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JUN 14 2019

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OFFICE OF OPEN RECORDS

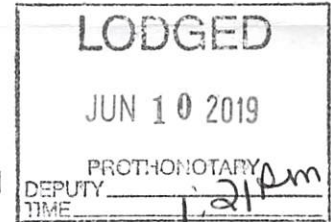
Attorney for Appellant

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

LEHIGHTON AREA SCHOOL DISTRICT, :  
1000 Union St. :  
Lehighton, PA 18235 :  
Appellant, :  
vs. :  
SIMON CAMPBELL :  
668 STONY HILL RD. # 298 :  
Yardley, PA 19067 :  
Appellee. :

No. 19-0421

Office of Open Records Appeal



APPELLANT'S TRIAL BRIEF

AND NOW, comes the Lehighton Area School District, by and through its counsel, William G. Schwab & Associates, to submit this brief in support of their appeal of the decision from the Office of Open Records, respectfully stating in support thereof:

JURISDICTION

This Court has jurisdiction over the matter pursuant to 65 Pa.C.S. § 67.1302. This statute states that "within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b) or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common

pleas for the county where the local agency is located. ” 65 Pa.C.S. § 67.1302(a). The Lehigh Area School District is located within the jurisdiction of the Carbon County Court of Common Pleas.

## **STATEMENT OF THE CASE**

### ***Procedural History***

On December 11, 2018, the Appellee sent a Right-to-Know request making four requests related to the “whereas clauses” of the District's resolution to retain King Spry. The request also sought communications with specifically identified individuals, including conversations with the District's attorneys. On December 19, 2018, Melanie Windhorn, the District's Open Records Officer, sent the Appellee a response indicating that two of his requests were denied and two were at least partially granted. That same day the Appellee filed an appeal to the Office of Open Records and served a copy to the District.

On December 21, 2018, the District received the Official Notice of Appeal from the Office of Open Records. On January 11, 2019, the District sent Mr. Campbell and the Office of Open Records the District's reply brief along with five C.D.s of responsive documents. In its brief, the District specifically requested the Office of Open Records hold a hearing to supplement the information regarding the redactions to meet its burden.

The Office of Open Records did not hold a hearing in this matter. The Office of Open Records granted the Appellee's appeal in part and denied the appeal in part by a Final Determination issued on January 30, 2019. On March 1, 2019, the District filed the above captioned appeal with this Court. The Court issued an order on April 11, 2019, scheduling a hearing on this matter for May 31, 2019. Following the hearing, the Court

gave the parties ten (10) days to submit briefs. This is the District's brief in support of their appeal.

### ***Factual Allegations***

The Appellant, the Lehigh Area School District, is a Carbon County school district and a local agency under the Pennsylvania Right-to-Know Law. It has a business address of 1000 Union St., Lehigh, PA 18235. The Appellee, Simon Campbell, is an adult individual with an address of 668 Stony Hill Rd. # 298, Yardley, PA 19067. The Lehigh Area School District is seeking to have the Court review the Pennsylvania Office of Open Records January 30, 2019, decision in AP 2018-2187.

On December 11, 2018, Mr. Campbell sent a Right-to-Know request making four requests related to the "whereas clauses" of the District's resolution to retain King Spry. The request also sought communications with specifically identified individuals, including conversations with the District's attorneys. On December 19, 2018, Melanie Windhorn, the District's Open Records Officer, sent Mr. Campbell a response indicating that two of his requests were denied and two were at least partially granted. That same day Mr. Campbell filed an appeal to the Office of Open Records and served a copy to the District. Mr. Campbell took the position, which the Office of Open Records agreed with, that there was a deemed denial as to all records on the December 19, 2018, notwithstanding the fact that the District's Open Records office was closed on one of the intervening week days.

On December 21, 2018, the Agency received the Official Notice of Appeal from the Office of Open Records. On January 11, 2019, the District sent Mr. Campbell and the Office of Open Records the District's reply brief along with five C.D.s of responsive documents. The responsive documents included more than four thousand pages (4000)

of e-mails, court filings, previous right-to-know requests, board minutes, and video footage. Of these documents, 167 e-mails contained manual redactions.

The brief itself contained affidavits signed by Ms. Melanie Windhorn, Mr. William Schwab, the Lehigh Area School District Solicitor, Mr. Brian Feick, the Lehigh Area School District Business Manager, Ms. Rebecca Young, a member of the King, Spry, Herman, Freund & Faul Law Firm, Wayne Wentz, Stephen Holland, Larry Stern, Andrew Yenser, Rita Spinelli, and a redaction log related to the redacted e-mails. This redaction log contains the type of content redacted and the reason for the redaction.

In the Lehigh Area School District's brief they argued that the redactions were proper under 65 Pa.C.S. § 67.102, 65 Pa.C.S. § 67.302., 65 Pa.C.S. § 67.708(b)(1), The Family Educational Rights and Privacy Act of 1974, 65 Pa.C.S. § 67.708(7), and Under 65 Pa.C.S. § 67.708(b)(4). The redactions broadly fell into four different categories employee criticism, legal advice or opinions, student information, and I.T. Login/Password Info. In their brief, the District specifically requested the Office of Open Records hold a hearing to supplement the information regarding the redactions to meet its burden; Mr. Campbell also asked for *in camera* review of the redacted information.

The Office of Open Records did not hold a hearing in this matter. The Office of Open Records granted the Appellee's appeal in part and denied the appeal in part by a Final Determination issued on January 30, 2019. The OOR properly determined that the e-mails containing legal advice or opinions and I.T. Login/Password Info were excluded. The School District believes that the Office of Open Records wrongfully determined that the District was required to turnover the un-redacted e-mails concerning student information and employee criticism. As a result, the District has filed this appeal.

**ISSUES PRESENTED ON APPEAL**

I. Did the O.O.R. incorrectly determined that the requested documents were not exempt under 65 Pa.C.S. § 67.708.

Suggested Answer: Yes.

a. Did the O.O.R. incorrectly determine that the requested documents were not exempt as they contained protected records relating to an agency employee?

Suggested Answer: Yes.

b. Did the O.O.R. incorrectly determine that the requested documents were not exempt as they contained protected records relating to the District's students? Suggested Answer: Yes.

II. Is the Pennsylvania Right-to-Know Law unconstitutional as it is written and as it is applied.

Suggested Answer: Yes.

III. Did the O.O.R. improperly determine that the district could not provide redacted documentation.

Suggested Answer: Yes.

## STANDARD OF REVIEW

Courts conducting a judicial review of an O.O.R. appeal officer's ruling review the matter using a *de novo* standard. *Bowling v. Office of Open Records*, 990 A.2d 813, 818, (Commw. Ct. 2010)("Initially, we examine the statutory language providing for judicial review. Section 1301(a) of the Law provides that decisions of the reviewing court shall contain findings and conclusions based on the evidence as a whole. 65 P.S. § 67.1301(a). This express duty of fact-finding is consistent with a standard similar to *de novo* review.") *aff'd Bowling v. Office of Open Records*, 621 Pa. 133, 164 (2013). Further, the expressed language of the Right-to-Know Law requires the reviewing court to abstain from giving any deference to the O.O.R.'s decision. *Bowling*, 990 A.2d 813, 815. ("Thus, the Law commands that the usual deferential standard of review on appeal from Commonwealth agencies, such as the Office of Open Records, does not apply").

## ARGUMENT

**THE COURT SHOULD OVERRULE THE O.O.R.'S JANUARY 30, 2019, DECISION BECAUSE THE APPELLEE'S REQUEST INCLUDED RECORDS THAT ARE EXEMPT UNDER THE LAW, THE ORDER HAD NO PROVISION FOR REDACTING THESE EXEMPTIONS, AND THE PENNSYLVANIA RIGHT-TO-KNOW LAW IS UNCONSTITUTIONAL AS IT IS WRITTEN AND AS IT IS APPLIED BY THE OFFICE OF OPEN RECORDS.**

"The objective of the RTKL is to empower citizens by affording them access to information concerning the activities of their government." *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013). However, the Pennsylvania constitution specifically states that "the

people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.” Pa. Const. art. 1, § 8.” “This right of privacy typically arises when the government seeks information related to persons accused of crimes or other malfeasance, and requires an assessment of the extent to which the government's demands invade the bounds of the person's subjective privacy interest, which in turn requires consideration of the extent to which the person's privacy interests are reasonable.” *Pa. State Educ. Ass'n v. Commonwealth*, 637 Pa. 337, 350 (2016). “Constitutional rights to privacy are not, however, limited to those claimed by people who have been accused of, or associated with, criminal activity.” *Id.*

“In identifying rights to informational privacy under the Pennsylvania Constitution, [the Pennsylvania Supreme] Court has focused its attention not on the rights of persons accused as set forth in Article 1, section 8, but rather to the broader array of rights granted to citizens under Article 1, Section 1, which is entitled “Inherent rights of mankind:” *Id.* at 351. “Constitutionally protected privacy interests must be respected even if no provision of the RTKL speaks to protection of those interests.” *Id.* at 361. “The right to informational privacy is guaranteed by Article 1, Section 1 of the Pennsylvania Constitution, and may not be violated unless outweighed by a public interest favoring disclosure. “*Id.* at 364.

The O.O.R's decision in AP 2018-2187 denied the District, the District's employees, and the District's students its privacy rights and ignored clearly identified exceptions to the Right-to-Know Law.

**I. The O.O.R. should be overruled because they incorrectly determined that the requested documents were not exempt under 65 Pa.C.S. § 67.708.**

The Right-to-Know law requires an agency to provide public records. 65 Pa.C.S. § 67.301. "A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record." 65 Pa.C.S. § 67.305. However, this presumption does not apply if the record is exempt under 65 Pa.C.S. § 67.708. 65 Pa.C.S. § 67.305(a)(1). Section 708 list thirty (30) different types of records that are specifically excluded from the act. Included in these exemptions are certain documents regarding an agency employee and records that would result in the loss of Federal or State funds by an agency or the Commonwealth. 65 Pa.C.S. § 67.708(b)(1) and (7).

***a. The O.O.R. should be overruled because they incorrectly determined that the requested documents were not exempt as protected employee records.***

Certain documents relating to an agency's employees are exempt from Right-to-Know requests. 65 Pa.C.S. §§ 67.708(b)(7). Included in the employee exemptions are documents that contain "information regarding discipline, demotion or discharge contained in a personnel file" and records that contain written criticisms of an employee. 65 Pa.C.S. §§ 67.708(7)(vi) and (viii).

The O.O.R. has directed the District to turnover all the e-mails that the district has claimed were related to its employees. However, at the hearing Ms. Windhorn explained that these communications were where director Bradley was criticizing the performance of the District's employees, where the District was discussing the interview process of



employees, or where the District was discussing accreditation credits with the Carbon Lehigh Intermediate Unit. Thus, the O.O.R.'s decision violates section 708(7) of the right to know law. Consequently, the Court should overrule the O.O.R.'s decision.

***b. The O.O.R. should be overruled because they incorrectly determined that the requested documents were not exempt as protected student records.***

An additional exemption to the Right-to-Know law is any record the disclosure of which would result in the loss of Federal or State funds by an agency or the Commonwealth. 65 Pa.C.S. § 67.708. The Family Educational Rights and Privacy Act of 1974 (F.E.R.P.A.) is a federal law that governs the access of educational information and records to public entities such as potential employers, publicly funded educational institutions, and foreign governments. See 20 U.S.C. § 1232g. "FERPA does two things. First, it ensures that parents can access their child's academic and disciplinary records so that they can correct inaccurate information therein. 20 U.S.C. §1232g. To that end, the receipt of federal funds is conditioned upon schools giving parents access to their children's education records. Second, FERPA protects the privacy of these records and sanctions school districts that have "a policy or practice of permitting the release of education records" without parental consent." *Cent. Dauphin Sch. Dist. v. Hawkins*, 199 A.3d 1005, 1012 (Pa. Commonw. Ct. 2018).

F.E.R.P.A. contains provisions which would deny the School District money if they improperly disclosed a student's educational records. 20 U.S.C. § 1232g(b)(1).<sup>1</sup> Barring

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<sup>1</sup> "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records ... of students without the written consent of their parents to any individual, agency, or organization ..." 20 USCS § 1232g

certain non-applicable exceptions, an education record means “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4).

The O.O.R. has directed the District to turnover all the e-mails that the district has claimed were related to its students. However, at the hearing Ms. Windhorn explained that these communications were related to students who were receiving scholarships, students involved in disciplinary investigations, and students’ graduation ceremony and preparation. “The [F.E.R.P.A.] does not require an educational record to be related to a student’s academic performance, but it does require the information to be “directly related to a student.” “Directly” means “in a direct manner.” *Easton Area Sch. Dist. v. Miller*, 191 A.3d 75, 81 (Pa. Commonw. Ct. 2018). The e-mails in question here, do directly relate to students. As such, disclosing them would be a violation of F.E.R.P.A. Thus, the O.O.R.’s decision violates section 708(7) of the right to know law. Consequently, the Court should overrule the O.O.R.’s decision.

**II. The O.O.R. should be overruled because the Right-to-Know Law is unconstitutional as it is written, and as the O.O.R. is applying it.**

The Right-to-Know Law provides that the Office of Open Records’ Appeals officer has discretion on holding a hearing and that discretion is not appealable. 65 Pa.C.S. § 67.1102(a)(2). Pursuant to Pa. Cont. art. V, § 9, there shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court. Further, “it is incumbent upon an appeals officer to create an adequate factual record

in order to issue a determination.” *Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 59 (Pa. Commw. Ct. 2016). As the statute is written, the Right-to-Know Law prohibits an individual from appealing an O.O.R.’s decision to hold a hearing. However, the O.O.R is required to create a thorough enough record which would enable them to issue a proper determination.

Here the district was given just a few days to reduce it’s justification for redacting 156 e-mails out of the thousands of pages of documents to writing. The district provided multiple affidavits, the redacted e-mails, and a redaction log explaining the reasons for the redactions. The district specifically requested a hearing before the O.O.R. to further justify why they had to perform the redactions. Instead of holding this hearing, the office of open records simply determined that a hearing was not necessary, and the district had failed to establish its burden.

In essence the decision of the O.O.R. was that the district did not provide enough information and would not be given an opportunity to provide enough information. The District wanted to provide testimony regarding its redactions, but it was denied this request. Had the O.O.R. allowed a hearing, they would have been given the same information that was presented to the court. Under the statute, the District is not allowed to appeal the denial of hearing, even if that denial results in an inadequate record, as was the case here. Under the Pennsylvania Constitution, “there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court.” Because the plain language of the Right-to-Know Law violates the Pennsylvania constitution, the statute is unconstitutional as written.

Additionally, “both the United States and Pennsylvania Constitutions prohibit the

deprivation of property without due process of law, which requires an opportunity to be heard at a meaningful time and in a meaningful manner.” See *Squire v. Pennsylvania Dep’t of Pub. Welfare*, 696 A.2d 255, (Commonw Ct. 1997). There are numerous property interests and rights that the Lehigh Area School District has in its documents.<sup>2</sup> The District has contractual rights and obligations with its employees that would be violated by releasing the redacted information. The District has access to federal funds that would be jeopardized by releasing the students’ educational records. See 20 U.S.C. § 1232g(b)(1).<sup>3</sup> As stated earlier, the District’s employees and students have privacy rights in their own personal information too. See *Pennsylvania State Education Ass’n v. Dep’t of Community and Economic Development*, 637 Pa. 337, 148 A.3d 142 (Pa. 2016).

By denying the District’s request for a hearing to develop the record the District was denied the opportunity to be heard in a meaningful time and in a meaningful manner. Because they were not given a reasonable opportunity to lay the foundation for why certain documents in a voluminous request need redactions, the Lehigh Area School District has been denied substantive and procedural due process under the Federal and

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<sup>2</sup> It should be noted that the Commonwealth court has already addressed the due process argument from the point of the requester and determined that a requester has no property rights to protect which would require a hearing. See *State Employees’ Ret. Sys. v. Pennsylvanians for Union Reform*, 113 A.3d 9, 12 (Commonw Ct. 2015) (“A requester has no right to a hearing before the Pennsylvania Office of Open Records (OOR) and no right to examine or cross-examine those who may oppose access to the requested records. Due process does not require a hearing because the right to information provided by the RTKL does not involve a property right because access to public records is a privilege granted by the Pennsylvania general assembly.) This is clearly distinguishable from a responding agency who has multiple contractual and privacy concerns from the improper release of its protected information.

<sup>3</sup> Barring enumerated exceptions “No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization.”

Pennsylvania Constitution. As such, the Pennsylvania Right-to-Know Law, 65 P.S. 67.101 *et seq*, is also unconstitutional as it is being applied by the O.O.R.

**III. The O.O.R. should be overruled because the final determination failed to allow the school district to redact in compliance with state and federal law.**

The Right-to-Know law specifically allows agencies to redact protected information. 65 Pa.C.S. § 67.706.<sup>4</sup> The O.O.R. expressly required the District to turnover underacted e-mails. As stated above, the redactions that the District provided to Mr. Campbell were necessary to protect the privacy of the District's employees and students. These were proper exemptions under the Right-to-Know Law. As such, the Court should overrule the O.O.R. and issue an order explicitly allowing the District to redact all of the e-mails that included employee and student information.

### **CONCLUSION**

For the aforementioned reason the Court should overrule the O.O.R.'s January 30, 2019, decision. The Appellee made four requests related to the whereas clauses of the District's resolution to retain King Spry. " The District's provided more than four thousand pages of e-mails, court filings, previous right-to-know requests, board minutes, and video

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<sup>4</sup> "If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9." 65 Pa.C.S. § 67.706

footage. Of these documents, 167 e-mails contained manual redactions. Of these redacted e-mails, the Office of Open Records ordered the district to turnover un-redacted copies where the e-mails contained employee and student information. This type of information is specifically excluded from disclosure under Section 708 of the Right-to-Know law. The District requested that the O.O.R. hold a hearing in this matter, which was refused. Instead the O.O.R. directed the District to violate its employees' and students' privacy rights without providing the district a reasonable opportunity to be heard. As such, the process was unconstitutional and resulted in a clearly erroneous decision. Therefore, this Court should overrule O.O.R.'s January 30, 2019, decision.

**WILLIAM G. SCHWAB & ASSOCIATES**

Dated: June 10, 2019

By:



**ERIC J. FILER, ESQUIRE**

Attorney for Plaintiffs

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Attorney for Appellant

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CARBON COUNTY  
PROTHONOTARY

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**LEHIGHTON AREA SCHOOL DISTRICT,  
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**Appellant,**

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668 STONY HILL RD. # 298  
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**Appellee.**

No. ~~18~~ 19-0421  
Office of Open Records Appeal

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies he is an Attorney and a person of such age and discretion as to be competent to serve papers and that on June 10, 2019, he served a copy of the Appellant's Trial Brief and this certificate of service, by placing copies of said documents in postpaid envelopes, addressed as stated below at last known addresses, and by depositing said envelopes and contents in the United States Mail at Lehighton, Pennsylvania, unless otherwise indicated:


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