



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
TRICIA MEZZACAPPA,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2019-1922
	:	
COLONIAL INTERMEDIATE	:	
UNIT 20,	:	
Respondent	:	

### INTRODUCTION

Tricia Mezzacappa (“Requester”) submitted a request (“Request”) to the Colonial Intermediate Unit 20 (“Unit”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking video from an identified bus route. The Unit denied the Request in part, arguing that the request for video sought confidential information related to students. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Unit is required to take further action as directed.

### FACTUAL BACKGROUND

On September 4, 2019, the Request was filed, seeking, in relevant part:<sup>1</sup>

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<sup>1</sup> The Request included three other items, two of which were partially granted and one of which was denied because the responsive records do not exist. On appeal, the Requester affirmatively does not challenge these items of the response.

“Bus video AM route only for the first day of school 2019-2020.”<sup>2</sup>

On October 11, 2019, after taking a thirty-day extension, 65 P.S. § 67.902(b), the Unit denied the Request in part, arguing that the video is exempt under the Family Educational Rights and Privacy Act (“FERPA”), because it would reveal the home address of minors, 65 P.S. § 67.708(b)(30), because it would endanger personal safety, 65 P.S. § 67.708(b)(1),<sup>3</sup> contains personal identification information, 65 P.S. § 67.708(b)(6)(i), and because the Unit had weighed the interest in privacy against the public interest in disclosure and determined that the video should be withheld under the state constitutional right to privacy.

On October 17, 2019, the Requester appealed to the OOR, arguing only that the videos must be provided. The OOR invited both parties to supplement the record and directed the Unit to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On October 29, 2019, the Unit submitted a position statement, reiterating the Unit’s arguments. In support of this position, the Unit submitted the verified attestations of Dr. Frank DeFelice, the Unit’s Agency Open Records Officer, Dr. Christopher Wolfel, the Unit’s Executive Director, and Thomas Kalinoski, the Unit’s Director of Technology, who attested that the responsive videos contained personal details of minor students, that the Unit lacks the technology to redact the videos, and that the Unit had performed a balancing test and determined that the records could not be released.

The same day, the Requester submitted a position statement, stating that identical issues had been considered and disposed of by the OOR in a prior appeal, and that the Unit’s definition

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<sup>2</sup> The Requester subsequently clarified to the Unit that the record sought relates to one bus driver, Matt Dees, and that no other bus videos needed to be examined.

<sup>3</sup> The Unit occasionally refers to this as “708(b)(2)”, but this appears to be an error.

of an ‘education record’ under FERPA contravened the definition developed by the Commonwealth Court.

The same day, with the agreement of all parties, the OOR stayed the case pending the outcome of the Pennsylvania Supreme Court’s decision in *Easton Area School District v. Miller*, 13 MAP 2019, 2020 Pa. LEXIS 3378.

On June 22, 2020, the OOR notified the parties that the Pennsylvania Supreme Court had issued an opinion and reopened the record so that the parties could address the effect of the ruling on the instant appeal.

On July 3, 2020, the Unit submitted a position statement reiterating that it lacked the ability to redact the records at issue. In support of this statement, the Unit submitted the supplemental attestations of Dr. DeFelice and Mr. Kalinoski, who attest that the Unit does not possess the software it would require to securely redact the videos, that the videos contain various details which would allow viewers to easily discern the home addresses of students, and that disclosing the video would necessarily risk providing those addresses to the public.

The same day, the Requester submitted a position statement, arguing that the Unit had failed to demonstrate that there was any expectation of privacy in the locations that a bus stops on public roads, and that the redaction of the faces of the students would be acceptable.<sup>4</sup>

### **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,

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<sup>4</sup> The Requester also submitted various exhibits and a verification regarding the bus driver and various past allegations. Because the verification and exhibits are not relevant to the issue on appeal, they were not considered.

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 a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Unit 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)).

### **1. The responsive records must be provided with redactions**

The Unit argues that the videos responsive to the Request are exempt because they would reveal the home address of minors, 65 P.S. § 67.708(b)(30), because they would endanger personal safety, 65 P.S. § 67.708(b)(1), and because they contain personal identification information, 65 P.S. § 67.708(b)(6)(i). The Unit further argues that the responsive video is exempt under FERPA<sup>5</sup> and the constitutional right to privacy because it consists of footage of enrolled students

In support of these arguments, the Unit provided the verified attestations of Dr. DeFelice, Dr. Wolfel, and Mr. Kalinoski, who attest that the videos display details of the bus route such as landmarks, signs, the addresses of houses and the full bus route, which would permit a viewer to determine where children are picked up or deposited and therefore provide their home addresses. Specifically, Mr. Kalinoski attests that:

4. I personally reviewed the bus video, which depicts special education students traveling between home and school.
5. Anyone viewing the video will see the faces of the children on the bus.
6. Many of the bus stops are in front of the students' homes.
7. Anyone viewing the video can see the addresses of some of the homes at which the bus stops.

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<sup>5</sup> 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).

8. The video includes audio.

The OOR has previously considered an identical argument, supported by similar evidence. *Mezzacappa v. Colonial Intermediate Unit 20*, 2019-0838, 2019 PA O.O.R.D. LEXIS 656 (on appeal to the Northampton County Court of Common Pleas). In *Mezzacappa*, the requester sought all video filmed by the cameras of Bus #52 for a month, and the agency denied, arguing that the ability to discern the addresses and features of minors rendered the video exempt under Sections 708(b)(2), (6)(i) and (30). The OOR considered and rejected each of these reasons for denial, noting that the Unit's attestations failed to establish any reasonable threat to the safety of the students, that no part of Section 708(b)(6)(i) encompasses a school bus video, and that while houses, street names and address numbers are all occasionally visible on the responsive videos, there is no evidence that a watcher would be able to determine whether a minor dwells at any given house.

Since then, in *Easton Area Sch. Dist. v. Miller*, the Pennsylvania Supreme Court examined a similar situation, where a reporter sought school bus video which would show an instructor disciplining a student. 13 MAP 2019, 2020 Pa. LEXIS 3378. In *Miller*, the Court found that an "education record" under FERPA cannot be provided in unredacted form and explained that a video qualifies as an "education record" if it relates directly to a student, including by capturing a student's image at any event which would later become part of an inquiry by the school. *Id.* at 37. *Miller* relied on guidance promulgated by the United States Department of Education to find that the meaning of "education record" under FERPA is broader than lower courts previously held, explaining that even students who are innocently or incidentally involved in incidents which merit later official scrutiny are directly related. *Id.* at 31; *see Cent. Dauphin Sch. Dist. v. Hawkins*, 199

A.3d 1005, 1013-14 (Pa. Commw. Ct. 2018) (prior case holding that school bus video did not ‘directly relate’ to a student caught on film because it existed for the purpose of staff discipline).

The Court in *Miller* ultimately found that the images of the students should be redacted from the responsive video recording(s), either under FERPA or under the constitutional right to informational privacy. 2020 Pa. LEXIS 3378 \*37. The Court previously 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 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. 2020 Pa. LEXIS 3378 \*37.

Furthermore, although neither Section 708(b)(1) or (b)(30) of the RTKL were directly at issue in *Miller*, the Court addressed the potential for safety concerns in the release of the footage, stating that, “[i]n 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. In addition to obvious safety concerns, such a disclosure also necessarily implicates the students' right to informational privacy [.]” *Id.* at 34.

As in the previous *Mezzacappa* case, the attestations submitted by the Unit are conclusory on the topic of safety. 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). Meanwhile, 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). Here, the Unit has established only that some addresses may be visible and has not elaborated on any substantial and demonstrable risk to the children. However, the Requester has disclaimed any interest in the personal information of the students, such as addresses or identities. As a result, the OOR will address the purported security risks and possibility of home addresses just as the court did in *Miller*, through redaction.<sup>6</sup>

On appeal, the Unit explains that it has already conducted the *PSEA* balancing test and determined that “the right of each student and the students’ families to privacy far outweighs the public interest in having access to the requested videos.” This determination comports with the Pennsylvania Supreme Court’s rationale in *Miller*, and therefore the OOR finds that the Unit correctly determined that a privacy right in the identity of these students exists.

However, as the Supreme Court explained in *Miller*, both this right of privacy and the requirements of FERPA are satisfied if the identities of the students can be reasonably protected

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<sup>6</sup> The Unit also raises Section 708(b)(6) of the RTKL, which exempts from disclosure certain personal identification information, including “Social Security number; driver's license number; personal financial information; home, cellular or personal telephone numbers; personal e-mail addresses; employee number or other confidential personal identification number...[; a] spouse's name; marital status, beneficiary or dependent information...[; t]he home address of a law enforcement officer or judge.” 65 P.S. §§ 67.708(b)(6)(i)(A)-(C). However, the Unit does not identify any information from the video which would be encompassed by this exemption, and it appears to be irrelevant to this analysis.

by redaction of the video without destroying the underlying record. *See Id.* Similarly, the RTKL requires that information subject to exemption under Section 708 be redacted from otherwise-public records to the greatest extent possible. 65 P.S. § 67.706 (requiring that nonpublic information be removed by redaction if possible). Therefore, both *Miller* and the statutory language favor redaction of the videos.

The Unit argues that redaction is impossible for two reasons; it lacks the essential software to do so,<sup>7</sup> and because the video contains voluminous details which would require redaction. The Unit argues that in addition to the faces of students, the Unit would be required to required to redact street signs and addresses, and that it would also need to disguise the actual route being taken by the bus.

The right to privacy articulated in *PSEA* and applied by *Miller* is a personal right to privacy and is entirely satisfied if redaction can reasonably obscure the identity of the students; the fact that some number of unknown students take a particular bus route is not secret and requires no redaction. *See, e.g., Mission Pa., LLC, v. McKelvey*, 212 A.3d 119, 132 (PA. Commw. Ct. 2019) (emphasizing the fact that the constitutional right to privacy is in personal information alone). Furthermore, as the Requester notes, there is no expectation of privacy in the bus route itself, which is driven on public roads and at well-known times during every school day. *PSEA*, 148 A.3d at 150 (“[T]his Court has routinely required a factual examination of whether (1) the person has exhibited an actual (subjective) expectation of privacy in the items to be searched or disclosed, and (2) whether society is prepared to recognize this expectation as reasonable and protectable.”) Therefore, the right to privacy is satisfied by the redaction of details which shield the identities of the students and does not justify additional redaction to hide the bus route.

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<sup>7</sup> This argument is addressed more fully in the section below.

However, in light of the fact that the Requester has disclaimed any interest in the addresses of the students, the Unit may redact any specific addresses which are visible on the video.

**2. The Unit's redactions are governed by Section 1307(g) of the RTKL**

The Unit argues that it does not possess the capability to redact video footage. In support of this argument, the Unit submitted the supplemental affidavit of Mr. Kalinoski, who attests that:

4. I personally reviewed the bus video, which depicts special education students traveling between home and school.

5. The video includes audio.

6. In my capacity as the Director Technology, I am familiar with the software owned by and available to the Intermediate Unit.

7. The Intermediate Unit does not own or have access to software that would allow object tracking redaction of the video. This limits us to not being able to effectively redact student faces and home addresses.

Under the RTKL, an attestation 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 Unit has acted in bad faith, “the averments in [the verification] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. 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)). Therefore, the Unit has demonstrated that it does not have the ability to redact the video.

The agency in *Miller* likewise argued that it lacked the capabilities to redact student faces from video feeds, and the Pennsylvania Supreme Court still ordered that the records must be redacted and provided. *Miller*, 2020 Pa. Lexis 3378, \*33. However, the Court also noted that “[w]e do not suggest the District is obligated to finance such redaction, which responsibility may

fall either to the District or to the Requester depending upon other laws, policies, or legal directives that are not before the Court in the present appeal.” *Id.* at 34, n.15.

Fees under the RTKL are governed by Section 1307, which provides guidelines for postage fees, duplication fees, certification fees, printing fees, enhanced electronic access fees, and a catchall provision. 65 P.S. §§ 67.1307(a)-(g). Because the costs for procuring software or contract services are not governed by any of the regular fee provisions, the OOR turns to 1307(g), which provides that the miscellaneous costs an agency *necessarily* incurs for complying with a request may be imposed upon a requester provided that such costs are *reasonable*. 65 P.S. § 67.1307(g); *see also SERS v. Office of Open Records*, 10 A.3d 358, 363 (Pa. Commw. Ct. 2010). To show that a cost may be imposed on a requester, the agency must show that the cost at issue is both necessary to fulfill the request and reasonable in scope. *See Iverson v. Southeastern Pa. Transp. Auth.*, OOR Dkt. AP 2011-0742, 2011 PA O.O.R.D. LEXIS 477; *Lauff v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2011-0701, 2011 PA O.O.R.D. LEXIS 470. To demonstrate that the price is reasonable, the agency must show that this fee is “reasonable in the field” or that it was an ordinary price for such services. *Iverson*, 2011 PA O.O.R.D. LEXIS 477 (stating that because “... SEPTA did not establish that it consulted with other companies regarding the fees for similar services and or address the time reportedly required to comply with the Request, SEPTA failed to prove that the estimated charges are either necessary or reasonable, and, accordingly, SEPTA cannot pass the estimated charge on to the Requester”). Where an agency lacks the ability to extract and duplicate information without using a third-party vendor, it may recoup the costs for that charge. *See Allen v. Fairview Twp.*, OOR Dkt. AP 2010-0758, 2010 PA O.O.R.D. LEXIS 747.

Here, the Unit has presented the OOR with evidence that it does not have the software necessary to redact the faces of the students in the responsive video but has not provided the OOR

with any estimate of costs to either obtain such software or obtain a contractor.<sup>8</sup> Therefore, the Unit must determine what options exist to allow it to redact the responsive video as required by *Miller*, and provide the Requester with a good faith estimate of any reasonable expenses it will necessarily entail.<sup>9</sup> Upon payment of such expenses, the Unit must provide the redacted video.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Unit is required to provide the Requester with an estimate of reasonable and necessary fees for redaction 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 Northampton 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.<sup>10</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 31, 2020**

*/s/ Jordan Davis*

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APPEALS OFFICER  
JORDAN C. DAVIS

Sent to: Tricia Mezzacappa (via email only);

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<sup>8</sup> The OOR lacks the ability to determine what services the Unit could or should retain but notes that the Unit should consider the possibility of using low or zero-cost options. The popular video platform YouTube, for example, contains an onboard video editor which can automatically detect and blur faces, or permit the user to apply a custom blur to a video. See, e.g., "Edit videos & video settings; Blur your videos", YouTube Help, [support.google.com/youtube/answer/9057652?hl=en](https://support.google.com/youtube/answer/9057652?hl=en) (last accessed July 13, 2020).

<sup>9</sup> As noted, the word "necessarily" in Section 1307(g) indicates that the Unit should seek to identify the lowest-cost solution which will permit the redactions. If the Requester believes that the Unit is not operating in good faith, she may appeal to the Court of Common Pleas of Northampton County, which has the power to assess fees and penalties against the agency. 65 P.S. § 67.1305.

<sup>10</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Rebecca Young, Esq. (via email only);  
Dr. Frank DeFelice (via email only)