

client privilege, and that production of certain records would violate a school employee's constitutional right to privacy.

On May 10, 2024, the Requester appealed to the Office of Open Records ("OOR"), arguing that the cited exemptions do not apply to the video records sought.¹ 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 24, 2024, the District submitted a position statement conceding that the video is not subject to the attorney-client privilege but reiterating its other reasons for denial, explaining that the record was obtained and kept only for the purpose of conducting a noncriminal investigation into a complaint raised by an employee. In support of its argument, the District submitted the verification of Assistant Superintendent Isabel Resende, who attests in detail as to the process of the investigation and the adverse effects of release.

LEGAL ANALYSIS

The District is a local agency subject to the RTKL. 65 P.S. § 67.301. 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,

¹ Although the Request seeks a broad cross-section of records, the appeal is concerned entirely with the responsive video. As a result, the Requester has waived any arguments related to any other responsive records, and this Final Determination is limited to the issue of the video record.

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 sole issue on appeal is whether the responsive video footage of Bus #5 must be produced. The District argues, on appeal, that the footage in question is exempt because it relates to a noncriminal investigation. 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[c]omplaints submitted to an agency,” [i]nvestigative materials, notes, correspondence and reports” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation.” 65 P.S. §§ 67.708(b)(17)(i)-(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

In support of the District’s position, the Resende Attestation states that:

4. On February 27, 2024, a District employee (“District Employee”) notified a building principal and school police officer about concerns regarding the conduct of a bus driver (the “Driver”) employed by the District’s transportation vendor, Jennings Transportation Corp. (“Jennings”).

5. The District Employee's complaint stemmed from a concern that the Driver repeatedly invaded the District Employee's personal space and physically touched the District Employee while the District Employee escorted the students to the bus at dismissal (the "Incident").
6. This Incident made the District Employee very uncomfortable.
7. The District conducted a formal investigation into the Incident.
8. I personally requested the District's Information Technology Department download, save, and preserve video of the Incident.
9. But for the District specifically downloading and preserving the relevant surveillance video, the recordings would have otherwise been overwritten automatically.
10. The District's surveillance videos are not regularly or periodically downloaded, viewed, or saved; this only occurs in the event of an incident or complaint, which prompts an investigation by the District.
11. Together with the school police officer and administrators in the Transportation and Human Resource Departments, I reviewed the downloaded video surveillance footage personally and corroborated the District Employee's version of the Incident.
12. The surveillance video reveals the identity of the District Employee who made the complaint, as well as many of the District's students at the time of dismissal.
13. Additionally, the District Employee was interviewed by the District's Human Resource Office, and detailed notes were kept regarding that meeting.
14. The District contacted its Solicitor for legal advice and guidance regarding the Incident.
15. Whenever a concern is raised involving a District contractor (or an employee thereof), whether the concern is raised by an employee, a student, or a parent, the District ensures such concern is thoroughly investigated, documented, and addressed.
16. Together with the District's transportation administrator, I contacted Jennings to inform Jennings of the Incident, and requested that Jennings remind all bus drivers of their need to conduct themselves in a professional manner and to minimize driver interaction with the District's staff during dismissal, absent an emergency.

17. At the District Employee's request, the District Employee's identity was not revealed to Jennings, and the District Employee has been adamant that they do not wish to pursue this matter further and has asked that their anonymity be maintained.

18. The District did not request that Jennings remove the Driver from providing services to the District's students, did not ask that the Driver's route be reassigned to another school building, and did not seek disciplinary action to be taken by Jennings against the Driver.

19. Internally, the District moved the District Employee to a different location at the time of dismissal to avoid potential future uncomfortable interactions with the Driver.

20. The District does not currently have the technology that would blur the images of the students' faces, and given the number of days and students at issue, this would be an extremely burdensome task

21. Even if the students' faces could be blurred, however, revealing the videos would necessarily reveal [the] identity of the District Employee who wishes to remain anonymous, even if their image was blurred.

22. District employees reasonably assume that the District will maintain matters regarding sensitive work-related complaints confidentially, and surely never share them with outside entities absent some legal obligation to do so

Under the RTKL, a sworn affidavit or statement made under the 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the District acted in bad faith, "the averments in [the statement] 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)).

The District identifies the responsive video record as camera footage of Bus #5 which was pulled at the request of Assistant Superintendent Resende for the purpose of examining the footage to investigate a District employee's claim that the bus driver had invaded their personal space in

an uncomfortable fashion.² The Assistant Superintendent attests that the video was retrieved and maintained after the system would normally have wiped it to facilitate a noncriminal investigation, where the District, in consultation with the complainant employee and the solicitor, decided not to seek action against the bus driver but instead to alter the employee's schedule to avoid future conflicts.

To qualify as an investigation for the purposes of Section 708(b)(17), the agency must identify the statutory authority under which it conducted said investigation. *Chawaga*, 91 A.3d 257. Here, the District argues that the Public School Code grants it that power. The Pennsylvania Public School Code of 1949 (“Code”) provides that school districts “are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of this act,” 24 P.S. § 2-211, and are authorized to “adopt and enforce reasonable rules and regulations as it may deem necessary, regarding the management of its school affairs and the conduct and department of all superintendents, teachers and other appointees or employes during the time they are engaged in their duties to the [D]istrict,” 24 P.S. § 5-510. Although the District does not cite to any regulation promulgated under the Public School Code, it explains that it enforces the law by conducting an investigation in any situation where a complaint is made, and Assistant Superintendent Resende attests to the same. Resende Attestation ¶ 15. The OOR has previously found that the Code empowers public school districts to conduct investigations, both of the conduct of their own employees and of the safety of bus services. *See, e.g., Rothermel v. Central Dauphin Sch. Dist.*, OOR Dkt. AP 2022-2756, 2023 PA O.O.R.D. LEXIS 258. Therefore, the District has demonstrated that it possesses the statutory authority to conduct an investigation.

² Additionally, to the extent that the appeal challenges the existence of other responsive footage, the District's attestation notes that footage from February which was not specially preserved would have been automatically overwritten by the District's system. The District does not address the issue of whether additional footage would still have existed on March 13, 2024, when the Request was filed.

To conduct that investigation, Assistant Superintendent Resende attests that the video was obtained and preserved so that she and other District officials could observe the event and determine whether any action was warranted. Resende Attestation ¶ 8. She further attests that the records are not regularly downloaded or preserved and exist now only to facilitate her review. Resende Attestation ¶¶ 9-10. Finally, she attests that she reviewed the footage with the school police officer and other administrators, that the complainant was interviewed by the District's Human Resources office, and that the District contacted the solicitor for legal advice. Resende Attestation ¶¶ 9-14. Ultimately, the District chose to avoid escalating the situation and closed out the investigation with only an informal remedy to avoid conflict in the future. Resende Attestation ¶¶ 18-19.

The process described by the District is a multi-step investigation involving various administrators, the solicitor, multiple rounds of interviews, a review of video footage and resulting in an official determination. These are hallmarks of the “systematic or searching inquiry” described in *Pa. Dep't of Health* and suffice to meet the District's burden to show that the process constitutes a non-criminal investigation under the RTKL. 4 A.3d at 811. Finally, the video at issue is related to that investigation because it was obtained and preserved by the District for the sole purpose of conducting that investigation, and was used to corroborate the remarks made by the employee in their interviews. *See Port Auth. of Allegheny Cty. v. Towne*, 174 A.3d 1167 (Pa. Commw. Ct. 2017) (finding that the fact that a video is not maintained or accessed for any purpose other than an investigation to be relevant to the determination). Therefore, the District has demonstrated that the responsive video relates to a noncriminal investigation under Section 708(b)(17) of the RTKL.

CONCLUSION

For the foregoing reasons, the 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 or petition for review to the Northampton 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 according to court rules 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.³ 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: June 10, 2024

/s/ Jordan Davis

SENIOR APPEALS OFFICER
JORDAN C. DAVIS

Sent via OOR portal to: Christopher McLean, Esq.;
Adrienne Langen;
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³ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).