pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
CARMELA CILIBERTI,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2023-1904**
	:	
AVON GROVE SCHOOL DISTRICT,	:	
Respondent	:	

FACTUAL BACKGROUND

On June 19, 2023, Carmela Ciliberti, Esq. ("Requester") filed an extensive request ("Request") with the Avon Grove School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking "any documents or electronically stored information, to include but not limited to writings, video, and images related to" the unauthorized display of student-created posters containing sexual content in the District's Middle School, the subsequent removal of the posters, employee involvement and the District's response. The Request consisted of a four-page chart, summarized as follows:

1. Poster Incident: General Information
    a. Poster Creation
    b. Poster Content
    c. Poster Display

2. Poster Incident: Disciplinary Actions – Displaying Unauthorized Materials (if display was not approved)

a. Educator/ Employee Records
b. Educator / Employee Disciplinary Actions
c. Student Disciplinary Actions

3. Poster Incident: Disciplinary Actions – Imposing Political Beliefs on Anyone in the School System
    a. Educator/ Employee Records

4. Internal Investigation Subsequent to Poster Incident
    a. Conduct of Internal Investigation
    b. Obscene Materials and Sexual Abuse
    c. Sexual Harassment, Hazing, or Bullying Affecting Students
    d. Discrimination and Harassment Affecting Staff.

The Request lists various sections of the District's Policy Manual in a column on the left, entitled "Topic/Reference;" the column on the right, entitled "Description," identifies particular aspects of the "poster incident," for which records were requested.

On July 26, 2023, after invoking a thirty-day extension to respond, 65 P.S. § 67.902(b), the District denied the Request in part, providing an outline listing its response to each Item. The District denied the majority of the Request, arguing that many records do not exist. The District argued that the Items seeking professional study: course approval/tuition reimbursement and District Information Technology history/content accessed during the poster creation are insufficiently specific to enable the District to respond, 65 P.S. § 67.703. The District argued that evaluations of employees are exempt personnel records, 65 P.S. § 67.708(b)(7)(ii). The District denied the Item of the Request seeking video surveillance, arguing that the disclosure of responsive records would be reasonably likely to threaten building security, 65 P.S. § 67.708(b)(3). Finally, the District provided a heavily redacted email in response to the Item of the Request seeking notification of the incident to Board members, arguing that the redacted content is protected by the attorney-client privilege.

The District also granted some Items of the Request, providing a link to its Boarddocs website, where the policies listed in the Topic/Reference column of the Request could be located. *See* 65 P.S. § 67.704. Additionally, the District provided printouts of the educator profiles from the Teacher Information Management System ("TIMS") for the two teachers who supervise the club, as well as their employment contracts and educational certifications.[1]

On August 14, 2023, the Requester filed an appeal with the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.[2] Specifically, the Requester argues that the District's response fails to address each Item of the Request and argues that the District acted in bad faith. 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 5, 2023, the Borough submitted a position statement, reiterating its grounds for denial, and arguing that a number of other RTKL exemptions apply to potentially responsive records. *See* 65 P.S. §§ 67.708(b)(6), (16)-(17). The District also argues that records are protected by the constitutional right to privacy and the Family and Educational Rights Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 34 C.F.R. § 99.3. In support, the District submitted statements made under the penalties of unsworn falsification to authorities by Dr. Christopher Marchese, Superintendent ("Marchese Attestation"); Daniel Carsley ("Carsley Attestation"), Business Manager and Open Records Officer; Jason M. Kotch, Ed.D., Director of Innovation and

[1] The TIMS printouts identify the teachers only by identification number and do not have their names. The District subsequently identified the teachers, and the Requester later indicated that she did not contest this portion of the District's response.

[2] The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

Technology ("Kotch Attestation"); Christina Simpkins, Safety and Security Manager ("Simpkins Attestation"); and Andrew D.H. Rau, Esq., an attorney with the law firm serving as the District's Solicitor ("Rau Attestation").

On September 14, 2023, the Requester made a submission after the record closed, including a copy of the Request with the Items that were no longer at issue crossed off. The Requester indicated that she still wanted "District Information Technology Resources history/content accessed at the location and for the duration of poster creation," and still frames from surveillance footage showing the posters being affixed to the wall. The Requester also indicated that all of the Items in the portion of the Request addressing the conduct of the internal investigation remained at issue. Specifically, this portion of the Request sought:

a. Superintendent
    i. Employment Contract
    ii. Evaluations

b. Designee responsible for disciplinary rules for violations of Board policies, administrative regulations, rules and procedures
    i. Employment Contract
    ii. Evaluations

c. Designee responsible for reporting to the Pennsylvania Department of Education discovery of any educator against whom there are any allegations of sexual misconduct ….
    i. Employment Contract
    ii. Evaluations

d. Disciplinary Procedures / Rules for violations of Board policies, administrative regulations, rules, and procedures

e. Title IX Training Program

f. Date of last Title IX Training ….

g. Date of acknowledgement of Code of Professional Practice and Conduct ….

h. [Item seeking Curricula]

i. Age of each middle school student at the time of poster display

The Requester argues that the District's Policy Manual requires the Superintendent or his designee to report certain findings to the Pennsylvania Department of Education, and to develop and disseminate rules for violation of policies, but the District has not provided responsive information.[3] Further, the Requester argues that the dates of birth of the members of the club can be extracted from the District's database. Finally, the Requester argues that the Item seeking Curricula is sufficiently specific, given the Request's context and implied timeframe.

To develop the record, the OOR accepted the untimely submission and provided the District additional time to submit a reply. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

On September 26, 2023, the District submitted a supplemental position statement, objecting to the Requester's indication on appeal that she intended the Topic/Reference Column to provide evidence that the requested records were related to a transaction or activity of the District and that the District was required to use the column to analyze and interpret the remainder of the Request. Instead, the District argues that it interpreted this column as seeking the policies themselves, and because the entire Request stated that it sought records related to the "poster incident," the District only searched for records related to the incident. The District also notes several Items of the Request that the Requester now seeks to modify on appeal, but the District

[3] The Requester also argues that the District is required to post the Title IX training materials to its website. Although the District argues that no Title IX Training Program occurred during or around the time of the "poster incident," as a courtesy, it provided the link to its website where prior Title IX trainings could be found.

also provides several links to responsive records based on the Requester's subsequent clarification of the records she was seeking. Additionally, the District elaborates on why certain Items are insufficiently specific and notes that certain records that may be responsive to these Items may be protected by copyright law. *See Ali v. Philadelphia Planning Commission*, 125 A.3d 92 (Pa. Commw. 2015) (holding the local agency is not required to provide copies of copyrighted materials). The District notes that Policy 300 does not require that educators sign an acknowledgement of a Code of Conduct, and thus no records exist. Finally, the District argues that the dates of birth of minors are exempt from disclosure under the RTKL, 65 P.S. § 67.708(b)(30), and that providing the requested ages would require more than simply drawing information from a database. *See Pa. Dep't of Env't Prot. v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012) (internal citation omitted). In support, the District submitted a supplemental statement made under the penalties of unsworn falsification to authorities by Daniel Carsley ("Supplemental Carsley Attestation").

LEGAL ANALYSIS

The District is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the District is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). 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)).

1. The appeal is moot in part

As noted, the District granted access to certain responsive records on appeal. Accordingly, the appeal is moot insofar as it seeks these records.[4] *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (unreported opinion) (holding that an appeal is properly dismissed as moot where no controversy remains).

2. Certain Items of the Request are insufficiently specific according to the District's reasonable interpretation of the Request

The District argues that insofar as it seeks records outside the scope of the "poster incident," the Request is insufficiently specific to enable the District to respond. 65 P.S. § 67.703. In any case, the District argues that the Item seeking Curricula is not sufficiently specific.

In determining whether a particular request under the RTKL is sufficiently specific, the OOR applies a three-part balancing test set forth by the Commonwealth Court in *Pennsylvania Department of Education v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pennsylvania Department* of Corr*ections*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). The OOR examines to what extent the request identifies (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep't of Educ.*, 119 A.3d at 1125.

First, "[t]he subject matter of the request must identify the 'transaction or activity' of the agency for which the record is sought." *Id*. The subject matter should provide a context to narrow

[4] In response to the Requester's complaint on appeal, the District provided specific links to the responsive records available on its website. *See* 65 P.S. § 67.704.

the search. *Id*. (citing *Montgomery Cnty. v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) (*en banc*)). Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *Id*.

Finally, "[t]he timeframe of the request should identify a finite period of time for which records are sought." *Id*. at 1126. "The timeframe prong is … the most fluid of the three prongs, and whether or not the request's timeframe is narrow enough is generally dependent upon the specificity of the request's subject matter and scope." *Id*. Failure to identify a finite timeframe will not render an otherwise sufficiently specific request overbroad. *See Pa. Hous. Fin. Agency v. Ali*, 43 A.3d 532, 536 (Pa. Commw. 2012) (concluding that request for proposals and sales agreements relating to two specific projects that did not specify a timeframe was sufficiently specific). Similarly, an extremely short timeframe will not rescue an otherwise overbroad request. *Cf. Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2011) (finding a request for all emails sent or received by any school board member in thirty-day period to be sufficiently specific because of short timeframe), *appeal denied*, 54 A.3d 350 (Pa. 2012). None of these factors are dispositive; instead, the Commonwealth Court has emphasized the importance of a "flexible, case by case, contextual application of the test." *Off. of the Dist. Att'y of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Commw. Ct. 2017).

Here, the Request has a virtually unlimited scope; it seeks essentially all information related to aspects of the "poster incident" as related to various District policies. Similarly, while the subject matter of the Request is the creation and display of the posters and any resulting investigation and disciplinary action, the scope does not provide enough context to guide a search

for responsive records. Finally, as the District has provided the time of the poster creation, the Request has an implied timeframe.

As noted, the Requester suggests that the District was obligated to interpret the "Topic/Reference Column" as a lens through which to provide records created pursuant to the District's obligations, as enunciated in the policies. An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Bradley v. Lehighton Area Sch. Dist.*, OOR Dkt. AP 2021-0333, 2021 PA O.O.R.D. LEXIS 715; *Ramaswamy v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2019-1089, 2020 PA O.O.R.D. LEXIS 2095. When a request is subject to multiple reasonable interpretations, the OOR's task on appeal is to determine if the agency's interpretation was reasonable. *Ramaswamy*, 2020 PA O.O.R.D. LEXIS 2095. The OOR determines this from the text and context of the request alone, as neither the OOR nor the requester is permitted to alter a request on appeal. *See McKelvey v. Off. of the Att'y Gen.*, 172 A.3d 122, 127 (Pa. Commw. Ct. 2016); *Smith Butz, LLC v. Pa. Dep't of Env't Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016).

Here, it was reasonable of the District to interpret the Request as seeking records related to the "poster incident" in addition to the listed policies. Contrary to the Requester's implication, the District is not required to comb through its records to identify all records that document whether it has complied with its policies. *See Askew v. Pa. Off. of the Governor*, 65 A.3d 989, 993 (Pa. Commw. Ct. 2013) ("[a] request that explicitly or implicitly obliges legal research is not a 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."); *see also Faggiolo v. Aston Twp.*, OOR Dkt. AP 2022-0934, 2022 PA O.O.R.D. LEXIS 1479;

Rogers v. Lycoming Cnty., OOR Dkt. AP 2022-1027, 2022 PA O.O.R.D. LEXIS 1271 (holding that a request seeking authority to tax a property required legal research). Because responding to the Request according to the interpretation advanced by the Requester on appeal would require the District to make judgments, the District is not required to provide records.

Regarding the Item seeking Curricula, it is not clear what exactly this Item seeks, and responding to it would require the District to review potentially responsive records and make judgment calls as to whether a given record is actually responsive. *See Pa. Dep't of Env't Prot. v. Legere*, 50 A.3d 260, 264-265 (Pa. Commw. Ct. 2012) (finding that a request that would require an agency to review all potentially responsive files and "make judgments as to the relation of the documents to the specific request" would be insufficiently specific); *see also City of Phila. Off. of the Dist. Att'y v. Bagwell*, 155 A.3d 1119, 1143 (Pa. Commw. Ct. 2017) (finding that an open-ended request that fails to give an agency guidance in its search for the information sought may be so burdensome that the request will be found overbroad under the RTKL). Accordingly, because the Item of the Request seeking Curricula does not seek a defined universe of records and responding would require the District to make judgment calls, it is insufficiently specific. *See* 65 P.S. § 67.703.

However, nothing in this Final Determination prevents the Requester from filing a new request, describing with more detail exactly what records she seeks, and if necessary, filing an appeal pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

3. Records responsive to certain Items of the Request do not exist

The District argues that many of the requested records do not exist in its possession, custody or control. Two entire pages of the Request seek records related to an internal

investigation; as the District argues that no investigation occurred, it follows that no responsive records exist. *See*, *e.g.*, Supplemental Carsley Attestation at ¶ 6. In any case, the Marchese Attestation addresses the specific Items mentioned in this portion of the Request:

> 21. No employees or students were disciplined in relation to the creation or display of the posters.
> ...
> 32. … I confirmed that the two (2) District employees did not direct or participate in the "poster creation" activity, rather they were present solely at the Meeting for custodial purpose for student safety.
> …
> 63. … [N]o disciplinary actions were taken against students "for posting unauthorized material."
>
> 64. … (1) no disciplinary actions were taken against educators or employees for "failure to monitor school property for unauthorized content", "posting unauthorized materials" or partaking in political Pride Month activities on school property and during school time"; (2) no investigation "for partaking in political Pride Month activities on school property and during school time" occurred….
> …
> 67. … no internal investigations occurred subsequent to the "poster incident"….
>
> Additionally, the Carsley attestation provides:
>
> 11. As the Rainbow Club is not a class …, [records] … pertain[ing] to a class … do not exist.
> …
> 46. … I [] confirmed with Human Resources, the Compliance Officer, and the Title IX Coordinator that there were no findings of investigations on the topics identified in "internal Investigations Subsequent to Poster Incident: Obscene Materials and Sexual Abuse"[], "Internal Investigations Subsequent to Poster Incident: Sexual Harassment, Hazing, or Bullying Affecting Students", [], and "Internal Investigation Subsequent to Poster Incident: Discrimination and Harassment Affecting Staff" during the period of June 9. 2023, and June 19, 2023.
>
> 47. After review of their files, Human Resources, the Compliance Officer and the Title IX Coordinator confirmed this was accurate.
> …

50. … I [] confirmed with Human Resources that no Title IX training of District employees, vendors, contractors, and volunteers occurred between June 9, 2023, and June 19, 2023.

51. After a review of their files, Human Resources confirmed this was accurate.

…

84. To the best of my information, knowledge and belief, based on my understanding of the Request, I have provided the Requester with all responsive records.

Additionally, the Supplemental Carsley Attestation provides that "Wendi Kraft, the Director of Human Resources, advised [] that the District does not provide Title IX training for vendors, contractors or volunteers." Supplemental Carsley Attestation at ¶ 4. Further, the District asserts that, contrary to the implication of the Request, Policy Manual 300, entitled "Code of Professional Practice and Conduct for Educators" does not require that educators sign an "acknowledgement of Code of Professional Practice and Conduct" as requested. AVON GROVE SCHOOL DISTRICT, POLICY MANUAL, CODE OF PROFESSIONAL PRACTICE AND CONDUCT FOR EDUCATORS, POLICY MANUAL § 300, *available:* https://go.boarddocs.com/pa/avongrove/Board.nsf/Public?open&id=policies# (2015).

The District originally argued that the Item of the Request seeking "District Information Technology Resources history / content accessed at the location and for the duration of poster creation" is insufficiently specific. Though a Request may not be modified on appeal, as noted above, in response to the Requester's clarification that she was only requesting browser history during the time of the poster creation, the Kotch Attestation provides:

6. … [E]ven though I could not identify the record [that] was sought by the Requester, the District does not have the ability to generate a report connecting content to a specific location in the school.

7. Further, 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.

…

9. … [T]he District's content filter which records student browsing history cannot ascertain specific locations where devices were accessed. As such, there is no report to ascertain the location of where something was accessed as sought by the Requester, and, therefore, no such record would exist.

10. Further, 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.

11. The District has no ability to access non-District electronic devices that a student may utilize on District property or off-District property or determine the purpose for which the student accesses content on the non-District devices.

"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). An attestation by the individual who searched for responsive records is sufficient to meet an agency's burden of proving the nonexistence of a record. *Id.*; *see also Pa. Dep't of Health v. Mahon*, 283 A.3d 929, 936 (holding that, when there is evidence that a record does not exist, "[i]t is questionable to what degree additional detail and explanation are necessary…."); *Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a "more likely than not" inquiry).

The Requester argues that certain records should exist, in accordance with various District policies. However, the OOR makes no determinations as to whether additional records should exist, as our inquiry is limited to only whether or not records are "in existence and in possession of the … agency at the time of the right-to-know request." *Moore*, 992 A.2d at 909; *see also* 65 P.S. § 67.705.

In the absence of any evidence that the District has acted in bad faith,[5] "the averments in the [attestations] should be accepted as true." *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Accordingly, the District has met its burden of proving that no records exist in its possession, custody, or control that are responsive to the portion of the Request seeking "District Information Technology Resources history / content accessed at the location and for the duration of poster creation." *See Hodges*, 29 A.3d at 1192.

4. The disclosure of the security camera footage is not likely to threaten building security

The District argues that the disclosure of the requested security footage is likely to threaten building safety.[6] Section 708(b)(3) of the RTKL exempts from public access "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building…." 65 P.S. § 67.708(b)(3); *see Davis v. City of Lancaster*, OOR Dkt. AP 2018-1381, 2019 PA O.O.R.D. LEXIS 1194 (denying access to records related to a Planned Parenthood facility where the City presented evidence of prior threats to the facility); *but see Pecarchick v. Westmoreland Cnty.*, OOR Dkt. AP 2019-2639, 2020 PA O.O.R.D. LEXIS 2075 (holding electronic swipe card entry and exit records were not exempt).

[5] The Requester asks the OOR to make a finding of bad faith. Section 1304(a) of the RTKL states that a court "may award reasonable attorney fees and costs of litigation … if the court finds … the agency receiving the … request willfully or with wanton disregard deprived the requester of access to a public record … or otherwise acted in bad faith…" 65 P.S. § 67.1304(a). Similarly, Section 1305(a) authorizes a court to "impose a civil penalty of not more than $1,500 if an agency denied access to a public record in bad faith." 65 P.S. § 67.1305; *see also Off. of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017) ("An example of bad faith is a local agency's failure to comply with the mandate of Section 901 of the RTKL, which requires that a local agency make a good faith search for information responsive to a request and determination of whether that information is public."). However, the record does not support a finding of bad faith

[6] As noted above, in the Requester's September 14, 2023 submission, the appeal regarding the video surveillance was limited to "still frames from the video that depict the fixing of each poster to the wall."

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 a building. *See* 65 P.S. § 67.708(b)(3). 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).

In this instance, the Simpkins Attestation provides:

> 6. The security cameras are located in the lobby, corridors and stair wells.
>
> 7. The release of security surveillance footage reasonably endangers the security of the Middle School.
>
> 8. The specific locations of District security cameras provide essential information to those intent on causing harm to others or damage to property.
>
> 9. Knowledge of security camera coverage areas, as well as[] the location of blind spots provides invaluable information for those planning to gain entry into areas where activities are not visible to the District. This information can also be used by individuals inside and outside of the school building seeking to create disruption to school through intrusion or to perpetrate activities in violation of District policies and federal and state law.
>
> 10. Security footage from security cameras allows for the identification of room locations, exit and entry points, HVAC systems, and alarm locations, which is essential information for those intent on causing harm to others or damage to property.
>
> 11. Knowledge of room locations as well as their entry and exit points would provide invaluable information in planning to gain entry into areas of the school building, as well as[] securing areas against law enforcement. This information can also be used by intruders in determining the best location to hold hostages and delay police intervention.
>
> …
>
> 18. During the 2021-2022 school year, the District ha[d] 127 "higher" level infractions[, including] assaults on students or staff, fighting, harassment, threats to students or staff, possession of a weapon, theft, vandalism, and offenses involving controlled substances.

19. During the 2021-2022 school year 48 infractions required law enforcement involvement, with 21 arrests.

20. Based on the above reasons, it is my informed opinion that the release of even a redacted version of security footage from the Middle School security cameras as requested will create a reasonable likelihood of endangering the safety of the Middle School, the students who attend school, and the individuals who work or visit that building….

The OOR recently rejected a very similar attestation in *Webb v. Avon Grove School District*, noting that the requested footage was from common areas and concluding that the District's evidence was speculative. OOR Dkt. AP 2021-1290, 2023 PA O.O.R.D. LEXIS 2506. The OOR found that the District failed to establish that the disclosure of the video footage would create a reasonable likelihood of endangerment to the safety or physical security of a building.

Conclusory statements are not sufficient to establish that records are exempt under the RTKL. *See Scolforo v. Off. of the Governor*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records"); *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) ("Affidavits that are conclusory or merely parrot the exemption do not suffice"); *W. Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) ("The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions") (internal citation omitted). Here, the District does not explain how disclosure of the requested information could pose a threat. As such, it has failed to carry its burden of proof. *See* 65 P.S. § 67.708(a).

5. The District may redact student images from the surveillance footage

The District argues that if it is required to disclose the requested video footage, it must be redacted. In *Easton Area School District v. Miller*, the Pennsylvania Supreme Court held:

> 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*.

In *Miller*, the Court found that the images of students should be redacted from a school bus video, either under FERPA or the constitutional right to informational privacy. 232 A.3d at 731. 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.

FERPA protects "personally identifiable information" contained in "education records" from disclosure, and financially penalizes school districts that 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). The law defines "education records" as those records that are "[d]irectly related to a student" and are "[m]aintained by an educational agency or institution or by a party acting for the agency or institution." 20 U.S.C. § 1323g(a)(4)(A); *see also* 34 C.F.R. § 99.3. The Commonwealth Court has stated that education records are not restricted to academic records; rather, "the appropriate inquiry is whether the record—regardless of its subject matter—directly relates to a student…." *W. Chester Univ. of Pa. v. Rodriguez*, 216 A.3d 503, 509-10 (Pa. Commw. Ct. 2019); *see also* 34 C.F.R. § 99.3. Regarding the maintenance of education records, the Pennsylvania Supreme Court has concluded that a record being "generated and possessed" by the educational agency or institution is sufficient to establish that the record was "maintained" by the agency or institution. *Miller*, 232 A.3d at 630.

Here, the Carsley Attestation affirms that the video depicts minor students. Carsley Attestation at ¶¶ 59-62. In *Miller*, the Pennsylvania Supreme Court examined FERPA's relationship to the RTKL, holding that an "education record" cannot be provided in an unredacted form and explained that a video qualifies as an "education record" if it relates directly to a student, including by capturing a student's image at any event which would later become part of an inquiry by the school. *Miller*, 232 A.3d at 630. The Court ultimately found that the images of the students should be redacted from the responsive video recording(s).

Unlike *Miller*, the instant Request seeks footage from inside of a middle school. While there is evidence that there was not a subsequent investigation or disciplinary action connected with any specific incident, the video depicts minor students during daily school activities. Therefore, the Request plainly seeks video footage in the District's possession that is related to minor students and concerns the education of those students. *See Fennell v. Pa. Game Comm'n*,

149 A.3d 101, 104 (Pa. Commw. Ct. 2016) ("...[W]here the facts are undisputed by the parties ... we see no reason why OOR cannot decide the legal issue presented based on those undisputed facts"); *Off. of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2014) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record). Accordingly, the District has an obligation to redact the requested still frames from the video in a way that protects the informational privacy rights of all minors depicted in the video.

6. The District has demonstrated that it does not possess the capacity to redact student images from the video footage

The District argues that it "does not have the capabilities to perform the necessary review and redaction of the security footage for student faces." Kotch Attestation, ¶¶ 23-26. The OOR has considered a variety of cases where video redaction was required and generally rejects arguments that an agency is unable to effectuate such redactions unless the agency's evidence is substantial. As the Commonwealth Court stated in *Central Dauphin School District v. Hawkins*:

> [I]t is not at all clear from the government's affidavit why it cannot segregate the portions of the record that do not [invade privacy] ….
>
> The government further does not explain why it cannot by use of such techniques as blurring out faces, either in the video itself or in screenshots, eliminate unwarranted invasions of privacy. The same teenagers who regale each other with screenshots are commonly known to revise those missives by such techniques as inserting cat faces over the visages of humans. While we do not necessarily advocate that specific technique, we do hold that the government is required to explain why the possibility of some similar method of segregability is unavailable if it is to claim the protection of the exemption.

253 A.3d 820, 835 (Pa. Commw. Ct. 2021) (citing *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 587, 445 U.S. App. D.C. 361 (D.C. Cir. 2020)). Thus, to demonstrate that an agency cannot redact a record, it must submit evidence that it has no reasonable access to that redaction, not merely that it does not currently and regularly use such software or that it does not employ a video specialist.

In extremely limited situations, the volume of such a request could impact an agency's ability to process and redact the requested information. This is such a situation. When a request for video records is so voluminous that it prevents or severely impacts the District's capability to redact such video records, a contract with a third-party can be proper and those reasonably incurred costs transferred to the Requester. An agency is permitted under the RTKL to charge the requester necessarily incurred costs and the fee must be reasonable. Here, the District demonstrates that there is over 148 hours of footage and that it is unable to redact the voluminous amount of records without third party assistance. Based on nearly identical evidence, the OOR recently found that the District does not have the software necessary to convert and redact the video. *See Webb v. Avon Grove Sch. Dist*., 2023 PA O.O.R.D. LEXIS 250; Kotch Attestation at ¶¶ 23-31. The Carsley Attestation provides that the Chester County Intermediate Unit has previously been willing to perform this sort of redaction at a rate of $125/hour, with additional standard charges totaling $2,500, and that he anticipates the Intermediate Unit would provide a similar price quote in this instance. Carsley Attestation at ¶¶ 65-67.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Further, the Requester has not challenged this figure.

Because the District has proven that it does not have the capabilities for such a voluminous request to make the redactions that are required under FERPA, the District may contract with a third party and may seek prepayment of the reasonable and necessary costs that the District must incur in extracting, converting and redacting the requested video footage. *See* 65 P.S. § 67.1307(g)

("Except as otherwise provided by statute, no other fees may be imposed unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable. No fee may be imposed for an agency's review of a record to determine whether the record is a public record, legislative record or financial record subject to access in accordance with [the RTKL]"). The OOR directs that the District, prior to contracting with any third parties to make redacted video copies, confirm that the Requester still wants copies of the redacted video records. The OOR further notes that an analysis of a request for smaller amounts of information could result in a different finding.

7. Employee evaluations are exempt employee records

The District argues that the requested employee evaluations are exempt employee records. Section 708(b)(7) of the RTKL exempts certain "records relating to an agency employee" including "[a] performance rating or review." 65 P.S. § 67.708(b)(7)(viii).

The OOR has previously acknowledged that subsections within 65 P.S. § 67.708**(**b)(7) only apply to records specifically mentioned and do not protect a broad class of generic "personnel records." *Krug v. Bloomsburg Univ. of Pa.*, OOR Dkt. AP 2018-1600, 2018 PA O.O.R.D. LEXIS 1442; *Hummel v. Union Sch. Dist.*, OOR Dkt. AP 2018-1550, 2018 PA O.O.R.D. LEXIS 1197.

Here, the Carsley Attestation provides:

> 25. I was advised by Human Resources that there were evaluations of the two (2) District employees in response to "Poster Incident: General Information, Poster Creation". []
>
> 26. After consultation with the Solicitor, I determined the employee evaluations were exempt from access under the [RTKL].

The OOR notes that the Requester also seeks the evaluations of the superintendent and designee(s) responsible for reporting promulgating disciplinary rules and reporting allegations to the

Pennsylvania Department of Education; however, as such records are expressly exempt from disclosure, the District has met its burden of proving that the evaluations are exempt from public access. *See* 65 P.S. § 67.708(a).

8. A record providing the ages of students does not exist and the District is not required to provide dates of birth

The District argues that it does not have the ages of students, that dates of birth of minors are exempt from disclosure under the RTKL, and that providing the requested ages would require more than simply drawing information from a database.

Here, the Kotch Attestation establishes that the District was not able to identify the participating students and, in any case, the District does not have a record identifying a student's age on a particular day. Kotch Attestation at ¶¶ 13-16. However, the Request argues that the District has students' dates of birth and that calculating their ages would merely constitute drawing information from a database.

While an agency is not required to compile information in a certain way, "the information contained in databases that is subject to disclosure under the [RTKL] must simply be provided to request[ers] in the same format that it would be available to agency personnel." *Pa. Dep't of Env't Prot. v. Cole*, 52 A.3d 541, 549 & n.12 (Pa. Commw. Ct. 2012) (citing *Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *14 (Pa. Commw. Ct. Jan. 12, 2012).

The Carsley Attestation provides:

> 54. The only potentially responsive record that would allow the Requester to make her own calculation of the students' ages during the period of "poster display" is the birth dates of all Middle School students.
>
> 55. … the Middle School students were all minors ….

Section 708(b)(30) of the RTKL exempts "[a] record identifying the name, home address or date of birth of a child 17 years of age or younger." 65 P.S. § 67.708(b)(30).

As the District has proven that it does not have the ages of the students at the time, that providing the requested ages would require more than simply drawing information from a database and because dates of birth of minors are facially exempt from disclosure under the RTKL, the District has met its burden of proof with regard to this Item of the Request. *See* 65 P.S. § 67.708(a).

9. The District properly redacted information protected by the attorney-client privilege

The District redacted information protected by the attorney-client privilege from the email notifying the Board of the poster incident. The RTKL's definition of privilege includes the attorney-client privilege, and the presumption that records in the possession of local agencies are public records does not apply to records that are privileged. *See* 65 P.S. §§ 67.102 and 305(a)(2).

In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Bousamra v. Excela Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citation omitted). When waiver is at issue, the burden of proof shifts to the requester. *See Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014). An agency may not rely on a bald assertion that the attorney-client privilege applies;

instead, the agency must establish the first three prongs of the privilege for it to apply. *See*, *e.g.*, *Mezzacappa v. Northampton Cnty.*, OOR Dkt. AP 2022-2617, 2023 PA O.O.R.D. 240.

Here, the Rau Attestation provides:

> 5. My Firm and I provide legal services to the District in the capacity of Solicitor.
>
> 6. At all times relevant to the period of time covered by the Request, I and my Firm have provided legal services to the District.
>
> …
>
> 9. [A]n e-mail sent from District Superintendent Chris Marchese, Ed.D. on June 8, 2023, was potentially responsive to the Request, but subject to the statutory exceptions under the [RTKL].
>
> 10. I was a recipient of the e-mail, along with the District's Board of School Directors ("Board"), and certain District administrators.
>
> 11. Every person included on the e-mail in question is a District employee, Board member or a District administrator.
>
> 12. Upon information and belief, the contents of the e-mail were not disseminated to any non-District affiliated person.
>
> 13. The e-mail was properly redacted pursuant to attorney-client privilege and provided to the Requester in redacted form.
>
> 14. The redactions were directly related to confidential legal advice the District, Board and Dr. Marchese were seeking from me, related to what the Requester refers to as the "poster incident."
>
> 15. It is Dr. Marchese's practice to copy me on e-mails addressing matters that he or the Board will be or are seeking my legal counsel.
>
> 16. It is not the practice of Dr. Marchese to copy me on every e-mail he sends; I am, however, copied where there is a legal issue that will need my input or that of my Firm.
>
> 17. I was copied on this e-mail to continue to make me aware of the status of the "poster incident" and to assist me, and my Firm, in our on-going provision of legal advice related to the matter.
>
> 18. Attorney-client privilege has not been waived with respect to the contents of the e-mail in question.

The Rau Attestation provides that the redacted material was exchanged between the District's Solicitors and certain District employees, administrators and Board members, that the email contains a request for and the provision of legal advice, and that the District has claimed the privilege and has not waived it.

The Requester argues that Attorney Rau was only copied on the email to render it exempt from disclosure; however, the Rau Attestation expressly refutes this argument, stating not only that it is not Dr. Marchese's practice to copy Attorney Rau on all emails but also that this particular email contained legal questions and advice related to the poster incident. Accordingly, the District has met its burden of proving that it properly redacted the email. *See* 65 P.S. §§ 67.305(a)(2), 706.

10. The District must provide certain records

The Request sought the employment contract of the Superintendent, disciplinary rules and the designee(s) responsible for disciplinary rules and for reporting to the Pennsylvania Department of Education.[7] The District has not provided this information. *See* 65 P.S. § 67.708(b)(6)(ii) ("Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment related contract or agreement and length of service of a public official or an agency employee."). With regard to disciplinary rules, the District has directed the Requester to its Boarddocs website where Policy Manual 317, "Disciplinary Procedures," and Policy Manual 317.1, "Investigation of Suspected Employee Wrongdoing," are available. AVON GROVE SCHOOL DISTRICT, DISCIPLINARY PROCEDURES, INVESTIGATION OF SUSPECTED EMPLOYEE WRONGDOING, POLICY MANUAL §§ 317,

[7] The District argues that the Requester is not permitted to modify the Request on appeal; however, the Request expressly sought this information.

317.1, *available:* https://go.boarddocs.com/pa/avongrove/Board.nsf/Public?open&id=policies# (2021). However, the District has not presented evidence regarding the existence of other records.

The OOR is mindful that an agency "shall not be required to create a record which does not currently exist…." 65 P.S. § 67.705. However, agencies have the burden of proving that a record does not exist. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). Because the District has not presented evidence as to whether the requested records exist or if a good faith search was conducted, the District has not met its burden of proof. The District is therefore directed to conduct a good faith search for responsive records as set forth in 65 P.S. § 67.901, and provide any records discovered as a result of that search. If no records are located as a result of this search, the District shall inform the Requester of such in writing.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part** and **dismissed as moot in part**, and within thirty days, the District is required to conduct a good faith search for the Superintendent's employment contract, disciplinary rules and the indicated designee(s) and provide any responsive records to the Requester. If no records are discovered, the District shall produce a sworn affidavit or statement made under the penalty of perjury to that effect. The District is also required, prior to contracting with any third parties to make redacted video copies, to confirm that the Requester still wants copies of the redacted video records. 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 Chester 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,

but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.[8] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: November 21, 2023

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Delivered via E-File Portal to: Carmela Ciliberti, Esq.; Daniel Carsley; and Amanda Sundquist, Esq.

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