Received 4/22/2022 11:08:09 AM Commonwealth Court of Pennsylvania

Filed 4/22/2022 11:08:00 AM Commonwealth Court of Pennsylvania
1463 CD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1463 C.D. 2021

PENNCREST SCHOOL DISTRICT,
Appellant

v.

THOMAS CAGLE,
Appellee

BRIEF FILED ON BEHALF OF APPELLANT, PENNCREST SCHOOL DISTRICT

On Appeal from December 16, 2021 Opinion and Order of the trial court of the Court of Common Pleas of Crawford County, Pennsylvania entered by The Honorable William R. Cunningham, Senior Judge

George Joseph, Esquire
PA Supreme Court ID 36606
2222 West Grandview Blvd.
Erie, Pennsylvania 16506
Phone: (814) 833-2222
Email: gjoseph@quinnfirm.com
Attorneys for Appellant, PENNCREST School District

TABLE OF CONTENTS

TABLE OF CITATIONS I

I. STATEMENT OF JURISDICTION 2

II. ORDER IN QUESTION 3

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW 4

IV. STATEMENT OF THE QUESTIONS INVOLVED 5

V. STATEMENT OF THE CASE 6

VI. SUMMARY OF ARGUMENT 9

VII. ARGUMENT 11

A. Individual school board members do not shed their First Amendment rights to freedom of expression on matters of personal interest. 11

B. Posts and/or comments made by school board members on personal social media accounts from personal computers, not made in connection with their positions as public officials, do not constitute a transaction, business, or activity of the District. 14

C. The trial court erred in concluding that, because the board is capable of acting on a matter, the statements of two board members relate to a transaction, business or activity of the District. 20

D. Members of the public attending a school board meeting and expressing their personal opinions about the postings and comments on the personal social media accounts of a school board member do not, by their comments, create a transaction, business, or activity of the District. 24

VIII. CONCLUSION 27

CERTIFICATE OF SERVICE 29

CERTIFICATE OF COMPLIANCE 30

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127 30

APPENDIX 31

TABLE OF CITATIONS

Cases

Allegheny County Department of Administrative Services v. A Second Chance, Inc., 13 A.3d 1025 (2011) 17

B.H. ex rel Hawk v. Easton Area School District, 725 F.3d 293 (3rd Cir. 2013).... 25

Bagwell v. Pa. Department of Education, 76 A.3d 81 (Pa. Commw. 2013) 17

Bangor Area Education Association v. Angle, 720 A.2d 198 (Pa. Commw. 1998) *affirmed per curiam* 561 Pa. 305, 750 A.2d 282 (2000)..... 13, 14

Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa. Commw. 2012)..... 21, 22

Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Commw. 2010) *affirmed* 621 Pa. 133, 75 A.3d 453 (2013) 4

Boyer v. Wyoming Borough, AP 2018-1110 (2018)..... 15

Chirico v. Cheltenham Township School District, AP 2018-0391 (2018)..... 15

Garcetti v. Ceballos, 547 U.S. 410 (2006) 12

Holt v. 2011 Legislative Reapportionment Commission, 38 A.3d 711, 728, 614 Pa. 364 (Pa. 2012) 4

In re Silberstein, 11 A.3d 629 (Pa. Commw. 2011)..... 18

Lane v. Franks, 573 U.S. 228 (2014) 12

Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021)..... 11

Mollick v. Township of Worcester, 32 A.3d 850 (Pa. Commw. 2011)..... 21, 22

Pa. Office of Attorney General v. Bumsted, 134 A.3d 1204, (Pa. Commw. 2016) 18

Pa. Office of Attorney General v. The Philadelphia Inquirer, 127 A.3d 57 (Pa. Commw. 2015)..... 17, 18

Pa. State Police v. Kim, 150 A.3d 155 (Pa. Commw. 2016) 19

Pickering v. Board of Education, 391 U.S. 568 (1968) 11

Purdy v. Chambersburg Borough, AP 2018-1229 (2018) 14

Saxe v. State College Area School District, 240 F.3d 200 (3rd Cir. 2000) 25, 26

Stein v. Plymouth Township, 994 A.2d 1179 (Pa. Commw. 2010) 4

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 11

U.S. Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973) 12

U.S. v. National Treasury Employees Union, 513 U.S. 454 (1995) 12

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 25

Werkheiser v. Pocono Township, 210 F. Supp. 3d 633 (M.D.Pa. 2016) 12, 13

Zimmerlink v. Zapotosky, 2011 U.S. Dist. LEXIS 53186 (W.D. Pa. 2011), *adopted* 2011 U.S. Dist. LEXIS 53189 (W.D. Pa. 2011) 12

Statutes

24 P.S. § 2-211 12

42 Pa.C.S. § 762 2

65 P.S. §67.101 4

65 P.S. §67.102 ..... 16, 17, 18, 25

65 P.S. §67.1302 7

65 Pa C.S. § 704 13

65 Pa.C.S. § 702(a) 24

65 Pa.C.S. § 702(b) 24

65 Pa.C.S. § 703 24

65 Pa.C.S. § 710.1(a) 25

Rules

Pa.R.A.P. 2115 3

I. STATEMENT OF JURISDICTION

The Commonwealth Court has jurisdiction to review the Order in question pursuant to 42 Pa.C.S. § 762.

II. ORDER IN QUESTION

A full and complete copy of the Opinion and Order of the Crawford County Court of Common Pleas, dated December 16, 2021, is attached as the Appendix to Appellant's Brief. In addition, pursuant to Pa.R.A.P. 2115, the Order of The Court is set forth *verbatim* below.

ORDER OF THE COURT

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

December 14, 2021

/s/William R. Cunningham
WILLIAM R. CUNNINGHAM, Senior Judge

Cc: Attorney George Joseph
Attorney Brian Cagle

Distributed by Prothonotary Office
Dist:_____
Faxed: Atty's 12-16-21
Mailed:_____
Emailed:_____
Moving Party "MUST" Notify Opposing Party

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The scope of review refers to the confines within which an appellate court must conduct its examination. Holt v. 2011 Legislative Reapportionment Commission, 38 A.3d 711, 728, 614 Pa. 364 (Pa. 2012). The scope of review for a question of law under the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. §§67.101-.3104, is plenary. Stein v. Plymouth Township, 994 A.2d 1179 (Pa. Commw. 2010).

The standard of review under the RTKL provides that a reviewing court, in the exercise of its appellate jurisdiction, shall independently review orders regarding open records and may substitute its own findings of fact for that of the agency.

Under this broad standard, this Court's standard of review *is de novo* and its scope of review is broad or plenary when it hears appeals from determinations made by appeals officers under the RTKL. Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Commw. 2010) *affirmed* 621 Pa. 133, 75 A.3d 453 (2013).

IV. STATEMENT OF THE QUESTIONS INVOLVED

A. WHETHER THE SOCIAL MEDIA POSTS AND COMMENTS MADE TO OR FROM INDIVIDUAL SCHOOL BOARD MEMBERS' PERSONAL SOCIAL MEDIA ACCOUNTS, WHICH WERE NOT RELATED TO ANY PENDING, SUBSEQUENT, OR CONTEMPLATED TRANSACTION, BUSINESS, OR ACTIVITY OF THE SCHOOL BOARD AND NOT BETWEEN BOARD MEMBERS, DOCUMENTS A TRANSACTION, BUSINESS, OR ACTIVITY OF THE DISTRICT

Suggested answer in the negative.

B. WHETHER SCHOOL BOARD MEMBERS, ACTING AS PRIVATE CITIZENS, ARE ABLE TO EXPRESS PERSONAL OPINIONS USING A PERSONAL COMPUTER AND PERSONAL SOCIAL MEDIA ACCOUNT TO MAKE POSTS OR COMMENTS ON MATTERS OF PERSONAL INTEREST WITHOUT CREATING A TRANSACTIONS, BUSINESS, OR ACTIVITY OF THE DISTRICT AND BEING SUBJECT TO DISCLOSURE IN RESPONSE TO RIGHT TO KNOW LAW REQUESTS.

Suggested answer in the affirmative.

C. WHETHER MEMBERS OF THE PUBLIC ATTENDING A SCHOOL BOARD MEETING TO EXPRESS THEIR PERSONAL OPINIONS ABOUT THE POSTINGS AND COMMENTS ON THE PERSONAL SOCIAL MEDIA ACCOUNTS OF TWO SCHOOL BOARD MEMBERS CAN CREATE A TRANSACTION, BUSINESS, OR ACTIVITY OF THE BOARD.

Suggested answer in the negative.

V. STATEMENT OF THE CASE

On June 17, 2021, Appellee Cagle made a Right-to-Know Law (hereinafter "RTKL") request for access to certain information, including Facebook posts and comments by David Valesky (hereinafter "Valesky") and Luigi DeFrancesco (hereinafter "DeFrancesco") related to homosexuality and PENNCREST between January 1, 2020, through June 13, 2021. (R.R. 16a-17a). PENNCREST's Open Records Officer, Denise M. Gable, replied to Cagle by letter dated July 7, 2021, wherein she partially granted and partially denied his requests. (R.R. 18a-23a). At issue in this appeal are the following requests:

3. All Facebook posts and comments by David Valesky related to homosexuality and PENNCREST School District, its officials, employees, or students, or its curriculum, physical recourses (sic), or electronic resources, between January 1, 2020 through June 13, 2021, including posts or comments removed by Mr. Valesky;

4. All Facebook posts and comments by Luigi DeFrancesco related to homosexuality and PENNCREST School District, its officials, employees, or students, or its curriculum, physical recourses (sic), or electronic resources, between January 1, 2020 through June 13, 2021, including all posts or comments removed by Mr. DeFrancesco;

5. All comments to the Facebook posts identified in request number 3, including comments deleted or removed by Mr. Valesky;

6. All comments to the Facebook posts identified in request number 4, including comments deleted or removed by Mr. DeFrancesco.

(R.R. 17a).

On July 26, 2021, Appellee appealed to the Office of Open Records (hereinafter "OOR"), arguing the requested records are public records in the possession, custody, or control of PENNCREST. The OOR issued a Final Determination on August 24, 2021. PENNCREST was ordered to produce the Facebook records responsive to the request. (R.R. 35a-43a). PENNCREST appealed the Final Determination by filing a Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records (hereinafter "Petition"), pursuant to 65 P.S. §67.1302 of the RTKL, 65 P.S. §67.1302. (R.R. 4a-50a). The trial court affirmed.

In the present appeal, the Appellee asserts that two members of the School Board used personal social media accounts, in this case "Facebook," to comment on a post made from a private citizen, an employee of a contractor working on a renovation project in the building, of a library book display at Maplewood High School, one of three District high schools. Appellee claims that these personal social media account posts constitute discussion of District business and asserts a right to access under the RTKL. (R.R. 24a-25a).

The display at the Maplewood High School library was prepared by the high school librarian as part of Pride Month addressing LGBTQ+ issues. It is part of a regular process that the librarian goes through in highlighting various books available in the library that address topics which may be of interest to students

during the month. In addition to the subject book display, other book displays in the same library included books on baseball, American music, and bullying. (R.R. 29a). None of the books on display related in any way to matters that were agenda items for the School Board. The displays were not made at the direction of the Administration or the School Board. (R.R. 29a).

Neither Pride Month nor the issue of LGBTQ+ rights within the school community were matters contained on the meeting agendas of the PENNCREST School Board. Likewise, these topics did not become items on the school board agenda since the social media posting of the book display. (R.R. 29a). However, public comment on this issue was made at the part of the board meeting during which the school board heard public comment on "non-agenda items."

The Board members in question did not make any comments to any social media account under the ownership or control of the District. In fact, Appellee admitted that the Facebook accounts at issue are owned personally by Mr. Valesky and Mr. DeFrancesco. Appellee further admitted that "*some*, and perhaps the majority, of the posts and comments contained in the aforementioned accounts are not records of an agency. (R.R. 66a-67a, Paragraph 25). Likewise, they were not authorized by or on behalf of the PENNCREST School Board to comment any matter related to the book display and were not communications between Board members.

VI. SUMMARY OF ARGUMENT

School board members are residents of the school district in which they serve. They do not give up their rights as private citizens by virtue of their election and are able to express opinion on matters of interest, including in personal social media accounts and posts as public records of the District without having these communications subject to general public access. Individual Board members, to the extent that they made any social media posts or comments on their personal social media accounts, did so as private citizens only and not in their official capacity as Board members. School districts in the Commonwealth are vested as "bodies corporate" with all necessary powers to enable them to carry out of the provisions of the Act. Individual board members lacked authority to act on behalf of the District to create a public record. The communications at issue were not between members of the Board.

In order to be a public record, information must first be a record. The RTKL defines "record" as "information, … that documents a transaction or activity of an agency that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." Not all emails, even on agency-owned computers, are records under the Right to Know Law. Similarly, personal social media posts are not records unless they document a transaction or activity of the District or are created, received or retained pursuant to law or in connection

with a transaction, business or activity of the District. To the extent that any social media posts or comments exist on the personal computers of Mr. Valesky or Mr. DeFrancesco, in order to be records of the District and subject to disclosure under the Right-to-Know Law, they would have to relate to a transaction, business or activity of the District.

In this case, there was no agency business associated with the high school library book displays. Neither the display nor anything associated with it was or subsequently became an item of agency business on the Board of School Directors' public meeting agendas. The board members posted in their individual capacities to personal social media accounts to a social circle of friends. The communications were not between or among board members. Any posts were made by board members acting as private citizens on a matter of personal interest. The trial court erred in concluding that the book display may become the topic of agency business.

The Sunshine Act recognizes the right of its citizens to have notice of and to attend all meetings of public agencies. The Sunshine Act also gives residents the right to comment on matters of concern. However, neither of these rights gives the public the ability to create or establish an agenda item of agency business. Consequently, public comment at board meetings did not create a transaction or activity of the District for public record purposes.

VII. ARGUMENT

A. Individual school board members do not shed their First Amendment rights to freedom of expression on matters of personal interest.

Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). In the recent United State Supreme Court decision in Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021), the Court held that, although the school's regulatory interests remained significant in some off-campus circumstances, certain features of off-campus speech diminished the strength of the school's interest in prohibiting students from using vulgar language to criticize a school team or its coaches and did not overcome the student's interest in free expression. In doing so, the Court noted that courts must be more skeptical of a school's efforts to regulate off-campus speech and have a heavy burden to justify intervention when it comes to political or religious speech that occurs outside school.

When engaging in political speech or matters of public concern, the U.S. Supreme Court has held that regulating a public employee's speech requires a weighing of interests of the employee as a "citizen," against the government's interest in promoting efficiency of public services of the agency that it performs. *See*, Pickering v. Board of Education, 391 U.S. 568 (1968); U.S. Civil Service

Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973); U.S. v. National Treasury Employees Union, 513 U.S. 454 (1995).

The regulation of employee speech is different, and the ability of the public agency to restrict speech is broader in the context of speech related to the public employee's official job duties. In that context, the public agency is acting as the employer and not as the sovereign. *See*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (Employee's retaliation failed because he was not speaking as a citizen for First Amendment purposes since he made the statements pursuant to his official duties). However, a citizen does not surrender their First Amendment rights by accepting public employment. Citizen speech about matters of public concern is protected. *See*, Lane v. Franks, 573 U.S. 228 (2014).

Importantly, the Garcetti decision has been found not to apply in the case of elected public officials. Werkheiser v. Pocono Township, 210 F. Supp. 3d 633 (M.D.Pa. 2016); Zimmerlink v. Zapotosky, 2011 U.S. Dist. LEXIS 53186 (W.D. Pa. 2011), *adopted* 2011 U.S. Dist. LEXIS 53189 (W.D. Pa. 2011). Thus, the District does not regulate speech for members of the school board.

School boards are corporate bodies created for the purpose of implementing state legislative policy concerning public schools and locally administering the state's system of public education. 24 P.S. § 2-211. Because the authority of the local school board lies in its status as a corporate body, a public meeting of the

school board is required for official action involving any transaction, business, or activity of the District. 65 Pa C.S. § 704. Individual board members are not vested with powers outside their role as a member of the local school board and have no authority distinct from members of the public. Bangor Area Education Association v. Angle, 720 A.2d 198 (Pa. Commw. 1998) *affirmed per curiam* 561 Pa. 305, 750 A.2d 282 (2000).

School board members are and remain residents of the school district in which they serve and do not give up their rights as private citizens by virtue of their election. Werkheiser v. Pocono Township, *supra*. They are able to express opinion on matters of interest, including in personal social media accounts, which posts and comments are not public, unless the account is an account of the agency. In the present matter, they are not. Appellee has admitted that some, and perhaps a majority of the posts to the personal social media accounts of Mr. Valesky and Mr. DeFrancesco do not constitute public records of the District. (R.R. 66a-67a). Posting comments as a private citizen on a matter of personal interest does not expose the comments to access under the RTKL and certainly does not create information documenting a transaction or activity of the District. Nor are such posts and comments created, received, or retained in connection with a transaction, business, or activity of the District.

B. Posts and/or comments made by school board members on personal social media accounts from personal computers, not made in connection with their positions as public officials, do not constitute a transaction, business, or activity of the District.

Board members do not have authority outside of the corporate body of the board. Bangor Area Education Association v. Angle, *supra*. Their posts and comments made on personal social media accounts from personal computers about matters of personal interest not contemplated as District business are not made in their capacities as public officials. The Pennsylvania Office of Open Records (OOR) itself has drawn such a distinction regarding whether a personal Facebook page of an agency official contains public records. To OOR, the issue turns on whether the posts themselves involve discussions of agency transactions or activity. Denying access to the personal social media accounts in this case is entirely consistent with OOR precedent.

In Purdy v. Chambersburg Borough, AP 2018-1229 (2018) , the OOR concluded that a Facebook page was a record of the Borough because it was listed on the Borough's official website and contained the link "Find the Mayor on Facebook." In addition, the page contained discussions and posts regarding activities within the Borough, including those relating to the police department and councilmembers, and contained contact information for the Borough.

Likewise, in Boyer v. Wyoming Borough, AP 2018-1110 (2018), the OOR determined that a Facebook page titled "Joseph Dominick Mayor of Wyoming," was a record of the Borough because nearly all of the postings consisted of the Mayor's opinion on news stories involving the Borough and political entities affiliated with the Borough, announcements of Borough council meeting times and places, and discussion on topics of public interest within the Borough.

On the other hand, not every social media post is a record of the District. The OOR has previously determined that a board member's communications made on a personal social media account and made in his personal capacity are not records of the District, even if certain posts reflect District activities. In Chirico v. Cheltenham Township School District, AP 2018-0391 (2018), the school board president publicly read a statement at a public meeting regarding another school board member's Facebook post to hold a "Cover Our Schools in Prayer" event on school property. A requester subsequently sought information about the other school board members' Facebook accounts, including their viewing history and messages regarding the "Prayer" post. OOR determined that individual school board member's personal Facebook accounts were not records of the District subject to access under the RTKL even though the post was read at a public board meeting.

Like the present matter, the Facebook pages in the Chirico case were not linked to the District's webpage. In that case, one board member acknowledged that he had been contacted through the personal account by members of the public on matters concerning the District, but he asserted that the contents of the communications were not shared with other school board members. The OOR concluded that, under these facts, the board members' social media accounts, and the communications contained therein, were not records of the District. Similarly, here, the personal posts and comments were not directed to other board members in particular, but to a circle of friends on the personal social media account.

The analysis necessarily turns on the terms "Record" and "Public Record" as defined in the RTKL. What constitutes a "Public Record" is defined as follows:

> "PUBLIC RECORD." A record, including a financial record, of a Commonwealth or local agency that:
> (1) is not exempt under section 708;
> (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or
> (3) is not protected by a privilege.

65 P.S. §67.102 (emphasis added). Significantly, the RTKL defines a "Record" as follows:

> "RECORD." Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

65 P.S. § 67.102 (emphasis added). In making a determination that the information sought is a "public record," a requestor must establish that the information sought falls within the definition of a "record" of the agency as defined in 65 P.S. § 67.102. What constitutes a "Record" requires a two-part analysis: (1) Does the information document a transaction or activity of any agency; and (2) Was the information created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. Pa. Office of Attorney General v. The Philadelphia Inquirer, 127 A.3d 57 (Pa. Commw. 2015). This Court has interpreted "documents" to mean "proves, supports or evidences." Bagwell v. Pa. Department of Education, 76 A.3d 81 (Pa. Commw. 2013); Allegheny County Department of Administrative Services v. A Second Chance, Inc., 13 A.3d 1025 (2011).

In this case, any posts or comments were made on personal social media accounts and did not document, prove, support, or evidence any District transaction or activity and were not created, received, or retained in connection with a transaction, business or activity of the District. The requestor has not established that these posts and comments are records of the District. Indeed, some of the comments would certainly include those of private citizens.

Courts have generally recognized that it is not where the documents are located, whether on a district or personal computer or account, but rather whether

the documents relate to an agency transaction or activity. The requirement that an email, or in this case social media posts and comments, must document a "transaction or activity of the agency" is essential for a record to be a public record pursuant to 65 P.S. § 67.102. What makes a social media post a "public record" is whether the information sought documents an agency transaction or activity. Whether the information is sent to, stored on, or received by a public or personal computer is irrelevant in determining whether it constitutes public records. Pa. Office of Attorney General v. The Philadelphia Inquirer, *supra*.

For example, in Pa. Office of Attorney General v. Bumsted, 134 A.3d 1204, (Pa. Commw. 2016), this Court determined that emails containing pornographic materials were not "public records" under the RKTL simply because they were sent and received via OAG email, since they could not relate to any OAG "transaction" or "activity." That is so because a record is "information...that documents a transaction or activity of an agency," and personal emails that do not do so are simply not records. Consequently, the OAG was not required to disclose them.

Importantly, in the case of In re Silberstein, 11 A.3d 629 (Pa. Commw. 2011), this Court was asked to address whether emails or documents on Township Commissioner Silberstein's personal computer were public records. The Court considered the distinction that must be made between transactions or activities of

an agency which may be a "public record" under the RTKL and the emails or documents of an individual public office holder. It was noted that Commissioner Silberstein was not a governmental entity but rather an individual public official with no authority to act alone on behalf of the Township. Ultimately, the Court held that emails and documents found on Commissioner Silberstein's personal computer would not fall within the definition of record. In reaching its decision, the Court concluded that any record personally and individually created by Commissioner Silberstein would not be documentation of a transaction or activity of the Township, as the local agency. Likewise, the record created by Commissioner Silberstein was not created, received or retained pursuant to law or in connection with a transaction, business or activity of the Township. In other words, unless the emails and other documents in Commissioner Silberstein's possession were produced with the authority of the Township, as a local agency, or were later ratified, adopted or confirmed by the Township, said requested records could not be deemed as "public records" within the meaning of the RTKL as the same are not "of the local agency."

Similarly, in Pa. State Police v. Kim, 150 A.3d 155 (Pa. Commw. 2016), this Court ruled that disclosure by the State Police of a surveillance video of a two-car accident obtained from a private party was not a "record" of the police under the RTKL because it did not document any transaction or activity of the police.

The analysis is the same in the present matter. Any social media posts were individually and personally created by Mr. Valesky and Mr. DeFrancesco. They were public officials, not a public agency, and they had no authority to act alone on behalf of the District. Their posts or comments would not document a transaction or activity of the District. Neither would any posts or comments have been created, received, or retained in connection with a transaction, business or activity of the District.

C. The trial court erred in concluding that, because the board is capable of acting on a matter, the statements of two board members relate to a transaction, business or activity of the District.

Information that neither (1) documents a transaction or activity of an agency; nor (2) is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency is simply not a record. To the extent that board members maintain personal social media accounts and use the accounts to communicate with a circle of friends in their personal capacities, the posts and comments on these personal social media accounts are not public records of the District.

The trial court pointed out that a school board member does not shed his or her status as a board member simply by using a personal computer to send emails or posts on a personal Facebook page about school matters. (R.R. 102a). For this

reason, emails *between* Township Supervisors on personal computers discussing business within the Township were public records under the Right-to-Know Law. See, Mollick v. Township of Worcester, 32 A.3d 850 (Pa. Commw. 2011) (R.R. 102a). The court went on to note that if a school board member uses a computer to *discuss with another board member* a school-related matter, a record has been created by the posting board member "in connection with their positions as public officials." Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa. Commw. 2012) (R.R. 103a). At issue in Barkeyville was whether the private emails between public officials created a public record subject to access under the RTKL. Although the Barkeyville case dealt with private emails, the trial court concluded the same logic applies to posts made to a personal Facebook page.

However, the trial court erred in applying Mollick and Barkeyville to the present matter. The posts and comments on the Board members' personal social media accounts were not communications *between or among* Board members. Rather, they were communications within a circle of social media friends. Nevertheless, the trial concluded specifically as follows:

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

(R.R. 104a)(emphasis added). That is an incorrect statement of fact and a misunderstanding of the personal social media posts. In fact, the requestor did not

even request records between board members; rather, the request made were with regard to "all Facebook posts and comments" by David Valesky and by Luigi DeFrancesco related to homosexuality. (R.R. 17a). There was no suggestion that the comments were being shared by and between board members only. For this reason, the Mollick and Barkeyville cases are distinguishable.

The trial court also noted that the book display had quickly become publicly controversial, and a significant number of citizens appeared at subsequent PENNCREST school board meetings to express various opinions about the book display. The trial court concluded that "the reason the citizens were there was because the PENNCREST board had the authority to take action, one way or another, about the book display." (R.R. 104a). However, that does not mean that the PENNCREST school board had acted, or intended to act, with regard to the book display. There was no discussion with other board members, and the personal social media posts do not document a transaction, business or activity of the Board or District. The subject book display never became and agenda item for any PENNCREST school board meeting.

The social media posts were made by individual board members in their individual and personal capacities. To hold otherwise would be to conclude that school board members, upon their election, lose any right of personal expression guaranteed to every other citizen under the First Amendment.

The trial court decision also broadened the scope of what constitutes a transaction, business or activity required for a document to be a public record under the Right-to-Know Law, suggesting that a subject can constitute a transaction, business or activity of a district even if no action is contemplated or taken by the agency. The trial court further opined that determining that a subject would not be placed on the agenda is included in business or activity of the school. (R.R. 105a). Such a holding is not supported in the record. No deliberation or discussion was ever had in this regard. There is no evidence of any official action by the Board to refrain from action on the book display.

Commenting on personal social media accounts on matters that individual board members do not control does not make the matter a public record. Mr. Valesky's posts are, at their essence, an expression of his sincerely held religious beliefs as an individual, not as a board member, and do not themselves constitute a transaction or activity of the District.

The trial court erred in suggesting that the social media posts could be equated to email communications between elected officials. The record in this matter is actually devoid of any information that would suggest that either Mr. Valesky or Mr. DeFrancesco was acting in their official capacities as opposed to making personal comments on their personal social media accounts.

D. Members of the public attending a school board meeting and expressing their personal opinions about the postings and comments on the personal social media accounts of a school board member do not, by their comments, create a transaction, business, or activity of the District.

The General Assembly has recognized the right of the public to be present at all meetings of agencies and to witness the deliberation and decision-making of public agencies. 65 Pa.C.S. § 702(a). This includes the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon. 65 Pa.C.S. § 702(b). However, these rights do not carry with them the right to define or designate the business of the public agency itself.

"Agency business" is defined in the Sunshine Act as "the framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action." 65 Pa.C.S. § 703. Furthermore, the Act defines "Deliberation" as "the discussion of agency business held for the purpose of making a decision." 65 Pa.C.S. § 703. The establishment of agency business then rests with the agency itself, not the public at large.

The Sunshine Act requires public agencies to provide a reasonable opportunity at each advertised regular meeting and advertised special meeting for residents to comment on matters of concern, official action or deliberation which

are or may be before the board or council prior to taking official action. 65 Pa.C.S. § 710.1(a). In other words, comments are not limited to agency business and may include "non-agenda" items. Nowhere in the Sunshine Act or otherwise, does the General Assembly provide that the members of the public may thereby create or establish an agenda item of agency business. To conclude otherwise would stand the definition of what constitutes agency business on its head.

The trial court suggested that citizens appeared at school board meetings because they perceived the Board to have authority to take action. (R.R. 104a). However, the trial court failed to consider that the topic was not, and did not become, an agenda item for the Board. The public's comments do not thereby document a transaction or activity of the District. 65 P.S. § 67.102.

Discussion of or taking any action with regard to the book display at issue in this case never became an agenda item of business of the PENNCREST school board. The books that were subject to the display were already purchased for the high school library and were owned by the District.

While the board may place time, place and manner restrictions on expression within its school buildings, it may not engage in viewpoint discrimination. Any time, place or manner restrictions must be viewpoint neutral. Ward v. Rock Against Racism, 491 U.S. 781 (1989); B.H. ex rel Hawk v. Easton Area School District, 725 F.3d 293 (3rd Cir. 2013); Saxe v. State College Area School District,

240 F.3d 200 (3rd Cir. 2000). Thus, contrary to the perceptions of members of the public, this was not something that the board could act upon, the personal opinions of individual board members aside. The only opportunity the Board would have to intervene would be in the event that there was a substantial disruption in the educational environment. Saxe v. State College Area School District, *supra*.

VIII. CONCLUSION

For all of these reasons, it is respectfully submitted that individual school board members have the right of First Amendment freedom of expression on matters of personal interest or concern. By making comments and expressing their opinions, they are not acting in their official capacities and do not thereby create a transaction or activity of the school board.

Posts or comments made by the school board members on their personal social media accounts and from personal computers, made to a circle of friends with whom they have connected on social media, do not constitute communications with other board members in their positions as public officials. The posts and comments made do not document a transaction or activity of the district. Likewise, those posts and comments were not created, received, or retained by individual board members pursuant to law or in connection with any transaction, business or activity of the district. To the contrary, they are simply comments made by private individuals in their individual capacities.

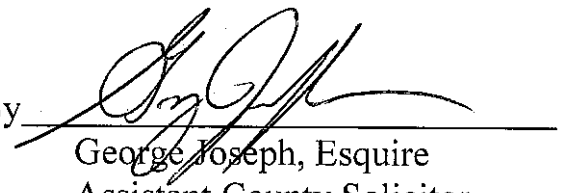
The members of the public have a variety of opinions on topics of interest as well. However, their appearance at or comments made during a public board meeting do not, thereby, create or establish an item of agency business. The public does not dictate the agenda for the board. The issue of the book display at Maplewood High School was not, and by virtue of the public comments, did not

become a topic of agency business for the board of school directors of the PENNCREST school district.

Under all circumstances, the determination of the Court of Common Pleas of Crawford County should be reversed and a determination made that the individual posts and comments made to the personal social media accounts of David Valesky and Luigi DeFrancesco should be determined not to constitute public records of the District subject to access under the RTKL.

Respectfully submitted,

QUINN, BUSECK, LEEMHUIS, TOOHEY & KROTO, INC.

By 

George Joseph, Esquire
Assistant County Solicitor
Pa. I.D. No 36606
2222 West Grandview Boulevard
Erie, Pennsylvania 16506
Tel: (814) 833-2222
Fax: (814) 833-6753
Attorneys for Appellant,
PENNCREST School District

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNCREST School District, Appellant	:	
v.	:	1463 C.D. 2021
Thomas Cagle, Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this 22nd day of April, 2022, serving a true and correct copy of the foregoing BRIEF FILED ON BEHALF OF APPELLANT, PENNCREST SCHOOL DISTRICT, upon the persons indicated below, by electronic filing and/or U.S. First Class Mail, which service satisfies the requirements of Pa.R.A.P. 121:

Respectfully submitted,

QUINN, BUSECK, LEEMHUIS, TOOHEY & KROTO, INC.

By _____

George Joseph, Esquire
Assistant County Solicitor
Pa. I.D. No 36606
2222 West Grandview Boulevard
Erie, Pennsylvania 16506
Tel: (814) 833-2222
Fax: (814) 833-6753
Attorneys for Appellant,
PENNCREST School District

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNCREST School District, Appellant	:	
v.	:	1463 C.D. 2021
Thomas Cagle, Appellee	:	

CERTIFICATE OF COMPLIANCE

As required by Pa.R.A.P. 2135(d), I certify that the Brief for Appellant contains less than 14,000 words, excluding the parts of the Brief for Appellant that are exempted by Pa.R.A.P. 2135(d).

I declare under penalty of perjury that the foregoing is true and correct. Executed on: April 22, 2022.

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

QUINN, BUSECK, LEEMHUIS, TOOHEY & KROTO, INC.

By _____

George Joseph, Esquire
Assistant County Solicitor
Pa. I.D. No 36606
2222 West Grandview Boulevard
Erie, Pennsylvania 16506
Tel: (814) 833-2222
Fax: (814) 833-6753
Attorneys for Appellant,
PENNCREST School District

APPENDIX

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

PENNCREST SCHOOL DISTRICT	:	
	:	
v.	:	**A.D. No. 2021-486**
	:	
THOMAS CAGLE	:	

OPINION/ORDER

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

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

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

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

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

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

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

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

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

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

Mollick, at 872.

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

> What makes an email a 'public record,' then, is whether the information sought documents of an agency transaction or activity, and the fact whether the information is sent to, stored on or received by a public or personal computer is irrelevant in determining whether the email is a 'public record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Separately, it does not matter that a single Board member is unable to take final action on behalf of the school. A single Board member has a vote in the decision-making process as well as the ability to influence the thoughts and votes of other Board members. Thus, a Board member plays a role in all Board decisions, including decisions to not take action or place a matter as a meeting agenda item. As more cogently stated by the Commonwealth Court: "(w)hile an individual school board member lacks the authority to take final action on behalf of

the entire board, that individual acting in his or her official capacity, nonetheless, constitutes agency activity when discussing agency business." *Easton Area School District v. Baxter*, 35 A.3d 1259,1264 (Pa.Cmwlth.2012).

CONCLUSION

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

December 14, 2021

WILLIAM R. CUNNINGHAM, Senior Judge

Distributed by Prothonotary Office

Dist _____

Faxed Atty's 12-16-21

Mailed _____

Emailed _____

Moving Party "MUST" Notify Opposing Party

cc: Attorney George Joseph
Attorney Brian Cagle