

expense. All text messages via board members between 7 pm - 9:10 pm w/the same inclusion as administration.

On March 21, 2019, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the District denied the Request, arguing that records are not records of the District and that if they exist, they are subject to exemption as materials without an official purpose. *See* 65 P.S. § 67.708(b)(12).

On March 25, 2019, 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 April 3, 2019, the District submitted a position statement reiterating its grounds for denial. The District claims that none of the communications were the record of any District decision or transaction and that information regarding a student safety incident and login and password information are exempt under the RTKL. In support of its position, the District submitted the affidavits of Andrew Netznik, Superintendent; Mimi Shade, Administrative Assistant to the Superintendent; Justin Welker, Assistant Principal at Tulpehocken Area Junior-Senior High School; Michel Leister, Assistant Principal at Tulpehocken Area Junior-Senior High School; Derek Stehr, Principal at Bethel Elementary School; and Stacy Linderman, Principal at Penn-Bernville Elementary School.

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 District requested *in camera* review and the OOR determined that it was necessary and conducted an *in camera* review of the records.

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). 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)).

1. The District has demonstrated that some communications are not records of the District

In its position statement, the District argues that none of the electronic communications responsive to the Request are records of any District decision or transaction and therefore fall outside the definition of “public records.” In the *in camera* inspection index the District specifically identifies Bates Nos. 1, 6-15 and 26-28 as not records of the District. The RTKL defines a “record” as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data processed or image-processed document.

65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency?” and if so, 2) was the material “created, received or retained . . . in connection with a transaction, business or activity of [an] agency?” *Id.*; *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. *Id.* at 1034.

Based upon the OOR’s *in camera* review of the record, Bates No. 1, an email exchange between Superintendent Netznik and Mr. Shirk, does not document a transaction or activity of

the District. The subject matter of the exchange is “phones;” however, the content of the exchange contains no substantive communication regarding District transactions, business or activities. Bates Nos. 6-15 also do not document a transaction or activity of the District. These emails are personal communications between two District employees. The subject matter of one email thread (Bates Nos. 6-7) is “high school picture of you” and is a joking exchange between the employees. The other, entitled “Bethel faculty meeting,” is another joking exchange about the length of Bethel Elementary School faculty meetings, as well as the length of the Board meeting the parties were attending. These are personal opinions and communications that do not document any District business. Similarly, Bates Nos. 26-27 are personal communications between two District employees regarding food. This is a personal conversation that does not document any District business.

Lastly, Bates No. 28 is a text exchange between a school board member and a District administrator regarding the possibility that someone was recording a meeting. Although Superintendent Netznik attests that this exchange was not regarding an agenda item, that is not sufficient to prove that the message is not a record of the District, as the message was regarding agency business. The District also raises Section 708(b)(12) of the RTKL, 65 P.S. §67.708(b)(12), in its position statement, noting the communication constitutes material without an official purpose but provides no evidence to support this statement. Therefore, the District must provide this text exchange to the Requester.

2. The District has not demonstrated that communications regarding a safety incident are exempt from disclosure

The District argues that the communications regarding a student safety incident (Bates Nos. 3-5) are exempt under Sections 708(b)(1)(ii) and 708(b)(2). Section 708(b)(1)(ii) of the RTKL exempts from disclosure a record that “would be reasonably likely to result in a substantial and

demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies). Section 708(b)(2) of the RTKL exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, the Department must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

Superintendent Netznik, who reviewed all communications, attests that there was communication among the group of principals regarding a “Safe2Say” report and Mr. Welker, Mr. Stehr and Mrs. Linderman all attest that they communicated via District-issued cell phones regarding this report during the meeting. The District’s position statement explains that the Safe2Say program is administered by the Office of the Attorney General and relies on confidential and anonymous reporting about threats to student and school safety. Per the Safe2Say website, upon receipt of an anonymous tip, a crisis center reviews, assesses and processes the submission.

It then sends the submission to school administration and/or law enforcement. www.safe2saypa.org (visited June 7, 2019).

The District provided the records in question for *in camera* review and they clearly indicate ongoing District involvement in an incident; however, the District has not provided sufficient evidence that disclosure would result in substantial and demonstrable risk to a person's security or would be reasonably likely to threaten public safety or a public protection activity. *In camera* review reveals the email exchange is an update on a situation, without any identifying information. Therefore, the District has not demonstrated that the communications are exempt from disclosure under Sections 708(b)(1)(ii) and 708(b)(2). 65 P.S. § 67.708(a)(1).

3. The District demonstrated that records revealing computer passwords and login information may be redacted

The District also argues that computer login and password information is exempt from disclosure under Section 708(b)(4). *See* 65 P.S. § 67.708(b)(4). A review of the records shows that Bates Nos. 16-25 all contain computer login and password information. Bates No. 2 is an email instructing the IT department to activate a white swiper card for a new employee. It contains the card's identification number. Section 708(b)(4) exempts from disclosure "[a] record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security." 65 P.S. § 67.708(b)(4). *In camera* review of Bates Nos. 16-25 shows that these records do contain secure login credentials, the release of which would be reasonably likely to jeopardize computer security; however, the secure login credentials can be redacted from the emails pursuant to Section 706 of the RTKL. *See* 65 P.S. § 67.706. Similarly, *in camera* review of Bates No. 2 contains information which is subject to access as well as information which is not subject to access. Specifically, the card identification number may be redacted.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the District is required to provide records Bates Nos. 2, 3-5, 16-25 and 28, as set forth above, 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 Berks 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 18, 2019

/s/ Erin Burlew

APPEALS OFFICER
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Sent to: Lisa Hassler (via email only);
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¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).