



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>JUDITH SHERRY</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2009-0857</b>
	:	
<b>RADNOR TOWNSHIP SCHOOL</b>	:	
<b>DISTRICT</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Judith Sherry (the “Requestor”) filed a request (the “Request”) with the Radnor Township School District (the “District”) pursuant to the Right-to-Know Law (the “RTKL”), 65 P.S. §67.101, *et. seq.*. She sought copies of records relating to Academic Honor Code (“Code”) offenses. The District denied the Request. The Requestor timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **denied** and the District is not required to release the records/information requested.

**FACTUAL BACKGROUND**

On August 26, 2009, the Requestor filed the Request with the District.

Specifically, she sought;

1. Complete copies of any and all de-identified records of Academic Honor Code offenses maintained by the Administration for the school

years 2007-2008 and 2008-2009 as required in Policy #106 of the Radnor Township School District. [The Requester stated in her appeal: "Policy 106 states "In this context, a 'de-identified' record is one in which the identity of any students involved will be kept confidential.""]

2. Complete copies of any and all de-identified records of Academic Honor Code offenses given to the Honor Council "to be used as a tool for further teaching and reflection about academic honor" as required in Policy #106 of the Radnor Township School District.
3. Complete copies of any and all de-identified records of Academic Honor Code offenses maintained by the Honor Council members for the school years 2007-2008 and 2008-2009 as required in Policy #106 of the Radnor Township School District and maintained by any or all of the following teachers: Mrs. Pumarada, Mrs. Reardon, Mr. Rosin, Mr. Ryan.
4. Complete copies of any and all Administrative and/or official actions for the school years 2007-2008 and 2008-2009 that were taken as a result of any/all offenses and/or violations to the Radnor High School Academic Honor Code.

On September 2, 2009, the District indicated that it would require an additional 30 days to search for the records and complete a legal review of any responsive documents located. In a September 16, 2009 letter to the OOR, the District's Solicitor requested an advisory opinion from the OOR with regard to the Request.

In a September 24, 2009 letter, the District requested that the Requester grant the District additional time to respond to the Request while it waited for a response from the OOR. Understanding that the request for an advisory opinion may not toll the statutory response period, the District also denied all four items within the Request. The District stated that the requested records relate to a noncriminal investigation and were therefore exempt pursuant to 65 P.S. § 67.708(b)(17). The District also stated that the records are "education records" as defined in the Family Education Rights and Privacy Act (FERPA) and cannot be released.

The Requester filed a timely appeal with the OOR on October 7, 2009. In her appeal, the Requester states that she is not seeking any records that would disclose

student's names or that have not already been turned over to other high school students who serve on the Radnor High School Academic Honor Council (the "Council"). The Requester asserts that she seeks records that the Honor Code requires to be produced to administrators, teachers, parents, and unaffiliated high school students who are members of the Council, and have already been widely disseminated to those parties.

The Requester argues that this undermines the District's claims of privacy and the necessity of secrecy. The Requester also argues that if there were truly concerns over a noncriminal investigation and FERPA, the de-identified records would not have been reviewed by the Council. Finally, the Requester argues that the District did not identify or cite any specific investigation that would support its exemption under § 708(b)(17). Likewise, the Requester also argued that the District's failure to cite to a specific section within FERPA is improper and does not rebut her arguments that the requested records are public.

In response to the appeal, the District stated that the records were exempt under 65 P.S. § 67.708(b)(17) as part of a non-criminal investigation. The District provided further detail regarding the Honor Council and the records at issue through the sworn affidavits of Radnor High School Principal Mark Schellenger and a teacher and member of the Council, Carl Rosin.

The Council is made up of 7 students, 4 teachers, and 1 community member/parent representative. All members of the Council receive training regarding student confidentiality and serious consequence result from any breach of that confidentiality. The purpose of the Council is to educate the student body with regard to honorable behavior in a school setting, including how to react in situations where honor

code infractions might arise and how to prevent dishonor.

The District states that the requested records are reports of student discipline contained in education records maintained by the District. The reports consist of a uniform form for each infraction reported to the Principal's Office at Radnor High School. The discipline form is used by an individual, usually a teacher, personally reporting a disciplinary infraction. The forms are maintained by the discipline secretary at the High School and kept in a locked drawer and are not accessible to the general public. The District states that the Honor Council does not receive or maintain any of the discipline reports.

The District also stated that the Council has met on one occasion in the spring of 2008. At the meeting, the student and teacher members of the council reviewed the de-identified discipline reports that existed at that time.<sup>1</sup> Documents were de-identified by the disciplinary secretary by redacting student and teacher names. The Council does not have the power or authority to discipline or punish any students. A single copy of the de-identified reports were shown to the group. No one received or kept a copy of the reports. When the review meeting was completed, the single de-identified copy was returned to the disciplinary secretary.

The District argues that each report is a record of a noncriminal investigation into that particular disciplinary infraction. The District asserts that a noncriminal investigation does not need to be ongoing for the records to be exempted. The District argues that because the records are exempt under the RTKL any non-public information contained within the records is not required to be released. The District argues that the High School discipline process is a noncriminal investigation consisting of complaints of

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<sup>1</sup> The District notes that the community member/parent representative was absent from that meeting.

disciplinary infractions to the school's administration, investigative materials completed by teachers looking into the violations, notes of investigation correspondence and reports to the principal's office. The reports also reveal the result of the agency investigation in that the discipline imposed is recorded on the form.

The District also argues that the requested records are education records and are exempt under FERPA which states in relevant part:

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; recordkeeping.

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization.....

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless--

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

20 U.S.C. § 1232g(1) and (2).

The District argues that records of student discipline are education records within the meaning of FERPA because they directly relate to students and are maintained by the

school. Since the records are made confidential by FERPA, the District argues it cannot release them to a third party without express approval from the parents. The District argues that it is not merely the contents of the record, but the nature of the record as an education record that makes it protected.

Finally, the District distinguished this case from the OOR's Final Determination in *Churchill v. Lebanon School District*, OOR Dkt. AP 2009-0857 because the requested records are not records of a law enforcement unit. Additionally, the District asserts that FERPA does not require the production of education records that have been de-identified/redacted. The District argues that the disciplinary records contain information that could identify the student, for example grade, class, date of class, class period, teacher name, teacher handwriting, and details of the infraction.

In response, the Requester argues that there are glaring discrepancies between the affidavits and what is authorized by the plain language of the Radnor High School Academic Honor Code. The Requester requested a hearing and to depose Principal Schellenger and Mr. Rosin. The OOR denied both Requests.

The Requester states that there are significant material discrepancies between what has been raised in the sworn affidavits and what is contained within Policy 106 and the District's official webpage. The Requester argues that because of these discrepancies it would be inappropriate for the OOR to rely upon the affidavits for purposes of its Final Determination. The Requester points out that the District fails to include any citations to their own memorialized writings and policies. The Requester reiterates its arguments opposing the District's contention that the reports constitute a noncriminal investigatory record. The Requesters argue that the District's discussion of FERPA is irrelevant

because the records are de-identified and do not include specific student names. Finally, the Requester states that *Churchill* supports release of the records.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). The District is a local agency subject to the RTKL. See 65 P.S. § 67.302.

Section 102 of the RTKL, defines the term “record” as:

“Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document.”

The RTKL provides further clarity in defining a “public record” as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.”

65 P.S. §67.102.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions. Specifically, § 708 in pertinent part states:

(a) Burden of proof. —

(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.

Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8<sup>th</sup> ed. West 2004). *See also Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992).

The District states that the requested records are education records and protected under FERPA. The OOR agrees. 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).

Here, the requested records directly relate to specific students and are maintained by the District which is an education agency. The records are not maintained by any law enforcement unit for the District and thus, do not fall under the exception for law enforcement records set forth in FERPA. As such, the OOR finds that they are education records.

The Requester counters by arguing that the requested records have been de-identified and do not contain any personal identifiable information and should be released. The District argues that the records even though de-identified contain information that would be meaningful to members of the community and could identify the student involved. The District cites such information as class name, teacher handwriting, grade of student, etc. FERPA regulations define “personally identifiable information,” 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.

Here, the District has provided sworn affidavits that the records contain information that could allow people within the school community to identify students. Release of such records is expressly precluded under FERPA. While the review of the records by the Council may raise confidentiality and privacy concerns under FERPA, such a release does not entitle the Requester to the records here. Further, the OOR has no jurisdiction to make a determination that an alleged violation of FERPA occurred.

Even if the records were available under FERPA, the District’s discipline process is a noncriminal investigation. Section 708(b)(17) states that a local or Commonwealth agency can withhold the following records:

“A record of an agency relating to a non-criminal investigation, including

- (i) **Complaints submitted to an agency.**
- (ii) **Investigative materials, notes, correspondence and reports.**
- (iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L.1559, No.169), known as the Whistleblower Law.
- (iv) A record that includes information made confidential by law.
- (v) Work papers underlying an audit.
- (vi) A record that, if disclosed, would do any of the following:
  - Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.**

*See 65 P.S. §67.708 (emphasis added).*

The plain language of § 708 exempts investigative materials, notes, and reports submitted to an agency. The OOR has previously issued rulings upholding denial of records related to non-criminal investigations, *see Rippel v. Department of Conservation and Natural Resources*, OOR Dkt. AP 2009-0134; see also *Lewis v. PSP*, OOR Dkt. AP 2009-0508. Here, the requested records consist of complaints of disciplinary infractions to the school's administration, investigative materials completed by teachers looking into the violations, notes of investigation, correspondence, and reports to the principal's office. The requested records reveal the institution, progress and result of non-criminal investigation conducted by school officials. Further, a noncriminal investigation does not need to be ongoing for the records to be exempted.

To compensate, the Requester challenges the affidavits and raises the release of the records to the Council as support for her position. The OOR is not persuaded by these arguments. First, the affidavits do not contradict each other and do not contradict any factual assertions made by the District. The Requester alleges that the affidavits contradict the Honor Code, Policy #106 and the District's webpage. While this may be true, whether the district is averring that it is conducting the Council in accordance with or contrary to its own guidelines is irrelevant to the issues in this appeal.

Second, the limited release of the records to Council members for review at a private meeting does not automatically transform the records into public records. As noted above, such release may raise confidentiality and privacy concerns under FERPA. However, the OOR has no jurisdiction to make any such determination.

While unrelated to the basis for this Final Determination, the OOR is obligated to address the District's statement that if a record contains information that is exempt under

the RTKL, any public information contained within that record is also exempt from release. This statement is contrary to the plain language of the RTKL. *See* 65 P.S. § 67.706.

### **CONCLUSION**

For the foregoing reasons, this appeal is **denied**, and the District is not required to release the records/information requested. The parties are advised that this is a Final Determination and is binding on the parties. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Common Pleas Court, Delaware County. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1302. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED** November 4, 2009



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