IN THE

Supreme Court of Pennsylvania

WESTERN DISTRICT

31 WAP 2023

PENNCREST SCHOOL DISTRICT,

Appellee,

– v. –

THOMAS CAGLE,

Appellant.

On Appeal from the Order of the Commonwealth Court entered April 23, 2023 at No. 1463 CD 2021, Vacating the Order of the Court of Common Pleas of Crawford County entered December 16, 2021 at No. AD 2021-486 and remanding.

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE QUESTION INVOLVED

The Statement of the Question Involved was set forth in the Court's December 4, 2023, Order. That Statement, verbatim, is as follows:

> Whether the Right to Know Law, 65 P.S. §§ 67.101 – 67.3104, ***requires*** the disclosure of school board members' social media posts on their ***private Facebook accounts*** relating to the propriety of a display of certain books in the school library.

(emphasis added).

SUGGESTED ANSWER: NO.

"[S]ocial media activity must comply with three criteria: (1) it must prove, support, or evidence an agency's transaction or activity; (2) it was created, received, or retained in connection with an agency's transaction, business, or activity; and (3) it was created by, originated with, or possessed by the agency." *Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783, 798-99 (Pa. Cmwlth. 2023).

Social media posts on private Facebook accounts do not satisfy the above requirements, as set forth by the Commonwealth Court, or at the very least, this Court should affirm the

Commonwealth Court's decision to remand the case back to the trial court for further inquiry. *Id.*

COUNTERSTATEMENT OF THE CASE

A. The Display.

In May 2021, Appellee, Penncrest School District's ("Penncrest") Superintendent was Dr. Timothy Glasspool ("Dr. Glasspool"). On May 28, 2021, Dr. Glasspool, among others, was interviewed by the Meadville Tribune, for an article entitled, "Display of LGBTQ books at Maplewood draws debating comments on Facebook." R. 26a. The article did not cover comments at a public meeting, or "document agency transaction, business, or activity." *Penncrest*, 293 A.3d at 791 (Pa. Cmwlth. 2023) (citing *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 90 (Pa. Cmwlth. 2013)).

Comments in the article attributed to Dr. Glasspool state that, "[t]he display from the Facebook post [was] up since May 3, [2021]…and was done in recognition of June being Pride Month." R. 27a. Other comments attributed to Dr. Glasspool state, "[o]ur staff is determined to offer a safe learning environment for all students," and that "[a]s a public school, we teach tolerance and

celebrate diversity." R. 27a. Dr. Glasspool was further quoted as stating, "such displays are made by librarians and are based around 'seasonal, cultural[,] athletic, holiday[,] historic[,] and similar timely themes' during the school year." R. 27a. The display was "in anticipation of Pride Month." *Penncrest*, 293 A.3d at 786 (Pa. Cmwlth. 2023).

B. The Facebook Posts.

"A third party [, Glenn Wright,] photographed the displayed books and then publicly posted the photograph, apparently ***on that person's own Facebook social media account***." *Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783, 786 (Pa. Cmwlth. 2023) (emphasis added) (footnote omitted). "The third party [post stated], "Hey Maplewood/PENNCREST parents...just a little pic of what is on display at Maplewood High School Library... I realize this makes me a hater, but I am totally ok with that label...[.]" *Id.* (ellipses in original).

"David Valesky ("Valesky"), a member of the Penncrest School Board ("Board"), then publicly 'shared' the post on his own personal Facebook account with an additional comment." *Id.*

"Valesky commented: '[t]his is on display at Maplewood High School. Besides the point of being totally evil, this is not what we need to be teaching kids…[t]hey aren't at school to be brainwashed into thinking homosexuality is okay…[i]ts [sic] actually being promoted to the point of where it's even 'cool.'" *Id.*

"Luigi DeFrancesco ("DeFrancesco"), President of the Board, publicly "shared" the third party's original post without comment on DeFrancesco's own personal Facebook account." *Id.*[1]

C. The Right-to-Know Request.

On June 17, 2021, the Appellant, Thomas Cagle ("Cagle") submitted a Right- to-Know Request (hereinafter the "Request") to Penncrest. R. 23a-24a. "Cagle requested Facebook posts and comments 'related to homosexuality and Penncrest School District, its officials, employees, or students, or its curriculum, physical [resources], or electronic resources, between January 1, 2020[,] through June 13, 2021, including posts or comments removed' or deleted by Valesky and DeFrancesco." *Id.* "In support, Cagle

[1] The Facebook posts made by Mr. Johnson and Mr. Brooks, were not requested by Cagle, and are not the main subject of this matter.

argued that the issue of treatment of LGBTQ+ students and related [Penncrest] policies quickly became an important topic of public and official debate at the next four public meetings of the Board, which were attended by hundreds of citizens." *Id.* at 787. "Penncrest countered that 'LGBTQ+ rights…were not' and have not been on the Board's agenda." *Id.*

"Penncrest's open records officer denied Cagle's requests for the above records…on the basis that no such posts or comments existed for any Penncrest-owned Facebook accounts." *Id.*[2]

D. The Pertinent Procedural History.

"Cagle timely appealed to the OOR, which granted relief to Cagle." *Id.* "In granting relief, the OOR cited *Purdy v. Borough of Chambersburg*, No. AP 2017-1229, 2017 WL 3587346 (Pa. Off. Open Recs. filed August 16, 2017), and *Boyer v. Wyoming Borough*, No. AP 2018-1110, 2018 WL 4293461 (Pa. Off. Open Recs., filed September 5, 2018)." *Id.* "Per OOR, those decisions

[2] The email records produced by Penncrest to Mr. Cagle are not at issue in this appeal. *See* R. 87a-88a (where the exchange with counsel and the trial court indicated that the sole issue before the trial court was social media posts and comments, not personal emails).

provided a framework for resolving 'whether a Facebook page is a record of the agency.'" *Id.* "OOR explained that it was 'immaterial' as to whether the agency controlled the Facebook page." *Id.* "OOR [apparently] reviewed the contents of the Facebook page to determine whether 'it is used as a significant platform by an elected official or employee to conduct or discuss official business…'" *Id.* "OOR noted that although the LGBTQ+ book display was not on the Board's agenda, the Board discussed the display in June 2021." *Id.*

"Penncrest timely appealed to the trial court," and "[t]the trial court affirmed, reasoning, *inter alia*, that 'it does not matter if a Facebook post was made on the [Board's] Facebook [account] or on the . . . member's private Facebook [account]. These posts can become a 'record' if they are created by person(s) acting as a [Board] member and contain information related to school business." *Id.* at 788. "The trial court also reasoned that because Valesky was expressing his views about a topic within the Board's purview, he "created a public record" subject to the RTKL." *Id.* "Penncrest timely appealed [to the Commonwealth Court] and

timely filed a court-ordered Pa. R.A.P. 1925(b) statement, which did not raise a First Amendment claim." [3]

In its Opinion, the Commonwealth Court provided a detailed analysis of the "Application of the RTKL to Social Media." *Penncrest*, 293 A.3d at 798 (Pa. Cmwlth. 2023). It also "summariz[ed] Penncrest's argument…and…discuss[ed] [its] framework for applying the RTKL to social media activity." *Id.* "On appeal, Penncrest argue[d] that although Valesky and DeFrancesco are public officials, they created the social media posts on their personal social media accounts in their personal capacities." *Id.*

[3] Penncrest acknowledges that the Commonwealth Court stated, in footnote 6, of its Opinion, that Penncrest's prior counsel waived its First Amendment argument for appellate review. *See Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783, 788 n.6 (Pa. Cmwlth. 2023) (citing *See City of Phila. v. Lerner*, 637 Pa. 605, 151 A.3d 1020, 1024 (Pa. 2016)). However, as the dissent in *Lerner* correctly points out, the waiver construct can recognize "exceptions for extraordinary circumstances." *City of Phila. v. Lerner*, 637 Pa. 605, 616, 151 A.3d 1020, 1026 (2016) ("As a general rule, I support the enforcement of waiver constructs as a means to sharpen controversies and maintain fairness to opposing litigants[, but] I would nevertheless recognize exceptions for extraordinary circumstances."). Further, this Court's review of the Commonwealth's Court decision is plenary, and this Court can exercise a broad scope of review large enough to allow for a review of the First Amendment implications here. *See Bowling v. Office of Open Records*, 621 Pa. 133, 155, 75 A.3d 453, 466 (2013) ("Because these issues are purely legal ones involving statutory interpretation, we exercise a de novo standard of review and a plenary scope of review of the Commonwealth Court's decision.").

Penncrest further argued that "even if their personal social media posts reflect Penncrest's activities, those posts are not 'records' under the RTKL," because "the posts 'did not document, prove, support, or evidence any [Penncrest] transaction or activity…'" *Id.* Penncrest also argued that the "posts 'were not created, received, or retained in connection' with any Penncrest transaction or activity." *Id.*

The Commonwealth Court then summarized its test in the following manner:

> To briefly reiterate, Section 102 of the RTKL defines "record" as information, *e.g.*, social media activity, "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." 65 P.S. § 67.102. Accordingly, social media activity must comply with three criteria: (1) it must prove, support, or evidence an agency's transaction or activity; (2) it was created, received, or retained in connection with an agency's transaction, business, or activity; and (3) it was created by, originated with, or possessed by the agency.

Penncrest, 293 A.3d at 798-99 (Pa. Cmwlth. 2023). Ultimately, the Commonwealth Court "vacate[d] the trial court's December 16,

2021 order and remand[ed] for further proceedings consistent with its decision." *Id.* at 802.

Cagle then subsequently filed a Petition for Allowance of Appeal, and this Court reframed the Statement of the Question involved as set forth in the Court's December 4, 2023, Order:

> Whether the Right to Know Law, 65 P.S. §§ 67.101 – 67.3104, ***requires*** the disclosure of school board members' social media posts on their ***private Facebook accounts*** relating to the propriety of a display of certain books in the school library.

(emphasis added).

SUMMARY OF THE ARGUMENT FOR THE APPELLEE

When elected officials are sworn into office in the Commonwealth of Pennsylvania, they don't lose their individual First Amendment rights. Instead, they take an oath to uphold the same. As Justice, Anthony Kennedy aptly stated:

> First Amendment freedoms are most in danger when the government seeks to control thought ***or to justify its laws for that impermissible end***. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

Ashcroft v. Free Speech Coal., 535 U.S. 234, 253, 122 S. Ct. 1389, 1403, 152 L.Ed.2d 403, 423 (2002) (emphasis added).[4]

[4] Even if the Court agrees with the Commonwealth Court Opinion that Penncrest waived the First Amendment argument, Justice Kennedy's quote is still appropriate to consider whether posting thoughts and opinions on private social media accounts is enough to constitute a "record" under the RTKL. It is also worth noting that Justice Kennedy was arguably the biggest champion of the First Amendment in Supreme Court history, and he did not capitulate under the pressure placed on the Supreme Court, even in the context of something so heinous as child pornography. To be clear, the context of the Facebook posts and child pornography are not at all similar; however, the point is that the First Amendment shouldn't be eroded amidst societal pressure and a potent force shaped by norms and expectations. In fact, if there is a parallel here between this matter and *Ashcroft*, it is that this Court should shy away from the call to expand Pennsylvania's RTKL into something so vague and unrecognizable that it proscribes protected speech, and has an irreversible effect on social media for public officials as we recognize it today.
Additionally, it is worth pointing out that the Amici Curiae, the Pennsylvania NewsMedia Association, Reporters Committee for Freedom of the Press, and

Cagle implores this Court to justify an impermissible expansion of the RTKL to personal Facebook accounts—a certain perversion of the legislative intent of the RTKL. In fact, the legislative history of the current RTKL shows that the bill, at one time contemplated, the definition of a "record" as "any document maintained by an agency in any form, whether public or not."[5] That definition of "record" in Senate Bill No. 1 of 2007, at Printer's No. 772, pondered early on that "any document maintained by an agency" should be a "record," "whether public or [private]." At one point, then, the legislature deliberated about whether private documents under agency control should be "records;" however, it ultimately settled on the current definition of "record" in the RTKL

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the Cornell Law School First Amendment Clinic's submission also appear to be at odds with one of their cornerstone principals—by suggesting greater protection for RTKL Requesters than for those seeking First Amendment protection. Indeed, the Pennsylvania NewsMedia Association's website champions the importance of the First Amendment. *See* https://panewsmedia.org/about-us/ ("Our mission is to…educate the public on the importance of the First Amendment…") (last visited, April 14, 2024). Perhaps, if the media was under scrutiny, and not the individual board members' social media, as in this matter, the shoe would be on the other foot. Instead, the colloquial phrase, "rules for thee and not for me," seems applicable here.

[5] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2007&sessInd=0&billBody=S&billTyp=B&billNbr=0001&pn=0772

that is much more restricted. Indeed, "[t]o briefly reiterate, Section 102 of the RTKL defines 'record' as information, e.g., social media activity, '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.' 65 P.S. § 67.102." *Penncrest*, 293 A.3d at 798-99. "Accordingly, social media activity must comply with three criteria: (1) it must prove, support, or evidence an agency's transaction or activity; (2) it was created, received, or retained in connection with an agency's transaction, business, or activity; and (3) it was created by, originated with, or possessed by the agency." *Id.* (footnotes omitted).

It appears, then, that the legislature did consider a critical, "distinction…between transactions or activities of an agency which may be a 'public record' under the RTKL and the [social media posts] of an individual public office holder." *Id.* at 791 n.9 (Pa. Cmwlth. 2023).

Further, the Supreme Court of the United States recently contemplated this exact distinction in a hypothetical question

penned by Justice Amy Coney Barrett in which she posed the following:

> Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. ***While the substance of the announcement is the same, the context—an official meeting versus a private event—differs.*** He invoked his official authority only when he acted as school board president.

Lindke v. Freed, 144 S. Ct. 756, 218 L.Ed.2d 121, 135 (2024) (emphasis added). By quoting this hypothetical, Penncrest is not suggesting that any individual action by a school board president binds the Board. Instead, the cognizable distinction that Justice Barrett offers is that it's not what you say, it's in what capacity, and when you say it.

Justice Barrett's profound "offline world" hypothetical provides much needed clarity to the "murky" online world and

expansive definitions Cagle would have this Court adopt. *See Lindke v. Freed*, 144 S. Ct. 756, 218 L.Ed.2d 121, 130 (2024).[6] This distinction is the core issue before this Court, and the Court should heed caution when deciding whether to expand the definition of a "record" under the RTKL to personal Facebook, or any, social media platform accounts. It is not what was said in these individual board members' social media accounts that matters nearly as much as where it was said—i.e. a public meeting or a backyard barbeque.

This Court should adopt the Commonwealth Court's Opinion, and subsequent three-part test, as set forth in *Penncrest*, 293 A.3d at 800-02, using *Lindke* as a polestar. The Commonwealth Court Opinion went to great lengths, and provided an exhaustive analysis, to consider both "Pennsylvania Jurisprudence" and "Non-Pennsylvania Jurisprudence," for guidance, since there were no

[6] The Supreme Court in *Lindke* noted that "the caselaw is ***murky*** as to when a state official acts personally and when he acts officially") (emphasis added). *Id.* The Supreme Court also noted that, "an official's activity is state action if the "text of state law requires an officeholder to maintain a social-media account," the official "use[s] . . . state resources" or "government staff" to run the account, or the "accoun[t] belong[s] to an office, rather than an individual officeholder." *Id.*

cases on all fours with the issue before this Court. The Commonwealth Court's analysis was sound; however, *Lindke* now gives the Commonwealth Court's Opinion that much more weight and credibility and this Court should adhere to it.

Finally, Cagle's public policy argument is misplaced. The Commonwealth Court's standard does not "create perverse incentives for public officials to use private accounts to conduct public business." *Cagle Brief* at p. 27. Instead, the Commonwealth Court's standard is well-reasoned and balances the importance of individual thought, and opinion, with official business. To expand the RTKL so that it has unlimited bounds, such that personal opinions become public records, is the only perversion here.

ARGUMENT FOR THE APPELLEE

I. THIS COURT SHOULD ADOPT THE COMMONWEALTH COURT'S TEST TO DETERMINE WHEN SOCIAL MEDIA POSTS CONSTITUTE A "RECORD" UNDER THE RTKL.

A. The Supreme Court of the United States' Recent Unanimous Decision in *Lindke* is Instructive Here.

The hypothetical question Justice Barrett posed in *Lindke* is on all fours with the question before this Court:

> Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. ***While the substance of the announcement is the same, the context—an official meeting versus a private event—differs.*** He invoked his official authority only when he acted as school board president.

Lindke v. Freed, 144 S. Ct. 756, 218 L.Ed.2d 121, 135 (2024) (emphasis added). By quoting this hypothetical, Penncrest is not suggesting that any individual action by a school board president binds the Board. Instead, the cognizable distinction that Justice

Barrett offers is that it's not what you say, it's in what capacity and when you say it.

Justice Barrett's profound "offline world" hypothetical provides much needed clarity to the "murky" online world and expansive definitions Cagle would have this Court adopt. *See Lindke v. Freed*, 144 S. Ct. 756, 218 L.Ed.2d 121, 130 (2024).[7] This distinction is the core issue before this Court, and the Court should heed caution when deciding whether to expand the definition of a "record" under the RTKL to personal Facebook, or any, social media platform accounts. It is not what was said in these individual board members' social media accounts that matters nearly as much as where it was said—i.e. a public meeting or a backyard barbeque.

The Commonwealth Court's decision is well-reasoned. In that decision, the Commonwealth Court looked to both "Pennsylvania

[7] The Supreme Court in *Lindke* noted that "the caselaw is ***murky*** as to when a state official acts personally and when he acts officially") (emphasis added). *Id.* The Supreme Court also noted that, "an official's activity is state action if the "text of state law requires an officeholder to maintain a social-media account," the official "use[s] . . . state resources" or "government staff" to run the account, or the "accoun[t] belong[s] to an office, rather than an individual officeholder." *Id.*

Jurisprudence" and "Non-Pennsylvania Jurisprudence" for guidance since there were no cases on all fours with the issue before this Court. *Id.* at 793 and 795. Since the Commonwealth Court's Opinion, one of the cases, among others, that the Commonwealth Court turned to for this guidance, *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022), was reviewed and analyzed by the Supreme Court of the United States. The test in *Lindke*, as articulated by the Sixth Circuit, asked whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" *Id., citing Waters v. City of Morristown*, 242 F.3d at 353, 359 (6th Cir. 2001) and further stating that "[i]t stems from [the] recognition that public officials aren't just public officials—they're individual citizens, too." *Id.* Recently, the Supreme Court adopted the test in *Lindke*, and narrowed it even further, stating that:

> a public official's social-media activity constitutes state action under §1983[8] only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported

[8] Appellee certainly acknowledges the distinction between 42 U.S.C.S. § 1983 and the RTKL; however, the holding by the Supreme Court of the United States is otherwise instructive here.

> to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first.

Lindke v. Freed, 144 S. Ct. 756, 218 L.Ed.2d 121, 133 (2024). This Court should follow the guidance available in *Lindke* and either adopt the test as articulated by the Commonwealth Court, or narrow the test articulated by the Commonwealth Court, to follow the same logic as the Supreme Court of the United States.

B. "Records" Are Not Necessarily Presumed to be Public.

"Section 102 of the RTKL defines 'record' as '[i]nformation, 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.'" *Penncrest*, 293 A.3d at 789 (citing 65 P.S. § 67.102). "Courts have construed the following phrases within this definition: (1) 'documents a transaction or activity of an agency'; (2) 'in connection with a transaction, business or activity'; and (3) 'of the agency.'" *Id.* Further, there "appears to be…tension with the statutory presumption in Section

305 of the RTKL that all records in the agency's possession are presumed to be a public record." *Id., citing* 65 P.S. § 67.305; *see also Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783 at 789 n.8. Indeed, in footnote 8 of its decision, the Commonwealth Court noted the distinction between Section 1101(a)(1) and Section 305 of the RTKL. *Id.* While it is noted that the General Assembly intended to shift the initial burden of record analysis from a requester under the Right-to-Know Act (RTKA), 65 P.S. §§ 66.1-66.9, to the agency under the RTKL, Section 1101(a)(1) of the RTKL states that "on *appeal* from a denial of a request, the appeal shall state the grounds upon which the requester asserts that the record is a public record…"). "If the agency wishes to deny a request, then the agency must prove by a preponderance of the evidence that the requested information is privileged or otherwise exempt from disclosure. Sections 708(a)(1) and 901 of the RTKL, 65 P.S. §§ 67.708(a)(1), 67.901; *Bowling v. Off. of Open Recs.*, 621 Pa. 133, 75 A.3d 453, 457 (Pa. 2013)." *Id.* Therefore, "[s]ection 1101(a)(1) appears to be in apparent tension with the statutory presumption in Section 305 of the RTKL that all records

in the agency's possession are presumed to be a public record." *Id.* (citing 65 P.S. § 67.305).

C. The Facebook Posts are Not "Records."

"Agencies, in response to a request, are 'not…required to create a record which does not currently exist, or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize [a] record." J. Chadwick Schnee, *The Right-To-Know Law and The Sunshine Act* § 1-4 (4th ed. 2024) (citing 65 P.S. § 67.705 ("Creation of record"). Further, "[c]orrespondence from an individual elected official who does not have the power, absent the agreement of a quorum, to take any 'official action' and correspondence from an elected official serving in a personal capacity is ***not considered a 'record' of an agency.***" *Id., citing* 65 Pa.C.S. § 703 (defining 'official action' as '(1) [r]ecommendations made by an agency pursuant to statute, ordinance or executive order[,] (2) [t]he establishment of policy by an agency[,] (3) [t]he decisions on agency business made by an agency[, and] (4) [t]he vote taken by any agency on any

motion, proposal, resolution, rule, regulation, ordinance, report or order"); *see also In Re Silberstein*, 11 A.3d 629 (Pa. Cmwlth. 2011); *Brandt v. Pennsylvania Office of Lieutenant Governor*, OOR Dkt. AP 2016-1758) (emphasis added).

Here, Cagle seeks to have this Court expand and create what currently constitutes a "record" under the RTKL. This Court should resist that argument.

The RTKL defines a "public record" as:

> "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 Pa. Stat. Ann. § 67.102. (emphasis added).

The RTKL defines a "record" as:

> "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.

Id. (emphasis added).

These two definitions are distinct, and the definition of "public record" incorporates the definition of "record." Therefore, a "public record" does not exist under the RTKL unless it is first established that a "record" exists. Stated differently, although the RTKL expanded upon its predecessor, the RTKA, it does not require an agency to "create" a non-existent "record."

D. The Facebook Posts Do Not "Document A Transaction or Activity."

The Commonwealth Court "defined 'documents' as 'proves, supports, or evidences.'" *Penncrest,* 293 A.3d at 789 (citing *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 91 (Pa. Cmwlth. 2013) (en banc) (cleaned up); *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Cmwlth. 2011). The Commonwealth Court has held that, "personal emails sent or received using an agency email address or located on an agency's computers are not 'records.'" *Id.*, *citing Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1264 (Pa. Cmwlth. 2012). Indeed,

the Commonwealth Court "explained that personal emails are not 'records' because they do not 'document[] a transaction or activity of an agency,' even if the agency had a policy precluding personal use of agency computers." *Id.*

Here, the Facebook post in question in this matter was originally posted by an unrelated third party from his own personal electronic device. R. 25a; R. 29a. It was then "shared," by Mr. DeFrancesco and Mr. Valesky. Mr. DeFrancesco shared Mr. Wright's post "though he did not write anything accompanying the photo to show his view on the matter." R. 27a. Mr. Valesky shared Mr. Wright's post with further comment. R. 26a. However, Mr. DeFrancesco and Mr. Valesky did not generate the original post by the unrelated third party. R. 26a-27a. Instead, they "shared" it from personal accounts.

E. The Facebook Posts Are not "In Connection with a Transaction, Business, or Activity."

For the next part of the test, the Commonwealth Court has held "that, a 'record' includes 'information created by a private contractor *in connection* with its contractual obligations to the agency.'" *Penncrest*, 293 A.3d at 790 (emphasis in the original).

"In other words, even if the social media post did not originate from the agency or if the agency did not possess or create the post, if the post directly relates to the agency's governmental function, the post may be subject to RTKL disclosure." *Id.* at 791 (Pa. Cmwlth. 2023) (citing *W. Chester Univ. of Pa v. Browne*, 71 A.3d 1064, 1608; *Allegheny Cnty. Dep't of Admin Servs v. A Second Chance, Inc.*, 13 A.3d 1025, 1040 (Pa. Cmwlth. 2011)).

Mr. Valesky's quote about the display in the Meadville Tribune article demonstrated that there was no Board (agency) action taken. In fact, Mr. Valesky simply stated that, "[w]e're just kind of discussing it at this point," to describe conversations he had with Dr. Glasspool and Mr. DeFrancesco, not the whole Board in public session. R. 26a-27a. In that regard, the record does not suggest that Penncrest took any official action in response to Mr. Wright's post, or comments on the post; therefore, there is nothing to support that Mr. DeFrancesco or Mr. Valesky's posts, "prove, support, or evidence a transaction or activity of an agency," or that the posts were made in any "official capacity." *Id.* at 801-802.

Mr. Cagle's attempt to extrapolate agency business from a culturally related seasonal photo displaying library books is misplaced. R. 91a ("there was no agency business that related to…Pride Month, the resource materials, or the LGBT[Q+] community at the time."). There is no support for anything to the contrary in the record. Instead, the record clearly indicated, through the statements of Penncrest's then superintendent, Dr. Timothy Glasspool, that the "propriety" of the display was that "such displays are made by librarians and are based around '***seasonal***, cultural, holiday[,] historic[,] and ***similar timely themes***' during the school year." R. 27a. (emphasis added). Accordingly, there was no agency business related to the library display other than it "was done in recognition of June being Pride Month." R. 27a.

Importantly, even if Mr. DeFrancesco and Mr. Valesky's posts did relate to agency business, "[i]ndividual Board members cannot act on behalf of the Board, unless the authority is delegated to them by the Board." R. 91a. (citing 24 P.S. § 2-211, "[t]he several school districts in this Commonwealth shall be, and hereby are

vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of this act"). "Board members, while acting alone, may create official records when they are communicating with other public officials or otherwise acting in some official capacity in discussing agency business[; however,] [n]one of that happened in this case." R. 92a.

F. The Facebook Posts Were Not Created, Received, or Retained in Connection with an Agency's "Transaction, Business, or Activity."

As stated above, "[a]gencies, in response to a request, are not…required to create a record which does not currently exist, or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize [a] record." J. Chadwick Schnee, § 3-2.9 (citing 65 P.S. § 67.705 ("Creation of record").

Further, "the prepositional phrase 'of the agency,' is a limiting phrase applicable to each of the listed items preceding the phrase, *i.e.*, 'transaction, business or activity[.]'" *Penncrest*, 293 A.3d at 791 (Pa. Cmwlth. 2023) (citing 65 P.S. § 67.102; *Rendell*

v. Pa. State Ethics Comm'n, 603 Pa. 292, 983 A.2d 708, 715 n.7 (Pa. 2009)).

The Commonwealth Court has gone on to "explain[] that the 'preposition 'of' indicates a record's origin, its owner or possessor, or its creator.'" *Id.*, *citing Bagwell*, 76 A.3d at 91 (cleaned up)). "In addition to information created by or otherwise originating with the agency, a 'record' also includes information in the agency's possession." *Id.* "Thus, we held that correspondence received by the agency may qualify as 'records' as long as they document agency transaction, business, or activity." *Id.*

In its opinion, the Commonwealth Court went to great lengths to "examine[] whether emails of elected public officials were 'of the agency,' and thus within the scope of the RTKL." "[I]n *In re Silberstein*, 11 A.3d 629 (Pa. Cmwlth. 2011), [the Commonwealth Court] addressed whether emails on a township commissioner's personal computer were subject to the RTKL." *Id.* Ultimately, the Commonwealth Court held that, "the commissioner was not a governmental agency and had 'no authority to act alone on behalf of the' township." *Id.*, *citing Silberstein* at 633). "The

[Commonwealth] Court explained that 'emails…found on the commissioner's personal computer would not fall within the definition of record as any record ***personally and individually created by the commissioner*** would not be a documentation of a transaction or activity *of [the agency]*." *Id.*

Here, at a baseline level, Penncrest's Social Media Policy demonstrates that social media posts on a personal account are not "of the agency." Indeed, the Social Media Policy states:

> The district shall not authorize, endorse, or participate in posting on private social media accounts of individual school directors or school employees.
>
> School directors and employees are strongly encouraged to use privacy settings on social media accounts and to clearly identify that it is their personal social media account and that it does not officially represent the Board or district.
>
> ***
>
> The district respects employees' freedom of expression. The district does not actively monitor personal social media accounts…

R. 49a.

Further, the "purpose" of Penncrest's Social Media Policy is, "to establish the process and standards for approval and operation

of district-owned social media accounts, and to identify the differences between personally owned social media accounts and those mandated by the district." R. 48a. Penncrest, in accordance with its policy, identified throughout the record below, that the social media accounts used by Mr. DeFrancesco and Mr. Valesky, ***were not Penncrest accounts***. R. 17a-18a; R. 31a-33a; R. 92a-93a; 123a-129a. Moreover, "[t]he Penncrest School District [web]site does not link to any personal Facebook accounts of Board members;" rather, "it lists the Penncrest School District e-mail addresses as the means of contacting individual Board members." R. 92a-93a.

Even if this Court were inclined to disagree with Penncrest's position, including the affidavits made under penalty of perjury, a review of the Facebook accounts, and the "reposting" of Glenn Wright's "original" post, show that Mr. DeFrancesco and Mr. Valesky's are plain, personal, and innocuous in nature. R. 25a (Mr. DeFrancesco's post); R. 29a (Mr. Valesky's post). There are no "trappings" of Penncrest School District contained on those

accounts in any visible form. *Penncrest,* 293 A.3d at 801 (Pa. Cmwlth. 2023).

II. THE DEVELOPMENT OF THE RTKL FROM THE RTKA WAS NOT WITHOUT RESTRICTION.

The legislative history of the current RTKL shows that the bill, at one time contemplated, the definition of a "record" as "any document maintained by an agency in any form, whether public or not."[9] That definition of "record" in Senate Bill No. 1 of 2007, at Printer's No. 772, pondered early on that "any document maintained by an agency" should be a "record," "whether public or [private]." At one point, then, the legislature deliberated about whether private documents under agency control should be "records;" however, it ultimately settled on the current definition of "record" in the RTKL that is much more restricted. Indeed, "[t]o briefly reiterate, Section 102 of the RTKL defines 'record' as information, e.g., social media activity, 'that documents a transaction or activity of an agency and that is created, received

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9 https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2007&sessInd=0&billBody=S&billTyp=B&billNbr=0001&pn=0772

or retained pursuant to law or in connection with a transaction, business or activity of the agency.' 65 P.S. § 67.102." *Penncrest*, 293 A.3d at 798-99. "Accordingly, social media activity must comply with three criteria: (1) it must prove, support, or evidence an agency's transaction or activity; (2) it was created, received, or retained in connection with an agency's transaction, business, or activity; and (3) it was created by, originated with, or possessed by the agency." *Id.* (footnotes omitted).

It appears, then, that the legislature did consider a critical, "distinction…between transactions or activities of an agency which may be a 'public record' under the RTKL and the [social media posts] of an individual public office holder." *Id.* at 791 n.9 (Pa. Cmwlth. 2023).

Here, Cagle seeks to have this Court expand and create what currently constitutes a "record" under the RTKL. This Court should resist that argument.

The RTKL defines a "public record" as:

> "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 Pa. Stat. Ann. § 67.102. (emphasis added).

The RTKL defines a "record" as:

> "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.

Id. (emphasis added).

These two definitions are distinct, and the definition of "public record" incorporates the definition of "record." Therefore, a "public record" does not exist under the RTKL unless it is first established that a "record" exists. Stated differently, although the RTKL expanded upon its predecessor, the RTKA, it does not require an agency to "create" a non-existent "record."

III. THE PUBLIC POLICY CONSIDERATIONS AND RAMIFICATIONS OF CAGLE'S REQUEST ARE UNIMAGINABLE.

Finally, the public policy considerations and ramifications of Cagle's request are unimaginable. If Cagle's position is adopted by this Court, all public officials in the Commonwealth of Pennsylvania will be subject to the inspection of their personal social media accounts, via the RTKL, for any post, at any time, whatsoever. The burden that it would place on all municipal agencies in the Commonwealth is wildly unreasonable and could not have coincided with the legislature's intent in drafting the RTKL. Moreover, it will have a chilling effect on speech and the First Amendment, such that elected officials will essentially be forced to check their personal opinions at the doorstep of their agency offices.

CONCLUSION

As President Harry Truman said in a Special Message to the Congress of the United States on August 8, 1950, "[o]nce a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear."[10] Indeed, "[i]f the Bill of Rights were to be broken down, all groups, even the most conservative, would be in danger from the arbitrary power of government." *Id.*

If this Court adopts Cagle's argument, the RTKL will blur the lines of personal thought, and public office, to a point that it will be irretrievably broken and incapable of being remedied. This should not happen.

[10] https://www.trumanlibrary.gov/library/public-papers/207/special-message-congress-internal-security-united-states (last visited April 14, 2024).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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.

Submitted by: Jordan Peter Shuber, Esquire

Signature: /s/ Jordan Peter Shuber

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Penncrest School District

v.

Thomas Cagle
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I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on April 18, 2024

I served the within Brief for Appellee in the above captioned matter upon:

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Sworn to before me on April 18, 2024

/s/ Robyn Cocho
_____

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2027

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