

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PENNCREST SCHOOL DISTRICT, :  
Petitioner :  
v. :  
BETHANY RODGERS, :  
Respondent :

No. AD 2023 - 275

PROTHONOTARY  
CRAWFORD COUNTY, PA  
2024 MAY 17 PM 4:15  
FILED

**MEMORANDUM and ORDER**

John F. Spataro, P.J.

PENNCREST School District ("Penncrest"), on May 18, 2023, pursuant to 65 P.S. § 67.1302, and in the absence of any applicable local procedural rule, timely filed a petition requesting review of the "Final Determination" of the Office of Open Records (OOR) dated April 21, 2023. Bethany Rodgers ("Rodgers") filed a response in opposition to the petition for review, and on February 26, 2024, with discovery concluded, a motion to deny the petition, along with a supporting brief. The motion, by virtue of the jointly requested Case Management Order of September 19, 2023, triggered the placement of this case on the May 2024 Civil Argument List. Penncrest filed a brief in opposition to the motion, to which Rodgers responded, and both parties have consented to having the motion decided on the briefs without oral argument.

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This dispute commenced when Rodgers, in reliance upon the Right-to-Know Law (RTKL),<sup>1</sup> submitted a request to Penncrest for electronic copies of emails or text messages between Penncrest's Superintendent or Directors and the Pennsylvania Family Institute (PFI) or the Independence Law Center (ILC) from August 1, 2022, to January 27, 2023 (referred to hereinafter as the "Request").<sup>2</sup> Penncrest's Open Records Officer responded with 1) an email sent January 23, 2023 on Penncrest's domain by Board member David Valesky to Board President Luigi DeFrancesco referring to correspondence with the ILC about Penncrest policies ("Email 1"),<sup>3</sup> and 2) an email sent the next day by Mr. DeFrancesco on the zoominternet.net domain to ILC personnel, in which he identified himself as President of the Board, and copied the Superintendent at his Penncrest email address ("Email 2"). See Pet. Ex. B.

Rodgers appealed to the OOR on the issue of whether Penncrest should ask the Directors to search their personal email accounts for correspondence responsive to the Request. The Final Determination requires Penncrest "to conduct a good faith search of its records, including inquiring with [Penncrest] employees and officials identified in the Request [i.e., the Superintendent and the Directors] as to whether they possess responsive emails, including in their personal email accounts." Final Determination at 6.

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<sup>1</sup> Act of February 14, 2008, P.L. 6, as amended and codified at 65 P.S. §§ 67.101 *et seq.*

<sup>2</sup> The Request is set forth in full on page 1 of the Final Determination. See Pet. Ex. D.

<sup>3</sup> Director Valesky was then chairman of the committee that developed and presented policy recommendations to the Board. Valesky Dep. at 6-7.

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Having reviewed the record *de novo* (including but not limited to the Request, Penncrest's response, the OOR appeal, and the Final Determination), the Court adopts the OOR's findings of fact (which do not seem to be in dispute) and conclusions of law, although our legal analysis may differ slightly.

The RTKL requires Penncrest, as a local agency, "to provide public records in accordance with this act." 65 P.S. § 67.302; see *id.* § 67.102 (defining "agency"). A "public record" is defined as a "record ... of a ... local agency" which is not protected by a privilege or exempted from disclosure. *Id.* §§ 67.102, 67.305(a). A "record" is information that 1) documents a transaction or activity of the agency, and 2) is created, received, or retained in connection with the agency's activity. *Id.*; see *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95 (Pa. Cmwlth. 2012). Emails 1 and 2, "referring to [Penncrest] policies and events that occurred after the passing of such policies," document Penncrest activities, and were created by individuals in connection with their positions as Penncrest officials. Final Determination at 5. Emails 1 and 2, therefore, meet the RTKL's definition of a "record," as would any similar electronic correspondence of Penncrest's Supervisor or Directors.<sup>4</sup> See *Barkeyville, supra*; see also *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1264 (Pa. Cmwlth. 2012) ("an "individual [school board member] acting in his or her official capacity ... constitutes agency activity when discussing

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<sup>4</sup> We thus join with the ORR in rejecting Penncrest's assertion, in reliance on *In re Silberstein*, 11 A.3d 629, 633 (Pa. Cmwlth. 2011), that emails sent individually from Directors cannot be "public records" because Directors cannot individually bind the Board. See, e.g., *Baxter, infra*.

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agency business"). Records are not protected from disclosure by being located in personal email accounts. See *Pennsylvania Office of Att'y Gen. v. Philadelphia Inquirer*, 127 A.3d 57, 62 (Pa. Cmwlth. 2015) ("What makes an email a 'public 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.'").<sup>5</sup>

Penncrest, upon receipt of the Request, was required to make a good faith effort to ascertain whether the records that Rodgers requested were in its possession, custody or control, and thus presumed to be public records.<sup>6</sup> See 65 P.S. §§ 67.901, 67.305(a). The emails Penncrest provided indicate that other such records may well exist.<sup>7</sup> A good faith effort entails inquiring of the Supervisor and Directors as to the existence of the specified electronic communications, including emails located on domains other than Penncrest's. See *Barkeyville*, 35 A.3d at 96 ("constructive possession qualifies as possession

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<sup>5</sup> The ORR noted that "the emails provided by [Penncrest] to [Rodgers] in response to her Request clearly indicate that, like in *Barkeyville*, the School Board President used a personal email account to correspond with [ILC]." Final Determination at 5. This may be misleading, because in *Barkeyville*, the emails were between borough Council members. See *Barkeyville*, 35 A.3d at 97 (distinguishing *Silberstein* as having "involved email correspondence between the township commissioner and members of the public"). That distinction was disregarded, however, in *Baxter* (requiring the disclosure of emails qualifying as "records" from the school board members' and superintendent's accounts – regardless of the sender or recipient) and *Philadelphia Inquirer*, both cited later in the ORR's analysis.

<sup>6</sup> Penncrest has not demonstrated that the records requested are protected by a privilege or are exempted from disclosure. See 65 P.S. § 67.708 (exceptions for public records, and burden of proof); *Hodges v. Pennsylvania Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011) ("The burden of proving a record does not exist, or is exempt from disclosure, is placed on the agency responding to the right-to-know request.").

<sup>7</sup> Director Valesky seemed to corroborate their existence. Valesky Dep. at 18-19.

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under the RTKL to presume that a record is a *public* record based on Section 305 ... we cannot say that simply because emails are in the personal accounts of individual Council members that they are not in the possession of the Borough"). Communications that are not related to Penncrest's or the Board's activities, however, need not be disclosed. *See Philadelphia Inquirer*, 127 A.3d at 63 (emails relating only to an individual's personal activities are not subject to disclosure under the RTKL).

The Court, accordingly, enters the following Order:

**MAY 17 2024**

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Moving Party **"MUST"** Notify Opposing Party

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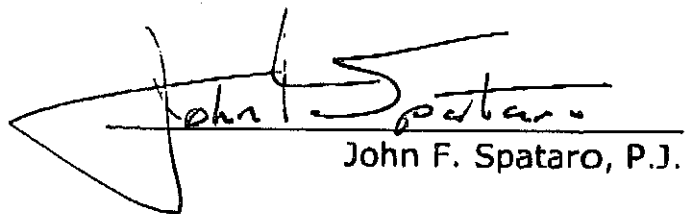
**ORDER**

AND NOW, **May 17, 2024**, for the reasons stated in the foregoing

Memorandum, the Court **ORDERS and DIRECTS** as follows:

1. The "Motion of Respondent, Bethany Rodgers, to Deny Petition for Review" is **GRANTED**;
2. The "Petition for Review of Office of Open Records Final Determination dated April 21, 2023," is **DISMISSED**; and
3. the "Final Determination" of the Office of Open Records, dated April 21, 2023, is **AFFIRMED**; and
4. The Petitioner, **PENNCREST School District ("Penncrest")**, is directed to conduct a good faith search of its records, including inquiring with Penncrest's Superintendent and members of Penncrest's Board of Directors as to whether they possess responsive emails (relating to transactions or activities of Penncrest or its Board of Director), including in their personal email accounts, and provide all responsive records to the Respondent within thirty days.

BY THE COURT,



John F. Spataro, P.J.

cc: Craig A. Markham, Esq.  
 Thomas W. King, III, Esq.