pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
VALERIE HAWKINS AND *FOX43 NEWS*,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2016-0583**
	:	
CENTRAL DAUPHIN SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Valerie Hawkins, Planning Editor for *Fox43 News* (collectively "Requester"), submitted a request ("Request") to the Central Dauphin School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking a video from a District school bus. The District denied the Request, stating, among other reasons, that the video is confidential under federal law. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted** and the District is required to take further action as directed.

FACTUAL BACKGROUND

On February 23, 2016, the Request was filed, seeking "a copy of the video that was captured by a school bus camera system that occurred on Feb. 16, 2016." On March 24, 2016, after extending its time to respond to the Request by thirty days, *see* 65 P.S. § 67.902(b), the District denied the Request, stating that disclosure of the video would violate the Family

Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and would result in the loss of federal funding. 65 P.S. § 67.708(b)(1)(i). In addition, the District argued that the video is exempt from disclosure because it is related to a noncriminal investigation. 65 P.S. § 67.708(b)(17).

On March 24, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.[1] Specifically, the Requester notes that the video shows an adult grabbing a 17 year old student by the wrist. 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 April 1, 2016, the District submitted a position statement reiterating its grounds for denial, and supported by the affidavit of Karen McConnell, the District's Open Records Officer.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request." 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an

[1] In its appeal, the Requester granted the OOR an additional thirty days to issue a final determination. *See* 65 P.S. § 67.1101(b)(1).

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 necessary, 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 clearly 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)).

1. <u>The requested video is not an education record</u>

The District argues that the requested school bus video is protected from disclosure by FERPA. FERPA protects "personally identifiable information" contained in "education records" from disclosure and financially penalizes school districts "which [have] a policy or practice of

permitting the release of education records ... of students without the written consent of their parents." 20 U.S.C. § 1232g(b)(1). Regulations implementing FERPA define "education records" as those records that are "[d]irectly related to a student" and "[m]aintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. 99.3. While the express language of FERPA's implementing regulation would appear to encompass *all* records held by an educational institution and which relate to a student, a review of case law interpreting FERPA reveals that not all records pertaining to a student and held by an educational institution are "education records" for purposes of FERPA. Just because a record involves a student does not automatically invoke the confidentiality provisions of FERPA.

In *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, the United States Supreme Court held that individual student papers are not "education records" under FERPA because they were not maintained in a central file by the official records custodian. 534 U.S. 426 (2002). Other courts have looked at the records themselves and have concluded that only those records relating to a student's academic performance are "education records" for purposes of FERPA. *Bd. of Educ. of the Toledo City Sch. Dist. v. Horen*, 2011 U.S. App. LEXIS 26644 (6th Cir. 2011) (tally sheets denoting student's daily activities for purposes of compiling the student's official progress reports are not "educational records" because the records were not part of the student's permanent file.); *Pollack v. Regional Sch. Unit 75*, 2015 U.S. Dist. LEXIS 55992 (D. Me. 2015) (holding that "educational records" are those records which follow a student from "grade to grade."); *S.A. v. Tulare County Office of Educ.*, 2009 U.S. Dist. LEXIS 93170 (E.D. Cal. 2009) (e-mails mentioning a student's name are not "education records" because they are not part of the student's permanent file); *Wallace v. Cranbrook Educ. Cmty.*, 2006 U.S. Dist. LEXIS 71251 (E.D. Mich. 2006) (student statements provided in relation to an investigation into school

employee misconduct do not directly relate to a student, and, therefore, are not "education records."); *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019 (N.D. Oh. 2004). Perhaps the most succinct definition of "education records" was enunciated by the United States District Court for the Western District of Missouri:

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

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

Here, the Request seeks a school bus video showing an altercation between an adult and a 17 year-old student. While this video purportedly depicts the individual student, there is no evidence that this video is part of the student's permanent academic file. This is precisely the type of record which the courts have held to not constitute an "education record" under FERPA. The District points to *Remling v. Bangor Area Sch. Dist.*, OOR Dkt. AP 2011-0021, 2011 PA O.O.R.D. LEXIS 74, wherein the request sought a copy of a school bus video recording. Because the video recording depicted students on the bus, the OOR concluded that the record met the definition of an "education record," and, therefore, was protected from disclosure by FERPA. A review of the final determination in *Remling* reveals that the OOR relied solely on the broad language of FERPA's implementing regulations and did not analyze the relevant case

law limiting the scope of what constitutes an "education record." Based on the foregoing, the requested video is not an "education record" protected by FERPA.[2]

2. <u>The requested video does not relate to a noncriminal investigation</u>

The District also withheld the requested video on the basis that it is being used as part of the District's noncriminal investigation into the incident depicted on the video. The District argues that this is the type of noncriminal investigation which the Commonwealth Court has held to be exempt from disclosure. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515 (Pa. Commw. Ct. 2011). Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to noncriminal investigations[.]" *Id.* 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). Furthermore, 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 Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). The investigation must specifically involve an agency's legislatively-granted fact-finding powers. *See Pa. Dep't of Pub. Welf. 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 *Sherry*, the requester sought records regarding Academic Honor Code violations. In finding the records related to a noncriminal investigation, the Court noted that "these records surpass the District's routine performance of its duties and entail a systematic or searching inquiry, detailed examination, and/or official probe into purported student rule violations on the

[2] Because the requested video is not protected by FERPA, disclosure would not threaten the loss of Federal funding. Accordingly, the District has not met its burden of proof to withhold the video under Section 708(b)(1)(i) of the RTKL, 65 P.S. § 67.708(b)(1)(i). *See* 65 P.S. § 67.708(a)(1).

District's premises." 20 A.3d at 523. Subsequent to the Court's decision in *Sherry*, the Court considered whether a report of a performance audit of a Department of Public Welfare grantee was a record of a noncriminal investigation. In finding that it was not a record of a noncriminal investigation, the Court noted that "DPW's performance audit was not part of DPW's legislatively-granted fact-finding or investigative powers; rather the audit was *ancillary to DPW's public assistance services*." 91 A.3d at 259 (emphasis added).

Here, unlike the situation in *Sherry*, the District is not investigating Academic Honor Code violations, which would unquestionably relate to the District's core function of educating students. Rather, the District is investigating an assault on a student by the parent of another student. This cannot be said to relate to the District's core function of educating students, and can only be said to be "ancillary" to the District's mission. Furthermore, the District has pointed to no "legislatively-granted fact-finding authority" to conduct a noncriminal investigation. As such, the District's "investigation" cannot be said to be the type of inquiry that falls within the ambit of the noncriminal investigative exemption. *Chawaga*, 91 A.3d at 259.

Assuming, *arguendo*, that the District's "investigation" is a noncriminal investigation for purposes of the RTKL, the mere fact that the video is being used in the investigation, does not, in and of itself, mean that the video is a record of a noncriminal investigation. In *Pa. State Police v. Grove*, a requester sought a copy of a "dash-cam" video recording of a traffic stop. The State Police denied access, arguing that the video documented the results of a criminal investigation, and, therefore, was exempt from disclosure. 119 A.3d 1102 (Pa. Commw. Ct. 2015). In rejecting the State Police's argument, the Court noted that "[dash-cam videos] are created to document troopers' performance of their duties in responding to emergencies and in their interactions with members of the public, *not merely or primarily to document, assemble or*

report on evidence of a crime or possible crime." 119 A.3d at 1108 (emphasis added). Thus, to withhold a video under an investigative exemption, the video must exist "merely or primarily" for investigative purposes. Here, there is no evidence that the video exists for reasons other than to document the behavior of students and others aboard school buses. In other words, the requested video does not exist "merely or primarily" for investigative purposes. Accordingly, the District has failed to meet its burden of proof that the requested video relates to a noncriminal investigation.[3] 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the District is required to disclose the requested video within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Dauphin 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. 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.[4] This Final Determination shall be placed on the OOR website: http://openrecords.pa.gov.

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[3] Additionally, while Section 708(b)(16) of the RTKL references videos as a type of record that may relate to a criminal investigation, Section 708(b)(17) of the RTKL contains no reference to videos. *Cf.* 65 P.S. § 67.708(b)(16)(ii) *with* 65 P.S. § 67.708(b)(17)(ii).

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

FINAL DETERMINATION ISSUED AND MAILED: May 19, 2016

/s/ Charles Rees Brown_____
CHARLES REES BROWN
CHIEF COUNSEL

Sent via e-mail to:

Valerie Hawkins
Tricia Lontz, Esq.