



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOAN MYERS BROWN ACADEMY, A	:	
STRING THEORY CHARTER SCHOOL,	:	
Requester	:	
	:	Docket No: AP 2021-2198
v.	:	(Consolidated)
	:	
PHILADELPHIA SCHOOL DISTRICT,	:	
Respondent	:	

### INTRODUCTION

Joan Myers Brown Academy, A String Theory Charter School, (“Requester”), through its legal counsel, Abigail Lipow, Esq.,<sup>1</sup> submitted four requests (collectively the “Requests”) to the Philadelphia School District (“School District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records concerning charter school applications received by the School District. The School District partially denied the Requests, asserting, among other things, that the responsive records relate to a noncriminal investigation. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeals are **denied**, and the School District is not required to take any further action.

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<sup>1</sup> The caption of the appeals consolidated herein originally identified Attorney Lipow as the “requester,” since she filed the underlying requests and subsequent appeals. However, because the real party at interest is her client, Joan Myers Brown Academy, A String Theory Charter School, we now amend the caption of these matters for purposes of our Final Determination.

## FACTUAL BACKGROUND

On July 2, 2021, the Requests were filed, seeking the following:

### **Request One:**

[Item 1.] Any and all records created by either the [School District] or Coaching & Convening pursuant to the attached contract; and

[Item 2. The Requester] also requests the following for all charter applications reviewed by Coaching & Convening:

[a.] The detailed summary of findings of analysis ELA & Math curriculum documents as compared against the PA Core Curriculum;

[b.] The completed checklist and gap analysis of all ELA & Math curricular materials compared against the PA Core standards that identifies areas of alignment and misalignment with the PA Core Curriculum;

[c.] Any clearly identified deficiencies and references provided as part of the review cited in [b]; and

[d.] Responses to follow-up queries from the Charter Schools Office as delineated in the attached contract.

### **Request Two:**

[Item 1.] Any and all records created by either the [School District] or Midwestern IU IV for the 2020-2021 charter applications, pursuant to the attached contract; and

[Item 2. The Requester] also requests the following for all charter applications reviewed by Midwestern IU IV, as delineated in the attached contract:

[a.] The analysis of the extent to which the curricula submitted with the new charter applications submitted in 2020 aligned to the PA Core Academic Standards, specifically:

[i.] Whether the charter application's curricula is aligned with 100% of Students will graduate ready for college or career; and

[ii.] 100% of 8-year-olds will read on or above first grade level;

[b.] The template provided by the [School District] for the analysis of the charter applications;

[c.] All charter application evaluation reports from Midwestern IU IV;

[d.] The findings of Midwestern IU IV created by using the reporting template provided by the School District;

[e.] The reporting template provided by the School District;

[f.] All charter application initial analyses provided by Midwestern IU IV;

[g.] All completed templates provided by Midwestern IU IV; and

[h.] All charter application curriculum reviews for the following areas:

- [i.] Science and Technology Review
- [ii.] Reading in Science & Technology Review
- [iii.] Writing in Science & Technology
- [iv.] Environment and Ecology
- [v.] Math
- [vi.] Social Studies
- [vii.] Reading in History and Social Studies
- [viii.] Writing in History and Social Studies
- [ix.] Arts and Humanities
- [x.] Career Education
- [xi.] ELA

**Request Three:**

[Item 1.] Any and all records created by either the [School District] or SchoolWorks, LLC for review of charter applications, pursuant to the attached contract.

[Item 2. The Requester] also requests the following for all charter applications reviewed by SchoolWorks, LLC, as delineated in the attached contract.

[a.] The review of the charter application narratives and attachments, and the analysis of the alignment of the narrative and attachments utilizing the Charter Schools Office's evaluation tool;

[b.] The Charter Schools Office evaluation tool used by the contractor to review charter applications;

[c.] All written reports and findings submitted to the Charter Schools Office by SchoolWorks, LLC;

[d.] The in-depth analysis and detailed findings from the analyses of each charter application's curriculum documents, including the gap analyses of all curricular materials as compared against the PA Core and Academic

Standards, identifying areas of alignment and misalignment, and to the academic goals and assessment plan of the respective applicant;

[e.] The detailed findings from the analyses of new charter applications' academic goals and assessment plans;

[f.] The identified deficiencies and references for the cited deficiencies for identified areas of misalignment; and

[g.] The final narrative for each application provided by SchoolWorks on the alignment between the submitted curriculum and PA Core and Academic Standards.

**Request Four:**

[Item 1.] Any and all records created by either the [School District] or Public Consulting Group for review of charter applications, pursuant to the attached contract.

[Item 2. The Requester] also requests the following records [from] the [School District]:

[a.] The evaluations of the grade and subject area curriculum materials contained within the charter applications selected by the Charter Schools Office and reviewed by Public Consulting Group;

[b.] The detailed summaries of findings from the analysis of the Charter Schools Office selected applicant's curriculum documents as compared to the PA Core & Academic Standards;

[c.] The completed checklist and gap analysis of all curricular materials compared against the PA Core & Academic standards that identifies areas of alignment and misalignment;

[d.] Any clearly identified deficiencies and references provided for identified areas of misalignment in the submitted charter applications; and

[e.] Responses to follow-up queries from the Charter Schools Office, as delineated in the attached contract.

On July 9, 2021, the School District invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). The Requester subsequently agreed to two additional extensions of time for the School District to process the Requests. On September 30, 2021, the School District denied the

Requests in part, arguing that Item One of each Request was insufficiently specific under Section 703 of the RTKL. 65 P.S. § 67.703 In addition, the School District contended that records responsive to Item Two of each Request were exempt from public access because they reflected internal predecisional deliberations, 65 P.S. § 67.708(b)(10), and related to a noncriminal investigation, 65 P.S. § 67.708(b)(17), in accordance with the provisions of Pennsylvania’s Charter School Law (“CSL”). 24 P.S. §§ 17-1701-A *et seq.* To the extent that the Requests sought the “final new charter school application evaluation reports” issued by the School District’s School Charter Office (“CSO”),<sup>2</sup> the School District advised the Requester that it was using its discretion to grant access to those documents via a web link.

On October 18, 2021, the Requester appealed to the OOR, challenging the denial of each Request and stating grounds for disclosure.<sup>3</sup> In its appeals, the Requester maintains that Item One of the Requests is sufficiently specific and that the other exemptions cited to by the School District do not apply. The OOR invited both parties to supplement the appeal records and directed the School District to notify any third parties of their ability to participate in the appeals. 65 P.S. § 67.1101(c).<sup>4</sup>

On November 24, 2021, the School District submitted a position statement reasserting its grounds for denial. In support of its position, the School District submitted the attestation of Peng

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<sup>2</sup> The CSO is authorized by the School District’s Board of Education (“Board”) as the entity “to monitor charter schools to support the [B]oard’s charter authorizing responsibilities and duties effectively and efficiently.” *See School District’s Board of Education Policy #400*, adopted November 19, 2020. Part of the CSO’s responsibilities include the establishment of charter school standards that are approved by the Board, “organizing and conducting new charter application processes,” charter school compliance monitoring, etc. *Id.*

<sup>3</sup> The Requester provided additional time for the OOR to issue a Final Determination in this matter. 65 P.S. § 67.1101(b)(1).

<sup>4</sup> The Requester filed four separate appeals, which were docketed at OOR Dkts. AP 2021-2198, AP 2021-2199, AP 2021-2200, and AP 2021-2201. Because the appeals involve the same agency and requester, the appeals are consolidated into OOR Dkt. AP 2021-2198 for disposition. *See* 65 § 67.1102(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”).

Chao, Acting Chief of Charter Schools for the School District. The factual statements in the School District's argument were also verified by its legal counsel, Roberto Fernandez, Esq.

### 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 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. Item One of each Request does not meet the specificity requirements of Section 703 of the RTKL.**

The School District contends that Item One of each Request is insufficiently specific. Once again, Item One of the Requests sought as follows:

**Request One, Item 1:** “Any and all records created by either the [School District] or Coaching & Convening pursuant to the attached contract”;

**Request Two, Item 1:** “Any and all records created by either the [School District] or Midwestern IU IV for the 2020-2021 charter applications, pursuant to the attached contract”;

**Request Three, Item 1:** “Any and all records created by either the [School District] or SchoolWorks, LLC for review of charter applications, pursuant to the attached contract.”; and

**Request Four, Item 1:** “Any and all records created by either the [School District] or Public Consulting Group for review of charter applications, pursuant to the attached contract.”

Section 703 of the RTKL provides: “A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested....” 65 P.S. § 67.703. 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 at 824).

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). First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep't of Educ.*, 119 A.3d at 1125. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *Id.* Third, “[t]he timeframe of the request should identify a finite period of time for which the records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* None of these factors are dispositive; instead, the Commonwealth Court has emphasized the importance of a “flexible, case by case, contextual application of the test.” *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Commw. Ct. 2017).

Here, the Requests are insufficiently specific as the scope of the Requests is overly broad and they fail to seek a clearly defined universe of documents. *See Dep't of Envtl. Prot. v. Legere*, 50 A.3d 260 (Pa. Commw. Ct. 2012). The Requests at issue seek “any and all records created by either [the School District]” or its independent contractor, pursuant to a contract between those entities. Although each Request identifies a subject matter, *i.e.* the contract between the agency and its contractor, the Requests do not identify a discrete group of documents sought. *See PSP v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010) (finding that the portion of a request seeking “any and all records, files or communications” related to vehicle stops, searches,

and seizures was insufficiently specific under Section 703 of the RTKL, and that only the portion of the request seeking a particular type of document--manuals related to vehicle stops, searches, and seizures--was sufficiently specific); *see also Pa. Hous. Fin. Agency v. Ali*, 43 A.3d 532 (Pa. Commw. Ct. 2012) (finding a request for “all correspondence...concerning” the restructuring of a particular mortgage and a project was insufficiently specific). As part of his attestation, Mr. Chao states that “[t]he term ‘[a]ny and all records created by either party pursuant to the underlying contract’ could mean various different types of records such as correspondence, emails, drafts, blank forms, example documents, draft contracts, draft exhibits or draft amendments, and could also include financial or fiscal records such as insurance certificates, background clearances, company financial audits and budgets, and invoices and payments to the vendor for services.” Chao Aff. at ¶ 3. A review of the language in the contracts provided along with the Requests confirms Mr. Chao’s statement. Thus, the pool of records implicated by the “any and all records” portion of the Requests is quite broad. The Commonwealth Court has found that “a request for a broad category of documents, such as all records, may be sufficiently specific if confined to a particular recipient or recipients” *Pa. Dep’t of Educ.*, 119 A.3d at 1125; *see also Carey*, 61 A.3d at 372 (concluding that a request for “all records that were provided to the transferred inmates” was sufficiently specific because it sought “a discrete group of documents” limited by recipient). However, such is not the case in this matter as the Requests implicate records created by an entire agency and its contractor in relation to their contract.

In addition, the subject matter potentially requires the School District to make a judgment call regarding what records were “created...*pursuant to* the...contract[s].” *Cf. Legere, supra.*, at 265 (Pa. Commw. Ct. 2012) (*en banc*) (concluding a request seeking “a clearly-defined universe of documents” spanning almost four years was sufficiently specific because there [were] no

judgments to be as to whether the documents [were] “related” to the request); *see also Pedro v. City of Philadelphia*, OOR Dkt. AP 2020-1165, 2021 PA O.O.R.D. LEXIS 48 (finding that a request seeking “any and all other documents, records and public information related to, arising from, and/or growing out of” a contract was insufficiently specific and would likely require the agency to make judgments as to the relation of the documents sought). “[I]t is the requester’s responsibility to tell an agency what records he or she wants.” *Mollick v. Twp. of Worcester*, 32 A.3d 859, 871 (Pa. Commw. Ct. 2011).

Lastly, we note that the timeframe applicable to each Request is not explicitly identified. However, the fact that the Requests seek records created pursuant to a particular contract suggests that the contract terms set forth are likely the time periods that are implicated.<sup>5</sup> The contract terms for the identified contracts range from almost four months to a little over seven months. Even assuming that the term of each contract is the time period applicable to the requested records, such an interpretation still does not cure the overly broad scope of the Requests.

For the foregoing reasons, we conclude that Item One of each of the Requests is not sufficiently specific under Section 703 of the RTKL. This ruling, however, does not preclude the Requester from filing a new request with the School District to include the additional details necessary to guide the School District’s search for responsive records.

## **2. The records withheld are exempt under Section 708(b)(17) of the RTKL.**

The School District next argues that the records it withheld in response to Item Two of each Request are exempt from disclosure because they relate to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a

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<sup>5</sup> In its argument on appeal, the Requester suggests as much indicating that, at a minimum, the timeframe relevant to the Requests would be the term of the contract. The Requester also argues, however, that if records were produced before or after the term “pursuant to” the contracts, then such records would also be included.

noncriminal investigation,” including “[i]nvestigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(ii). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See 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; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

The School District contends the records sought are exempt from access under Section 708(b)(17) of the RTKL because they are part of the CSO’s evaluation, on behalf of the Board, of applications submitted for review under the CSL. More specifically, the School District maintains that the records here are part of the CSO’s detailed examination of whether an applicant’s proposed curriculum in a charter school application adheres to established academic and legal requirements.

Under Section 17-1717-A(c) of the CSL, an application to establish a charter school is required to be submitted to the “local board of school directors of the district where the charter school will be located.” 24 P.S. § 17-1717-A(c). Upon its receipt of a charter school application, the local board of school directors is required to hold at least one public hearing on the provisions of the charter application, in accordance with the Sunshine Act, 65 Pa.C.S. §§ 701, *et seq.*; 24 P.S. § 17-1717-A(d). The school board must grant or deny the application no later than seventy-five days after the first public hearing on the application. 24 P.S. § 17-1717-A(e)(1). Section 17-1717-

A(e)(2) of the CSL requires that the local board of school directors evaluate the applications received based on certain criteria.<sup>6</sup> 24 P.S. § 17-1717-A(e)(2). The CSL further provides that “(f)ormal action approving or denying the application shall be taken by the local board of school directors at a public meeting, with notice or consideration of the application given by the board, under the ‘Sunshine Act.’” 24 P.S. § 17-1717-A(e)(4). To the extent that an application is denied, the CSL sets forth an appeals process to which an applicant may avail themselves. 24 P.S. § 17-1717-A. In the case of a denied application, the Board is required to provide “the reasons for the denial, including a description of deficiencies in the application” to the applicant. 24 P.S. § 17-1717-A(e)(5).

In support of its position that the records sought are related to a noncriminal investigation, the School District relies on the attestation of Mr. Chao, who attests, in part, as follows:

4. The CSO assists [the Board], the governing body of the School District, in meeting its legislative obligations under the [CSL] and in promoting accountability by exercising oversight for educationally sound and fiscally responsible charter schools as a means of improving academic achievement and strengthening school choice options in Philadelphia.

5. Under Board Policy 400, the Board has authorized the CSO as the office at the School District to monitor charter schools to support the Board’s charter authorizing responsibilities and duties effectively and efficiently. A copy of Board Policy 400 is attached to this [attestation].

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<sup>6</sup> Section 17-1717-A(e)(2) of the CSL provides as follows:

(2) A charter school application submitted under this article shall be evaluated by the local board of school directors based on criteria including, but not limited to, the following:

- (i) The demonstrated, sustainable support for the charter school plan by teachers, parents, other community members and students, including comments received at the public hearing held under subsection (d).
- (ii) The capability of the charter school applicant, in terms of support and planning, to provide comprehensive learning experiences to students pursuant to the adopted charter.
- (iii) The extent to which the application considers the information requested in section 1719-A and conforms to the legislative intent outlined in section 1702-A.
- (iv) The extent to which the charter school may serve as a model for other public schools.

24 P.S. § 17-1717-A(e)(2).

6. As Acting Chief of Charter Schools, my duties and responsibilities include managing and developing CSO staff, creating a service oriented and accountability-focused environment that enables the Board and the School District to support and monitor brick and mortar charter schools in Philadelphia and designing strategic processes through which charter schools will be held accountable for academic outcomes, organizational compliance and financial stewardship.

7. Annually, the CSO issues and posts on its website a new charter application form that details the information and documents applicants for new charter schools are to submit to the School District for evaluation under the [CSL]. New Application forms for application years 2018-2019, 2019-2020 and 2020-21 have been attached to this Affidavit.

8. The new charter application form requests information and documents related to various components of the application, including but not limited to:

1. The Academic Program
  - a. Curriculum and Educational Plan
  - b. Diverse Learners
  - c. Extracurricular Activities
  - d. Student Supports and Services
2. Organizational Capacity and Compliance
  - a. Founding Applicant/Coalition
  - b. Governance
  - c. Charter Management Organization
  - d. Dissolution Plan
  - e. School Leadership
  - f. Talent Acquisition, Development and Evaluation
  - g. Staff Benefits
  - h. School Operations and Third-Party Service Providers
  - i. Student Discipline, Code of Conduct and Due Process
  - j. School Safety Plan
  - k. Insurance Coverage
3. Community Engagement, Support and Impact
  - a. Targeted Community
  - b. Student Demographics
  - c. Parent/Guardian/Family Engagement
4. Finance
  - a. Finance and Operations
  - b. Financial Policies and Procedures
  - c. Fiscal Management
  - d. Evidence of Financial Solvency
5. Facilities
  - a. Facility Suitability
6. Existing Operator
  - a. Historical Trends of the Existing Operator

b. Current Capacity for Replication

9. Upon receipt of a new charter school application, the CSO conducts a detailed examination and official probe into the application pursuant to Section 17-1717-A and 17-1719-A of the [CSL] which establishes standards for approval of an application for a new charter school and the new charter application process.

10. The detailed examination and official probe conducted by the [CSO] of new charter school applications involves an evaluation based on the following criteria, including but not limited to:

a. The extent to which the application considers the information requested in Section 1719-A of the [CSL] and conforms to the legislative intent outlined in section 1702-A of the [CSL].

b. The capabilities of the applicant, in terms of support and planning, to provide comprehensive learning experiences to students pursuant to the proposed charter.

c. The demonstrated, sustainable support for the proposed charter school plan by teachers, parents/guardians, community members, and students.

d. The extent to which the proposed charter school may serve as a model for other public schools.

11. The CSO contracts with vendors which have the necessary certification and experience to review curriculum to ensure that the curriculum submitted by charter applicants pursuant to the [CSL] and the new charter application process is compliant with the Pennsylvania standards set forth in Chapter 4 of the PA Code.

12. The curriculum materials submitted by different applicants may vary in terms of size, level of detail, and compliance with the requirements of the [CSL] and Chapter 4 of the PA Code.

13. Once the vendor's review is completed, depending upon the curriculum materials submitted by a specific applicant, the CSO will receive a summary review from a vendor for a specific application.

14. The vendor's summary review is reviewed and evaluated by the CSO with potential further engagement with the vendor.

15. Once the information and documents submitted as part of a new charter application have been reviewed and evaluated, the CSO prepares an evaluation report on each application detailing the conclusions of each review and evaluation. Sample evaluation reports have been attached to this Affidavit.

Under the RTKL, statements made under the penalty of perjury are competent evidence to sustain an agency's burden of proof. *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 competent evidence that the School District acted in bad faith, "the averments in [Mr. Chao's attestation] 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)).

The School District's evidence demonstrates that the School District has statutory authority pursuant to the CSL to evaluate and make findings with respect to charter school applications submitted to it under that law. Such evaluations occur as part of the School District's official duty in determining whether to grant or deny a charter school application under the CSL.

While the records responsive to the Requests are not necessarily described in detail by the School District in its evidence, that evidence, when read along with the language of the Requests and the coinciding contracts, makes clear that the records at issue relate to School District's evaluation of the applications it receives under the CSL. Item Two, although worded differently in each Request,<sup>7</sup> essentially seeks the findings, reviews, narratives, analysis and conclusions made by the various vendors contracted by CSO to review charter school applications, as well as templates and evaluation tools provided to the vendors under the terms of the contract to conduct those reviews. As such, any records responsive to Item Two inevitably relate to the School District/CSO's examination of whether the charter applications meet the requirements of the CSL.

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<sup>7</sup> The wording in each Request, for the most part, tracks the language contained in the respective contract between the School District's CSO and its vendor as it pertains to the vendor's statement of work and/or deliverables under the contract.

The School District contends that the instant matter is similar to the case of *Pa. Liquor Control Bd. v. Beh*, 215 A.3d 1046 (Pa. Commw. Ct. 2019). In *Beh*, a RTKL request was submitted to the Liquor Control Board seeking liquor license applications for certain entities. The OOR determined that Individual Financial Disclosure Affidavits provided to the Board by the applicant were exempt from access under Section 708(b)(17) because such documents related to the Board's investigation to determine whether the applicants met the requirements of the Liquor Code. The Commonwealth Court affirmed the OOR's conclusion, finding that the information on the Affidavit forms was collected to document the financial fitness of the applicant under the Liquor Code and the Board's regulations. *Id.* at 1061-2. Like the records sought in *Beh*, the School District contends that the records at issue here form part of CSO's examination and probe to determine whether the proposed curriculum included in each charter application adheres to the requirements of Chapter 4 of the Pa. Code and the CSL.

We would agree that the rationale of that case is applicable here. The records sought are part of and/or arise out of the systematic, detailed examination conducted by the School District/CSO, via its vendors, to determine whether the submitted applications meet the necessary academic and legal requirements under the CSL and Chapter 4 of the Pennsylvania Code. *See also Dowd v. Pa. Dep't of Ins.*, OOR Dkt. AP 2017-1802, 2017 PA O.O.R.D. LEXIS 1705 (determining that the Department properly withheld records under Section 708(b)(17) where it proved that it conducted a systematic investigation, under Section 1402(f) of the Insurance Companies Holding Act, when reviewing to approve or disapprove an application for the acquisition of an insurer). Given our review of the appeal record and the evidence presented by the School District, we conclude that the School District has demonstrated, by a preponderance of

the evidence, that the records withheld are exempt under Section 708(b)(17)(ii) of the RTKL. 65 P.S. § 67.708(a)(1).

The Requester contends that the School District's review of the charter school applications is more akin to a "performance audit" than a "systematic or searching inquiry, a detailed examination, or an official probe." It likens the District's review under the CSL to the performance audit which occurred in *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 of Public Welfare'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. The Court made clear in *Chawaga* that, "[n]ot all agency fact-finding constitutes a 'noncriminal investigation' subject to the protections of the RTKL." The Requester asserts that the School District has engaged its contractors to provide a "one-time objective analysis" of certain parts of charter school applications submitted to the School District. It also contends that the records produced or created by the School District's vendors are ancillary to the District's investigation into whether the charter school applications meet the requirements under the CSL. We disagree. A review of a sample CSO evaluation report, referenced by Mr. Chao in his attestation, shows that the School District's examination of charter school applications is quite comprehensive, covering multiple subject areas, including, among other things, a review of the applicant's curriculum and education plan. In addition to an applicant's curriculum, the School District, as part of its examination, also assesses areas such as student supports and services, governance, school leadership, operations, fiscal management and solvency, parent/guardian engagement, recruitment, financial policies and procedures, admissions and enrollment, among others. Moreover, as stated earlier, the School District's detailed examination is conducted in order to

assess the charter school applicant's compliance with the relevant statutory and regulatory provisions. *See Beh, supra*. The review of the curriculum materials and information by CSO's vendors, is not ancillary to the School District's investigation, but rather an integral part of the investigation performed. The summary reviews from the CSO vendor are utilized by the CSO to prepare the evaluation report that is provided to the Board for consideration. Chao Aff. at ¶ 13-15.

The Requester also suggests that public policy supports the disclosure of the requested records because the General Assembly determined that the charter school application process under the CSL should be transparent. The Requester points to the requirement in the CSL that the Board is required to hold a hearing on the application within a prescribed time period and, in addition, necessitates that the Board take formal action on the application at a public meeting. *See* 24 P.S. §§ 17-1717-A(d) and (e)(4).

While we would agree that the statutory language of the CSL reflects an intention by the General Assembly to infuse transparency into the process by which a local school board of directors considers an application for a charter school, that does not necessarily mandate the disclosure of the board's analysis during its evaluation process. Indeed, the CSL establishes a framework by which the public and applicants can participate in the application process. Moreover, a board must issue its reasons for denying an application in writing and the CSL sets forth an appeal process by which an applicant may avail themselves if necessary. *See* 24 P.S. §§ 17-1717-A(e)(5) and (f). In addition, certain public policy reasons, such as harm to an applicant's reputation or to the CSO's investigatory process itself, could be realized should certain records related to its examination be disclosed to the public.

Next, because the evaluation of charter school applications was performed by vendors hired by the School District and not the School District itself, *i.e.* the Board, the Requester maintains

that the examination or inquiry performed cannot constitute an “investigation” as contemplated under Section 708(b)(17). In support of its position, the Requester cites to *Pa. Dep’t of Labor & Indus. v. Darlington*, 234 A.3d 865 (Pa. Commw. Ct. 2020). In *Darlington*, the Commonwealth Court was presented with the question of whether a regular inspection under the Boiler Law, 35 P.S. § 1331.13(a), qualified as a noncriminal investigation. *Id.* at 874. As part of its reasoning for finding that such inspections do not qualify as a noncriminal investigation, the Court noted that an inspection, under the Boiler Law, need not be performed by the Department. *Id.* at 875. Conversely, “[a]n investigation,” the Court noted, per the Boiler Law, “is always under the purview of the Department and performed by the Department itself.” The Court went on to say:

The fact that the Department is charged with investigations, but may delegate the duties of regular inspections to be performed by independent inspectors is telling. The ability to delegate inspection authority differs from the inspections in Department of Health, where the inspections were made by DOH or one of its authorized agents under the HCFA. *Dep’t of Health*, 4 A.3d at 811 (citing Section 813(a) of the HCFA, 35 P.S. § 448.813(a) (“any authorized agent of the department . . . .”). Similarly, in both *Michak*, 56 A.3d at 926 and *Gilbert*, 40 A.3d at 759, the respective agencies performed the inspections. Here, the Department does not contend that the inspectors hired by the owner of the boiler were authorized agents of the Department. Nor does the Department contend that the inspections at issue were performed by a Department inspector pursuant to Section 9(d) of the Boiler Law.

*Darlington* at 875-876. The Requester maintains that, similar to the express language of the Boiler Law, which only permits the Department to conduct an investigation, the CSL requires that the Board, not a delegate of the Board, evaluate the School District’s charter school applications. *See* 24 P.S. § 17-1717-A(e)(2) (“[a] charter school application submitted...shall be evaluated by the local board of school directors based on criteria...”). According to the Requester, any examination of the applications conducted by a private consultant is performed outside the CSL and cannot constitute an investigation.

Contrary to the Requester’s assertion, however, we find *Darlington* to be inapposite to the instant matter. The Court’s discussion in *Darlington* compared the applicable statutory language of the Boiler Law as it related to inspections and investigations in the context of Section 708(b)(17). The Court did not address, for purposes of Section 708(b)(17) of the RTKL, whether or not the Department could delegate its investigatory power under the Boiler Law. Moreover, unlike in *Darlington*, the agency in the instant matter hired a contractor to act on its behalf. The fact that the CSL requires “the Board” to examine and review the applications, does not preclude the Board from utilizing an agent with the requisite expertise to assist in performing its duty. Nor do we subscribe to the conclusion that the Board/CSO’s use of third parties to assist in its examination of the applications negates the existence of an investigation.<sup>8</sup> See *Palo, Inc. v. Pa. Dept. of Trans.*, OOR Dkt. AP 2016-0247, 2016 PA O.O.R.D. LEXIS 623 (finding that an investigation report completed by the Department’s contractor was exempt under Section 708(b)(17)); *Halpin v. Pa.DOT*, OOR Dkt. AP 2014-0773, 2014 PA O.O.R.D. LEXIS 632 (finding a report resulting from an investigation conducted by an agency contractor was exempt under Section 708(b)(17)).

## CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the School District is not required to take any further action. 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 Philadelphia County

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<sup>8</sup> The Requester cites to the recent Pennsylvania Supreme Court decision in *Chester Water Auth. v. Pa. Dep’t of Cmty. and Econ. Dev.*, 249 A.3d 1106 (Pa. 2021), for the proposition that only records related to an investigation conducted by an agency itself, and not an outside contractor, fall within the parameters of Section 708(b)(17) of the RTKL. *Chester Water Auth.*, however, dealt with Section 708(b)(10)(i)(A) of the RTKL and whether the records there reflected the internal, predecisional deliberations of the agency. The Supreme Court found that communications are not “internal” under Section 708(b)(10) if they are sent to or from a party that is not an employee or official of an entity that is defined as an agency under the RTKL. *Id.* at 1114. While we understand the Requester’s argument in this respect, *Chester Water Auth.* did not involve the application of Section 708(b)(17), and we therefore find it unpersuasive and inappropriate to apply that holding here.

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>9</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: January 31, 2022**

*/s/ Angela Edris*

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APPEALS OFFICER  
ANGELA EDRIS, ESQ.

Sent via email to: Abigail Lipow, Esq.;  
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<sup>9</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).