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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 217 CD 2024

COMMONWEALTH CHARTER ACADEMY CHARTER SCHOOL,
Appellant,

v.

SUSAN SPICKA AND EDUCATION VOTERS OF PA,
Appellees.

BRIEF FOR APPELLEES, SUSAN SPICKA AND EDUCATION VOTERS OF PA

Appeal from the Order of the Honorable John F. Cherry, Dated February 6, 2024, in the Court of Common Pleas of Dauphin County at 2022 CV 7857

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Dated: July 24, 2024

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Suggested answer: Yes.

B. Can an agency fulfill its obligations under the Right to Know Law by creating and providing a summary of the requested records, rather than the requested records themselves?

Suggested answer: No.

C. Did the trial court correctly hold that, following redaction, there is no information in the requested records protected by constitutional privacy rights?

Suggested answer: Yes.

II. COUNTERSTATEMENT OF THE CASE

Appellees, Susan Spicka and Education Voters of PA ("Requesters"), are advocates for public education who seek through this case to scrutinize how Appellant Commonwealth Charter Academy Charter School ("CCA") spends taxpayer funds. Over two years ago, they filed a request under the Right to Know Law ("RTKL") for copies of Community Class Registration Forms from CCA ("Request"). (R. 34a). Parents and guardians submit these forms to obtain reimbursement payments from CCA for classes taken outside of the cyber charter school. The Request sought:

> Copies of ALL 'Community Class Registration Forms' for the 2019-2020 and 2020-2021 school year that were submitted to CCA with the following UNREDACTED information:
>
> Course title
> Number of time[s] the class meets
> Start date
> Cost of the class
> Amount requesting for the reimbursement

(R. 34a).

A. Procedural History

Appellees supplement the Procedural History as recited in Appellant's Brief with the following additions:

On September 16, 2022, the Office of Open Records ("OOR") issued a Final Determination granting Requesters' appeal and requiring CCA to provide the registration forms, redacted of any identifying information, within thirty days. (R.

15a-21a). OOR held that redaction of the forms of "any information not sought sufficiently de-identifies the forms such that they may be released under FERPA" and resolves any constitutional privacy concerns. (R. 20a).

On October 13, 2022, CCA filed its Petition for Review in the Dauphin County Court of Common Pleas seeking review of OOR's Final Determination, arguing, among other things, that education records under FERPA are categorically exempt from disclosure under the RTKL and thus need not be disclosed even in redacted form. (R. 11a).

Following briefing and oral argument, on September 11, 2023, the trial court ordered *in camera* review of "the unredacted documents at issue in the Right to Know proceedings as requested by Susan Spicka and Education Voters of PA, as well as the Excel spread sheet suggested by counsel during argument." (R. 110a).

On February 6, 2024, the trial court issued an Order upon consideration of the parties' briefing, oral argument, and the *in camera* submission that summarily affirmed OOR's Final Determination, rejected CCA's claims that "even with redactions as directed by OOR, the identity of a student/and or their parent would be discoverable," and found that CCA's proposed Excel spreadsheet would not adequately respond to the Request. (R. 112a).

On May 7, 2024, the trial court issued an Opinion further setting forth its rationale, explaining that, in light of the Supreme Court's *Central Dauphin* decision,

disclosure of the redacted records comports with the RTKL and FERPA; parent handwriting is not personally identifiable under FERPA; and the redacted records sufficiently remove personally identifiable information such that they must be disclosed. (R. 123a-124a).

On March 5, 2024, CCA filed its Notice of Appeal of the trial court's Order to this Court. (R. 111a).

III. SUMMARY OF ARGUMENT

The Order of the Dauphin County Court of Common Pleas affirming OOR's Final Determination and requiring CCA to release redacted versions of the requested records was correct and should be affirmed by this Court.

The trial court correctly applied the analysis set forth in *Central Dauphin School District v. Hawkins*, 286 A.3d 726 (Pa. 2022), addressing the interplay of FERPA and the RTKL. Following a careful *in camera* review of the requested forms, the trial court rightly concluded that none of the information at issue is exempt from disclosure under FERPA, the RTKL, or the Pennsylvania Constitution. The trial court conducted this analysis properly, and its findings of fact are supported by substantial evidence and should not be reviewed on appeal as if they were conclusions of law.

The trial court also correctly held that disclosure of an agency-created summary, rather than copies of the requested forms themselves, would not satisfy CCA's obligations under the RTKL. The RTKL guarantees access to public records, not to an agency's selective summaries of its records. Holding otherwise would undermine the RTKL's purpose of promoting governmental transparency and accountability and allowing for public scrutiny of governmental activity.

Ms. Spicka and Education Voters of PA have now waited over two years for these public records, and this Court should promptly affirm the trial court's decision.

IV. ARGUMENT

A. This Court Should Affirm Based on the Pennsylvania Supreme Court's Decision in *Central Dauphin*

CCA's core argument before OOR and the Court of Common Pleas—that FERPA makes education records categorically exempt from disclosure under the RTKL—is not tenable under the Pennsylvania Supreme Court's decision in *Central Dauphin School District v. Hawkins*, 286 A.3d 726 (Pa. 2022). Although CCA now reluctantly concedes that education records in a public school's possession are presumed public under the RTKL pursuant to *Central Dauphin*, it persists in criticizing this holding and attempts to use its disagreement with the Supreme Court's decision to justify this appeal. But, as the court below recognized, the Supreme Court has now spoken to the precise issues presented here, and *Central Dauphin* controls the outcome of this case.

1. Following *In Camera* Review, the Trial Court Correctly Found that the Redacted Records Do Not Contain Any Personally Identifiable Information Exempt from Disclosure

Both OOR[1] and the trial court followed the analysis set forth in *Central Dauphin* and found that, although the requested forms were education records under FERPA, the inquiry did not end there as "the critical exemption from disclosure

[1] Although OOR's Final Determination predated the Supreme Court's *Central Dauphin* decision, OOR applied an analysis that precisely tracks the analysis set forth in *Central Dauphin*. (R. 19a) (Final Determination) (citing *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 729-30 (Pa. 2020), a plurality decision applying an analytical framework that the *Central Dauphin* majority subsequently endorsed).

under FERPA is not the entire category of education records … but rather the students' personally identifiable information." 286 A.3d at 741. Consistent with the principle that the redaction provisions of both the RTKL and FERPA regulations apply to education records, OOR (R. 19a-20a) and the trial court (R. 124a) next considered whether the records could be sufficiently de-identified by redacting all personally identifiable information, such that they must be disclosed. *See* 286 A.3d at 742-45; 65 P.S. § 67.706; 34 C.F.R. § 99.31(b)(1).

In so doing, OOR and the trial court engaged in precisely the "context-specific, case-by-case, fact sensitive" examination that FERPA and the RTKL require. 286 A.3d at 744. As part of its examination, the Court of Common Pleas ordered *in camera* review of all relevant records. (R. 110a). Following that careful review, the trial court determined that, under the circumstances presented here where Requesters seek only five unredacted fields—course title, number of times the class meets, start date, cost of class, and amount requested for reimbursement—redaction would successfully de-identify the community class registration forms such that they must be disclosed. [2] (R. 112a, 124a).

[2] To the extent that CCA claims redaction is overly burdensome, this argument fails. CCA alleges that the *Central Dauphin* Court's "pronouncement that education records in the possession of a public school are presumed public" creates "absurd" obligations for school districts. CCA's Brief at 17 n.5. But the mandatory language of the RTKL is clear: "A local agency **shall** provide public records in accordance with this act," 65 P.S. § 67.302 (emphasis added), and "[t]he agency may not deny access to the record if the information which is not subject to access is able to be redacted," *id.* § 67.706. In light of these clear mandates, Pennsylvania courts routinely reject agencies' attempts to plead burden to avoid redaction and disclosure. *See, e.g., Cent. Dauphin Sch.*

The trial court's factual finding here is correct, supported by substantial evidence, and should be affirmed. *See, e.g.*, *In re Melamed*, 287 A.3d 491, 497 n.11 (Pa. Cmwlth. 2022) ("This Court's review of a trial court's order in an RTKL dispute is limited to determining whether findings of fact are supported by substantial evidence or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision." (cleaned up)). And, as the *Central Dauphin* Court noted, the context-specific inquiry as to whether a student's identity is discernable is "properly raised before the factfinder, rather than decided as a matter of law on appeal." 286 A.3d at 744; *see also Office of Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Cmwlth. 2015) (en banc) ("Records reviewed *in camera* may serve as a sufficient basis for a fact-finder to assess whether an exemption applies.").

2. Parent Handwriting Is Not Personally Identifiable Information Under FERPA

After *Central Dauphin* gutted CCA's chief arguments, and recognizing that Requesters do not seek any personally identifiable information ("PII"), CCA raised for the first time before the Court of Common Pleas, and continues to maintain here

Dist. v. Hawkins, 286 A.3d 726, 743 n.12 (Pa. 2022) (rejecting District claim of lack of capacity or financial ability to redact and holding that "Section 706 of the RTKL mandates agencies like the District to redact information exempt from disclosure and does not give them discretion in this regard; they are simply required to comply with the law"); *McKelvey v. Pa. Dep't of Health*, 255 A.3d 385, 404 (Pa. 2021) (recognizing the difficulty of redaction, but concluding the "agency may not delegate its disclosure duties or defer to the redactions of third parties"). In addition, the redaction required by CCA's report card hypothetical, CCA's Brief at 17 n.5, is simpler than what was at issue in *Central Dauphin*, which required the blurring of faces in a video. Besides, academic transcripts are already exempt from access under the RTKL. 65 P.S. § 67.708(b)(15)(i).

on appeal, a novel argument that the forms nevertheless may not be redacted and disclosed because they contain parent handwriting. CCA asserts that the parent handwriting is protected PII under FERPA which "cannot be redacted," so CCA "cannot provide access to the CCR forms in their entirety." CCA's Brief at 18.[3]

As a threshold point, there is no evidence in the record that the requested registration forms contain parent handwriting. While CCA "acknowledges that it did not explicitly address the mode by which a parent/guardian completes a CCR form, whether typed or handwritten, until oral argument," it argues that "it can be inferred from the evidence related to the submission and the oral argument transcript that almost all parents/guardians complete the forms by hand and then submit them electronically to CCA in varying forms." CCA's Brief at 18-19. The only support CCA offers for this claim is a citation to the oral argument transcript. *Id.* at 19 (citing R. 98a). But counsel's statement at oral argument that many of the forms contain parent handwriting cannot create a record fact. *E.g.*, *Commonwealth v. Puksar*, 951 A.2d 267, 280 (Pa. 2008) ("[I]t is well-settled that arguments of counsel are not evidence.").

Setting aside the belatedness of the argument and the deficiency of record evidence, parent handwriting is not protected by FERPA. FERPA's definition of PII

[3] This mischaracterizes the original RTKL Request. Requesters have not asked for "the CCR forms in their entirety." Rather, the Request seeks copies of the forms with five specific unredacted fields. (R. 34a).

includes "biometric record[s]," which in turn are defined to include "handwriting." 34 C.F.R. § 99.3. As CCA admits, however, "as used in [FERPA's] definition, 'handwriting' relates to a student's handwriting" and the handwriting on the requested forms is parent handwriting. CCA's Brief at 19. CCA argues that this regulation nonetheless "supports a determination that handwriting is an identifying characteristic." *Id.* But the FERPA regulations lead to the opposite conclusion. Several of the PII definition subsections explicitly protect information about parents that might reveal a student's PII. *See, e.g.*, 34 C.F.R. § 99.3 (subsection (b) of the definition of PII protects "the name of the student's parent or other family members" and subsection (e) protects "mother's maiden name"). Not so for biometric records of a parent.

Finally, CCA argues that parent handwriting falls within subsection (f) of FERPA's PII definition, a catchall provision restricting disclosure of "[o]ther 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," *id.*; CCA's Brief at 19. This is pure speculation, unsupported by any evidence in the record or caselaw. CCA does not, and cannot, provide any

explanation as to how a reasonable person in the school community[4] without personal knowledge of the relevant circumstances could use the five unredacted fields on a scanned handwritten form to identify a parent with reasonable certainty, let alone to ascertain the identity of a student.

Recognizing this, and following *in camera* review of all requested documents, the trial court made a factual finding rejecting CCA's "claim that, even with the redactions as directed by OOR, the identity of a student/and or their parent would be discoverable." (R. 112a). The trial court also concluded as a matter of law that "*parent* handwriting [is not] personally identifiable information under 34 CFR Section 99.3 (f)." (R. 124a). Both this finding of fact and this conclusion of law should be affirmed.

On appeal, CCA returns to an argument appropriately rejected by both OOR and the Court of Common Pleas: speculation that Requesters have previously demonstrated that they are willing to publicly share information obtained through RTKL requests and private CCA Facebook groups, so "CCA cannot disclose the handwritten forms even with redactions" without running afoul of FERPA. CCA's Brief at 19. Even if CCA's speculation were correct, this argument gets CCA nowhere.

[4] CCA is "a statewide public cyber charter school" that "enrolls students from across the state." (R. 56a).

The RTKL provides that "[a] local agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law." 65 P.S. § 67.302(b). Correspondingly, the RTKL prohibits the agency from making it a requirement to disclose the purpose or motive in requesting access to records. 65 P.S. § 67.1308(2). Therefore, "[t]he status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b)." *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Cmwlth. 2014); *see also City of Allentown v. Brenan*, 52 A.3d 451, 455 n.8 (Pa. Cmwlth. 2012) (noting that the "motive or intent of the requester is not a valid reason for denying a request" where requester sought same records through RTKL request that requester had previously unsuccessfully sought through discovery in federal litigation). Here, Requesters' supposed prior conduct or intended use of the forms is irrelevant under the RTKL. And, as discussed above, nothing in FERPA bars disclosure once the records are appropriately redacted.

3. CCA's Attempt to Distinguish These Records from the Records in *Central Dauphin* Fails

At various points, CCA argues that the records here are distinct from those at issue in *Central Dauphin* because they are "true educational record[s,] not a record of the school which contains personally identifiable student information." CCA's Brief at 16. CCA here invents a novel distinction between "true education records,"

like the forms here, and some other category of education records that are deserving of lesser protection, like the bus video at issue in *Central Dauphin*. *See also id.* at 18 ("CCA maintains that the original CCR forms are personal records of student educational endeavors (different in kind from school surveillance videos) and contain personally identifiable information . . . .").

There is no basis for such a distinction. The plain language of FERPA defines education records as records that (1) are directly related to a student and (2) are maintained by the educational agency. *See* 20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. § 99.3. The video in *Central Dauphin* and the forms requested here are education records under FERPA for the same reason: because both satisfied this two-prong test under FERPA. To the extent that CCA's proposed distinction is premised on a record containing PII being different from a record not containing PII, the record in *Central Dauphin* also contained PII.[5]

B. A Requester is Entitled to Access Public Records, Not Just Agency-Created Summaries of Records

The Court of Common Pleas correctly decided that CCA's alternative proposal to provide a spreadsheet summary of the forms, rather than the forms themselves, does not adequately respond to the RTKL request.[6] (R. 112a).

[5] The bus surveillance video in *Central Dauphin* that had to be redacted and disclosed was replete with much more sensitive identifying information than the CCA registration forms, such as students' faces and jersey numbers, and was significantly more difficult to redact. *See* 286 A.3d at 732, 745.

[6] CCA proposed a spreadsheet summary for the first time on appeal to the Court of Common Pleas.

The RTKL provides that "A record being provided to a requester **shall be provided in the medium requested if it exists in that medium;** otherwise, it shall be provided in the medium in which it exists." 65 P.S. § 67.701(a) (emphasis added). Here, Requesters sought "Copies of ALL 'Community Class Registration Forms' for the 2019-2020 and 2020-2021 school year that were submitted to CCA with the following UNREDACTED information: Course title, Number of time the class meets, Start date, Cost of the class, Amount requesting for the reimbursement." (R. 34a). This request sought the forms themselves with certain unredacted fields, not an agency-created summary of information culled from the forms. As evidenced by their production for *in camera* review, the forms exist in the medium requested and therefore must be provided under the mandatory language of the RTKL.

In support of its offer of a summary in place of the forms, CCA cites *Grine v. County of Centre*, 138 A.3d 88 (Pa. Cmwlth. 2016) (en banc). *Grine* states merely that "an agency may create a record in order to ease review of requested information." *Id.* at 99. The question in *Grine*—a case brought by judicial personnel, not RTKL requesters—was whether Centre County had exceeded its authority by generating a summary of "records showing the activities of uniform judicial system personnel." *Id.* at 100. *Grine* in no way addressed whether an agency can fulfill its RTKL obligations by providing only a summary of the requested records when a requester has specifically asked for the underlying records themselves.

The RTKL requests that prompted the *Grine* litigation sought "records of all telephone calls, text messages, instant messages, email ... and/or any other form of electronic communication" as to a judge, as well as "all to and from cell phone/call records[,] and to and from text messages from [DA's Office] and [another judge]." *Id.* at 91. In response, the county "created a color-coded spreadsheet showing calls between the Judges and the DA's office," but did not disclose a "500-plus page detailed Verizon invoice corresponding to Judge Grine." *Id.* at 99. That spreadsheet fully satisfied the RTKL requests, which sought "records" of "calls" and "text messages," without specifically seeking phone company invoices.[7] Here by contrast, Requesters have asked for "Copies of ALL 'Community Class Registration Forms'" (R. 34a). A spreadsheet summarizing the contents of the forms would not be responsive to the request for "Copies" of the "Forms." CCA cannot avoid releasing the forms by generating an Excel summary and releasing that instead.[8]

[7] Nothing in *Grine* suggests the requesters there would have been dissatisfied to receive spreadsheets instead of invoices, and indeed in many circumstances (but not here) RTKL requesters prefer the convenience of receiving an electronic database instead of uncompiled primary materials. *See, e.g.*, *Dep't of Envtl. Prot. v. Cole*, 52 A.3d 541, 548 (Pa. Cmwlth. 2012) ("Cole . . . . requested the Department's Sunshine Program information and noted that she believed it would be easiest, for all those involved, if the information was provided electronically. The Department must provide Cole this information but only in the format in which it is available.").

[8] CCA is not offering a spreadsheet to "ease review," *Grine*, 138 A.3d at 99. Rather, it is offering to respond to the request "in an alternate format to protect the information which is not subject to access," CCA's Brief at 21. But the RTKL already has a procedure in place for protecting information not subject to access: redaction under Section 706.

CCA also cites an OOR final determination, *Bowling v. Pennsylvania Emergency Management Agency*, for the proposition that "if an agency has concerns regarding the alteration of manipulation of information, the agency may provide the information in another format." CCA's Brief at 20-21 (citing *Bowling*, No. AP 2009-0128 (Pa. OOR Apr. 17, 2009), *rev'd on other grounds sub nom. Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Cmwlth. 2010) (en banc), *aff'd*, 75 A.3d 453 (Pa. 2013)). This grossly overstates OOR's holding in *Bowling*, which is in any event not binding precedent in this Court. In *Bowling*, the requester sought "electronic spreadsheets," slip op. at 2, and the agency responded by providing him with a PDF file. The requester argued to OOR that the agency should be required to provide the records in a different electronic format (namely, as a .xls Excel spreadsheet instead of as a .pdf document). OOR decided this issue in the agency's favor, noting that "Mr. Bowling received the 'information' requested" and that "[i]t was provided in an electronic medium," consistent with his RTKL request. *Id.* at 9. In the instant case, by contrast, CCA proposes not to provide the "Forms" Requesters seek, but instead to provide a spreadsheet summarizing them.[9]

[9] CCA suggests that Requesters intend to "manipulate" the requested records by "holding the academic choices of parents and cyber students to public ridicule and shaming." CCA's Brief at 21. CCA's innuendo about Requesters' motives is untrue. Nor is it true that publicly releasing records obtained through a RTKL request is a form of "manipulation" that somehow exempts records from disclosure.

Setting aside the fact that CCA's spreadsheet proposal is contrary to the mandatory language of the RTKL and unsupported by precedent, it also raises serious practical concerns. In the transcription process of summarizing records, agency staff could introduce unwitting errors. Allowing agencies to create summaries in place of providing actual records would undermine the RTKL's purposes and goals. "The RTKL 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." *Pa. State Educ. Ass'n v. Commonwealth Dep't of Cmty. & Econ. Dev*., 148 A.3d 142, 155 (Pa. 2016); *see also McKelvey v. Pa. Dep't of Health*, 255 A.3d 385, 399 (Pa. 2021) ("The RTKL is remedial legislation to facilitate government transparency and promote accountability."). Permitting agencies to respond to RTKL requests for primary sources with agency-created summaries would inhibit governmental transparency and diminish agency accountability.

C. Following Redaction of the Records, There is No Information Implicating the Constitutional Right to Privacy

OOR concluded, and the trial court affirmed, that, following redaction of the forms, "there are no constitutional right to privacy concerns for the OOR to address." (R. 20a). This is correct because none of the information sought here is the kind of information that courts have found to be potentially protected by Article 1, Section 1 of the Pennsylvania Constitution. The only information that would be disclosed is

course title, number of times a class meets, start date, cost of class, and amount requested for reimbursement. As CCA admitted in its brief before the trial court: "OOR and PA courts have thus far determined the following types of information implicate privacy concerns, subject to the balancing test: home addresses, telephone numbers, and social security numbers." Brief of Petitioner Commonwealth Charter Academy (Court of Common Pleas) (Aug. 15, 2023) at 13; *see also Pa. State Educ. Ass'n v. Commonwealth Dep't of Cmty. & Econ. Dev.*, 148 A.3d 142, 156-58 (Pa. 2016) (finding constitutional right to privacy in home addresses and setting forth balancing test that must be followed if right to privacy is implicated).

Here, CCA raises the novel argument that parent handwriting is protected by the constitutional right to informational privacy. CCA's Brief at 23. This is simply wrong. CCA cites no precedent for its argument. In fact, the handwriting cases that CCA cites earlier in its brief in support of its FERPA argument undercut its constitutional privacy argument, as those cases hold that there is no reasonable expectation of privacy in handwriting. *See* CCA's Brief at 19 (citing *United States v. Doe*, 457 F.2d 895, 898 (2d Cir. 1972) ("Handwriting and voice exemplars fall on the side of the line where no reasonable expectation of privacy exists."); *United States v. Mara*, 410 U.S. 19, 21 (1973) ("[T]here is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice."); *In re Casale*, 517 A.2d 1260, 1264 (Pa. 1986) (citing *Mara* with approval).

Since none of the information sought here triggers a constitutional right to privacy, OOR and the trial court correctly rejected CCA's constitutional privacy argument.

V. CONCLUSION

The Court should affirm the decision of the Dauphin County Court of Common Pleas in full.

Dated: July 24, 2024

Respectfully submitted,

/s/ Benjamin Geffen

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 24, 2024

/s/ Benjamin Geffen
Benjamin Geffen