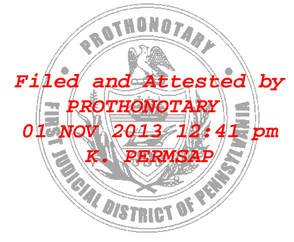

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THE SCHOOL DISTRICT OF PHILADELPHIA,	:	
Appellant,	:	PHILADELPHIA COUNTY COURT OF COMMON PLEAS TRIAL DIVISION—CIVIL
vs.	:	
HELEN GYM, on behalf of Parents United for Public Education,	:	May Term, 2013 No. 1003
Appellee.	:	

BRIEF OF APPELLEE

When a member of the public volunteers documents to an agency, and the agency then shares those documents with a second member of the public, and then a third member of the public requests copies of those documents, can the agency withhold those documents from the

third member of the public on the grounds that they are "internal" to the agency? The Commonwealth Court and the Pennsylvania Office of Open Records have routinely said "no," and this Court should say "no" as well.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellee, Helen Gym ("Requester") submitted a request for records to Appellant, the School District of Philadelphia (the "School District"), pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, on December 19, 2012 (the "Request"). The Request sought "the record or records containing the list of schools identified by the Boston Consulting Group [('BCG')] as their top candidates for school closure as well as their criteria for choosing their recommended schools." On January 24, 2013, the School District granted the Request insofar as it sought "the criteria used by executive management to identify schools that would be considered candidates for school closure," but denied it in all other respects, citing the RTKL exception for "internal, predecisional deliberations," 65 P.S. § 67.708(b)(10)(i)(A).

On February 14, 2013, Requester filed an appeal (the "2/14/2013 Appeal") with the Pennsylvania Office of Open Records ("OOR") from the School District's partial denial. The 2/14/2013 Appeal contended that the exception the School District had cited "is not applicable here because BCG's recommendations are not **internal** materials." *Id.* at 1. In a response dated March 1, 2013 (the "3/13/2013 School District Response"), the School District submitted documents suggesting that BCG and the School District had entered into a contract for the provision of consulting services during the period from February 21, 2012 through March 29, 2012 ("Phase I"). Exhibit C to 3/13/2013 School District Response. These documents further indicated that BCG performed additional work from April 9, 2012 through April 27, 2012 ("Phase II") and from May 1, 2012 to June 11, 2012 ("Phase III"), but did not indicate that the

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School District had entered into contracts with BCG for the latter's Phase II or Phase III work. *Id.* The School District also submitted the affidavit of its general counsel, who explained that the School District paid for BCG's Phase I services from the proceeds of a grant to the School District from the William Penn Foundation, but that during Phases II and III, "the William Penn Foundation and others contracted directly with, and paid, [BCG] and donated [BCG]'s services to the School District." Affidavit of Michael A. Davis ("Davis Aff."), attached as Exhibit D to 3/13/2013 School District Response, ¶ 8.

Requester replied with a letter to the OOR noting that the School District had not produced any contract for Phases II and III between the District and BCG, and noting that "[t]he list of recommendations requested was provided during Phase III." Letter of Requester, dated Mar. 5, 2013, at 1. Requester's letter ended by stating that the William Penn Foundation and its Chief Executive Officer "had unlimited access to materials that the District is calling internal but which as the paying agent the CEO had access to at any time." *Id.* at 2.

In response, the School District stated that there was a "lack of evidence to support [Requester's] statement that the 'Foundation and its CEO had unlimited access' to BCG's work product." Letter of School District, date Mar. 19, 2013, at 3. After receiving that letter, the OOR asked the School District to "provide evidence regarding whether the William Penn Foundation, or any other third party, had access to any of the withheld records at any time." Email of OOR Appeals Officer Kyle Applegate, dated Apr. 1, 2013. The OOR explained that "[s]uch evidence is necessary to determine whether the records were 'internal' or not under Section 708(b)(10) of the RTKL." *Id.*

The School District then submitted the affidavit of Thomas E. Knudsen, who was Chief Recovery Officer and Acting Superintendent during Phases I through III. Affidavit, dated Apr. 9,

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2013 ("Knudsen Aff."). Mr. Knudsen averred that "[t]o the best of my knowledge, information, and belief," the records that are the subject of this appeal were "never a specific topic of conversation or exchange between representatives of The William Penn Foundation and me, School District staff or consultants employed by BCG." *Id.* ¶ 15.

On April 12, 2013, the OOR issued its Final Determination. The OOR noted that the affidavits of Mr. Davis and Mr. Knudsen "do not clearly address whether the William Penn Foundation, the party that paid for [BCG]'s services, had access to the withheld records," and that paragraph 15 of Mr. Knudsen's affidavit "does not directly address the OOR's request for information." Final Determination at 5-6. The OOR therefore concluded that "the District has failed to meet its burden of proving that the withheld records are exempt pursuant to Section 708(b)(10) of the RTKL. *Id.* at 6.

II. COUNTERSTATEMENT OF ISSUES

A. Does the Right-to-Know Law permit the School District to share records with selected outsiders, but then to withhold those records from general public disclosure on the grounds that they reflect "internal" predecisional deliberations?

Suggested Answer: No.

B. When a private party with no contractual relationship to a public agency voluntarily offers written recommendations to that agency, are those recommendations "internal" to the agency?

Suggested Answer: No.

C. Has the School District been given enough chances to submit evidence?

Suggested Answer: Yes.

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III. ARGUMENT

"[T]he 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 LLC v. Wintermantel*, 615 Pa. 640, 662, 45 A.3d 1029, 1042 (Pa. 2012). The RTKL's general rule is that "[a] record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record." 65 P.S. § 67.305(a).

In an appeal from a final determination of the OOR, this Court is required "to conduct [a] full *de novo* review[]" and to "adopt[] the appeals officer's factual findings and legal conclusions when appropriate." *Bowling v. Office of Open Records*, No. 20 MAP 2011, 2013 Pa. LEXIS 1800, at *60 (Pa. Aug. 20, 2013). The School District bears the burden of proving by a preponderance of the evidence that the public should be denied access to the requested records. 65 P.S. § 67.708(a)(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."). *See generally 500 James Hance Court v. Pa. Prevailing Wage Appeals Bd. Bureau of Labor Law Compliance*, 613 Pa. 238, 272-73, 33 A.3d 555, 575-76 (Pa. 2011) (noting that if the party with the burden of proof fails to make a prima facie case, the court must find for the other side, even if the other side puts on no evidence).

A. Records Are Not "Internal" If Shared With Outsiders

An exception to the RTKL's general rule of public disclosure applies to:

> A record that reflects . . . [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

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> proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A) (emphasis added). This case concerns documents that a private foundation paid a private business to write and to give to the School District. Before issuing its Final Determination, the OOR asked the School District for evidence clarifying whether it had kept those documents internal, or whether it had shared them with a private party with which it has no contractual relationship, namely the William Penn Foundation. Instead of providing a straight answer, the School District submitted a carefully worded affidavit from its former leader, who said that "[t]o the best of my knowledge, information and belief," the requested records were "never a specific topic of conversation or exchange." In its brief to this Court, the School District all but admits that the William Penn Foundation received the records. School District's Brief at 8 ("As grantor, the philanthropic entity [i.e., the William Penn Foundation] had the right—and indeed an affirmative duty—to know that BCG's services were rendered and to review the work product prior to issuing payment to the consultant."). The School District has thus not carried its burden of proving that the records are "internal."

Cases interpreting section 67.708(b)(10)(i)(A) uniformly hold that for the exception to apply, "[t]he records must . . . be 'internal' to a governmental agency." *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 379 (Pa. Commw. Ct. 2013). *E.g.*, *Phila. Pub. Sch. Notebook v. Sch. Dist. of Phila.*, 49 A.3d 445, 453 (Pa. Commw. Ct. 2012) (draft resolutions "were no longer 'internal' deliberations once they were presented to the [School Reform Commission] for public consideration and comment at its public planning meeting"); *Koch v. Jersey Shore Area Sch. Dist.*, No. AP 2012-2008, 2013 PA O.O.R.D. LEXIS 34 (Pa. OOR Jan. 11, 2013) (school district's PowerPoint presentation about its draft comprehensive grade restructuring plan for four elementary schools was not "internal" because district had shown it to the presidents of the four

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schools' parent-teacher organizations); *Sansoni v. Pa. Hous. Fin. Agency*, No. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375 (Pa. OOR June 2, 2010) (documents submitted to an agency by a third party were not "internal"). *See generally Carey*, 61 A.3d at 373 ("The RTKL is remedial legislation; therefore, the exceptions from disclosure must be narrowly construed."). The sole case the School District cites is not to the contrary. *Marshall v. Neshaminy Sch. Dist.*, No. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67, at *6 (Pa. OOR Feb. 5, 2010) ("The Affidavit shows the [summary appraisal reports from interested purchasers] are 'predecisional' but there is no evidence that they are 'internal' as records prepared by the agency or one of its agents on its behalf and would therefore not be protected."). The School District cites no authorities in support of the novel proposition that an agency can selectively share records with some members of the public without affecting the "internal" character of those records.

The statute's plain text further supports the conclusion that a document is not "internal" if shared with individuals other than "an agency, its members, employees or officials."[1] Conspicuously absent from this list is any mention of "donors." Under such circumstances, the Latin maxim "*expressio unius est exclusio alterius*" applies. *See, e.g.*, *Atcovitz v. Gulph Mills Tennis Club*, 571 Pa. 580, 589, 812 A.2d 1218, 1223 (Pa. 2002) (explaining the maxim as meaning that "the inclusion of a specific matter in a statute implies the exclusion of other matters").

A public agency cannot, under the RTKL, selectively share records with some members of the public and then hide them from other members of the public behind the "internal,

[1] Under the second half of section 67.708(b)(10)(i)(A), records can also fall under the exception if they reflect predecisional deliberations between the members of two public agencies. *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1216 (Pa. Commw. Ct. 2011). The William Penn Foundation and BCG are not in any sense public agencies.

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predecisional deliberations" exception. Giving donors a special status under the RTKL could raise the appearance of improper access or influence over policy decisions. Appealing to public policy, the School District urges the Court nonetheless to hold that "public agencies must be allowed to engage stakeholders and members of the philanthropic community without fear that sensitive and otherwise predecisional deliberative records would be subject to disclosure." School District's Brief at 8. The Court should decline the School District's invitation to overrule the judgment of the General Assembly that agency records are public records unless they are kept internal. *Cf. SWB Yankees LLC v. Wintermantel*, 615 Pa. 640, 665, 45 A.3d 1029, 1044 (Pa. 2012) ("While we have little doubt that the disclosure requirements pertaining to third-parties undertaking governmental functions may have bearing on their business decisions in dealing with agencies, this is within the range of considerations likely to have been taken into account in the General Assembly's open-records calculus.").

B. Documents Given To The School District By A Third Party Are Not "Internal"

The Request seeks records that BCG provided to the School District during Phase III. The evidence in the record indicates that BCG and the William Penn Foundation had a contractual relationship with each other during Phase III. There is no evidence, however, of any contractual relationship between the School District and BCG (or any other third party) during Phase III.[2]

[2] Mr. Knudsen's affidavit states that "[a]t all times relevant hereto, representatives of BCG worked at the direction of myself and School District staff." Knudsen Aff. ¶ 12; *accord* Davis Aff. ¶ 10. But the District has offered no evidence that BCG had any obligations or duties to perform activities for the School District, as opposed to acting simply as friendly outside volunteers.

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As Requester noted in her appeal to the OOR, BCG's recommendations were not prepared by employees of the School District or other public agencies, nor were they "commissioned by the District, nor are they recommendations sought from a then-consultant to the District." 2/14/2013 Appeal at 1-2. Rather, the requested records "were prepared by a third party and voluntarily submitted to the District." *Id.* at 2. The School District has conceded that during Phases II and III, "BCG's consulting services were donated to the School District." 3/13/2013 School District Response at 4. Merely because these "consulting services"—including the records requested here—were donated to the School District does not make them **internal** to the School District, any more than if Requester had donated her own list of recommendations to the District. Such a list might also have been "predecisional," but that would not have made it "internal." *E.g.*, *Lund v. Dep't of Conservation & Natural Res.*, No. AP 2013-0854, 2013 PA O.O.R.D. LEXIS 488, at *17 (Pa. OOR June 25, 2013) (records not internal, because they "were submitted by a private club in support of its proposal for the [snowmobile] Trail"); *Sansoni*, 2010 PA O.O.R.D. LEXIS 375, at *6 (ordering record released where "the Requester seeks only the Application submitted by a third party, not the agency's work product with respect to it").

C. The School District Has Had Ample Opportunity To Submit Evidence

Under the RTKL, "the Chapter 13 courts have the authority to expand their record to fulfill their statutory role." *Bowling v. Office of Open Records*, No. 20 MAP 2011, 2013 Pa. LEXIS 1800, at *67 (Pa. Aug. 20, 2013). This does not mean, however, that an agency appealing from a decision of the OOR must always be allowed to submit any additional evidence it wishes. Otherwise, the proceedings before the OOR would be nothing more than dress rehearsals, serving no function but to delay agencies' releases of records. This is especially true in the present case, where the OOR asked for a specific sort of evidence, the School District then failed

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to produce it, and now the School District wants a "do-over." *See id.* at *57 ("[W]e perceive nothing in the RTKL that would prevent a Chapter 13 court from simply adopting the findings of fact and conclusions of law of an appeals officer when appropriate").

In its first filing with the OOR, the School District submitted an affidavit from its General Counsel. Then the OOR requested that the School District provide additional evidence, showing "whether the William Penn Foundation, or any other third party, had access to any of the withheld records at any time."[3] In response, the School District submitted the nebulous affidavit of its former Chief Recovery Officer and Acting Superintendent. Now the School District wants a third try. School District's Brief at 9 ("At the very least, the Court should, pursuant to the Supreme Court's ruling in *Bowling*, allow the record to be supplemented with additional evidence, such as affidavit or testimony on behalf of the William Penn Foundation or BCG, to prove that the records of deliberations regarding school closures were kept 'internal' to the School District."). The Court should deny the request.

Procedurally, the School District should have asked for this third chance via a motion to supplement the record, not via a one-sentence request in its brief. *See Wishnefsky v. Dep't of Corr.*, No. 2319 C.D. 2012, 2013 Pa. Commw. Unpub. LEXIS 652, at *6 n.2 (Pa. Commw. Ct. 2013). ("Petitioner also filed a motion to supplement the record. In RTKL cases, it is within the court's discretion to supplement the record."). Had it filed a motion, the School District would have been obligated to append to it any affidavit or affidavits it sought to file, so that Requester would have had an opportunity to respond substantively at the same time as or before filing this brief. *See* Phila. Civ. R. 208.3(B)(2)(E) ("All Motions shall include copies of all documents or

[3] The OOR's request did not limit the School District to a single affidavit, nor did it specify that the affiant(s) must be current or former School District officials, as opposed to officials of the William Penn Foundation or BCG.

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items necessary or relevant to the disposition of the issues. This shall include the complaint, answer, and reply to new matter. All such documents or items shall be included or attached and marked as exhibits separately. The Court may decide any matter against a party who fails to attach to the filing those items sufficient to enable the Court to determine the matter.”). Apparently unwilling or unprepared to detail the nature of the evidence it wishes to submit, the School District has requested carte blanche to introduce unspecified new evidence. The Court should not allow the School District to take this procedural shortcut, nor should it afford the School District any additional opportunities to present evidence that it could and should have presented long ago.

Courts properly allow expansion of the record in RTKL matters when the decision below was based on incomplete information. Here, by contrast, the OOR spelled out precisely the type of information required, but the School District responded with an affidavit that studiously avoided making a clean denial that it had shared the requested records with the William Penn Foundation. That stratagem failed. Moreover, the School District has now taken the position that the William Penn Foundation had “an affirmative duty” to review the requested records before paying BCG, and that “public agencies must be allowed” privately to share predecisional deliberative records with donors. School District’s Brief at 8. This position is incompatible with the School District’s implication that it might be able to come up with evidence that the William Penn Foundation did not receive the documents. Evidently, the District is merely playing for more delay before releasing the requested records. The Court should not assist that effort, particularly when the OOR specifically asked the School District to produce such evidence some seven months ago.

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IV. CONCLUSION

For all of the foregoing reasons, the Final Determination of the OOR should be affirmed in its entirety.

Respectfully submitted,

/s/ Benjamin D. Geffen
Benjamin D. Geffen

Counsel for Appellee

Dated: November 1, 2013

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CERTIFICATE OF SERVICE

I hereby certify that the attached Brief of Appellee is being filed electronically on November 1, 2013 and is available for viewing and downloading from the Electronic Filing System and that the attorney listed below has consented to electronic service:

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Benjamin D. Geffen

Dated: November 1, 2013

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