



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>JOHN PERFETTI,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2018-2144</b>
	:	
<b>UPPER DARBY SCHOOL DISTRICT,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

John Perfetti submitted a request (“Request”) to the Upper Darby School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records containing the number of students enrolled in the District that are residents of the Borough of Clifton Heights.<sup>1</sup> The District denied the Request, stating that it does not maintain any responsive records; however, the District created a record and provided it to the Requester. 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.

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<sup>1</sup> Mr. Perfetti is the Borough of Clifton Heights’ Open Records Officer.

## FACTUAL BACKGROUND

On November 15, 2018, the Request was filed, seeking:

Any study, analysis, report or other record which contains information on the number of students enrolled in the ... District in the following grades who are residents of the Borough of Clifton Heights.

- Kindergarten
- Elementary School
- Middle School
- High School

On November 26, 2018, the District denied the Request, stating that “the District does not maintain any record that catalogs students in the way ... asked.”<sup>2</sup> Further, the District argued that students’ home addresses are protected by the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and made exempt under Section 708(b)(30) of the RTKL, 65 P.S. § 67.708(b)(30).

Regardless, the District stated:

However, your request made the Board curious about the same information. As a result, the Administration was able to create a new record with de-identified information based solely on the grade enrollment and the 19018 zip code. Although there was no duty to create this record nor to share it, the District has chosen to do so in this case. We recognize that using zip codes in this fashion might miss some students and include others that should not be included, but we offer it as a close approximation of the Clifton Heights students that the District is responsible for educating.

On December 13, 2018, the Requester appealed to the OOR, challenging the denial 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. *See* 65 P.S. § 67.1101(c).

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<sup>2</sup> Due to the Thanksgiving holiday, the District’s response was timely issued. *See* 65 P.S. § 67.901 (requiring a response within five business days).

On December 24, 2018, the District submitted a position statement in support of its denial, along with the attestation, made under penalty of perjury, of Patrick Grant, the District's Open Records Officer.

### **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.” 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.* 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.* Here, neither party requested a hearing; however, the OOR has the necessary 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. 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). 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)). “The 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).

On appeal, the District argues that it does not possess records responsive to the Request. Mr. Grant, the District’s Open Records Officer, explains his search as follows:

3. Upon receipt of the Request, I conducted a thorough examination of files in the possession, custody and control of the [District] for records relevant to the aspect of the [R]equest.... Specifically, I searched my own records and all records available to me in my roles as Open Records Officer and Chief Financial Officer. In doing so, I searched for records that existed as of the date of the Request that might indicate the number of students enrolled with the [District] in various grades, who were also residents of the Borough of Clifton Heights.
4. Additionally, I consulted with Robert Hilinski, the Director of Technology for the [District]. Although Mr. Hilinski is not a person whom I would normally expect to maintain records responsive to Right-to-Know requests, due to his familiarity with the [District’s] electronic systems I consulted with him to determine the reports the District’s systems had or could generate.
5. In consultation with Mr. Hilinski I determined that the [District’s] eSchool system contains various information pertaining to students, including their grades,

demographic data, residential postal addresses and other relevant educational and personal information. However, there is no field within the eSchool system for the political subdivision where the student resides.

6. In order to create a report such as [the Requester] requested using the eSchool system, [a District] employee would need to cross-reference individual students' data with other municipality data.
7. Subsequently, I inquired with Dr. Daniel McGarry, Acting Superintendent of Schools for the [District], whether he possessed a record containing the requested information.
8. Dr. McGarry informed me that the [District] had no such report. He also informed me that the [District] had contracted with a third-party demographer to help determine the distribution of students within the school district. However, said third party did not group such data using municipal boundaries, and he has neither requested nor received a report from the third-party demographer that calculates the number of students living in the Borough of Clifton Heights. Furthermore, in order to create such a report, [a District] employee would need to use additional data related to municipal boundaries.
9. To explain further, the [District] is still evaluating its facility needs. As part of this process, the [District] contracted with the third-party demographer mentioned ... above, in order to determine such information as student population density across the District. However, as yet, this evaluation process has not required the [District] to ascertain the number of students living in each constituent municipality.
10. Lastly, I determined that there were no other relevant third-party contractors with whom to inquire regarding the requested information, because the [District] does not contract with any other third parties to maintain or compile students' demographic information other than the demographer mentioned ... above.
11. As a result of the above-described search, I determined that the [District] does not maintain any record that categorizes students based on their townships or boroughs of residence, nor does it regularly compile such a report. Accordingly, the records requested are not within the [District's] possession, custody or control....
13. I also informed the District's Board of School Directors [of the Request], and the Board instructed me to create a new record that would provide an estimate of the number of [District]-enrolled students living in the Borough of Clifton Heights. Although this report was for the Board of School Directors, they instructed me to provide a copy to [the Requester], as well.
14. I consulted with Mr. Hilinski, who generated a new record with de-identified information based solely on grade enrollment and the 19018 ZIP code. This ZIP Code is primarily, but not exclusively, used by the U.S. Postal Service for the

Borough of Clifton Heights. This means that individuals with mailing addresses of “Clifton Heights” are likely in the Borough of Clifton Heights, but might be another municipality. The resultant record was, therefore, a close approximation of the information ... requested.

Under the RTKL, an attestation made under the penalty of perjury may serve as sufficient evidentiary support of the nonexistence of records. *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 District acted in bad faith or that the requested records exist, “the averments in [the 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)).

Mr. Grant’s attestation demonstrates that he conducted a good faith search for responsive records. 65 P.S. § 67.901; *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (“As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession”). Based upon this good faith search, Mr. Grant determined that the requested records do not exist because the District does not track information as contemplated by the Request. As a result, the District was permitted to deny the Request. *See* 65 P.S. § 67.705 (“When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record”). In response to the Request, the District created a record which was “a close approximation of the information ... requested” and provided this record to the Requester, although

it was not required to do so. Based upon the above evidence, the District has met its burden of proving that no other responsive record exists.<sup>3</sup>

### 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 Delaware 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.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: January 10, 2019**

/s/ Kyle Applegate

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APPEALS OFFICER  
KYLE APPLGATE, ESQ.

Sent to: John Perfetti (via email only);  
Denis Gray, Esq. (via email only);  
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<sup>3</sup> The District also denied the Request "to the extent" that it sought individual students' records or addresses. While the Requester argues that the District mischaracterized the Request, he ultimately confirms in his appeal that he did "not request records of individual students nor ... individual student addresses."

<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).