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OFFICE OF OPEN RECORDS

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT
OF EDUCATION,

Petitioner,

v.

ALLEN WING,

Respondent.

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Docket No. 146 C.D. 2020

PETITION FOR REVIEW
(Appellate Jurisdiction)

The Pennsylvania Department of Education (Department), through its undersigned counsel, petitions this Honorable Court to review the January 15, 2020, Final Determination of the Office of Open Records (OOR) in OOR Docket No. AP 2014-0906, based on the following:

Statement of Jurisdiction

1. This Court has appellate jurisdiction over this matter under section 1301(a) of the Right-to-Know Law (RTKL), 65 P.S. § 67.1301(a), and section 763(a)(2) of the Judicial Code, 42 Pa.C.S. § 763(a).

2. The Court exercises *de novo* standard of review and plenary scope of review of questions of both law and fact in appeals from determinations of the OOR, independently reviews OOR's orders and may substitute its own findings of fact for that of the OOR. *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013).

Parties

3. The Department is a Commonwealth agency as defined in section 102 of the RTKL, 65 P.S. § 67.102, and subject to the RTKL pursuant to section 301 of the RTKL, 65 P.S. § 67.301.
4. Allen Wing (requester) submitted to the Department the request for records (RTKL request) that is the subject of this Petition for Review.

Factual and Procedural Background

5. On or about October 15, 2019, PDE received the RTKL request which indicated: "I am requesting PVAAS (Pennsylvania Value Added Assessment System) scores for all Algebra I (one) teachers at the following Philadelphia Public High Schools: Lankenau H.S., Philadelphia Learning Academy, South Constitution H.S., Benjamin Franklin H.S., Parkway Center City H.S. and North East High School."
6. By letter dated November 13, 2019, the Department issued a Final Response that denied the RTKL request.

7. On November 18, 2019, the requester filed with the OOR a timely appeal (Appeal) of the Department's Final Response.
8. On November 19, 2019, the OOR issued to the parties a letter instructing the parties to submit information and legal argument in support of their positions in the Appeal.
9. On November 26, 2019, the Department submitted additional information and legal argument in support of its position in the Appeal. The Department argued that the requested information is exempt under Section 708(b)(7) of the RTKL and that disclosure is prohibited by the Public School Code as well as the right to privacy guaranteed by the Pennsylvania Constitution.

Determination Sought to be Reviewed

10. By Final Determination dated January 15, 2020, OOR granted the Appeal. The OOR ordered the Department to provide all the responsive records to the requester on or before February 14, 2020. *Allen Wing v. Pa. Department of Education*, OOR Dkt. No. AP 2019-2293. A true and correct copy of OOR's Final Determination is attached hereto as Exhibit A.

Objections to the Determination

11. OOR erred in determining that the requested information is not exempt under Section 708(b)(7) of the RTKL. 65 P.S. § 67.708(b)(7).

12. OOR erred in determining\ and that disclosure of the requested information is not prohibited by the Public School Code. 24 P.S. § 11-1123(p).
13. OOR erred in determining that disclosure of the requested information is not prohibited by the constitutional right to privacy of the involved teachers.

Relief Sought

WHEREFORE, Petitioner, Pennsylvania Department of Education, respectfully requests that this Honorable Court REVERSE the Final Determination of OOR, affirm the Department's denial of the RTKL request and grant such other relief as the Court deems appropriate.

Respectfully submitted,

/s/ Robert M. Tomaine
Senior Assistant Counsel
Attorney I.D. No. 81396

Pennsylvania Department of Education
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Date: February 11, 2020

EXHIBIT

A



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**ALLEN WING,
Requester**

v.

**PENNSYLVANIA DEPARTMENT
OF EDUCATION,
Respondent**

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Docket No.: AP 2019-2293

INTRODUCTION

Allen Wing (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Education (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking Pennsylvania Value Added Assessment System (“PVAAS”) scores for Algebra I teachers at certain schools in the Philadelphia School District. The Department denied the Request, arguing that the information constitutes exempt performance ratings or reviews. 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 Department is required to take further action as directed.

FACTUAL BACKGROUND

On October 15, 2019, the Request was filed, stating:

I am requesting the PVAAS ... scores for all Algebra I (one) teachers at the following Philadelphia Public High Schools...

1. Lankenau
2. Philadelphia Learning Academy
3. Constitution H.S.
4. Benjamin Franklin H.S.
5. Parkway Center City
6. North East H.S.

On November 13, 2019, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Department denied the Request, arguing that PVAAS scores “are part of the performance ratings of Pennsylvania educators.” *See* 65 P.S. § 67.708(b)(7)(ii).

On November 18, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On November 26, 2019, the Department submitted a position statement and the affidavit, made under penalty of perjury, of Brian Truesdale, Division Chief of the Department’s Division of Assessment and Accountability. In addition to arguing that the requested information is exempt under Section 708(b)(7) of the RTKL, the Department argues that disclosure is prohibited by the Public School Code of 1949 (“Code”), as well as the constitutional right to privacy.

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.*

¹ The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(c).

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.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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). 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 Code requires that “all professional employes and temporary professional employes shall be rated through the use of an approved rating tool developed by the Secretary of Education....” 24 P.S. § 11-1123(a); *see also* 24 P.S. § 11-1101(1) (defining “professional employe” to include “those who are certificated as teachers...”). This rating form can be found at 22 Pa. Code § 19.1, and a copy was provided by the Department on appeal. While the form is developed by the Department, the rating of teachers is solely conducted by the local education agency.² 24 P.S. § 11-1123(h)(3); 22 Pa. Code § 19.1(II.1). However, “the aggregate results of all classroom teacher evaluations” is required to be reported to the Department by the local education agency, 22 Pa. Code § 19.1(V.) (b); *see also* 24 P.S. § 11-1123(i). The Code states that “[a]n employe’s individual rating form shall not be subject to disclosure under the ... [RTKL],”

24 P.S. § 11-1123(p), and the Department’s regulations add that local education agencies “shall maintain [rating tool data, records and forms] in accordance with Section 708(b)(7) of the ... [RTKL] and Sections 221(a)(1) and 1123(p) of the Public School Code....” 22 Pa. Code § 19.1(V.) (c).

² A “local education agency” includes public school districts, vocational-technical schools, and intermediate units. 22 Pa. Code § 19.1(I.)

The rating form includes a “Teacher Specific Rating,” which includes “statewide assessments and value-added assessment system data if and when such data is available.” 22 Pa. Code § 19.1(II). This section takes into account “Value-added assessment system data made available by the Department.” 22 Pa. Code § 19.1(IV.)(b)(1)(ii). The Code explains that the “Value-added assessment system” is “a statistical analysis of results on the Pennsylvania System of School Assessment test or any other test ... that uses measures of student learning to enable the estimation of school or school district statistical distributions.” 24 P.S. § 2-221(b). It is “a component of the Commonwealth’s assessment system to provide the [local education agencies] with analyses and reports to offer valuable information for focused program improvement to increase performance.” 22 Pa. Code § 403(d)(iii).

The Department’s regulations state that “[a]ny PVAAS data score attributable to a classroom teacher shall be based on a rolling average of available assessment data during the most recent three consecutive school years.” 22 Pa. Code § 19.1(IV.)(b)(2)(iv). Local education agencies are then required to “use the PVAAS data score provided by the Department or its designee,” in combination with a conversion table included in the Department’s regulations, “to calculate a classroom teacher’s rating on [a] zero to three rating scale.” 22 Pa. Code § 19.1(IV.)(b)(2)(vi). If PVAAS data is unavailable, such as when PVAAS data for a teacher does not exist for three consecutive school years, other data may be used instead. 22 Pa. Code § 19.1(IV.)(b)(2)(ix). Ultimately, “teacher specific data” comprises 15% of the Final Teacher Effectiveness Rating, and “[a] score based upon available PVAAS data shall comprise not less than 10% of the classroom teacher’s Final Teacher Effectiveness Rating.” 22 Pa. Code §§ 19.1(IV)(b)(2)(i), (vii).

The Department does not cite to, nor can the OOR locate, any other statutory or regulatory provision describing what PVAAS data entails. Mr. Truesdale attests, in relevant part, that:

5. [The Department] calculates the teacher-specific PVAAS rating scores for inclusion in the teacher's performance evaluation using methodology provided by our contractor, *SAS Inc. SAS, EVASS for k-12....*
7. A PVAAS rating score is one of the several performance ratings received by an educator and included in his or her performance evaluation....
11. The PVAAS rating score comprises all or part of the required "Teacher Specific Rating," listed on the [Department] rating form....
12. While [the Department] requires that the PVAAS rating score—also known as the "PVAAS 3-year rolling average"—must comprise at least 10% of the "Teacher Specific Rating," the score can be (and often is) the entire rating.
13. The PVAAS rating score of an individual teacher is one measure of the teacher's performance. It is a rating of the academic growth of the teacher's students. It considers more than just student achievement.

Similarly, the Department's position statement explains: "By concentrating on growth, PVAAS puts the emphasis on what the educator can influence. PVAAS considers both the students' endpoint and their entering achievement level."

A more thorough explanation of PVAAS data can be found on the Department's website. A Department publication, titled "PVAAS Methodologies: Measuring Growth & Projecting Achievement," generally describes PVAAS data as follows:

PVAAS provides a wealth of information to educators through a variety of reports within a web-based system. This information can be divided into two main categories – measuring growth and projecting achievement.

First, PVAAS provides information on the academic growth students have made in the most recently tested school year. This is what we call "looking back" information as it helps districts, schools, and teachers assess how their educational programs and instructional strategies are impacting the academic growth, or progress, of groups of students. This "looking back" information is about the growth of groups of students, NOT individual students, and is available at the district, school, and teacher levels. In PVAAS, there are two ways of measuring growth depending on whether or not Pennsylvania's state assessments (PSSA and

Keystones) are administered in consecutive years in the same subject. Both ways of measuring growth are discussed in detail in later sections.

Second, PVAAS provides information on students' possible academic performance, or achievement, on future assessments (PSSA, Keystones, Advanced Placement, ACT, PSAT, and SAT) – called PVAAS Student Projections. This is what we call “looking ahead” information as it helps districts, schools, and teachers plan appropriately for the needs of its students – including decisions regarding intervention placement, enrichment opportunities, course selection, and differentiated instruction. This “looking ahead” information is available for educators at an individual student level, or for grade-level groups and demographic subgroups of students. Details for projecting student achievement are discussed in a later section.

PVAAS Methodologies: Measuring Growth & Projecting Achievement (May 2019), p. 4, available at <https://www.education.pa.gov/Documents/K-12/Assessment%20and%20Accountability/PVAAS/Methodology/PVAASMethodologies.pdf>.

The Department argues that the requested PVAAS data should be withheld pursuant to Section 708(b)(7) of the RTKL, and also cites to the Code and the Department's regulations. Section 708(b)(7)(ii) of the RTKL exempts from disclosure certain “records relating to an agency employee,” including “[a] performance rating or review.” 65 P.S. § 67.708(b)(7)(ii). Based upon the above, the Department has not demonstrated that the requested PVAAS data constitutes a performance rating or review of a teacher. Although the data pertains to specific teachers, the evidence does not support the conclusion that it rates or reviews the performance of those teachers;

rather, as stated by Mr. Truesdale, “[i]t is a rating of the academic growth of the teacher's students.” Cf. *Commonwealth v. Rudberg*, 32 A.3d 877 (Pa. Commw. Ct. 2011) (involving Employee Performance Reviews and noting that “[i]t is undisputed that EPRs are a species of performance review”). The Code and the Department's regulations are clear that *the local education agencies* are the entities conducting the performance reviews of the teachers through use of the rating form, 24 P.S. § 11-1123(h); the fact that the requested data may be used by the

local education agencies as part of their performance review is of no consequence to the application of the exemption here. Exemptions from disclosure must be narrowly construed, *Pa. State Police v. Grove*, 161 A.3d 877, 992 (Pa. 2017) (“Consistent with the RTKL’s goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed”) (citing *Office of Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015)). While data concerning a teacher’s students may ultimately reflect positively or negatively on the performance of that teacher, this fact does not elevate the data to “[a] performance rating or review” as contemplated by the RTKL. Therefore, based upon the evidence before the OOR, the Department has not met its burden of proving that it may withhold the requested PVAAS data pursuant to Section 708(b)(7)(ii) of the RTKL.

Further, although the Department references confidentiality provisions of the Code and Department’s regulations, neither provision applies in this instance. The Code makes “[a]n employe’s individual rating form” exempt from disclosure, 24 P.S. § 11-1123(p); however, these forms have not been requested, and they do not even appear to be in the possession of the Department. *See* 24 P.S. § 11-1123(i) (requiring local education agencies to “provide to the [D]epartment the aggregate results of all ... evaluations”); 22 Pa. Code § 19.1(V.)(b). While Mr. Truesdale attests that the PVAAS scores often constitute the entire “Teacher Specific Rating” contained on the rating form, without access to the forms, it is unclear how anyone can ascertain if this is the case.³ Additionally, the Department’s regulations require local education agencies to “maintain records in accordance” with the Code and Section 708(b)(7) of the RTKL, 22 Pa. Code

³ Regardless, the PVAAS scores themselves do not appear to be contained on the rating forms, as the Department’s regulations provide a calculation for local education agencies to use to convert PVAAS scores to a 0-3 scale for use on the forms. 22 Pa. Code § 19.1(IV.)(b)(2)(i).

§ 19.1(V)(c), but this provision does not apply to the Department and ultimately involves records that are not in the possession of the Department and not at issue in this appeal.

Finally, the Department argues that the information is protected by the constitutional right to privacy, citing *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016) (“PSEA”). In *PSEA*, the Pennsylvania Supreme Court held that individuals possess a right to privacy in certain types of personal information, including their home addresses, and that 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 information privacy with the public interest’s in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.* The Department argues that “PVAAS ratings included in teachers’ performance evaluations, like the teachers’ home addresses at issue in [*PSEA*] are personal, private and confidential matters....”

The Supreme Court has not expressly defined the types of “personal information” subject to the balancing test; however, it has described the “right to informational privacy” as “namely the right of an individual to control access to, and dissemination of, personal information about himself or herself.” *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017). To date, courts have found certain identifiers and contact information to be among the types of personal information subject to the balancing test. *See West Chester Univ. of Pa. v. Rodriguez*, 216 A.3d 503, 510 (Pa. Commw. Ct. 2019) (noting that *PSEA* “reaffirmed prior cases that ‘recognized a right to privacy inuring in three types of identifiers: Social Security numbers, telephone numbers and home addresses’”) (quoting *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173, 1181 (Pa. Commw. Ct. 2017)); *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the

balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test).

In *Butler Area Sch. Dist.*, the Commonwealth Court determined that a tax assessment list was not sufficiently "personal" to trigger the balancing test. Specifically, the Court stated:

When the type of information is not categorically protected, privacy analysis consists of two steps. The first step is assessing whether the information at issue is sufficiently personal in nature to trigger protection as a privacy interest. The second step is weighing an individual's privacy interest in nondisclosure against an interest in disclosing the personal information.... [B]efore reaching the balancing test, we must first discern a cognizable privacy interest in the information at issue....

... [A]ppellate decisions teach us that certain factors are constant when evaluating a privacy interest in information. One is an individual's reasonable expectation that the information is of a personal nature.... When information is public as a matter of statute, it is unreasonable for a person to expect that it is of a personal nature.... Another factor is how the agency obtained the information; when an individual voluntarily submits information, it may be disclosed...; whereas, information obtained by an agency premised on statutory confidentiality is protected.... Also, the context holds additional significance, as does whether the information is an essential component of a public record....

172 A.3d at 1182-84 (citations omitted). Here, although the Department argues that the same analysis in *PSEA* applies to the instant case, the only similarity between the two cases is that the information is related to teachers. The home address of an individual is clearly "personal," as it is contact information associated with that individual. The PVAAS scores, on the other hand, are only tangentially related to the teachers; instead, they focus on the growth and achievement of the teachers' students. Unlike the home addresses in *PSEA*, the information *is* directly related to the teacher's public employment. The Department has not explained how teachers have any expectation of privacy in these PVAAS scores, and, as explained above, the information is not

subject to any confidentiality provision. The right to privacy does not extend to all information pertaining to a public employee, and the Department cites to no support for this proposition. Therefore, the OOR concludes that the requested PVAAS scores are not sufficiently "personal" to trigger the *PSEA* balancing test.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the Department is required to provide the requested information within thirty days. 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 Commonwealth Court. 65 P.S. § 67.1301(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: January 15, 2020

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Allen Wing (via email only);
Angela Riegel (via email only);
Robert Tomaine, Esq. (via email only)

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

CERTIFICATE OF COMPLIANCE Pa.R.A.P. 127

Undersigned counsel, pursuant to Pa.R.A.P. 127, hereby certifies that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trials Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Robert Tomaine
Robert M. Tomaine,
Senior Assistant Counsel
Pennsylvania Department of Education
I.D. No. 81396

Date: February 11, 2020

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**PENNSYLVANIA DEPARTMENT
OF EDUCATION,
Petitioner,**

v.

Docket No. __ C.D. 2020

**ALLEN WING,
Respondent.**

PROOF OF SERVICE

I, Robert M. Tomaine, Senior Assistant Counsel, Pennsylvania Department of Education, hereby certify that on this 11th day of February 2020, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following in the manner described below:


Allen Wing
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BY:



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Pennsylvania Department of Education