



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**BRIAN DOUTY,
Requester**

v.

**KEYSTONE CENTRAL SCHOOL
DISTRICT,
Respondent**

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Docket No: AP 2018-1783

INTRODUCTION

Brian Douty (“Requester”) submitted a request (“Request”) to the Keystone Central School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to the hiring of a middle school music teacher. The District partially denied the Request, stating that records do not exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On August 9, 2018, the Request was filed seeking:

[Item 1] Documentation regarding the process of selecting the employee for the middle school music position. I am interested in things such as [Item 2] internal communications regarding interview times, process, and who may have been included in the decision making process, [Item 3] as well as any internal concerns

about the process or candidates. Please include that and any other relevant documentation.¹

On August 13, 2018, the District invoked a thirty day extension to respond. *See* 65 P.S. § 67.902.

On September 14, 2018, the District partially denied the Request, providing the records responsive to Item 1. The District also provide records responsive to Item 2; however, the District redacted information of candidates not hired by the District, citing 65 P.S. § 67.708(b)(7)(iv). Lastly, the District denied Item 3, stating that the requested records do not exist in the District's possession, custody or control.

On September 28, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² The Requester also stated that this "request was a preliminary look into the possibility that a highly qualified experienced, part time employee was passed over for a full time positions due to a prior whistle blowing incident involving the HR director." 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 October 26, 2018, the Requester submitted a position statement arguing that additional responsive records must exist in the District's possession, custody or control. On October 26, 2018, the District also submitted a position statement reiterating its grounds for denial. In support of its position, the District submitted numerous affidavits made under the penalty of perjury from employees of the District. The District also provided a copy of a letter sent to the Requester on October 26, 2018, stating that it conducted another search for responsive records because it had

¹ This Request replaced an earlier request submitted to the District on August 2, 2018 seeking similar information.

² In his appeal, the Requester states that the "requested information that was denied had to do with internal communications regarding concerns over the selection process and/or candidates. [The District] stated that the information cannot be provided because it does not exist." As the Requester does not challenge the sufficiency of the records provided by the District in response to the Request or the redactions made thereto, the Requester has waived any objections regarding these records. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

recently converted its email software system; and, as a result, located additional records providing these additional ten records on appeal. The District asserts that it redacted these records pursuant to Section 708(b)(6), Section 708(b)(7) and Section 708(b)(17) of the RTKL.³ Additionally, on November 29, 2018, the District supplemented the record providing evidence that this additional search also resulted in records it withheld as relating to its noncriminal investigations. The District provided supplemental affidavits of Mark Condo, Director of Human Resources, and Susan Blesh, Open Records Officer.

On December 4, 2018, the District, in response to the OOR's request for clarification, confirmed that the withheld records all post date August 9, 2018, the date the District received the Request.

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

³ On appeal, the Requester indicated that he is not challenging the District's redactions to the records provided on October 26, 2018.

to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the District requested the OOR to conduct an *in camera* review; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter. As such, the Requester for an *in camera* review is denied.

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 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). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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 Requester cannot modify his Request on appeal

The District argues that it conducted a search for records of internal concerns about the process or candidates for a middle school music teacher and that the. On appeal, the Requester submitted a statement that he is seeking this information to “look into the possibility that a highly qualified, experienced, part time employee was passed over for a full-time position due to a prior whistleblowing incident involving the HR director.” The District argues that the Requester has impermissibly modified the Request on appeal because it he is now seeking records of a whistleblowing incident involving the HR director.

A requester may not modify, explain or expand upon a request on appeal. *See Michak v. Pa. Dep’t of Pub. Welf.*, 56 A.3d 925, 930 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal, argue that an agency must instead disclose a different record in response to the request”); *Staley v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (“A requester may not modify the original request as the denial, if any, is premised upon the original request as written”). As such, to the extent the Requester is expanding his Request to seek records of a possible whistleblowing incident, such cannot be considered.⁴ Therefore, the OOR’s review on appeal is confined to the Request as written. *See, e.g., Hong v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2013-0328, 2013 PA O.O.R.D. LEXIS 162.

⁴ The District did submit evidence, through the Affidavits of Ms. Blesh and Mr. Condo, that there is no whistleblower report, nor was an investigation whistleblower conducted for wrongdoing or waste.

2. The identified records are not responsive to the Request

In its supplemental position statement, the District states that the withheld records related to a noncriminal investigation it conducted after receiving a complaint regarding the process and hiring of a candidate for the middle school music teacher position. Mr. Condo attests that he noncriminal investigation to which these records relate was instituted on August 9, 2018. The OOR notes that the District received the Request on August 9, 2018. After seeking clarification from the District, it confirmed that the withheld records postdate the Request. Because an agency cannot release records that do not exist at the time a RTKL request is submitted, a request is necessarily limited to records possessed by the agency at the time of the RTKL request. *See Terensky v. City of Monessen*, OOR Dkt. AP 2013-0772, 2013 PA O.O.R.D. LEXIS 349. Here, the withheld records postdate the Request; and, therefore are not responsive to the Request.⁵

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, 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 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁵ This ruling does not preclude the Requester from filing a new request with the District seeking records that came into existence after August 9, 2018.

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: December 6, 2018

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Brian Douty (via email only);
Susan Blesh (via email only)