



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

LAURIE MAZER,
Requester

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:

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v.

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Docket No: AP 2021-2883

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SCHOOL DISTRICT OF
PHILADELPHIA,
Respondent

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INTRODUCTION

Laurie Mazer (“Requester”)¹ submitted a request (“Request”) to the School District of Philadelphia (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records related to a letter issued by the District’s superintendent regarding school selection. The District denied the Request, arguing, among other things, that records reflect internal, predecisional deliberations of the District. 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 **dismissed as moot in part**, and the District is required to take additional action as directed.

¹ The Requester is represented by Benjamin Geffen, Esq. and The Public Interest Law Center, which aided with the filing of the appeal.

FACTUAL BACKGROUND

On October 27, 2021, the Request was filed, stating as follows:

1. A letter to “School District of Philadelphia Families” from Superintendent Hite dated October 6, 2021 states that “Zip code preference will be applied at select criteria-based schools for students who meet the minimum qualifications.” Please provide policies, memos, training materials, research, correspondence and any other records showing how the District will apply Zip code preference, including but not limited to records specifying Zip codes for which the [D]istrict will apply preference.
2. Please provide policies, memos, training materials, research, correspondence and any other records showing how and when the District selected zip codes for which it will apply the preference mentioned in the October 6, 2021 letter.
3. The October 6, 2021 letter further states that “[s]chool selection will move to a computerized lottery system to support greater access for students who meet the qualifications.” Please provide policies, memos, training materials, research, correspondence and any other records showing how this computerized lottery system will work, including but not limited to records specifying how and quantifying to what degree the system will weight Zip codes, minimum applicant qualifications (including but not limited to grades, attendance, and writing-sample scores), the applicant’s sending school, and any other factors.

On December 3, 2021, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the District partially denied the Request,² arguing, in pertinent part, that certain records reflect the internal, predecisional deliberations of the District, 65 P.S. § 67.708(b)(10)(i)(A).

On December 15, 2021, the Requester appealed to the OOR, challenging the partial 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).

² On December 2, 2021, the District sought an additional extension of time to respond to the Request; however, the Requester declined to grant the extension. *See* 65 P.S. § 67.902(b)(2).

On March 29, 2022, following a series of agreed-upon extensions³ of the case deadlines, the parties notified the OOR that the appeal was limited to arguments made by the District pursuant to Sections 708(b)(10)(i)(A).

On March 30, 2022, the Requester submitted a position statement, arguing that the records or parts of records withheld under Section 708(b)(10)(i)(A) are not “internal” to the District and do not, therefore, satisfy the requirements of the exemption. Furthermore, the Requester argues that the District has failed to present sufficient evidence to support withholding records under Section 708(b)(11) of the RTKL.

On April 1, 2022 and April 2, 2022, the District submitted a verified position statement⁴ reiterating its argument that certain records are exempt under Section 708(b)(10)(i)(A) of the RTKL. The District also explained that it was no longer pursuing an earlier argument made under Section 708(b)(11) of the RTKL, 65 P.S. § 67.708(b)(11) (exempting records that would reveal confidential proprietary information or trade secrets), and provided one of the records withheld thereunder.⁵ In further support of its position, the District provided an affidavit, made under the penalty of perjury, from Melanie Harris, Chief Information Officer of the District’s Office of Information Technology, as well as an exemption log identifying the records at issue in this appeal.⁶

³ The last such extension, which occurred on March 23, 2022, set the party submission deadline as April 1, 2022, and the Final Determination due date as April 15, 2022. Furthermore, by correspondence dated March 25, 2022, the parties were advised that this appeal had been reassigned to the undersigned Appeals Officer for disposition. Finally, on April 8, 2022, the Requester granted the OOR until April 22, 2022 to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

⁴ The accuracy of the factual statements made in the District’s position statement were verified, under the penalty of perjury, by Roberto Fernandez, Esq., the District’s Associate General Counsel and Open Records Officer.

⁵ The remaining two items withheld under Section 708(b)(11) were also withheld under Section 708(b)(10)(i)(A); as such, they will be further addressed below.

⁶ The exemption log includes columns for page number(s), sender(s) and recipient(s), the subject matter of the email and the exemption asserted.

LEGAL ANALYSIS

During the course of the appeal, the District provided the Requester with responsive records, including the record identified as “SDP 313 + eleven unnumbered pages.” Accordingly, insofar as the appeal pertains to the records provided, it is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (holding that an appeal is properly dismissed as moot where no controversy remains).

With respect to the remaining records at issue in the appeal, the District withheld communications, in whole or in part, under Section 708(b)(10)(i)(A), which exempts from disclosure records reflecting:

The 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.

65 P.S. § 67.708(b)(10)(i)(A). An agency must prove three elements to establish 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 or policy-making. *Kaplan v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). Furthermore, “[o]nly ... confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice [are] protected as ‘deliberative.’” *Payne v. Pa. Dep’t of Health*, 240 A.3d 221 (Pa. Commw. Ct. 2020) (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 378 (Pa. Commw. Ct. 2013)).

Regarding the first element of the exemption, the District argues that the records, which are identified as communications between the District and SchoolMint, Inc. (“SchoolMint”), a third-party contractor, are internal to the District because SchoolMint “perform[s] institutional functions” and, pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and its implementing regulations, “should be deemed an official for purposes of [S]ection 708(b)(10)(i)(A) of the RTKL.” Conversely, the Requester asserts that communications between the District and a third party fall squarely within the Pennsylvania Supreme Court’s decision in *Chester Water Auth. v. Pa. Dep’t of Cmty. and Econ. Dev.*, wherein the Court found that Section 708(b)(10)(i)(A) did not protect communications between an agency and private third-party contractors and subcontractors because the communications were not internal to the agency. 249 A.3d 1106 (Pa 2021).

As a preliminary matter, the word “official” is not defined in the RTKL and, as a result, must be taken according to its common meaning. *Chester Water Auth.*, 249 A.3d at 1112 n.13 (citing *Pa. State Police v. Grove*, 161 A.3d 877 (Pa. 2017)); *see also* 1 Pa.C.S. § 1903(a). As it relates to government or other similar entities, the term is defined as “one who holds or is invested with an office.” MERRIAM-WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/official> (last visited on April 15, 2022). Of further significance, the term “‘internal,’ relative to organized structures, commonly means ‘of, relating to, or occurring on the inside’—or, in other words, *within*—the organization.” *Chester Water Auth.*, 249 A.3d at 1113 (emphasis in original) (internal citations omitted).

Here, the District seeks to include a third-party meeting the definition of a “school official” under FERPA as an agency “official” under the RTKL. The regulations implementing FERPA provide that “[a] contractor, consultant, volunteer, or other party to whom an agency or institution

has outsourced institutional services or functions may be considered a *school official* under this paragraph” if the contractor:

- 1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
- 2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
- 3) Is subject to the requirements of § 99.33 governing the use and redisclosure of personally identifiable information from education records.

34 C.F.R. § 99.31(a)(1)(i)(B) (emphasis added).

Thus, according to the District, if SchoolMint performs an institutional service or function that would otherwise be performed by District employees, is under the direct control of the District with respect to the use and maintenance of education records and is subject to the requirements of 34 C.F.R. § 99.33, then SchoolMint would be a school official under FERPA and should also be considered an agency “official” for purposes of Section 708(b)(10)(i)(A). However, even if we assume SchoolMint meets this definition, FERPA pertains only to the “[c]onditions for availability of funds to educational agencies or institutions” and, more specifically, relates to the disclosure of “education records” by these institutions or agencies. 20 U.S.C. § 1232g(a). There has been no argument or evidence presented to suggest that the communications withheld by the District contain the personal identification information of students or that they otherwise constitute education records under FERPA.

Furthermore, while the RTKL must be read *in pari materia* with certain other Pennsylvania statutes, *see Schenk v. Twp. of Centre*, 893 A.2d 849, 853 (Pa. Commw. Ct. 2006), *appeal dismissed as improvidently granted*, 975 A.2d 591 (Pa. 2009) (“Because they relate to the same class of things, information about actions by public agencies, the [RTKL] and the Sunshine Act are in *pari materia*”), no such relationship exists between the RTKL and FERPA, as FERPA

describes when “[a]n educational agency or institution may disclose personally identifiable information from an *education record* of a student without ... [student or parental] consent.” 34 C.F.R. § 99.31(a) (emphasis added). In other words, the fact that SchoolMint may meet the definition of a “school official” and is, as a result, subject to FERPA’s disclosure requirements, does not have any impact on the public or nonpublic nature of records under the RTKL, particularly when there is no argument that the responsive records consist of the types of records protected by FERPA. Accordingly, SchoolMint does not meet the definition of an agency official, as contemplated in Section 708(b)(10)(i)(A).

Finally, given that the District acknowledges that the only remaining responsive records are communications between the District and representatives of SchoolMint, a third-party contractor, as confirmed by the District’s exemption log,⁷ the communications are not internal to the District; therefore, Section 708(b)(10)(i)(A) does not apply to the records. *Chester Water Auth.*, 249 A.3d at 1114. Because the District has raised no other reason for withholding the communications, it has not met its burden of proof under the RTKL. *See* 65 P.S. § 67.708(a)(1); 65 P.S. § 67.305.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **dismissed as moot in part**, and the District is required to provide all 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 Court of Common Pleas of Philadelphia. 65 P.S. §

⁷ By correspondence dated March 31, 2022, a copy of which was included with the District’s position statement, the District identified each of the responsive records contained on its exemption log and noted which sender or recipient was external to the District. Regarding the records identified as SDP 107-108, the March 31, 2022 correspondence identifies “Chandrika Arya” as one such external person; however, neither the exemption log nor Ms. Harris’ affidavit includes this individual as a sender or recipient of the communication(s). However, a review of the redacted records provided to the OOR by the Requester shows that “Chandrika Arya” was copied on the correspondence identified as SDP 107-108.

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.⁸ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 21 April 2022

/s/ Joshua T. Young

JOSHUA T. YOUNG
DEPUTY CHIEF COUNSEL

Sent to: Benjamin Geffen, Esq. (via email only);
Roberto Fernandez, Esq., AORO (via email only)

⁸ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).