



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**TYLER MILLER,
Requester**

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:

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v.

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Docket No.: AP 2020-1112

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**CHAMBERSBURG AREA
SCHOOL DISTRICT,
Respondent**

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INTRODUCTION

Tyler Miller (“Requester”) submitted a request (“Request”) to the Chambersburg Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the work email address and work phone number of a public official. The District granted the Request, providing the work email and work phone number of two different District employees. 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 additional action as directed.

FACTUAL BACKGROUND

On July 6, 2020 the Request was filed, seeking “Assistant Superintendent Cathy Dusman’s direct district email address and direct district phone number.” On July 9, 2020, the District granted the Request, providing the email address of Crystal Ellgass and a phone number that reaches the Chambersburg Area School District Elementary Services Department.

On July 9, 2020, 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. 65 P.S. § 67.1101(c).

On July 22, 2020 the District submitted a position statement claiming that no other responsive records exist. In support of its position, the District submitted the affidavit of Karen Gokay, Esq., its 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” 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 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 parties did not request 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 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).

Here, the District provided a general District phone number and administrative assistant email address in response to a Request for Dr. Dusman’s direct work email and phone number. The District initially claimed that no other public records existed.

The OOR, observing that the Superintendent and all other Assistant Superintendent's direct work email addresses and phone numbers are provided online,¹ sought evidence from the District relating to the existence of Dr. Dusman's email address and work phone number.

In response, the OOR received an affidavit from Attorney Gokay, stating:

3. Upon receipt of the [R]equest, I provided Requester with the current email and work phone number for Assistant Superintendent Catherine (Cathy) Dusman as publicized on its public Website.
4. No other email address or telephone number for Dr. Dusman is available/operational or posted on the District Website due to the nature of her current work arrangement and the fact that she will not be returning to the District after the expiration of her contract on July 31, 2020. Communications to Dr. Dusman received by school district designees are forwarded to her as appropriate.

Under the RTKL, an affidavit 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).

Although it states that no other email address is "available/operational" for Dr. Dusman, the affidavit stops short of stating that no other responsive work email address exists and does not mention work phone numbers at all.² Additionally, the fact that communications are forwarded to Dr. Dusman "as appropriate" tends to indicate that Dr. Dusman may have a public employment email address, and the District has simply elected not to disclose it.

Public records that exist within the possession, custody, or control of the District are required to be disclosed. *See* 65 P.S. § 67.302. The District has not attested to the nonexistence of these public records and has not raised a single exemption or legal ground for withholding this

¹ Available at: <https://www.casdonline.org/Page/17511> (last visited July 22, 2020).

² Although the affidavit references the fact that Dr. Dusman's contract expires on July 31, 2020, the OOR cannot conclude from the evidence provided by the District that she no longer has a work email address or work phone number.

information, relying solely on its unexplained position to not make this record available to the public.³ See 65 P.S. § 67.708(a)(1); see also *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the District is required to provide the responsive records 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 Franklin 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. 65 P.S. § 67.1303. 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: July 31, 2020

/s/ Joy Ramsingh

APPEALS OFFICER
JOY RAMSINGH

Sent to: Tyler Miller (via email only);
Karen Gokay, Esq. (via email only)

³ In certain cases, work email addresses and work phone numbers of agency employees may be withheld under Section 708(b)(6) of the RTKL. The District has provided no evidence on this point.

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