



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**WILLIAM SCHEINLER,
Requester**

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:

:

v.

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Docket No: AP 2021-1352

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**SOUTHERN LEHIGH SCHOOL
DISTRICT,
Respondent**

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On May 17, 2021, William Scheinler (“Requester”) submitted a request (“Request”) to the Southern Lehigh School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. All Records discussing whether it is reasonable, necessary, appropriate, advisable, or acceptable to label an SLSD student as “oppressed” or as an “oppressor” based on the color of their skin or their race.

2. All Records relating to how SLSD defines, may define, uses, or interprets the terms “diversity,” “equity,” and “inclusion” (in their various forms), including, without limitation,

(a) the phrase “inclusive and diverse” as used in the “Shared Values” section of the various SLSD handbooks,

(b) the phrase “diversity/equity/inclusion” in various locations throughout the Southern Lehigh SD District Level Plan 07/01/2019 — 06/30/2022.

3. All Records relating to the addition of the phrase “diversity, equity, and inclusion” in multiple places in the SLSD Handbook/Plan in 2018 (and its subsequent versions), including, without limitation, Records addressing who proposed those changes and why.

4. All Records relating to the operation, findings, requests to, and recommendations of the “Equity” sub-committee, as described on p.6 of the Southern Lehigh SD District Level Plan 07/01/2019 —06/30/2022, including, without limitation, all materials produced or reviewed by such subcommittee and all minutes and other summaries of all meetings, informal or formal, of such subcommittee.
5. All Records relating to why SLSD’s existing policies (including, without limitation, policies, statements, and disciplinary procedures relating to non-discrimination based on race under Title IX, bullying, and unlawful harassment, in each case as set forth in SLSD’s handbooks for each of SLSD's schools) are inadequate as written and implemented.
6. All Records confirming, disconfirming, acknowledging, or otherwise discussing whether there is systemic racism within SLSD in violation of Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America.
7. All Records relating to potential or planned changes to SLSD curriculum based on, relating to, or reflecting any aspect of CRT/DEI, including, without limitation, preliminary drafts or discussions of any such changes, by whom they were created, and why.
8. All Records relating to any workshop, presentation, assembly, or other meeting or method of disseminating information, whether in person or electronically, that have occurred within the SLSD relating to CRT/DEI, including, without limitation, any materials or presentations presented or made available in connection with the same, whether in advance, contemporaneously, or subsequently.
9. All Records relating to the identification, evaluation, selection, contracting with, comparisons of, and interactions with third-party consultants, vendors, or providers of training or other materials of any type relating to CRT/DEI.
10. All Records relating to the SLSD School Board's review, consideration, evaluation, and approval of the proposal from Joseph Allen, Ph.D. dated June 17, 2020.
11. All Records received by SLSD from Joseph Allen, Ph.D., including, without limitation, any training materials, “action plans,” or recommendations, whether in draft, sample, reference, or final form.
12. All Records provided to Joseph Allen, Ph.D. in connection with his proposal dated June 17, 2020, including, without limitation, the “discipline data from the last five years” and the “academic data from the last five years” referenced on page five of such proposal.

13. All Records of or relating to the results (as they exist on the date of this letter) of the two surveys that were issued to SLSD parents and students arising out of the proposal from Joseph Allen, Ph.D. dated June 17, 2020, as well as any data analysis standards, metrics, practices, rubrics, or plans that have been or may be applied to such results.

14. All Records discussing or evaluating whether the CRT/DEI-related training proposed in proposal from Joseph Allen, Ph.D. would contradict any existing SLSD policies, statements, or disciplinary procedures relating to non-discrimination based on race under Title IX, bullying, and unlawful harassment, in each case as set forth in SLSD's handbooks for each of SLSD's school.

15. All Records demonstrating, showing, or suggesting that SLSD considered any alternative viewpoints, approaches, or other theories or methods when identifying and selecting Joseph Allen, Ph.D. as an appropriate vendor to SLSD.

16. All Records relating to inquiries from third parties (including, without limitation, students and parents of students) relating to CRT/DEI, as well as all Records discussing those inquiries, whether and how to respond, and any responses thereto by any employee or agent of SLSD, including, without limitations, inquiries submitted by Ms. Maria Ault or me, William Scheinler.

17. All Records (a) demonstrating that SLSD has paid for, or reimbursed an SLSD employee or agent for, training in any CRT/DEI topic, including, without limitation, through reimbursement for tuition or attendance of professional seminars, and (b) all materials associated with such training shared by such employee or agent with any other SLSD employee or agent.

18. All Records referencing the creation, establishment, toleration, support, or encouragement of "safe spaces" within SLSD.

19. All Records discussing the importance of viewpoint diversity and Freedom of Speech/First Amendment rights within SLSD.

20. All Records (a) discussing, alleging, or demonstrating that any employee or agent of SLSD has created, maintained, or contributed to an environment of discrimination based on race through his or her actions or inactions and (b) any disciplinary Records relating thereto.

21. All Records discussing, alleging, or demonstrating that any employee or agent of SLSD created, maintained, contributed to, or expanded any structure, function, rule, policy, process, practice, or procedure within SLSD that discriminates or discriminated among students based on the color of their skin, as well as any disciplinary Records relating thereto.

22. All Records relating to whether any structure, function, rule, policy, process, practice, or procedure relating to CRT/DEI does or would violate any protection afforded by applicable law, including, without limitation, Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America.

23. All Records discussing, evaluating, or relating to whether any aspect of training or curriculum relating to CRT/DEI may constitute compelled speech prohibited under the law based the protections of the First Amendment to the Constitution of the United States of America or Article I, Section 7 of the Constitution of the Commonwealth of Pennsylvania, including, without limitation, asking or requiring students to “acknowledge their privilege” or complete any worksheet or survey, whether in physical or electronic form, relating to “privilege.”

24. To the extent not covered by a request for Records in this letter, all Records created or distributed (whether internally to other SLSD employees or agents or otherwise) by SLSD employees or agents relating to CRT/DEI.

25. All Records relating to how SLSD should handle the teaching of controversial topics and theories, including, without limitation, any policy relating thereto.

26. All Records relating to the use by SLSD employees or agents (including, without limitation, members of the SLSD School Board) of electronic systems not authorized by SLSD (e.g., outside e-mail services or messaging platforms) to communicate regarding SLSD matters, as well as any guidance or corrective action SLSD has taken with respect to the same.

On June 22, 2021, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the District partially denied the Request, arguing that some records do not exist, some records are exempt employee records, 65 P.S. § 67.708(b)(7), or internal, predecisional deliberations, 65 P.S. § 67.708(b)(10), and redacting names of anyone who is not a District employee or agent or was not named in the Request.

On June 30, 2021, the District provided a few additional documents.

On July 13, 2021, the Requester appealed to the OOR, challenging the partial 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).

The parties then communicated about extensions to keep the record open for the District to provide additional records. The Requester granted the OOR an extension to issue a final determination.¹

On August 13, 2021, the District submitted a position statement explaining that the voluminous number of individual items in the Request necessitated an extended submission period pursuant to the OOR's ability to extend deadlines by which an agency must process a request, as enunciated in *Pa. State Sys. of Higher Educ. v. Ass'n of State Coll. & Univ. Faculties* ("APSCUF"), 142 A.3d 1023 (Pa. Commw. Ct. 2016). Accompanying the District's submission was the attestation, made under the penalty of perjury, of Henna Shah, the District's Open Records Officer, who explains that the District has not been able to provide timely responses and that it would take 100 days to collect, review, and redact responsive records.² On August 16, 2021, the Requester submitted a position statement, challenging the District's request for an extension. Among other things, the Requester argues that the District has failed to meet prior deadlines, even with the Requester withdrawing the terms "first amendment, "1st amendment," and "1A."³

On August 16, 2021, in consideration of the factors enunciated in *APSCUF*, the OOR granted the District a thirty-day extension and required rolling production of documents and status reports for any additional extensions.

¹ 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).").

² Under the RTKL, a sworn affidavit or 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 statement] 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)).

³ Counsel for both parties were in contact regarding the searches and appropriate search terms. These terms were withdrawn in an email between counsel, provided as part of the Requester's August 6, 2021, statement.

On September 15, 2021, the District produced the required status report and sought additional time. The Requester again objected, but the OOR granted the District an additional thirty-day extension in light of the *APSCUF* factors and the District's compliance with the OOR's requirements for additional extensions. On October 18, 2021, the District produced the required status report and sought another extension; the Requester objected. The OOR granted the District a final extension and required the District to submit a statement when all records have been provided and state any reasons for withholding or redacting records.

On November 24, 2021, the District submitted a position statement and the statements, made under the penalty of perjury, of Agency Open Records Officer Shah, Jason Sam, Esq., the District solicitor, Ken Jordan, the Director of Instructional Technology, and Edward Donahue, Principal at Southern Lehigh Middle School. The District also provided exemption logs. The District redacted personal identification information, 65 P.S. § 67.708(b)(6), information of a minor, 65 P.S. § 67.708(b)(30), information protected under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, medical records, 65 P.S. § 67.708(b)(5), noncriminal investigative records, 65 P.S. § 67.708(b)(17), personal notes, 65 P.S. § 67.708(b)(12), discussions held in executive session, 65 P.S. § 67.708(b)(21), written criticism of an employee, 65 P.S. § 67.708(b)(7), records protected by the attorney-client privilege or attorney work-product doctrine and non-responsive records. The District also withheld records for the reasons cited above, as well as records it asserts reflect internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), and a working draft of a District directive, 65 P.S. § 67.708(b)(9). Finally, the District maintained that records responsive to Item 1 do not exist and that Item 26 is insufficiently specific. *See* 65 P.S. § 67.703.

On December 16, 2021, the Requester provided his position statement. He asserts that the District has improperly redacted records. Specifically, he challenges certain redactions made under FERPA, and redactions applied for non-responsiveness. He asserts that Item 26 is sufficiently specific; and finally, he argues that the District failed to produce records related to School Board retreats and the Equity Committee and failed to search for or produce records from the Canvas system.⁴

1. The Requester identified six specific issues on appeal

The District sought and was granted an *APSCUF* extension in this matter. As part of that, on October 19, 2021, the OOR set forth a final schedule for production of documents and the Requester's position statement which was to identify any issues with the District's production of records.

In his December 16, 2021, position statement, the Requester sought six specific remedies⁵:

1. Production of SLSD03173 without the improper FERPA redactions
2. Production of documents without the redactions for "non-responsiveness"
3. Production of documents responsive to Item 26
4. Production of missing documents from the School Board retreats
5. Production of missing documents relating to the Equity Committee; and
6. Production of all responsive documents on the Canvas system as well as any other SLSD document storage system not previously searched that may contain records

The District redacted or withheld records citing numerous exemptions, privileges and other laws. Notably, the Requester does not challenge the redaction or withholding of records based on the following exemptions under the RTKL: medical records, personal identification information, employee records, draft records, internal predecisional deliberation, personal notes or working papers, noncriminal investigation, executive session and information of a minor exemptions. 65

⁴ Canvas is an online document and learning system utilized by the District.

⁵ The Requester also seeks a finding of bad faith.

P.S. §§ 67.708(b)(5)-(7), (9)-(10), (12), (17), (21), (30). The Requester also does not challenge records redacted or withheld pursuant to the attorney-client privilege, the attorney work-product doctrine or the constitutional right to privacy. Lastly, while the Requester identifies a specific redaction done pursuant to FERPA, he does not challenge all FERPA redactions.

2. The District did not demonstrate that FERPA applies to an alumni's email

The District redacted some emails arguing they include information protected by FERPA, However, in his submission, the Requester identified a single record, SLSD03173, as the sole record with improper FERPA redactions.

FERPA protects “personally identifiable information” contained in “education records” from disclosure, and financially penalizes school districts that have “a policy or practice of permitting the release of education records ... of students without the written consent of their parents.” 20 U.S.C. § 1232g(b)(1). Regulations implementing FERPA define “education records” as those records that are “[d]irectly related to a student” and are “[m]aintained by an educational agency or institution or by a party acting for the agency or institution.” 34 C.F.R. 99.3. FERPA’s regulations define the term “student” as “any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.” *Id.* However, the term does not include “[r]ecords created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual’s attendance as a student.” *Id.*

The District has provided no evidence that the redactions applied to SLSD03173, which was sent after the individual graduated from the District, is an education record as defined by FERPA. This record was received by the District after the individual no longer attended District schools and the District has not provided evidence that they relate to the individual’s attendance

as a student. The District may not redact information pursuant to FERPA, as SLSD03173 does not constitute an education record that would qualify for its protection.

3. The District has failed to establish that nonresponsive information within responsive records can be redacted

Attorney Sam attests that the District redacted certain “emails where a portion of the record is responsive to the [R]equest but the rest of the record is not.” As the OOR explained in *Scheinler v. Southern Lehigh Sch. Dist.*, OOR Dkt. AP 2021-1696, 2021 PA O.O.R.D. LEXIS 1923, generally, an agency may not redact “nonresponsive” information from responsive records. *Kerr v. N. Huntingdon Twp.*, OOR Dkt. AP 2014-1080, 2014 PA O.O.R.D. LEXIS 1031 (“Nor is there an exemption under the RTKL which permits an agency to redact content in a responsive record that is presumptively public because that content is non-responsive”). Accordingly, to the extent the District considers the redacted information as not responsive to the Request because it is beyond the scope, an agency may not redact such information from a responsive public record without proving that it is other exempt from disclosure. *See Garland v. Pa. State Police*, OOR Dkt. AP 2017-2204, 2017 PA O.O.R.D. LEXIS 1824.

The District relies upon *Kutztown Univ. of Pa. v. Bollinger*, arguing that the Commonwealth Court noted that not redacting non-responsive portion of the records would “impermissibly broaden” the original request and that an agency may redact nonresponsive information. 217 A.3d 931, 2019 Pa. Commw. Unpub. LEXIS 521.⁶

However, the facts in *Bollinger* are not the same as are present in this case. In *Bollinger*, the Court concluded that the requester sought information and that the University had provided all of the information that was requested, which happened to be contained within emails. Therefore, the redaction of the non-responsive information within those emails was irrelevant to the request

⁶ An unreported opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414.

itself, resulting in a moot case. Here, the records sought are documents, including emails, and some of the redactions are an issue in controversy on appeal. Furthermore, there is no evidence that the redactions for non-responsiveness were for entire emails that were unrelated or non-responsive and contained within an email chain. *See Ference v. Sewickly Borough*, OOR Dkt. AP 2020-0095, 2020 PA O.O.R.D. LEXIS 1879 (distinguishing withholding entire non-responsive records and making redactions). Therefore, the District's reliance on *Bollinger* is misplaced, as the redactions to non-responsive information here does not result in this appeal being moot.

Lastly, the District has not raised any other reason for the non-responsive redactions. Accordingly, the nonresponsive information the District redacted from the records is subject to public access.

4. Item 26 of the Request is insufficiently specific

The District denied Item 26 of the Request as insufficiently specific for failing to identify a subject matter and scope. Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep’t of Educ.*, 119

A.3d at 1125. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See Id.* at 1125. Third, “[t]he timeframe of the request should identify a finite period of time for which the records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

Item 26 seeks “[a]ll records relating to use by [District] employees or agents (including, without limitation, members of the [District] School Board) of electronic systems not authorized by [the District] (e.g., outside e-mail services or messaging platforms) to communicate regarding [District] matters, as well as any guidance or corrective action [the District] has taken with respect to the same.”

The District argues that the phrase “[District] matters” fails to identify a specific activity or transaction of the agency. Furthermore, the District asserts that the scope of “all records related to” is impermissibly broad. The Requester, meanwhile, asserts that Item 26 is specific and notes the OOR has previously ordered production of these types of documents.

The scope of the Item encompasses all records related to use of nonauthorized electronic systems. In *Pa. State Police v. Office of Open Records*, the Commonwealth Court held that the portion of a request seeking “any and all records, files or communications” related to vehicle stops, searches, and seizures was insufficiently specific under Section 703 of the RTKL, and that only the portion of the request seeking a particular type of document – manuals related to vehicle stops, searches, and seizures – was sufficiently specific. 995 A.2d 515, 517 (Pa. Commw. Ct. 2010). Similar to *PSP*, Item 26 does not identify a particular type of document.

Additionally, “[District] matters” is far too broad of a subject matter as it encompasses all District matters and does not identify any particular matter. On appeal, the Requester explains that he seeks “documents related to [District] employees improperly using texts, personal email, or encrypted messaging apps to communicate official [District] business”; however, the OOR’s review on appeal is confined to the Request as written. *See Brown v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998. The Requester also asserts that the OOR has previously ordered the disclosure of these types of records. The final determinations cited by the Requester are factually distinct from the instant matter.⁷ In those, the requests specifically sought text messages, emails, and other forms of electronic messages, whereas here, the Item seeks “records related to the use...of electronic systems[.]” Therefore, the District has demonstrated that Item 26 is insufficiently specific.

Nothing in this Final Determination prevents the Requester from filing a more specific RTKL request for the same information, and if necessary, filing an appeal pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

5. The District’s search was insufficient

The Requester challenges the sufficiency of the records provided, asserting that the District failed to produce responsive documents concerning School Board retreats and the Equity Committee. He also asserts that the District failed to search Canvas, its online learning management system. In support of this, the Requester points to SLSD04888, SLSD03174, and SLSD05623, all of which refer to a School Board retreat. The Requester also provided emails he received separately from an individual involved in the Equity Committee. He asserts those emails were not provided to him in response to the Request despite being responsive records.

⁷ *Hassler v. Tulpehocken Area Sch. Dist.*, OOR Dkt. AP 2019-0455, 2019 PA O.O.R.D. LEXIS 702; *Scarcella v. Sullivan County Sch. Dist.*, OOR Dkt. AP 2019-0926, 2019 PA O.O.R.D. LEXIS ____.

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” as used in Section 901 of the RTKL, the Commonwealth Court outlined the elements of a good faith search in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018) *aff’d*, 243 A.3d 19 (Pa. 2020). The Court noted that an Agency Open Records Officer (AORO) has a duty to:

1. Advise all custodians of potentially responsive records about the request;
2. Obtain all potentially responsive records from those in possession of the potentially responsive records;
3. Contact agents within its control, including third party contractors; and
4. Review the records and assess their public nature.

Id. In sum, an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents; an agency may do so by providing relatively detailed and non-conclusory affidavits submitted in good faith by officials or employees with knowledge of the records and the search for the records. *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 Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Here, the District has submitted evidence describing its search for responsive records.

Attorney Sam affirms:

6. During the search process I reviewed the request and attempted to draft search terms that were responsive to the request items with minimal non-responsive records. This resulted in the District running and re-running searches where voluminous records were pulled with many potential non-responsive records. During this process, I collaborated with Requester’s counsel to craft search terms for request items. Not all of Requester’s Counsel’s recommendations were utilized but all terms used in the final search for records responsive were terms recommended by counsel.

7. The final searches conducted that I believe satisfy the Request in full were:

a. Request Item 1:

i. Search parameter: across all District employee inboxes with the date range of 1/1/17 to 5/14/21.

ii. Search terms:

1. Oppressor” or “Oppressed” AND “Skin”.

a. This Search returned 0 hits.

b. Request Items: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 ,19, 20, 21, 22, 23, and 24:

i. Search parameter: across all District employee inboxes with the date range of 1/1/17 to 5/14/21.

ii. Search Terms:

1. Critical race theory

2. CRT

3. Diversity

4. Equity

5. Inclusion

6. Systemic racism

7. Structural racism

8. Institutional racism

9. Anti-racism (with or without the dash)

10. Racial sensitivity

11. Implicit bias

12. Anti-bias training (with or without the dash)

13. White supremacy

14. White fragility

15. Internalized racism

16. Cultural competency

17. Culturally competent

18. Culturally responsive

19. Educational justice

20. Social justice

21. Racist

22. Racism

c. Request items: 5, 6, 14, 22, and 25:

i. Search parameter: Date range of 1/1/17 to 5/14/21.

a. Accounts searched: Inboxes of the Superintendent and School Board members. Accounts: (evisonk@sbsd.org, ruhft@sbsd.org, gangewerek@sbsd.org, sareenp@sbsd.org, parsonsk@sbsd.org, smithj@sbsd.org, gehmane@sbsd.org, desaia@sbsd.org)

dimmigjeffrey@slds.org,
nordm@slds.org).

lycettw@slds.org,

ii. Search Term:

1. Policy

d. Request Item 9, 10, 11, 12, 13, 14, 15:

i. Search parameter: [] across all District employee inboxes with the date range of 1/1/17 to 5/14/21.

ii. Search term:

1. Dr. Joseph Allen OR Dr. Allen

e. Request Item 19:

i. Search parameter: [] across all District employee inboxes with the date range of 1/1/17 to 5/14/21.

ii. Search terms:

1. Viewpoint Diversity

a. This search yielded 0 hits.

2. Diversity of Opinion

f. Request Items 20 and 21:

i. Search parameter: Employee records with the date range of 1/1/17 to 5/14/21

ii. Search conducted:

a. Confirmed with Director of Human Resources that no terminations or resignations occurred on the basis of race discrimination.

g. Request Item 23:

i. Search parameter: [] across all District employee inboxes with the date range of 1/1/17 to 5/14/21.

ii. Search term:

1. Compelled Speech

a. This Search returned 0 hits.

h. Request Item 25:

i. Search parameter: [] all District employee inboxes with the date range of 1/1/17 to 5/14/21.

ii. Search term:

1. Controversial Topic

a. This Search returned 0 hits.

In addition, Ms. Shah affirms:

On June 30, 2021, Attorney for Requester served the District with a Material Preservation Notice. The District then disseminated the Material Preservation Notice, which listed the types of records to preserve, to administrative staff and any

potential District custodians the same day which notified them to preserve any records that may be responsive in their possession. The email sent advised that the District and its employees should refrain from destroying any existing records/communications for the requested items in the material preservation notice....

The District asserts that it must perform a search “that would reasonably uncover all relevant documents [but] it does not need to actually uncover all responsive records...as that is impossible.”

In *Yakim v. Municipality of Monroeville*, the OOR stated:

[I]n order for an agency to meet its burden that a good faith search was conducted in response to a FOIA request an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents as established by relatively detailed and non-conclusory affidavits submitted in good faith by responsible officials.

OOR Dkt. AP 2016-1083, 2016 PA O.O.R.D. LEXIS 1062 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted).

Here, the search terms utilized were reasonably calculated to uncover all relevant documents on the email server and in employee records. Indeed, many of the terms utilized were provided by the Requester or his attorney.

However, the evidence demonstrates that this search was solely of email inboxes and “employee records” and does not demonstrate any search of servers for deleted emails, *see Pa. Dep’t of Labor and Indus. v. Earley*, 126 A.3d 355, 358 (Pa. Commw. 2015) (an agency must also demonstrate that records of deleted emails no longer exist on the agency’s servers), or the Canvas system, the learning management tool utilized by the District. The evidence demonstrates an insufficient search such that the District must search its email servers as well as the Canvas system for responsive records.⁸

⁸ Section 1304(a) of the RTKL states that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the District is required to provide the unredacted nonresponsive records and an unredacted copy of SLSD03173, as described above, as well as perform a search of the server and the Canvas system for responsive records within thirty days. The District is required to provide the Requester with a statement describing the search and that no responsive records exist or provide all responsive records discovered as part of that search. 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 Lehigh 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. 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.⁹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 18, 2022

/s/ Erin Burlew

APPEALS OFFICER
ERIN BURLEW, ESQ.

Sent via email to: Joseph Jesiolowski, Esq., Sam Jason, Esq.

to a public record ... or otherwise acted in bad faith..." 65 P.S. § 67.1304(a). Similarly, Section 1305(a) authorizes a court to "impose a civil penalty of not more than \$ 1,500 if an agency denied access to a public record in bad faith." 65 P.S. § 67.1305; *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017) ("An example of bad faith is a local agency's failure to comply with the mandate of Section 901 of the RTKL, which requires that a local agency make a good faith search for information responsive to a request and determination of whether that information is public."). However, while the OOR concludes that the District's search was inadequate, the District's response to the Request does not rise to the level of bad faith. *Cf. Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018), *aff'd* 243 A.3d 19 (Pa. 2020) (finding bad faith where the agency failed entirely to search for records at all during the request stage).

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⁹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).