pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
KATHARINE MAYER,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2019-2019**
	:	
TREDYFFRIN-EASTTOWN SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Katharine Mayer ("Requester") submitted a request ("Request") to the Tredyffrin-Easttown School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking benchmark reading data. The District denied the Request, arguing the records are protected from disclosure by the Family Educational Rights and Privacy Act ("FERPA"), and the constitutional right to privacy. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On September 16, 2019, the Request was filed, seeking

> [A]ll elementary school benchmark reading data for the 2018-2019 school year – including fall, winter and spring benchmarks for kindergarten through 4th grades by individual student and school. For confidentiality purposes, please redact names. The benchmarks include those on the chart below and the ERB's.

The chart identified the following benchmark screeners: KIDS, PSF, NWF-CLS, NWF-WWR, DORF, MAZE, and 4Sight. On October 23, 2019, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the District denied the Request, arguing that the records constitute personally identifiable information contained in education records and are protected by FERPA, *see* 20 U.S.C. § 1232g., and the information is protected by the constitutional right to privacy.

On October 28, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.[1] Specifically, she argues that the District can redact student names to de-identify the records and thus no longer make them subject to FERPA. 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). After questions by the Requester and District, and upon review of the file as it stood, the OOR then requested that the District not notify any potential third parties unless the OOR directed notification following the closure of the record.

On November 8, 2019, the Requester provided sample benchmark data to the OOR consisting of undated conference notes; Reading Benchmark Fall Score Reports for Fall 2018; undated Reading Diagnostic/Prescriptive Reports; spreadsheets; Kindergarten Screening Assessment Results from 2014 and 2018-2019; ERB reports from 2017; Intelligence Test records; and SFAF Member Center 2.0 Report Center Testing Reports from 2018.

On November 19, 2019, the District submitted a position statement reiterating its grounds for denial. The District claims that it does not maintain a database containing all requested benchmark reading data. Further, the District claims the benchmark data is exempt from access under FERPA and the constitutional right to privacy. In support of its position, the District

[1] The Requester granted the OOR an extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).").

submitted the statements made under penalty of perjury of Chris Groppe, the Director of Individualized Student Services for the District; Benjamin Kemp, the Supervisor of Information Services for the District; and Dr. Wendy Towle, the Director of Curriculum, Instruction, Staff Development and Planning for the District.

On December 12, 2019, the Requester submitted additional evidence in support of her appeal. She argues that ERB and 4Sight data is available through their proprietary systems and the other benchmarks are available through an inhouse system. She also provides evidence that the District contracts with Performance Plus, which can track benchmark assessments.

On December 24, 2019, the District submitted the supplemental affidavit of Dr. Towle, responding to the Requester's additional evidence. Dr. Towle attests that the District administers DORF, NWF-CLS, WWR, MAZE and 4Sight benchmark assessments. She explains that ERBs "are not and have never been a benchmark assessment." Further, she attests that the exhibits provided by the Requester on December 12, 2019 are from an inhouse system (utilized to track assessment and progress for reading support students) as well as the spreadsheets created by the District and are not from any database. She adds that the District only uses Performance Plus for PSSA results.

On January 8, 2020, the Requester provided two affidavits in support of her appeal. On January 30, 2020, in response to the OOR's request for more information, the District provided a supplementary affidavit from Mr. Kemp explaining how the District maintains the records at issue.

On January 31, 2020, the Requester submitted an additional affidavit in support of her argument; however, as the submission was made after the record had closed and provides no new relevant information, it was not considered for purposes of this appeal. *See* 65 P.S. § 67.1102(b)(3) ("In the absence of a regulation, policy or procedure governing appeals under this chapter, the

appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

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, 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 *in camera* review, however, the OOR has the necessary 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 the 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).

The District argues that it does not maintain a database containing all benchmark data for the 2018-2019 school year. The District manually prepared two spreadsheets for each grade level, listing students receiving reading support and students not receiving reading support, along with each student's benchmark testing scores. The grade-level spreadsheets are organized by school, by teacher/class within each grade level and alphabetically within each teacher/class. The District also sent several letters to parents/guardians of each child providing them with the benchmark data. The letters differed depending on whether the child received reading support.

On appeal, the Requester indicated she would be willing to accept aggregated data in the form of the District-created Excel spreadsheets with the names and schools redacted; however, the District argues that aggregated data is not individual student data, but summary statistical data for certain groups and subgroups. The RTKL defines "aggregated data" as "[a] tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories." 65 P.S. § 67.102. Because the Requester's proposed aggregated data would still provide individual student data, even if the names and schools were redacted, the District argues that it would be possible for the Requester to identify individual students based on her prior knowledge and release of the data as stored in the spreadsheets would violate FERPA.

The Requester provided copies of several documents purporting to show a database housing the requested information. However, per Dr. Towle's affidavit, this "inhouse system" tracks only students receiving reading support. 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 has acted in bad faith or that the records exist, "the averments in [the affidavit] 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)). Because the inhouse system only tracks a specific subset of students, it is not responsive to the Request which seeks the information for all students.

1. The District has not demonstrated that the records do not exist

The District initially argues that no responsive record exists, as it does not maintain a database containing all elementary school benchmark reading data and that because of the way the District maintains the information and the nature of the Requester's familiarity with the subjects of the data, the District is unable to de-identify the data sufficiently. The District explains that such de-identification would require the creation of a new record. While Section 705 of the RTKL states that "an agency shall not be required to create a record which does not currently exist...," 65 P.S. § 67.705, Section 706 of the RTKL is clear that "[t]he agency may not deny access to the record if the information which is not subject to access is able to be redacted." 65 P.S. § 67.706. *See Ciavaglia v. New Hope Borough*, OOR Dkt. AP 2019-0707, 2019 PA O.O.R.D. LEXIS 616. Here, the District argues that it cannot sufficiently redact the exempt information within the spreadsheets based on the manner in which they organize and maintain them. However, the District acknowledges that the data exists within spreadsheets and letters to parents created by the District's Supervisor of Information Services. Therefore, the issue is whether the existing spreadsheets and letters are confidential under FERPA.

2. The District has demonstrated that the records are confidential under FERPA

The District asserts that the requested records are education records maintained by the District that contain information directly related to students and, therefore, are confidential under FERPA and not a public record under Section 102 of the RTKL, 65 P.S. § 67.102.

FERPA states that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization," except as

set forth in FERPA. 20 U.S.C. § 1232g(b)(1); *see also* 65 P.S. § 67.708(b)(1)(i) (exempting a record that "would result in the loss of Federal or State funds by an agency..."). 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. In other words, the fact that a record involves a student does not automatically invoke the confidentiality provisions of FERPA. More specifically, an agency must prove that the requested records are directly related to a student. *W. Chester Univ. of Pa. v. Rodriguez*, 2019 Pa. Commw. LEXIS 690, at *6 (Pa. Commw. Ct. 2019); *see also Easton Area Sch. Dist. v. Miller*, 191 A.3d 75, 81-82 (Pa. Commw. Ct. 2018) ("Congress made no content-based judgments with regard to its 'education records' definition") (quoting *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1022 (N.D. Ohio 2004))), appeal granted, 201 A.3d 721 (Pa. 2019).

The question of whether or not a record is an "education record" under FERPA is a case-by-case, fact-based analysis. *See Easton Area Sch. Dist. v. Miller*, 191 A.3d 75 (Pa. Commw. Ct. 2018) (education records can be non-academic but must relate directly to a student); *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002) (individual student papers are not education records because they are not maintained by the official records custodian); *Ellis v. Cleveland Municipal Sch. Dist.*, 309 F.Supp.2d 1019 (N.D. Ohio 2004) (holding that records relating to altercations between students and substitute teachers were directly related to teachers and only tangentially related to students). "Personally identifiable information" is defined to include:

> a) The student's name;
>
> …
>
> g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3. While the RTKL does not require an evaluation of the circumstances surrounding the request for records, FERPA does. *See* 34 C.F.R. § 99.3(g).

In support of the District's position, Mr. Kemp attests that he manually created two spreadsheets for each elementary grade level containing individual student reading benchmark data. They were not generated through database queries and each spreadsheet relates to a specific grade level, is organized by school, teacher and student name alphabetically. He utilized the spreadsheet and mail merge to generate three letters sent to parents/guardians throughout the school year based on whether or not their child received reading support. The letters sent to parents/guardians contain the child's benchmark scores. The records at issue clearly contain information directly related to a student because they contain individual student scores.

Mr. Kemp further attests that the individual reading scores are kept within individual student records, maintained centrally with respect to each student. The reading specialists for each school pulled student scores from individual student records and provided Mr. Kemp with school-specific spreadsheets. He utilized those spreadsheets to generate the responsive spreadsheets for each grade level. He accessed individual student files to obtain any missing information. After the mail merge, the letters were delivered to parents/guardians with each child's report card. The spreadsheets that Mr. Kemp created have been maintained by him and by the reading specialists only. Electronic copies of the letters are maintained securely on the District's servers and searchable by student.

Mr. Groppe attests that the Requester and other members of Everyone Reads T/E have publicly solicited parents of elementary school children to meet with them and discuss their child's reading concerns. Further, the Requester and other members of the group have attended multiple Individualized Education Plan ("IEP") meetings at District elementary schools as advocates with the permission of the child's parent/guardian.

Dr. Towle attests to the number of students per grade level at each elementary school. Each school has roughly 500 students total.

The Requester, in turn, attests that she is a co-founder of Everyone Reads T/E and a co-leader of a special education parent group within the District called Better Understanding of Individuals with Learning Disabilities. She affirms that she has attended IEP meetings within the District and is privy to data regarding 40 students in the District across Kindergarten through 10th grade, as well as her own children's data.

Here, the Request seeks the reading benchmark data broken down by school and individual student. The District has demonstrated that the data requested exists in two Excel spreadsheets for each grade level, broken down by school, teacher, and student in alphabetical order as well as in letters sent to parents/guardians. Each grade level has a spreadsheet for students receiving reading support and one for students not receiving reading support. Mr. Kemp attests that in at least one case, the spreadsheet contains only four students.

Based upon a review of the evidence, the District has demonstrated a reasonable belief that even if student names were redacted, the Requester could identify the student to whom each dataset belongs based on the manner in which the data is retained and organized. The Requester's familiarity with some student data would allow identification of that student and therefore, the

other students within that class on that spreadsheet. As such, the District has demonstrated that the records cannot be sufficiently de-identified such that they can be released.[2]

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 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. 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.[3] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: February 5, 2020

/s/ Erin Burlew

APPEALS OFFICER
ERIN BURLEW, ESQ.

Sent to: Katharine Mayer (via email only);
Justin O'Donoghue, Esq. (via email only);
Art McDonnell (via email only)

[2] Because the District has demonstrated that the requested records are protected from disclosure by FERPA, the OOR need not reach the District's alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927

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