



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

**IN THE MATTER OF**

**BETHANY RODGERS AND  
USA TODAY NETWORK,  
Requester**

**v.**

**PENNCREST SCHOOL DISTRICT,  
Respondent**

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**Docket No.: AP 2023-0289**

**FACTUAL BACKGROUND**

On January 27, 2023, Bethany Rodgers and USA Today Network (collectively “Requester”) submitted a request (“Request”) to the Penncrest School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[E]lectronic copies of correspondence (emails or text messages) between Penncrest School District board members or Superintendent Glasspool and representatives of the Pennsylvania Family Institute (email domain @pafamily.org) or the Independence Law Center (email domain @indlawcenter.org), including but not limited to Michael Geer, Thomas Shaheen, Randall Wenger, Cheryl Allen, Jeremy Samek, Janice Martino-Gottshall, Kurt Weaver, Robert Albino, Ruth Wilson, Emily Kreps, Dan Bartkowiak, Alexis Sneller, Allison Rishel, Tina Brumagen, and Kenneth Stracuzzi from Aug. 1, 2022, to Jan. 27, 2023

On January 30, 2023, the District granted the Request, and provided the Requester with two responsive emails. On February 2, 2023, the Requester inquired with the District regarding whether additional responsive records exist and whether the personal email accounts of board

members were searched for responsive emails, and the District responded that all responsive records were provided.

On February 8, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the District’s search for emails, asserting that additional records may exist, and arguing that the District failed to address whether it inquired with board members who use personal email addresses to conduct business if they possessed any records responsive to the Request.<sup>1</sup> The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 21, 2023, the District submitted an unsworn position statement, arguing that all responsive records in the District’s possession have been provided to the Requester, and that any records contained within the personal email accounts of board members are not records of the District pursuant to the RTKL. The District relies on *In re Siberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011), to support of its argument. On February 23, 2023, the Requester submitted a position, citing various case law to support her argument that the District is required to conduct a good faith search of its records which includes contacting District personnel to ascertain whether responsive records exist on private email accounts. In her submission, the Requester also asserts that the District’s position “is unreasonable and raises issues of bad faith.”

On April 3, 2023, the OOR sought additional information from the District, specifically asking the District to address *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Commw. Ct. 2012) as it relates to the instant appeal. The OOR also reminded the District that any factual statements

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<sup>1</sup> The Requester granted the OOR an extension to issue a final determination. See 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

must be supported by a testimonial affidavit. The OOR set a record closing date of April 11, 2023; however, the District failed to make an additional submission to the OOR as requested.

### LEGAL ANALYSIS

The District is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the District is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The District argues that it conducted a search and provided the Requester with the only responsive records that is possessed, and that any documents maintained in personal accounts would not be records of the District under the RTKL. In support of its position, the District cites to *In re Silberstein*, where the Commonwealth Court found that emails located on an individual township commissioner’s personal computer were not records of the agency. 11 A.3d 629, 633 (Pa. Commw. Ct. 2011). The Court held that since the township commissioner was an individual public official with no authority to act alone on behalf of the agency, his emails, contained on his personal computer, were not records of the agency, as they were not “produced with the authority of [the agency] ... or ... later ratified, adopted or confirmed by ... [the] township.” *Id.*

The Requester, on the other hand, argues that the emails that were provided in response to the Request indicated that a board member stated that the Independence Law Center had “forwarded [him] a lot of info.” The Requester provided a copy of the email with her appeal to

the OOR. The Requester further asserts that this statement suggests that there should be more records responsive to the Request than what was provided, and that because the records provided indicated that the School Board President was using a personal email account rather than an official District address, it is not out of the realm of possibility that other board members are also using personal email addresses.<sup>2</sup> In support of her position, the Requester cites to *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012), where the Commonwealth Court discussed its decision in *Silberstein*. The Commonwealth Court found that “applying the rationale of *Silberstein* to the present case and holding that an individual school member can only create a ‘record’ when he or she acts in tandem with the other school board members essentially defeats the purpose of the RTKL.” *Id.* at 1262. The Court further found that “[w]hile emails located on an agency-owned computer are not presumptively records of the agency simply by virtue of their location, emails that document the agency’s transactions or activities are records.” *Id.* at 1264.

Section 102 of the RTKL, 65 P.S. § 67.102, defines a record as “information...that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” As discussed in *Baxter*, “[w]hile an individual school board member lacks the authority to take final action on behalf of the entire board, that individual acting in his or her official capacity, nonetheless, constitutes agency activity when discussing agency business.” *Baxter*, 35 A.3d at 1264 (citing *Barkeyville, supra*).

In *Barkeyville*, the Commonwealth Court distinguished the holding in *Silberstein*, stating that “*Silberstein* involved email correspondence between the township commissioner and

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<sup>2</sup> The OOR’s review of the emails provided indicates that while the Board President used a Penncrest.org email address for one of the emails, he used a zoominternet.net email address for another email where he corresponded with the Independence Law Center.

members of the public. The case before us, on the other hand, involves emails between Council members concerning Borough business. This distinction is one recognized by the trial court as well as this Court in [*Mollick v. Twp. of Worcester*, 32 A.3d 859, 872-73].” *Barkeyville*, 35 A.3d at 97. The Court further found that the emails at issue in *Barkeyville*, consisted of “Council members ... acting in their official capacity as elected officials of the Borough while exchanging the emails in question.” *Id.*

Here, the District did not submit evidence regarding its search for records, but rather, relies on its argument that *Silberstein* does not require the District to inquire with school board members regarding whether they have used personal email accounts for District business and whether those personal email accounts contain records responsive to the Request. *See* 65 P.S. § 67.901 (in response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record”). However, the emails provided by the District to the Requester in response to her Request clearly indicate that, like in *Barkeyville*, the School Board President used a personal email account to correspond with the Independence Law Center. The individual identified himself as the District’s School Board President and within the email referred to District policies and events that occurred after the passing of such policies with regard to school board business (a board member and the solicitor resigning, a complaint being filed and subsequent court proceedings). The record in this matter indicates that the School Board President conducted District business using a personal email address, but there is no evidence that the District asked the School Board President or any other individual identified in the Request if they possessed responsive records.<sup>3</sup> *See Pa. Office of Attorney General v. The Philadelphia Inquirer*, 127 A.3d 57 (Pa. Commw. Ct. 2015) (“What makes an email a ‘public

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<sup>3</sup> Another School Board member’s District address was copied on the email, which is presumably why the District was able to locate such record.

record,' then, is whether the information sought documents an agency transaction or activity, and the fact whether the information is sent to, stored on or received by a public or personal computer is irrelevant in determining whether the email is a 'public record.'"); *see also Baxter, supra; Barkeyville, supra*. Additionally, the District did not submit evidence regarding its search for records, and the Requester provided an email from one school board member indicating that he was forwarded "a lot of info" from the Independence Law Center. Therefore, the District has not proven that it has provided all responsive records within its possession, custody or control.<sup>4</sup> *See Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

### CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the District is required to conduct a good faith search of its records, including inquiring with the District employees and officials identified in the Request as to whether they possess responsive emails, including in their personal email accounts, and provide all responsive records to the Requester within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Crawford County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>5</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

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<sup>4</sup> While the Requester asserts that the District's position raises an issue of bad faith, based on the record before the OOR, the record does not support a finding of bad faith.

<sup>5</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: April 21, 2023**

*/s/ Kathleen A. Higgins*

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KATHLEEN A. HIGGINS  
DEPUTY CHIEF COUNSEL

Sent via portal to: Bethany Rodgers; Christine Shields; Thomas King, Esq.