

Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(g). The District also claimed that the release of the video would result in a threat to personal security. 65 P.S. §§ 67.708(b)(1)(i)-(ii). Lastly, the District raised Section 708(b)(3) of the RTKL, stating that disclosure of the video would endanger the security of the District’s information system. 65 P.S. § 67.708(b)(3).

On October 7, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. On appeal, the Requester indicates that the appeal would be satisfied with access to the video outside the bus.¹ 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 October 24, 2016, the District submitted a position statement reiterating its grounds for denial. The District confirms that there are three school buses—an elementary school bus, middle school bus and high school bus—that traveled on York Drive during the timeframe provided in the Request. The District indicates that each video has a time and GPS stamp revealing the exact time and location each child is dropped off at his or her designated bus stop. The videos also capture audio of the students on the buses and any individuals in close proximity to the buses. On appeal, the District argues that the release of the videos would threaten public safety, 65 P.S. § 67.708(b)(2), and that the videos identify the names and home addresses of minors, 65 P.S. § 67.708(b)(30). The District also raises Section 708(b)(7) of the RTKL, stating that the videos are used to review the performance of its bus drivers. 65 P.S. § 67.708(b)(7).

¹ The Requester limited his appeal to challenge only the denial of the exterior bus videos, stating that he would be “satisfied with access to the video from outside the bus.” Accordingly, the OOR will only consider the District’s denial of the exterior bus videos. *See Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

Finally, the District states that the videos contain audio and the release of the videos would, therefore, violate Pennsylvania's Wiretapping and Electronic Surveillance Control Act ("Wiretap Act"), 18 Pa.C.S. §§ 5701-5781.² In support of its position, the District submitted statements made under penalty of perjury from Richard Sniscak, the District's Superintendent of Schools, Rodney Troutman, the District's Assistant Superintendent of Schools, David Keppel, the District's Director of School Services, and Anthony Naradko, the District's Assistant Director of Transportation and Safety.

On October 31, 2016, the District responded to the OOR's request for clarification regarding its ability to redact the audio portion of the video recordings. The District states that removing the audio portion of the video is not a redaction but, instead, would be the creation of a record, and the RTKL does not require agencies to create records. 65 P.S. § 67.705. The District also states that there is a constitutional right to privacy in one's image and voice and that the school bus environment is a place where the students and occupants have been told they have a right to privacy, citing the Wiretap Act, which requires the school board to notify students and parents/guardians in the student handbook of the School's policy to audio record students on its buses. The District further states that Section 708(b)(1) must take into consideration a person's right to privacy under Article I, Section 1 of the Pennsylvania Constitution. The District states that, when read together, the Pennsylvania Constitution and Section 708(b)(1) allow the District to deny access to the videos without having to identify an actual risk of harm to a person's security.

² The District is permitted to raise these additional reasons for denying access to records on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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, neither party requested 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)).

1. The bus videos are not education records under FERPA

The District argues that the requested school bus videos are protected from disclosure by FERPA. FERPA protects “personally identifiable information” contained in “education records” from disclosure and financially penalizes school districts “which [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 “[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 that 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. Just because a record involves a student does not automatically invoke the confidentiality provisions of FERPA.

Perhaps the most succinct definition of “education records” was enunciated by the United States District Court for the Western District of Missouri:

It is reasonable to assume that criminal investigation and incident reports are not educational records because, although they may contain names and other personally identifiable information, such records relate in no way whatsoever to *the type of records which FERPA expressly protects; i.e., records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files.*

Bauer v. Kincaid, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (emphasis added). Here, the Request seeks the exterior video of each identified school bus that captures students exiting the bus. These records are not a part of a student’s academic file. Based on the foregoing, an exterior bus video is not an “education record” under FERPA. *See Hawkins v. Central Dauphin Sch. Dist.*, OOR Dkt. AP 2016-0583, 2016 PA O.O.R.D. LEXIS 760 (finding that a school bus video is not an education record under FERPA), *appeal pending*, 2016-CV-4401-MP (Dauphin Com. Pl. 2016).

In addition, because the requested videos are not protected by FERPA, disclosure would not result in the loss of Federal funding to the District. Accordingly, the District has not met its burden of proof to withhold the videos under 65 P.S. § 67.708(b)(1)(i). *See* 65 P.S. § 67.708(a)(1).

2. There is no constitutional right to privacy in an exterior school bus video

The District claims there is a constitutional right to privacy in one’s image and voice, citing the recent decision of the Pennsylvania Supreme Court regarding the accessibility of the home addresses of school employees. *Pa. State Educ. Ass’n v. Office of Open Records*, 11 MAP 2015, 2016 Pa. LEXIS 2337 (Pa. 2016) (“PSEA”). In PSEA, the Court found a constitutional

right to privacy in a public school employee's home address. The Court required a balancing test to weigh privacy interests against the public benefit of disclosing the information. The Court concluded that "public school employees have strong privacy interests in protecting their home addresses from disclosure in response to broad and generic request based upon no criteria other than their occupation." *Id.* at *38.

Here, the videos responsive to the Request contain a view of each bus's exterior. The District states that the videos reveal the bus route, the exact time a bus gets through its route, the location and time of each stop, as well as children getting off the bus at their respective stops. In fact, the District's affidavit asserts that the video has a GPS location stamp and the exact time each student is dropped off at his or her bus stop. The District states that the Request for the bus videos is similar to a request for home addresses because it seeks personal information, such as the students' images and voices. The District further argues that the Requester has not shown that there is a public benefit in obtaining the videos that would justify invading the privacy rights of the persons depicted in the videos.

However, based on the evidence submitted, the District has not shown that there is a constitutionally protected privacy interest in an exterior school bus video, which only captured images outside of the bus and along a public road. Likening the release of videos of a public place to a request for personal information such as a home address, as discussed in *PSEA*, is insufficient to demonstrate a constitutional right to privacy in the videos.

3. Audio portions of the bus videos are protected by the Wiretap Act and can be redacted

The District argues that the audio portion of each video is exempt from public disclosure under the Wiretap Act. *See* 18 Pa.C.S. §§ 5701-5782. Pursuant to the Wiretap Act, it is unlawful for a person to "intentionally intercept[], endeavor[] to intercept, or procure[] any other

person to intercept or endeavor to intercept any wire, electronic or oral communication....” 18 Pa.C.S. § 5703. However, the Wiretap Act contains exceptions allowing audio recording in certain circumstances, including on school buses. Section 5704(18) provides that it is not unlawful and no prior court approval will be required for:

(18) A person to intercept oral communications for disciplinary or security purposes on a school bus or school vehicle, as those terms are defined in 75 Pa.C.S. § 102 (relating to definitions), if all of the following conditions are met:

(i) The school board has adopted a policy that authorizes audio interception on school buses or school vehicles for disciplinary or security purposes.

(ii) Each school year, the school board includes the policy in a student handbook and in any other publication of the school entity that sets forth the comprehensive rules, procedures and standards of conduct for the school entity.

(iii) The school board posts a notice that students may be audiotaped, which notice is clearly visible on each school bus or school vehicle that is furnished with audio-recording equipment.

(iv) The school entity posts a notice of the policy on the school entity's publicly accessible Internet website.

18 Pa.C.S. § 5704(18).

The District references its Policy 810.2, “Use of Recording Devices on School Buses and Vehicles,” stating that the cameras on the buses are used for recording audio and video for the purpose of discipline and security of students and staff. The District’s affidavit confirms that each video depicts the images and sounds of students and bus drivers, both inside and outside of the bus, as well as other persons in close proximity to each bus. Based on the evidence, the District is authorized to intercept audio on school buses for disciplinary and security purposes; however, the District is prohibited from releasing the audio portions of the videos under the Wiretap Act. Accordingly, to the extent that there is any audio captured on the exterior bus videos sought in this Request, the District may redact the audio from the videos.

The District's supplemental position statement argues that removing the audio portion of the video is not a redaction pursuant to 65 P.S. § 67.706. Rather, the District asserts that the removal of the audio from the videos constitutes the creation of a record under Section 705 of the RTKL, which states that when responding to a request, an agency is not "required to create a record which does not currently exist." 65 P.S. § 67.705. However, the removal of the audio portion from the video is a redaction and is not considered the creation of a new record under the RTKL. The Commonwealth Court, in *Pa. State Police v. Grove*, recognized that, in certain circumstances, the audio contained on a mobile video recording ("MVR") may be redacted, stating that "[the agency] may redact their utterances from the audio portion of the . . . MVR." 119 A.3d 1102, 1111 (Pa. Commw. Ct. 2015), *appeal pending*, 595 MAL 2015.

4. The District has failed to show that the disclosure of the bus videos would threaten personal safety

The videos responsive to the Request provide views of the exterior of each bus. As mentioned above, the videos reveal the bus route, the exact time a bus gets through its route, the GPS location and time of each stop, as well as children getting off the bus at their respective stops. The District claims that releasing this information would be reasonably likely to result in a threat to a student's personal security. 65 P.S. § 67.708(b)(1)(ii).

Section 708(b)(1)(ii) of the RTKL exempts from disclosure a record that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1)(ii). Under the RTKL, "reasonable likelihood" of "substantial and demonstrable risk" is necessary to trigger the personal security exception. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). The term, "substantial and demonstrable risk" is not defined in the RTKL. However, construing these terms in accordance with their common and approved usage, 1 Pa.C.S. § 1903(a), the risk of harm must

be material, real, and ample. The risk of harm must also be demonstrable, which is defined as being obvious or apparent. *See Swartzwelder v. Butler County*, OOR Dkt. AP 2009-0632, 2009 PA O.O.R.D. LEXIS 129. Mere belief that the release of a record would cause substantial and demonstrable risk of harm is insufficient. *Zachariah v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

The District provides transportation of students between their designated bus stop and school and maintains the video in connection with this function; however, in order to meet the asserted exemption, the District is required to provide evidence demonstrating that there is a reasonable likelihood of harm to an individual. Here, the OOR determined that the District's position statement failed to provide sufficient evidence for the OOR to make a decision as to whether the records were exempt under Section 708(b)(1) and directed the District to provide additional evidence. Again, the District did not provide sufficient evidence addressing Section 708(b)(1) of the RTKL. Rather, the District relied on its constitutional right to privacy argument as implicating a threat to safety, stating:

[t]he disclosure of the audio and video would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual because such risk is demonstrated when a person has a constitutional protected right of privacy to the information sought for disclosure. An actual demonstrable risk of physical harm or to the personal security to an individual need not be identified.

To meet its burden, an agency must provide evidence on the “reasonable likelihood” of a “substantial and demonstrable risk,” *Schaefer, supra*, which the District has failed to do despite being given an additional opportunity to supplement the record. In fact, the District's affidavit fails to address any facts supporting the application of Section 708(b)(1) to the requested videos.

While an affidavit may serve as sufficient evidentiary support to sustain an agency's burden under the RTKL, *see Sherry*, 20 A.3d at 520-21, conclusory statements are not sufficient to meet an agency's burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). The OOR recognizes the exceedingly important task with which the District has been entrusted—the safety and welfare of children—but the District failed to provide evidence to support its assertion that the release of the exterior bus videos meets the requirements of Section 708(b)(1) of the RTKL. Based on the evidence submitted on appeal, the OOR is constrained to conclude that the District has failed to meet its burden of establishing that the videos are exempt under Section 708(b)(1). *See* 65 P.S. § 67.708(a)(1).

5. The District has failed to establish that the release of the bus videos would threaten public safety

The District asserts that the videos are exempt for public safety reasons pursuant to 65 P.S. § 67.708(b)(2). Section 708(b)(2) of the RTKL exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity....” 65 P.S. § 67.708(b)(2). In order to establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

Here, the District's position statement discusses the data collected and superimposed on the videos—the route, the time a bus arrives at a location and the speed—arguing that the video

is used to maintain safety on the school buses by monitoring behavior. The District's argument focuses only on the videos' purpose to maintain bus safety, but does not discuss how the release of the videos would be reasonably likely to threaten public safety. Therefore, the District has not demonstrated that disclosure of the video would be reasonably likely to threaten the public safety.

6. The District has failed to establish that the release of the bus videos would threaten the District's information storage system

The District argues that the videos are exempt under Section 708(b)(3) of the RTKL because "cameras are strategically mounted ... [and] it is important that none of the cameras be compromised since they all form an important link providing safety and security." Section 708(b)(3) 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, resource, infrastructure, facility or information storage system...

65 P.S. § 67.708(b)(3); *see Crockett v. SEPTA*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under this exemption); *but see Moss v. Londonderry Twp.*, OOR Dkt. AP 2009-0995, 2009 PA O.O.R.D. LEXIS 724 (holding that records related to the Three Mile Island nuclear power plant were not subject to public access). 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 security of information systems. *See* 65 P.S. § 67.708(b)(3). Therefore, because the District has not presented evidence demonstrating that the disclosure of the videos would be reasonably

likely to threaten its information security system, the District has not met its burden of proving that the videos are exempt under Section 708(b)(3).

7. The District has failed to establish that the bus videos relate to an employee's performance rating or review

The District asserts that, as stated in its Policy, it uses the bus videos to evaluate the bus drivers' job performance. The District cites to Section 708(b)(7)(ii) which exempts from public disclosure an employee's "performance rating or review." 65 P.S. § 67.708(b)(7)(ii). While the District may use these videos in employee job performance reviews, the District has not provided any evidence to indicate that the videos sought in this Request contain information relating to any employee's performance review or rating. Although the videos may capture bus drivers performing their job, there is no indication that the videos contain the District's review of the drivers' performance. Accordingly, the District has not proven that the videos are exempt under Section 708(b)(7).

8. The District has not demonstrated that the bus videos identify the names or home addresses of minors

The District asserts that the videos depict the images of students who may be minors and that the recorded conversations may include the names of the students, which the District argues are exempt under Section 708(b)(30). As the OOR has found that audio portions of the video are to be redacted in accordance with the Wiretap Act, the OOR need only address the portions of the videos depicting the students' images. Section 708(b)(30) allows an agency to prohibit the release of a "record identifying the name, home address or date of birth of a child 17 years of age or younger." 65 P.S. § 67.708(b)(30). As there is no evidence that the video, itself, identifies the name, home address or birth date of a minor, the District has not met its burden to withhold the record under Section 708(b)(30). *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the District is required to provide the Requester with the exterior bus videos, subject to redaction of the audio portions of the videos, 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 Lehigh 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 15, 2016

/s/ Jill S. Wolfe

APPEALS OFFICER

Sent to: Steven Adams (via e-mail only);
C. Steven Miller, Esq. (via e-mail only);
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³ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).