



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:
	:
<b>HEATHER KELLER,</b>	:
<b>Requester</b>	:
	:
<b>v.</b>	<b>: Docket No: AP 2024-0549</b>
	:
<b>WEST SHORE SCHOOL DISTRICT,</b>	:
<b>Respondent</b>	:

### **FACTUAL BACKGROUND**

On January 15, 2024, Heather Keller (“Requester”) submitted a request (“Request”) to the West Shore School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. Deliberations, opinions exchanged, and/or conversations about how to vote that occurred via email and social media between board members Heidi Thomas, Kelly Brent, David Brinton, Brenda Cox, and/or Mandy Davis relating to the Request for Proposals for Legal Services that was on the January 11, 2024 Board Meeting agenda.
2. Electronic communications that occurred via email and social media between board members Heidi Thomas, Kelly Brent, David Brinton, Brenda Cox, and/or Mandy Davis and members of the public relating to the current Solicitor/Labor Counsel for the [District] and/or Request for Proposals for Legal Services that was on the January 11, 2024 Board Meeting agenda.
3. Electronic communications that occurred via email and social media between board member Heidi Thomas and the following members of the public: Denise Dugan, Kristen Spangler (may also go by the names Kristi Harmon or Kristi

Spangler), Shaun Spangler, Brandi Brandl, Allison Shipp, Mariana Reed, and/or Casey Reed relating to the current Solicitor/Labor Counsel for the [District] and/or the Request for Proposals for Legal Services that was on the January 11, 2024 Board Meeting agenda.

4. Electronic communications that occurred via email and social media between board member Kelly Brent and the following members of the public: Denise Dugan, Kirsten Spangler (may also go by the names Kristi Harmon or Kristi Spangler), Shaun Spangler, Brandi Brandl, Allison Shipp, Mariana Reed, and/or Casey Reed relating to the current Solicitor/Labor Counsel for the [District] and/or the Request for Proposals for Legal Services that was on the January 11, 2024 Board Meeting agenda.

On February 19, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the District partially denied the Request, arguing that it properly redacted personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), and that it properly withheld records protected by the attorney-client privilege.

On February 26, 2024, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.<sup>1</sup> Specifically, the Requester argues that “[v]oting members who exchanged opinions, deliberated, encouraged, or had conversations about how to vote a particular way via email and/or social media would violate the Sunshine Act.”<sup>2</sup> The Requester further states that she does “not contest the [p]ersonally [i]dentifying [i]nformation that was redacted on [p]ages 25-28 of the response that the District supplied[.]”<sup>3</sup> Finally, the Requester argues that she did not receive “a complete response to [her

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<sup>1</sup> The Requester granted the OOR a 30-day 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).”).

<sup>2</sup> The Requester appears to challenge the District’s compliance with the Sunshine Act. 65 Pa.S.C. § 701, *et. seq.* However, the OOR is without jurisdiction to determine whether the Sunshine Act has been violated. Section 715 of the Sunshine Act provides that the “Commonwealth Court shall have original jurisdiction of actions involving State agencies and the courts of common pleas shall have original jurisdiction of actions involving other agencies to render declaratory judgments or to enforce this chapter by injunction or other remedy deemed appropriate by the court.” 65 Pa.C.S. § 715.

<sup>3</sup> As the Requester is not challenging the personal identifiable information that was redacted from the responsive records, the OOR will not address such issue in this Final Determination.

Request].”<sup>4</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 March 18, 2024, the District submitted a position statement, arguing that it “properly asserted the attorney-client privilege” and that it “conducted a good faith search and produced to Requester all responsive public records within its possession, custody or control.” In support of its argument, the District submitted the attestation, made subject to the penalties of unsworn falsification to authorities, 18 Pa.C.S. § 4904, of Dr. Ryan Argot (“Argot Attestation”), Open Records Officer and Director of Federal Programs for the District.

On April 4, 2024, in response to an inquire by the OOR, both the Requester and District confirmed that the Request was received by the District on January 15, 2024.

### 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)).

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<sup>4</sup> The Requester argues that “school board members use electronic communications, especially social media, to engage with members of the public to disseminate important information.” In support, the Requester attached comments appearing on a private Facebook group that was discovered on February 24, 2024.

**1. The District is not required to provide records that have not been created at the time of the Request**

The District argues that it “properly asserted the attorney-client privilege to withhold one email chain.” The District explains that “[t]he email chain withheld from production occurred on January 16, 2024.” See the Argot Attestation<sup>5</sup> at ¶ 5. A RTKL request can only seek records that are in existence as of the date of the request; agencies are not required to provide records that do not exist, or have not been created, as of the time of the request. See, e.g., *Deeter v. New Britain Twp.*, OOR Dkt. AP 2019-1641, 2019 PA O.O.R.D. LEXIS 1314; *Terensky v. City of Monessen*, OOR Dkt. AP 2013-0772, 2013 PA O.O.R.D. LEXIS 349. Here, the Request was received by the District on January 15, 2024 and the responsive record identified by the District (i.e. email chain) was created on January 16, 2024. As the responsive record had not yet been created as of the time of the Request, the District is not required to provide that record.

**2. The District demonstrated that it conducted a good faith search and that no additional records responsive to the Request exist in its possession, custody or control**

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[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining

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<sup>5</sup> Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. See *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the District has acted in bad faith, “the averments in [the Argot Attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020).

An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

In support of the District's assertions that it no additional records responsive to the Request exist in its possession, custody or control, the Argot Attestation states, in relevant part, the following:

14. The District conducted a good faith search for all potentially responsive records.

15. Upon receipt of the Request, I directed a search of the District's email server for potentially responsive records. That search included the following parameters:

- a. Searching the [D]istrict-issued email accounts of the identified Board members: Kelly Brent, Brenda Cox, David Brinton, Heidi Thomas and Mandy Davis.
- b. For any email communications sent or received that contained any of the following key terms: "rfp" or "RFP" or "Solicitor" or "request for proposal" or "Stock and Leader" or "legal".
- c. For any email communications sent or received and that contained any of the following key terms: "solicitor" and "evaluation" or "performance".
- d. For any email communications sent or received and that contained any of the following key terms: "Stock and Leader" and "evaluation" or "performance"[]

16. The District redacted personal identification information from the responsive records and the District withheld one email chain as a protected attorney-client communication. Otherwise, all records located by the above-described search were provided to Requester. No other responsive records exist within the District's possession, custody or control.

17. In addition to searching the District's records, I conducted a good faith search for potentially responsive records in the personal possession of the identified board members.
18. I shared the Request with the five board members identified in the Request.
19. I asked the five board members to search their personal email and social media accounts for potentially responsive records and to notify me if any such records were in their possession.
20. After review, if no such records were in their possession, I asked the board members confirm that fact to me.
21. I received written or verbal confirmation from each of the five board members that no records responsive to the Request were located in their personal possession.
22. Other than withholding one record under the attorney-client privilege, all other responsive records were provided to Requester.

It is important to note that the OOR makes no determinations as to whether responsive records should exist, and its inquiry is limited only to whether records are "in existence and in possession of the ... agency at the time of the right-to-know request." *Moore*, 992 A.2d at 909; *see also* 65 P.S. §67.705. As such, allegations that additional records could exist or should exist are insufficient to establish that the records do, in fact, exist.

The District's attestation is authored by its Open Records Officer ("ORO"), who attests that the District "directed a search of the District's email server for potentially responsive records" and listed the various search terms used in that search. Argot Attestation, ¶ 15(a-d). Specifically, the District searched the "[D]istrict-issued email accounts of the identified Board members[.]" *Id.* at ¶15(a). Dr. Argot further attests that he "conducted a good faith search for potentially responsive records in the personal possession of the identified board members." *Id.* at ¶ 17. Dr. Argot identified the five Board members listed in the Request, contacted those Board members, and asked those Board members to "search their personal email and social media accounts for

potentially responsive records[.]” *Id.* at ¶¶ 18-19. The Board members confirmed that “no records responsive to the Request were located in their personal possession.” *Id.* at ¶ 20. Thus, based on the evidence provided, the District has demonstrated that it conducted a good faith search and does not have additional records responsive to the Request. There has been no sufficient evidence provided that otherwise contradicts the statements offered by the District in the attestation submitted.<sup>6</sup> *See Pa. Dep’t of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022). Therefore, the District has met its burden of proof that a good faith search was performed and that no additional records responsive to the Request exist in its possession, custody or control. *Hodges*, 29 A.3d at 1192.

### CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the District is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the York 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 as per Section 1303 of the RTKL; 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>7</sup> 65 P.S. § 67.1303. All documents or communications following the issuance of this Final Determination shall be sent to [oor-postfd@pa.gov](mailto:oor-postfd@pa.gov). This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>6</sup> The Requester argues that “social media communications are a matter of public record” and attaches a Facebook media post from February 25, 2024, a time period outside the timeframe of the instant Request. Thus, this evidence does not demonstrate that there are records responsive to the *instant* Request, as the Request was submitted to the District on January 15, 2024. *See, e.g., Deeter*, 2019 PA O.O.R.D. LEXIS 1314.

<sup>7</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: April 24, 2024**

*/s/ Lyle Hartranft*

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LYLE HARTRANFT, ESQ.  
APPEALS OFFICER

Sent via the e-file Portal to: Heather Keller; Dr. Ryan Argot, AORO ; David Walker, Esq.