pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION UPON RECONSIDERATION

IN THE MATTER OF	:	
	:	
BROCK MCCLEARY,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2022-0753**
	:	
YORK SUBURBAN SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Brock McCleary ("Requester") submitted a request ("Request") to the York Suburban School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking emails about masking and a health and safety plan. The District provided emails redacted of internal, predecisional, and deliberative content, among other things. 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**, **denied in part**, and **dismissed as moot in part**, and the District is required to take further action as directed.

FACTUAL BACKGROUND

On February 7, 2022, the Request was filed, seeking:

> All emails between two or more of the following individuals: School Board Member Steven Sullivan, School Board Member John Posenau, School Board Member Joel Sears, and/or Superintendent Timothy Williams. The subject matter of the emails would be related to, but not limited to, discussion of the Health and Safety Plan and/or masking. The timeframe for the emails would be between December 14, 2021 and January 28, 2022. The email addresses should include both

> [District] email addresses as well as any alternative email addresses used by any of the four individuals to discuss [D]istrict matters.

On February 14, 2022, the District invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902. On March 15, 2022, the District provided records, redacted of personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), certain employee records, 65 P.S. § 67.708(b)(7), internal, predecisional, and deliberative content, 65 P.S. § 67.708(b)(10)(i)(A), and material related to a noncriminal investigation, 65 P.S. § 67.708(b)(17).

On March 28, 2022, the Requester appealed to the OOR, challenging only the District's redactions of internal, predecisional, and deliberative content and stating grounds for disclosure.[1] Specifically, the Requester argues that the emails were not predecisional, as several post-date the District's decision to modify its Health and Safety Plan, and that some emails are missing, as evidenced by the gap in the page numbers of records provided. 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 March 30, 2022, the District provided the records that account for the gap in page numbers referenced by the Requester. The District explains why each of the emails was excluded from the District's original production—either because they were duplicates and/or did not fall within the scope of the Request. The District also cross-references the records for the Requester's information. On March 31, 2022, the Requester submitted copies of emails that were responsive to the Request but were not produced by the District. Because the Requester failed to copy the

[1] As the Requester does not challenge any of the other bases the District has asserted for redacting records, he has waived any objections thereto. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011). The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

District, the OOR forwarded the submission to the District and reminded the Requester of the requirement to copy the other party.

On April 14, 2022, the District submitted a position statement, reiterating its grounds for redaction and acknowledging that it had also redacted two home addresses pursuant to the constitutional right to privacy. In support, the District submitted a verified exemption log and the sworn affidavits of its Open Records Officer, Kathy Ciaciulli, and its Director of Technology, Vincent Henry. On the same day and again on the next day, the Requester sent the OOR two more *ex parte* communications. In response to the OOR's reiteration of the prohibition of *ex parte* communication, the Requester apologized, stating that "he did not realize," as he had never done this before. On April 26, 2022, the District requested that the OOR not consider the Requester's recent *ex parte* submissions.

The OOR's Official Notice of Appeal states that "[a]ny information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered." The Requester is again reminded that future *ex parte* submissions may not be considered. Nevertheless, because the Requester raises a worthwhile consideration and the OOR has cured the *ex parte* nature of the submissions by forwarding them to the Authority, the OOR will consider the Requester's argument. *See* 65 P.S. § 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").

On May 27, 2022, the OOR issued a Final Determination, granting the Requester's appeal in part and requiring the District to provide a written statement after conducting a search for records. On the same day, the Requester filed a Petition for Reconsideration, arguing that the

District should be required to provide a sworn affidavit supporting its search. The OOR hereby grants the Petition for Reconsideration in order to modify its final order.

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

Initially, the OOR notes that the District has un-redacted some material from responsive records and has produced copies of emails that it originally considered outside the scope of the appeal. *See* 65 P.S. § 67.506(c) (noting that agencies have discretion to release otherwise exempt records). Accordingly, insofar as it seeks records that have subsequently been provided, 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. Internal, predecisional, and deliberative content that has been presented to a quorum for deliberation cannot be redacted

The District redacted internal, predecisional, and deliberative material from one email. *See* 65 P.S. § 67.708(b)(10)(i)(A). Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure a record that reflects:

> [t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, … including predecisional deliberations relating to a budget recommendation, … or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). In order for this exemption to apply, three elements must be satisfied: 1) "[t]he records must … be 'internal' to a governmental agency"; 2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and 3) the contents must be deliberative in character, *i.e.*, pertaining to proposed action. *See Kaplin v. Lower Merion Twp*., 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

To be deliberative in nature, a record must make recommendations or express opinions on legal or policy matters and cannot be purely factual in nature. *Id.* The term "deliberation" is generally defined as "[t]he act of carefully considering issues and options before making a decision or taking some action...." BLACK'S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep't of Cmty. & Econ. Dev*., OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, *aff'd* No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014). In addition, to withhold records under this section, an agency must explain how the information withheld reflects or shows the deliberative process in which an agency engages during its decision making. *See Twp. of Worcester v. Off. of Open Records*, 129 A.3d 44, 61 (Pa. Commw. Ct. 2016).

Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014). However, factual material can still qualify as deliberative information if its "disclosure would so expose the deliberative process within an agency that it must be deemed excepted"; or in other words, when disclosure of the factual material "would be tantamount to the

publication of the [agency's] evaluation and analysis." *Id*. at 387-88 (citing *Trentadue v. Integrity Comm'cn*, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

Here, Ms. Ciaciulli attests that the District redacted a paragraph of a weekly update email dated January 28, 2022:

> 16. This email is an internal communication between the Superintendent of the District and the School Board members of the District.
>
> 17. The information redacted is related to the then upcoming proposed interview process for the Director of Facilities vacancy.
>
> 18. The Superintendent used the phrase "we are planning" when discussing the proposed interview process.
>
> 19. At the time, the District had not conducted the interviews and at this time has not hired the new Director of Facilities.

Ms. Ciaciulli describes how the redacted material, which was circulated only among the District Superintendent and Board members, discusses proposed plans prior to a decision.

However, Section 708(b)(10)(ii) states that "[a] record that is not otherwise exempt from access under [the RTKL] and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 (relating to open meetings) shall be a public record." 65 P.S. § 67.708(b)(10)(ii). Accordingly, two requirements must be met for the record to be subject to the exception to the exemption: 1) it must be presented to a quorum; and 2) for deliberation.

Here, the email in question was sent by the Superintendent to Board Members, and the District has presented evidence that the redacted material is deliberative in nature. In *Schmitt v. Pine-Richland Sch. Dist.*, the OOR concluded that certain predecisional and deliberative records that were circulated among the board of school directors were publicly available. OOR Dkt. AP 2016-1635, 2017 PA O.O.R.D. LEXIS 1280. In *Schmitt*, the OOR rejected the agency's claim that the records were reviewed in executive session, because the subject matter of the records, which

were related to proposals and projected costs for transportation services, did not provide a valid reason for holding an executive session. *Id*. (citing 65 Pa.C.S. § 708); *see also Kabel v. Manheim Twp*, OOR Dkt. AP 2019-2009, 2020 PA O.O.R.D. LEXIS 2314 (noting that while minutes of an executive session are exempt from disclosure under Section 708(b)(21)(ii) of the RTKL, predecisional and deliberative records presented to a quorum in anticipation of an executive session were not exempt). In the instant matter, although discussions related to employment generally constitute a valid basis for holding an executive session, 65 Pa.C.S. § 708(a)(1), there is no evidence that an executive session was held. Accordingly, the exception to the exemption applies, and as the District asserts no other basis for redacting the information, it constitutes a public record. *See* 65 P.S. § 67.706.

3. Home addresses and personally identifiable medical information are protected by the constitutional right to privacy

The District redacted two home addresses and personal identifiable medical information pursuant to the constitutional right to privacy. Ciaciulli Aff. at ¶¶ 26-31 & 47-49. 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. *See Pa. State Educ. Ass'n v. Commonwealth* ("*PSEA*"), 148 A.3d 142 (Pa. 2016) (recognizing an individual right to privacy in certain types of personal information).

Here, the issue is whether the redacted information is contained in the type of record in which an individual has any reasonable expectation of privacy. *See Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173 (Pa. Commw. Ct. 2017). To discern whether parties may have a privacy interest in the release of their information, the OOR assesses whether the information is traditionally public, whether an individual has a cognizable interest in the status

of the records, and whether the record is personal, such that an individual has a reasonable expectation of privacy. *Id*. Information related to the identity of individuals who have contacted governmental officials is traditionally considered private. *See Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110 (Pa. 2008) (holding that cell phone numbers of individuals contacting or receiving calls from a city council member were protected by the constitutional right to privacy); *Chirco v. Cheltenham Twp. Sch. Dist.*, OOR Dkt. AP 2018-0484, 2018 PA O.O.R.D. LEXIS 697 (finding that the names of citizens who contacted a school board member about a certain topic were protected by the right to privacy).

The Requester does not assert a public interest in the disclosure of the information. Conversely, the District argues that these members of the public were not aware that their home addresses might be released in response to a RTKL request. Ms. Ciaciulli attests that the health information relates to a District employee and explains why that employee had been advised by a doctor not to work under certain health conditions and why that employee could now return to work. Ciaciulli Aff. at ¶¶29-31. There is no discernable public benefit in the disclosure of this information.

Additionally, "[o]ur [S]upreme [C]ourt has explained that the disclosure of personal information, such as home addresses, reveals little, if anything, about the workings of government." *PSEA*, 148 A.3d at 145 (internal citation omitted). This is especially so when the individuals whose home addresses are at issue are private citizens. Although the individual whose health information was redacted is a District employee, concerns about protecting the employee's personally identifiable health information outweigh any perceived public benefit in disclosure. Accordingly, the District has appropriately redacted the home addresses and medical information. *See* 65 P.S. § 67.706.

4. The District has not proven that no other responsive records exist in its possession, custody or control

The District argues that it has identified all responsive records in its possession, custody, or control. Ms. Ciaciulli attests to the District's search:

> 7. … I instructed [Mr. Henry] … to conduct a thorough examination of files in the possession, custody and control of the District, for the communications outlined in [the] Request due to Mr. Henry being the employee with knowledge of, and the capability of, conducting a search for responsive records.
>
> 8. After conducting a thorough examination of files in the possession, custody and control of the District, Mr. Henry provided the District's Solicitor with 58 pages of documents responsive to the Request. In addition, Mr. Henry informed me and the District's Solicitor that his search criteria was for the following information between December 14, 2021 and January 28, 2022:
>
> "("health and safety" OR "health safety" OR "hs plan" OR mask)
> AND
> (from:steven.sullivan OR from:john.posenau OR from:joel.sears OR from:twilliams) AND
> ((to:steven.sullivan AND to:john.posenau) OR
> (to:steven.sullivan AND to:joel.sears) OR
> (to:steven.sullivan AND to:twilliams) OR
> (to:john.posenau AND to:joel.sears) OR
> (to:john.posenau AND to:twilliams) OR
> (to:joel.sears AND to:twilliams))"
>
> …
>
> 12. On or about March 31, 2022, I instructed Mr. Henry to conduct a second examination of files in the possession, custody and control of the District, for the communications outlined in [the] Request, due to [the Requester's] assertion that the District failed to provide all records responsive to his [R]equest.
>
> 13. On or about April 11, 2022, Mr. Henry communicated to me that no new record was located after conducting a second search of the District's files.

Mr. Henry also attests to the facts outlined above. Henry Aff. at ¶¶ 4-7.

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. Off. 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 statement] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The Requester has produced an email that he argues is responsive to the Request but was not provided. However, the OOR does not assess whether an agency should have responsive records. *See*, *e.g.*, *Voisine v. Cooperstown Borough,* OOR Dkt. AP 2018-1687, 2018 PA O.O.R.D. LEXIS 1302 ("While … evidence may establish that a [record] *should* exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such a [record] -- the OOR may only determine whether a responsive record does, in fact, exist.") (internal citation omitted). Regardless, the District has produced evidence of a thorough search, reasonably designed to identify responsive records. *See Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2016-1083, 2016 PA O.O.R.D. LEXIS 1062 ("an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents," quoting *Judicial Watch, Inc. v. United States Dep't of Homeland Sec*., 857 F.Supp. 2d 129, 138-139 (D.D.C. 2012) (citations omitted)); *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).

The Requester argues that the search detailed above appears designed to return only emails sent by one of the identified individuals to at least two of the other individuals whereas his Request sought emails between the individuals; *i.e.* the search would not capture emails sent from one individual to only one other individual. However, this argument is unavailing, as each of the individuals' names are included in both the "To" and "From" search fields; thus, effectively

cancelling each other out. As such, the search would capture emails sent by one individual to only one other individual.

However, while the District's search of District-issued email addresses is sufficient, the Request also specifies any alternative addresses used by the identified individuals to conduct agency business. The District does not offer evidence that it has inquired of these individuals whether they conduct agency business using any alternative addresses; as such, the District must conduct such an inquiry and provide any additional emails that may exist.[2]

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part**, **denied in part**, and **dismissed as moot in part**, and the District is required to provide an unredacted copy of the email of January 28, 2022, and inquire of the individuals identified in the Request whether any responsive emails exist in alternate accounts and provide either (1) any such records, or, (2) if no records are subsequently discovered, a sworn affidavit or attestation made under the penalty of perjury,[3] identifying who conducted the search and how the search was conducted within thirty days. This Final Determination Upon Reconsideration is binding on all parties. Within thirty days of the mailing date of this Final Determination Upon Reconsideration, any party may appeal to the York 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

[2] 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 an agency providing a sufficient evidentiary basis that no responsive records exist, the OOR will order disclosure of responsive public records. *See, e.g., Campbell v. Galeton 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.
[3] Both forms of evidentiary documents are considered sufficient evidence under the RTKL.
[4] *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Determination Upon Reconsideration shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION UPON RECONSIDERATION ISSUED AND MAILED: June 14, 2022

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

Sent via email to: Brock McCleary, Christopher Harris, Esq., Brooke Say, Esq., and Kathy Ciaciulli