



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**RYAN HORAN AND FREEDOM  
FOUNDATION,  
Requester**

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**v.**

**: Docket No: AP 2021-2522**

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**COLONIAL SCHOOL DISTRICT,  
Respondent**

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On October 26, 2021, Ryan Horan, on behalf of the Freedom Foundation (collectively, the “Requester”), submitted a request (“Request”) to the Colonial School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the following information about District employees, employed in a union-represented bargaining unit:

1. First name, middle name, last name
2. Birth year
3. Job title/position
4. Hire date
5. Work email address
6. Employer (department, board, commission, etc.)
7. Worksite address/location
8. Name of the labor union representing their bargaining unit.

It is my preference to receive any responsive information electronically in an Excel/CSV format.

On October 28, 2021, the District denied the Request asserting it does not maintain a list that contains all of the information sought and that it is not required to create a record or compile a record in a manner in which it does not currently compile the record. 65 P.S. § 67.705.

On November 18, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> The Requester argues that although that District does not have to create a record or list, the District is obligated to provide the information requested in the form it possesses it in, unless an exemption applies. He asserts that the District raised no basis to redact and prevent the release of the requested information. 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 December 3, 2021, the District submitted a position statement providing some information and asserting that other information is protected by the constitutional right to privacy or exempt employee information, 65 P.S. § 67.708(b)(7). The District also argues that the appeal is deficient for failing to address whether a responsive record exists. Along with the position statement, the District submitted the attestation, made under the penalty of perjury, of Michelle O'Reilly, the District's Open Records Officer.

**1. The District's interpretation of the Request was not reasonable and the Requester's appeal is sufficient**

The District argues that it properly interpreted the Request as seeking a single list in an Excel or text file and because it does not maintain all the information sought in a single list, it properly denied the Request as seeking records that do not exist and that it is not required to create a record. 65 P.S. § 67.705. An agency may interpret the meaning of a request for records, but that

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<sup>1</sup> In the appeal, the Requester granted the OOR an additional thirty days to issue this Final Determination. See 65 P.S. § 67.1101(b)(1).

interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. The OOR determines the reasonableness of the agency's interpretation from the text and context of the request alone, as neither the OOR nor the Requester are permitted to alter the request on appeal. *See McKelvey v. Office of Attorney General*, 172 A.3d 122 (Pa. Commw. Ct. 2017) ("Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal."). Here, the Requester does indicate a preference for file type, but a preference for file type is not akin to requesting only that file type or a single record containing all the requested information. It is not a reasonable interpretation, especially in light of Section 705 of the RTKL, which provides that when responding to a request, "an agency shall not be required to create a record which does not currently exist or 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; *see also Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that an agency cannot be made to create a record that does not exist). "An agency need only provide the information in the manner in which it currently exists." *Commonwealth v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012). An agency is not required to create a list or spreadsheet containing the requested information; however, "the information ... must simply be provided to requestors in the same format that it would be available to agency personnel." *Id.* at 549, n.12.

The District further asserts that its basis for denial does not address the public nature of the information or whether the District has access to such information and that the Requester failed to address this basis for denial in his appeal, such that the appeal should be dismissed.

However, the Requester includes a statement asserting that just because a singular list does not exist, does not relieve the District of any duty provide the information in the form in which it does exist. Furthermore, the Requester used the OOR's standard appeal form, which provides that by submitting the form, the Requester is asserting that the "records do not qualify for any exemption under § 708 of the RTKL...." *See Barnett v. Pa. Dep't of Public Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). The OOR has found that this statement is sufficient to satisfy a requester's burden under Section 1101(a). *See, e.g., Phillips and WHYY v. Pa. Dep't of Env'tl. Prot.*, OOR Dkt. AP 2016- 1782, 2017 PA O.O.R.D. LEXIS 222; *Tomassi v. Municipality of Mt. Lebanon*, OOR Dkt. AP 2017-0644, 2017 PA O.O.R.D. LEXIS 896. As such, the Requester's appeal is sufficient.

**2. The District provided access to some records on appeal but must provide worksite addresses**

Ms. O'Reilly affirms that the District maintains an online directory through which the Requester can access first and last names, email addresses, and positions.<sup>2</sup> *See* 65 P.S. § 67.704(b)(1) (permitting an agency to respond to a request for records "by notifying the requester that the record is available through publicly accessible electronic means[.]"). O'Reilly Attestation ¶¶ 5-7. Because the District granted these items on appeal, the appeal is dismissed as moot as to these items.

Ms. O'Reilly also affirms that the employer and address for all District employees is the District and provided the District's main address. O'Reilly Attestation ¶ 8. However, the

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<sup>2</sup> Under the RTKL, a sworn affidavit or statement 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 statement] 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)).

Requester specifically seeks the worksite address/location. According to the District's website<sup>3</sup>, the District encompasses several schools at different locations and presumably the District employees are spread out amongst those locations. Therefore, because the worksite address was not provided to the Requester and the District has raised no exemptions, the District must provide the worksite addresses for employees.

### **3. Birth year and union membership are protected by the constitutional right to privacy, but dates of hire are not**

The District asserts that birth years, union membership and dates of hire are personal information protected by the constitutional right to privacy. The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; see also *Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

In enacting the RTKL, the legislature has already performed this balancing test for certain types of information, such as hire date. Section 708(b)(6) of the RTKL explicitly makes an agency employee's name, current position, compensation and *length of service* public information, except that an agency may redact the name of an individual performing an undercover or covert law enforcement activity. 65 P.S. § 67.708(b)(6)(ii)-(iii). Therefore, the District must provide the date of hire for each employee as it reveals the length of service of an employee.

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<sup>3</sup> See <https://www.colonialsd.org/> (last accessed January 5, 2022).

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, by their very nature, implicate privacy concerns and require balancing. *Id* at 156-57; *see also Pa. State Univ. v. State Employees’ Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).; *Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test); *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143 (Pa. 2017) (holding that before the government releases personal information, such as birth years, it must first conduct a balancing test to determine whether the right of informational privacy outweighs the public’s interest in dissemination).

To determine whether the constitutional right to privacy precludes disclosure of an individual’s personal information, the OOR must apply the balancing test articulated in *Denoncourt v. Pa. State Ethics Comm’n*, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), “weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.”

The District relies on *Horan and the Freedom Foundation v. Crawford County*, OOR Dkt. AP 2021-1079, 2021 PA O.O.R.D. LEXIS 2348, in support of its assertion that birth years and union membership are protected by the constitutional right to privacy. In that final determination, the OOR held that while there is a diminished privacy interest in birth years, because the Requester did not articulate any public benefit in disclosing birth years, the employee’s privacy interest

outweighs the Requester's failure to demonstrate any public benefit in disclosure. Similarly, here, the Requester has not articulated any public benefit in disclosure of this information.

The OOR also will not disturb its own reasoning as it relates to the name of the labor union representing employees' bargaining units. It is well established that an employee's membership in a labor union is protected by the constitutional right to freedom of association; the United States Supreme Court has consistently held that it is a violation of an individual's right of freedom of association under the *First Amendment of the U.S. Constitution* for states to mandate the disclosure of an individual's association with any organization. *See McCutcheon v. Federal Election Comm'n*, 572 U.S. 185 (2014); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). The Commonwealth Court has held that "the RTKL disclosure requirements are not distinguishable from other disclosure laws deemed violative of employees' rights to freely associate." *Pennsylvanians for Union Reform v. Pa. Office of Admin.*, 129 A.3d 1246, 1259 (Pa. Commw. Ct. 2015).

The Request explicitly seeks the name of the labor union to which each employee in a bargaining unit is affiliated; thus, asking for the employee's membership in a labor union. In this case, the disclosure of the requested union affiliation information infringes upon the employees' associational freedom. Because the requested bargaining unit information implicates rights that are protected by the First Amendment, the OOR must determine whether the constitutional right of privacy allows disclosure by applying the *PSEA* balancing test.

Again, Requester has not articulated any public interest in favor of disclosure. *See Pennsylvanians for Union Reform*, 129 A.3d 1246 (Pa. Commw. Ct. 2015) (rejecting an argument that disclosure of public employees payroll deductions relates to the public interest in the Commonwealth's use of taxpayer resources). Thus, in applying the *PSEA* balancing test, the

employees' privacy interests in their bargaining unit information outweigh the Requester's failure to demonstrate any public benefit which would result in disclosure. To that end, whether or not a particular District employee is a member of a labor union is of no consequence to the public. Thus, the District may withhold the employees' bargaining unit information. *See Mandrusiak and Freedom Foundation v. York County*, OOR Dkt. AP 2021-1708, 2021 PA O.O.R.D. LEXIS 1947.

#### **4. Middle names of employees are subject to disclosure**

Finally, the District withheld employee middle names asserting that it does not require this information from its employees and does not enter any middle names provided into its Skyward personnel management database, therefore to the extent it does possess middle names of employees, that information is housed within each employee's confidential personnel file, and the confidential nature of all information in an employee's personnel file is a well-accepted best practice in the human resources industry. The District also argues that the Requester did not articulate any public interest favoring the disclosure of the middle names as required by the *PSEA* balancing test. The District asserts that the *PSEA* Court expressly disapproved of the reasoning in *Office of the Gov. v. Raffle*, 65 A.3d 1105 (Pa. Commw. Ct. 2013).

Here, the District argues that there is no public benefit to releasing the middle names of employees. Pursuant to Ms. O'Reilly's verification of the position statement, employees' middle names are not posted to the District's online directory or uploaded into its Skyward personnel management database. The District asserts that Human Relations professionals consider identification and demographic information concerning an employee to be confidential, O'Reilly Attestation ¶ 18, and Ms. O'Reilly affirms that the District maintains any employee middle names in the employees' confidential personnel files and that any employee who provides a middle name does so voluntarily but with the understanding that it will be kept confidential. O'Reilly



Attestation ¶¶ 13, 16. Meanwhile, the Requester only argues that middle names are not exempt from disclosure and does not set forth any public interest with respect to middle names.

As it relates to middle names, the OOR has consistently explained that any expectation of privacy in that information is not particularly strong. As explained by the Commonwealth Court, “an individual cannot reasonably expect to keep his or her middle name private” because the information is routinely disclosed and available in various records available to the public. *Raffle*, 65 A.3d at 1110 (Pa. Commw. Ct. 2013). *Raffle* is no longer precedential due to the Supreme Court’s holding in *PSEA*, but the Commonwealth Court’s logic is persuasive, as middle names are commonly disclosed. However, even if the OOR were to assume that a privacy interest in an employee’s name exists, “the General Assembly has already performed the necessary *PSEA* balancing test” by declaring this information public in Section 708(b)(6)(ii) of the RTKL. *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1160 (Pa. 2017) (citing *PSEA*, 148 A.3d at 156 n.8); see also *Governor’s Office of Admin. v. Campbell*, 202 A.3d 890, 894-95 (Pa. Commw. Ct. 2019) (“In performing [the balancing test], we may rely upon, when appropriate, ‘legislative pronouncements or prior decisions’ of Pennsylvania courts”); *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173, 1184 (Pa. Commw. Ct. 2017) (describing factors to determine whether a privacy interest exists, including whether there is a reasonable expectation of privacy in that information); *Pa. State Univ.*, 935 A.2d at 534 (holding that there is no privacy interest in a public employee’s name, service history and salary, but public employees do enjoy right to privacy as to their address, telephone numbers and social security numbers.). Therefore, the District has failed to prove that the withheld middle names are exempt from public disclosure under the constitutional right to privacy.

This finding is consistent with previous cases, where the OOR held that middle names were not subject to the constitutional right to privacy and ordered the release of middle names. *See Mandrusiak and Freedom Foundation v. York County*, OOR Dkt. AP 2021-1708, 2021 PA O.O.R.D. LEXIS 1947; *Horan and Freedom Foundation v. Northumberland County*, OOR Dkt. AP 2021-1927, 2021 PA O.O.R.D. LEXIS 2204.

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the District is required to provide the responsive middle names and worksite addresses 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 Montgomery 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.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: January 14, 2022**

*/s/ Erin Burlew*

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APPEALS OFFICER  
ERIN BURLEW, ESQ.

Sent via email: Ryan Horan, A. Kyle Berman, Esq.

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<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).