

CENTRAL DAUPHIN SCHOOL DISTRICT,

Petitioner

v.

VALERIE HAWKINS, FOX 43 NEWS, and the COMMONWEALTH OF PENNSYLVANIA OFFICE OF OPEN RECORDS,

Respondents

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

NO. 2016 CV 4401 MP

CIVIL ACTION – LAW

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MEMORANDUM OPINION

Presently before this Court is the appeal of Central Dauphin School District (hereinafter "Plaintiff" or "the District") from a final determination of the Office of Open Records (hereinafter "OOR") under the Right-to-Know Law, 65 P.S. §§ 67.101, et seq. ("RTKL").

FACTUAL AND PROCEDURAL BACKGROUND

The parties submitted the following stipulations in regard to the factual and procedural background of this case:

- 1. On February 23, 2016, Requester Valerie Hawkins (hereinafter "Requester" or "Respondent") submitted a RTKL request to the District seeking the following: "FOX 43 News is requesting a copy of the video that was captured by a school bus camera system that occurred on February 16, 2016."
2. The video recording at issue is a video recording that was captured on a District school bus through its video recording system on February 16, 2016.
3. In response to the RTKL request for the school bus video recording, the District's Open Records Officer invoked the District's right to an additional 30-day period to respond to the Request on March 1, 2016, and then issued a timely denial of the request on March 24, 2016.
4. Requester appealed the District's denial to the OOR on March 24, 2016.
5. On March 25, 2016, the OOR issued an Official Notice of the Requester's appeal and invited both parties to supplement the record.

6. Only the District supplemented the record by submitting a letter brief and supporting affidavit of the District's Open Records Officer in support of its denial.
7. The OOR issued a Final Determination granting the Requester's appeal on May 19, 2016, at OOR docket number AP 2016-0583.

In its denial, the District states that the school bus video contains personally identifiable information directly related to a student or students, which is considered an education record that is maintained by the District and is protected from release by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 34 CFR Part 99. Likewise, the District stated that the school bus video is also exempt from disclosure pursuant to 65 P.S. § 67.708(b)(1)(i) (a record, the disclosure of which would result in the loss of Federal or State funds by an agency or the Commonwealth) because a violation of FERPA would result in the loss of Federal funds to the District. In addition, the District states that the school bus video is exempt from disclosure pursuant to 65 P.S. § 67.708(b)(17)(ii) – investigative materials, notes, correspondence and reports relating to a noncriminal investigation. There was no explanation as to why the District believes the video is exempt as a noncriminal investigation. See Certification of Record, Exhibit 1, August 30, 2016.

Requester appealed the denial to the OOR. Neither party requested a hearing. The OOR granted Requester's appeal and issued a Final Determination on May 19, 2016, setting forth its reason for the decision. Specifically, the OOR determined that (1) the school bus video is not an education record and (2) the school bus video does not relate to a noncriminal investigation. In determining that the school bus video is not an education record, the OOR relied upon Owasso Indep. Sch. Dist. No. I-011 v. Falvo, a

United States Supreme Court case which 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). The OOR lists a Sixth (6th) Circuit, as well as a number of district court cases, that have similar holdings as Owasso. Accordingly, it is the OOR’s position that the case law clearly indicates that only those records relating to student academics are “education records” protected by FERPA, and the mere fact that a record involves a student does not automatically render a record an “education record”. Applying the law to the facts of this case, the OOR determined that the school bus video is not part of a student’s permanent academic file. Therefore, the school bus video is not protected by FERPA, and disclosure would not result in the loss of federal funding.

The OOR also determined that the school bus video does not relate to a noncriminal investigation. They note that 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.” Fox43 News v. Central Dauphin School District, OOR Dkt. AP 2016-0583 at p. 5. Further, the OOR notes that the District failed to cite any legislatively-granted fact-finding authority to conduct a noncriminal investigation. Alternatively, the OOR determined that even if the District’s “investigation” is considered a noncriminal investigation for purposes of 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.” Fox43 News v. Central Dauphin School District, OOR Dkt. AP 2016-0583

at p. 7. The OOR noted that there was no evidence that the existence of the video is primarily for investigative purposes.

On June 9, 2016, the District appealed the Final Determination of the OOR pursuant to 65 P.S. § 67.1302. Respondent filed an Answer on July 14, 2016. On July 19, 2016, PA Media Group filed a Petition to Intervene, which was subsequently denied on August 25, 2016. The OOR filed a Certification of Record on August 30, 2016. A status conference was conducted on December 20, 2016, wherein it was determined that an evidentiary hearing would be necessary for the Court to make a decision.

EVIDENTIARY HEARING

An evidentiary hearing was held on March 30, 2017, before this Court. We heard testimony from Karen McConnell, the District's Assistant Superintendent for Finance and Administrative Operations, as well as the District's Office of Open Records Officer, regarding how the school bus video recording system works and how videos may be maintained. No other testimony was offered.

In her capacity as Assistant Superintendent for Finance and Administrative Operations, Ms. McConnell is responsible for overseeing the District's transportation function, i.e. the school buses. (Notes of Testimony, Evidentiary Hearing 3/30/17 (hereinafter "N.T.") at 6-7). Ms. McConnell stated that she was personally involved in the investigation into staff and student discipline as a result of the conduct that was captured on the school bus recording at issue. (N.T. at 10).

Each District school bus is equipped with two cameras. (N.T. at 7). The District does not own the school bus, but it does own the video recording system. (N.T. at 20). One camera is mounted over the driver's head and shows the front door of the school

bus, as well as the area outside the front door. (Id.) This camera captures the students' backs as they walk toward their seat, and their faces while sitting in their seats. (Id.) The other camera is mounted in the front of the bus and shows the length of the interior of the bus from front to rear. (Id.) The cameras are high resolution and capture individuals that get on and off of the bus. (Id.) However, the cameras are not focused on any specific individual on the bus, and the driver does not have the ability to adjust the camera. (N.T. at 29, 47). The cameras typically begin recording when the bus engine is turned on and continue to record until twenty (20) minutes after the bus engine is turned off. (N.T. at 28). They are programmed to record over already recorded content every ten (10) to fourteen (14) days. (N.T. at 7-8).

Video recordings are only extracted into a permanent form when there is a particular reason for the District to pull and download a recording. (Id.) The video recordings may be created for several purposes – student discipline, reviewing staff members' performance, and to monitor safety issues. (N.T. at 9). The typical process for obtaining a school bus video recording is to contact the Director of Transportation and to indicate that there was an issue on a bus. (N.T. at 8). Typically, principals are the individuals making the request. (Id.) The Director of Transportation would then go to that particular bus, remove the drive, and review the video footage to capture that section which was requested. (Id.) Once the section of the video is captured, it is maintained by the Director of Transportation. (N.T. at 13). Although the District has a police force, the police do not maintain possession of the recordings. (Id.) Further, they must follow the same process as outlined above in order to obtain a school bus video recording. (Id.)

The school bus video at issue in this case was recorded on February 16, 2016. The District received a number of concerns and complaints from parents via electronic mail regarding the incident. (N.T. at 10, 30). Thereafter, the District began an investigation to determine if there should be student or staff discipline. (N.T. at 12). As a result of the investigation, at least one (1) student and one (1) staff member were disciplined. (N.T. at 12, 42). The school bus was located in front of Central Dauphin High School following a Central Dauphin East High School girls' basketball game in the public area of the school parking lot. (N.T. at 17-19). The school bus video includes footage of a confrontation between Erica Rawls, the wife of the Central Dauphin East High School principal and a parent of a student, and a member of CD East's girls' basketball team. (N.T. at 50). The incident on the video actually began outside the school bus in a public area and continued onto the bus. (N.T. at 21, 24). The relevant portion of the school bus video is approximately twenty (20) minutes total – approximately ten (10) to twelve (12) minutes on each camera. (N.T. at 47).

Although Ms. McConnell testified that the Director of Transportation maintains any recordings in permanent form, the school bus video at issue is being maintained solely by Ms. McConnell in a fireproof safe in her office. (N.T. at 13). Ms. McConnell provided no explanation for the deviation from the standard procedure in this particular instance except to say that she is maintaining the school bus video as the open records officer. (N.T. at 38). The school bus video is not being kept in any student file. (N.T. at 39). Although Ms. McConnell testified on direct examination that she is responsible for student and staff discipline (N.T. at 7), she admitted on cross-examination that she is "very rarely" involved in a case of student discipline. (N.T. at 40). Further, she is not charged with

maintaining student files, and does not know whether academic and discipline files are kept together. (N.T. at 42). She was also not involved in deciding disciplinary issues in this particular case. (N.T. at 41).

As a result of this incident, Mrs. Rawls was charged with summary harassment. A portion of the subject video recording was played during Mrs. Rawls' trial before Magisterial District Justice ("MDJ") Dominic Polinio¹. The names of the student and adult involved in the incident are known to the public, and they both testified during the trial. The charge was subsequently dismissed by MDJ Polinio.²

DISCUSSION

Pennsylvania's RTKL provides that records possessed by agencies are presumed to be public records, but this "presumption shall not apply if: (1) the record is exempt under section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree." 65 P.S. § 67.305(a). The relevant portions of Section 708 states that "[a] record, the disclosure of which: (i) would result in the loss of Federal or State funds by an agency or the Commonwealth" and a record relating to a noncriminal investigation are exempt from disclosure. 65 P.S. § 67.708(b)(1), (17). The District has the burden of proving by a preponderance of the evidence that the record is exempt from disclosure, noting exemptions from disclosure are to be narrowly construed. Pa. State Police v. Grove, 2017 WL 2645401 at 4 (2017); *citing* Pa. State Police v. McGill, 83 A.3d 476, 479

¹ The case was originally filed in MDJ Lowell Witmer's office, but was subsequently transferred. See MJ-12305-NT-54-2016 and MJ-12304-NT-140-2016.

² See Matt Miller, *Judge Dismisses Harassment Charge Against CD East Principal's Wife*, PennLive (May 25, 2016 5:19 PM, updated May 25, 2016, 5:28 PM), http://www.pennlive.com/news/2016/05/judge_dismisses_harassment_cha.html.

(Pa.Comm. Ct. 2014) (*en banc*). Conclusory statements are not sufficient to justify an exemption. West Chester Univ. of Pa. v. Schackner, 124 A.3d 382, 393 (Pa.Comm. Ct. 2015). “The evidence must be specific enough to permit [the court] to ascertain how disclosure of the [video] would reflect that the records sought fall within the proffered exemptions.” Id.

The District maintains that the school bus video is exempt from disclosure because it is considered an education record under FERPA, therefore is not a public record under the RTKL. Additionally, the District maintains that the school bus video is exempt because disclosure of the video would result in a loss of federal funding (FERPA). Alternatively, the District asserts that the school bus video is a record relating to a noncriminal investigation and is therefore exempt from disclosure pursuant to Section 708(b)(17).

FERPA

Under FERPA, “education records” are those records, files, documents, and other materials which “(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A). However, “FERPA does not protect information which might appear in school records but would also be known by members of the school community through conversation and personal contact.” Daniel S. v. Bd. of Educ. of York Cmty. High Sch., 152 F.Supp.2d 949, 954 (N.D.I.L. 2001) *citing* Frasca v. Andrews, 463 F.Supp. 1043, 1050 (E.D.N.Y. 1979) (internal citations omitted).

To qualify as an education record, the video recording must first contain information “directly related” to a student. The District asserts that the school bus video is directly related to a student and cites Bryner v. Canyos Sch. Dist., 351 P.3d 853 (Ct.

App. Utah 2015) for support. "Records ... directly relate to a student if the matters addressed in the ... records pertain to actions committed or allegedly committed by or against the student and contain information identifying the student." Bryner, 351 P.3d at 858 *citing* United States v. Miami Univ., 91 F.Supp.2d 1132, 1149 (S.D. Ohio 2000) (internal citations omitted). Despite finding that the record in Bryner was directly related to a student, the court permitted a redacted copy of the video to be disclosed.

The District also cites to Medley v. Bd. of Educ. Of Shelby Cnty., 168 S.W.3d 398, 404 (Ky. Ct. App. 2005) and Rhea v. Dist. Bd. of Trustees of Santa Fe Coll., 109 So.3d 851, 858 (Fla. Dist. Ct. App. 2013). In Medley, a teacher requested a copy of a video recording from a camera in her classroom. The camera was placed in her classroom after students complained of inappropriate treatment. The Medley court found that although the video recordings were education records, the request was not being made by a member of the public. Rather, the request was made by a teacher and as such, the video recordings would not be exempt from disclosure so long as a legitimate education interest is established. Since the lower court did not make a determination as to whether the teacher requested the video recordings for a legitimate education interest, the case was remanded.

In Rhea, a professor requested a copy of an e-mail written by a student regarding inappropriate classroom behavior on behalf of the professor. The professor was provided with a copy of the e-mail with the student's name redacted. However, the request for disclosure of the student's name was denied. The Rhea court held that while it is clear that employee records are not included in the definition of an education record, those employee records must relate exclusively to the employee in his or her capacity as an

employee. Therefore, the content of the e-mail was considered a public record, but the name of the student who authored the e-mail was not.

In the instant case, Respondent is requesting a copy of the school bus video from February 16, 2016. Specifically, Respondent asserts that it is most interested in the actions of the adult portrayed in the school bus video, not necessarily the actions of the student. In both Rhea and Bryner, the court permitted an education record to be disclosed so long as the identifying information was redacted. Although Ms. McConnell testified that the District did not have the capability to blur out individual students (N.T. at 14), it is not impossible to do so. There are several video editing software and/or programs that would allow for portion of a video recording to be blurred, i.e. student faces and identifying information. Even if this Court were to find that the school bus video at issue is an education record, it is clear that it is permissible to disclose a redacted copy of the video.

Additionally, the case law cited above indicates that FERPA does not protect information that may be in a school record, but is known by members of the school community through conversation and personal contact. Here, the incident which is the subject of the video recording was covered by several news media outlets from the outset. Following an MDJ hearing on Mrs. Rawls' harassment charge, PennLive published a news article that includes the name of the adult, as well as the student involved in the incident.³ Further, it is hard for this Court to believe that the incident and the names of those individuals involved did not spread through the high school gossip channels.

³ See Matt Miller, *Judge Dismisses Harassment Charge Against CD East Principal's Wife*, PennLive (May 25, 2016 5:19 PM, updated May 25, 2016, 5:28 PM), http://www.pennlive.com/news/2016/05/judge_dismisses_harassment_cha.html.

Respondent cites Ellis v. Cleveland Mun. Sch. Dist., 309 F.Supp.2d 1019 (N.D. Ohio 2004) to support its contention that the school bus video is not an education record exempt from disclosure. In Ellis, the requester sought incident reports related to altercations between substitute teachers and students, including witness statements. Even though the records sought “clearly involve students as alleged victims and witnesses,” the court held that they “do not implicate FERPA because they do not contain information directly related to a student.” Ellis, 309 F.Supp.2d at 1023. The Court further noted that even if the records were considered education records, “FERPA is not a law which absolutely prohibits the disclosure of educational records; rather, it is a provision which imposes a financial penalty for the unauthorized disclosure of educational records.” Id.

The second part of the definition of an “education record” requires the record to be maintained by an educational agency or institution or by a person acting for such an agency or institution. “The word ‘maintain’ suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled.” Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 433 (2002). Other courts have made it clear 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 “education records” because the records were not part of the student’s permanent file); Pollack v. Regional Sch. Unit 75, 2015 WL 1947315 (D. Me. 2015) (holding that “educational records” are those records in a central record which

follow a student from grade to grade and school to school); S.A. v. Tulare Cnty. Office of Educ., 2009 WL 3296653 (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).

In the instant case, Ms. McConnell testified that the school bus video at issue is being kept in a fireproof box in her office. (N.T. at 13). There is no evidence that the school bus video is part of a student's permanent academic record. (N.T. at 39). Further, the school bus video recording system is not generally kept in permanent form and is overwritten approximately every two (2) weeks. (N.T. at 7-8). If a particular video recording is converted to a permanent form, it is generally maintained by the Department of Transportation – not in any student file. (N.T. at 13). Even if this Court were to agree that video recordings in permanent form are maintained in a central location, the video recording at issue here is not. For whatever reason, it is separately maintained by Ms. McConnell in her capacity of open records officer.

Accordingly, this Court finds that the school bus video recording is not an education record protected from disclosure by FERPA. Therefore, the school bus video recording is a public record pursuant to the RTKL. The Court notes, however, that in order to be disclosed, the student's faces and identifying information must be blurred out or redacted in accordance with 65 P.S. § 67.706.

Noncriminal Investigation

Alternatively, the District contends that the school bus video is exempt from disclosure as it relates to a noncriminal investigation into the incident depicted on the video. Section 708(b)(17) of the RTKL exempts from disclosure:

A record of an agency relating to noncriminal investigations, including:

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- (iii) A record that includes the identity of a confidential source, including individuals subject to ... the Whistleblower Law.
- (iv) A record that includes information confidential by law.
- (v) Work papers underlying an audit.
- (vi) A record that, if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.
 - (B) Deprive a person of the right to an impartial adjudication.
 - (C) Constitute an unwarranted invasion of privacy.
 - (D) Hinder an agency's ability to secure an administrative or civil sanction.
 - (E) Endanger the life or physical safety of an individual.

65 P.S. § 67.708(17). The term 'noncriminal' is "intended to signal that the exemption is applicable to investigations other than those which are criminal in nature." Sherry v. Radnor Twp. Sch. Dist., 20A.3d 515, 522 (Pa. Commw. Ct. 2011) *citing* Pa. Dept. of Health v. Office of Open Records, 4 A.3d 803, 810-811 (Pa. Commw. Ct. 2010). The term 'investigation' means "a systematic or searching inquiry, a detailed examination, or an

official probe.” Id. For the exemption to be applicable, the investigation must be conducted as part of an agency’s official duties. Pa. Dep’t of Health, 4 A.3d at 814. Furthermore, “[a]n official probe only applies to noncriminal investigations conducted by an agency acting within its legislatively granted fact-finding and investigative powers.” Pa. Dep’t of Pub. Welf. v. Chawaga, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014).

The District asserts that the school bus video is part of a noncriminal investigation of student and staff conduct for safety and discipline after receiving reports of the incident. (N.T. at 12). The District does not state the date on which the reports were received, nor the date on which their investigation began. Further, as Respondent notes in their brief, the District fails to specify which provision of 65 P.S. § 67.708(b)(17) it believes applies to the school bus video at issue. The request is specifically seeking the raw video which captured the incident. It does not appear to request any of the complaints allegedly received by the District, any records into the investigation of the incident, the identity of a confidential source, and the school bus video itself would not reveal any progress in or result of an investigation conducted by the District. The only exception that could apply is that disclosure of the school bus video constitutes an unwarranted invasion of privacy. Even if that exception was applicable, it could easily be remedied by redacting any identifying information.

The District contends that but for their investigation, the school bus video at issue would not exist in permanent form as it would have been recorded over. This Court disagrees with that assertion. The RTKL request was made on February 23, 2016, seven (7) days after the incident on February 16, 2016. Based on the present request, this Court concludes that the District would have gone to the specific bus, pulled the video recording,

found the portion requested, and converted into a permanent form in order to process the RTKL request. Therefore, it is disingenuous for the District to argue that the school bus video would not exist but for their internal investigation.

Additionally, the District asserts that the school bus video is exempt because it was utilized during the course of their investigation. According to the testimony of Ms. McConnell, the District conducted a lengthy investigation that included reviewing the video, interviewing students and staff, and speaking with parents. (N.T. at 10-11). However, as noted above, Ms. McConnell first testified on direct examination that she is responsible for student and staff discipline. (N.T. at 7). Subsequently on cross-examination, Ms. McConnell testified that she is very rarely involved in student and staff discipline because she is on the finance and operations side of the District. (N.T. at 39-40). Although Ms. McConnell testified that she was personally involved with the investigation, based upon her inconsistent statements, this Court is unsure as to how or why an employee in the finance and operations side of the District would be involved in an investigation regarding staff and student conduct. Further, when specifically asked on cross-examination as to how many student discipline issues in the past year she had been involved in, Ms. McConnell responded "I can't think of any". (N.T. at 40). Therefore, this Court finds Ms. McConnell's testimony regarding the alleged investigation not credible.

Even if this Court determined that the District's investigation into the incident is a noncriminal investigation for RTKL purposes, the mere fact that the video is being used in the investigation, does not, in and of itself, mean that the video is being used in the investigation. Pa. State Police v. Grove, 2017 WL 2645401 (2017). In Grove, the

requester sought a copy of a dash-cam video recording of a motor vehicle accident. The Pennsylvania State Police (“PSP”) denied access because the video documented the results of a criminal investigation, and therefore, was exempt from disclosure. Id. The dash-cam videos were created when two troopers arrived on scene of the accident. Id. Neither video showed the accident as it occurred. Id. One of the videos contained video only and showed a trooper speaking to individuals involved in the accident, examining the vehicles, directing traffic, and relaying information to his partner. Id. The other video contained audio and video recordings of his interviews with the two drivers, as well as bystanders. Id. The Supreme Court of Pennsylvania held that motor vehicle recordings (“MVR”) do not always contain criminal investigative materials and are not automatically exempt. Id. The determination of whether a particular MVR contains criminal investigative material must be on a case-by-case basis. Id. The Court further held that the video aspects of both MVR’s were not exempt from release because the PSP failed to explain how the video portion captured any criminal investigation. Id.

Similarly, the school bus video at issue does not contain any investigative materials. It merely shows an altercation that began outside of the bus, moved onto the bus, and other individuals getting on and off of the bus. The District has failed to explain how the school bus video, once redacted for identifying information, contains noncriminal investigative materials.

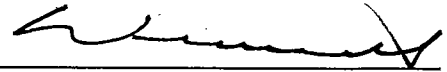
CONCLUSION

Based upon the foregoing, this Court finds that the District has failed to meet its burden in proving by a preponderance of the evidence that the school bus video is exempt

from disclosure under FERPA, or any of the enumerated exceptions outlined in Section 708 of the RTKL.

Accordingly, the District's Petition to Vacate the Final Determination of the OOR is **DENIED.**

BY THE COURT:



William T. Tully, J.

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