

TREDYFFRIN/EASTTOWN SCHOOL
DISTRICT

Petitioner

v.

WALTER ZIMOLONG and AMERICAN
FIRST LEGAL

Respondents

: IN THE COURT OF COMMON PLEAS

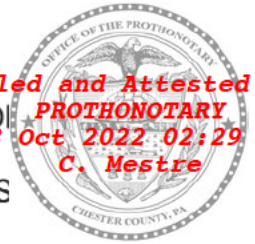
: CHESTER COUNTY, PENNS

: NO. 2022-00917-MJ

: CIVIL ACTION

:

Filed and Attested by
PROTHONOTARY
18 Oct 2022 02:29 PM
C. Mestre



MEMORANDUM OPINION AND ORDER

Petitioner, Tredyffrin/Easttown School District (the "District"), has petitioned for review of the Final Determination Upon Reconsideration ("Final Determination-R") issued by the Office of Open Records ("OOR"), which granted in part the appeal filed by Requesters, Walter Zimolong, Esquire, and American First Legal (collectively, "Requester"). See 65 P.S. § 67.1302(a). The District's petition is limited to Request No. 4.¹

Background

On July 13, 2021, Requester submitted a request to the District pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101 *et seq.* The request set forth eleven items, some of which contained multiple subparts.

After invoking a thirty-day extension, the District provided its response on August 19, 2021.

On September 3, 2021, the Requester filed an appeal with the OOR challenging the District's response to Items 4 and 10. At Item 4, Requester sought:

¹ At ¶ 14 of the within petition, the District states, "The District now files this timely Petition for Review of the OOR's Final Determination Upon Reconsideration with regard to Request No. 4."

All records prepared by Pacific Education Group ["PEG"] for the School District between 2018 and the present, including, without limitation, any communications, slides, documents, or training materials, distributed or shared with any employee of the School District, whether under the Pacific Education Group's "Courageous Conversations Protocol" or otherwise.

The District responded to Item 4 by stating:

Denied. This request is denied because the records requested are exempt from access as the confidential proprietary information of a third party.

On November 22, 2021, the OOR issued its Final Determination granting in part, denying in part, and dismissing as moot in part the Requester's appeal.

On December 6, 2021, the District submitted a petition for reconsideration regarding Items 10(c) and 10(d) to the OOR.

On December 13, 2021, the OOR granted reconsideration and provided the Requester fifteen days to answer. No answer was forthcoming.

On January 12, 2022, the OOR issued a its Final Determination-R and concluded that the District had carried its burden and established that no records responsive to Items 10(c) and 10(d) exist.

Thereafter, the District timely filed the within petition. The Requester has answered the petition and filed new matter. The District has answered the new matter. A briefing schedule was established by order entered July 11, 2022. All briefs have been submitted.

Issues

The District filed its petition to seek reversal of the OOR's Final Determination-R with regard to Item 4. The District contends that the Final Determination-R obligates the District to produce emails and other documents, which, when Item 4 is interpreted

reasonably, were not requested. Further, to the extent the request could have triggered the obligation to produce records, the District contends the records are subject to withholding or redaction pursuant to exemptions under the RTKL at 65 P.S. § 67.708(b)(17)/non-criminal investigation, 65 P.S. § 67.708(b)(7)(vii)/employee grievance materials related to discrimination or harassment, 65 P.S. § 67.708(b)(6)(i)(A)/personal email addresses and cellular telephone numbers, and 65 P.S. § 67.708(b)(1)(i)/student privacy exemption mandated by Family Educational Right and Privacy Act (“FERPA”), 20 U.S.C. § 1232g; 34 CFR Part 99.

Discussion

This court reviews the decision of the OOR *de novo*. *Bowling v. Office of Open Records*, 621 Pa. 133, 75 A.3d 453, 459 (2013). The scope of review is plenary. *Id.* at 476.

The District interpreted Item 4 as a request for “*records prepared by PEG for the School District*” rather than a request for “*all communications exchanged between PEG and any member of the School District.*” Accordingly, the District did not conduct an all inclusive search for every email communication or correspondence with or from PEG. The District argues that its interpretation of the request was reasonable and cites to *UnitedHealthcare of Pennsylvania, Inc. v. Pennsylvania Dep’t of Human Servs.*, 824 C.D. 2017, 2018 WL 2436334, at *3 (Pa.Cmwlt. May 31, 2018)(unreported) for support. In *UnitedHealthcare*, the Commonwealth Court upheld the agency’s narrow interpretation of a request and concluded that the omission of the word “after” from the request resulted in a temporal limitation.

The RTKL provides that a request for records “should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. When determining whether a request satisfies this statutory requirement, “the specificity of a request must be construed in the request's context, rather than envisioning everything the request might conceivably encompass.” *Askew v. Pennsylvania Office of Governor*, 65 A.3d 989, 992 (Pa.Cmwlt. 2013)(citing *Montgomery Cnty. v. Iverson*, 50 A.3d 281, 283 (Pa.Cmwlt. 2012)).

Here, Requester sought “[a]ll records prepared by [PEG] ... including, without limitation, any communications ... distributed or shared with any employee of the School District.” As this sentence is constructed, “communications” describes a type of record being sought. Communications include emails, correspondence, texts, preserved video chats, etc. Among the records requested are any communications prepared by PEG and distributed or shared with any District employee. Any communication originating from PEG was necessarily prepared by PEG for the District and, when received by the District employee, was distributed or shared by PEG with a District employee. It is evident on the face of the request that the Requester sought any emails or correspondence or communications in any form originating from PEG to the District.

The District is required to conduct a good faith search for all such records and to provide all responsive records within thirty days. The District contends that certain of these records are subject to withholding or redaction pursuant to exemptions under the RTKL at 65 P.S. § 67.708(b)(17)/non-criminal investigation, 65 P.S. § 67.708(b)(7)(vii)/employee grievance materials related to discrimination or harassment, 65 P.S. § 67.708(b)(6)(i)(A)/personal email addresses and cellular telephone numbers,

and 65 P.S. § 67.708(b)(1)(i)/student privacy exemption mandated by Family Educational Right and Privacy Act ("FERPA"), 20 U.S.C.A. § 1232g; 34 CFR Part 99. Based on the reasoning set forth in *Wishnfsky v. Pennsylvania Dep't of Corr.*, 144 A.3d 290, 297 (Pa.Cmwlt. 2016),² the District has not waived these claims.

Requester seeks an award of attorney fees and costs under 65 P.S. § 67.1304(b). Requester was denied this relief by the OOR and did not petition for review. To the extent that Requester can properly raise the claim here having failed to seek review, we deny the same and adopt the findings and reasoning of the OOR as set forth in the Final Determination-R at pp. 21-22.³

For the reasons stated, we enter this

ORDER

AND NOW, this 17th day of OCTOBER, 2022, upon consideration of the Petition of the Tredyffrin/Easttown School District for Review of the Final Determination Upon Reconsideration Issued by the Office of Open Records, the response of Walter Zimolong, Esquire, and American First Legal, and all related filings, it is

² In *Wishnfsky*, the Commonwealth Court held that the agency was permitted to assert exemptions not asserted in the agency's initial denial. "In holding that there was no waiver, the Supreme Court [in *Levy*] balanced the need for liberal construction of the RTKL to effectuate the 'overriding legislative intent of transparency of government and speedy resolution of requests,' with the legislative intent to shield numerous categories to protect 'the Commonwealth's security interests and individuals' privacy rights.'" *Wishnfsky* at 381–82 (citing *Levy v. Senate of Pennsylvania*, 619 Pa. 586, 65 A.3d 361 (2013)).

³ "While a court of common pleas or this Court (collectively, "reviewing courts") may conduct *de novo*, plenary review of appeals from decisions made by appeals officers, there is 'nothing in the RTKL that would prevent [reviewing courts] from simply adopting the findings of fact and conclusions of law of an appeals officer when appropriate....'" *Com., Office of Open Records v. Ctr. Twp.*, 95 A.3d 354, 369 (Pa.Cmwlt. 2014)(quoting *Bowling*, 75 A.3d at 473).

ORDERED that the Final Determination Upon Reconsideration of the Office of Open Records is affirmed. Petitioner is directed to conduct a good faith search for all communications responsive to Item 4 and to provide the same to Respondents within thirty days. If Petitioner asserts that certain records are protected from disclosure, Petitioner is directed to submit to Respondents an exemption log, listing the date, record type, author, recipients and a description of the withheld record; Petitioner may submit testimonial affidavits in support of a claimed exemption.^{4, 5}

BY THE COURT:



Edward Griffith, J.

⁴ See *McGowan v. Pennsylvania Dep't of Env'tl. Prot.*, 103 A.3d 374, 381 (Pa.Cmwlt. 2014)(“Testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption.”)

⁵ If an exception log is produced, the parties' will be provided an opportunity to submit briefs before a ruling is made.