



**FINAL DETERMINATION**

**IN THE MATTER OF**

**JOHN DEBARTOLA,  
Requester**

**v.**

**CAMBRIA COUNTY,  
Respondent**

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**Docket No: AP 2022-0944**

On March 14, 2022, John DeBartola ("Requester") submitted a request ("Request") to Cambria County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking:

[A]ny and all records and correspondence - including emails - involving Katie Kinka Cambria County Planning Commission, Ethan Imhoff (former) Director of the Cambria County Planning Commission, Renee Daly executive director of the Cambria County Redevelopment Authority, Thomas Chernisky [C]ounty commissioner, John Dubnansky city of Johnstown community and economic development director, Bob Ritter finance director, Ethan Imhoff [sic] city manager, Dan Penatzer Interim City Manager, Mayor Frank Janakovic, and Amy Arcurio Superintendent GJSD to or from Mark Pasquerilla, Bill Polecek, Ethan Imhoff, Robert Eyer, Linda Thompson, Sue Mann, Mike Kane, Amy Arcurio, Amy Bradley, Thomas Chernisky, Robert Forcey, Frank Jankovic, Sylvia King, Elmer Laslo, Melissa Komar, Edward Sheehan, Jeff Stopko and Michael Kerr that discloses a non-disclosure agreement and any mention of any meetings between the above mentioned government employees/elected officials with Vision Together 2025 or staff including but not limited to dates, times, locations, meeting[] agendas, meeting minutes, including but not limited to "Johnstown's Future", "Strategic Plan", "Vision Together 2025 Priorities", "Confidentiality Agreement" some version of confidentiality agreement that would prohibit Vision Together 2025 board members and guests including the names above from talking about what was discussed at the meetings from January 1, 2021 to present.

On March 21, 2022, the County invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902. On April 19, 2022, the County provided two responsive emails, noting that other emails were returned by the search for responsive records, but, upon review, the County’s Solicitor, William Gleason Barbin, Esq., determined that only the two provided emails relate to County business.

On the same day, the Requester appealed to the Office of Open Records (“OOR”), challenging the partial denial and stating grounds for disclosure.<sup>1</sup> The Requester argues that he should be able to access all emails sent by government employees. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On April 29, 2022, the County submitted a position statement, and a statement made under the penalty of perjury by its Open Records Officer, Melissa Kestermont. On May 2, 2022, in response to the OOR’s request for additional evidence, the County submitted an unsworn position statement. On May 3, 2022, the County’s Solicitor, Attorney Barbin, who also represents the Greater Johnstown Water Authority, submitted supplemental evidence addressing a nearly identical request the Requester filed with the Greater Johnstown Water Authority.<sup>2</sup> On June 8, 2022, upon notification of the error, Attorney Barbin submitted a supplemental statement made under the penalty of perjury.

The County argues that the emails that were not provided do not document an activity or transaction of the County. The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created,

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<sup>1</sup> The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

<sup>2</sup> The appeal of the Authority’s response to this request was denied by the OOR on June 17, 2022. *See Debartola v. Johnstown Area Water Auth.*, OOR Dkt. AP 2022-0945, 2022 PA O.O.R.D. LEXIS 1476.

received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency?” and 2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency?” See 65 P.S. § 67.102; *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. See *A Second Chance*, 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[?]”). In *A Second Chance*, the Commonwealth Court interpreted the word “documents” as meaning “proves, supports [or] evidences.” 13 A.3d at 1034.

Here, the County explains that the subjects identified in the Request, *i.e.* Vision Together 2025 meetings, do not relate to an activity or transaction of the County. In support, Ms. Kestermont attests:

3. I ran a computer search of all documents containing any one of the terms or names referenced in [the] Request quoted above.
4. Of the records returned which identified said names and/or terms, only two (2) emails from Mike Tedesco, President/CEO of Vision Together 2025, to Thomas C. Chernisky, President Commissioner, represented documents which involved matters within [the] County’s scope of activity or business.

Attorney Gleason attests:

1. Thomas Chernisky, named in the [R]equest is an elected Commissioner of [the] County and one of three elected Commissioners who act as the governing body of [the] County.
- ...
4. I requested [that Ms.] Kestermont [] run a computer search of all documents containing any one of the terms referenced in [the R]equest quoted above.

5. I examined all 66 emails generated from the search. Of the records returned which met the [R]equester's terms, only 2 pages represented documents which involved matters within the [ ] scope of [the County's] activity or business. The two records mentioned 1) [ ] stimulus spending, which can be a County function and 2) an email asking for responses on a survey from Lisa Rager of the Johnstown Convention and Visitors Bureau (JCVB). The JCVB is annually funded by a County tax on hotel rooms.
6. The [County] is a Pennsylvania Municipality engaged in providing governmental services to the public pursuant to the Pennsylvania County Code.
7. Thomas Chernisky, as a private individual, has engaged in activities as a member of Vision Together 2025 board, on his own time, without permission or direction from the [County] Board of Commissioners.
8. Except for the mentioned documents, the search demonstrated that Thomas Chernisky had not created or received documents with any of the above-named entities related in any way to the official activities of [the] County.

While records in an agency's possession are presumed to be records of that agency, *see* 65 P.S. §67.305, emails are not automatically records of an agency simply because they are sent or received using an agency email address or by virtue of their location on an agency computer. *Meguerian v. Off. of the Att'y Gen.*, 86 A.3d 924, 930 (Pa. Commw. Ct. 2013) (citing *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012)). Instead, for emails to qualify as records of an agency, the OOR must look to the subject matter of the records.

The OOR notes that a number of individuals listed in the Request are specifically identified as employees of other agencies, and the key words identified in the Request specifically relate to meetings of Vision Together 2025 and the City of Johnstown, not the Authority. The organization's website reflects that it has "created a vision around bettering the Johnstown region." *See* <https://www.johnstownvision.com/>. The OOR has found that Vision Together 2025 is not a local agency subject to the RTKL. *See DeBartola v. Vision Together 2025*, OOR Dkt. AP 0311, 2022 PA O.O.R.D. LEXIS 992.

In certain cases, the records of private entities are accessible under the RTKL. In *W. Chester University v. Schackner, et al.*, the Commonwealth Court analyzed whether records of lobbying activities in the possession of a private, nonprofit foundation could be accessible under the RTKL. 124 A.3d 382 (Pa. Commw. Ct. 2015). Because the foundation was an *alter ego* of the University and existed to promote the University's interest in the passage of certain legislation, records related to the firm's lobbying activities were accessible. *See also Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 91 (Pa. Commw. Ct. 2013) (holding that correspondence between university board members and the Secretary of Education, who was acting on behalf of the Department of Education while statutorily serving as an *ex officio* member of the university's board of trustees, constituted records "of" the Department).

However, in *Off. of the Governor v. Bari*, the Commonwealth Court found that meeting minutes and other records received by the Governor's representative on a non-profit corporation's board did not constitute records "of" the Office under the RTKL because they were not "created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." 20 A.3d 634, 641 (Pa. Commw. Ct. 2010).

The situation here is similar to *Bari*. Attorney Barbin acknowledges that Mr. Chernisky is a member of Vision Together 2025, but that he participates in the organization on his own time and without the County's permission or direction. Unlike the foundation in *Schackner*, evidence establishes that Vision Together 2025 is not an *alter-ego* of the County, and there is no evidence of a contract between the County and Vision Together 2025, such that records in the possession of the latter might be accessible under Section 506(d)(1) of the RTKL. *See* 65 P.S. § 67.506(d)(1) (holding that record in the possession of third-party contractors that have contracted to perform a

governmental function on behalf of the agency, so long as they are directly related to the governmental function).

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the County acted in bad faith, “the averments in [the statements] 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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Accordingly, the County has met its burden of proving that none of the other responsive emails are records of the County. *See* 65 P.S. § 67.708(a)(1); *see Debartola v. Johnstown Area Water Auth.*, OOR Dkt. AP 2022-0945, 2022 PA O.O.R.D. LEXIS \_\_ (denying a similar request for the same reasons).

However, nothing in this Final Determination prevents the Requester from requesting records from the other agencies identified in the Request.

For the foregoing reasons, the Requester’s appeal is **denied**, and the County 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 to the Cambria 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. 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>3</sup> *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: June 23, 2022**

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

Sent via email to: John DeBartola, William Gleeson Barbin, Esq., and Melissa Kestermont