

PREPARED BY THE COURT

HERB WADDELL,

Plaintiff,

v.

NEW JERSEY DEP'T OF
EDUCATION and CHIEF OF
STAFF – RECORDS
CUSTODIAN,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY
DOCKET NO. L-1266-23

CIVIL ACTION

**ORDER COMPELLING
DEFENDANTS TO PRODUCE
RESPONSIVE RECORDS AND
AWARDING COUNSEL FEES**

THIS MATTER having come before the Court, the Hon. Robert Lougy, A.J.S.C., presiding, by way of a Verified Complaint and Order to Show Cause filed by Plaintiff Herb Waddell, represented by Walter M. Luers, Esq.; and Defendants New Jersey Department of Education and Chief of Staff – Records Custodian, represented by Deputy Attorney General Colin Klika, having filed opposition; and Plaintiff having filed a reply; and the Court having considered the parties' pleadings and written and oral arguments; and for the reasons as stated below; and for good cause shown;

IT IS on this 12th day of February 2024 **ORDERED** that:

1. Plaintiff's application for an Order directing Defendants to provide to Plaintiff a copy of the District Report of Transported Resident Students database for November 2022 as entered by Berkeley Heights Public Schools is **GRANTED**. Defendants shall produce the requested documents with appropriate omission of fields that would identify a student. Additionally, Defendants may omit records that would reasonably identify a student as receiving special education services. Defendants shall engage in good-faith discussions with Plaintiff's counsel regarding any proposed redactions.
2. Plaintiff's application for an order declaring Plaintiff is the prevailing party in this matter and is entitled to an award of reasonable counsel fees and costs is **GRANTED**. Plaintiff and Defendants shall negotiate the amount of counsel fees. If the parties are unable to resolve counsel fees, Plaintiff can apply to this Court for same.
3. Given the disposition of Plaintiff's OPRA claim, the Court does not reach his common law claim.
4. This Order shall be deemed filed and served upon uploading to eCourts.

/s/ Robert Lougy
ROBERT LOUGY, A.J.S.C.

Waddell v. DOE
February 12, 2024
Page 2 of 17

PURSUANT TO RULE 1:74(a), THE COURT PROVIDES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter comes before the Court by way of Plaintiff Herb Waddell's Verified Complaint and Order to Show Cause against Defendants New Jersey Department of Education and Chief of Staff – Records Custodian. Plaintiff brings this action under New Jersey's Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access. Defendants filed opposition. Plaintiff filed a reply. The Court heard oral argument on February 6, 2024. For the following reasons, the Court grants the relief sought in Plaintiff's order to show cause.

The Court provides the matter's procedural and factual histories. Plaintiff Herb Waddell lives in Berkeley Heights, New Jersey. Pl.'s Compl. ¶ 2. On May 26, 2023, he filed an OPRA request for access to public records through Defendants' OPRA portal. *Id.* at ¶ 7. Plaintiff requested a copy of the District Report of Transported Resident Students ("DRTRS" or "Report") database for November 2022 as entered by Berkely Heights Public Schools. *Ibid.* On June 7, 2023, Defendants denied Plaintiff access to the requested data. They explained:

6-7-23: DRTRS records include student-level data that cannot be sufficiently redacted to protect student privacy, even with student names redacted. As such, responsive records have been withheld to protect reasonable expectations of privacy relative to student identification/confidentiality rights under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. Sect 1232g and NJAC 6A:32-7.1 et seq., as well as reasonable expectations of privacy pursuant to the Open Public Records Act ("OPRA"), NJSA 47:1A-1 et seq. Accordingly, the request is denied. Requestor notified by email.

[Certif. of Walter M. Luers, Esq., Ex. A.]

Waddell v. DOE
February 12, 2024
Page 3 of 17

On July 5, 2023, Plaintiff filed his verified complaint and order to show cause. The Court entered the order to show cause on July 6, 2023. The Court entered several consent orders extending the schedule for briefing and oral arguments.

Plaintiff argues the following in his letter brief. Plaintiff argues that Defendants should produce the Report with any personally identifiable information redacted. Ibid. Plaintiff asserts that he requested a copy of Berkeley Heights School District’s Report of Transported Students, which is a report that consists mostly of data that is not confidential. Id. at 5. Furthermore, Plaintiff asserts, although there are “a handful” of fields that may be legitimately privileged, such as “last name,” “first name,” “date of birth,” and “address,” education institutions may release documents and information that relate to students, as long as all personally identifiable information is removed. Id. at 6. Once Defendants remove any personally identifiable information or fields, such records do not meet the definition of a student record. Absent protected information, Plaintiff maintains that Defendant must provide Plaintiff with a copy of the DRTRS report, with appropriate redactions. Id. at 7.

Next, Plaintiff demands, in the alternative, access to the records requested under the common law right of access. Ibid. Plaintiff argues that, as a resident of Berkeley Heights, he is entitled to some insight regarding bussing decisions. Ibid.

Once personally identifiable information is removed from the DRTRS report, Defendants no longer have any interest in confidentiality. Ibid.

Next, Plaintiff argues that if he prevails, he is entitled to reasonable attorney's fees and costs, under either OPRA's statutory provision or the catalyst theory under the common law. Ibid.

Defendants oppose. Allen T. Dupree, Director of the Office of School Finance for the New Jersey Department of Education, certifies the following in support of Defendants' opposition. To comply with federal law, NJDOE does not make student-level information available to the public. Dupree Cert. ¶ 7. A document entitled "New Jersey School Performance Reports: Data Privacy Rules" provides:

The New Jersey School Performance Reports contain information related to school and district performance, which is based on student-level information. Student-level information is confidential under the federal Family Educational Rights and Privacy Act (FERPA), is not to be made accessible to the public pursuant to the Open Public Records Act, and will not be released.

[Ibid.]

Mr. Dupree asserts that releasing student-level data, even with redactions, risks inappropriate disclosure of sensitive, protected information. Id. at ¶ 8.

Next, he explains that the measurement between home and school is defined by the distance between the entrance of the residence and the nearest public

entrance of the school of attendance using public walkways and roadways, rounded to the nearest tenth of a mile. He maintains that, in some instances, releasing these records could allow the identification of some students. Id. at ¶ 8. Furthermore, depending on the school of attendance, distance between home and school, and a district's decision about courtesy bussing, releasing the records may reveal that a given student receives special education services. Ibid.

Defendants argue the following in their letter brief. First, Defendants argue that DOE properly denied the request because the records are exempt from disclosure. Db5. Defendants assert that both the Federal Family Educational Rights and Privacy Act ("FERPA") and New Jersey's Pupil Records Act ("NJPRA") protect the records from disclosure. Ibid. Defendants argue FERPA precludes the release of information that may lead to the disclosure of a student's identity and that education agencies cannot even disclose de-identified records if it has made a reasonable determination that a student's identity is personally identifiable. Id. at 6-7. Furthermore, the NJPRA expressly requires compliance with FERPA and is intended to safeguard the legitimate privacy interests of students. Id. at 7.

Next, Defendants argue that the Department has determined, based on its specialized expertise, as well as its obligations under NJPRA and N.J.A.C. 6A:32-7.5(g)1, that the records cannot be released or meaningfully redacted in a fashion

that would protect the privacy of students. Id. at 8. Because of the volume of information contained in the DRTRS files, and specifically because they contain the measurement of the distance between home and school, bus routes, and school of attendance, the Department has determined that the files cannot be released, even with redactions to individual names, without risking identification of at least some students. Id. at 8-9.

Next, Defendants argues that Plaintiff is not entitled to individual student data under the common law. Id. at 10. Defendants assert that Plaintiff's interest in obtaining the Berkeley Heights Public Schools DRTRS records from the Department does not outweigh the State's interest in protecting the privacy interests of the students whose individual student level information is contained in the DRTRS records. Ibid. First, the student-level data that Plaintiff seeks is made confidential under federal and state law. Id. at 11. Second, Defendants assert that Plaintiff's interest in the requested document does not outweigh the State's interest and obligation to abide by the federal and state laws prohibiting the disclosure of protected information. Id. at 12. The need to protect the privacy of students and their families outweighs Plaintiff's desire to learn more about bussing. Id. at 12-13. Defendants assert that this interest was already served with the Department's earlier production of the District Report on Transported Resident students, which contains a summary of all students receiving bussing services in the district,

including a total number of “courtesy students” in both elementary and secondary school levels. Id. at 13.

Plaintiff argues the following in his reply. First, Plaintiff asserts he has no interest in learning the personal identities of any specific student or whether any student has an IEP. Pl.’s Reply 1. Furthermore, the notion that if a person is given the distance over roads or walkways between a bus stop and a school they can reverse-engineer that student’s identity is “ridiculous,” and Defendants provide no specific, factual basis for how this could be possible. Id. at 1-2.

Next, Plaintiff asserts that Defendants’ theory is that if a person can draw a concentric circle that has a diameter that is twice the distance, along roadways and walkways, from a school to a student’s home address, a person can identify that student. Id. at 2. Plaintiff argues this is speculative because such a circle would run through dozens, if not hundreds, of residences in Berkeley Heights, making such a determination impossible. Ibid. Plaintiff argues Mr. Dupree’s analysis is unreliable because there is no way to identify students by drawing circles around schools that are the diameter of bus trips to their homes. Id. at 5. Furthermore, Plaintiff asserts, Mr. Dupree has no experience in bussing, OPRA, or how data or information can be used to identify students; his certification is a net opinion. Id. at 3. Plaintiff asserts that “[b]ecause Defendants’ and Dupree’s facts and analysis have no relationship to reality, that analysis must be given no weight.” Id. at 9.

Next, Plaintiff argues that the Department must release the school mileage information. Id. at 4. Plaintiff asserts that the parties agree that N.J.A.C. 6A:32-7.5(g)1 governs this case and that “personally identifiable information” should be redacted but disagree on the scope of the redactions and whether a student’s identity may be determined through single or multiple releases of information or when added to other reasonably available information. Id. at 4-5.

Finally, Plaintiff argues that the document Mr. Dupree cites, called the New Jersey School Performance Reports: Data Privacy Rule, is not a law or regulation, cannot create an OPRA exception, and should not be considered. Id. at 10. Furthermore, Defendants’ assertion that if a district has elected to not provide non-mandated bussing, then students can be identified as having IEPs is based upon a factually inapposite premise because Berkely Heights does provide courtesy bussing. Thus, a route that is less than the “definition of remote from school” cannot identify students as having IEPs because any route might be servicing a student. Id. at 11.

The Court now turns to the relevant law. “Any analysis of OPRA must begin with the recognition that the Legislature created OPRA intending to make government records ‘readily accessible’ to the state’s citizens ‘with certain exceptions.’” Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 170 (2016) (alteration in original) (quoting N.J.S.A. 47:1A-1); see also Mason v. City of Hoboken, 196

N.J. 51, 65 (2008). New Jersey champions a “long and proud ‘tradition[] of openness and hostility to secrecy in government.’” Simmons v. Mercardo, 247 N.J. 24, 37 (2021) (quoting Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274, 283 (2009)). “The public’s right to disclosure is not, however, absolute.” North Jersey Media Grp., Inc. v. Bergen Cty. Prosecutor’s Office, 447 N.J. Super. 182, 195 (App. Division 2016) (citations omitted).

N.J.S.A. 47:1A-1 provides that “government records shall be readily accessible for inspection, copying, or examination ... with certain exceptions, for the protection of the public interest” N.J.S.A. 47:1A-1. A “[g]overnment record” includes:

any . . . information stored or maintained electronically . . . that has been made, maintained or kept on file in the course of . . . official business by any officer . . . of the State or of any political subdivision thereof . . . or that has been received in the course of . . . official business by any such officer

[N.J.S.A. 47:1A-1.1.]

“The custodian must ‘promptly comply with a request’ and, if ‘unable to comply ... shall indicate the specific basis therefor on the request form and promptly return it to the requestor.’” North Jersey Media Group, 447 N.J. Super. at 195. “A public agency that denies access bears ‘the burden of proving that the denial of access is authorized by law.’” Ibid., N.J.S.A. 47:1A-6.

OPRA does not diminish any grant of confidentiality afforded by other statutes or regulations. N.J.S.A. 47:1A-9. Defendants rely on numerous such authorities here. N.J.A.C. 6A:32-7.5 governs access to student records. In relevant part, it provides:

(g) In complying with this section, district boards of education and charter school and renaissance school project boards of trustees shall adhere to the requirements pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99.

1. When responding to OPRA requests from any party, including parties other than those listed [in other sections], a district board of education or charter school or renaissance school project board of trustees may release, without consent, records removed of all personally identifiable information, as such documents do not meet the definition of a student record. Before making any release, the district board of education or charter school or renaissance school project board of trustees shall have made a reasonable decision that a student's identity cannot be determined whether through single or multiple releases, or when added to other reasonably available information.

[N.J.A.C. 6A:32-7.5.]

Federal regulations define “personally identifiable information” to include, but not limited to:

- (a) The student’s name;
- (b) The name of the student’s parent or other family member;
- (c) The address of the student or student’s family;
- (d) A personal identifier, such as the student’s social security number or student number, or biometric record;
- (e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

[34 C.F.R. § 99.3.]

Further, the regulation explains where prior consent is not required:

De-identified records and information. An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made

a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

[Ibid.]

State law also provides various protections to student information. Under the New Jersey Pupil Records Act:

The State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereof and access thereto, to provide general protection for the right of the pupil to be supplied with necessary information about herself or himself, the right of the parent or guardian and the adult pupil to be supplied with full information about the pupil, except as may be inconsistent with reasonable protection of the persons involved, the right of both pupil and parent or guardian to reasonable privacy as against other persons and the opportunity for the public schools to have the data necessary to provide a thorough and efficient educational system for all pupils.

[N.J.S.A. 18A:36-19.]

Here, the Court finds that Defendants improperly denied Plaintiff's access to the requested records under OPRA. Releasing the records with redactions related to students' personally identifiable information would not violate reasonable expectations of privacy relative to student identification or confidentiality rights under FERPA, NJPRA, and other related regulations.

The threshold question in the instant litigation is whether it was reasonable for the Department to make the determination that releasing the DRTRS database,

even with redactions of students’ “personally identifiable information,” would still lead to a student’s identity being personally identifiable, resulting in a violation of federal and/or New Jersey law. The Court finds it was not.

Defendants contend that the records “cannot be released or meaningfully redacted in a fashion that would protect the privacy of students ... specifically because they contain [among other things] the measurement of the distances between home and school ...” Pb8. Defendant reasons that, because the DRTRS reports “the measurement between home and school [] defined in a very precise manner – the distance between the entrance of the residence and the nearest public entrance of the school of attendance using public walkways and roadways ... rounded to the nearest tenth of a mile,” there is a “likelihood, at least in some instances, that some students would be identified through the release of these records.” Dupree Cert. at 4-5. But, as Plaintiff painstakingly describes in his Reply with accompanying highlighted zoning maps, “Defendants’ theory ... that if a person is able to draw a concentric circle that has a diameter that is twice the distance, along roadways and walkways, from a school to a student’s home address, a person can identify that student ... is speculative because such a circle would run through dozens if not hundreds of residences in Berkeley Heights, making such a determination impossible.” Pl.’s Reply at 2.

Plaintiff concedes that, in some sparsely populated school district, somewhere, Defendants' theory might hold water. But the Court agrees with Plaintiff that, in this instance, it does not. One, Berkeley Heights is a densely populated suburb, and it is not possible to identify, with any degree of likelihood, the identity of any given student from the number of private residences found upon the circumference at any given distance from any given in-district public school. The very authority relied upon Mr. Dupree allows the Department to report performance data where there are, in most instances, more than ten students. Two, FERPA protects information that can be aggregated to identify a student with "reasonable certainty," and Defendants' arguments fall well short of that. Likewise, New Jersey law requires that the Department's conclusions regarding data privacy be reasonable, and here the Court finds that the concerns are speculative once appropriate redactions are made. Three, as to Defendants' arguments about agency deference, the Court finds that such deference does not easily apply in the OPRA context, based upon one certification. The analysis would of course be different, both on a local and statewide basis, if the Department had engaged in rulemaking on this topic, as N.J.S.A. 18A:36-19 provides.

Simply put, Defendants' concerns about aggregation of data and re-identification of students are not reasonable, assuming appropriate fields are redacted.

To be clear, in the instant case, once the personally identifiable information is removed, the record is considered “de-identified” and may be released under FERPA, as the Department, for the reasons discussed above, has not made “a reasonable determination” that doing so would be contrary to the Act. Furthermore, under N.J.A.C. 6A:32-7.5(g), the Department “shall adhere to the requirements pursuant to [OPRA]” and may release the records per N.J.S.A. 6A:32-7.5(g)1. Because the records are “de-identified” and the records are removed of all personally identifiable information, the documents are not student records, and no reasonable privacy interest exists under state law to withhold the remainder of the report.

As explored at oral argument, Plaintiff does not dispute Defendants’ obligations to maintain student identity or the receipt of special education services, in special circumstances. Defendants may redact certain fields, globally by agreement (e.g., the field indicating that the student has an IEP) and exclude records meeting certain criteria altogether. For instance, during oral argument, Plaintiff’s counsel agreed that Defendants could withhold records where a student is attending a private school out of district, which could lead to the reasonable conclusion that the student is receiving special education services.

Here, Plaintiff prevailed on securing documents under OPRA, which would not have been produced but for this litigation, therefore Plaintiff is the prevailing

party. Plaintiff requested documents, did not receive those documents, filed this action, and was successful. Therefore, Plaintiff is entitled to reasonable counsel fees and costs. Plaintiff and Defendants shall negotiate the amount of counsel fees. If the parties cannot resolve the issue, Plaintiff may seek relief from the Court.