



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**JOHN MCFADDEN,
Requester**

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:

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v.

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Docket No: AP 2022-1009

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**UPPER PERKIOMEN SCHOOL
DISTRICT,
Respondent**

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FACTUAL BACKGROUND

On March 17, 2022, John McFadden (“Requester”) submitted four separate requests (“Requests”) to the Upper Perkiomen School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “cafeteria video footage with [identified student name omitted] from 12:30 [p.m.] - 1:00 p.m.” from February 3, 2022, February 10, 2022, February 22, 2022, and March 10, 2022. On April 26, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the District denied the Requests, arguing that the records are confidential under the constitutional right to privacy, as well records that would be reasonably likely to jeopardize student safety and security by disclosing surveillance footage of school operations at a time when students are present within the school building. *See* 65 P.S. § 67.708(b)(3).

On April 27, 2022, the Requester appealed to the OOR. 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). On May 18, 2022, the District submitted a position statement, reiterating its reasons for denial. The District also submitted the affidavit of Dennis Kenwood (“Kenwood Affidavit”), School Safety and Security Coordinator for the District. The Requester did not submit any additional argument during the course of the appeal.

LEGAL ANALYSIS

1. The District has not proven that the video footage is exempt from disclosure under Section 708(b)(3) of the RTKL

The District argues that the requested video footage is exempt from public access pursuant to 65 P.S. § 67.708(b)(3). Section 708(b)(3) of the RTKL exempts from disclosure “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information storage system....” 65 P.S. § 67.708(b)(3). In order for this exemption to apply, “the disclosure of” the records - rather than the records themselves - must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3); *see also Pa. State Police v. ACLU of Pa.*, 189 A.3d 37 (Pa. Commw. Ct. 2018) (holding that when an affidavit is legally sufficient to prove that the disclosure of a record at issue would likely cause the alleged harm under Section 708(b)(3) of the RTKL, *in camera* review of the records is unnecessary). The Commonwealth Court has held that “[a]n agency must offer more than speculation or conjecture to establish the security-related exemptions....” *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018) (internal citations omitted); *see also Mission Pa., LLC v. McKelvey*, 212 A.3d 119 (Pa. Commw. Ct. 2019).

In support of the District's position, Mr. Kenwood affirms that the surveillance camera system in the cafeteria shows access points and door locations, and having access to the video would allow an individual to determine the number and types of District staff present in the cafeteria at a particular time of day. *See* Kenwood Affidavit, ¶¶ 4, 7, 8. Mr. Kenwood also affirms that having access to the video would also reveal the number and locations of cameras and coverage angles so that blind spots can be identified. *Id.* at ¶ 10. Further, Mr. Kenwood affirms that releasing the requested video footage in response to the Requests, would allow the video to be shared on the internet and with the general public, and is more than mere speculation as the 1999 Columbine High School massacre was perpetrated by concealing bombs within a school cafeteria. *Id.* at ¶¶ 13, 16.

The District relies on *Hartnett v. Keystone Oaks Sch. Dist.*, OOR Dkt. AP 2017-1941, 2017 PA O.O.R.D. LEXIS 1860, where the OOR held that requested video footage of an elementary school facility was exempt pursuant to Section 708(b)(3). In *Hartnett*, the agency established that disclosure of video from "cameras on the top floor of an elementary school" would be reasonably likely to endanger the safety and security of the elementary school. However, as also set forth in *Hartnett*, "[w]hen the OOR analyzes whether or not video footage from an agency's surveillance camera is available under the RTKL, the analysis is necessarily based on the unique circumstances of each case." Here, unlike in *Hartnett*, the video sought is from one specific area, a middle school cafeteria, and seeks video from a specific time of a specific student, rather than from the top floor of an elementary school where a district proved that the camera footage showed both the interior and exterior of the building, and that disclosure of the video "would create a video blueprint of the elementary school."

Given that the Requests in the instant matter are limited to a specific area during a specific time period, in an area that, although closed to the public at the time, is generally considered a common area of the school, the District has not established that disclosure of the requested video footage would be reasonably likely to endanger the safety or physical security of a building. *See* 65 P.S. § 67.708(a)(1).

2. The District may redact student images

The District argues that the requested video footage is protected by the constitutional right to privacy. The OOR shares the same concerns set forth by the Pennsylvania Supreme Court in *Easton Area Sch. Dist. v. Miller*:

The overlooked yet implausible ramification of the Commonwealth Court's decision below is its potential to subject any school surveillance to disclosure, without parental consent, to any resident of the Commonwealth who makes a request pursuant to the RTKL. In the case of a school bus surveillance video, such a disclosure could reveal the identity of minor students; their clothing, behaviors, or disabilities; the specific bus they take; and the geographical location where they exit the bus.

232 A.3d 716, 731 (Pa. 2020).

Addressing that concern, the Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the responding agency and the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

In *Miller*, the Court found that the images of students should be redacted from a school bus video, either under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232, or the constitutional right to informational privacy.¹ 232 A.3d at 731. In *Miller*, the Court explained that each student had a potential privacy interest in their identification in a school video, but that the right to privacy may be satisfied by the redaction of the faces of “reasonably identifiable” students. *Id.* at 732.

In the instant matter, the District argues that the responsive video footage cannot be provided, even in redacted form, because information about the minor identified in the Requests would be revealed, including specific dates and times that the minor was present in the cafeteria. In support of its argument, the District cites to *Gardner v. North Penn Sch. Dist.*, arguing that the requested video cannot be provided in redacted form because the identity of the minor child that is the subject of the Requests would be revealed, regardless of redactions. OOR Dkt. AP 2019-2622, 2020 PA LEXIS 1617. Additionally, the District argues that the video footage would reveal information, including which students were in which specific lunch period, who students interact with at lunch, whether students purchase lunch or bring their own meal from home, what clothes students wear, and the extent to which students are disciplined by school staff. In support of the District’s position, Mr. Kenwood affirms that the cafeteria is closed to the general public during the school day and that release of the requested video footage would serve as confirmation as to the presence of a particular student, including the student identified in the Requests, in a specific location during certain identified times of the day.² *See* Kenwood Affidavit, ¶¶ 5, 16-17.

¹ In the instant matter, the District has not raised FERPA as a reason to withhold access to the requested video.

² Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support to sustain an agency’s burden of proof. *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).

The Requester on the other hand, asserts only that he seeks video regarding his daughter. However, a request under the RTKL must be construed without regard to the identity of the requester. *See Slaby v. Northumberland County*, OOR Dkt. AP 2011-0331, 2011 PA O.O.R.D. LEXIS 257. Therefore, the Requests will be reviewed as if made by an unrelated member of the community.

Unlike *Miller*, the video footage sought in the instant matter is from inside the school, in a middle school cafeteria and depicts a specifically named minor child on specific dates and times. Therefore, any responsive video would necessarily include the identified minor. However, the privacy concerns raised by the District mirror those in *Miller*. While the student in *Miller* was not specifically named, the footage in that case related to a specific well publicized event and involved the same concerns of potentially easily identifying minors and details about them. In this appeal, we employ the same analysis and application set forth in *Miller*.

For reasons set forth above, the requested video footage here is a public record subject to disclosure. If a third party's personal information is contained in a public record, the agency should conduct a balancing test to determine whether the parties right to privacy outweighs the public interest. Here, the Requester has not articulated any public benefit in the release of the identities of the students depicted in the video footage from inside the middle school cafeteria, and as a result, the privacy interests of middle school students outweigh any public interest in the video. As a result, the District has an obligation to redact the video in a way that protects the informational privacy rights of the minors depicted in the video. Therefore, like in *Miller*, the District can effectuate access to at least some of the requested footage without violating students' informational

privacy rights by redacting their images in the video.³ However, if the named minor is alone in any video footage, the District is not required to release that portion of the video footage.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the District is required to provide the redacted video footage 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 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. 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 6, 2022

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS
DEPUTY CHIEF COUNSEL

Sent to: John McFadden (via email only);
Dian Hipszer (via email only);
Kyle J. Somers, Esq. (via email only)

³ A proper framework involves redacting identifiable information 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. Given that the video will be provided in redacted form, the OOR encourages the District, before utilizing its time and resources, to reach out to the Requester to confirm that he still wishes to receive the requested video footage.

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