



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**THOMAS CAGLE,
Requester**

v.

**PENNCREST SCHOOL DISTRICT,
Respondent**

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Docket No: AP 2021-1442

INTRODUCTION

Thomas Cagle (“Requester”) submitted a request (“Request”) to Penncrest School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking emails and Facebook posts from the personal accounts of two District School Board members. The District partially denied the Request, arguing that no responsive emails exist and that no Facebook posts or comments exist for District Facebook accounts. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the District is required to take additional action as directed.

FACTUAL BACKGROUND

On June 17, 2021, the Request was filed, seeking:

1. All written correspondence (including e-mails) from David Valesky to Penncrest School District officials, employees, or students regarding homosexuality, including e-mails originating from Mr. Valesky’s personal e-mail account, between January 1, 2020 through June 13, 2021.

2. All written correspondence (including e-mails) from Luigi DeFrancesco to Penncrest School District officials, employees, or students regarding homosexuality, including e-mails originating from Mr. DeFrancesco's personal e-mail account, between January 1, 2020 through June 13, 2021.
3. All Facebook posts and comments by David Valesky related to homosexuality and Penncrest School District, its officials, employees, or students, or its curriculum, physical resources, or electronic resources, between January 1, 2020 through June 13, 2021, including posts or comments removed by Mr. Valesky.
4. All Facebook posts and comments by Luigi DeFrancesco related to homosexuality and Penncrest School District, its officials, employees, or students, or its curriculum, physical resources, or electronic resources, between January 1, 2020 through June 13, 2021, including posts or comments removed by Mr. DeFrancesco.
5. All comments to the Facebook posts identified in request number 3, including comments deleted or removed by Mr. Valesky.
6. All comments to the Facebook posts identified in request number 4, including comments deleted or removed by Mr. DeFrancesco.

On July 13, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the District partially granted the Request, providing responsive emails from District-owned email accounts. The District denied the remainder of the Request, arguing that Mr. Valesky and Mr. DeFrancesco were asked to provide responsive emails and that neither Board member provided responsive emails to the District. The District further denied the Request, stating that no responsive Facebook posts or comments exist for District-owned Facebook accounts.

On July 26, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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 August 9, 2021, the District submitted a position statement, arguing that the District appropriately responded to the portion of the Request seeking emails, while also arguing that the requested Facebook comments and posts are not records of the District because they are not

connected to District business.¹ Accompanying the submission were the sworn affidavits of Kenneth Newman, Assistant Superintendent for the District, and Denise M. Gable, Open Records Officer for the District. The Requester did not submit additional evidence on appeal.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65

¹ As the record in this matter closed on August 4, 2021, the District’s submission was filed late. On August 9, 2021, the Requester filed an objection, arguing that the District’s late submission should not be made part of the record in this appeal. In order to develop the record in this matter and fairly and expeditiously resolve this dispute, the District’s submission has been accepted by the OOR. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The District argues that no responsive Facebook posts or comments exist on any District-owned or controlled social media accounts. Additionally, the District argues that it contacted Mr. Valesky and Mr. DeFrancesco regarding the Request, and that both individuals indicated that no responsive records exist. In support of the District’s position, Ms. Gable attests the following:

3. I reviewed the District's social media accounts and comments with regard to the matters that were the subject of the request and found no records which satisfy the request.

4. Consistent with the records request, I made inquiry of Board member, David Valesky, and Board member, Luigi DeFrancesco, for copies of any Facebook posts or comments on their individual social media accounts. I was informed that no records exist on their personal accounts which satisfy the request.

5. Having received this information from the individual Board members, I appropriately responded to the Right-to-Know Request on behalf of the District.

Under the RTKL, an affidavit 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). Here, the District has addressed the fact that no responsive records exist with regard to the District's social media accounts; however, in her affidavit, Ms. Gable did not address whether Mr. Valesky and Mr. DeFrancesco were asked and performed a search of their personal email accounts for responsive emails. *See Pa. Office of Attorney General v. The Philadelphia Inquirer*, 127 A.3d 57 (Pa. Commw. Ct. 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.'"); *see also Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012); *Barkleyville Borough v. Sterns*, 35 A.3d 91 (Pa. Commw. Ct. 2021). As Items 1 and 2 of the Request specifically seek emails from the personal email accounts of Mr. Valesky and Mr. DeFrancesco, the District has not met its burden of proving that the requested emails do not exist within its possession, custody or control.

The Requester argues that the District's School Board members are using personal social media and email accounts to comment on and discuss District business. With his appeal to the OOR, the Requester provided copies of relevant Facebook posts from both Mr. Valesky and Mr. DeFrancesco, one of which the Requester asserts has been commented on by another District School Board member, as well as a May 28, 2021 article from the Meadville Tribune that references Mr. DeFrancesco and Mr. Valesky both sharing a Facebook post of a District book

display, with Mr. Valesky also offering his view regarding the book display and the teaching of homosexuality by the District's high school.

The District argues that to the extent that any Facebook or other social media posts or comments exist, they are not records of the District as they do not document a transaction, business or activity of the District. *See* 65 P.S. §67.102 (defining "record"). The District further argues that "[t]here was no agency business associated with the high school library book displays nor was there any issue or item on the business agenda of the Board of School Directors relating to the LGBTQ+ community," but rather, "[i]ndividual Board members, to the extent that they made any Facebook or other social media posts or comments relating to the same would be doing so not in their official capacity as Board members, but in their individual capacities only."

The OOR must determine whether the Request seeks records of the District as defined by the RTKL. Section 102 of the RTKL defines a "record" as "[i]nformation, regardless of physical form or characteristics, 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." 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a "transaction or activity of an agency"; and, if so, 2) was the material "created, received or retained ... in connection with a transaction, business or activity of [an] agency." *Id.*; *see also Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of "record" must be liberally construed. *See A Second Chance, Inc.*, 13 A.3d at 1034; *Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012).

In support of the District's position that the requested Facebook posts and comments are not records of the District, Mr. Newman attests as follows:

2. In my capacity as Assistant Superintendent, I am familiar with the monthly agendas for both the Board's work session and public Board meetings.

3. During the Spring of 2021, and specifically during the months of April, May and June of 2021, the agenda items for the Board, including the work session and the Board meeting, did not include any agenda item addressing the Maplewood High School library book displays or specific or related to the book display involving LGBTQ+ community matters.

4. I am aware that during the June 2021 work session and Board meeting, the Board received a number of public comments addressing the Maplewood High School library book display issue and the LGBTQ+ issues within the District.

5. Even after the public comments received by the Board, neither the book display itself nor the LGBTQ+ issue has been placed as an agenda item on either the work session or public board meetings of the Board of School Directors of the Penncrest School District.

While the District argues that the requested records are not records of the District because the Facebook accounts are personal and not connected to the District, in *Purdy v. Borough of Chambersburg*, OOR Dkt. AP 2017-1229, 2017 PA O.O.R.D. LEXIS 1224, the OOR held that in determining whether a Facebook page is a record of the agency, it was "immaterial whether or not [an agency] has oversight over the Facebook page or authorized [an officer] to maintain such an account." Rather, the OOR looks at whether the content of the Facebook page shows that it is used as a significant platform by an elected official or employee to conduct or discuss official business, such as, "among other things, economic development, community planning, maintenance, public safety and community service projects within the [agency]." *Id.*; see also *Boyer v. Wyoming Borough*, OOR Dkt. AP 2018-1110, 2018 PA O.O.R.D. LEXIS 1100.

Here, the District has not identified any responsive Facebook posts or comments, but instead argues that if posts and comments exist, they would not be records of the District. Although

Mr. Newman attests that while the issue of the book display involving LGBTQ+ community matters has not been on the School Board's agenda, it was discussed during the June 2021 work session and Board meeting. Additionally, the Meadville Tribune article states that Mr. Valesky planned to "bring the matter up at the next [District] School Board meeting – which [was] scheduled for June 14 – assuming it has not been resolved before then." Therefore, posts and comments by current District School Board members regarding the book displays and homosexuality document a transaction or activity of the District, as they are related to issues that concern the District and have been brought to the District's School Board during its public meetings. *See DeBartola v. Johnstown Redev. Auth.*, OOR Dkt. AP 2019-1868, 2019 PA O.O.R.D. LEXIS 1946 (“[A] board member, acting alone, may create official records when they are communicating with other public officials or otherwise acting in some official capacity and discussing agency business”). As the District has not set forth any additional reasons for withholding the records under the RTKL, they are subject to public access. *See* 65 P.S. § 67.305(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the District is required to provide all responsive records 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 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. 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 24, 2021

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS
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Sent to: Thomas Cagle (via email only);
Brian T. Cagle, Esq. (via email only)
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² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).