

#13-103
RTK REQUEST NUMBER

7/24/2013
DATE RECEIVED

7/31/2013
5 DAY RESPONSE DATE
DEADLINE



COUNTY OF LUZERNE

RIGHT TO KNOW LAW REQUEST FORM

NAME OF REQUESTER: Brominski Edward A.
(PLEASE PRINT CLEARLY) LAST FIRST MI

MAILING ADDRESS: _____
STREET / P.O. BOX

CITY STATE ZIP CODE

PHONE # _____ FAX# _____

EMAIL ADDRESS: _____

SIGNATURE: Edward A. Brominski DATE: 7/23/13

RECORDS REQUESTED - Requesters MUST specify the document(s) sought. Please use additional pages if necessary.
Redacted Resumes of ALL candidates interviewed
BUT NOT SELECTED for the following positions:
CORRECTIONS: Budget & Finance; Judicial Services;
OPERATIONS: Administrative Services; Public Defender;
Solicitor; HUMAN SERVICES

PLEASE CHECK ONE OF THE FOLLOWING:
 I AM ONLY REQUESTING ACCESS TO THE DOCUMENT(S)
OR I AM REQUESTING A HARD COPY OF THE DOCUMENT(S) (PAPER, CD, etc...)
 I AM REQUESTING AN E-FILE OF THE DOCUMENT(S) (IF AVAILABLE) (PDF, EXCEL SPRDSHT, etc...)

PLEASE NOTE: LUZERNE COUNTY IS NOT REQUIRED TO CREATE A RECORD WHICH DOES NOT CURRENTLY EXIST OR TO COMPILE, MAINTAIN, FORMAT OR ORGANIZE A RECORD IN A MANNER IN WHICH THE AGENCY DOES NOT CURRENTLY COMPILE, MAINTAIN, FORMAT OR ORGANIZE THE RECORD



COUNTY of LUZERNE
P E N N S Y L V A N I A
ESTABLISHED 1 7 8 6

Right-To-Know Response Form

Denial

July 25, 2013

Edward Brominski

RTK REQUEST #13-103

Dear Mr. Brominski,

Thank you for writing to Luzerne County with your request for information pursuant to the Pennsylvania Right-To-Know law.

On July 23, 2013, you requested, as described in the attached Right To Know request, redacted resumes of all candidates interviewed but not hired for the positions of Corrections, Budget & Finance, Judicial Services, Operations, Administrative Services, Public Defender, Solicitor and Human Services. Your request is denied for the following reason:

Under Section 708 of the Pennsylvania Right to Know Act, subsection (b)(7)(iv) provides that "the employment application of an individual who is not hired by the agency" is exempt from access by a requester under the Act. The Pennsylvania Office of Open Records has firmly upheld this exemption under the Act. See, Bartley v. Lock Haven University, OOR Dkt. AP 2009-093, 2009 PA O.O.R.D. Lexis 733; Hoyer v. Dauphin Co., OOR Dkt. AP 2010-0913; Rudberg v. Pennsylvania Dept. of Labor & Industry, OOR Dkt. AP 2010-0774.

Based on the above referenced legal authority, the employment application documents for the individuals not hired for the aforementioned positions are exempt from disclosure under the Act.

You have a right to appeal this denial of information in writing to Terry Mutchler, Executive Director, Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120.

If you choose to file an appeal you must do so within 15 business days of the mailing date of the agency's response. Section 1101. If you have further questions, please call Sandra A. Zurek. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Respectfully,

Shannon Crake Lapsansky, Esq.
Luzerne County
Open Records Officer
200 North River Street
Wilkes-Barre, PA 18711
(570)825-1598

EMAILED TO: Mr. Edward Brominski



pennsylvania
OFFICE OF OPEN RECORDS

July 29, 2013

Via E-mail only:

Edward Brominski

Via E-mail only:

Shannon Crake-Lapsansky
Open Records Officer
Luzerne County
200 North River Street
Wilkes Barre, PA 18711
Shannon.Crake@LuzerneCounty.org

RE: OFFICIAL NOTICE OF APPEAL - DOCKET # AP 2013-1319

Dear Parties:

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.* ("RTKL") on July 29, 2013. The process to follow in submitting information to the OOR is attached. A binding Final Determination will be issued in 30 calendar days as set forth in the RTKL.

The Supreme Court of Pennsylvania has held that an agency is permitted to assert exemptions on appeal, even if the agency did not assert them when the request was originally denied. *Levy v. Senate of Pa.*, 2013 Pa. LEXIS 788 at *60-61 (Pa. Apr. 24, 2013). Accordingly, the agency may supplement its response within the time frame set forth below.

You may submit information and legal argument to support your position by 5:00 p.m. seven (7) business days from the date on this letter. Please include the docket number above on all submissions.

The law requires that your position must be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and Final Determinations of the OOR. **Statements of fact must be supported by an affidavit made under penalty of perjury by a person with actual knowledge.** An affidavit is required to demonstrate nonexistence of records. Blank sample affidavits are available on our website.

The agency has the burden of proving that records are not subject to public access. Any written information you provide to OOR must be provided to all parties.

Agency Must Notify Third Parties: If records concern or pertain to an employee of the agency; constitute confidential or proprietary or trademarked records of a person or business entity ; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice to the OOR within 7 business days.**

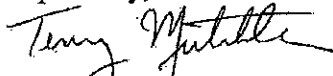
Such notice must be made by 1) providing a copy of all documents included with this letter; and 2) advising that interested persons may request to participate in this appeal (*see* 65 P.S. § 67.1101(c)).

The Commonwealth Court has held that “the burden [is] on third-party contractors ... to prove by a preponderance of the evidence that the [requested] records are exempt.” *See Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011). **Failure to participate in an appeal before the OOR may be construed as a waiver of objections regarding release of the requested records.**

Law Enforcement Records of Local Agencies: District Attorneys are required to appoint appeals officers to hear appeals regarding access to criminal investigative records in possession of a local agency. If records were denied in part upon that basis, requester may consider filing a concurrent appeal with the District Attorney of the County where the agency is located if the records were denied, in part, because they are criminal investigative records of a local agency.

If you have questions, contact the assigned Appeals Officer in writing and copy the other party.

Respectfully,



Terry Mutchler
Executive Director

Enclosures:

Assigned Appeals Officer contact information
Entire appeal as filed with OOR



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Bina Singh, Esquire

CONTACT INFORMATION:

Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

PHONE:

(717) 346-9903

FACSIMILE:

(717) 425-5343

E-MAIL:

Bksinghesq@gmail.com

**Preferred method of contact
and submission of information:**

EMAIL

Please direct submissions and correspondence related to this appeal to the above Appeals Officer. Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR.

The OOR website, <http://openrecords.state.pa.us>, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.

RECEIVED

JUL 29 2013

OFFICE OF OPEN RECORDS

July 26, 2013

Dear Executive Director Muchler:

I am Edward A. Brominski a sitting member of the Luzerne County Council, the legislative Branch of our Home Rule County.

I wish for a review of a denial I received for a request of information from the Human Resources Department of our County.

The sequence of events leading to this letter are as follows:

On May 25, 2013 (item 1) enclosed is the Initial request I made for information.

On may 28, 2013 (item 2a and 2b) are the responses I received from an Assistant County Solicitor.

On that same day (evening) at a council meeting in Hazleton, Pa. I addressed the denial to the County Solicitor and suggested that the response was in error. He acknowledged that it was and suggested I rewrite the request and state that as part of my "oversight duties" I should receive the information requested. I did that as per correspondence May 29, 2013 (item 4).

On July 15, 2013 (item 5) I received a denial again, this time from the County Solicitor who advised me how to write the request!

On July 23, 2013 (item 6) I submitted a Right To Know request with the county, and on July 25 2013 I received another denial.

I am asking for a review of this request and a favorable answer reversing the denial, as

I feel as a member of council I am entitled to review the credentials of applicants, in order to compare their credentials to applicants who were denied. I believe it is necessary to review these selections and those denied in order for me to evaluate the manager's performance.

Thank you for the time you have afforded this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Edward A. Brominski". The signature is written in dark ink and is positioned above the printed name.

Edward A. Brominski

Luzerne County Council

IN THE MATTER OF	:	PENNSYLVANIA OFFICE OF OPEN RECORDS
EDWARD BROMINSKI,	:	
COMPLAINANT	:	DOCKET NO.: AP 2013-1319
	:	
v.	:	
LUZERNE COUNTY	:	
RESPONDENT	:	

LUZERNE COUNTY'S RESPONSE TO COMPLAINANT'S APPEAL

FACTS

The Complainant in the matter, Edward Brominski, is a council member under Luzerne County's home rule government. Under Luzerne County's Home Rule Charter, the County Manager is vested with the authority to interview and make appointments to certain positions. County Council then approves or denies those appointments of the individuals selected by the County Manager. Council members are not involved in the receipt of applications/resumes, their review or in the interview process. Over the course of the last several months, individuals have been appointed to the positions of Director of Corrections, Director of Budget and Finance, Director of Administrative Services, Director of Judicial Services, Chief Public Defender and Chief County Solicitor. Complainant, as stated in his appeal, repeatedly requested the resumes/applications of applicants who applied but were not hired to fill these positions. His stated reasoning for the request was that council members should have this information in order to evaluate the performance of the County Manager. Complainant was denied this information multiple times both as it relates to the division of duties set forth in the Luzerne County Charter, as well as, under the Right to Know Act as a record that is exempt from disclosure.

Most recently, and which is the subject of this appeal, Mr. Brominski requested the aforementioned information, resumes/applications of individuals who applied but were not hired, on July

23, 2013. Luzerne County denied that request on July 25, 2013 citing subsection 708(b)(7)(iv) of the Right to Know Act and supporting case law.

QUESTION PRESENTED

- I. Should the information requested be subject to disclosure under the Right to Know Act.

Suggested Answer: No.

LAW AND ARGUMENT

The employment application of an individual who is not hired by the agency is exempt from access by a requester under the Right to Know Act. 65 P.S. §67.708(b)(7)(iv). The Pennsylvania Office of Open Records has firmly upheld this exemption under the Act. See, Bartley v. Lock Haven University, OOR Dkt. AP 2009-093, 2009 PA O.O.R.D. Lexis 733; Hoyer v. Dauphin Co., OOR Dkt. AP 2010-0913; Rudberg v. Pennsylvania Dept. of Labor & Industry, OOR Dkt. AP 2010-0774; Donahue v. Luzerne County, OOR Dkt. AP 2013-1118.


In Rudberg, the Requestor requested documents from the Department of Labor and Industry including, among other things, applications and resumes of unsuccessful job applicants. The agency denied the request and Requestor appealed. The Pennsylvania Office of Open Records denied the appeal as it related to those documents.

CONCLUSION

Based upon the foregoing statute citation, as well as, case law precedent within the Office of Open Records, Respondent respectfully requests that the appeal in this matter be denied and dismissed. There

is no legal authority to forego the statutory exemption for the documents requested just because of Complainant's position on County Council. Discussion of the County Manager's performance at public council meetings or among emails between council members (which may be subject to disclosure themselves depending on the situation) based on applications/resumes of candidates not hired would subject these documents to further public disclosure.

RESPECTFULLY SUBMITTED,


SHANNON CRAKE LAPSANSKY, ESQ.
OPEN RECORDS OFFICER
LUZERNE COUNTY OFFICE OF LAW



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
EDWARD BROMINSKI,	:	
Complainant	:	
	:	
v.	:	Docket No.: AP 2013-1319
	:	
LUZERNE COUNTY,	:	
Respondent	:	

INTRODUCTION

Edward Brominski (the “Requester”), Member of the Luzerne County Council, submitted a request (“Request”) to Luzerne County (“County”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), seeking resumes of unsuccessful applicants for several County positions. The County denied the Request, arguing that resumes of individuals not hired by the County are not public under an exemption for personnel records. The Requester timely appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied** and the County is not required to take further action.

FACTUAL BACKGROUND

On July 23, 2013, a Request was filed, seeking “redacted resumes of all candidates interviewed *but not selected* for the following positions: Corrections[:] Budget and Finance[:] Judicial Services[:] Operations[:] Administrative Services[:] Public Defender[:] Solicitor[:] Human Resources [emphasis added].” The County denied the Request, arguing that the

requested records are exempt from disclosure under Section 708(b)(7)(iv) of the RTKL because the records involve individuals not hired by the County.

On July 29, 2013, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c). On August 6, 2013, the County provided a position statement.

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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* No. 20 MAP 2011, 2013 Pa. LEXIS 1800 (Pa. Aug. 20, 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 or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Upon receipt of a request, an agency is required to assess whether a

record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. 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 existence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep’t of Transp. V. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

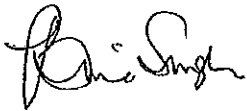
In the present appeal, the County argues the resumes of individuals not hired are exempt from disclosure under Section 708(b)(7)(iv) of the RTKL. Section 708(b)(7)(iv) exempts from disclosure “[t]he employment application of an individual who is not hired by the agency.” The OOR has previously held that resumes of individuals not hired are exempt from disclosure under 65 P.S. § 67.708(b)(7)(iv). *See Bartley v. Lock Haven University*, OOR Dkt. AP 2009-0931, 2009 PA O.O.R.D LEXIS 733. Accordingly, the OOR holds that the resumes of the unsuccessful applicants are exempt from public access.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **denied** and the County is not required to take any further action. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Luzerne

County Court of Common Pleas. 65 P.S. § 67.1302. 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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: August 26, 2013



APPEALS OFFICER
BINA SINGH, ESQ.

Sent to: Edward Brominski (via e-mail only);
Shannon Crake-Lapsansky (via e-mail only)