

Case# 2022-15276-0 Docketed at Montgomery County Prothonotary on 08/05/2022 12:44 PM. Fee = \$289.50. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

UPPER PERKIOMEN SCHOOL DISTRICT

vs.

JOHN MCFADDEN

NO. 2022-15276

**CIVIL COVER SHEET**

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: KYLE J SOMERS, Esq., ID: 307683

Self-Represented (Pro Se) Litigant

Class Action Suit  Yes  No

MDJ Appeal  Yes  No

Money Damages Requested

Commencement of Action:  
Petition

Amount in Controversy:  
\_\_\_\_\_

**Case Type and Code**

Civil Appeals: \_\_\_\_\_

Other \_\_\_\_\_

**Other:** OFFICE OF OPEN RECORDS

**RECEIVED**

AUG 15 2022

OFFICE OF OPEN RECORDS

**KYLE J. SOMERS, ESQUIRE**  
Attorney I.D. No. 307683  
**BETHANY O. BYRNE, ESQUIRE**  
Attorney I.D. No. 205526  
**WISLER PEARLSTINE, LLP**  
460 Norristown Road, Suite 110  
Blue Bell, Pennsylvania 19422  
(610) 825-8400  
[ksomers@wispearl.com](mailto:ksomers@wispearl.com)  
[bbyrne@wispearl.com](mailto:bbyrne@wispearl.com)

Attorneys for Petitioner

**UPPER PERKIOMEN SCHOOL DISTRICT** : **IN THE COURT OF COMMON PLEAS OF**  
: **MONTGOMERY COUNTY, PENNSYLVANIA**  
**Petitioner** :  
: **NO. 2022-**  
**v.** :  
**JOHN MCFADDEN** :  
**Respondent** : **Petition for Review of Administrative Agency**  
: **Determination**

**PETITION FOR REVIEW**

1. The Court has jurisdiction over this Petition for Review pursuant to 65 P.S. §67.1302. This Petition for Review is addressed to the Court's appellate jurisdiction.

2. Petitioner, Upper Perkiomen School District, is a Pennsylvania public school district organized under the laws of the Commonwealth of Pennsylvania with its office located at 2229 East Buck Road, Pennsburg, Pennsylvania 18073 (the "District").

3. Respondent John McFadden ("Respondent") is an adult resident of the District who resides at 324 Main Street, Pennsburg, Pennsylvania 18073.

4. On March 17, 2022, Respondent submitted four<sup>1</sup> separate requests (the "Request") to the District for records under the Right-to-Know Law ("RTKL").

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<sup>1</sup> Respondent submitted a total of five requests on March 17, 2022. The first request was for emails between certain parties, which was granted by the District. Responsive records were provided to Respondent, and he did not contest the District's response in his appeal to the Office of Open Records, therefore it was not addressed in the Final Determination and we do not address it here.

5. The Requests were each related to video footage taken inside the cafeteria in a District middle school building on certain days and times when students were present.

6. In accordance with the RTKL, the District, through its Open Records Officer, invoked a 30-day extension and ultimately responded to the Request on April 26, 2022.

7. The District's response addressed each of the four requests and invoked certain exceptions under the RTKL as a basis for denying access to records.

8. On April 27, 2022, Respondent appealed the District's response to the Pennsylvania Office of Open Records ("OOR").

9. Following submissions by both Parties, on July 6, 2022, the OOR issued a Final Determination at Docket No. 2022-1009 (the "Final Determination"). A true and correct copy of the Final Determination is attached hereto as Exhibit "A".

10. The Final Determination granted the appeal in part and denied the appeal in part.

11. The District seeks review and reversal of certain elements of the Final Determination.

12. Specifically, the District seeks reversal of the Final Determination to the extent that it granted Respondent's appeal of the District's denial of each of the four requests on the grounds that releasing the requested records would endanger the physical security of a building under the RTKL. 65 P.S. §67.708(b)(3).

13. The Office of Open Records erred in determining that the requested video footage, taken from inside a school cafeteria at a time when students were present, is not exempt from access pursuant to Section 708(b)(3) of the RTKL.

14. The Office of Open Records erred in reaching the conclusion that the District's evidence did not rise above the level of mere speculation to establish that Section 708(b)(3) of the

RTKL applies to the requested records. For example, during the notorious Columbine High School massacre in 1999, the perpetrators placed concealed propane bombs within the school cafeteria that were designed to detonate during a particular lunch period.

15. The requested videos contain information that poses a risk to the security of the Middle School building, including number and location of security cameras, camera blind spots, number of students in the cafeteria at different times, number of staff in the cafeteria at different times, and locations of exits. Because the requests are for videos from the same time period over four different days, this would allow a bad actor to establish a routine at the Middle School for that time of day.

16. The District also seeks reversal of the Final Determination to the extent that it provided for redaction under the constitutional right to privacy, as opposed to finding that the requested records were entirely exempt under the constitutional right to privacy.

17. Although the Office of Open Records was correct in finding that the students in the videos have a constitutional right to privacy and correctly denied Respondent's appeal in part on the grounds that student faces could be redacted, this finding does not go far enough to account for all of the security and privacy concerns at stake.

18. Providing the requested records with redaction of student faces is not sufficient to protect the security of the building or the students. Each of Respondent's four requests were for times when a specific named minor student was present in the cafeteria. Therefore, this named student must be present in the videos in order for them to be responsive. As a result, it is necessarily the case that providing any records whatsoever in response to the four requests would disclose personal information about a minor child, including but not limited to the specific dates and times when she was present in the Middle School cafeteria eating lunch.

19. Further, disclosure of video footage from a school cafeteria during times when students are eating lunch would reveal a wide variety of personal information including, but not limited to, who students interact with during lunch, whether they purchase lunch or bring their own meal from home, the extent to which students are disciplined by school staff who supervise the lunch periods, students' choice of clothing, how often they get up to use the restroom, what specific lunch period they eat during, etc.

**WHEREFORE**, Petitioner Upper Perkiomen School District requests that a hearing on this matter be held with the subsequent entry of an order reversing the Final Determination dated July 6, 2022 to the extent that the Final Determination held that the requested records are not fully exempt from disclosure and directing that the District is not required to take further action with respect to those Requests.

Respectfully submitted,

**WISLER PEARLSTINE, LLP**



By: \_\_\_\_\_

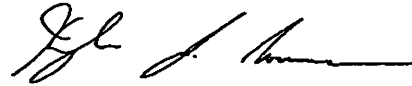
Kyle J. Somers, Esquire  
460 Norristown Road, Suite 110  
Blue Bell, Pennsylvania 19422  
*Attorneys for Petitioner*

VERIFICATION

I, Kyle J. Somers, Solicitor for the Upper Perkiomen School District, hereby state that the facts set forth in the foregoing Petition for Review are true and correct to the best of my knowledge, information and belief.

I understand that this Verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

Dated: August 5, 2022



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Kyle J. Somers

**UPPER PERKIOMEN SCHOOL  
DISTRICT**

**Petitioner**

**v.**

**JOHN MCFADDEN**

**Respondent**

**: IN THE COURT OF COMMON PLEAS OF  
: MONTGOMERY COUNTY, PENNSYLVANIA**

**:**

**: NO. 2022-**

**:**

**: Petition for Review of Administrative Agency  
: Determination**

**:**

**:**

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**:**

**ORDER**

**AND NOW**, this                    day of                    , 202  , upon consideration of the Petition for Review of Upper Perkiomen School District, and following hearing, briefing, and argument, it is hereby **ORDERED** and **DECREED** that the Final Determination of the Office of Open Records dated July 6, 2022 is **REVERSED** and the Upper Perkiomen School District's initial denial of those requested records is hereby **AFFIRMED**.

**BY THE COURT:**

\_\_\_\_\_

**KYLE J. SOMERS, ESQUIRE**  
Attorney I.D. No. 307683  
**WISLER PEARLSTINE, LLP**  
460 Norristown Road, Suite 110  
Blue Bell, Pennsylvania 19422  
(610) 825-8400  
ksomers@wispearl.com

Attorneys for Petitioner

**UPPER PERKIOMEN SCHOOL  
DISTRICT**

**Petitioner**

v.

**JOHN MCFADDEN**

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: **IN THE COURT OF COMMON PLEAS OF**  
: **MONTGOMERY COUNTY, PENNSYLVANIA**  
:  
: **NO. 2022-**  
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:  
:  
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:

**CERTIFICATE OF SERVICE**

I, Kyle J. Somers, Esquire, hereby certify that a true and correct copy of the Petition for Review was served via the Court's electronic filing system, and U.S. First Class Mail, on this date to the following:

John McFadden  
324 Main Street  
Pennsburg, Pennsylvania 18073

Appeals Officer Kathleen Higgins  
Commonwealth Office of Open Records  
Keystone Building  
400 North Street, 4th Floor  
Harrisburg, PA 17120-0225

**WISLER PEARLSTINE, LLP**



Date: August 5, 2022

By: \_\_\_\_\_  
Kyle J. Somers, Esquire  
460 Norristown Road, Suite 110  
Blue Bell, Pennsylvania 19422



# EXHIBIT A



## **pennsylvania** OFFICE OF OPEN RECORDS FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:	
	:	
<b>JOHN MCFADDEN,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No: AP 2022-1009</b>
	:	
<b>UPPER PERKIOMEN SCHOOL</b>	:	
<b>DISTRICT,</b>	:	
<b>Respondent</b>	:	

### **FACTUAL BACKGROUND**

On March 17, 2022, John McFadden (“Requester”) submitted four separate requests (“Requests”) to the Upper Perkiomen School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “cafeteria video footage with [identified student name omitted] from 12:30 [p.m.] - 1:00 p.m.” from February 3, 2022, February 10, 2022, February 22, 2022, and March 10, 2022. On April 26, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the District denied the Requests, arguing that the records are confidential under the constitutional right to privacy, as well records that would be reasonably likely to jeopardize student safety and security by disclosing surveillance footage of school operations at a time when students are present within the school building. *See* 65 P.S. § 67.708(b)(3).

On April 27, 2022, the Requester appealed to the OOR. 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. 65 P.S. § 67.1101(c). On May 18, 2022, the District submitted a position statement, reiterating its reasons for denial. The District also submitted the affidavit of Dennis Kenwood (“Kenwood Affidavit”), School Safety and Security Coordinator for the District. The Requester did not submit any additional argument during the course of the appeal.

### LEGAL ANALYSIS

**1. The District has not proven that the video footage is exempt from disclosure under Section 708(b)(3) of the RTKL**

The District argues that the requested video footage is exempt from public access pursuant to 65 P.S. § 67.708(b)(3). Section 708(b)(3) of the RTKL exempts from disclosure “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information storage system...” 65 P.S. § 67.708(b)(3). In order for this exemption to apply, “the disclosure of” the records - rather than the records themselves - must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3); *see also Pa. State Police v. ACLU of Pa.*, 189 A.3d 37 (Pa. Commw. Ct. 2018) (holding that when an affidavit is legally sufficient to prove that the disclosure of a record at issue would likely cause the alleged harm under Section 708(b)(3) of the RTKL, *in camera* review of the records is unnecessary). The Commonwealth Court has held that “[a]n agency must offer more than speculation or conjecture to establish the security-related exemptions....” *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018) (internal citations omitted); *see also Mission Pa., LLC v. McKelvey*, 212 A.3d 119 (Pa. Commw. Ct. 2019).

In support of the District’s position, Mr. Kenwood affirms that the surveillance camera system in the cafeteria shows access points and door locations, and having access to the video would allow an individual to determine the number and types of District staff present in the cafeteria at a particular time of day. *See* Kenwood Affidavit, ¶¶ 4, 7, 8. Mr. Kenwood also affirms that having access to the video would also reveal the number and locations of cameras and coverage angles so that blind spots can be identified. *Id.* at ¶ 10. Further, Mr. Kenwood affirms that releasing the requested video footage in response to the Requests, would allow the video to be shared on the internet and with the general public, and is more than mere speculation as the 1999 Columbine High School massacre was perpetrated by concealing bombs within a school cafeteria. *Id.* at ¶¶ 13, 16.

The District relies on *Hartnett v. Keystone Oaks Sch. Dist.*, OOR Dkt. AP 2017-1941, 2017 PA O.O.R.D. LEXIS 1860, where the OOR held that requested video footage of an elementary school facility was exempt pursuant to Section 708(b)(3). In *Hartnett*, the agency established that disclosure of video from “cameras on the top floor of an elementary school” would be reasonably likely to endanger the safety and security of the elementary school. However, as also set forth in *Hartnett*, “[w]hen the OOR analyzes whether or not video footage from an agency’s surveillance camera is available under the RTKL, the analysis is necessarily based on the unique circumstances of each case.” Here, unlike in *Hartnett*, the video sought is from one specific area, a middle school cafeteria, and seeks video from a specific time of a specific student, rather than from the top floor of an elementary school where a district proved that the camera footage showed both the interior and exterior of the building, and that disclosure of the video “would create a video blueprint of the elementary school.”

Given that the Requests in the instant matter are limited to a specific area during a specific time period, in an area that, although closed to the public at the time, is generally considered a common area of the school, the District has not established that disclosure of the requested video footage would be reasonably likely to endanger the safety or physical security of a building. *See* 65 P.S. § 67.708(a)(1).

**2. The District may redact student images**

The District argues that the requested video footage is protected by the constitutional right to privacy. The OOR shares the same concerns set forth by the Pennsylvania Supreme Court in *Easton Area Sch. Dist. v. Miller*:

The overlooked yet implausible ramification of the Commonwealth Court's decision below is its potential to subject any school surveillance to disclosure, without parental consent, to any resident of the Commonwealth who makes a request pursuant to the RTKL. In the case of a school bus surveillance video, such a disclosure could reveal the identity of minor students; their clothing, behaviors, or disabilities; the specific bus they take; and the geographical location where they exit the bus.

232 A.3d 716, 731 (Pa. 2020).

Addressing that concern, the Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the responding agency and the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

In *Miller*, the Court found that the images of students should be redacted from a school bus video, either under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232, or the constitutional right to informational privacy.<sup>1</sup> 232 A.3d at 731. In *Miller*, the Court explained that each student had a potential privacy interest in their identification in a school video, but that the right to privacy may be satisfied by the redaction of the faces of “reasonably identifiable” students. *Id.* at 732.

In the instant matter, the District argues that the responsive video footage cannot be provided, even in redacted form, because information about the minor identified in the Requests would be revealed, including specific dates and times that the minor was present in the cafeteria. In support of its argument, the District cites to *Gardner v. North Penn Sch. Dist.*, arguing that the requested video cannot be provided in redacted form because the identity of the minor child that is the subject of the Requests would be revealed, regardless of redactions. OOR Dkt. AP 2019-2622, 2020 PA LEXIS 1617. Additionally, the District argues that the video footage would reveal information, including which students were in which specific lunch period, who students interact with at lunch, whether students purchase lunch or bring their own meal from home, what clothes students wear, and the extent to which students are disciplined by school staff. In support of the District’s position, Mr. Kenwood affirms that the cafeteria is closed to the general public during the school day and that release of the requested video footage would serve as confirmation as to the presence of a particular student, including the student identified in the Requests, in a specific location during certain identified times of the day.<sup>2</sup> See Kenwood Affidavit, ¶¶ 5, 16-17.

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<sup>1</sup> In the instant matter, the District has not raised FERPA as a reason to withhold access to the requested video.

<sup>2</sup> Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support 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).

The Requester on the other hand, asserts only that he seeks video regarding his daughter. However, a request under the RTKL must be construed without regard to the identity of the requester. See *Slaby v. Northumberland County*, OOR Dkt. AP 2011-0331, 2011 PA O.O.R.D. LEXIS 257. Therefore, the Requests will be reviewed as if made by an unrelated member of the community.

Unlike *Miller*, the video footage sought in the instant matter is from inside the school, in a middle school cafeteria and depicts a specifically named minor child on specific dates and times. Therefore, any responsive video would necessarily include the identified minor. However, the privacy concerns raised by the District mirror those in *Miller*. While the student in *Miller* was not specifically named, the footage in that case related to a specific well publicized event and involved the same concerns of potentially easily identifying minors and details about them. In this appeal, we employ the same analysis and application set forth in *Miller*.

For reasons set forth above, the requested video footage here is a public record subject to disclosure. If a third party's personal information is contained in a public record, the agency should conduct a balancing test to determine whether the parties right to privacy outweighs the public interest. Here, the Requester has not articulated any public benefit in the release of the identities of the students depicted in the video footage from inside the middle school cafeteria, and as a result, the privacy interests of middle school students outweigh any public interest in the video. As a result, the District has an obligation to redact the video in a way that protects the informational privacy rights of the minors depicted in the video. Therefore, like in *Miller*, the District can effectuate access to at least some of the requested footage without violating students' informational

privacy rights by redacting their images in the video.<sup>3</sup> However, if the named minor is alone in any video footage, the District is not required to release that portion of the video footage.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part and denied in part**, and the District is required to provide the redacted video footage within thirty days. 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 Montgomery 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. 65 P.S. § 67.1303. 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.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 6, 2022**

*/s/ Kathleen A. Higgins*

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KATHLEEN A. HIGGINS  
DEPUTY CHIEF COUNSEL

Sent to: John McFadden (via email only);  
Dian Hipszer (via email only);  
Kyle J. Somers, Esq. (via email only)

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<sup>3</sup> A proper framework involves redacting identifiable information that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty. Given that the video will be provided in redacted form, the OOR encourages the District, before utilizing its time and resources, to reach out to the Requester to confirm that he still wishes to receive the requested video footage.

<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).