

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

**PENNCREST SCHOOL DISTRICT**

:

**v.**

:

**A.D. No. 2021-486**

:

**THOMAS CAGLE**

:

DEC 2021 16 AM 11:44  
PROTHONOTARY  
CRAWFORD COUNTY, PA

2021-12-16 11:44

**OPINION/ORDER**

The presenting matter is the PETITION FOR JUDICIAL REVIEW OF A FINAL DETERMINATION OF THE PENNSYLVANIA OFFICE OF OPEN RECORDS filed by the Penncrest School District (Penncrest). Upon consideration of the written and oral arguments of the parties, coupled with the record as established by a hearing on November 16, 2021, said Petition is DENIED.

At issue is the request by Thomas Cagle (Cagle) under Pennsylvania’s Right to Know Law (RTKL), 65 P.S. 67.101 *et. seq.*, for Facebook posts from the personal accounts of two Penncrest School Board members, specifically David Valesky and Luigi DeFrancesco.

The Pennsylvania Office of Open Records (OOR), by a Final Determination issued on August 24, 2021, ordered Penncrest to disclose all Facebook posts by these two board members between January 1, 2020 through June 13, 2021 on their private Facebook accounts relating to homosexuality.

On appeal, Penncrest contends the Facebook posts on a private account of a school board member are not a public record that is kept by Penncrest or needs to be disclosed under the RTKL. According to Penncrest, any such posts do not relate to a transaction, business or activity of the school district.

The burden of proving an item is exempt from RTKL disclosure rests upon Penncrest. 65 P.S. 67.708(a).

As defined in the RTKL, a “record” is “information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained...in connection with a transaction, business or activity of the agency.” 65

P.S. 67.102. The definition of "record" must be liberally construed in favor of disclosure. See *A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Cmwlth. 2011). If it is determined there is a record, the next inquiry is whether it relates to a transaction, business or activity making it a public record subject to RTKL disclosure.

Penncrest argues it does not own, possess or have access to the private Facebook accounts of the two Board members and therefore cannot produce an item it does not possess. As a practical matter, Penncrest's arguments are initially appealing. However, the concept of a "record" under the RTKL is more abstract and technologically advanced beyond the agency's access, ownership, or possession of a physical paper file.

A school board member does not shed his or her status as such by simply using a personal computer to send emails or posts on a personal Facebook page about school matters. In *Mollick v. Township of Worcester*, 32 A.3d 859 (Pa. Cmwlth. 2011), the Commonwealth Court held that emails between township supervisors on personal computers discussing business within the township were "records" under the RTKL:

Regardless of whether the Supervisors herein utilized personal computers or personal email accounts, if two or more of the Township Supervisors exchanged emails that document a transaction or activity of the Township and that were created, received, or retained in connection with a transaction, business, or activity of the Township, the Supervisors may have been acting as the Township, and those emails could be 'records' of the Township. As such, any emails that meet the definition of 'record' under the RTKL, even if they are stored on the Supervisor's personal computers or in their personal email accounts, would be records of the Township.

*Mollick, at 872.*

In another case involving emails on a personal computer, the Commonwealth Court held:

What makes an email a 'public record,' then, is whether the information sought documents of 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.

*Pa. Office of Attorney General v. The Philadelphia Inquirer*, 127 A.3d 57, 62 (Pa. Cmwlth. 2015).

The same analysis applies to Facebook posts on a personal page by a school board member. Actually, there is a stronger argument in favor of the RTKL disclosure of Facebook posts because they are a platform to express viewpoints far faster and more broadly than a private email. It seems the fastest way to disseminate a private email would be to screenshot and post it on Facebook.

It does not matter if a Facebook post was made on the school's Facebook page or on the personal computer of the board member's private Facebook page. These posts can become a 'record' if they are created by person(s) acting as a school board member and contain information related to a school transaction, business or activity.

For purposes of the RTKL, if a school board member uses a personal computer to discuss with another board member a school-related matter, a record has been created by the posting Board member "in connection with their positions as public officials." *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95 (Pa. Cmwlth. Ct. 2012).

In *Barkeyville*, the issue was whether the private emails between public officials created a record subject to RTKL disclosure. The agency did not have access, ownership or physical possession of the private emails, but was required to disclose them as a public record. The same logic applies to posts made by a public official on a personal Facebook page. To hold otherwise, as noted by the *Barkeyville* court, would enable a public official to evade and eviscerate the RTKL. See also *Robert Boyer v Wyoming Borough*, AP 2018 – 1110, at pp.4-5 (OOR, 2018); *Purdy v. Borough of Chambersburg*, AP 2017-1229 at pp.4-5 (OOR 2017).

Nonetheless, Penncrest contends the private Facebook posts in this case, if they do exist, do not relate to a transaction, business or activity of the school district. Therefore, any such posts are not "public records" that need to be disclosed pursuant to the RTKL.

It is true that communications between Board members about non-school district matters bear no public interest that needs to be disclosed. However, in the case *sub judice*, it cannot be said that the requested Facebook posts involving Valesky and DeFrancesco were private matters unrelated to a transaction, business or activity of the school. To the contrary,

the subject matter goes to the core of the educational mission and responsibilities of the Penncrest school district.

The display of books about sexual orientation in the school library was created by a school employee. The display of these books was intended to inform and educate students about homosexuality and LGBTQ+ issues.

Because of social media, the display quickly became publicly controversial. It is a topic for which people can hold differing opinions, including whether these materials need to be displayed in the school. It is undisputed that a significant number of citizens appeared at one or more Penncrest Board meeting(s) to express varying opinions about the book display in the school library. The reason the citizens were there was because the Penncrest Board had the authority to take action, one way or another, about the book display.

Similar discussions were taking place on social media. Indeed, the Facebook posts being sought in this case from Board member David Valesky include his description of the book display as "evil" and stating his intent to bring the matter up for discussion at the next Board meeting if it had not been resolved before then. Such posts by Valesky reflect his belief as a Board member that the display of the school's books in the school library was an activity for which the school board could take action. Valesky is expressing his views about a topic that is clearly within the purview of Board action. Furthermore, he is discussing action he intends to take in his official capacity before the next Board meeting. Hence, Valesky has created a public record subject to RTKL disclosure

In sum, the Facebook posts being requested in this case involve communications between two Board members directly related to a transaction, business or activity within the core oversight responsibilities of the Penncrest Board.

Undeterred, Penncrest argues that the display of books involving homosexuality in the school library was never an agenda item for any Board meeting and not a matter that needed the Board's approval. As such, Penncrest maintains this subject did not involve a transaction, business or activity of the school, hence any Facebook posts by a board member on a personal page is not subject to RTKL disclosure.

Penncrest's constrained conception of what constitutes business or activity within the purview of the school board is unpersuasive. The statutory definition of record does not require that the business or activity be an agenda item. Penncrest cites no legal authority for its proposition.

Common sense does not dictate that a subject can only become a transaction, business or activity if it is listed as a meeting agenda item. The decision not to place an issue as an item on the agenda can easily include matters that are the business or activity of the school. Further, some business matters or activities may not need to be an agenda item.

The facts of this case provide a classic example of an important matter that involved, or could have involved, the consideration of the Penncrest Board without the need to be an agenda item.

Lastly, Penncrest maintains that Valesky and DeFrancesco were not authorized to speak on behalf of the school in their personal Facebook posts nor did they have the ability to take final action on behalf of the school. These are distinctions without a difference for purposes of the RTKL.

Public officials commenting about public business do not need the approval or authorization of the agency to express their views. The purpose in large part of the RTKL is to ensure the public is fully informed of what a public official believes or intends to do about a public matter. For example, the public needs to know if Board member Valesky thinks the library book display is evil and he intends to take action in his official capacity.

A public official cannot pander to chosen constituents on a personal Facebook page and then hide such views from the public on a matter involving a school activity or business. It is the type of secretive behavior the RTKL was designed to illuminate.

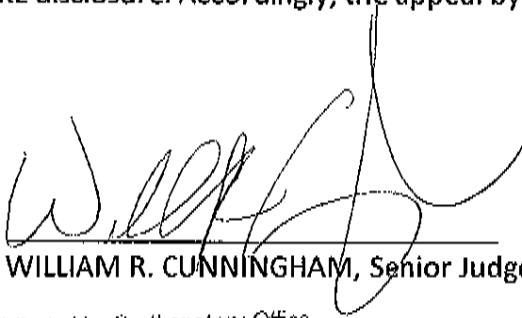
Separately, it does not matter that a single Board member is unable to take final action on behalf of the school. A single Board member has a vote in the decision-making process as well as the ability to influence the thoughts and votes of other Board members. Thus, a Board member plays a role in all Board decisions, including decisions to not take action or place a matter as a meeting agenda item. As more cogently stated by the Commonwealth Court: "(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." *Easton Area School District v. Baxter*, 35 A.3d 1259,1264 (Pa.CmwltH.2012).

**CONCLUSION**

For all of the foregoing reasons, Penncrest has not met its burden of proving the requested information was exempt from RTKL disclosure. Accordingly, the appeal by Penncrest is without merit.

December 14, 2021

  
WILLIAM R. CUNNINGHAM, Senior Judge

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cc: Attorney George Joseph  
Attorney Brian Cagle

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Moving Party \*MUST\* Notify Opposing Party