pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
J. CHADWICK SCHNEE AND THE LAW OFFICE OF TUCKER HULL, LLC,	:	
Requester	:	
	:	**Docket No: AP 2022-0763**
v.	:	
	:	
PARKLAND SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

J. Chadwick Schnee, Esq., on behalf of The Law Office of Tucker Hull, LLC, (collectively "Requester") submitted a request ("Request") to the Parkland School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking, among other things, copies of emails for two named District School Board members. The District partially denied the Request, arguing, among other things, that certain records do not exist, certain records are exempt from disclosure pursuant to the Federal Education Rights and Privacy Act ("FERPA"), that certain records are protected by the constitutional right to privacy, and that some records are privileged. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On January 28, 2022, the Request was filed, seeking:

> 1. A screenshot image showing the name of the software program(s) in the District's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic file types.
>
> For the time period between December 1, 2021 and December 22, 2021:
>
> 2. All emails sent to or from David J. Hein on all personal or District-issued email accounts;
>
> 3. All emails sent to or from Robert M. Cohen on all personal or District-issued email accounts;
>
> 4. All deleted emails sent to or from David J. Hein on all personal or District-issued email accounts;
>
> 5. All emails sent to or from Robert M. Cohen on all personal or District-issued email accounts.

Following a thirty-day extension to respond to the Request, 65 P.S. § 67.902(b), on March 7, 2022, the District partially denied the Request, arguing that no records exist that are responsive to Item 1, and by providing redacted records responsive to Items 2 – 5. The District argues that the redacted records contain information protected by FERPA, 20 U.S.C. § 1232g, information that is protected by the constitutional right to privacy, personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), and information protected by the attorney-client privilege. The District further argues that the records from Mr. Hein's and Mr. Cohen's personal email accounts are not records of the District and, in the alternative, the Items of the Request seeking records from the personal email accounts are insufficiently specific, 65 P.S. § 67.703.

On March 28, 2022, 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 April 14, 2022, the District submitted a position statement reiterating its grounds for denial.[1] In support of its position, the District submitted the attestations made under penalty of perjury from Leslie Frisbie, the District's Open Records Officer, David Hein, District School Board Director, C. Steven Miller, Esq., the District's Solicitor, Robert Cohen, District School Board Director, and Thomas Derhammer, the District's Director of Technology. In addition, the District attached nineteen documents to the position statement that included, email exemption logs prepared by Mr. Hein and Mr. Cohen. Finally, the District included additional records not previously provided to the Requester, with the position statement. The District's submission indicates that Mr. Hein and Mr. Cohen were notified of the appeal on April 8, 2022.

On April 25, 2022, the Requester agreed to extend the Final Determination deadline for the purpose of seeking a supplemental exemption log from the District. In addition, on the same date, the OOR agreed to accept the Requester's supplemental position statement dated April 21, 2022.[2] In the Requester's supplemental submission, he states that he "does not object to the redaction of any home addresses alleged to be protected by the constitutional right to privacy."

On May 4, 2022, the District submitted an exemption log, comprising all District and personal emails, along with supplemented and updated exemption logs from Mr. Hein and Mr. Cohen. The District also provided a supplemental position statement in reply to the Requester's April 21, 2022, supplemental submission. In addition, the District submitted the supplemental attestations from Attorney Miller, Ms. Frisbie, Mr. Hein, Mr. Cohen, and Mr. Derhammer and copies of the redacted emails of Mr. Hein and Mr. Cohen. The District also submitted the

[1] On April 6, 2022, the OOR granted the District's request to extend the record closing date until April 14, 2022. *See* 65 P.S. § 67.1102(b)(3).

[2] In addition, on May 19, 2022, the Requester agreed to an additional extension of the Final Determination deadline, until June 13, 2022. *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)."); *see also* 65 P.S. § 67.1102(b)(3).

attestation of Dr. Rodney Troutman, one of the District's Assistant Superintendents. On May 17, 2022, the District submitted the second supplemental attestations of Mr. Hein and Mr. Cohen addressing the nonpublic nature of their personal email addresses.

On May 17, 2022, after being granted leave to do so by the Appeals Officer, the District submitted the second supplemental attestations of Mr. Hein and Mr. Cohen attestations limited to the inclusion of one sentence in each, addressing whether their personal email addresses are held out to the public.

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 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). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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).

1. The appeal is moot as to certain records

During the course of the appeal, the District reconsidered its position of denying a copy of the screenshot sought in Item 1. The record was attached to the District's position statement. The Requester has not disputed receiving the copy of the screenshot. In addition, the District disclosed

four additional emails. Ms. Frisbie attests that the four additional emails were produced as attachments to the District's position statement.[3]

Furthermore, in its supplemental submission, the District explains that "except for one communication sent by the District Solicitor, all of the emails contained in Mr. Hein's and Mr. Cohen's personal email accounts that constitute a record of the ... District between December 1, 2021 and December 22, 2021, have been or are now being disclosed subject to redaction of personal identification information ...." In support of the District's production of additional emails, Mr. Cohen attests that he has two personal email accounts "identified on [his] revised Exemption [L]og as 1 and 2 ..." and that he "learned that the emails that had been in [his] personal email account related to ... District matters and which [he] turned over to the Open Records Officer were not disclosed as part of the District's final Response Letter ...." Mr. Cohen further attests that he has "authorized the ... District to disclose all of [his] Parkland related emails as part of the District's supplemental submission[]" and "[his] exemption log highlights those emails for which I have authorized disclosure." Cohen supplemental attestation, ¶¶ 2, 7, 10. Based on a review of Mr. Cohen's exemption log and supplemental exemption log, the supplemental exemption log shows the previously released emails and the emails released with the District's supplemental submission. With respect to his personal email accounts, Mr. Hein attests that he also prepared a revised exemption log containing "all emails sent or received by me in my personal email account between December 1, 2021 and December 22, 2021[]" and, like Mr. Cohen, he learned that certain District related emails were not disclosed with the District's final response to the Request. Mr. Hein also attests that he "authorized the ... District to disclose all of [his] Parkland related emails as part of

[3] Under the RTKL, a statement made under 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).

the District's supplemental submission[]" and "[his] exemption log highlights those emails for which I have authorized disclosure." A comparison of Mr. Hein's initial and supplemental exemption logs demonstrates that the supplemental log shows all of the previously released emails and emails released with the District's supplemental submission. Finally, Ms. Frisbie attests that attached to the supplemental submission are personal emails from Mr. Hein and Mr. Cohen. Accordingly, the appeal as to the records released is dismissed as moot.

2. The District conducted a good faith search

The Requester argues that the District did not conduct a good faith search because the District's evidence is conclusory as to the search, especially regarding Mr. Hein's and Mr. Cohen's deleted District and personal email accounts. Also, the Requester relies on *McKelvey v. Pa. Dep't of Health*, to argue that the District's Open Records Officer had a duty to independently review Mr. Hein's and Mr. Cohen's personal email accounts, as third parties, not District officials, "to determine whether they constituted records, and ... whether any exemptions apply." 255 A.3d 385 (Pa. 2021).

The District disputes that Ms. Frisbie's and Mr. Derhammer's attestations are conclusory regarding the search conducted. The District further argues that a search of the personal email accounts by the Open Records Officer was not required or appropriate, due to privacy considerations. The District asserts that the Requester's reliance on *McKelvey* is misplaced because the marijuana applications submitted to the Department of Health are far different from personal email accounts.

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 concluded that:

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

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018), *aff'd,* 243 A.3d 19 (Pa. 2020). Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open records officers have:

> a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the … requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also 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).

In support of the District's argument, Ms. Frisbie attests, that she conducted a good faith search for records upon receipt of the Request. Ms. Frisbie further attests to the relevant steps taken in the search:

> 4. I contacted Thomas Derhammer, the ... District Director of Technology, to conduct a search of ... District issued email accounts for [Mr.] Hein and [Mr.] Cohen based on the ... Request .... Mr. Derhammer was given a copy of the Request to guide him on what emails had been requests. The search conducted encompassed December 1, 2021 through and including December 22, 2021.
>
> 5. I received and reviewed from Mr. Derhammer all potentially responsive records based on the emails that Mr. Derhammer had produced from his search.

6. The search of the Parkland issued email accounts resulted in ... 879 pages of emails for Mr. Hein and 192 pages of emails for Mr. Cohen.

7. All emails provided by Mr. Derhammer were disclosed in the District's Final Response Letter dated March 7, 2022, except for emails and documents that were deemed protected under the Attorney/Client privilege and Attorney Work Product Doctrine and four (4) emails dated December 22, 2021, that are now being disclosed with the District's submission on appeal....[4]

8. The Open Records Officer issued instructions to Mr. Hein and Mr. Cohen to review their respective personal email accounts and to provide all emails that related to Parkland School District for review by the Open Records Officer in order to make a determination on whether those emails should be provided in response to the ... Request.[5]

9. Mr. Hein and Mr. Cohen made determinations regarding which emails contained in their personal email accounts and sent [them] to ... [Ms. Frisbie] for review were potentially related to ... District transactions, activities and were created, received or retained in connection with a transaction, business or activity of [the] ... District.

10. [Ms. Frisbie] relied upon the reviews conducted by Mr. Hein and Mr. Cohen of their respective personal email account to determine which emails, if any, may potentially be related to a 'record' as that word is defined under the [RTKL]. [Ms. Frisbie] did not believe that it was appropriated for her to review the personal email accounts of Mr. Hein and Mr. Cohen knowing that those accounts would contain personal emails related to their personal matters which have no connection to the ... District.

11. Mr. Hein provided to [Ms. Frisbie] 17 emails that he believed were potentially related to ... District business as described in the letter of instruction dated February 4, 202[2].

12. Mr. Cohen provided to [Ms. Frisbie] 13 emails that he believed were potentially related to ... District business as described in the letter of instruction dated February 4, 202[2]....

18. ... There are 1,071 pages of emails that were reviewed by the Open Records Officer to determine what content needed to be redacted as allowed by law.....

[4] The District appended a list of the disclosed emails to its appeal submission.

[5] Also appended to the District's submission is the February 3, 2022 search instruction letter sent to Mr. Hein and Mr. Cohen and a February 22, 2022 email containing additional search instructions, both of which were copied to Mark J. Madson, the Superintendent of Schools and Steve Miller, the District Solicitor. Ms. Frisbie incorporates the contents of the letter and email by reference as part of her attestation.

In further support of the District's argument, Mr. Derhammer attests that Ms. Frisbie provided him with a copy of the Request for the purpose of conducting a search of Mr. Hein's and Mr. Cohen's District email accounts. Mr. Derhammer further attests, the following:

> 3. On Friday, January 28, 2022, I sent an email to David Russell, Director of Management Information Systems at Carbon Lehigh Intermediate Unit #21 to request the emails that were specified in the [RTKL] Request. My request stated as follows:
>
> - Please provide all emails sent to or from heind@parklandsd.org for the dates: December 1, 2021 through December 22, 2021.
> - Please provide all emails sent to or from cohenr@parklandsd.org for the dates: December 1, 2021 through December 22, 2021.
>
> 4. The email archives of the CLIU pertain to all emails that were ever sent or received whether deleted by the user or not.
>
> 5. I provided copies of all emails produced by the search to Leslie Frisbie.

In a supplemental attestation, Mr. Derhammer further attests, the following:

> 3. The Carbon Lehigh Intermediate Unit #21 (CLIU) hosts a Microsoft Exchange Email server that handles all parklandsd.org emails. The District pays the CLIU #21 to manage our Email service, email archiving, and to provide us any emails pertaining to a [RTKL] request....
>
> 5. The CLIU utilizes software know as an email archiver that works alongside their Microsoft Exchange Email Server. The email archiver will log and retain all emails that were ever sent or received whether deleted by the user or not. The email archiver is used for compliance and eDiscovery.
>
> 6. The CLIU Mail Archiving System process is listed below.
>
> - New emails come into exchange, exchange makes a copy of the new email to be archived and sends it to an email box that the mail archiving system checks.
> - The mail archiving system archives the email and indexes it to be searched.
>
> 7. The ... District retention policy is currently set to retain email for all times, so all emails ever sent or received are accessible to us.
>
> 8. List below are the two search queries run for the timeframe of December 1, 2021 through December 22, 2021.
>
> - From:cohenr@parklandsd.org OR to:cohenr@parklandsd.org
> - From:Heind@parklandsd.org OR to:Heind@parklandsd.org[.]

9. After the CLIU conducted their search, the[y] saved emails related to the search queries into two separate outlook data files (.pst) which contained all the messages requested.

- cohenr_parklandsd.pst
- heind_parklandsd.pst[.]

10. The CLIU then provided me a link to their FTP secure site with credentials to download and access these .pst files in my Outlook Client.

11. I provided copies of all emails produced by the search to Leslie Frisbie.

Further, Mr. Hein and Mr. Cohen attest that the search of their personal email accounts included their Inbox, Sent Folder, and Deleted Items folder. Hein supplemental attestation, ¶19; Cohen supplemental attestation, ¶19. As set forth above, a sworn statement serves as sufficient evidentiary support. *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Based on a review of the District's evidence, including the extensive detail attested to by Mr. Derhammer regarding the District's email archiving system and the search parameters, the District has proven that a good faith search for Mr. Hein's and Mr. Cohen's District emails was conducted and the search included deleted emails. *See Hays v. Pa. State Police,* OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search has been conducted by an agency when it "contact[ed] the Bureau most likely to possess responsive records, ... explain[ing] why that Bureau is most likely to possess those records.")

Regarding the search for and review of Mr. Hein's and Mr. Cohen's personal email accounts, the Requester refers to Ms. Frisbie's attestation at paragraph 10 to assert that the District did not carry out its search duties in good faith with respect to the personal email accounts because Ms. Frisbie did not do the search of the email accounts. More specifically, the Requester states that "for the time period in question, Hein and Cohen were not District officials, but, rather, third parties such that the District had a duty to independently review their emails to determine whether

they constitute records and, if so, whether any exemptions apply," and the District's evidence that Ms. Frisbie did not conduct the personal email search is contrary to the holding in *McKelvey*.

In *McKelvey*, the Supreme Court concluded that the Department did not fulfill its statutory duty to "independently evaluate and discern the validity of claimed exemptions to disclosure in the first instance, including those made by third parties," when the Department failed to review redactions made by third party applicants on the applications for medical marijuana licenses. *McKelvey*, 255 A.3d at 403-04. Ms. Frisbie attests that she "relied upon the reviews conducted by Mr. Hein and Mr. Cohen of their respective personal email account to *determine which emails, if any, may potentially be related to a 'record'* as that word is defined under the [RTKL]" and that both Mr. Hein and Mr. Cohen provided records to her in accordance with the District's February 4, 2022, search instruction letter. A review of the February 4, 2022 letter shows that it included the Section RTKL definition of a "Record" and, with respect to the search of the personal email accounts, contained the following instructions:

> Another search that must be conducted relates to your personal email account(s) that you maintain. If you are using your personal email account(s) on matters related to School District business, those emails (not your email address) need to be produced in response to [] the Request, unless they would be otherwise exempt from disclosure under the RTK Law. I am asking that you conduct a search of your personal email account(s) for any emails received or sent between December 1, 2021 to December 22, 2021, that relate to School District business. If you are unsure as to whether an email relates to School District business, please send the email to me for review with Steve.
>
> In addition to the search of your personal email account, I am also requesting that you do a search of your Parkland School District email account as a double check on the search conducted by the IU. Your search results of the Parkland account will be compared to the IU search results.
>
> After you complete your search of your personal and Parkland email accounts, you will need to respond to me in one of two ways. *If you have emails that are responsive to the Request, please provide a copy of the emails to me.* If the search of your personal email account produces no emails that are related to School District business, I have attached an attestation form for you to read and sign which

> serves to attest to the fact that you have no emails in your personal email account(s) that are responsive to the Request. The attestation does not include your Parkland email account because the search conducted by the IU has already identified that emails do exist. (Emphasis added).

The District submitted exemption logs prepared by Mr. Hein and Mr. Cohen detailing the emails that result from the search of their personal accounts based on the District's instructions. The exemption logs contain both emails that related to District business and personal matters. Mr. Hein and Mr. Cohen attest that they prepared a log of all emails from their person email accounts that was created following a search performed according to the District's instructions and that the "email exemption log[s] represents a complete list of emails located in my personal email account from December 1, 2021, to December 22, 2021." Mr. Hein and Mr. Cohen further attest, in their supplemental attestations that, "[w]ith respect to the Parkland related emails that are set forth in my exemption log, I have made no determination regarding those emails as being Parkland public records or whether they should be redacted since those decisions are made by the District's Open Records Officer." Hein supplemental attestation, ¶10; Cohen supplemental attestation, ¶11. The evidence presented by the District demonstrates that the Open Records Officer carried out her duty to review the records and consult with District officials, including the District's solicitor, to determine whether the responsive records should be disclosed, redacted or withheld. As compared to the Department of Health in *McKelvey*, the evidence here does not indicate that the District's Open Records Officer ceded her obligation to determine whether an exemption applied to the records obtained from Mr. Hein's and Mr. Cohen's personal email account by permitted these individuals to redact or withhold records. *Cf. Mollick v. Upper Moreland Twp. Sch. Dist.*, OOR Dkt. AP -2021-1103, 2022 PA O.O.R.D. LEXIS 354 (concluding that the district's reliance on attestations from education association members in which the individuals made their own determination that records were exempt, without having the open records officer obtain and review

the records, was not a good faith search). Accordingly, we determine that the District conducted a good faith search for records. Whether certain emails obtained from Mr. Hein's and Mr. Cohen's personal accounts fall within the definition of "Records" under Section 102 of the RTKL is a separate issue that will be addressed later in this Final Determination.

3. Personal email addresses and telephone numbers may be redacted

In the appeal, the Requester states that, if the redacted email addresses and telephone numbers have not been held out to the public, he does not object to the redactions. However, the Requester asserts in the appeal and in the April 21, 2022 supplemental submission that the District has not demonstrated that the email addresses and telephone numbers are personal and have not been held out to the public.

Section 708(b)(6) of the RTKL exempts from disclosure certain personal identification information, including "a record containing all or part of a person's Social Security number; driver's license number; personal financial information; home, cellular or personal telephone numbers; personal e-mail addresses; employee number or other confidential personal identification number." 65 P.S. § 67.708(b)(6)(i)(A). Ms. Frisbie attests that the "personal identification information redacted under the RTK Law exception were telephone numbers and email addresses of private citizens that were not known to be available to the public." Frisbie attestation, ¶14; Frisbie supplemental attestation, ¶3. Ms. Frisbie further attests that certain emails sent to Mr. Hein from LCTI "included other recipients, some of whom had email addresses that were personal to them and not available to the public" and "those emails addresses were redacted from these emails, except for those recipients who were known to have ... [D]istrict email addresses of other local educational agency email addresses known and available to the public, which email addresses were disclosed...." Frisbie attestation, ¶¶ 18-19. In addition, a review of the Districts exemption log

descriptions of several of the responsive emails indicate that they contain personal email addresses and personal telephone numbers. Ms. Frisbie attests that to the best of her knowledge, information and belief, "all names, telephone numbers, home addresses and email addresses that have been redacted are not known to the Open Records Officer to have been held out to the public." We note that the District need only prove an exemption by a preponderance of the evidence and "[a] preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry." *Delaware Cnty. v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012); *Campbell v. Pa. Interscholastic Ath. Assoc*., 268 A.3d 502 (Pa. Commw. Ct. 2021). While names and home addresses are not expressly exempt under Section 708(b)(6)(i)(A), personal telephone numbers and emails addresses are and, therefore, such redactions, as detailed in the District's log, are appropriate.

4. Certain emails are not records of the District

The District argues that certain emails obtained from Mr. Hein's and Mr. Cohen's personal email accounts for the relevant timeframe are not records of the agency and, therefore, are not accessible under the RTKL. More specifically, the District asserts that the subject matter of such emails are purely personal to each individual and do not document a transaction or activity of the District. Section 102 of the RTKL defines a "record" as "[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of the agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of [an] agency." *See also Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.,* 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Emails are not considered records of an agency merely because they were sent or received using agency email addresses or by virtue of their location on an agency computer, but, rather, they must document an agency transaction or activity. *See Meguerian v.*

Office of the Attorney General, 86 A.3d 924, 930 (Pa. Commw. Ct. 2013); *Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011).

Both Mr. Hein and Mr. Cohen prepared an exemption log detailing the emails found in their respective personal email accounts for the timeframe stated in the Request. Mr. Cohen and Mr. Hein attest that the personal emails that are unrelated to District business are noted on his exemption log as personal and a description is provided that "factually explain[s] why the email is personal to [them]." Mr. Hein and Mr. Cohen include the word "personal" in the description column and attest that the "emails are personal and ... involve multiple persons including but not limited to immediate family members, friends and others." Mr. Hein and Mr. Cohen further attest that "[n]one of [their] personal emails contain any information or subject matter that relates to Parkland School District. The emails do not contain any information that documents a transaction or activity of the ... District that was created, received, or retained in my personal email account pursuant to law or in connections with a transaction, business or activity of the ... District." Further, Mr. Hein attests that certain emails "reference [his] affiliation with the Pennsylvania School Boards Association (PSBA)" and that "[his] affiliation with PSBA does not involve ... District matters ...."

A review of Mr. Hein's and Mr. Cohen's exemption logs show that, except for the emails marked as District business that have been disclosed on appeal, the descriptions demonstrate that the communications are purely personal and do not document an activity or transaction of the District. For example, the emails are described as "personal picture," "shampoo recall," "lunch invitation," "legal matter ... pertaining to a family individual," "birthday wishes," "holiday greeting," "product delivery update," account notifications and correspondence with financial providers and insurers and religious and community newsletters. Based on a review of the

evidence presented, and in conjunction with a review of Mr. Hein's and Mr. Cohen's exemption logs, the District has demonstrated that, except for the emails already released, the emails found in the personal email accounts for the relevant timeframe are not records of the District. Therefore, these records are not accessible under the RTKL. *See* 65 P.S. § 67.102.

5. The District has proven that the chorus concert photograph may be withheld.

The District withheld a picture of District students performing in a chorus concert at the Springhouse Middle School that was attached to an email sent to District Board member, arguing it is an education record protected from disclosure pursuant to FERPA and, alternatively, that it is not a record of the District.

a. Section 102 of the RTKL

As set forth above, Section 102 of the RTKL defines a "record" as "[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of the agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of [an] agency." Further, emails are not considered records of an agency merely because they were sent or received using agency email addresses or by virtue of their location on an agency computer, but, rather, they must document an agency transaction or activity. *See Allegheny Cnty. Dep't of Admin. Servs,* 13 A.3d at 1034-35; *Meguerian*, 86 A.3d at 930.

Regarding the subject of the email that attached the withheld photograph, Ms. Frisbie attests that an email was located in Mr. Hein's and Mr. Cohen's District issued accounts that was sent by a parent on December 2, 2021, "related to students appearing in-person on stage for a chorus concert performed by 7th grade students who attended Springhouse Middle School" and the parent attached a picture of the students performing, as the parent had a child who was performing. Frisbie attestation, ¶¶ 22-23. Ms. Frisbie further attests, in relevant part, the following:

> 25. The parent sent the picture because the parent wanted to know why the elementary students did not perform for their concert in-person, but instead performed virtually. A response was communicated to the parent by the administration explaining that the FDA had approved emergency use for COVID vaccine for ages 12-15, but not for children ages 5-11.
>
> 26. The ... District maintains the picture in the School District email accounts....

Because the RTKL is remedial legislation, the definition of "record" must be liberally construed. *See A Second Chance*, 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. Jan. 12, 2012) ("[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]"). For a record to be a public record, it must reflect some transaction or activity of the agency. *Pa. Office of Attorney General v. Bumsted*, 134 A.3d 1204 (Pa. Commw. Ct. 2016). In *Bumsted*, for example, the Court found that pornographic emails sent and received by employees of the Attorney General were not records of the agency. *Id*. Here, the email that had the picture attached was sent by a parent to District School Board members and consisted of an inquiry regarding why a decision was made to hold one District chorus concert in-person and another concert virtually. A reasonable inference is that the inquiry relates to the District's policy and decisions regarding COVID-19 precautions at the time, which is clearly an activity of the District. Further, Ms. Frisbie's attestation supports the conclusion that the email is maintained on District servers and that the District administration responded by providing the reasoning behind the decision or policy regarding whether to hold chorus concerts in person or virtually. In addition, the District's music program is clearly an activity of the District. Therefore, the withheld photograph attachment constitutes a record of the District.

b. FERPA

The District argues that the withheld photograph is protected by FERPA because it constitutes an education record, as it is an image of students "engaged in an activity that

demonstrates the students' educational experience at the School District." The District further argues that because the image shows students in masks, a contentious topic among parents, although the picture is "only stored on the District server ... [it] could later merit official scrutiny by the school [D]istrict." Finally, the District asserts that a photograph may possibly fall within the definition of directory information under FERPA, 34 C.F.R. § 99.3, and it is not permitted to release directory information without parental consent. *See* 34 C.F.R. § 99.37. However, its primary position is that the image is a protected education record.

The Requester argues that FERPA does not apply to the image of the chorus concert because the District has repeatedly disclosed on the District's Twitter feed the images of choral students performing in public. The Requester further argues that even if FERPA does apply, the image would only have to be redacted in accordance with the holding in *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716 (Pa. 2020). Finally, the Requester argues that "to the extent that the District argues the image from the concert constitutes directory information ... by posting images on of its chorus group on its Twitter feed, implicitly concedes that permission has been granted to release such directory information ...."

In its supplemental position statement, the District argues that the disclosure of images on Twitter does not vitiate its FERPA argument, because the District has the discretion to release education records within the restrictions of FERPA. The District further asserts that the photograph of the Springhouse Middle School concert was not made public by the District on social media; rather, it was attached to an email sent to Mr. Hein. Finally, the District argues that redaction pursuant to Section 706 of the RTKL, 65 P.S. § 67.706, is not necessary because a determination has been made that the entire record is protected by FERPA.

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). FERPA defines "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." 20 U.S.C. § 1323g(a)(4)(A); *see also* 34 C.F.R. § 99.3. Furthermore, the Commonwealth Court has stated that education records are not restricted to academic records; rather, "the appropriate inquiry is whether the record—regardless of its subject matter—directly relates to a student…." *West Chester Univ. of Pa. v. Rodriguez*, 216 A.3d 503, 509-10 (Pa. Commw. Ct. 2019). Regarding the maintenance of education records, the Pennsylvania Supreme Court has concluded that a record being "generated and possessed" by the educational agency or institution is sufficient to establish that the record was "maintained" by the agency or institution. *Miller*, 232 A.3d at 730. Regulations implementing FERPA define "personally identifiable information" as:

> a) The student's name;
>
> b) The name of the student's parent or other family members;
>
> c) The address of the student or student's family;
>
> d) A personal identifier, such as the student's social security number, student number, or biometric record;
>
> e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
>
> f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

> g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3.

As set forth the above, the image at issue is of students performing at a District Middle School chorus concert. Ms. Frisbie attests:

> [b]ased on information and belief the picture of students performing in the chorus concert are able to be identified by members of the District staff who may not have an educational interest with respect to the students and other members of the community if the picture is made available to the general public in response [to the Request]. If it is decided that the picture must be disclosed in response to [the Request], the School District will need to consider whether it must notify all parents of the students that the picture will be disclosed and thereby become public.

In *Easton Area School District v. Miller*, the Pennsylvania Supreme Court examined FERPA's relationship to the RTKL. 232 A.3d 716 (Pa. 2020). In *Miller*, the Court found that an "education record" under FERPA cannot be provided in an unredacted form and explained that a video qualifies as an "education record" if it relates directly to a student, including by capturing a student's image at any event which would later become part of an inquiry by the school. *Id.* at 37. *Miller* relied on guidance promulgated by the United States Department of Education ("USDOE") to find that the meaning of "education record" under FERPA is broader than lower courts previously held, explaining that even students who are innocently or incidentally involved in incidents which merit later official scrutiny are directly related. *Id.* at 31; *but see Cent. Dauphin Sch. Dist. v. Hawkins*, 199 A.3d 1005, 1013-14 (Pa. Commw. Ct. 2018) (holding that a school bus video did not 'directly relate' to a student caught on film because it existed for the purpose of staff discipline). The Court explained that the USDOE's guidance lists various factors to consider. *See* USDOE FAQs on Photos and Videos under FERPA, https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa. Furthermore, the Court ultimately found that the images of the

students should be redacted from the responsive video recording(s), either under FERPA or under the constitutional right to privacy.

In reviewing the USDOE guidance, in conjunction with the District's evidence, the photograph of students participating in a District sanctioned chorus concert directly relates to the educational activities of those individuals. The email that contained the attached image is maintained by the District and clearly the faces of the students are personal identification information that may be "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty...." In addition, as explained in the USDOE FAQs, the image can also be viewed as "[t]he audio or visual content of the photo or video [that] otherwise contains personally identifiable information contained in a student's education record." Accordingly, we determine that the chorus concert photograph is protected under FERPA. However, FERPA regulations do allow schools to release education records or information without consent when the records have been "de-identified," that is, when all personally identifiable information has been removed. 34 C.F.R. §99.31(b)(1) ("An educational agency . . . may release the records or information without the consent required by §99.30 ... after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable . . . ."). Therefore, the photograph must be disclosed with the faces of the students redacted. *See Miller*, 232 A.3d at 730.

6. The District has proven that parent identifying information may be redacted from certain emails

The District has redacted parent identifying information from certain parent emails that contained information, arguing that, if disclosed, "student information protected under FERPA",

would also be disclosed. In the alternative, the District argues that parent names are protected by the constitutional right to privacy.[6]

a. FERPA

As set forth above, 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). In support of the District's argument, Ms. Frisbie attests that "[i]f a parent email related to their child which included the parent name were to be disclosed, the result would be to disclose student personally identifiable information, which is protected ... under FERPA. Ms. Frisbie further attests that a "parent concern was expressed in an email dated December 11, 2021, sent to a District administrator, John Pfeifer, who replied that he would pass along the parent email to the technology personnel. In the reply to the parent a copy was sent to [Board] President David Hein and [Board] Vice President Carol Facchiano. Mr. Hein sent a copy of the email to the District Superintendent. The email related to a specific concern that [the] parent had about the use of technology by the parent's student. This email communication identifies the parent and student and constitutes an education record of the identified student." With respect to the December 11, 2021 email, Ms. Frisbie's attestation establishes that the email is an education record that directly relates to a student, in that the subject matter involves concerns related to the student's use of District technology for his or her educational purposes. Further, the presence of the parent's name and the student's name fall squarely into the personal identification categories defined by FERPA that are statutorily protected from disclosure. *See* 34 C.F.R. §

[6] The District also asserts that parent home addresses are protected by the right to privacy; however, the Requester stated in his supplemental submission that he does not contest the redaction of home addresses.

99.3(a)-(b). Accordingly, the December 11, 2021 email described in Ms. Frisbie's attestation is protected from disclosure under FERPA.

b. Right to Privacy

The District's exemption log shows that the District also redacted names of "residents" and "private citizen" based on the constitutional right to privacy. The District argues that, "[b that parent names are protected by the right to privacy "when communicating with the School District on a matter that is personal to them and does not relate in any manner that would create a public interest that outweighs the individual right to privacy" and "[i]n the case of emails sent by the parents to the Board members, all email communications were personal to the parent."

The Requester argues that the emails were voluntarily submitted to the District without any representation of confidentiality. The Requester also argues that, even if the right to privacy applies, "a substantial *public* interest in scrutinizing the actions of public officials with respect to the COVID-19 pandemic[]" at a time when the District was making decisions on masking and other issues. (Emphasis in original). The Requester further argues that any privacy interest has been waived by virtue of the emails being sent to a quorum of the School Board and "looking for the public officials to take[] action with regard to their concerns." Based on a review of the District's argument and exemption log, it appears that there are emails in which a citizen's name is redacted, but the subject matter of the email is not necessarily related to student-related concern that would make the content an education record falling within the FERPA analysis set forth above. Regarding such private citizen names, we will examine whether they have been properly redacted pursuant to the right to privacy.

The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*,

148 A.3d 142, 158-59 (Pa. 2016) ("PSEA"). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

In support of the District's argument, Ms. Frisbie attests, in relevant part, the following:

> 15. The names and addresses of private citizens who sent emails or received emails were redacted based on those persons[']right to privacy under the PA Constitution. The Requester has provided no legal basis for disclosure of names and addresses of private citizens that persuades the Open Records Officer that the public interest in the names and addresses of private citizens outweighs the citizens' right to privacy. Absent a compelling interest in the public for disclosure there is no[] duty to disclose.
>
> 16. A private citizen who is sending an email to a school board member(s) related to a personal concern would have no reason to believe that their personal concern would be disclosed to the public in response to a RTK[L] request.
>
> 17. Nonetheless, the content of all emails received from or sent to private citizens were disclosed except that the personal identifying information related to their name, address, telephone number, and email address were redacted....

The Supreme Court has not expressly defined the types of "personal information" subject to the balancing test; however, it has described the "right to informational privacy" as "namely the right of an individual to control access to, and dissemination of, personal information about himself or herself." *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017). To date, courts have found certain identifiers and contact information to be among the types of personal information subject to the balancing test. *See West Chester Univ. of Pa. v. Rodriguez*, 216 A.3d 503, 510 (Pa. Commw. Ct. 2019) (noting that PSEA "reaffirmed prior cases that 'recognized a

right to privacy inuring in three types of identifiers: Social Security numbers, telephone numbers and home addresses'") (*quoting Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173, 1181 (Pa. Commw. Ct. 2017)).

In *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, the Court applied the analysis set forth in *Pennsylvania State Education Association v. Commonwealth of Pennsylvania, Department of Community and Economic Development,* 637 Pa. 337, 148 A.3d 142 (Pa. 2016) (PSEA III), to determine that a tax assessment list was not sufficiently "personal" to trigger the balancing test. 172 A.3d 1173 (Pa. Commw. Ct. 2014). Specifically, the Court stated:

> When the type of information is not categorically protected, privacy analysis consists of two steps. The first step is assessing whether the information at issue is sufficiently personal in nature to trigger protection as a privacy interest. The second step is weighing an individual's privacy interest in nondisclosure against an interest in disclosing the personal information.... [B]efore reaching the balancing test, we must first discern a cognizable privacy interest in the information at issue....
>
> ... [A]ppellate decisions teach us that certain factors are constant when evaluating a privacy interest in information. One is an individual's reasonable expectation that the information is of a personal nature.... When information is public as a matter of statute, it is unreasonable for a person to expect that it is of a personal nature.... Another factor is how the agency obtained the information; when an individual voluntarily submits information, it may be disclosed...; whereas, information obtained by an agency premised on statutory confidentiality is protected.... Also, the context holds additional significance, as does whether the information is an essential component of a public record....

172 A.3d at 1182-84 (citations omitted).

Courts have recognized a limited personal interest in connection with a person's name alone, and names may be provided in cases where there is a more significant public interest, or where the name will not give rise to some other injury to security or reputation. *See Sapp Roofing Co. v. Sheet Metal Workers' International Assoc*., 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test); *Times Publishing Co. v. Michel*, 633 A.2d

1233, 1240 (Pa. Commw. Ct. 1993); *see also Hartman v. Pa. Dep't of Conserv. & Nat. Res*., 892 A.2d 897, 906-07 (Pa. Commw. Ct. 2016) (finding the names and home addresses of snowmobile registrants to be protected by the constitutional right to privacy).

The OOR has previously performed the balancing test when the redaction of names based on the right to privacy has been challenged on appeal. *See Stewart v. Kingston Borough*, OOR Dkt. AP 2020-2022, 2020 PA O.O.R.D. LEXIS 3081 (finding that members of a borough pool had an expectation of privacy in their names, and the public interest in disclosure did not outweigh the right to privacy); *Willshier v. Northumberland Cnty*., OOR Dkt. AP 2021-1153, 2021 PA O.O.R.D. LEXIS 1457 (finding that the names of licensed dog owners was protected by the right to privacy); *Lehman v. Northampton Cnty*., OOR Dkt. AP 2017-0098, 2017 PA O.O.R.D. LEXIS 421 (concluding that the names of employment references are protected by the constitutional right to privacy).

In *Chirico v. Cheltenham Twp. Sch. Dist.*, OOR Dkt. AP 2018-0484, 2018 PA O.O.R.D LEXIS 697, a request was made for all records related to school board members' action on a piece of state legislation, Senate Bill 2. The records included emails sent to and received from school board members regarding the board's action in response to the legislation that contained private individuals' names. The OOR conducted the privacy balancing test enunciated in *PSEA*, and determined that the Requester had not articulated any public interest in the disclosure of individual residents' names contained in the emails and, therefore, the names were properly redacted. The OOR noted that, "[a]s stated by the Supreme Court, 'the constitutional right of the citizens of this Commonwealth to be left alone remains a significant countervailing force' to disclosure." *See Pa. State Educ. Ass'n*, 148 A.3d at 158.

Here, the Requester asserts that the responsive emails "concern District business" and "[b]y voluntarily submitting information to a government agency (here, the District) that is subject to the public access requirements of the RTKL and without any representation of confidentiality, the public waives any right to privacy that it may have in such communications." The Requester also argues that there is a substantial public interest "in scrutinizing the actions of public officials with respect to responses to the COVID-19 pandemic[,]" and that "the strong public interest in obtaining information concerning the District's reaction to COVIC-19 (including with regard to comments from the public), the public interest overcomes any alleged constitutional right to privacy...." In support, the Requester cites *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 902--03 (Pa. 2020), *cert. denied*, 141 S. Ct. 239 (U.S. 2020).

While the Requester's argument may be compelling regarding why the contents of responsive emails to the District from private citizens should be disclosed, because the content of the emails, which represents the named Board member's responses to the concerns raised by the Requester was released, on balance, the interest in disclosure of the private citizens' names does not outweigh their privacy rights. *See Kathleen Gentner v. Palisades Sch. Dist.*, OOR Dkt. AP 2022-0519, 2022 PA O.O.R.D. LEXIS 996, *14-15. In addition, we note that not all of the responsive emails related to COVID-19 issues such as masking. We conclude that the private citizen names were properly redacted from the emails provided to the Requester.

7. The District prove that certain records are privileged

The District asserts that email communications between Attorney Miller and District officials were properly withheld, as they are protected by the attorney-client privilege and attorney work product doctrines. More specifically, the District asserts that communications from the District's Solicitor, Attorney Miller, and the District's labor attorney, Jeffrey Sultanik, Esq., in the

form of emails and attachments contain "an analysis on how the Pennsbury School District case relating to 1st Amendment right to freedom of speech affects District policy and public comment at School Board meetings," are privileged communications. The District further argues that, despite there being a unrelated delay in the election certification, Mr. Cohen and Mr. Hein were unopposed and duly re-elected to the Board, resulting in a status of "Board Member-elect."

The Requester argues that any privilege was waived because Mr. Hein and Mr. Cohen were not "legally" Board members during a portion of the time period identified in the Request and, therefore, they would not have been a client of the District's solicitor. The Requester argues that the communications with Mr. Cohen and Mr. Hein, as private citizens, constitutes a waiver of the attorney-client privilege. In addition, the Requester asserts that the quotation of portions of the withheld emails at issue constitutes a subject matter waiver. Finally, the Requester asserts that because he is currently engaged in litigation involving the District, the disclosure has resulted in a waiver of the attorney work-product doctrine.

In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *Bousamra v. Excela Health,* 210 A.3d 967, 982-83 (Pa. 2019) (citing *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007), *aff'd* 992 A.2d 65 (2010)). "[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege

must prove waiver under the fourth prong." *Office of the Governor v. Davis,* 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014). An agency may not, however, rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County,* OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 ("Simply invoking the phrase 'attorney-client privilege' or 'legal advice' does not excuse the agency from the burden it must meet to withhold records").

The attorney work-product doctrine, on the other hand, prohibits disclosure "of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa.R.C.P. 4003.3. "The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *Bousamra v. Excela Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep't of Env't Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) ("[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked"). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id*. at 979 (internal citations and quotation omitted).

Attorney Miller attests that the content of two emails, one dated December 7, 2021, sent at 1:04:30 PM by Rod Troutman, Assistant Superintendent of Schools, to David Hein's District issued email account, with the subject listed as 'Subject FW: First Amendment Case Alert, attached a legal opinion rendered by the ... District solicitor, C. Steven Miller, and one sent on the same date, at 1:15 PM, by Mr. Hein using his District email account, bearing the same subject line,

acknowledged receipt of the legal opinion and included Mr. Hein's comments, but the content of this email was not disclosed when the District's Final Response Letter dated March 7, 2022. However, upon further review the District determined that the content was not protected by the attorney-client privilege or attorney work-product doctrine, so they were disclosed with the District's appeal submission. However, Attorney Miller attest that "[o]ther emails between the ... District solicitor and the assistant superintendent were not disclosed because the content of those documents are protected from disclosure under the attorney[-]client privilege or attorney work-product doctrine." Attorney Miller attests, regarding the elements of the attorney-client privilege, that: he is the duly appointed solicitor for the District; he is a member of the Pennsylvania bar, licensed to practice law by the Supreme Court of Pennsylvania, who is currently in good standing; the District, its authorized representatives, officers and Board members are his client; and, the District has not waived its attorney-client privilege and asserts that privilege as a basis for denying access to certain documents responsive to the Request. Miller attestation, ¶¶ 1-2, 10a-10b, 10f. Regarding the attorney work-product doctrine, Attorney Miller attests that, "in his emails and memo referenced [in his attestation] set[] forth relevant facts and his opinions, mental impressions, legal advice and legal theories based on those facts all of which addressed the issues discussed in the First Amendment Alert case that was the subject matter of the emails and memos." Attorney Miller also attests that, because the District School Board meetings had become increasingly contentious and, at times, unruly, his "legal opinion ... was important for the Board members to know so that each Board Member was aware of the limitations that could be placed on public comment based on the court case that was discussed by [him] in his legal opinion ...." Miller attestation, ¶¶ 12-13.

Attorney Miller further attests, regarding the description of the allegedly privileged records, the following:

> 6. ... emails between the ... District solicitor and the [A]ssistant [S]uperintendent were not disclosed because the content of those documents are protected from disclosure under the attorney-client privilege or the attorney work-product doctrine. The documents are described in the following paragraphs.
>
> 7. Email dated December 7, 2021, at 1:20:51 PM sent from Rod Troutman to David Hein, 'Subject RE: FW: First Amendment Case Alert.' This email is excluded because it includes in part what the Solicitor stated in the Solicitor's opinion about the First Amendment Case Alert. The one line in the email that does not discuss the Solicitor's opinion states as follows, "I will wait to see what PSBA drafts before I make any changes." To put this in context the Assistant Superintendent was talking about making changes in Board Policy based on the First Amendment Alert.
>
> 8. Email dated December 7, 2021, at 1:22:18 PM sent by David Hein to Rod Troutman, Subject: FW: First Amendment Case Alert. The full content of this email states 'Completely agree.' Although the content standing alone is not protected, it responds to the email of December 7, 2021, at t1:20:51 PM and is being treated as part of the same email trail entitled to protection under the Attorney - Client privilege.
>
> 9. The emails of December 7, 2021..., served to forward other emails sent prior to December 1, 2021, beginning with an email sent by Rod Troutman, Assistant Superintendent ..., seeking legal advice about a first amendment court case that was the subject of a memo that had just been sent to the ... District, but not to the School Board, by the District's special counsel, Jeffrey Sultanik. These emails are set forth in chronological order starting with the earliest to the latest as follows:
>
> > 9a. Email dated November 22, 2021, at 8:18 AM sent from Rod Troutman to Steve Miller which states in relevant part as follows: Please let me know your thoughts as we will need to prepare the Board for such change in procedure. To place this in context, a first amendment case had been decided in relation to public comment at Board meeting that was thought to have relevancy about whether the ... District Board Policy needed changes in light of the holding and analysis set forth in the case.
> >
> > 9b. Email dated November 22, 2021, at 4:47 PM from Steve Miller to Rod Troutman with a copy to Mark J. Madson [,] Superintendent of Schools and Michelle Minotti – also an Assistant Superintendent of Schools[,] Subject Re: FW: First Amendment Case Alert". The content of this email is a legal opinion prepared by the Solicitor ...

that responds to the request from Rod Troutman for a legal opinion about whether Board policy needed to be changed.

9c. Email dated November 22, 2021, at 7:14 PM from Rod Troutman to Steve Miller which states in relevant part as follows: '...[i]s there a reason to require individuals to verbally announce their name and address?' To place this in context, the ... Board has a practice of having members of the public complete a sign-in sheet listing their name and address before making their public comment to the Board. Some residents were reluctant to verbally state their address .... The solicitor responded to this [r]equest in the email dated November 26, 2021, at 6:10 PM, which is described below.

9d. Email dated November 26, 2021, at 6:10 PM from Steve Miller to Rod Troutman with a copy to Mark J. Madson ..., Michelle Minotti ..., and Leslie Frisbie ..., 'Subject Re: FW First Amendment Case Alert'. The content of this email is a legal opinion that responds to the request from Rod Troutman for legal advice about whether the public must verbally provide their name and address before they make their comments to the Board.... The email also makes reference to an attached Memo. The email also addresses another matter that was requested by Mr. Troutman related to the reading of a statement by the Board President prior to public comment in order for the public to know the rules for public comment....

10e. Dr. Rodney Troutman presented facts to the ... District solicitor as herein above stated, which were communicated to the [s]olicitor through an email without a copy of the email being sent to a stranger, i.e. a non-client.

10f. The ... District has not waived its attorney[-]client privilege ....

In a supplemental attestation, Attorney Miller attests, the following:

4. When I sent my legal opinions to Dr. Rodney Troutman on November 22, 2021, and November 26, 2021, ... I intended that my legal opinion would be confidential and protected from disclosure to others who were not considered a client of the Solicitor. To the extent that Dr. Troutman believed that my legal opinions should be shared with the ... Board including those persons who were newly elected or re-elected Board members, Dr. Troutman had the authority to share the legal opinions in his capacity as an assistant superintendent of schools. Furthermore, sharing my legal opinions with any person who was newly elected or re-elected would be viewed by me as providing my legal opinions to individuals who Dr. Troutman could reasonably believe would keep the legal opinions confidential and who have

> common interests with the ... District as they relate to the content of the legal opinions. Such persons would not be reasonably viewed as adversaries.

In further support of the District's argument that certain emails are privileged, Dr. Troutman attests that he is authorized to act for the School Board for the purpose of communicating with the District solicitor to obtain legal opinions and to share such opinions with the District's administration and School Board, as necessary. Dr. Troutman further attests, the following:

> 4. On December 6, 2021, I received an email from Board member David Hein about an article about the Pennsbury School District federal district court case related to public comment at board meetings.
>
> 5. On December 7, 2021, I sent an email ... [Mr.] Hein containing legal opinions prepared by the District Solicitor, [Attorney Miller] on November 22, 2021 and November 26, 2021. The legal opinions had been previously requested by me ... and provided to me by the Solicitor....
>
> 6. I believe that it was important for Mr. Hein to be aware of the Solicitor's legal opinions as they related to public comment at Board meetings since Mr. Hein in his capacity as the next President of the School Board for the next year is responsible for maintaining order at Board meetings ....
>
> 7. When I sent the Solicitor's legal opinions to Mr. Hein, I believed that I was sending them to him in his capacity of District Board member and as the incoming Board President for the forthcoming year. Furthermore, regardless of what status Mr. Hein may have had as a school board member on December 7, 202, I had every reason to believe that Mr. Hein would not disclose the Solicitor's legal opinions to any adversary of the District and that Mr. Hein's interest[s] were fully aligned with that of the District.

Finally, Mr. Hein attests that he considers himself to be a Board member of the District between December 6, 2021, and December 21, 2021, because he was elected to the position on November 2, 2021. Mr. Hein also attests that, "[a]lthough [his] term of office expired prior to the Lehigh County Election Board issuing [his] Certificate of Election on December 13, 2021, [his] election was not challenged and [he] had received more votes than any other candidate for the District Board." Mr. Hein also attests that "as a precautionary measure," the District blocked access to his District issued email account as of December 13, 2021, because his term had expired

on December 6, 2021, and the election results had been challenged for reasons unrelated to Mr. Hein's election. Hein supplemental attestation, ¶¶ 7-8. Regarding the emails the District claims are privileged, Mr. Hein further attests, the following:

> 10. I did not receive any legal opinion or memo prepared by the law office of Jeff Sultanik from Rod Troutman ... or from Jeff Sultanik directly[,] related to the subject of "First Amendment Alert". I did receive the [District'] Solicitor's opinion related to the subject of "First Amendment Alert". The Solicitor's legal opinion was sent to Mr. Hein by Rod Troutman on December 7, 2021, in response to an email sent by Mr. Hein on December 6, 2021, which spoke about a newspaper article related to a court decision involving the Pennsbury School District and the Board cutting off public comment at an open Board meeting. As President of the School Board it was important for me to be prepared to properly supervise public comment at Board meetings. I was sworn-in as [S]chool [B]oard director at the ... Board open meeting on December 21, 2021, and was also elected at the same meeting as [Board President] for the next year, and thereafter presided over public comment. The ... District's legal opinion which was provided to me by Rod Troutman ... on December 7, 2021, was critical for me to know how to supervise the public comment at the ... Board meeting on December 21, 2021....
>
> 12. It is customary and routine practice for school districts ... to provide elected Board members with information about ... Board matters that is not shared with the public in order to prepare the ... Board member for taking the oath of office and immediately assuming his duties as ... [B]oard [D]irector. In this regard an orientation is conducted with all elected ... members at times between the date of the elections and the date of taking the oath of office to disseminate official school district information that may include a variety of issues including how the organization meeting is conducted, school district budget mater, and issues of concern to the District, of which there were many including how to address public comment at School Board meetings.

In a supplemental attestation, Mr. Hein further attests that, when he received the December 7, 2021 email containing the legal opinion from Dr. Troutman, he was interested in the legal opinions to facilitate his duties as Board President and that "[his] interest in the Solicitor's emails were identical to the interests of the ... District, the District's administration and all School Board members." He attests that he "would not breach [his] duty as a School Board member and disclose the Solicitor's opinion to anyone without express permission of the School Board and only after

consultation with the District's solicitor" and "[he] would not disclose the Solicitor's legal opinions to any adversary of the District." Hein supplemental attestation, ¶19.

The District attached to its submission the certified meeting minutes from May 18, 2021, which memorialized the vote appointing Attorney Miller as solicitor for the timeframe relevant to the Request. *See* 24 P.S. § 4-406 "Solicitor and other appointees." Such representation necessarily includes representation of the District Board, the District administration, and District officials. The evidence has established that the withheld emails in question are comprised of Attorney Miller's opinion respecting the impact of the federal court decision issued in *Marshall v. Amuso*, No. 21-4336, 2022 U.S. Dist. LEXIS 62498 (E.D. Pa. Apr. 4, 2022) on District and School Board policies related to public comment at public meetings and the identification requirements to participate as a commenter. The work-product rule includes the protection of "the mental impressions of a party's attorney or his or her conclusions, *opinions*, memoranda, notes or summaries, legal research or legal theories." Pa.R.C.P. 4003.3; *see also Snead and Honest Elections Project v. Northampton Cnty*. OOR Dkt. AP 2021-0189, 2021 PA O.O.R.D. LEXIS 635 (finding that the county solicitor's summary and mental impressions of a court opinion and discussions between non-adversarial parties was protected as attorney work-product). Based on a review of the District's evidence as a whole, the District has demonstrated that the withheld emails are protected as attorney work-product. The opinion was requested by Dr. Troutman, an Assistant Superintendent and a client of the Solicitor. Attorney Miller's attestation confirms his view that his opinions were being shared with a client and that the client, Dr. Troutman, had the authority to further share it with individuals falling within the District's authority and the parameters of the privilege.

The Requester argues that the work-product doctrine has been waived because Mr. Hein was a "private citizen" during a portion of the timeframe identified in the Request. The basis of Requester's argument is the undisputed fact that the certification of the Lehigh County election had been delayed, due to a challenge of the results, and that Mr. Hein's term of service had expired on December 6, 2021. The evidence presented by the District shows that the election was certified on December 13, 2021, and that Mr. Hein took the oath of office at the official public School Board meeting on December 21, 2021. In his attestation, Mr. Heim establishes that his 2020 term as School Board member and President expired on December 6, 2021; however, it also establishes that his election was not challenged and that he received the highest amount of votes of the candidates. Dr. Troutman's attestation confirms that, in his view, he shared Attorney Miller's opinion with a Board Member "elect" and an individual who would likely be chosen as the Board President again. Both Dr. Troutman and Mr. Hein attest that their positions are fully in line with the District's best interests and that they are in no way adversaries with respect to the implementation of the holding in *Amuso* and the attendant discussions. Dr. Troutman further establishes that it is customary for the District Administration to share necessary information with newly elected and re-elected Board members, in order for them to be prepared for the statutorily mandated organizational meeting pursuant to Section 4-404 of the Public School Code, which provides, "[i]n each school district of the second, third and fourth class, the school directors shall effect a permanent organization by electing, during the first week of December, from their members, a president and vice-president, each to serve for one year...." *See* 24 P.S. § 4-404. The court in *Bousamra*, stated, "[i]n evaluating the maintenance of secrecy standard, a lower court should consider whether a reasonable basis exists for the disclosing party to believe 'that the recipient would keep the disclosed material confidential'." 201 A.3d at 978 citing *U.S. v. Deloitte*,

610 F.3d 129, 140 (D.C. Cir. 2010). With respect to waiver, the *Bousamra* court held, "that the work product doctrine is waived when the work product is shared with an adversary, or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it. This waiver rule comports with the prevailing view in state and federal courts across the country, and the rule's fact intensive structure requires evaluation on a case-by-case basis." *Bousamra*, 210 A.3d at 977-78. The court also explained what factors should be considered to determine waiver with respect to the work-product doctrine:

> We recognize that a fact intensive analysis is required to determine whether Fedele sending outside counsel's email to Cate 'significantly increased the likelihood that an adversary or potential adversary would obtain it.' Restatement (Third) of the Law Governing Lawyers § 91(4) (2000). Courts tasked with analyzing similar factual situations generally consider whether the disclosure was 'inconsistent with the maintenance of secrecy from the disclosing party's adversary.' *Deloitte*, 610 F.3d at 140. In evaluating the maintenance of secrecy standard, a lower court should consider whether a reasonable basis exists for the disclosing party to believe 'that the recipient would keep the disclosed material confidential.' *Id*.

Here, the evidence demonstrates that the content of the email was Attorney Miller's work product and that Dr. Troutman forwarded it to Mr. Hein, as a fellow client, with the view that it would be kept confidential and not shared with an adversary.[7,8]

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot**, 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

[7] The Requester argues that, because the District included some quoted language from the withheld emails, that the work-product privilege has been waived under the concept of "subject matter waiver." While we have determined that the emails at issue are protected by the attorney work-product doctrine, we note that as pointed out by the District, the broad subject matter waiver doctrine used in federal court relative to the attorney-client privilege has not been adopted in Pennsylvania . *See Bagwell v. Pa. Dep't of Educ*., 103 A.3d 409, 419 (Pa. Commw. Ct. 2014); *Commw. v. Spanier*, 132 A.3d 481, 497; *Perelman v. Perelman*, 259 A.3d 1000, 1011.

[8] Because we have determined that the emails are protected by the attorney work-product doctrine, we do not need to address the District's alternative claim that the emails are confidential under the attorney-client privilege.

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: June 13, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: J. Chadwick Schnee, Esq. (via email only);
C. Steven Miller, Esq. (via email only);
Leslie Frisbie (via email only)

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