



FINAL DETERMINATION

IN THE MATTER OF

TERRY LANG,
Requester

v.

ERIE RISE LEADERSHIP ACADEMY
CHARTER SCHOOL,
Respondent

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**Docket No: AP 2021-0685
(CONSOLIDATED)**

INTRODUCTION

Terry Lang (“Requester”) submitted two requests (“Requests”) to the Erie Rise Leadership Academy Charter School (“School”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to employees, loans, and payments, among other things. The Requests were deemed denied, and 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 **dismissed as moot in part**, and the School is required to take further action as directed.

FACTUAL BACKGROUND

On March 18, 2021, the first request was filed, seeking:

1. Employment Status of the following [School] Team Members presently listed on your website (3/18/2021):
 - N. Barbero
 - L. Barnes
 - T. Brown
 - A. Vella
 - S. Champion

S. Monin
B. Davis
E. Durovchic
D. Hinton
C. Kilgallon
M. Renshaw
N. Stewart¹

2. The FTE count number indicated on the [Paycheck Protection Program (“PPP”)] loan granted to [the School].
3. The date the PPP loan was submitted for evaluation to the lending institution.
4. The date the PPP loan was approved by the lending institution.
5. The name of the lending institution used to secure the PPP loan.
6. Copy of the staff members and all other persons compensated via the use of the PPP funds.
7. Copy of the narrative/rational provided to the lending institution to support the need for a PPP loan.
8. The legal and/or consultative recommendations pursuant to the legality of a PPP loan for Charter Schools.

On the same day, the second request was filed, seeking:

1. Copy of all payments made to: Acquanetta Osborne.
2. Copy of all payments made to: Tyrone Clarke, 3i Network or Christ Temple Church
3. Copy of all 21st CCLC payments made to: Booker T. Washington Community Center (March 2020 - March 2021)
4. Copy of all non - 21st CCLC payments made to: Booker T. Washington Community Center (March 2020 - March 2021)
5. Name, salary and hire date for the 21st CCLC Director
6. Copy of all receipt(s) of purchase; and validation of city code installation of the ventilation system per room.

¹ The first request contained the following: “(**Please Note:** There are teachers/staff persons displayed on your website that are employed with other school districts/employers, Including ESD)”

7. Copy and/or evidence of *purchase and proper installation* of ventilation system occurred prior to student/teacher habitation for learning.
8. Copy of all written communications provided to parents relative to the Health & Safety Reopening plan.²
9. Amount of the PPP loan secured in 2020 by [the School]. If applicable, the date the lending institute issued a ‘forgiveness’ of the PPP loan secure by Erie Rise in 2020.
10. Lending Institute by which [the School] secured its’ PPP loan.
11. The dates in which the Authorizer expended the following monthly payments for student enrollment to [the School] for the months of March, April, May, June, July, August, September, November, December in 2020.
12. The dates in which the Authorizer expended the following monthly payments for student enrollment to [the School] for the months of January, February, March in 2021.

When the School did not respond to the Requests, they were deemed denied on March 25, 2021.

See 65 P.S. § 67.901.

On April 5, 2021, the Requester appealed to the OOR, stating grounds for disclosure.³ The OOR invited both parties to supplement the record and directed the School to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On April 22, 2021, the Requester submitted a position statement, accusing the School of malfeasance and including a number of documents related to a retirement fund dispute, a Performance Audit of the School by the Pennsylvania Department of the Auditor General, the School’s bylaws, and a link to a hearing at which the School’s Charter was not renewed. On the same day, the School submitted various invoices, the PPP loan application, emails sent to parents,

² The second request contained the following: “**Please Note:** The Health & Safety Reopening plan posted on your website on 3/1/2021, has not been edited and/or checked for spelling errors; the document also requires repagination & proper page numbering. <https://www.erie rise.org/updated-health-and-safety-plan/>”

³ The appeal of the first request was docketed at OOR Dkt. AP 2021-0685, and the second was docketed at OOR Dkt. AP 2021-0701. Because they involve the same parties and dates, the appeals are hereby consolidated at OOR Dkt. AP 2021-0685.

and the dates the employment of the individuals identified in Item 1 of the first request concluded.⁴ Later on April 22, 2021, the School submitted affidavits executed by Aubrey Favors, the School's interim CEO. On April 28, 2021, the Requester submitted a position statement, expanding upon his assertions of malfeasance and asserting that the School has provided inaccurate and altered documents.

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 School 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. §

⁴ The School asserts that there is no document that captures the date the employment of these individuals concluded.

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).

Initially, the OOR notes that the School has provided records responsive to most of the Items of the Requests. Accordingly, insofar as it seeks those records, the appeal 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).

In support of the School’s assertion that no additional responsive records exist, Mr. Favors attests that “[t]o the best of my knowledge ... the documents contained in [the School’s responses] represent the information available at [the School] to respond to the [R]equest[s].” However, the Commonwealth Court has repeatedly held that in order for an agency to prove that responsive

records do not exist, it must provide some non-generic, non-conclusory description of the good faith search it conducted. *See Pa. State Police v. McGill*, 83 A.3d 476, 481 (Pa. Commw. Ct. 2014) (“[A]n agency [may not] avoid disclosing existing public records...in the absence of a detailed search....”); *see also Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d at 1171-72 (Pa. Commw. Ct. 2018) (explaining the search procedures required to meet the threshold of the “good faith effort” contemplated by Section 901 of the RTKL); *Office of the Governor v. Scolforo*, 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, as the School does not describe the search it conducted or the basis for its conclusion that no other records exist, the OOR cannot conclude that the School has conducted a good faith search.⁵

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records. Absent the School’s provision of a sworn affidavit verifying the nonexistence of other records, the School must release all responsive public records. *See, e.g., Campbell v. Galetton Area Sch. Dist.*, OOR Dkt. AP 2018-2175, 2019 PA O.O.R.D. LEXIS 45; *Kowalchick v. Norwegian Twp.*, OOR Dkt. AP 2018-2217, 2019 PA O.O.R.D. LEXIS 48.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **dismissed as moot in part**, and the School is required to produce any additional responsive records that may exist in its possession, custody, or control. This Final Determination is binding on all parties.

⁵ Additionally, the Requester asserts that a third-party vender, Charter Choices, maintains all financial records of the School. The OOR notes that public records in the possession of third parties are accessible through Section 506(d) of the RTKL if (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to the performance of that function. *See Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (citation omitted), *aff’d* 124 A.3d 1214 (Pa. 2015).

Within thirty days of the mailing date of this Final Determination, any party may appeal to the Erie 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 3, 2021

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to via email to: Terry Lang;
Thomas Fitzpatrick, Esq.;
Aubrey Favors, AORO;
Dianntha McCaughtry

⁶ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).