



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**MICHAEL CHURCHILL for
Public Interest Law Center, Phila.,
Complainant**

v.

**LEBANON SCHOOL DISTRICT,
Respondent**

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Docket No. AP 2009-0796

INTRODUCTION

Michael Churchill on behalf of the Public Interest Law Center of Philadelphia (the “Requester”), submitted a request to Lebanon School District (“School District”) seeking records related to truancy and enforcement of absenteeism pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The School District supplied some reports of absences but did not provide the other records citing the Family Educational Rights and Privacy Act (“FERPA”) and exceptions under the RTKL. The Requester appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Requester’s appeal is **granted in part and denied in part**, and the School District is required to take further action as directed.

FACTUAL BACKGROUND

On August 31, 2009, the Requester submitted a right-to-know request for

- (1) All Reports of student absences exceeding three days without lawful excuse by a principal or other school official to the School Attendants officer, Superintendent or Board of Director (“Reports”);
- (2) All Letters to parents and guardians notifying them of unlawful absences exceeding three days (“Letters”);

- (3) All Receipts of mailing certified letters (“Receipts”);
- (4) All Notices of hearings or summons for court proceedings (“Notices”);
- (5) All Fines for absenteeism or truancy assessed in favor of the District or received pursuant to sections 13-1327 or 13-1333 showing the payer and amount paid or assessed and any total for each fiscal year (“Fines”).

(the “Request”).

On September 4th, Dr. Marianne T. Bartley, Superintendent for the School District, timely responded by providing certain records that qualify as Reports, but denying access to the other records (the “Denial”). The School District denied the records sought in parts (2) through (4) above for concerning specific student and parent information as exempt under FERPA, 20 U.S.C. §1232g, and its regulations. The School District states that even in redacted form, the information requested “would be linkable to students and their parents.” In addition, the School District asserted that the following exceptions under Section 708(b): (b)(5) pertaining to medical records; (b)(16) criminal investigative records; (b)(17) noncriminal investigative records; (b)(28) social services records; and (b)(30) personal information of a minor (name, address, birth date).

With regard to FERPA, the School District advised that the Letters, Receipts, Notices and Fines are all “education records” that contain information directly related to a student or maintained by an educational institution which cannot be disclosed. The records contain “personally identifiable information” (PII) that is protected under 20 U.S.C. §1232g(b)(1). The School District maintains that PII includes a student’s personal identifiers like the student’s name and student number, as well as indirect identifiers like the name of a parent or other family members or personal characteristics that make the student’s identity traceable.

On September 16, 2009, the Requester timely appealed to the OOR. In his appeal, the Requester advised that the truancy citation records, comprised of Letters (2), Notices (3) and

Receipts (4), and fine collection records, Fines (5), are not protected by FERPA or the cited exceptions (the “Appeal”). The Requester argues that neither the truancy citation records nor the fine collection records qualify as “education records” as that term is defined under FERPA. He claims that the records requested could be provided in redacted form, and still maintain the privacy of the students. With regard to the truancy reports, sought in Part 1 of his Request, he contends that once the names and addresses are redacted, the remaining information does not compromise student privacy, and thus, the School District should be required to provide the records in redacted form.

The School District argued that since the Requester asked to inspect the records, and did not seek copies, that the School District could not supply the requested records as all of them contain material that must be redacted. The School District included Policy #800, on Records Management, and Policy #802 on Public Records, and Policy #801 on Administrative Procedure on Disclosure and Fees. The School District charges a fee of \$0.25 for every paper and electronic copy of a page, and advises that since redaction is needed, the fees for the copies of the records need to be paid in advance of disclosure of records. The School District Solicitor, Harry W. Reed, Jr., advised the number of pages that would need to be disclosed as follows:

Citations = 1,907, double-sided Magisterial District Judges forms;

Income Report, showing Fines = 1,040 pages;

Attendance Data = total of 1,543 (304 pages of Attendance Logs for the high school and middle school, 261 pages for the Attendance and Membership Summary Report, from K-4 through 12, 978 pages of Attendance Logs for the elementary schools, broken down by school);

Letters (indicating notice of absences and withdrawal) = estimated at 68,800 pages

The Solicitor described the contents of the above records and explained that most of the records contain student names and addresses. The Attendance Data is maintained in Excel spreadsheets.

The School District also re-emphasized that the redaction from these records “would not eliminate the Personally Identifiable Information (PII), including student names or identifiers like parent or family names and addresses, or “other information that would make the student’s identity easily traceable.” The School District did not submit any additional material.

After granting a ten-day extension for the determination, the Requester responded to the School District submission contending the School District failed to meet its burden that FERPA protects the records. The Requester notes that the School District did not address the truancy citations filed by the School Attendance Officer, and did not address the reports of the total amounts paid for the fiscal year. The Requester submitted a copy of the School District’s Job Description for the Attendance Officer, which reflects the Officer’s responsibilities as they relate to student attendance. Neither party addressed the “Receipts” sought in Part 3 of the Request.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The School District qualifies as a local agency subject to the RTKL and its obligations of mandatory disclosure. *See* 65 P.S. §67.102, §67.302. Records of a local agency are presumed “public” unless the record is: (1) exempt under Section 708; (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §67.305. The School District asserts the requested records are protected under FERPA and several exceptions under Section 708(b), including (b)(5) pertaining to medical records; (b)(16) criminal investigative records; (b)(17) noncriminal investigative records; (b)(28) social services records; and (b)(30) personal information of a minor (name, address, birth date). The School District must overcome the presumption of openness to show the asserted statutory exemption applies, and meet its burden of proof on the exceptions with regard to the Attendance Reports, Letters, Receipts, Notices and Fines.

1. FERPA Does Not Protect the Non-Educational Records Withheld.

The School District contends that all five categories of records are protected under FERPA. FERPA protects “education records” and records within a student’s educational file. FERPA defines “education records” as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 33 C.F.R. §99.3. The statute explains that the term “does not include... (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement. 20 U.S.C. §1232g(a)(4).

The School District identified several responsive records to the Request, including Citations from a Magisterial District Judge and Income Reports containing the Fines sought in Part 5 of the Request. However, on the face of the records identified, they do not qualify as “education records,” and may be more properly characterized as “law enforcement records” that are specifically exempted from the education records protected by FERPA. Indeed, the School District did not substantiate that the Fines or the Notices qualify as “education records” as is required to trigger the FERPA statutory exemption from disclosure. The School District employs a School Attendance Officer whose official responsibilities include ensuring “regular attendance through enforcement of state attendance laws.” Part of the Officer’s duty is to issue the Letters to parents regarding student absences. As the Letters are records created by the “law enforcement unit” of the School District, they qualify as “law enforcement records.” Thus, the Letters, Notices and Fines are not properly exempt under FERPA and cannot be protected from disclosure on that basis. Receipts that reflect certified mailing, if they exist within the School District’s records, also do not qualify as education records, leaving only Attendance Reports.

The School District did not explain how Citations from the Magisterial District Judges qualify as “education records” in order to be protected by FERPA as the mere presence of a name and address on a record does not suffice alone to convert a record into an education record as “information directly related to a student.” In fact, directory information for students may be released unless prohibited by a parent. Such “directory information” includes the following:

the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

Moreover, information directly related to a student is not equivalent to “personally identifiable information.” FERPA regulations define “personally identifiable information,” PII, to include:

“(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.”

33 C.F.R. §99.3. However, there is no obligation to protect the PII unless it is within an education record, and only then, the PII may be redacted. *See* Department of Education Guidance, Final Rule, 73 Fed. Reg. 74,811 (Dec. 8, 2008). Only the Attendance Reports may qualify as education records containing information directly related to a student, which are not excepted as law enforcement records.

Under Section 706, the School District must provide the public parts of requested records, and redact the remainder. Although the School District has argued that these records cannot be redacted to protect the privacy and PII of the students, the School District supplied no evidence in support of that assertion. The School District must show that the entire Attendance Reports must be withheld based upon their content, and cannot be de-identified with redactions.

FERPA regulations state as follows regarding “de-identified” records:

...[a]n educational agency or institution ...may release the records or information without the consent required by §99.30 after the removal of all personally identifiable information provided that the educational agency or institution...has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

The Attendance Reports as described by the School District, are electronically maintained in Excel sheet format. The Excel sheets have columns that the School District could remove prior to providing in electronic form. As a result, the School District has the capability to de-identify the records so that they no longer contain information traceable to the student. In this case, the School District did not show that de-identification of the Attendance Reports was impossible in order to protect PII as the OOR recognizes is necessary. *Hahn v. Methacton Sch. Dist.*, OOR Dkt. AP 2009-0153. Only the PII may be redacted from the Attendance Reports under FERPA.

2. The School District Did Not Prove Each of Its Section 708(b) Exceptions.

Under Section 708(a), the School District must show that its claimed exceptions apply by a preponderance of the evidence meaning by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). The School District fails to meet its burden of proof that each of the asserted exceptions apply to the information sought here.

The School District Denial asserts several exceptions under Section 708(b), but does not explain how they apply to the records at issue. For example, the Attendance Reports (logs and summaries) are described by the School District as containing attendance issue, medical letter sent, sick call-in, as well as a student’s name and grade. The School District does not tie the type of information to the asserted exception, *i.e.*, medical letter entry may be protected by (b)(5). As the School District bears the burden of proof, the only exceptions that can be enforced must be apparent on the face of the record, such as inclusion of personal identification information of a minor in (b)(30).

The Reports, Letters, Notices, Receipts and Fines contain the names and/or addresses of a minor. With regard to Section 708(b)(30), the names and addresses of minors is clearly protected and therefore, any addresses of the students may be redacted from any of the records. Although some of the records, such as the Fines, Receipts and Notices, may not contain the names of students, Section 708(b)(30) does not require that the name *and* address be requested in order to qualify for protection under this exception. Strict construction of this exception shows that a record containing home addresses of a child 17 years or age or younger are exempt from public access. *See Blasi v. Pen Argyl Area Sch. Dist.*, Dkt. No. 2009-3706 (Northhamp. C.C.P. 2009)(upholding OOR Final Determination). Pursuant to Section 708(b)(30), the School District may redact the dates of birth of students, as well as name and address information of students, from all responsive records.

Section 708(b)(5) protects medical information, which would include information regarding the illness or a medical letter regarding a student's condition and medical excuses for absences. As such information is evident from the record descriptions, the School District may redact such information from the Attendance Reports and to the extent that medical information regarding treatment or condition appears in any of the other types of records at issue.

However, from the facts of record the School District cannot establish any of the other cited exceptions. The School District did not show that it performed an investigation of any type and that all the records at issue are related to investigations. Having not established the underlying facts with any evidence or explanation, none of the records may be protected under the investigation exceptions in Section 708(b)(16) (criminal) or (b)(17) (noncriminal). The social services exception, (b)(28), does not apply on its face to truancy records so that exception also cannot serve as a proper ground for denial here.

3. Provision of Records and Duplication Costs for Same.

The School District did not support its Denial to the Attendance Reports, Letters, Notices, Receipts and Fines, and must therefore provide the five types of records requested in redacted form. *See* 65 P.S. §67. 706. The Citations from the Magisterial District Judges, the Notices, the Receipts and the Fines are not protected by FERPA. Therefore, they must be provided with only the information protected expressly by (b)(30) and (b)(5) redacted. With regard to the Income Report, which contains the Fine amounts, the records exist in electronic form, so provided the “Defendant name” reveals the minor’s name, it can be redacted electronically and the remainder supplied in electronic form. The Attendance Reports as described are protected by FERPA as education records, but may have all PII redacted. Again, as the Attendance Reports consisted of Excel sheets that the School District may electronically redact without needing to print them.

The School District contends that the Requester is required to pay the costs of duplication prior to receiving the records. While this is accurate for any estimated fees over \$100 as per Section 1307(h), the School District has refused to provide any of the records, many of which exist in electronic form and may be duplicated less expensively by downloading the redacted electronic records to a disk or CD-ROM. Contrary to the School District’s Fee Policy, the cost for electronic duplication is not identical to hard-copies, and \$0.25 cannot be charged per electronically copied page. Rather, in accordance with the OOR Fee Schedule, the School District is limited to charging the actual cost of the disk/CD-ROM. The School District explained that in addition to the Excel sheets containing the Attendance Reports, (which contain the bulk of the records sought), the schools house the records with the information in hard-copy.

The Citations from the district judges are hard copies that do not exist in electronic form, so prior to receiving redacted copies of them, the School District is correct that the Requester would be required to pay \$0.25 per page. Moreover, for any electronic pages that the School District must print in hard-copy in order to redact before scanning and producing electronically,

the School District may also charge \$0.25 per page. Now that the estimated numbers of pages has been furnished, and since the School District has not copied the information, the Requester may decide to reduce his Request to include less records than originally sought to reduce costs.

CONCLUSION

For the foregoing reasons, the Requester's Appeal is **granted in part and denied in part**. The Letters, Notices, Receipts and Fines are protected by FERPA and must be disclosed with permitted redactions under Section 708(b)(30) and 708(b)(5). The Attendance Reports are only partially protected by FERPA, and must be provided with redaction of any personally identifiable information defined by FERPA, and any additional redactions under (b)(30) and (b)(5). Thus, the School District is directed to provide to the Requester these records with only those redactions permitted by this decision, in hard-copy for the records existing in that format, and electronic form, via e-mail or on a disk for those the School District advised exist electronically, upon payment of the permitted fees as outlined above, within thirty (30) days. As the Requester notes, the School District raised no ground for protecting the total amount of fines paid for the fiscal year, and thus that financial record also must be produced.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Lebanon County Court of Common Pleas. 65 P.S. §67.1302(a). All parties must be served with notice of the appeal. The OOR shall be served notice and have an opportunity to respond according to court rules as per Section 1303. This Final Determination shall be posted at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: October 26, 2009



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Michael Churchill; Harry W. Reed, Jr., Solicitor for School District