pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JESSICA CALEFATI,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2019-1288**
	:	
SCHOOL DISTRICT OF PHILADELPHIA,	:	
Respondent	:	

INTRODUCTION

Jessica Calefati ("Requester"), a reporter with the Philadelphia Inquirer, submitted a request ("Request") to the School District of Philadelphia ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking attendance period count reports and ADA/ADM detail reports for several years. The District denied the Request in part, arguing that it would be required to create a record. 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 June 13, 2019, the Request was filed, seeking:

> Attendance Period Count Reports for all district schools for the following school years: 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019. Please provide a separate report for each term. Each report should be grouped by period and include all grades. Each report should include all student[s] with student names redacted. Each report should include the statuses of absent,

> tardy and early release and include all excuse codes. Each report should include school name and school code. If possible, please provide the aggregated data contained in these reports in CSV format.
>
> ADA and ADM Detail Reports[1] for all district schools for the following school years: 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019. Please redact student names from the "detail" portion of each report. Each report should include school name and school code. If possible, please provide the aggregated data contained in these reports in CSV format.

On July 23, 2019, after taking a thirty-day extension, 65 P.S. § 67.902(b), the District denied the Request, arguing that it did not possess any records because it began use of the Infinite Campus program in February of 2017 and cannot generate reports from before that point, and that running the Infinite Campus program to generate the reports requested would entail the creation of a record.

On August 1, 2019, the Requester appealed to the OOR, arguing that the District is required to provide the information sought in whatever manner in which it exists. 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 August 16, 2019, the District submitted a position statement, arguing that the District does not possess reports directly responsive to the Request, and that to create them it would have to design a search pulling the data from multiple collections systems. The District also argued that it could not generate the records from Infinite Campus, as sought, because those records would be protected by the Family Educational Rights and Privacy Act ("FERPA"). 20 U.S.C. § 1232g. The position statement was verified by a statement made by Melanie Harris, the District's Chief Information Officer.

On August 17, 2019 the Requester submitted a position statement, arguing that the act of drawing information from multiple databases does not constitute the creation of a record under

[1] Average Daily Membership and Average Daily Attendance, statistical measures of student attendance rates.

Section 705 of the RTKL. 65 P.S. § 67.705. The Requester further argued that the information sought is available from the Infinite Campus system as part of pre-built reports and could be easily de-identified in Microsoft Excel. Finally, the Requester argued that FERPA does not apply to the responsive records because the students could be easily de-identified.

On August 26, 2019, the District filed a response, arguing that the ease of redaction was irrelevant because redaction is not required where a record is exempt under FERPA, and that the Requester had not rebutted the District's verified statements regarding the function of Infinite Campus.[2]

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" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony,

[2] On August 26, 2019, the Requester submitted a statement that she disagrees with the District's position. The same day, the District asked the OOR to strike this statement. Because the statement makes no new argument and contains no evidentiary statements, the OOR does not need to consider it separately.

evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id*. The decision to hold a hearing is discretionary and non-appealable. *Id*.; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. 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 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)(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)). Likewise, "[t]he 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).

1. The responsive record is comprised of information in the Infinite Campus database

The Request seeks information from various pre-canned reports from the Infinite Campus database, which it references by the name of each report. Furthermore, several times over the course of the appeal the Requester has stated that her Request concerns only the information within the Infinite Campus database. Therefore, the OOR interprets the Request as seeking only data from that system.[3]

2. The District has not demonstrated that no responsive records exist

On appeal, the District argues variously that the records sought do not exist for all years listed in the Request, that the District may not use the Infinite Campus system to track all of the information sought by the Request, and that the Infinite Campus reports specifically requested "are not available to developers and users of Infinite Campus at the School District." Each of these arguments is supported by the verification of Melanie Harris, the District's Chief Information Officer, who attests that each factual statement is true.

Under the RTKL, a verification 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 has acted in bad faith or that responsive records do exist, "the averments in [the verification] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)). Here, however, the District's evidentiary statement

[3] The District argues that this information, by itself, will be inaccurate because the District uses multiple systems in tandem to track attendance. However, the fact that the data requested may be inaccurate is not a valid reason for denial under the RTKL. *See Denvir v. School District of Phila.*, OOR Dkt. AP 2014-0726, 2014 PA O.O.R.D. LEXIS 721. Nothing prevents an agency from providing additional explanation and context, or additional records, which it believes will help a requester better understand records provided in response to a RTKL request.

does not contain any specific facts to show how the District determined that none of the requested report information can be retrieved from Infinite Campus, and therefore is conclusory. Under the RTKL, a "generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (en banc); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL") (citations omitted); *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d at 659 ("Affidavits that are conclusory or merely parrot the exemption do not suffice") (citing *Scolforo*); *West 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") (citing *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)). Therefore, the District has not demonstrated that no responsive records exist.

3. The requested information is not exempt under FERPA

The District argues that the responsive records are exempt under FERPA because they consist of lists of student data, associated with individual student identifiers, and are maintained in a centralized database system. 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). Regulations implementing FERPA define "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." 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 pertaining to a student, a review of case law interpreting FERPA reveals that not all of these records constitute "education records" as defined by FERPA. Just because a record involves a student does not automatically implicate the confidentiality provisions of FERPA. *See Bockis v. Agora Cyber Charter Sch.*, OOR Dkt. AP 2016-0845, 2016 PA O.O.R.D. LEXIS 848; *Newhouse v. Manheim Twp. Sch. Dist.*, OOR Dkt. AP 2016-0541, 2016 PA O.O.R.D. LEXIS 759.

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. Ca. 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).

In *West Chester Univ. of Pa. v. Rodriguez*, the Commonwealth Court explained that to determine that a record is an education record under FERPA, the OOR must first find that a record "directly relates to a student other than [the Requester]" and that it is maintained in some way that "preserves [the record] and tracks requests for access." 2019 Pa. Commw. LEXIS 690 at 9-10 (Pa. Commw. Ct. 2019). The character of the record is irrelevant so long as it is directly, rather than tangentially, related to a student. *Easton Area Sch. Dist. v. Miller*, 191 A.3d 75 (Pa. Commw. Ct. 2018) ("Congress made no content-based judgments with regard to its 'education records' definition.") (on appeal to the Pa. Supreme Court); *Cent. Dauphin Sch. Dist. v. Hawkins*, 199 A.3d 1005, 1013-14 (Pa. Commw. Ct. 2018) (school bus video did not 'directly relate' to a student caught on film because it existed for the purpose of staff discipline).

Although the information is not stored in a central student file, the records exist within the Infinite Campus database system, which logs information for an extended period of time and serves as the District's official database. Therefore, the records are stored within a central database under the meaning of FERPA.

The Department argues that the records sought by the Requester relate to individual students because the attendance information is tracked according to individual students. On appeal, the Department cites to *Hacke v. Aspira Bilingual Cyber Charter School*, in which the OOR found that a request for student log-in records and metrics used to measure attendance at the Charter School were necessarily related to individual students. OOR Dkt. AP 2017-1190, 2017 PA O.O.R.D. LEXIS 1171. In that case, however, the request specifically sought protected student data, in the form of the student login logs which the agency used to track attendance. *Id.*

Here, the Request seeks the information contained within four reports, except that it specifically does *not* seek any identifying student information. Though the District correctly argues that it is not required to create and then redact a report containing identifying student information, it has not provided evidence that it is incapable of pulling only the de-identified information from Infinite Campus in the first instance. *See Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012) ("[D]rawing information from a database does not constitute creating a record under the Right-to-Know Law"); *see also Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 *21 (Pa. Commw. Ct. 2012) (providing an example method of conducting a database search to an agency is not an excuse for the agency to avoid conducting other types of database search).[4] Therefore, because the Request seeks only information which does not identify any individual student and the District has not demonstrated that this information cannot be generated from the database without identifying student information, FERPA does not apply to the requested record.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the District is required to provide responsive records as they exist within Infinite Campus within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Philadelphia 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. However, as the

[4] The District also argues that it does not have the discretion to release records exempt under FERPA. While this is true, nothing in FERPA or the RTKL prevents the District from releasing de-identified records. *See "Data De-identification: An Overview of Basic Terms,"* United States Department of Education, https://studentprivacy.ed.gov/resources/data-de-identification-overview-basic-terms (last accessed 8/29/19) ("De-identified data may be shared without the consent required by FERPA with any party for any purpose…"). Further, while the RTKL does not compel the creation of a record, the OOR's holding here is that providing the requested information from the Infinite Campus database does not constitute the creation of a record.

quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.[5] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: September 6, 2019

/s/ Jordan Davis

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APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Jessica Calefati (via email only);
Kimberly Dutch, Esq. (via email only)

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