

[3.]Number of students who obtain a bachelor[']s degree within 5 years of graduation

On July 25, 2016, the District invoked a thirty day extension to respond to the Request. *See* 65 P.S. § 67.902. On August 25, 2016, the District denied the Request claiming that records responsive to Item 1 of the Request are not subject to public access under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g. The District also claimed that it does not possess records responsive to Items 2 and 3 of the Request.

On September 9, 2016, 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 District to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 21, 2016, the District filed a position statement reiterating the claims made in its response. In support of its position, the District submitted the affidavit of Dr. James Cekada, the District Superintendent.

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. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 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” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to 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 requisite information and evidence before it to properly adjudicate the matter.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. 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 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 nonexistence.” *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)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. Item 1 of the Request seeks information subject to FERPA

The District claims that student transcripts are responsive to Item 1 of the Request, but are subject to withholding under FERPA. FERPA protects “personally identifiable information” contained in “education records” from disclosure and financially penalizes school districts “which [have] a policy or practice of permitting the release of education records . . . of students without the written consent of their parents.” 20 U.S.C. § 1232g(b)(1). Regulations implementing FERPA define “education records” as those records that are “[d]irectly related to a student” and “[m]aintained by an educational agency or institution or by a party acting for the agency or institution.” 34 C.F.R. 99.3. Courts interpreting the term “education records” have determined that Congress intended to protect records related to “a student’s educational life that relate to academic matters or status as a student.” *See C.N. v. Whitehall-Coplay School Dist.*, OOR Dkt. AP 2015-2466, 2016 PA O.O.R.D. LEXIS 62 (quoting *Kirwan v. The Diamondback*, 721 A.2d 196 (Md. Ct. App. 1998)).

In *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, the United States Supreme Court held that individual student papers are not “education records” under FERPA because they were not maintained in a central file by the official records custodian. 534 U.S. 426 (2002). Other courts have looked at the records themselves and have concluded that only those records relating to a student’s academic performance are “education records” for purposes of FERPA. *Bd. of Educ. of the Toledo City Sch. Dist. v. Horen*, 2011 U.S. App. LEXIS 26644 (6th Cir. 2011) (tally sheets denoting student’s daily activities for purposes of compiling the student’s official progress

reports are not “educational records” because the records were not part of the student’s permanent file.); *Pollack v. Regional Sch. Unit 75*, 2015 U.S. Dist. LEXIS 55992 (D. Me. 2015) (holding that “educational records” are those records which follow a student from “grade to grade”); *S.A. v. Tulare County Office of Educ.*, 2009 U.S. Dist. LEXIS 93170 (E.D. Ca. 2009) (e-mails mentioning a student’s name are not “education records” because they are not part of the student’s permanent file); *Wallace v. Cranbrook Educ. Cmty.*, 2006 U.S. Dist. LEXIS 71251 (E.D. Mich. 2006) (student statements provided in relation to an investigation into school employee misconduct do not directly relate to a student, and, therefore, are not “education records”); *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019 (N.D. Oh. 2004). Perhaps the most succinct definition of “education records” was enunciated by the United States District Court for the Western District of Missouri:

It is reasonable to assume that criminal investigation and incident reports are not educational records because, although they may contain names and other personally identifiable information, such records relate in no way whatsoever to the type of records which FERPA expressly protects; i.e., records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files.

Bauer v. Kincaid, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (emphasis added). Thus, based on the foregoing, the courts have made clear that only those records relating to student academics are “education records” protected by FERPA. The mere fact that a record involves a student does not automatically render a record an “education record.”

Here, the District explains that Item 1 of the Request seeks “records regarding college transfer credits earned by students of the District, ... information that is part of student transcripts maintained by the District.” As such, it is clear that the withheld records are education records, as they pertain to students, relate to academic services and are also maintained by the District as part of a student’s transcript. While the District reasonably interpreted Item 1

of the Request as seeking information contained in student transcripts, nothing precludes the Requester from refining her request to seek aggregated data about college transfer credits.

2. The District does not possess records responsive to Items 2 and 3 of the Request

The District claims that it does not possess records responsive to Items 2 and 3 of the Request. In support of its assertion, the District submits the affidavit of Dr. Cekada, who attests that he searched the District's file for records responsive to Items 2 and 3 of the Request and determined that no responsive records exist. Dr. Cedaka explains that "[t]he District does not maintain records of the statistical data requested, specifically of the number of students enrolled in college within two years of graduation or the number of students who obtain a Bachelor's degree within five years of graduation." Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-521 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Department acted in bad faith, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence provided, the District has met its burden of proof that it does not possess records responsive to Items 2 and 3 of the Request.

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied** and the District is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Cambria 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 as per Section 1303 of

the RTKL. 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 10, 2016

/s/ Benjamin Lora

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Johanna Boratko (via e-mail only);
Jarad Handelman, Esq. (via e-mail only);
Michael Vuckovich (via e-mail only)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).