



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
SCOTT THOMAS,	:
Requester	:
	:
v.	: Docket No: AP 2020-0967
	:
POTTSVILLE AREA SCHOOL	:
DISTRICT,	:
Respondent	:

On June 4, 2020, Scott Thomas (“Requester”) submitted a request (“Request”) to the Pottsville Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking copies of the text messages of Jeffrey Zweibel¹ relating to any agency business between May 11, 2020 and the date of the Request.

On June 11, 2020, the District denied the Request, arguing that no responsive records exist within its possession, custody or control. On June 12, 2020, the Requester filed an appeal with the Office of Open Records (“OOR”), 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).

¹ Jeffrey Zweibel was the District’s Superintendent at the time of the Request.

On June 23, 2020, the Requester submitted a position statement challenging the District's position that no text messages discussing agency business exist on the Superintendent's business cellular phone. The District did not make any additional submissions during the appeal.

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt from disclosure. 65 P.S. § 67.708(a)(1). In the present case, the District did not comply with the RTKL by providing any factual or legal support for its assertion that the requested records do not exist.² Based on the District's failure to comply with the statutory requirements of the RTKL or provide any evidentiary basis in support of an exemption under the RTKL, the District did not meet its burden of proof under the RTKL. 65 P.S. § 67.305.³

For the foregoing reasons, the appeal is **granted**, 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 or petition for review to the Schuylkill 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 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.⁴ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

² See generally 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith...”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith”).

³ The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records sought in the Request. Absent the Township providing a sufficient evidentiary basis that no additional records exist, the OOR will order disclosure of responsive public records. See generally *Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: August 10, 2020

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Scott Thomas (via email only);
Brian Manning (via email only)