



Paul J. Giuffre, Esquire

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August 19, 2019

Kelly Isenberg, Esq.
Pennsylvania Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Via email (kisenberg@pa.gov) and U.S. Regular Mail

***IN RE: NIEDERBERGER v. FOX CHAPEL AREA SCHOOL DISTRICT
DOCKET NO. AP 2019-1263***

Dear Ms. Isenberg:

As solicitor to the Fox Chapel Area School District, I am responding on the district's behalf to the appeal filed before the Office of Open Records in the above matter.

I. PROCEDURAL HISTORY

On June 19, 2009, Mary Niederberger, (Requester) submitted a Right- to-Know request to the Fox Chapel Area School District which stated:

I would like: the official log and/or list or description of the documents sent for shredding for the Fox Chapel Area School District administrative center on Tuesday June 18. Please see attached photo of shredding bins that were loaded onto a Weleski Transfer truck.

On June 20, 2019, David P. McCommons, Ed.D., Deputy Superintendent and Open Records Officer for the Fox Chapel Area School District, responded invoking a 30 day extension. (*Exhibit 1*). On July 26, 2019 the school district issued its final response denying the request on the basis that "No public record exists." (*Exhibit 2*). On July 31, 2019 the district received official notice of this appeal from the Office of Open Records.

II. ARGUMENT

Pennsylvania's Right-to-Know Law (RTKL) provides that a local agency, such as a public school district, shall upon request make accessible any public record which exists and is in its possession. 65 P.S. 67.701(a). The RTKL also requires that a public record not in the agency's possession but in the possession of party with whom the agency contracted to perform a

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governmental function shall be considered a public record for purposes of the act. 65 P.S. 67.707(d.) Pursuant to the act, an agency is not required to create a record which does not currently exist. 65 P.S. 67.705.

With this response the district has provided an Affidavit of Nonexistence of Record by Dr. McCommons, attesting that he caused a search to be conducted of the Fox Chapel Area School District files and that no log or list providing a description of the documents sent for shredding on June 18, 2019 exists. (*Exhibit 3*).

An agency is only required to search for the records requested. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011) The affidavit submitted by the district conclusively establishes that the log or list requested does not exist. See *Moore v. Office of Open Records*, 992 A.2d 907 (Pa. Commw. Ct. 2010); *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). For this reason alone, requester's appeal should be dismissed or denied.

Additionally, the Office of Open Records lacks jurisdiction to make a determination that a record *should* exist. "While ... evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record] - the OOR may only determine whether a responsive record does, in fact, exist." *Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731

As stated above, through the affidavit of its Open Records Officer the district has met its burden of proof of the nonexistence of the record requested.

III. CONCLUSION

For these reasons, the Fox Chapel Area School District requests that the appeal filed by Mary Niederberger be denied or dismissed.

Respectfully submitted,


Paul J. Giuffre

cc: Ms. Mary Niederberger

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**FOX CHAPEL AREA
SCHOOL DISTRICT**

"Excellence is not an act, but a habit." - Aristotle

June 20, 2019

Ms. Mary Niederberger
1936 Fifth Avenue
Pittsburgh, PA 15219

Dear Ms. Niederberger,

As the Right-To-Know Officer for Fox Chapel Area School District, I give you notice that your request received June 19, 2019, is being reviewed.

I have determined that an extension of time for a response is required under Section 902(a) for one or more of the following reasons:

1. A timely response to the request for access cannot be accomplished due to bona fide staffing limitations; and
2. A legal review is necessary to determine whether certain records are records subject to access under the RTK law.

See RTK Law Section 902(a), Subparagraphs 3, and 4.

A reasonable date when you can expect the pending electronic copies is July 26, 2019, which is 30 days following the 5 business days allowed for the notice under Section 902 of the RTK law.

Sincerely,

David P. McCommons, Ed.D.
Deputy Superintendent, Right-To-Know Officer

DPM:db

Gene Freeman Ed.D.
Superintendent
e-mail: gene_freeman@fcsd.edu

David P. McCommons, Ed.D.
Deputy Superintendent
e-mail: david_mccommons@fcsd.edu

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611 Field Club Road
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EXHIBIT 1



**FOX CHAPEL AREA
SCHOOL DISTRICT**

"Excellence is not an act, but a habit." Aristotle

Gene Freeman Ed.D.
Superintendent
e-mail: gene_freeman@fcsd.edu

David P. McCommons, Ed.D.
Deputy Superintendent
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Kimberly M. Pawlshak
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611 Field Club Road
Pittsburgh, PA 15238
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Web: www.fcsd.edu

July 26, 2019

Ms. Mary Niederberger
1936 Fifth Avenue
Pittsburgh, PA 15219

Dear Ms. Niederberger,

As the Right-To-Know Officer for Fox Chapel Area School District, I give you notice that your request received June 19, 2019, is denied.

No public record exists.

You have a right to appeal any denial of information in writing to Erik Arneson, Executive Director, Office of Open Records, 333 Market Street Street, 16th Floor, Harrisburg, PA 17101.

If you choose to file an appeal you must do so within 15 business days of the mailing date of the agency's response, as outlined in Section 1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address the reasons the Agency denies your request.

If you have further questions, please call me at (412) 967-2456. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Please feel free to contact me if you have any questions.

Sincerely,

David P. McCommons, Ed.D.
Deputy Superintendent, Right-To-Know Officer

DPM:db

We are an Equal Rights and Opportunity School District

EXHIBIT 2

PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:)

MARY NIEDERBERGER)
Requester)

v.)

FOX CHAPEL AREA SCHOOL)
DISTRICT)
Respondent)

DOCKET NO.: AP 2019-1263

AFFIDAVIT OF NONEXISTENCE OF RECORD

COMMONWEALTH OF)
PENNSYLVANIA)
COUNTY OF ALLEGHENY)

SS:

BEFORE ME, the undersigned authority, personally appeared DAVID P. McCOMMONS, who being duly sworn according to law, deposes and says that:

1. I am the Deputy Superintendent and the Open Records Officer (ORO) of Fox Chapel Area School District.
2. I attest that I have caused a good faith and thorough search of the Fox Chapel Area School District's files to be conducted and that, based thereon, no log and/or list providing a description of the documents sent for shredding from the Fox Chapel Area School District administrative offices on Tuesday, June 18, 2019 was found to exist.
3. I have reviewed the Letter Response prepared by the school district's solicitor and to the best of my knowledge, information and belief, any statement of fact contained therein is true and correct.

SWORN TO and subscribed
before me, this 19th day
of August, 2019.

Kathleen Anuszek
NOTARY PUBLIC

David P. McCommons
David P. McCommons, Ed. D.
Open Records Officer

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Kathleen Anuszek, Notary Public
O'Hara Twp., Allegheny County
My Commission Expires July 29, 2021
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

EXHIBIT 3