pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DAVID SCHWARTZ,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2016-1724**
	:	
PALMERTON AREA	:	
SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

David Schwartz ("Requester") submitted a request ("Request") to the Palmerton Area School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking e-mails exchanged among District officials. The Request was deemed denied, and the Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the District is required to take further action as directed.

FACTUAL BACKGROUND

On August 15, 2016, the Request was filed, seeking all e-mails between District School Board President Tammy Recker and District Superintendent Scot Engler for the period January 1, 2016 through August 15, 2016. On August 15, 2016, the District extended its time to respond to the Request by thirty days, 65 P.S. § 67.902(b); however, because the District did not timely

respond thereafter, the Request was deemed denied on September 22, 2016. *Id.* On September 27, 2016, the District responded by providing partially redacted records.[1]

On October 14, 2016, the Requester timely appealed to the OOR, challenging the District's untimely response and stating grounds for disclosure.[2] 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 25, 2016, the District submitted a position statement, along with the supporting affidavit of Ryan Kish, the District's Open Records Officer. In its position statement the District argued that the redacted information was either confidential under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; contained information concerning a District employee, 65 P.S. §§ 67.708(b)(7)(i)-(ii), (iv); contained strategy regarding collective bargaining negotiations, 65 P.S. § 67.708(b)(8)(i); reflected the District's internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A); or was protected by the attorney-client privilege.[3]

On December 2, 2016, the OOR directed the District to submit unredacted copies of the records for *in camera* review. Following the District's submission of the unredacted records, along with a supporting Inspection Index, the OOR reviewed the records *in camera*.[4]

[1] Contrary to the requirements of the RTKL, the District's response cited no legal bases for redacting the records. *See* 65 P.S. § 67.903(2) (an agency's response must cite to supporting legal authority to deny access to record).
[2] In his appeal, the Requester granted the OOR an additional thirty days to issue a final determination. *See* 65 P.S. § 67.1101(b)(1). The Requester subsequently granted the OOR until March 14, 2017 to perform an *in camera* review of the redacted records and issue a final determination. *Id.*
[3] The District is permitted to raise grounds for denial on appeal where a request was previously deemed denied. *McClintock v. Coatesville Area Sch. Dist.*, 74 A.3d 378 (Pa. Commw. Ct. 2013).
[4] The District submitted the unredacted records in two exhibits. Exhibit A consisted of 48 pages and Exhibit B consisted of 67 pages.

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, requisite 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 clearly 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)).

1. <u>The withheld records are not education records</u>

The District redacted Exhibit A, pages 6, 7, 22 and 23, on the basis that these redactions are protected from disclosure by FERPA because they identify a student. FERPA protects "personally identifiable information" contained in "education records" from disclosure and financially penalizes school districts "which [have] a policy or practice of permitting the release of education records ... of students without the written consent of their parents." 20 U.S.C. § 1232g(b)(1). Regulations implementing FERPA define "education records" as those records that are "[d]irectly related to a student" and are "[m]aintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. 99.3. While the express language of FERPA's implementing regulation would appear to encompass *all* records held by an educational institution that relate to a student, a review of case law interpreting FERPA reveals that not all records pertaining to a student and held by an educational institution are "education records" for purposes of FERPA. Just because a record involves or identifies a student does not automatically invoke the confidentiality provisions of FERPA.

In *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, the United States Supreme Court held that individual student papers are not "education records" under FERPA because they were not maintained in a central file by the official records custodian. 534 U.S. 426 (2002). Other courts

have looked at the records themselves and have concluded that only those records relating to a student's academic performance are "education records" for purposes of FERPA. *Bd. of Educ. of the Toledo City Sch. Dist. v. Horen*, 2011 U.S. App. LEXIS 26644 (6th Cir. 2011) (tally sheets denoting a student's daily activities for purposes of compiling the student's official progress reports are not "educational records" because the records were not part of the student's permanent file); *Pollack v. Regional Sch. Unit 75*, 2015 U.S. Dist. LEXIS 55992 (D. Me. 2015) (holding that "educational records" are those records which follow a student from "grade to grade"); *S.A. v. Tulare County Office of Educ.*, 2009 U.S. Dist. LEXIS 93170 (E.D. Ca. 2009) (e-mails mentioning a student's name are not "education records" because they are not part of the student's permanent file); *Wallace v. Cranbrook Educ. Cmty.*, 2006 U.S. Dist. LEXIS 71251 (E.D. Mich. 2006) (student statements provided in relation to an investigation into school employee misconduct do not directly relate to a student, and, therefore, are not "education records"); *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019 (N.D. Oh. 2004). Perhaps the most succinct definition of "education records" was enunciated by the United States District Court for the Western District of Missouri:

> It is reasonable to assume that criminal investigation and incident reports are not educational records because, although they may contain names and other personally identifiable information, such records relate in no way whatsoever to *the type of records which FERPA expressly protects; i.e., records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files*.

Bauer v. Kincaid, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (emphasis added). Thus, based on the foregoing, the courts have made clear that only those records relating to student academics are "education records" protected by FERPA. The mere fact that a record involves a student does not automatically render a record an "education record."

Here, the District redacted a portion of the e-mail exchanges because they identify a student. While these records may identify a student, there is no evidence that these e-mail exchanges between District officials are part of any student's permanent academic file. These are precisely the type of records that the courts have held to not constitute an "education record" under FERPA. Accordingly, the District may not redact these records under FERPA.

2. The District may not redact records regarding District employees

The District redacted Exhibit A, pages 1, 2, 4, 5, 8, 10, 13, 18, 21, 27, 34, and 40, and Exhibit B, pages 43, 53 and 64, arguing that these records concern District employees, 65 P.S. §§ 67.708(b)(7)(i)-(ii), (iv). These portions of the RTKL exempt from disclosure a "letter of reference or recommendation pertaining to the character or qualifications of an identified individual …[, a] performance rating or review[, or t]he employment application of an individual who is not hired by the [District]." *Id.* Based on a review of the records *in camera*, it is clear that none of the redactions constitute any of the foregoing records specified in the RTKL. While these e-mail discussions appear to involve District employees, none of the redacted materials can be considered a letter of reference, performance review or employment application. Accordingly, the District may not redact these records under Section 708(b)(7) of the RTKL.

3. The District may redact certain information pertaining to strategy and negotiations relating to collective bargaining

The District redacted numerous e-mails, arguing that the redacted information pertains to collective bargaining with the District's teachers' union. 65 P.S. § 67.708(b)(8)(i). Section 708(b)(8)(i) of the RTKL exempts from disclosure a "record pertaining to strategy or negotiations relating to labor relations or collective bargaining[.]" *Id.* Based a review of the records *in camera*, the following redactions discuss the District's position and negotiating strategy regarding collective bargaining with the District's teachers' union, and are, therefore,

exempt from disclosure: Exhibit A, pages 31, 32 and 37; Exhibit B, pages 17, 30, 44 - 47, and 58. In addition, the following redactions are also exempt from disclosure because they discuss the District's strategy and negotiations with the District's teachers' union: Exhibit B, pages 18 (3rd redaction only),[5] 19 (1st, 2nd and 4th redactions only), 23 (1st redaction only), 24 (2nd redaction only), 31 (1st redaction only), and 32 (2nd redaction only).

The remaining redactions to Exhibit B, pages 6, 7, 11, 12, 14 - 16, 20, 21, 25 - 28, 33 - 36, and 48 are *not* exempt from disclosure because they do not pertain to any negotiating strategy regarding collective bargaining. Rather, these redaction simply concern ministerial actions such as transmitting documents without comment and scheduling meetings. Therefore, the District must disclose unredacted copies of these e-mails.

4. <u>The District has not met its burden of proof that certain redactions reflect the District's internal, predecisional deliberations</u>

The District redacted Exhibit A, pages 6, 7, 22, 38 and 39, arguing these records reflect the District's internal, predecisional deliberations. 65 P.S. § 67.708(b)(10)(i)(A). Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure records reflecting:

> [t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

Id. An agency must show three (3) elements to substantiate this exemption: (1) the deliberations reflected are "internal" to the agency; (2) the deliberations reflected are predecisional, *i.e.*, before a decision on an action; and (3) the contents are deliberative in character, *i.e.*, pertaining to proposed action and/or policy-making. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214

[5] In referencing the limited redactions, the redactions are counted from the top of each page. For example, "3rd redaction" would identify the 3rd line redacted but not the prior two lines redacted.

(Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *Sansoni v. Pa. Hous. Fin. Auth.*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. Pa. Dep't of Comm. & Econ. Dev.*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep't of Evir. Prot.*, 103 A.3d 374, 385-386 (Pa. Commw. Ct. 2014).

Based on a review of these records *in camera*, while these records are internal to the District, these records contain purely factual information with no deliberative component. As set forth above, purely factual information is required to be disclosed. Accordingly, the District is required to disclose the foregoing records in their entirety.

5. <u>The District may redact Exhibit B, page 57 pursuant to the attorney-client privilege</u>

The District argues that Exhibit B, pages 11, 12, 14, 15, 16, 20, 21, 26, 27, 28, 34, 35, 36, 48, and 57, are protected by the attorney-client privilege and the attorney-work product doctrine. The RTKL excludes records subject to a privilege from the definition of "public record." *See* 65 P.S. § 67.102. The RTKL defines "privilege" as "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." *Id*.

In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the

privilege has been claimed and is not waived by the client. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). "[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong." *Pa. Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2015) (citing *Fleming*).

An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 ("Simply invoking the phrase 'attorney-client privilege' or 'legal advice' does not excuse the agency from the burden it must meet to withhold records"). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client's goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001).

The attorney-work product doctrine, on the other hand, prohibits disclosure "of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa.R.C.P. 4003.3. The Pennsylvania Supreme Court has explained that the attorney-work product doctrine "manifests a particular concern with matters arising in anticipation of litigation." *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that "[t]he 'work product rule' is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation")); *see also Heavens v. Pa. Dep't of Envtl.. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) ("[U]nder the RTKL the work-product doctrine

protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked").

Based upon a review of the records *in camera*, only Exhibit B, page 57, is protected by the attorney-client privilege and/or attorney work-product doctrine because this record reveals confidential communications between attorney and client or an attorney's legal advice or conclusions. Other records claimed to be protected by privilege are not exempt from disclosure because these records do not reveal any confidential communications between attorney and client, nor do these records seek or provide any legal advice.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the District is required to all redacted records in their entirety with the exception of Exhibit A, pages 31, 32 and 37, and Exhibit B, pages 17, 18 (3rd redaction only), 19 (1st, 2nd and 4th redactions only); 23 (1st redaction only), 24 (2nd redaction only), 30, 31 (1st redaction only), 32 (2nd redaction only), 44 - 47, 57 and 58. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Carbon 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 according to court rules 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: http://openrecords.pa.gov.

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

FINAL DETERMINATION ISSUED AND MAILED: February 17, 2017

/s/ Charles Rees Brown_____
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