UNRUH TURNER BURKE & FREES
ATTORNEYS AT LAW

AMANDA J. SUNDQUIST
asundquist@utbf.com

September 5, 2023

VIA E-File Portal

Blake Eilers, Esquire
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101

RE: AP 2023-1904: Ciliberti v. Avon Grove School District

Dear Appeals Officer Eilers:

I am an attorney with Unruh, Turner, Burke & Frees, P.C., which is the duly appointed Solicitor for the Avon Grove School District (the "District"). I am responding to the request for information in the above-referenced matter.

A. PROCEDURAL BACKGROUND

On June 19, 2023, Daniel Carsley, the Business Manager and Open Records Officer for the District, received a records request pursuant to the Right-to-Know Law ("RTKL") from Carmela Z. Ciliberti, Esquire (the "Requester"). The request ("Request") sought voluminous information related to five (5) student posters hung the halls of the Avon Grove Middle School (the "Middle School") summarized as follows:

MAILING ADDRESS: P.O. Box 515, West Chester, PA 19381-0515, T: 610.692.1371, F: 610.918.1361
OFFICE ADDRESS: 17 West Gay Street, Suite 200, West Chester, PA 19380-3090
www.utbf.com

1. **Poster Incident: General Information**
    a. Poster Creation
    b. Poster Content
    c. Poster Display

2. **Poster Incident: Disciplinary Actions – Displaying Unauthorized Materials (if display was not approved)**
    a. Educator / Employee Records
    b. Educator / Employee Disciplinary Actions
    c. Student Disciplinary Actions

3. **Poster Incident: Disciplinary Actions – Imposing Political Beliefs on Anyone in the School System**
    a. Educator / Employee Records

4. **Internal Investigation Subsequent to Poster Incident**
    a. Conduct of Internal Investigation
    b. Obscene Materials and Sexual Abuse
    c. Sexual Harassment, Hazing, or Bullying Affecting Students
    d. Discrimination and Harassment Affecting Staff

See **Exhibit "A"** (emphasis in original; numbered and lettered bullets added).

On June 26, 2023, the District issued a Written Notice of Review indicating a response would be provided on or before July 26, 2023. See **Exhibit "B."** On July 26, 2023, the District granted the Request in part, and denied the Request in part (the "Response"). See **Exhibit "C."** On August 12, 2023, the Requester appealed the Response to this Office (the "Appeal"). See **Exhibit "D."**[1]

[1] The Requester did not appeal the denial of access to evaluations under 1) 65 P.S. 67.708(b)(7)(ii), see Exh. D, pp.17-19, "Poster Incident: General Information: Poster Creation", Item (b)(v); or 2) the denial of access to "Poster Incident: General Information: Poster Creation", Item (b)(iv) under 65 P.S. 67.703. See Exh. D, pp. 17-19. Therefore, any appeal as to these denials is waived. See Crocco v. Pa. Dep't of Health, 214 A.3d 316, 321 (Pa. Cmwlth. 2019) ("A requester waives arguments that are not raised in her Section 1101 appeal.") (citations omitted)).

On August 15, 2023, the Office of Open Records (the "OOR") issued correspondence to the parties from Elizabeth Wagenseller, Executor Director for the OOR, which described the RTKL appeal process, assigned Blake Eilers, Esquire as the Appeals Officer; and attached the Requester's documents filed in her Appeal. See **Exhibit "D."**

B. FACTUAL BACKGROUND

1. The Rainbow Club

The District is a Pennsylvania public school district. The Middle School is one of the District's secondary schools educating students in grades 7 to 8. All students in attendance at the Middle School are minors under the age of 18. During the 2022-2023 school year, on average, 870 students attended the Middle School.

The Middle School permits students to join and participate in a variety of clubs and activities. One such club is the "Rainbow Club." The Rainbow Club is a non-curriculum-related, voluntary, student-run and student-initiated group. The District does not sponsor or run the Rainbow Club. The District does not provide any funding to the Rainbow Club. The Rainbow Club typically meets on Fridays during the school year. Two (2) District employees are present at each meeting of the Rainbow Club solely for custodial purposes, that is, ensuring the safety of the students attending the meeting. The District employees do not direct, conduct, contribute, or participate in the meetings of the Rainbow Club. The Rainbow Club does not keep records of which students attend its meetings. Not every student-member attends every meeting of the Rainbow Club.

2. Creation and Hanging of Posters by Students

During the May 19, and May 26, 2023 meetings of the Rainbow Club (the "Meetings"), student-members of the club worked on the five (5) posters identified by the Requester in her Appeal (the "Posters"). See Exh. D, pp. 27-31. On or about June 1, 2023, some student-members of the Rainbow Club hung the Posters in the hallways of the Middle School. No District educators or employees[2] directed, supervised or participated in the hanging of the Posters.

3. Discovery and Removal of the Posters by the District

On or about June 8, 2023, approximately six (6) school days after the hanging of the Posters, M. Christopher Marchese, Ed.D, Superintendent of Schools for the District, entered into the Middle School and discovered the Posters. Dr. Marchese had a conversation with Janice Lear, Principal of the Middle School, about the Posters. Dr. Marchese reviewed Board Policy 220 and followed up with Ms. Lear to determine if the Posters were hung in accordance with the procedure outlined in Board Policy 220. Ms. Lear informed Dr. Marchese that students had hung the Posters without first obtaining the required District approvals under Board Policy 220. Dr. Marchese therefore arranged for the Posters to be removed, and they were so removed later that day on or about June 8, 2023. Dr. Marchese informed the Avon Grove Board of School Directors (the "Board") via email as to the removal of the Posters.

Although the Requester seeks information concerning a purported "internal investigation" following the Poster Incident, District actions were limited to the initial

[2] The two (2) District employees who attended the Meetings for custodial purposes were not present during the hanging of the Posters.

response to the "Poster Incident" itself: the straightforward conversation between Dr. Marchese and Ms. Lear, the quick removal of the Posters, and the Policy 220 refresher which followed. Therefore no records exist regarding internal investigations subsequent to the conclusion of the "Poster Incident." No students or District employees were disciplined with regard to creation or display of the Posters.

C. RESPONSE TO REQUESTER'S ARGUMENTS

The District submits the attestations of Dr. Marchese; Mr. Carsley; Jason M. Kotch, Ed.D., the Director of Innovation and Technology for the District; Christina Simpkins, the Safety and Security Manager for the District; and Andrew D.H. Rau, Esquire, with the law firm serving as the Solicitor to the District, attached hereto as **Exhibit "F," Exhibit "G," Exhibit "H," Exhibit "I,"** and **Exhibit "J,"** respectively, in support of the information set forth herein.[3]

1. The Request Is Insufficiently Specific.

Section 703 of the RTKL states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." 65 P.S. § 67.703. In determining whether a particular request is sufficiently specific, a three-part balancing test is utilized, which requires:

1. "[t]he subject matter of the request must identify the 'transaction or activity' of the agency for which the record is sought," Pa. Dep't of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121, 1125 (Pa. Cmwlth. 2015);

2. The request must identify "a discrete group of documents", id.; and

[3] The averments in these attestations are to be accepted as true absent a presentation of evidence showing that the District acted in bad faith. See In re Melamed, 287 A.3d 491, 495 (Pa. Cmwlth. 2022) (citing McGowan v. Pa. Dep't of Env't Prot., 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014)).

> *3.* "The time frame of the request should identify a finite period of time for which records are sought." Id. at 1126. This factor is the most fluid and is dependent upon the request's subject matter and scope. See id. A short timeframe does not make a broad request sufficiently specific. See id.

None of these factors individually are dispositive; instead, the Commonwealth Court has emphasized the importance of a "flexible, case by case, contextual application of the test." Office of the District Attorney of Phila. v. Bagwell, 155 A.3d 1119, 1145 (Pa. Cmwlth. 2017). The Court further stated that where a request does not seek a clearly defined universe of documents and requires files to be reviewed and judgments to be made as to the relation of the documents to the specific request, such a request is insufficiently specific. See Id. "The OOR has repeatedly held that a request that requires agency to make judgment whether each potentially responsive records is "related to" the request is insufficiently specific." Winklosky v. Pa. Office of the Governor, , 2018 WL 6018808 at *8 (Pa.Off.Open Rec. 2018) (citation omitted); see also Rayco Sunders v. Penn Hill Sch. Dist., 2019 WL 1436111 (Pa. Off. Open Rec. 2019).

While the Requester claims that her Request "was a comprehensive user-friendly guide organized in a logical sequence;" Exh. D, p. 18, the District disagrees with that characterization of the Request. Rather, the Request is so overly broad and unusually structured that it failed in many respects to adequately explain to the District what the Request seeks. As a result, the Request fails to meet the specificity requirements under Post-Gazette.

In particular, the Requester challenges the denial of the production of "Poster Incident: General Information: Poster Content", Item (a), "District Information Technology Resources history/content accessed at the location and for the duration of poster creation." See Exh. D, Page 18. However, Mr. Carsley could not identify on the face of the Request what records of the District the Requester sought in regard to this item. Based on the reference to "Information Technology Resources" Mr. Carsley consulted with Mr. Kotch, the Director of Innovation and Technology for the District, to attempt to ascertain what records were being requested by the Requester and if they may be in the possession of District. Mr. Kotch could not identify from the Request what record the Requester sought.[4] This portion of the Request was insufficiently specific and properly denied on that basis.

Neither the requester or OOR may modify, explain or expand a request on appeal. See Pa. State Police v. Office of Open Records, 995 A.2d 515, 516 (Pa. Cmwlth. 2010); Michak v. Pa. Dep't of Pub. Welfare, 56 A.3d 925, 930 (Pa. Cmwlth. 2012) (holding that "where a request[e]r requests a specific type of record . . . the request[e]r may not, on appeal argue that an agency must instead disclose a different record in response to the request").

[4] Further, as noted in Exh. "H", even if the District could ascertain what is requested, the District does not have the ability to generate a report connecting content to a specific location in the school. Further, the District does not have the ability to ascertain the purpose for which content was accessed — that is, if the access was related to the "Poster creation" or for some other purpose. Any correlation between the content history and time of the event would be an assumption.

The Requester now states, for the first time and only as part of her Appeal that she seeks "web browser history."[5] Exh. D, p. 18. Web browser history was not requested in the Request and therefore cannot be requested on appeal. See Michak, 56 A.3d at 930; Pa. State Police, 995 A.2d at 516. As such, the District properly determined this portion of the Request was insufficiently specific, and no further action is required by the District.

2. *The District Cannot Produce Records that Do Not Exist.*

Section 705 of the RTKL provides that "[w]hen responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. § 67.705.

An agency has the burden of proving that a record does not exist and "may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." Hodges v. Pa. Dep't of Health, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011);

[5] In her Appeal, the Requester fails to identify whose browser history is sought or identify a location, contributing to a lack of specificity even in the improper attempt to modify the Request on Appeal. If her modification is nonetheless accepted by OOR, the District is to again make its own judgment call to determine who or what would be included in the realm of "history/content accessed at the location and for the duration of poster creation", which is not required under the RTKL. See Micozzie v. Upper Darby Township, 2021 WL 20155198 at *6. The impediment noted by Mr. Kotch regarding the inability to generate a report connecting content to a specific location in the school or to ascertain the purpose of what the content was accessed continues to exist. Under either the original Request or as the Requester has modified it in her Appeal, as the District has not been able to identify the record sought by the Requester, it would not appear to exist. 65 P.S. 67.705. Further, to the extent such a record did exist, given the facts of the record any such record may not document a transaction or activity of the District, and therefore would not be a record of the District. See Grove v. Penn Valley Area School District, 2018 WL 4537457 (Pa. Off. Open. Rec 2018)(holding the internet browsing histories of employees may not be related to agency activity). Since the item sought in the Request (or as the Requester attempts to modify it upon Appeal) cannot be identified, the District cannot adequately determine or assert appropriate RTKL privileges, exemptions, or confidentiality statutes. See Mezzacappa v. Northampton County District Attorney's Office, 2023 WL 3452090 (Pa. Off. Open Rec. 2023).

Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) (a search of records and sworn and unsworn affidavits that documents were not in agency's possession are enough to satisfy burden of demonstrating nonexistence).

In the instant matter, Requester sought numerous records that simply do not exist. The Request contains a four (4)-page table outlining Requester's different requests related to the "Poster incident". See Exh. A, pp. 9-12. The table can be reduced to three general categories: 1) Poster Incident: General Information, 2) Poster Incident: Disciplinary Actions, and 3) Internal Investigation Subsequent to Poster Incident. Each of these three (3) categories contains requests for records that do not exist. Mr. Carsley's and Dr. Marchese's attestations detail the diligent inquiry that the District made into determining whether these requested records existed. See Exhs. F and G.

Many of the Requester's requests seek answers to questions rather than a public record. While interrogatories are useful in the context of civil litigation, they are not an appropriate means of making RTKL requests. See In the Matter of Larry George, Requester v. Penn Twp., Respondent, 2023 WL 5332636 at *2 (Pa.Off.Open Rec. 2023) ("Under the RTKL, a request must seek records rather than answers to questions.") (citing Walker v. Pa. Ins. Dep't, No. 1485 C.D. 2011, 2012 WL 8683307, at *6 (Pa. Cmwlth. June 15, 2012) ("The RTKL is not a forum for the public to demand answers to specifically posed questions to either a Commonwealth or local agency. In fact, there is no provision in the RTKL that requires an agency to respond to questions posed as a request"). Ultimately, an analysis of each of these categories shows that these records do not exist.

The Requester sought the following information which does not exist, and the District responded as follows, with additional clarification now provided in this letter response:[6]

POSTER INCIDENT: GENERAL INFORMATION

Poster Creation

a. **Location, Date, and Time:** The District does not possess a record containing this information.[7] In the course of gathering information to respond to the Request, the dates when some "Poster creation" activity may have occurred on the District's property, as set forth supra, were obtained. However, the District is unaware of what "Poster creation" activity student-members may have undertaken outside of school. Further, that information would not be a record of a transaction or activity of the District, nor in its possession.

b. **Educator or employee(s) directing and/or supervising the activity**: As noted supra, two (2) District employees were present at each meeting of the Rainbow Club for solely custodial purposes to ensure the safety of the students attending the meeting. The two (2) District employees did not direct, conduct, contribute, or participate in the meetings of the Rainbow Club. Specifically, the two (2) District employees here did not direct or participate in the "Poster creation" activity. As such, there are no records responsive to subsections (i) to (vi) because there were no educators or employees directing the "Poster creation" activity. However, as two (2) District employees were arguably "supervising" the activity in their custodial capacity, the District provided responses to subsections (i) to (vi) in its Response.

iii. Date of last Title IX Training: At the time the District responded to this portion of the Request, no record had been located and was believed not to exist. However, in preparing this letter response, upon additional search, a responsive record was located and is included herein as Exhibit "E". This portion of the Appeal is now moot as the responsive record has been provided.

[6] Not every line item from the Request is listed herein in Section C.2, as some of items were either granted or denied for reasons other than being nonexistent.
[7] Without a record, this item is tantamount to a question.

vi. Disciplinary Actions: The two (2) District employees were not disciplined for the "Poster creation activity" and therefore no corresponding records exist.[8]

c. Indicate whether the posters were created as part of curricular, interscholastic, co-curricular, extracurricular, non-school organization, group, or individual:

"If a class:" As the Rainbow Club is not a class there are not records responsive to subsections (i) and (ii), as no such records exist.

If a club or group:

iii. Board Approval: The Board does not approve non-curriculum related, voluntary, student-run and student-initiated groups; therefore, responsive records do not exist for the Request.

iv. Funding: The District does not provide funding to the Rainbow Club; therefore, responsive records do not exist for the Request.

v. Parent Permission to Participate: The District does not have permission forms for participation in non-curriculum related, voluntary, student-run and student-initiated groups; therefore, responsive records do not exist for the Request.

d. Age of each participating student: The Requester seeks the ages of each students participating in "Poster creation activities." As noted supra, the District was not able to ascertain which students participated in "Poster creation" activities. As the District cannot identify which students participated, it cannot provide ages for participating students.[9] Therefore, such record does not exist.

Poster Content

b. Student Electronic Devices history / content accessed at the location and for the duration of poster creation: As noted herein, after a diligent inquiry, the District was unable to determine which students participated in

[8] Even if the two (2) District employees had been disciplined for the Poster creation activity (which they were not), such information would be exempt from access under 65 P.S. § 67.708(b)(7).

[9] Even if it could identify which students participated, the District does not maintain a record of students' ages on specific days. Further, students' dates of birth are exempt from access under 65 P.S. § 67.708(b)(30). All Middle School students are minors, so the District is statutorily unable to provide birth dates to permit the Requester to make her own calculations of age. Further, the District has no knowledge of what Poster creation activity students may have undertaken outside of the Meetings, on their own time.

the "Poster creation" activity. As such, it cannot determine or acquire the "Student Electronic Device History" that was accessed (if at all) when the Posters were created. Therefore, responsive records do not exist.[10]

Poster Display

b. Educator of employee(s) directing and/or supervising the display of posters: Because no educator or employees directed and/or supervised the display of the Posters, responsive records do not exist. Neither the two (2) District employees which had custodial supervision over the Meetings or other District employees or educators were not present during the display of the Posters by the students.

c. Educator or employee(s) responsible for hanging posters (ladder was required for those hung near ceiling): As noted herein, no District educator or employee participated in the hanging of the Posters. This includes the hanging of a Poster on near the ceiling or obtaining a ladder as referenced by the Requester. Therefore, responsive records do not exist.[11]

d. Application, review, approval, or denial of poster display in accordance with Policy Manual 220: No application was submitted to display the Posters; therefore, there was no application for the District to review, approve, and/or deny. Thus, there are no records responsive to this part of the Request.

e. Policy or Standard Operating Procedure addressing the inspection of school property for the display of unauthorized materials: No District policy or procedure addresses such an inspection; therefore, no responsive records exist.

[10] Even if the District could identify which students participated in "Poster creation" activities (which it cannot), the Request would then be insufficiently specific as it would require the District to make a discretionary judgment as to what device history was related to Poster creation and what device history was unrelated to Poster creation. See Micozzie, 2021 WL 2015198 at 6 Winklosky, 2018 WL 6018808 at 8. In the event the District could ascertain which students participated in the Poster creation activity, which it cannot, the District would have an obligation to notify the parents/guardians of those student to permit them the opportunity to participate in this Appeal. The District notes the students are not elected officials, employees or contractors of the District; as such, their device history does not document an activity or transaction of the District. Students would have a constitutional right to privacy in their device history. Further, the District incorporates by reference the alternative arguments in footnote 5, as they would also apply to "device history".

[11] The District notes that items (b) and (c) effectively ask a question. As such, even if there had been an employee or educator participant, unless the District had a record containing the information sought by the Requester, no response would be required by the District to this portion of the Request. See George, 2023 WL 5332636 at *2; Walker, 2012 WL 8683307, at *6.

f. If no application was submitted or application was denied:

i. Report of the discovery of unauthorized material: Because no such report was created, no responsive record exists.

POSTER INCIDENT: DISCIPLINARY ACTIONS—DISPLAYING UNAUTHORIZED MATERIALS & IMPOSING POLITICAL BELIEFS OF ANYONE IN THE SCHOOL SYSTEM

Educator/Employee Records—Displaying Unauthorized Materials

a. Educator or employee(s) who actively participated in the display of the posters (subsections i-v). As noted supra, no District educators or employees participated, actively or otherwise, in the display of the Posters. As such, no responsive records exist.

Educator/Employee Disciplinary Actions.

In regard to subsection (a) and (b), as noted herein, no disciplinary actions were taken against District educators or employees.[12] Therefore, no responsive records exist.

Student Disciplinary Actions

a. **Disciplinary actions taken against student(s) for posting unauthorized material.** As noted herein, no disciplinary actions were taken against students.[13] As a result, no responsive records exist.

Educator/Employee Records—Imposing Political Beliefs on Anyone in the School System

a. **Investigation and disciplinary action taken against educator or employee(s) for partaking in political Pride Month activities on school property and during school time.** Based upon the facts at issue, no investigation or disciplinary actions were taken against educators or

[12] Even if such disciplinary actions had occurred, which it did not, they would be exempt from access. 65 P.S. § 67.708(b)(7).

[13] Even if such disciplinary actions had occurred, which it did not, they would be exempt from access under the Family Educational Rights and Privacy Act ("FERPA") and the constitutional right to privacy. Parental notification in order to permit the parents/guardians of the students to participate in this Appeal would also be required.

> employees for partaking in political Pride Month activities on school property and during school time. As such no responsive records exist.[14]

Exh. A, pp.9-12 (formatting of certain headings modified for ease of reading).

Internal Investigations Subsequent to Poster Incident

No records exist regarding internal investigations subsequent to the conclusion of the "Poster Incident." No such investigations occurred during the period between the "conclusion" of the "Poster incident" on June 9, 2023, and the Request on June 19, 2023. Therefore, none of the items the Requester identifies as part of the conduct of internal investigations subsequent to the "Poster incident" exist; thus, there are no responsive records.[15]

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[14] Even if such disciplinary actions had occurred, which it did not, they would be exempt from access. See 65 P.S. § 67.708(b)(7). Further, to the extent such an investigation had occurred, which it did not, such records would be exempt from access under 65 P.S. §§ 67.708(b)(6), (7), (16), (17), (30), the constitutional right to privacy, and as information protected from access by other law.

[15] While no internal investigations occurred subsequent to the Poster Incident, the District, in an abundance of caution, raises the following additional defenses in the alternative given the confusing nature of this Request. At the outset, if an internal investigation had occurred (which it did not), such records would be exempt from access as part of a criminal or noncriminal investigation. 65 P.S. 67.708(b)(16), (17).

To the extent the Requester seeks something other than the records related to internal investigation between June 9, 2023 and June 19, 2023 related to the "Poster incident", the Request is insufficiently specific as it does not allow the District to identify what it is she is in fact seeking or adequately respond with provision of the documents or raise and evaluate appropriate exemptions. Further, as noted supra, a Requester cannot modify her Request on Appeal. As a result, the Request fails to meet the specificity requirements under Post-Gazette. By way of further alternative response to the extent the Requester is seeking something other than records from an internal investigation occurring between June 9, 2023 and June 19, 2023 for the "Poster incident", the District notes the following:

- **Conduct of Internal Investigation, Items (a)(ii), (b)(ii), (c)(ii).** Evaluations are exempt from access under 65 P.S. § 67.708(b)(7). Further, no evaluations occurred between June 9, 2023, and June 19, 2023. The District notes the portion of the Superintendent's evaluation required to be posted is available on the District's website.
- **Conduct of Internal Investigation, Item (e).** No Title IX training occurred between June 9, 2023 and June 19, 2023.
- **Conduct of Internal Investigation, Item (g).** No acknowledgements occurred between June 9, 2023 and June 19, 2023.
- **Conduct of Internal Investigation, Item (h).** Each of the foregoing items in this portion of the Request is insufficiently specific as they are so overly broad that they fail to adequately explain to

the District what the Requester seeks. The Requester has failed to specify to which school(s), grade(s) and/or time frames each of the above items pertains. Further, to sift through all of the listed items in an attempt to connect them with the foregoing subject matter identified by Requester would require the District to make a discretionary judgment as to what materials are related or not related to the Request or perform research regarding the subjective descriptive categorizations provided by the Requester and in some cases perform legal research, which has been found to make a request insufficiently specific. See Micozzie, 2021 WL 2015198 at *6; Winklosky, 2018 WL 6018808 at *8. Moreover, the request for items such as "curriculum" and "textbooks" likely involves copyrights, trade secrets, or confidentiality issues, which could involve, inter alia, notification to third parties. See, e.g., 17 U.S.C. §§ 106, 501; Ali v. Philadelphia City Planning Commission, 125 A.3d 92 (Pa. Cmwlth. 2015). Further, there it may require access to District computer systems which is not required under the Right-to-Know Law. This portion of the Request, like the vast majority of it, is unreasonably burdensome in scope, and, as emphasized supra, such a burden is the result of the Request being, inter alia, insufficiently specific. Thus, no response of the District is possible or required. Further, the District expects that if it was required to review such documents, there may be no responsive documents to the Requester's identified categories.

- **Conduct of Investigation, Internal Item (i)** Age of Students. As discussed supra, the District does not have a record reflecting the ages of students on certain days. Further, students' dates of birth are exempt from access under 65 P.S. § 67.708(b)(30). All Middle School students are minors, so the District could not provide birth dates to permit the Requester to make her own calculations of age.
- **Obscene Materials and Sexual Abuse.** No findings of investigations related to the "Poster Incident" exist. 65 P.S. § 67.705. To the extent the Requester seeks findings of an investigation unrelated to the "Poster Incident" in the categories she identifies in Items (a)(i) and (ii), her Request is insufficiently specific as the District is unable to identify what records she seeks. Further, no findings of investigations were issued between June 9, 2023, and June 19, 2023. Further, such records, to the extent they existed (which they do not), would be exempt from access under 65 P.S. §§ 67.708(b)(6), (7), (16), (17), (30), FERPA, the constitutional right to privacy, and as information protected from access by other law.
- **Sexual Harassment, Hazing or Bullying Affecting Students.** No findings of investigations related to the "Poster Incident" exist. 65 P.S. § 67.705. To the extent the Requester seeks findings of an investigation unrelated to the "Poster Incident" in the categories she identified in Item (a)(i) to (iv), her Request is insufficiently specific as the District is unable to identify what records she seeks. Further, no findings of investigations were issued between June 9, 2023, and June 19, 2023. Further, such records, to the extent they existed (which they do not), would be exempt from access under 65 P.S. §§ 67.708(b)(6), (7), (16), (17), (30), FERPA, the constitutional right to privacy, and as information protected from access by other law.
- **Discrimination and Harassment Affecting Staff.** No findings of investigations related to the "Poster Incident" exist. 65 P.S. § 67.705. To the extent the Requester is seeking findings of an investigation unrelated to the "Poster Incident" in the categories she identified in Item (a), her Request is insufficiently specific as the District is unable to identify what records she seeks. Further, no findings of investigations were issued between June 9, 2023, and June 19, 2023. Further, such records, to the extent they existed (which they do not), would be exempt from access under 65 P.S. §§ 67.708(b)(6), (7), (16), (17), (30), FERPA, the constitutional right to privacy, and as information protected from access by other law.

The Requester herself notes that in her opinion her Request is "a list of records that would be reviewed during the normal course of an internal investigation." Exh. D, pp. 18. As there was no internal investigation post-Poster incident, there were no records to provide of an internal investigation.

For those reasons, these items, as noted in the District's Response, were denied as no public record exists and the District has no obligation to create one.

Requester also argues the following in her Appeal:

> The District's response is suspect for two reasons: 1. the District provided TIMS information for two employees supervising the activity, therefor [sic] demonstrating that the District did have some records in connection with the event

Exh. D, p. 18. TIMS refers to "Teacher Information Management System." The item referenced by the Requester was provided in response to Poster Incident: General Information: Poster Creation, Item B(ii) "Educator(s) certifications." As discussed herein, two (2) District employees served solely in a custodial capacity. However, as they were present for some portion of "Poster creation," the District provided copies of their educator certifications to the Requester. The possession of one (1) class of document, which is wholly unconnected to the event, does not signify the existence of another class of requested document.

3. The District Properly Redacted an Email Protected by Attorney-Client Privilege

The RTKL defines "privilege" as including the "attorney-client privilege" 65 P.S. § 67.102. The attorney-client privilege is codified in the Judicial Code. See 42 Pa. C.S.A. § 5928 ("In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client."). For the attorney-client privilege to apply, an agency must demonstrate that:

> 1) the asserted holder of the privilege is or sought to become a client;

> 2) the person to whom the communication was made is a member of the bar of a court;
>
> 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter; and
>
> 4) the privilege has been claimed and is not waived by the client.

Bousamra v. Excela Health, 210 A.3d 967, 983 (Pa. 2019) (internal citations omitted).

"If the agency proves the first three prongs of the test, the burden shifts to the challenger to prove that the privilege was waived under the fourth prong." California Univ. of Pa. v. Schackner, 168 A.3d 413, 421 (Pa. Cmwlth. 2017) (citing Office of the Governor v. Davis, 122 A.3d 1185, 1192 (Pa. Cmwlth. 2015)). The Pennsylvania Supreme Court "has repeatedly noted that the attorney-client privilege 'is deeply rooted in our common law' and is 'the most revered of our common law privileges.'" Levy v. Senate of Pennsylvania, 65 A.3d 361, 368 (Pa. 2013) (quoting Commonwealth v. Maguigan, 511 A.2d 1327, 1333 (Pa. 1986)). "[T]he purpose of the attorney-client privilege 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" Levy, 65 A.3d at 368 (quoting Gillard v. AIG Ins. Co., 15 A.3d 44, 47 n. 1 (Pa. 2011) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)) (alteration added; other citation omitted). The Supreme Court has expanded this privilege broadly, clarifying that attorney-client privilege is a bidirectional privilege, namely, that it protects both client–to-

attorney and attorney-to-client communications made for the purpose of obtaining or providing legal advice. See Schackner, 168 A.3d at 422 (citing Gillard, 15 A.3d at 59).

Here, the District provided a properly redacted email to Requester in response to "Poster Incident: General Information: Poster Display", Item (f) (ii) ("notification of incident to Board members"). Exh. A, p. 10. This record was redacted on the basis of attorney-client privilege. The email was from Dr. Marchese, the District Superintendent, and was sent to the Board, District administrators, and Andrew D.H. Rau, Esquire, the Solicitor for the District.

The attestation of Mr. Rau outlines why this communication is protected by the attorney-client privilege pursuant to Bousamra. See Exh. J. First, the District has an attorney-client relationship with the Solicitor. See Bousamra, 210 A.3d at 983. The Firm is the duly appointed solicitor for the District, and, in particular, was the duly appointed solicitor for all times relevant to this Request. Bousamra, 210 A.3d at 983 . Second, Mr. Rau is a licensed attorney in the Commonwealth of Pennsylvania, including at all times relevant to the Request. See id. Moreover, Mr. Rau provides legal advice and assists the District with all manner of legal issues arising out of District operations. See id. In particular, he provided legal advice and assisted with the District with the "Poster Incident" during the period of the Request.

Third, as outlined in Mr. Rau's affidavit, the redacted portions of the e-mail reflect the substance of a communication in which the District was seeking confidential legal advice from Mr. Rau and relaying information to both the Board and Mr. Rau. See id. The Requester asserts that Mr. Rau is merely a copied individual on the communication. See

Exh. D, p. 18. However, the practice for Dr. Marchese is to copy Mr. Rau on emails **only if** legal advice or insight is sought or is going to be sought in connection with that correspondence. It is not Dr. Marchese's general practice to copy Mr. Rau on every email that Dr. Marchese sends. In this instance, Dr. Marchese was actively communicating with Mr. Rau in regard to the "Poster incident".

Fourth, because the District has established the first three elements of attorney-client privilege, the burden shifts to Requester to prove that the District waived the privilege. See Schackner, 168 A.3d at 421. Nevertheless, despite not having the burden to do so, the District can establish it has not waived the privilege. All parties to the email are employees or elected officials of the District. To the best of the information, knowledge, and belief of Dr. Marchese and Mr. Rau, the email has not been shared with third parties, nor has the District's Board of School Directors waived its privilege. There is also no evidence of record that the privilege has been waived. Accordingly, with all elements proven, the District has established that the attorney-client privilege applies to parts of the redactions in the email See Bousamra, 210 A.3d at 983. Thus, the District has established that this document was protected by attorney-client privilege and was properly redacted prior to providing it to Requester.

4. Release of the Video Surveillance Footage Constitutes a Security Risk for Public Infrastructure.

In "Poster Incident: General Information: Poster Display", Item (a), the Requester seeks the location and duration of the Poster display, including video surveillance footage. Exh. A, p. 10. Herein, the District has provided the duration of the display. However, the release of the video surveillance constitutes a security risk for the District as it would

reasonably endanger the security of the Middle School. See 65 P.S. § 67.708(b)(3). In particular, video surveillance footage for the five (5) locations of the Posters involves six (6) surveillance cameras in the Middle School building. Providing the Requester with video footage from the security cameras creates two security vulnerabilities for the Middle School facility. First, it provides the location of security cameras in the facility. Provision of security footage from these cameras allows an individual to identify "blind spots" on the District's property where activities are not captured by security cameras. Allowing these locations to be identified creates vulnerabilities for effective District security permitting bad actors to evade detection. Similarly, knowledge of the location of all security cameras in the District's building would allow for the identification of room locations, exit and entry points, HVAC systems, and alarm locations, which is essential information for those intent on causing harm to others or damage to property. As a result, the video surveillance footage must be exempt from release and this portion of the Request denied.[16]

5. Assuming Arguendo the Release of the Video Surveillance Footage Does Not Pose a Security Risk to Public Infrastructure, the Request is Overbroad, and the Pennsylvania Supreme Court and the Constitutional Right to Privacy would still Require, at the Very Least, Redaction of the Footage.

In Easton Area School District v. Miller ("Easton"), the Pennsylvania Supreme Court addressed students appearing on security footage recordings maintained by a school district. 232 A.3d 716 (Pa. 2020). The Court found that an education record, as defined by FERPA, could not be provided in an unredacted form. A video qualifies as an

[16] The District acknowledges that the Middle School facility will not be used as a Middle School during the 2023-2024 school year. However, that does not alleviate the security concern as it will continue to be utilized for District office space, and a portion of the building will be used by the Chester County Intermediate Unit ("CCIU"), another local agency, to provide programs to students between the ages of pre-K to 21.

education record if it relates directly to a student, including the images of a student at an event that may later become part of an inquiry. Images of student includes students innocently or incidentally involved in the video. The Court found the images of the students should be redacted either under FERPA or under Pennsylvania's Constitution's right to privacy. An individual possesses a constitutional right to privacy in certain types of personal information. When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the local 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. The Court determined that each student has a privacy interest in their identification in a school video, but the right to privacy may be satisfied by the redaction of the faces of "reasonably identifiable" students. Easton, 232 A.3d at 730-31. As such, if there were an order to release the requested security footage videos sought by the Requester in this instance, the District would nonetheless be required to redact the faces of the students on the security video footage.

In In the Matter of Debartola, AP 2019-1261, the OOR reviewed an appeal regarding a request for videos of a school cafeteria. There, the OOR determined, even though the school district had not provided the OOR with evidence that the video recording was the subject of an official inquiry or investigation as in Easton:

> the videos undoubtedly contain identifying faces of students, and should be redacted under the constitutional right to privacy, if not FERPA. Therefore, the OOR finds that the video is a public record which should be provided once information which would reasonably identify individual students (such as faces) are redacted.

Id. at *4.

To protect the constitutional right to privacy of students in the security footage sought by the Requester, if the District were ordered to release the pertinent video, the students' faces must be redacted for the records sought by the Requester.[17] Here, the Requester has not articulated any public benefit in the release of the images or identities any students. The identical concerns raised in Easton exist as to these video recordings. The building is closed to the public during the school days. The video recordings would identify, among other information, with whom students interacted and associated with, what clothes students wore, what items they possessed, their schedules, and rooms they enter. As such, all images of all students must be redacted from the video footage. If release of the video is ordered, in spite of the stated security exceptions, the District specifically objects to any release of the security video footage without redaction of student images.

6. If the District Is Directed to Proceed with the Request, the Requester Must Pre-Pay the Associated Fee.

In Easton, the school district also did not have the ability to redact student faces. The Court stated, "We 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

[17] In the alternative, assuming arguendo OOR does not believe Easton requires the redaction of the video security footage, the OOR should direct issuance of a notice to every Middle School parent of a student in attendance on June 1, 2, 5, 6, 7 and 8, 2023, during school hours so they may intervene in this matter if they so choose in order to protect their students' rights under FERPA and/or the constitutional right to privacy. In the alternative, the District also asserts that the June 1, 2, 5, 6, 7 and 8, 2023 security video recordings are protected from release in their entirety under FERPA, the constitutional right to privacy, and 65 P.S. § 67.708(b)(1).

other laws, policies, or legal directives that are not before the Court in the present appeal." Id. at 731.

The OOR also examined this issue in Kmetz v. Greater Johnstown School District, AP 2019-1275 (August 14, 2020). In Kmetz, the Requester sought, among other items, "all video footage of the 4 cameras in the Westside Elementary School cafeteria, . . . between 8:30am-9:30am on Wednesday, May 22, 2019 and on Thursday, May 23, 2019." Kmetz, AP 2019-1275 at *1. On appeal to OOR, the District advised that it had no ability to redact the records, namely blur the student faces, and would only provide the records with the Requester was willing to pay for the means of redaction. See id. at *2.

The OOR in Kmetz analyzed the Pennsylvania Supreme Court's decision in Easton and Section 1307(g) of the RTKL. Video redaction costs are not governed by any of the fee provisions, so OOR deferred to Section 1307(g), which provides miscellaneous costs an agency necessarily incurs for complying with a request may be imposed upon the requester provided that such costs are reasonable. "To show that a cost may be imposed on the requester, the agency must show that the cost at issue is both necessary and to fulfil the request and reasonable in scope." Id. at *7. The OOR further stated:

> 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.

Id at *7. The OOR ultimately found in Kmetz that the school district had provided adequate evidence that it did not have the software necessary to redact the faces of the students in the responsive video, but it had not provided the OOR with any estimates of cost to either obtain the software or obtain a contractor. See id. As a result, the school district was directed to provide the requester with an estimate of reasonable expenses necessary and upon payment of the expenses, provide the redacted videos. See id.

Here, the District is in the same position as Easton and Kmetz. The District, if directed by OOR, can provide the approximately 148 hours of video footage for the Request with student faces obscured, **only if the Requester pays the expense of the redaction**. The District does not have the capabilities to perform the necessary review and redaction of the security video footage for student faces. The security video footage exists in the format of the security video program. The footage cannot be redacted within the program; rather, the footage of interest must be extracted and converted before any redaction of student images can occur. The District does not employ a video specialist trained to perform this type of work. The District's Technology Department does not own the software necessary to perform the redaction of the student images.

Based on the District's experience with prior RTKL requests and related quotations, most video specialists trained to perform this type of work are uninterested in a redaction project of the scale of this Request. The CCIU in the past has been willing to perform this work at a rate of $125/hour, with additional flat fee charges totaling $2,500 for uploading and

encoding data files into the CCIU editing system, and exporting the edited footage and delivering it to the District.

When the scale of the work is considered, the cost to be charged is reasonable. The approximately 148 hours of video footage related to the Request must be reviewed in order to determine which portions require the redaction of student faces, and once determined, the faces then need to be electronically obscured. As noted by the vendor who has performed the work before in the context of other matters, the number of students, the camera angles and lighting have made for a challenging task, which requires substantial manual redaction.

Based on the foregoing, should the OOR direct the District to proceed with the review and redaction of the requested records for the Request, the Requester must be directed to provide advance payment for the redaction.

7. If the District Is Directed to Proceed with This Portion of the Request, the District Requests that the OOR Exercise Its Discretion and Provide Additional Time for Response to this Portion of the Request.

As noted supra, the security footage in question, based on the days, times and locations sought, undoubtedly contains security video footage of students, which is required to be redacted under Easton. However, the District does not have the ability to process the Request given the enormous number of video hours to be processed

In Pa. State Sys. of Higher Educ. v. Ass'n of State Coll. & Univ. Faculties, the Commonwealth Court examined the State System's contention that it was incapable of reasonably discerning whether exemptions applied because it did not have the time nor

resources to fully review the volume of records produced by certain requests in the required time-period. 142 A.3d 1023 (Pa. Cmwlth. 2016). The court found as follows:

> If the request is so large that an agency does not have the ability to process the request in a timely manner given the enormous number of records requested, it would similarly undermine the specific legislative intent that every record be reviewed so that free and open discussions can take place within government when a decision is being deliberated, and that agencies should be afforded a sufficient opportunity to conduct investigations to protect the Commonwealth's security interests and the public's privacy rights.

Id. at 1031–32. An agency making a claim that it cannot process the records in the requested time period has to provide OOR with:

> (1) a valid estimate of the number of documents requested; (2) the length of time people charged with reviewing the request require to conduct the review and (3) if the request involves documents in electronic format, any difficulties it faces when attempting to deliver the documents in that format. "Based on the above information, the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply.

Id. at 1032.

In the Pa. State System case the governmental agency had to first ascertain both which exemptions applied and to which documents. The same issue exists here. The District has ascertained that the identifies of other students must be obscured in compliance with Easton, but it still must ascertain to which frames of the security footage that redaction must be applied. Here the Requester, as part of the Request, seeks approximately 148 hours, or 12.3 days, of video footage. Based on prior estimates from willing vendors, it will take approximately 148 hours to review the security footage and up to 148 hours to redact the security footage for a total of up to 296 hours of work.

From a practical standpoint, it would take one (1) individual 37 eight-hour days (with no breaks and performing no other work) to complete the review and redaction of the 148 hours of security video footage.

Given its experience with redaction by vendors over the last several years in other similar matters, it is likely that the vendor will experience challenges with these security videos,[18] and time needs to be built into the schedule to address these challenges (as well as the fact that the vendor may not be able to dedicate a single employee to a project for 37 business days). As such, the District estimated that from the time the Requester pays the necessary fees for the records responsive to the Request, it will take a minimum of 60 business days to complete the redaction.

Based on the foregoing, should the OOR direct the District to proceed with the review and redaction of the requested records for the Request, the District respectfully requests that the District be provided with 60 business days from the date the Requester pays the required fees to provide the responsive records for the Request.

8. The District Did Not Act in Bad Faith in Denying Certain Portions of the Request.

OOR decisions establish that bad faith findings against an agency are applied only in extremely limited circumstances, and involve agency decisions to ignore the law. None of those situations apply here as to the District's thoughtful and thorough response to the request at issue. "Under the RTKL, a finding of bad faith is appropriate where an agency refuses to comply with its statutory duties under the RTKL. … A finding of bad faith is

[18] The District has detailed at length in Mr. Kotch's and Mr. Carsley's attestations the challenges associated with electronic review and formatting, as well as delivery. See Exhs. G, H.

typically reserved only for an egregious or blatant violation of the RTKL." In the Matter of Julie Zeyzus, Requester v. Pa. Game Commission, Respondent, 2023 WL 2070613 at *3 (Pa.Off.Open Rec. 2023) [19].

The Requester has a burden of proof in a case involving bad faith allegations, and that burden is not met here. Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr., 185 A.3d 1161, 1170 (Pa.Cmwlth. 2018), aff'd, 243 A.3d 19 (2020) (finding the construction of the request by the agency did not evidence bad faith; however, finding a failure to obtain all records by contacting a contractor during a request stage, a failure to review records prior to denial, a failure to review the records before submitting verifications to OOR attesting to their content and completeness; and failures to comply with OOR's and the courts' orders were evidence of bad faith).[20] Evidence of the bad faith must be provided. Barkeyville Borough v. Stearns, 35 A.3d 91, 98 (Pa. Cmwlth. 2012). "…[B]ad faith is a matter of degree, implicating the extent of noncompliance." Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr., 151 A.3d 1196, 1208 (Pa. Cmwlth. 2016) (declining to make findings of bad faith until disposition on the merits).

In the instant matter, the Requester claims that "[d]ue to the District's repeated use of conclusory statements, absence of affidavits or attestations, and lack of response to

[19] "While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies." In the Matter of Philip Brown, Requester v. City of Harrisburg, Respondent, 2020 WL 704565 at *1 (Pa.Off.Open Rec.) (citing 65 P.S. § 67.1304(a)); 65 P.S. § 67.1305(a) ("A court may impose a civil penalty of not more than $1,500 if an agency denied access to a public record in bad faith").

[20] Compare Brunermer v. Apollo Borough, 283 A.3d 908 (Pa.Cmwlth. 2022), appeal denied sub nom. Brunermer v. Borough, 293 A.3d 252 (Pa. 2023) (unreported) (finding no bad faith existed when the local agency had not refused or failed to conduct a search and continued to search throughout the appeal process in an effort to comply).

more than a third of the records requested, in addition to the appeal, a Bad Faith Determination is requested." Exh. D, p. 18. However, none of these unsupported allegations demonstrate, in any way, that such a bad faith finding is warranted.

First, Requester has failed to point to which "conclusory statements" the District allegedly made in its Response (if any). See Exh. D, pp. 18-19. On the contrary, the District responded to each and every item included in the Request – of which there were approximately 107 – and produced responsive documents accordingly. Any denial in the Response contained the specific reason for denial and denial citation as required by the Right-to-Know Law. See 65 P.S. § 67.903. Such response reflects the time-intensive, comprehensive, and good faith approach taken by the District in conducting its search and response.

Second, the District was not required to include in its Response affidavits and/or attestations. See Exh. D, p. 19. Indeed, such evidentiary support is only required at the current stage, i.e., in an appeal proceeding the OOR. See 65 P.S. § 67.903 (not requiring inclusion of an affidavit/attestation in an agency's denial response). Moreover, the District has submitted five (5) attestations with this letter submission, which fully explain the extensive search procedure undertaken by the District in attempting to respond to a confusing and voluminous Request.

Third, the District did not fail to respond to "more than a third of the records requester". All items in the Request were addressed in the Response. As stated the Response and supra:

- the District could not provide responsive records to certain parts of the Request because they were insufficiently specific and did not allow the District to identify what the Requester was seeking, see Section C.1;

- the District could not provide responsive records to certain parts of the Request because the District did not possess records responsive to the Request, see Section C.2; and

- the District responded to other portions of the Request, where merited, with proper redactions or denials based on appropriate exemptions, see Sections C.1, C.2, C.3, C.4.

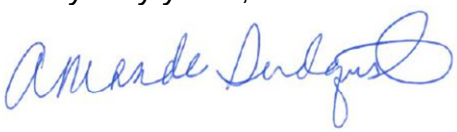
Thus, the District made a good faith search and thereafter responded to every item of the Request in the format required by the Right-to-Know Law. This hardly evinces "an egregious or blatant violation of the RTKL." Zeyzus, 2023 WL 2070613 at *3. In fact, the District's did not violate the RTKL in any respect.

Overall, Requester's dissatisfaction with the Response based on a belief that other records must exist or what she believes should have occurred in response to the "Poster incident" is not a sufficient basis for a finding of bad faith. The District conducted an good faith search and provided responsive documents. The District was faced with an overly broad and confusing Request; nevertheless, the District worked cross-functionally with its Superintendent, Right-to-Know Officer, Director of Innovation and Technology, Human Resources Department and Solicitor to respond to the approximately 107 requests to provide the detailed and legally appropriate Response. The District's efforts and Response have absolutely nothing in common with the situations where the courts or the OOR have found bad faith. It is therefore respectfully requested that the OOR clearly and decisively decline to find that the District acted in bad faith, in any way, in this instance.

We appreciate the OOR's time and careful attention to this detailed District response to the OOR request for information. Please let me know if you require any

additional information in this Appeal. The District reserves the right to respond to any information submitted by, or new grounds for appeal raised by, the Requester in this matter.

Very truly yours,



Amanda J. Sundquist

Enclosures Exhibit “A” – ”J”

cc: Daniel Carsley, Avon Grove School District Business Manager and Right-to-Know Officer
Carmela Z. Ciliberti, Esquire