



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
KODY LEIBOWITZ AND	:	
WJAC 6 NEWS,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-1612
	:	
WESTMONT HILLTOP SCHOOL	:	
DISTRICT,	:	
Respondent	:	

INTRODUCTION

Kody Liebowitz and *WJAC 6 News* (“Requester”) submitted a request (“Request”) to Westmont Hilltop School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other records, video recordings from two school buses. The District partially denied the Request, arguing that the videos are prohibited from being disclosed under the Family Educational Rights and Privacy Act (“FERPA”). The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On September 8, 2016, the Request was filed, seeking, among other records,¹ “[v]ideo from buses 101 and 105 in AM and PM between September 6-8, 2016.” On September 20, 2016, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the District partially denied the Request, arguing that the release of the videos is prohibited under FERPA, 20 U.S.C. § 1232g.

On September 22, 2016, the Requester appealed to the OOR, challenging the denial of the videos 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 28, 2016, the District made a submission indicating that, after a search was conducted, the requested videos do not exist. On October 4, 2016, the District submitted the attestation, made under the penalty of perjury, of Steven McGee, the District’s Interim Superintendent, who attests that the requested videos do not exist.

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).

¹ These other records are not at issue in this appeal.

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 is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing; however, 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. 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 *Pa. 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).

On appeal, the District argues that the requested video recordings do not exist because the identified buses do not have video cameras installed. Interim Superintendent McGee attests, in relevant part, that:

2. Bus 101 and Bus 105 are new buses added to the fleet of the ... District’s bus contractor for the first time at the start of the current 2016-2017 school year, which commenced in late August of 2016.
3. ... [T]here are currently no security cameras on Bus 101 and Bus 105, and there have not at any point, been any cameras present on Bus 101 and Bus 105, because these buses were newly added to the fleet and cameras have not yet been installed.
4. As a result, ... there is no video footage which exists for Bus 101 and Bus 105.

Under the RTKL, an affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (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 District acted in bad faith or that the records exist, “the averments in [the attestation] 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 proving that the requested video records do not exist in the District’s possession, custody, or control.

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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 23, 2016

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Kody Leibowitz (via e-mail only);
Steven McGee (via e-mail only)

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).