

FACTUAL BACKGROUND

On January 26, 2022, the Request was filed, seeking “[a]ll emails ‘to’ and ‘from’ Elaine Ruppert [and Robb Colyer] during the period 1-1-2021 to 1-25-2022” containing one or more of three words related to the Requester’s child’s name.¹

On March 4, 2022, after invoking its thirty-day extension, 65 P.S. § 67.902(b)(2), the School District partially denied the Request, arguing that the records contain personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), the records contain individually identifiable health information, 65 P.S. § 67.708(b)(5), the records relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17), the records contain the name, home address or date of birth of a child aged 17 or younger, 65 P.S. § 67.708(b)(30), the records contain student educational records protected from disclosure under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and that information in the records is protected by the Health Insurance Portability and Accountability Act (“HIPAA”).

On March 22, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² Specifically, the Requester argues that the “responses to this [R]equest from the [S]chool [D]istrict are woefully inadequate (i.e. under 20).” The OOR invited both parties to supplement the record and directed the School District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

¹ The appeal of the first Request was docketed at OOR Dkt. AP 2022-0708 (emails involving Elaine Ruppert), and the second was docketed at OOR Dkt. AP 2022-0709 (emails involving Robb Colyer). Because they involve the same parties and similar issues, the appeals are hereby consolidated at OOR Dkt. AP 2022-0708. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”). Also, the School District was permitted on appeal to make one submission covering both docket numbers and any responses by the Requester included both docket numbers.

² The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

On March 31, 2022, the School District submitted a position statement reiterating its grounds for withholding the records responsive to the Request. In support of its position, the School District submitted the attestations of Robert Catalano, the Director of Technology for the School District, and Robert Rizzo, Superintendent of Schools for the School District.

On April 5, 2022, the Requester submitted two separate position statements (emails) arguing that the School District improperly redacted the sender's name from the redacted records. On April 5, 2022, the OOR asked for the responsive records that had been provided to the Requester. Additionally, the OOR provided the School District with the opportunity to respond to Requester's challenge to the redaction of the sender's name.

On April 18, 2022, the School District submitted a supplemental position statement arguing that the sender's names are parents and if the parents' names are revealed, it would also reveal the identity of minor children, along with the redacted records sent to the Requester. The School District also provided a Redaction Log. *See* Attachment 2 attached to School District's supplemental position statement.

On April 18, 2022, the OOR asked the Requester to succinctly clarify what issues remain outstanding for the OOR to adjudicate on appeal. In response, on April 18, 2022, the Requester identified the following two issues that remain outstanding for the OOR to adjudicate: 1) the completeness of the emails, and 2) the proper or improper redaction of the sender's name.

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 LLC 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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The School 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. 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. 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)).

1. The School District conducted a good faith search

The Requester argues that the School District's responses to the Request are "woefully inadequate" and further challenges the completeness of the emails. Specifically, the Requester alleges that the School District's production of documents lacked emails that the Requester and his wife sent and received.

In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort," in *Uniontown Newspapers, Inc.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020) ; *see also* *Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

In support of its position that it conducted a good faith search and provided responsive records, Mr. Catalano, in pertinent part, attests:

1. I participated in, and am therefore familiar with, the search performed for responsive records.
2. A search was performed for emails “from” or “to” Dr. Colyer and Dr. Ruppert during the time-frame indicated above and containing the three listed search terms.
3. In total, 1,118 records were forwarded to the District’s legal counsel for review and recommendations regarding what documents should be withheld as legally exempt from production and/or for counsel to make redactions deemed legally appropriate and necessary.

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 School District acted in bad faith or that additional responsive records exist, “the averments in [the declaration] 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, Mr. Catalano’s attestation details the steps taken to conduct a search for responsive records including using the search terms listed in the Request. A total of 1,118 records responsive to the Request were forwarded to the School District’s legal counsel for review and for counsel to make the legally appropriate redactions. Thus, based on the evidence presented, the School District has

demonstrated that it conducted a good faith search for responsive records, identified numerous potentially responsive records, and that no additional responsive records exist. 65 P.S. § 67.901. *Uniontown Newspapers* at 1171-72.

2. The School District has demonstrated that the records are protected from disclosure under FERPA

The School District argues that many of the records identified as being responsive to the Request are protected under FERPA.³ 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. Additionally, where an education record may be redacted of personally identifiable information under FERPA, that record may be provided with redaction. *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 730 (Pa. 2020) (citing 34 C.F.R. §

³ The School District identified 1,118 records responsive to the Request that were provided to the School District’s legal counsel for review. Fifty-six (56) pages of the responsive records were produced and provided to the Requester, subject to redaction.

99.31(b)(1)). 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).

“Personally identifiable information” is defined to include:

- a) The student’s name;
- b) The name of the student’s parent or other family members;
- c) The address of the student or student’s family;
- d) A personal identifier, such as the student’s social security number, student number, or biometric record;
- e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- 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). The Commonwealth Court has stated that education records are not restricted to academic records; rather, “the appropriate inquiry is whether the record—regardless of its subject matter— directly relates to a student....” *West Chester Univ. of Pa. v. Rodriguez*, 216 A.3d 503, 509-10 (Pa. Commw. Ct. 2019). Regarding the maintenance of education records, the Pennsylvania Supreme Court has concluded that a record being “generated and possessed” by the educational agency or institution is sufficient to establish that the record was “maintained” by the agency or institution. *Easton Area Sch. Dist.*, 232 A.3d at 730. Accordingly, applying the FERPA definition of an education record, here, the records are being maintained by an educational agency and by a person acting for that agency.

In support of its argument, Mr. Rizzo attests the following:

6. Dr. Ruppert is the 11th Grade House Principal.

Dr. Colyer is the 10th-12th Grade Principal.

7. I requested the Director of Technology, Robert Catalano, to conduct a search for responsive records and provide those records to the District's Solicitor for further review.
8. Mr. Folino has a minor child ... who attends in the District.
9. Generally, communications containing student names in the District's possession vary widely and could include communications regarding students' attendance, test scores, discipline, transportation, education services, extra-curriculars, and/or medical or disability status.
10. The types of records outlined in paragraph ten (10) would be maintained in the students' individual files and protected from disclosure as confidential.
11. The District does not permit unfettered access to the types of records outlined in paragraph ten (10), and access to inspect student records is granted as required by the Family Educational rights and Privacy Act ("FERPA").
12. Members of the public are never given FERPA-protected student records in response to right-to-know law requests, regardless of their status in relation to a student.

Under the RTKL, an affidavit or statement made under 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). Here Mr. Rizzo attests that the communications could include students' attendance, test scores, discipline, transportation, education services, extra-curriculars, and/or medial or disability status. All types of education records that would be exempt under FERPA. Additionally, based on the express language of the Request, the context of these responsive records is that they are the communications with high school principals. Accordingly, applying the FERPA definition of an education record, here, the records are being maintained by an education agency and by a person acting for that agency. *See Hilton v. Pittsburgh Sch. Dist.*, OOR Dkt. AP 2018-0616, 2018 PA O.O.R.D LEXIS 981 (emails about students were education records because they were maintained

on the agency's server); *Merlin v. Saucon Valley Sch. Dist.*, OOR Dkt. AP 2017-1335, 2017 PA O.O.R.D. LEXIS 1390 (emails regarding an incident involving a student were education records because they were kept on the school district's central offices' computer system); *Hacke and PublicSource v. Commonwealth Charter Academy*, OOR Dkt. AP 2017-1199 (log-in and attendance records attributable to individual students are protected by FERPA). Based on a review of the record, the School District has demonstrated that portions of the Request seek education records as defined under FERPA.

The parent names were redacted from the responsive records that were provided to the Requester. Parent names are clearly personally identifiable information, as defined by FERPA regulations. *See* 34 C.F.R. § 99.3 (personally identifiable information includes a student's name and a parent's name). The Commonwealth Court has stated that education records are not restricted to academic records; rather, "the appropriate inquiry is whether the record—regardless of its subject matter – directly relates to a student..." *West Chester Univ. of Pa. v. Rodriguez*, 216 A.3d 503, 509-10 (Pa. Commw. Ct. 2019). Regarding the maintenance of education records, the Pennsylvania Supreme Court has concluded that a record being "generated and possessed" by the educational agency or institution is sufficient to establish that the record was "maintained" by the agency or institution. *Easton Area Sch. Dist.*, 232 A.3d at 730.

Because the emails at issue directly relate to a student(s) and their participation in an extra-curricular activity (sports),⁴ these records qualify as education records under FERPA and the redactions are permissible to make the records publicly accessible under the RTKL. 34 CFR 99.31; 65 P.S. § 67.706.

⁴ The emails in question involve concerns and potential punishment surround the School District's masking policy.

Notwithstanding our determination that the responsive records meet the definition of education records under FERPA, the Request indicates that the Requester is the parent of the student identified in the Request. Under Section 1232g(b)(1)(H) of FERPA, a parent of a dependent student is entitled to the student's education records and need not obtain written consent. 20 U.S.C. § 1232g(b)(1)(H). Because it is not disputed that the Requester is the parent of the minor student who is the subject of the Request, neither FERPA nor the RTKL prohibits disclosure of records concerning their child to the Requester. *See generally West Chester Univ. of Pa. v. Rodriguez*, 216 A.3d 503, 511 n.9 (Pa. Commw. Ct. 2019) (“Disclosure of a student’s own education records upon that student’s written request (such as in a RTKL request) is not prohibited by FERPA, and such records, are, thus, not exempt from RTKL disclosure”). As such the Requester, as a parent, may request records under FERPA following the procedures set for the in the statute. *See* 20 U.S.C. § 1232g(a)(1)(A) (“Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.”); 65 P.S. § 67.3101.1; *see also Pa. Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823, 832-33 (analyzing the interrelation between statutes establishing the public nature of records and access to those records and the RTKL regarding records that may be accessed through a federal law). Therefore, the Requester may access his minor child’s records in accordance with the requirements set forth by the School District, as authorized under Section 1232g(a)(1)(A) of FERPA.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the School District is required to provide the Requester access to their child's educational records, as sought above, pursuant to the requirements set forth in 34 CFR 99.10 and any District policy implementing that regulation. However, outside of that right to access, the appeal is denied, as the records were sufficiently deidentified for public access under FERPA. 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 Montgomery 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 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: 22 April 2022

/s/ Lyle Hartranft
Lyle Hartranft, Esq.
Appeals Officer

Sent via email to: Tony Folino (via email only);
Robert Rizzo AORO (via email only);
Alicia Luke, Esq. (via email only)

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