pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
CASEY MONAGHAN,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2022-0378**
	:	
EAST LYCOMING SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Casey Monaghan ("Requester") submitted a request ("Request") to the East Lycoming School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking resumes, emails about a sign, and a football playbook ("Playbook"). The District provided redacted resumes, argued that no responsive emails exist, and asserted that the Playbook contains exempt trade secrets. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On January 3, 2022,[1] the Request was filed, seeking:

*Résumé of Mr. Mic[]ah Burden

[1] The Request is dated December 26, 2021, but the District was closed for winter break until December 31, 2021, and the Request was not received until it reopened on January 3, 2022.

> *Offensive, defensive, and special teams [P]laybook for the Hughesville High School varsity American football team for 2021
>
> *Most recent offensive, defensive, and special teams [P]laybook for the Hughesville High School varsity American football team[2]
>
> *Résumé of Ms. Heather Burke
>
> *Any and all emails sent from or received by superintendent Mr. Michael Pawlik emailed between June 1, 2021 to September 1, 2021 regarding the [B]ible camp sign outside of Carl G. Renn Elementary School

On January 4, 2022, the District invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902. On February 3, 2022, the District denied the Request in part, providing resumes redacted of personal identification information, *see* 65 P.S. § 67.708(b)(6)(i)(A), arguing that responsive emails do not exist in its possession, custody, or control, and asserting that the Playbook contains exempt trade secrets, *see* 65 P.S. § 67.708(b)(11).

On February 7, 2022, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.[3] 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 16, 2022, the Requester submitted a verified position statement challenging the District's response. Specifically, the Requester argues that the Playbook does not contain trade secrets, and that he believes that Mr. Pawlik received a RTKL request about the sign, meaning that emails should exist. On February 28, 2022, the District submitted a position statement, and the statements, made under the penalty of perjury, of Mr. Tallman, Christopher Kenyon, Esq., Solicitor for the District, and Mr. Pawlik. The District also submitted a responsive email that was

[2] While both this Item as well as the previous one mention a Playbook, Ken Tallman, Athletic Director, attests that there is only one Playbook. Tallman Aff. at ¶ 4.
[3] The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

subsequently discovered. While the District maintains that the Playbook contains trade secrets and that its disclosure would be likely to threaten personal security, *see* 65 P.S. § 67.708(b)(1)(ii), it argues in the alternative that it is not a District record and is not accessible under Section 506(d)(1) of the RTKL. *See* 65 P.S. § 67.506(d)(1). On March 3, 2022, the Requester submitted a verified position statement, noting that he was withdrawing the appeal as to the redaction of the resumes and arguing that the Playbook is a record of the District. On March 8, 2022, in response to the OOR's request for additional evidence, the District submitted the statement, made under the penalty of perjury, of Adam Creasy, Director of Technology.

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 is moot in part

On appeal, the District has produced a responsive email. Accordingly, insofar as it seeks that record, 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).

2. The District has proven that no other responsive emails exist

Mr. Pawlik attests that he searched for responsive emails and that the sign referenced in the Request is not located on District property, so the District has not and cannot give permission to place the sign. Pawlik Aff. at ¶¶ 3-4. Regarding the search for responsive records, Mr. Creasy attests that he has access to all electronic records of the District, and that his search uncovered only the email and attached letter that were provided to the Requester. Creasy Aff. at ¶¶ 2-7.

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 statements] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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 no other responsive emails exist in its possession, custody, or control. *See Hodges*, 29 A.3d at 1192; *see also Campbell v. Pa. Interscholastic Ath. Assoc.*, 2021 Pa. Commw. LEXIS 579 (Pa. Commw. Ct. Nov. 30, 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a "more likely than not" inquiry).

3. The Playbook is not accessible under the RTKL

The District argues that the Playbook is not a record of the District and is not accessible under Section 506(d)(1) of the RTKL. The RTKL defines a "record" as "[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or

activity of the agency." 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a "transaction or activity of an agency?" and 2) if so, was the material "created, received or retained … in connection with a transaction, business or activity of [an] agency?" *See* 65 P.S. § 67.102; *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc*., 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of "record" must be liberally construed. *See A Second Chance*, 13 A.3d at 1034; *Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. Jan. 12, 2012) ("[H]ow [can] any request that seeks information … not [be] one that seeks records[?]"). In *A Second Chance*, the Commonwealth Court interpreted the word "documents" as meaning "proves, supports [or] evidences" and held that certain requested information met the first part of the definition of a record because it documented the existence of a governmental action. 13 A.3d at 1034.

Here, Mr. Tallman attests:

5. The Hughesville High School varsity football head coach is approved by the District Board of Directors as a volunteer coach on a yearly basis.

6. The District pays the varsity head football coach a yearly stipend for his services.

7. The head football coach develops and maintains the [Playbook].

8. The Playbook is the property of the varsity head football coach.

9. The Playbook is not approved by District (i.e. Athletic Director, Superintendent or Board of School Directors) for use by the varsity head football coach.

10. The Playbook is in the exclusive possession of the varsity head football coach, his staff and players.

11. The Playbook is not maintained in any format by the District.

Mr. Tallman attests that the head coach develops and maintains the Playbook, not the District. While the head coach does receive a stipend from the District, he is a volunteer, not an employee, and the Playbook is his property and is neither approved nor maintained by the District.

Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidentiary support. *Sherry*, 20 A.3d at 520-2; *Moore*, 992 A.2d at 909. Accordingly, the District has met its burden of proving that it does not possess the Playbook. *See Hodges*, 29 A.3d at 1192.

However, the Requester argues that compilation of the Playbook is a District activity, undertaken by the varsity coach pursuant to a contract with the District. The Playbook, he argues, documents the regular District activity of running football plays. Under Section 506(d) of the RTKL, public records in the possession of third parties are accessible if certain conditions are satisfied. *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). Section 506(d)(1) of the RTKL provides that:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency…

65 P.S. § 67.506(d)(1). "Under the RTKL, to reach records outside an agency's possession the following two elements must be met: (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." *Eiseman*, 86 A.3d at 939 (citation omitted).

The requirement that an agency have a contract with the third party from whom records are sought under Section 506(d) is essential. *See Eiseman*, 124 A.3d at 1223 (Pa. 2015) ("Upon consideration, we agree … that the [RTKL] channels access to third-party records through Section

506(d)(1), and that such provision contemplates an actual contract with a third party in possession of salient records").

A third party performs a governmental function on behalf of an agency where it performs "a function generally performed by that agency and is not ancillary to the agency's functions." *Eiseman*, 86 A.3d at 939 (citing *Wintermantel*, 45 A.3d at 1044). This must include the "delegation of some substantial facet of the agency's role and responsibilities, as opposed to entry into routine service agreements with independent contractors." *Wintermantel*, 45 A.3d at 1043. The Commonwealth Court has noted that "the records reached [by Section 506(d)] are only those that relate to the performance of [the governmental] function." *Allegheny County Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 346 (Pa. Commw. Ct. 2013), *appeal denied*, 72 A.3d 604 (Pa. 2013). Put differently, the information must have "a direct bearing on the third-party contractor's obligations" under the contract. *UnitedHealthcare of Pa., Inc. v. Baron*, 171 A.3d 943, 964 (Pa. Commw. Ct. 2017); *see also Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613 (Pa. Commw. Ct. 2011) (finding that "independent contractor agreements with interpreters who have not actually performed translation services under the Contract ... are not directly related to the Contract because the interpreters have not actually performed, and may never perform, translation services under the Contract") (emphasis removed). The "direct relationship" requirement of Section 506(d) "focuses on *what* services are performed and *how* they are performed, not *who* performs them." *Parsons*, 61 A.3d at 347 (emphasis in original); *see also Buehl v. Office of Open Records*, 6 A.3d 27, 31 (Pa. Commw. Ct. 2010); ("[W]hat [a third party contractor] paid for the items is beyond the parameters of its contract with the Department -- it does not directly relate to performing or carrying out this governmental function.").

Here, maintaining a sports team is a District activity. The Public School Code imposes a number or regulations on school districts related to athletics, but nowhere does it require that a district maintain a varsity football team. *See, e.g.*, 24 P.S. 5-511(a) (requiring school boards to prescribe, adopt, and enforce rules governing athletics and granting boards authority to suspend or dismiss any employee or appointee who oversees or supervises student activities); 24 P.S. 1604-C (requiring the Pennsylvania Department of Education to collect information about teams participating in interscholastic competition, including coaches' employment status and compensation); *Strawser v. Shamokin Area Sch. Dist.*, OOR Dkt. AP 2020-0291, 2020 PA O.O.R.D. LEXIS 2271 (finding that an agency had not demonstrated that communications between paid coaches and students did not document an agency activity, *i.e.* coaching).

As noted above, the Playbook is the property of the coach, who is responsible for its development and maintenance. Although the Playbook is shared with the coach's staff and players, the District has not approved it and does not have a copy. While the contract between the coach and the District is not before the OOR, there is no evidence that the coach must provide the Playbook to the District upon request or that the coach's position is dependent on the quality of the Playbook or the performance of the football team in general. While the Playbook relates to the athletic performance of the football team, it does not directly relate to the performance of the District's governmental function of maintaining a sports team and may be best described as ancillary to the District's government activity. *See Chester Cmty. Charter Sch. v. Hardy*, 38 A.3d 1079, 1088 (Pa. Commw. Ct. 2012) (recognizing that a school's primary function is to educate children), *vacated on other grounds*, 74 A.3d 118 (Pa. 2013); *see also Wintermantel*, 45 A.3d at 1042 (acknowledging that "some, if not many contracts do not implicate a government function" and rejecting the notion that government-always-acts-as-government) (quotation omitted). Like

the price paid for goods sold by the contractor in *Buehl*, the Playbook is outside of the scope of the District's contract with the coach. Similarly, as in *UnitedHealthcare*, there is no evidence that the Playbook has a direct bearing on the coach's obligations under the contract; accordingly, it is not accessible under Section 506(d) of the RTKL.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied in part** and **dismissed as moot in part**, and the 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 Lycoming 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.[4] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: March 17, 2022

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

Sent via email to: Casey Monaghan, Christopher Kenyon, Esq., Heather Burke, and David Maciejewski

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