

September 26, 2023

**VIA E-File Portal**

Blake Eilers, Esquire  
Appeals Officer  
Office of Open Records  
333 Market Street, 16th Floor  
Harrisburg, PA 17101

RE: AP 2023-1904: Ciliberti v. Avon Grove School District

Dear Appeals Officer Eilers:

The District appreciates the opportunity to respond to the Requester's September 14, 2023 Response to the District's Position Statement ("Requester's Response"), which raises new grounds for her Appeal which the District has not yet had an opportunity to address in its prior position statement ("Position Statement"). As to remaining matters which the Requester asserts are still before the OOR,<sup>1</sup> the District incorporates its arguments in the Position Statement herein, and offers the following additional responses.

**1. Utilization of the "Topic/Reference Column" in the Request.**

In the Requester's Response, she now explains that she included the list of items under "Topic/Reference Column" in her Request, not to seek copies of those records, but rather to attempt to demonstrate transactions or activities of the District. The District

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<sup>1</sup> As part of the Requester's Response in Exh. 2, the Requester identifies which items are no longer the subject of her Appeal. As a result, those items are now moot, and no further action is required by the District.

reasonably did not interpret the “Topic/Reference Column” in the same manner as the Requester. Rather, the District interpreted it as a request for the items listed in that column. In response, the District provided access to those records to the Requester in its Response. See Position Statement, Exh. C.

In regard to all items remaining at issue in the Appeal, the District explicitly objects to the implication in the Requester’s Response that the District was required to utilize the items listed in Topic/Refence column to analyze and interpret the “Description” column in order to determine which records were sought by the Requester. The entire chart, including the Topic/Reference column, was proceeded by the heading “Request for production of any documents or electronically stored information, include but not limited to writings, video, and images related to the following areas:”-- clearly indicating the Requester was seeking the items listed in the various columns in the Request, as modified by the overarching context of the “poster incident” and the various subject headings contained in the chart.<sup>2</sup>

To do as the Requester now suggests would require the District’s Open Records Officer to perform a level of analysis and legal interpretation that is not required by the RTKL. See Askew v. Pennsylvania Office of Governor, 65 A.3d 989, 993 (Pa.CmwltH. 2013) (stating “Indeed, a request that explicitly or implicitly obliges legal research is not a

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<sup>2</sup> The Requester also suggests that her original cover letter which included her intended use of the document (to perform an audit) should be considered. The RTKL does not allow the District to consider the purpose of a request in responding to a request. Hunsicker v. Pa. State Police, 93 A.3d 911, 913 (Pa. CmwltH. 2014). Further, just because the Requester would consider a particular document in an audit, does not mean the District possesses or utilized the document in relation to the “poster incident.”

request for a specific document; rather, it is a request for someone to conduct legal research with the hopes that the legal research will unearth a specific document that fits the description of the request.”). The RTKL does not obligate the District to review, analyze and interpret outside documents to determine what a requester may be seeking as part of another portion of a request. Rather, the District is to rely on the common meaning of words and phrases in the Request. A request that requires the District to interpret other documents to make a determination as to what is sought by the Requester in order to fulfill the request is the very definition of insufficiently specific, and should be dismissed.

***2. Poster Incident: General Information; Poster Content; Item (a), “District Information Technology Resources history/content accessed at the location and for the duration of poster creation.”***

The District incorporates by reference its arguments for this item as set forth in its Position Statement.

In the alternative, as set forth in the Position Statement (p. 7), the District could not identify what the Requester sought in regard to “Poster Incident: General Information; Poster Content; Item (a), “District Information Technology Resources history/content accessed at the location and for the duration of poster creation.”, and therefore, this portion of the Request was insufficiently specific. See also, Position Statement, Exhs. G, H. The Requester now belatedly explains she is seeking “the **history / content accessed on District devices, as monitored by the District**, ... [on] the dates the posters were created (May 19 and May 26, 2023), the location of the poster creation (Rainbow Club Meeting), and the District Employees present at each meeting (Marisa

Marlow and Katherine Oliver).” Requester’s Response, p. 2 (emphasis added). This is an entirely different request than the original Request. Compare Requester Response Exh. 1 with Requester Response, pp. 1-2. The Requester also incorporates language from policies to further explaining what she is now seeking. The record sought, as now explained by the Requester, constitute a different request. As set forth in the Position Statement, a requester may not modify, explain or expand a request on appeal, which is what the Requester now seeks to do.

Notwithstanding the foregoing, as set forth in Mr. Kotch’s Attestation included in the Response, the District does not have the ability to generate a report connecting content to a specific location in the school. In addition, Mr. Kotch has already explained the District does not have the ability to ascertain the purpose for which content was accessed – that is, if the access was related to the “poster creation” or for some other purpose. Any correlation between the content history and time of the event would be an assumption. As such, even if the District was required by OOR to respond to the modified Request, there would exist no responsive record.<sup>3</sup>

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<sup>3</sup> Assuming, arguendo, that this item is not insufficiently specific, the District raises the following additional defenses: The requested history and content accessed may not exist. To the extent it does exist, depending on the device, the District cannot confirm that the specified employee is the individual who accessed it. To the extent it does exist, it may not be a record of the District as it may not document a transaction or activity of the District. To the extent it does exist, it may implicate a constitutional right to privacy and require notification of the employees so they may participate in this matter. To the extent it does exist, the history and content may contain information that is otherwise exempt from access such as names of minors, health information, noncriminal investigations, predecisional matters, or educational records protected from release by FERPA.

**3. *Poster Incident: General Information; Poster Display; Item (a), Location and duration of display (including video surveillance).***

The District incorporates by reference its arguments for this item as set forth in its Position Statement.

The Requester has withdrawn her Appeal for all of the requested video surveillance except for a frame showing the posting of the posters; therefore the appeal of the remainder of this item is now moot.

**4. *Internal Investigation Subsequent to Poster Incident, Conduct of Internal Investigation.***

For all items under this subheading, the District incorporates by reference all arguments for these categories of items as set forth in its Position Statement. The District continues to emphasize that it reasonably interpreted the items sought by the Requester in this portion of the Request to apply only to an “Internal Investigation Subsequent to the Poster Incident”, and specifically the “Conduct of Internal Investigation”. As set forth in the Position Statement, no such investigation occurred between June 9, 2023 and June 19, 2023. See Position Statement, Exhs. F, G. As a result there are no such records of the categories listed by the Requester as part of a such an investigation. However, given the lack of clarity in the Requester’s Request, as in its Position Statement, the District continues to raise alternative arguments to the extent that may be required by the RTKL.

To the extent the Requester now implies that she was not seeking these items as part of an internal investigation conducted by the District, but rather as part of her own internal investigation audit, records relating to the Requester’s internal investigation audit are not records of the District.

a. *Internal Investigation Subsequent to Poster Incident, Conduct of Internal Investigation, Item (a), "Superintendent."*

As a courtesy to the Requester, the District directs the Requester to the information available on its publicly accessible website: <https://www.avongrove.org/district/board-of-directors/superintendents-performance-standards>.

b. *Internal Investigation Subsequent to Poster Incident, Conduct of Internal Investigation, Item (b) "Designee responsible for disciplinary rules for violations for Board policies, administrative regulations, rules and procedures."*<sup>4</sup>

In the alternative, rather than the originally requested "Designee responsible for disciplinary rules for violations for Board policies, administrative regulations, rules and procedures", the Requester now seeks "designee responsible for **the development and dissemination of these rules** ...". Compare Requester's Response Exh. 1 with Requester Response, p. 3. (emphasis added). The Requester also incorporates policies to further explain what she was seeking. What the Requester now indicates she is seeking is a different request than the item sought in the Request, as it encompasses different types of individuals (i.e. individuals responsible for enforcement of disciplinary rules for violations as opposed to individuals responsible for the development and dissemination of disciplinary rules). As noted in Position Statement, p.7, a requester may not modify, explain or expand a request on appeal, which is what the Requester now seeks to do.

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<sup>4</sup> While not included in the Requester's Response as a withdrawn item on Appeal, in the Requester's Response, the Requester does not challenge the District's alternative position that evaluations are exempt from access under 65 P.S. 67.708(b)(7) or that no evaluations occurred during the period of June 9, 2023 and June 19, 2023.

The Requester also now seeks the names of individuals, as opposed to employment contracts and evaluations.<sup>5</sup> Again, the Requester cannot modify a request on appeal. Further, the District is not required to respond to questions under the RTKL. See, Position Statement, p. 9.

- c. *Internal Investigation Subsequent to Poster Incident, Conduct of Internal Investigation; Item (c) “Designees responsible for reporting to the Pennsylvania Department of Education discovery of any educator against whom there are any allegations of sexual misconduct or sexual abuse or exploitations involving a child or a student.”*

The Requester also now seeks the names of individuals, as opposed to employment contracts and evaluations.<sup>6</sup> The Requester cannot modify a request on appeal. Further, the District is not required to respond to questions under the RTKL. See, Position Statement, p. 9.

- d. *Internal Investigation Subsequent to Poster Incident; Conduct of Internal Investigation; Item (d) “Disciplinary Procedures/rules for violations of Board policies, administrative regulations, rules and procedures.”*

Rather than the originally requested “Disciplinary Procedures/rules for violations of Board policies, administrative regulations, rules and procedures,”<sup>7</sup> based on her policy reference, the Requester now seeks “Disciplinary rules for violations of Board policies, administrative regulations, rules and procedures **that provide progressive penalties, including but not limited to, verbal warning, written warning, reprimand, suspension without pay, demotion, dismissal and/or pursuit of civil criminal**

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<sup>5</sup> The District incorporates its response in fn. 4, in regard to evaluations under this section.

<sup>6</sup> The District incorporates its response in fn. 4, in regard to evaluations under this section.

<sup>7</sup> The District effectively responded to this portion of the Request as it interpreted it in its response by providing a link to the Board Policy Manual. See Position Statement, Exh. C.

**sanctions**” for administrative employees. Compare Requester Response Exh. 1 with Requester Response, pp. 3, 7 (emphasis added). The Requester also provides explanations, apparently drawn from various policies, regarding what she was seeking.

The record as now explained by the Requester is different than the Request as written because it encompasses different types of records (i.e.. general disciplinary procedures and rules versus specific rules for administrative employees which provide for progressive penalties). As noted in the District’s Position Statement, p. 7, a requester may not modify, explain or expand a request on appeal, which is what the Requester now seeks to do.

e. *“Internal Investigation Subsequent to Poster Incident; Conduct of Internal Investigation, Item (e), “Title IX Training Program.”*

As a courtesy, the District directs the Requester to the information available on its publicly accessible website for training which occurred at other times, as no Title IX training, as part of an internal investigation, or generally between June 9, 2023 and June 19, 2023 occurred: <https://www.avongrove.org/departments/personnel-director/title-ix-information>.

f. *Internal Investigation Subsequent to Poster Incident; Conduct of Internal Investigation; Item (f) “Date of last Title IX Training for all district employees, vendors, contractors and/or volunteers (as required) servicing the middle school.”*

As set forth in the District’s Response, p. 14, fn. 14, no Title IX training occurred between June 9, 2023 and June 19, 2023 the period identified by the Requester in her Request that is the period subsequent to the “poster incident.” By way of additional response, the District does not provide, nor is it required to provide, Title IX training to



District vendors, contractors, and/or volunteers. See Exhibit “A”. Therefore, no such records exist for such individuals.

*g. Internal Investigation Subsequent to Poster Incident; Conduct of Internal Investigation, Item (g) “Date of acknowledgement of Code of Professional Practice and Conduct for all educators servicing in the middle school.”*

The policy referenced does not require an acknowledgement of the Code of Professional Practice and Conduct.

*h. Internal Investigation Subsequent to Poster Incident; Conduct of Internal Investigation; Item (h) “Curriculum, course of study, lesson plan, textbook, resource materials, co-curricular activity, and/or club charter containing the following topics: -Sexual Attraction -Sexuality of any kind (i.e. heterosexual, transgender, bisexual, pansexual gay, lesbian, bestiality, furry fetish, etc.) – Prostitution or Sex work -Erotic Art of Artists -Current events: Pride Month.”*

As set forth in the Position Statement, pp. 5-6, Section 703 requires that a request “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. Whether a request is sufficiently specific is determined by a three-part balancing test:

1. “The subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121, 1125. (Pa. Commw. Ct. 2015).
2. A discrete group of documents, by type or recipient must be sought. Id.
3. The time frame is a finite period of time. Id. at 1126.

Even assuming, arguendo, that the District was required to consider this portion of the Request outside of the scope of an internal investigation (post-incident or otherwise), it is

insufficiently specific as it fails to identify a subject matter, discrete set of documents or a finite time frame. No time frame is provided in the Request.<sup>8</sup>

The Request does not identify a specific school, grade level, teacher, course, program, publisher, or vendor for which she is seeking<sup>9</sup>, and therefore, appears to be effectively seeking “all” items in each category. The OOR has consistently held a request for “all” or “any and all” records to be insufficiently specific. See Nolan v. Council Rock School District, AP 2010-0419 (2010) (finding a request for “all curriculum materials of all subjects taught” to be overly broad as it encompassed all materials used by the named schools including any and all books and instructional materials).

While the Request does include keywords by stating “containing the following topics: -Sexual Attraction -Sexuality of any kind (i.e. heterosexual, transgender, bisexual, pansexual gay, lesbian, bestiality, furry fetish, etc.) – Prostitution or Sex work -Erotic Art or Artists -Current events: Pride Month,” those keywords still do not allow the District to determine a clearly delineated set of documents. The keywords provided must serve to limit the universe of potentially responsive records and guide the search. See Slaby v. City of Pittsburgh, OOR Dkt. AP 2017-0142 (2017). See also Behar v. Lower Merion

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<sup>8</sup> In the Requester’s Response, she modifies the time frame to “currently utilized by the District.” Requester’s Response, p. 4. A request cannot be modified on appeal; however, this modification does not create a finite time frame given the other deficiencies. Further, on the date of the Request school was no longer in session, and therefore, nothing was “currently” being utilized by the District.

<sup>9</sup> In Requester’s Response she states she is seeking everything without a limiting criteria. Requester’s Response, p. 4. The Requester now states context for this portion of the Request is the Requester’s audit, which is unrelated to the transaction or activity of the District, and the posters in the hallway. Requester’s Response, p. 4. As the posters are not part of any items sought in this portion of the Request, this supports a finding of no responsive records. See Position Statement passim.

School District, AP 2021-1920 (2021) (finding a request for “all materials” related to the use of Black Lives Matter movement and the 1619 Project, as well as all lesson plans involving the discussion of race, to be insufficiently specific); Gardner v. North Penn School District, AP 2019-2622 (2020) (finding a request without a time frame seeking email records related to a “new science curriculum” as insufficiently specific as it not seek a clearly delineated universe of documents and the district would need to make judgment calls as to what records were responsive). These keywords provided by the Requester improperly require the District to make subjective judgments as to the items sought in the Request. See Smith v. Lower Merion School District, AP 2022-1587 (2022) (finding all lesson plans for a one year time period for one teacher to be sufficient specific as no judgments were required to determine if the documents related to the request, but finding a request for materials (including books, handouts, digital media, apps, digital slideshows, decks, videos and power point presentations) used by the instructor to be unclear and overly broad); McCarthy v. Northeastern York School District, AP 2022-0793 (2022) (finding a request for all educational materials, books and activities containing the keywords “white supremacy”, “white supremacist”, “black lives matter”, “defund the police” and “critical race theory” to be insufficiently specific). Without a clearly defined subject matter, a narrow scope, or a finite time frame to limit the vast universe of potentially responsive records, the Request is insufficiently specific to permit the District to determine what records are even potentially responsive to this portion of the Request.

Further, it is expected that many items (if they could even be identified) such as textbooks, resource materials and lesson plans from third parties, by their origin and nature would be subject to copyright and therefore, not available for reproduction. See Ali v. Philadelphia Planning Commission, 125 A.3d 92 (Pa. Cmwlth 2015) (holding the local agency is not required to provide copies of copyrighted materials). Further, such items may also be subject to licensing or contracts which limit the District's ability to make the items available for public inspection, or in which the publisher or owner has asserted the item is in whole or part confidential proprietary information or trade secret. 65 P.S. §67.708(b)(11). These third parties would also require notice and the opportunity to participate.

As a result, this portion of the Request, to the extent it is not already dismissed because no internal investigation occurred, must be found to be insufficiently specific.

*i. Internal Investigation Subsequent to Poster Incident; Conduct of Internal Investigation; Item (i) "Age of each middle school student at the time of poster display."*

As set forth in the Position Statement (p. 15, fn.15), dates of birth of minors are exempt from access under the RTKL. See 65 P.S. §67.708(b)(30). All students attending the Middle School during the 2022-23 school year were minors. See Position Statement, Exh. F. Even if OOR directed the District to reach this portion of the Request, no responsive records exist. See Position Statement, p. 15, fn. 15. The Requester does not dispute this is the case in her Response.

In order to circumvent this exemption under the RTKL, the Requester now seeks to have the District create a record which it does not possess. See Requester's

Response, p. 5. In particular, she requests the District: (1) pull the students' dates of birth from its database; (2) transfer this information to an excel spreadsheet; (3) create an excel formula; (4) create a new data set containing students' ages on a particular date selected by the Requester; (5) remove that data to a new document; and (6) provide her with the newly created record. This new request is wholly outside the scope of the District's obligations under RTKL.

Section 705 states:

When responding to a request for access, **an agency shall not be 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.

65 P.S. §67.705 (emphasis added).

In Pennsylvania Department of Environmental Protection v. Cole, 52 A.3d 541

(Pa. Cmwlth. 2012), the Commonwealth Court found:

It is true that in Scranton Times this Court stated that, under Section 2 of the former Right-to-Know Law, an agency was not required to create a new document because this would make public employees, in effect, the "agents" of those seeking information and take them away from the jobs that they were hired to perform. That is as true under the current version of the Right-to-Know Law as under the former version. However, it is not relevant to the question here, which is whether the Department can be ordered to produce a "record" it holds in an electronic database in a format it uses. Following the persuasive analysis in *Gingrich*, we hold that pulling information from a database is not the creation of a record

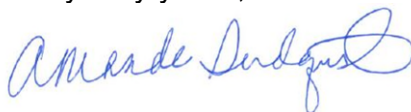
Id. at 548–49 (internal citations omitted). The Court found that drawing existing information from an existing database in the format the agency utilizes does not constitute the creation of a record. However, that is not what the Requester is requesting from the District. As noted above, the District only maintains the dates of birth of the students

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which are exempt from access. Here, the Requester seeks for the District to create an entirely new record containing information that does not currently exist or is maintained by the District, which is not required under the RTKL. See *Feldman v. Pennsylvania Comm'n on Crime & Delinquency*, 208 A.3d 167, 174 (Pa. Cmwlth. 2019) (“Thus, under the RTKL and our case law, agencies must only produce database information in the format that is available to the agency and they are not required to produce the database information in a format specifically requested or in a format that does not exist.”).

Please let me know if you require any additional information in this Appeal. The District reserves the right to respond to any additional information submitted by, or new grounds for appeal raised by, the Requester in this matter. Thank you again for your consideration.

Very truly yours,



Amanda J. Sundquist

Enclosures - Exhibit “A”.

cc: Daniel Carsley, Avon Grove School District Business Manager and Right-to-Know Officer  
Carmela Z. Ciliberti, Esquire

# **EXHIBIT “A”**





heterosexual, transgender, bisexual, pansexual gay, lesbian, bestiality, furry fetish, etc.)  
– Prostitution or Sex work -Erotic Art of Artists -Current events: Pride Month”.

6. When originally considering the Request, given the explanation by the Requester that she was seeking items as part of the conduct of an internal investigation subsequent to the “poster incident”, because no internal investigation occurred, it was determined there were no responsive records.

7. Assuming *arguendo*, the District was required to consider this portion of the Request outside of the scope of an internal investigation conducted subsequently to the “poster incident” as set forth on the face of the Request, this portion of the Request is not sufficiently specific.

8. Across four (4) schools and thirteen (13) grades, the District has:

- a. 275 courses of study;
- b. 130 textbooks/primary curriculum materials; and
- c. Thousands of resource materials.

9. During the 2022-23 school year, the District had 360 teachers, with 177 teachers at the elementary level, 61 teachers at the middle school level, and 122 at the high school level.

10. Each teacher at the elementary level will have on average three (3) lesson plans per day, and at the secondary level on average two (2) lesson plans per day.

11. There are typically 180 student days in a school year.

12. The requested items were not narrowed by a specific school, grade level, teacher, course, program, publisher, vendor, or any other form of limiting factor that would allow for the identification of a discrete set of records.

13. The requested items were not narrowed by a time limitation.

14. Further, the topic areas or “key words” provided by the Requester are subjective in nature and extremely broad in scope and therefore, did not assist with the identification of a discrete set of records.

15. Whether an item contains “sexual attraction” or “sexuality of any kind” is a subjective determination which may yield different results depending on the individual reviewing the item.

16. An example of one of the many subjective determination a reviewer would have to make would be whether a history textbook that mentioned that a male historical figure was married to a female would be considered responsive as addressing heterosexuality.

17. Whether artwork or an artist is “erotic”, that is has the quality or character of being able to arouse sexual feelings, is an entirely subjective determination which may yield different results depending on the individual reviewing the item.

18. What constitutes prostitution or sex work, is not only a legal determination which outside of the ability of District reviewers, it is also a subjective philosophical determination which may yield different results depending on the individual reviewing the item.

19. It is unclear how curriculum differs from the other listed items such as course of study, lesson plan, textbook, and resource materials.

20. It is unclear what is sought in regard to “cocurricular activity” as no class of record is identified with the activity.

21. The District does not routinely collect lesson plans or maintain a database of lesson plans.

22. Even if I was able to identify a subset of teachers from whom to request records which may be responsive to the Request, I would not be able to explain to them how to determine if a particular lesson plan, course, textbook or resource material would be responsive to the "keywords" sought by the Requester.

23. Furthermore, as the District does not require teachers to maintain lesson plans once the lesson is completed, some lessons plans may not exist or may be in the possession of teachers who are no longer employees of the District.

24. Even if I was able to identify a set of records responsive to this portion of the Request, all textbooks, the majority of resource materials, and lesson plans from third parties would be subject to copyright.

25. Depending on how course of study or curriculum is interpreted, any responsive records may also be subject to copyright.

26. Moreover, some items utilized by the District are subject to contracts wherein the vendor or publisher has limited how the District may use or release the items, or has asserted the items are confidential and proprietary or trade secrets.

27. As I have been unable to identify responsive records, these vendors or publishers are unable to receive the required notifications under the Right-to-Know Law.

28. Because of these factors, I am unable to identify or adequately search for potentially responsive records for this portion of the Request.

Date: 9/24/2023

By:   
Daniel Carsley