



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**SEAN DONAHUE,  
Complainant**

v.

**HAZLETON AREA SCHOOL DISTRICT,  
Respondent**

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**Docket No.: AP 2013-1702**

### **INTRODUCTION**

Sean Donahue (“Requester”) submitted a request (“Request”) to the Hazleton Area School District (“District”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), seeking financial records of the District. The District did not respond, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the District is required to take further action as directed.

### **FACTUAL BACKGROUND**

On August 31, 2013, the Request was filed, seeking “the records necessary to fully disclose the last year when [the District] was completely debt free, without either long-term or short-term debt balances” and “the records necessary to fully disclose the last year that [the District] had a budget surplus without borrowing any money that year.” On September 13, 2013, the Requester appealed to the OOR, arguing that the Request had been deemed denied and

stating grounds for disclosure. 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 pursuant to 65 P.S. § 67.1101(c).

On September 24, 2013, the District made a submission, arguing that the Request had not been received by the District's Open Records Officer<sup>1</sup> and that the Request did not use a form, per District policy.

On September 25, 2013, the OOR requested that the District provide an affidavit supporting the District's assertion that the District's Open Records Officer did not receive the Request. On September 27, 2013, the District's Open Records Officer responded that he "subsequently received the [R]equest third hand to a different email address."

### **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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* No. 20 MAP 2011, 2013 Pa. LEXIS 1800 (Pa. Aug. 20, 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

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<sup>1</sup> The District explained that the Request had been sent to the District's Superintendent instead of the District's Open Records Officer.

hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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 clearly 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). 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 *Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

### **1. The Request was deemed denied**

The District argues that its Open Records Officer never received the Request. Under the RTKL, an agency must issue a response within five (5) business days of its open records officer's receipt of a request for records. 65 P.S. § 67.901; *Office of the Governor v. Office of Open Records*, 59 A.3d 1165 (Pa. Commw. Ct. 2013), *appeal pending* 10 MAP 2013. Here, the Request was notably sent to the District Superintendent's e-mail address rather than the District's Open Records Officer's e-mail address.

However, the OOR cannot conclude that the District's Open Records Officer never received the Request. The OOR requested that the District provide an affidavit supporting its assertion that the District's Open Records Officer did not receive the Request. The District failed to do so. Under the RTKL, an affidavit 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. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Therefore, without any evidence showing that the District's Open Records Officer did not receive the Request, the OOR finds that the Request was deemed denied. See 65 P.S. § 67.901. See also *Commonwealth v. Office of Open Records*, 48 A.3d 503 (Pa. Commw. Ct. 2012) *appeal granted* No. 504 MAP 2012 (Pa. 2013) (holding a request for records may be considered deemed denied where the request never reaches the agency open records officer); *but see Office of the Governor, supra* (holding that the time to respond to a request commences after receipt by the agency open records officer).

## **2. The District did not properly deny the Request for failure to use a form**

The RTKL provides that a requester may submit a request in person, by mail, by e-mail, or by facsimile. 65 P.S. § 67.703. The RTKL does not require the use of any specific form, but an agency may promulgate regulations and policies to govern its administration of the RTKL. 65 P.S. § 67.504(a). The OOR has held that “[a]n agency that has a posted policy requiring use of a

form may deny access to the requested records where the request fails to use the required form, provided the agency timely responds to the Request notifying the Requester of the policy.” *See Mezzacappa v. West Easton Borough*, OOR Dkt. AP 2012-1605, 2012 PA O.O.R.D. LEXIS 1284.

On appeal, the District states that it has a policy requiring the use of a form, and that the Request did not comply with that policy. However, the District deemed denied the Request, rather than timely responding to the Request by notifying the Requester of its policy. As such, the District cannot use its policy as a basis for denying the Request on appeal. *Cf. Mezzacappa, supra; see also Donahue v. City of Hazleton v. Donahue*, OOR Dkt. AP 2013-1284, 2013 PA O.O.R.D. LEXIS 750 (stating that an agency cannot deny a request for failure to use a form when the agency’s policy not properly posted). As the District has not submitted any other argument or evidence in support of withholding the requested records, the District has failed to meet its burden of proof. *See* 65 P.S. § 67.708(a)(1).

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted** and the District is required to provide all responsive records to the Requester within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Luzerne 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: October 9, 2013**

*Kyle Applegate*

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APPEALS OFFICER  
KYLE APPLGATE, ESQ.

Sent to: Sean Donahue (via e-mail only);  
Anthony Lamanna (via e-mail only)