

OOOR Determines that a School Bus Surveillance Video is a Public Record (708(b)(17); FERPA)

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In *Galvez v. West York Area School District*, AP 2019-0267 (May 15, 2019), a reporter requested a portion of a school bus surveillance video depicting a student altercation. The District denied the request, arguing that the responsive video was an educational record under the Federal Educational Rights and Privacy Act (“FERPA”) and that the video related to a noncriminal investigation under Section 708(b)(17) of the RTKL. On appeal, the the Office of Open Records (“OOOR”) held that the video was a public record.

Noncriminal Investigations

Section 708(b)(17) of the RTKL exempts from disclosure records related to a noncriminal investigation. 65 P.S. § 67.708(b)(17). To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814. An investigation is only an official probe when conducted by agencies acting within their legislatively granted fact-finding or investigative powers. *Pa. Dep’t of Public Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. 2014).

The OOR acknowledged that in *Port Authority of Allegheny County v. Towne*, 174 A.3d 1167, 1171 (Pa. Commw. 2017), the Commonwealth Court held that records, including bus videos, “created before investigations and accessed only when necessary can constitute investigative records, especially when the agency asserts that their only purpose is for use in investigations.” However, the OOR asserted that in a more recent case, *Central Dauphin School District v. Hawkins*, 199 A.3d 1005, 1020 (Pa. Commw. 2018), the Commonwealth Court distinguished *Towne*, and concluded that the school district’s use of bus cameras for other purposes such as “discouraging student misbehavior” precluded the application of *Towne*’s rationale.

Accordingly, pursuant to *Hawkins*, the OOR held that Section 708(b)(17) did not apply to the requested videos because: 1) the videos serve multiple purposes and are not wholly investigatory (i.e., they are used “disciplinary and security purposes”); 2) the District reviewed the videos for purposes other than disciplinary investigation; and 3) the discipline was not imposed solely due to the video (i.e., the video depicts images that were seen by many bystanders).

FERPA

The OOR also held that the videos were not protected from disclosure pursuant to FERPA which protects “personally identifiable information” contained in “education records” from disclosure. 20 U.S.C. § 1232g(b)(1). Regulations implementing FERPA define “education records” as those records that are: 1) directly related to a student; and 2) maintained by an educational agency or institution or by a party acting for the agency or institution. See 34 C.F.R. 99.3.

In making this determination, the OOR relied on two recent Commonwealth Court cases. In *Easton Area Sch. Dist. v. Miller*, 191 A.3d 75, 82 (Pa. Commw. 2018), the Commonwealth Court concluded that security camera footage recording a teacher’s disciplinary actions was not an “education record” within the meaning of FERPA because, even though it captured individually identifiable images of students, it was not “directly related” to the students who were portrayed because the footage was “directly related” to the teacher whose behavior was at issue. In the words of the Commonwealth Court: “[A] video ... is only an educational record with respect to a student in the video for whom the video

may have consequences.” Id.

In *Central Dauphin School District v. Hawkins*, 199 A.3d 1005, 1016 (Pa. Commw. 2018), the Commonwealth Court expanded upon the requirement that a record be “maintained” by a school district to be protected by FERPA. Relying on *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 434 (2002), where the Supreme Court held that the records must be kept in a centralized file “with the education records,” the Commonwealth Court found that the agency had failed to establish the maintenance element because the agency was maintaining the video only on a temporary basis. *Hawkins*, 199 A.3d at 1015-1016.

In *Galvez*, the OOR concluded that since the agency did not submit any evidence that the video was used as part of any disciplinary action involving any student(s) shown in the video, the agency failed to demonstrate that the video was a requested record under FERPA.

Conclusion

The *Galvez* case is useful because it makes clear that school bus videos are not automatically exempt under the RTKL. In other words, the OOR believes that videos depicting students are presumed to be public and will only be exempt if a school district proves every element of any raised reason for withholding. However, if the school district meets this burden, the OOR will hold that records are exempt. For example, in *Clark v. Mechanicsburg Area School District*, AP 2018-1664 (Nov. 28, 2018), the OOR determined that a bus video showing an altercation between two students was exempt pursuant to FERPA because: 1) the video footage showed the inappropriate behavior of two students that directly related to disciplinary action taken by the District; and 2) the video was permanently maintained by the District in a central repository as an educational record. Accordingly, Open Record Officers should work with their solicitors when responding to requests for any videos depicting students under the RTKL.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.