the WEA and WAESPA who are covered by this plan under their respective executed current Contracts state, and 2. a complete electronic (pdf) COPY of the United Concordia Contract termed as prepaid dental care captioned “Basic Program” provided to WASD, as employer as well as the related Concordia documents explaining what defines “oral surgery”, “prosthetics”, and “periodontics” and those related Concordia Plan Fees.

On the same day, the District denied the Requests, asserting that it does not have copies of the records in electronic form. However, it informed the Requester that hard copies would be made available to be picked up.

Also on the same day, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On February 4, 2021, the District submitted a position statement, verified by Jeff Rockman, Esq., its solicitor, and the next day, the Requester submitted a verified position statement. On February 11, 2021, in response to a request for clarification, the District provided a supplemental

² The appeal of the first request was docketed at OOR Dkt. AP 2021-0168, and the appeal of the second was docketed at OOR Dkt. AP 2021-0169. Because they involve the same parties and dates, the appeals are hereby consolidated at OOR Dkt. AP 2021-0168.

The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

position statement, and the next day, the Requester provided a response. The Requester also submitted an additional position statement on February 14, 2021.

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, 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)). 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. The appeal of the first request is moot in part

The District notified the Requester that hard copies of records responsive to the first request would be made available for pick up. Therefore, the appeal as to the availability of records responsive to the first request is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. Electronic copies of records responsive to the first request do not exist

The Requester argues that the District should provide him with electronic copies, as requested. However, the District asserts that electronic copies do not exist in its possession, custody, or control. Pursuant to Section 701 of the RTKL, “[a] record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists.” 65 P.S. § 67.701. The RTKL does not define

“medium;” however, the OOR has defined it “as the substance through which something is transmitted or carried, a ‘means,’ such as on paper or on the hard-drive or on a database or over the internet.” *Acton v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2009-0926, 2009 PA O.O.R.D. LEXIS 786, *aff’d*, No. 2010-719 (Wash. Com. Pl. July 26, 2011), *aff’d*, 38 A.3d 1092 (Pa. Commw. Ct. 2012), *petition for allowance of appeal denied*, 57 A.3d 72 (Pa. 2012). Pursuant to Section 705 of the RTKL, “an agency shall not be required to ... compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705.

In its verified position statement, the District asserts that it does not maintain the responsive records in electronic format. Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 competent evidence that the District acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Accordingly, the District has met its burden of proving that it does not have electronic copies of records responsive to the first request in its possession, custody, or control.

The Requester argues that it is unlikely that there are not electronic copies of the requested records. In his verified position statement, the Requester asserts that he has received electronically formatted records in the past. In response, the District argues that such records were likely specially created by District staff. The District also confirms that the District has, in the past, provided responsive records to the Requester in his capacity as a Board member. However, a

requester's identity or motivation for making a request is not relevant to determining whether a record is accessible under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, a record is either available to the public at large as a public record or it is shielded from disclosure. *See* 65 P.S. § 67.102; 65 P.S. § 67.305; *see also* *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker v. Pa. State Police*, 93 A.3d 911, 912 (Pa. Commw. Ct. 2014)). The fact that the Requester may have obtained records in the past due to his status as a Board member has no bearing on the availability of records under the RTKL. As electronic records are not available, the District is not required to produce them.³ *See* 65 P.S. § 67.705.

3. The District has not met its burden of proving that records responsive to the second request do not exist in electronic form or that any responsive records may be redacted

However, in response to the second request, the District does not deny⁴ that it can obtain responsive records from the identified insurance companies and instead argues that the insurance providers will almost certainly convey the requested policies in .pdf format. The District argues that it would need to print the documents to redact individually identifiable health information and information that reflects an individual's enrollment in a health care program, *see* 65 P.S. § 67.708(b)(5). Precisely what individually identifiable health information might be contained in responsive records is not clear, and the District did not elaborate on the nature of responsive records or describe what information it planned to redact in response to the OOR's request for

³ The District may charge copying fees for hard copies of responsive records in accordance with the OOR's Fee Schedule. *See* <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm>.

⁴ In its verified position statement, the District states:

[The Requester] misses the point when he states that [the District] can obtain the health/dental insurance agreements from the insurance providers in electronic format. The point is that [the District] cannot redact the "individually identifiable health information" once it receives these policies electronically unless it downloads/prints a copy of same and redacts the excepted information. Moreover, the insurance providers will almost certainly convey the requested policies to WASD in PDF format.

clarification. Additionally, on appeal, the Requester reemphasizes that he did not request any individually identifiable health information and argues that the District never contacted him to clarify what he was requesting. *See W. Chester Univ. of Pa. v. Schackner*, 124 A.3d at 393 (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (quoting *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)). In conclusion, the District has not met its burden of proving that records responsive to the second request do not exist in electronic form or that any material in these records is exempt from disclosure. Therefore, the District must provide the Requester with records responsive to the second request in electronic form, without assessing copying fees.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **dismissed as moot in part**, and the District is required to provide electronic copies of records responsive to the second request 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 Lackawanna 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. 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

FINAL DETERMINATION ISSUED AND MAILED: February 26, 2021

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

Sent to: Gerard Grega (via email);
Jeff Rockman, Esq. (via email);
Theresa Barna, AORO (via email)