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IN THE SUPREME COURT OF PENNSYLVANIA
NO. 31 WAP 2023

PENNCREST SCHOOL DISTRICT,
Appellee,

v.

THOMAS CAGLE,
Appellant.

On Appeal from the Order of the Commonwealth Court of Pennsylvania, 1463 C.D. 2021, entered April 24, 2023, vacating and remanding the Order of the Court of Common Pleas of Crawford County, Pennsylvania, AD 2021-486, entered on December 16, 2021.

BRIEF FOR APPELLANT

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February 15, 2024

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INTRODUCTION

The issue in this case is whether school board members can evade public scrutiny of statements about board business by conducting their discussions on members' personal Facebook pages. The Commonwealth Court's ruling would permit such an outcome, in conflict with the text, structure, and purpose of the Right-to-Know Law. It should be reversed.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal pursuant to 42 Pa.C.S. § 724(a).

ORDER OR OTHER DETERMINATION IN QUESTION

The order on appeal from the Commonwealth Court states:

> AND NOW, this 24th day of April, 2023, we vacate the December 16, 2021 order entered by the Court of Common Pleas of Crawford County and remand for further proceedings as set forth in our decision. Thomas Cagle's application for relief is dismissed as moot. Jurisdiction relinquished.

(App. A at 31.)

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court reviews legal questions, including the proper interpretation of a statute, de novo. The scope of review is plenary. *Bowling v. Off. of Open Records*, 75 A.3d 453, 466 (Pa. 2013).

STATEMENT OF THE QUESTION INVOLVED

As set forth in this Court's December 4, 2023, order granting the petition for allowance of appeal, the question involved is:

> 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.

Suggested answer: yes.

STATEMENT OF THE CASE

A. The School Book Display and Board Members' Facebook Posts

In May 2021, in honor of Pride Month, a librarian in a Penncrest School District ("District") high school displayed books recognizing the Lesbian, Gay, Bisexual, Transgender, and Queer ("LGBTQ+") community. (R.R. 27a.) Penncrest librarians commonly create similar book displays to incorporate "seasonal, cultural, athletic, holiday[], historic and [other] timely themes" as resources for students. (*Id.*)

Glenn Wright, a District contractor working in the school, took a photo of the book display and posted it on his personal Facebook account, along with the statement: "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." (R.R. 25a.)[1]

One hour later, David Valesky—a District school board member—shared the post on his personal Facebook page. (R.R. 29a.) In the post, which included Wright's language targeting an audience of "Maplewood/PENNCREST parents," Valesky stated: "Besides the point of being totally evil, this is not what we need to be teaching kids." (*Id.*) He added that the school children "aren't at school to be brainwashed into thinking homosexuality is okay." (*Id.*)

Within hours, at least three other District board members weighed in on Facebook. Board member Robert Johnston was one of at least twelve people who commented on Valesky's post. (R.R. 27a, 29a.) He stated on Facebook—in language that has since been deleted or made private—that "we will be investigating the origin" of the book display. (R.R. 27a.) A third board member, Luigi DeFrancesco, shared Wright's post on his own personal Facebook page without additional comment. (R.R. 25a, 27a.) And a fourth board member, Jeff Brooks, used his personal Facebook page and his "Jeff Brooks for Penncrest" Facebook page to

[1] "Facebook is a social networking website. Users of that Web site may post items on their Facebook page that are accessible to other users, including Facebook friends who are notified when new content is posted." *Carr v. Dep't of Transp.*, 230 A.3d 1075, 1077 n.1 (Pa. 2020) (internal quotations omitted). Posting directly on a Facebook page is different from posting in a closed Facebook group, which "allows only current members to post, comment or share in the group." *Id.* at n.2.

address DeFrancesco's post and Valesky's comments. (R.R. 26a–27a.) The posts and comments by Valesky, DeFrancesco, Johnston, and Brooks and comments on those posts are collectively referred to herein as the "Facebook posts."

The officials' use of personal accounts to discuss matters affecting the District was consistent with their practice on other District-related issues. DeFrancesco, Valesky, and Johnston are members of a private Facebook group that regularly discusses District business. (R.R. 64a–68a.) Moreover, the District did not forbid the use of personal accounts by school board members and employees to discuss District-related matters.[2]

After the posts, interest in the District's treatment of LGBTQ+ students and related policies quickly intensified. DeFrancesco and Valesky soon made their Facebook posts and comments private or removed them. (R.R. 57a, 58a, 61a–62a.)[3] A citizen petition to recall DeFrancesco as a board member based on the Facebook statements also began circulating. (R.R. 20a.)

Valesky subsequently explained his opposition to the display by stating that "he was against the school 'pushing' such topics [i.e., "sex" and "who [students]

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[2] Even under the District's current social media policy, last amended after the Facebook posts, the District recognizes but does not prohibit job-related speech on officials' personal social media accounts. (R.R. 49a.)

[3] Brooks' Facebook posts and the comments in response remain online and are public; therefore, Cagle's request does not seek these documents. (R.R. 11a, n.1.)

should be interested in"], and that "he plan[ned] to bring the matter up at the next [Penncrest] School Board meeting . . . assuming it ha[d] not been resolved before then." (R.R. 27a–28a.) However, as DeFrancesco told a reporter—in an exchange on his official Penncrest email account—"the display situation was cleared on 5/27/21," making further action on the display "moot" in his view. (R.R. 21a.) Nevertheless, the book display and District policy impacting it were discussed at school board meetings, which hundreds of people attended. (R.R. 11a, 16a, 36a, 54a.)

In January 2023, the school board revised its policy with respect to standards for books available in District schools. (R.R. 144a, 153a.) DeFrancesco, Valesky, and Johnston (the members who opposed the LGBTQ+ book display on social media) all voted in favor of the new policy, which required removing books containing "sexualized content" from the District's libraries. (R.R. 155a–156a.)

Board member Jennifer Davis voted against the policy based on what she described as the board's lack of transparency, stating that "it's embarrassingly clear that there's [*sic*] members of the board who are meeting on evenings when we are not all present," and "[had] all figured this out before [they] got here." (R.R. 140a (*citing* video of Jan. 12, 2023, Penncrest Sch. Bd. Mtg., Armstrong Neighborhood

Channel, at 1:51:45–1:52:30)).[4] Board member Timothy Brown also expressed concern that some board members had "broken the Sunshine Law" by engaging in private deliberations, and he observed that five members were "spot on all the time" voting together. (*Id.* at 1:56:15–1:56:36.) Davis resigned from the school board in protest later that evening. (*Id.* at 2:00:16–2:01:29.)[5]

In reliance on the revised book policy, the District later removed thirteen books from its libraries for review, including *To Kill a Mockingbird* and *Beyond Magenta: Transgender Teens Speak Out*. (R.R. 163a–166a.)

B. The Request for Records

Appellant Thomas Cagle became aware of the board members' once-public Facebook statements shortly after the posts occurred. He suspected that other deliberations among board members were occurring outside of public view.

Accordingly, on June 17, 2021, Cagle submitted a Right-to-Know Law ("RTKL") request to the District seeking written correspondence from Valesky and DeFrancesco to District officials, employees, or students regarding homosexuality.

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[4] *Available at* https://www.youtube.com/watch?v=F9GIrIp-1J4&list=PLkptoHBsAOEP_RrLnQvboHgHxbc1jvKQE&index=7&t=5834s.

[5] Appellant applied to the Commonwealth Court to supplement the record with the board meeting recordings cited in this paragraph; that application is included in the Reproduced Record. In the determination under review on appeal, the Commonwealth Court denied the "application for relief as moot" without further explanation. (App. A at 30.) This Court should reverse that holding and may, in any event, take judicial notice of statements during the school board meetings, which can be "accurately and readily determined" from the recordings. Pa. R. Evid. 201(b)(2).

(R.R. 23a–24a.) Cagle also sought disclosure of Facebook posts and comments by Valesky and DeFrancesco "relating to homosexuality and Penncrest School District, its officials, employees, or students, or its curriculum, physical recourses [*sic*], or electronic resources," and all comments to these Facebook posts. (R.R. 24a.)

In July 2021, the District responded to Cagle by providing three emails that Valesky and DeFrancesco sent to reporters about the book display controversy using the board members' District email addresses. (R.R. 17a.) The District denied Cagle's RTKL request as it pertained to Facebook materials because it contended that "no such posts or comments exist[ed] for District-owned Facebook accounts." (R.R. 17a–18a.) It emphasized that "Facebook posts and comments may exist on other social media accounts" but treated those as outside the RTKL's scope. (*Id.*)

C. The Litigation

Cagle appealed to the Office of Open Records ("OOR"). The District never asserted in the proceedings that an RTKL exemption or privilege permitted withholding the documents. (R.R. 30a–34a.) The OOR ordered the District to disclose all responsive documents, including information constituting a government record on board members' personal Facebook accounts. (*See* App. C.)

The District appealed OOR's decision to the Court of Common Pleas of Crawford County, which ruled in favor of Cagle and ordered release of the requested records, regardless of whether they were on private or public accounts. As that court

explained, the Facebook posts "involve communications between two Board members directly related to a transaction, business or activity within the [Board's] core oversight responsibilities," and are thus "records" subject to the RTKL. (App. B at 4.) The court emphasized that 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." (*Id.* at 5.)

A sharply divided panel of the Commonwealth Court reversed, concluding that the common pleas court had applied the wrong legal standard to determine whether the Facebook posts were "records" under the RTKL. (App. A at 30.) Although the Commonwealth Court briefly cited the RTKL's definition of "record," it went on to identify a "list of nonexclusive factors" that, in its view, bear on what constitutes a record in the context of social media. (*Id.* at 26.)

The factors identified by the Commonwealth Court encompass (1) the trappings of the account, including whether the government official "has an actual or apparent duty to operate the account or whether the authority of the public office itself is required to run the account," (*id.* at 27); (2) whether the "posts prove, support, or evidence a transaction or activity of an agency," a term that the court defined to mean that the posts were not "merely informational in nature," (*id.* at 28); and (3) whether the posts were made in a person's "official capacity," a term the court used to mean "produced under the agency's authority or subsequently ratified,

adopted, or confirmed by the agency, i.e., authorized activity," (*id.* at 29). (*See also id.* ("We may consider whether the agency required the posts, the agency directed the posts, or whether the posts furthered the agency's interests.").)

For the second and third of these factors (regarding "informational" documents and an "official capacity" requirement), the Commonwealth Court expanded on prior case law it had adopted outside the social media context. (*See id.* at 28–29.)

The Commonwealth Court ordered that the case be remanded to the common pleas court for application of the new standard. This appeal followed.

SUMMARY OF ARGUMENT

Under the RTKL, an agency "record" includes any statement made by public officials that bears a substantial nexus to the agency's function or responsibilities. This standard applies regardless of whether the statement is made through government or personal channels of communication, and irrespective of whether the information is contained in old-fashioned letters, notes, emails, text messages, or—as in this case—Facebook posts.

The Commonwealth Court rejected this straightforward statutory standard, in favor of a convoluted test for determining whether materials on personal social media accounts are "records." Its decision should be reversed.

First, a "record" includes any information that documents an agency's activity

and is created or received in connection with that activity. *See* 65 P.S. § 67.102. The Facebook posts in this case were created or received by school board members; address the members' views on homosexuality in the context of District functions, like staffing, curriculum, and resources; and have never been claimed by the District to qualify for one of the RTKL's exemptions from disclosure. Accordingly, the Facebook posts are "records" that must be disclosed.

Second, the Commonwealth Court's standard for a "record" in this case is at odds with the RTKL's text and structure. That standard ignores the law's single, uniform definition of "record," regardless of a document's form or electronic nature. It is also refuted by RTKL provisions that recognize informational materials can document an agency's activity in a way that brings them within the RTKL's scope. And the Commonwealth Court's expansion of its "official capacity" requirement is untethered to statutory text and not limited to social media cases. Contrary to that court's rationale, federal civil rights cases imposing this requirement are inapt.

Third, even if the RTKL's definition of "record" is ambiguous, other indicia of statutory meaning foreclose the Commonwealth Court's standard. That test eviscerates the RTKL's reach and is unnecessary to protect government officials' legitimate privacy interests, which existing statutory and constitutional protections already address. The standard below also creates perverse incentives for officials to use private accounts to discuss public business, making the digital security of such

records less safe than they would be on public accounts. And it weakens the ability of requesters and courts to review an agency's decision to withhold records by examining affidavits and reviewing documents *in camera* because an agency would not need to reveal that it is withholding documents that it does not consider "records." The Commonwealth Court's standard makes Pennsylvania an anomaly among peers, instead of a state with strong, preeminent open records laws.

ARGUMENT

I. The RTKL's text and structure require the conclusion that the posts are "records" subject to disclosure.

The RTKL requires disclosure of public records upon request. *See* 65 P.S. § 67.701(a). Under the RTKL, "agency records are presumed to be public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific, enumerated exceptions or are privileged." *Bowling*, 75 A.3d at 457; 65 P.S. § 67.305(a). In a sharp break from its statutory predecessor, the RTKL places the burden on the government to demonstrate that a record can be withheld from the public. *See McKelvey v. Pa. Dep't of Health*, 255 A.3d 385, 399–400 (Pa. 2021). The law "'is designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.'" *Am. Civil Liberties Union of Pa. v. Pa. State Police*, 232 A.3d 654, 656 (Pa. 2020) (internal quotation marks omitted).

Applied correctly, the text and structure of the RTKL make clear that the requested documents in this case are "records" subject to disclosure.

A. The RTKL broadly defines covered records and an agency's disclosure obligations.

The RTKL's definition of "record" is owed a "liberal construction." *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013). The term refers to any "information" 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. This definition remains consistent "regardless of [the] physical form or characteristics" of a document: A "record" can encompass not only papers, but also "information stored or maintained electronically," photographs, film or sound recordings, and maps. *Id.*

An agency's RTKL obligations extend to all "record[s]" in its "possession, custody or control." 65 P.S. § 67.901. Even constructive possession is sufficient to trigger an agency's statutory obligation either to release a requested document or to justify its withholding under an RTKL exemption or privilege. *Trib.-Rev. Pub. Co. v. Westmoreland Cnty. Hous. Auth.*, 833 A.2d 112, 118 (Pa. 2003).

Once an agency's open records officer is in receipt of an RTKL request, the officer has a duty to "to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession." *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 25

(Pa. 2020). Regardless of where potentially responsive records may be—from file cabinets or boxes to email and other electronic accounts—agency employees and officials far beyond the open records officer play a critical role in ensuring that RTKL responses are complete.

B. Information that Cagle requested is a "record" because it documents activity of the District, was created by District officials, and is within the District's possession and control.

Cagle requested Facebook posts and comments by Valesky and DeFrancesco relating to homosexuality and Penncrest School District, its officials, employees, or students, or its curriculum, physical, or electronic resources, including those removed by Valesky and DeFrancesco. (R.R. 24a.) He also requested all comments, including those deleted or removed, to these Facebook posts. (*Id.*)

Therefore, the relevant questions are whether this information (1) "documents a transaction or activity of" the District, and (2) was "created, received or retained" *either* (a) "pursuant to law," *or* (b) "in connection with a transaction, business or activity of the agency." 65 P.S. § 67.102. If the requested information qualifies as a "record," then the District's RTKL obligations hinge on whether (3) it has possession, custody, or control of the information, either directly or through its officials. 65 P.S. § 67.901.

The documents requested by Cagle undoubtedly meet this standard.

1. The Facebook posts "document[] . . . activity of" the District because they involve officials discussing District functions and operations.

Although the RTKL does not define "activity," its common meaning in reference to an "organization[al] unit" pertains to the organization's "duties or functions." *Activity*, Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/activity (last visited Feb. 13, 2024); *see also, e.g.*, *Activity*, Oxford Dictionary of English (3d ed. 2010) ("the condition in which things are happening or being done," to include not just "action" but also "movement"). In *SWB Yankees LLC v. Wintermantel*, this Court echoed this broad definition, recognizing in an RTKL case that a "government agency's primary activities" may be "defined by statute as essential governmental functions." 45 A.3d 1029, 1044 (Pa. 2012). *Cf.* 65 P.S. § 67.506(d) (providing for disclosure under the RTKL of certain government contractor documents so long as they "directly relate[] to the governmental function" involved in the contract and are not otherwise exempt).

High courts in other states agree with this function and duties analysis. For example, in *City of San Jose v. Superior Court*, the California Supreme Court examined whether documents "relate in some substantive way to the conduct of the public's business." 389 P.3d 848, 854 (Cal. 2017). And in *Nissen v. Pierce County*, the Washington Supreme Court held that records "can qualify as public records if they contain any information that refers to or impacts the actions, processes, and functions of government." 357 P.3d 45, 55 (Wash. 2015).

The District has an obligation "to educate every person" of school-age, and to do so "without discrimination on the basis of a student's . . . sex [or] sexual orientation." 24 P.S. § 5-501(a); 22 P.S.§ 4.4(c). The school board wields tremendous power in carrying out this function. For example, it has broad authority to "adopt and enforce" rules regarding "school affairs" and the "conduct and deportment" of school employees and students. 24 P.S. § 5-510. The school board also has responsibility for the purchase of "textbooks [and] school supplies." 24 P.S. § 8-801. Discussions by school board members about homosexuality in reference to District policy, students, curriculum, and resources thus relate to the District's functions and responsibilities, i.e., its "activity" under the RTKL.

Similarly, although the RTKL does not define the verb "document," its common meaning is broad, encompassing any activity that "record[s] (something) in written, photographic, or other form." *Document,* Oxford Dictionary of English (3d ed. 2010). This definition makes sense for the RTKL, given the law's admonition that an agency is not required to create a record—for example, to compile notes of a verbal conversation—in order to respond to an RTKL request. 65 P.S. § 67.705.

As applied here, Cagle's request seeks Facebook posts to or from members of the school board, and only to the extent those posts relate to *both* "homosexuality" *and* some aspect of the District's work, including its "students, . . . curriculum, physical [resources]," or "electronic resources." (R.R. 24a.) The request is therefore

tailored to uncover information pertaining to the District's duties and functions. Board members' statements like Valesky's—in which he called the book display in a District school "totally evil" and "not what we need to be teaching kids" (R.R. 84a)—bear on the work of the school board by documenting a discussion that occurs between board members about the very issues for which they make decisions as a board. The statements also shed light on board members' views and motivations, furthering accountability for board actions that result. (R.R. 20a, 36a.)

The requested Facebook posts document an activity of the District because they record discussion between District officials regarding the District's functions and operations as a government agency.

2. District officials created, received, and retained the Facebook posts in connection with activity of the District because the posts reference and discuss core functions and responsibilities of the District.

In addition to "document[ing] a[n] . . . activity of" the District, the Facebook posts were "created, received or retained . . . in connection with a transaction, business or activity of the agency." 65 P.S. § 67.102.

There is no question that the first portion of this requirement is met here: school board members created, received, and retained the Facebook posts, and those actions are attributable to the district. For example, it has long been the rule in Pennsylvania that a record is retained by an agency if it is possessed by an official or other agent of the agency. *Trib.-Rev. Pub. Co.*, 833 A.2d at 118. *Accord City of*

San Jose, 389 P.3d at 857.

The salient issue is, therefore, whether the Facebook posts were "in connection" with an activity of the District. "In connection with" means "together with," "in conjunction with," or "[w]ith reference to." *In connection with (idiom)*, Webster's New World Dictionary (3d ed. 1994).

The Facebook posts clearly refer to the District's functions and responsibilities, including those of board members. Because Cagle's request seeks Facebook posts and comments by school board members, it exclusively seeks material either created by the members or received by them in response to their original posts. (R.R. 24a.) And as noted above, the RTKL request does not seek just *any* comments by the board members on homosexuality—such as private ones they might exchange with friends or family—but instead asks for those statements in relation to the District's staff, students, curriculum, or resources. (*Id.*)

Although the public cannot know the full range of records that fall into this category, the once-public posts described in the record of this case are illustrative. The contractor's original post shared by Valesky and DeFrancesco is specifically targeted at an audience of "Maplewood/PENNCREST parents," expressly refers to "Maplewood High School Library," and includes a photograph taken by the contractor in the course of his work at the school. (R.R. 25a.) Valesky's sharing post addressed whether the book display was "what we need to be teaching kids." (R.R.

29a). After journalists reached out on their District emails, Valesky responded by saying "I make no apology for what I posted on social media. . . . I do not believe homosexual books or clubs have any place in our schools." (R.R. 19a.) He also discussed the book display with the Penncrest superintendent and planned to bring it up at the next Penncrest School Board meeting. (R.R. 27a–28a.) Accordingly, the records at issue are not those that involve private conduct by board members; instead, they are records created and received by board members in connection with their duties as board members.

3. The District must release the Facebook posts because they were in its "possession, custody or control" at the time of the RTKL request.

The District has an obligation to release public records in its "possession, custody or control." 65 P.S. § 67.901. In its RTKL response, the District did not deny it had such authority with respect to the requested documents. Instead, it stated that no responsive records existed on *District-owned* Facebook accounts and that posts and comments may exist on *other* accounts. (R.R. 17a–18a.)

That is insufficient to meet the District's burden under the RTKL. Constructive possession triggers an agency's statutory obligation either to release a requested document or to justify its withholding under an RTKL exemption or privilege. *Dental Benefit Providers, Inc. v. Eiseman*, 124 A.3d 1214, 1223 (Pa. 2015). And an agency controls or constructively possesses a document if it is possessed by an official or other agent of the agency. *See Trib.-Rev. Pub. Co.*, 833

A.2d at 118. *See also Barkeyville Borough v. Stearns*, 35 A.3d 91, 96 (Pa. Commw. Ct. 2012) (holding that "emails from individual Council members' personal accounts [were] subject to the Borough's control" under RTKL); *Dep't of Lab. & Indus. v. Earley*, 126 A.3d 355, 356 & n.3 (Pa. Commw. Ct. 2015) (describing employee affidavits attesting they had "made a good faith effort to determine whether [they had] possession, custody or control of" records).

That rule makes sense: "Just like a private corporation, any governmental agency or political subdivision . . . can only act or carry out its duties through real people—its agents, servants or employees." *Moon Area Sch. Dist. v. Garzony*, 560 A.2d 1361, 1366 (Pa. 1989). And the rule aligns with similar standards in the discovery context. *Trib.-Rev. Pub. Co.*, 833 A.2d at 118.

Other states also recognize constructive possession in the open records context. In *City of San Jose*, the California Supreme Court stated "A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things." 389 P.3d at 855. *See Nissen*, 357 P.3d at 52.

And at least in the context of email, the District appears to agree: Both Valesky and DeFrancesco submitted affidavits during the litigation that—although notably silent with respect to social media accounts—explain that the officials searched their personal email accounts for District records in response to Cagle's

request. (R.R. 81a–84a.) There is no reason that personal social media accounts warrant different treatment.

II. The Commonwealth Court's test conflicts with the RTKL's language and structure.

The Commonwealth Court's standard hinges on (1) the trappings of an account, such as whether an official or employee is required by the government to maintain it, (2) whether the "posts prove, support, or evidence a transaction or activity of an agency," or are "merely informational in nature," and (3) whether the posts are made in a person's "official capacity," a term the court explained as "produced under the agency's authority or subsequently ratified, adopted, or confirmed by the agency, i.e., authorized activity." (App. A at 27–29); *see Wyoming Borough v. Boyer*, 299 A.3d 1079, 1085 (Pa. Commw. Ct. 2023) (elaborating on this standard in a case involving a mayor's social media posts).

Each of these components of the Commonwealth Court's standard is erroneous.

A. The Commonwealth Court erred in focusing on the "trappings" of a social media account in which information appears because this creates separate tests for social media and all other information.

The Commonwealth Court's holding that social media accounts should be examined for their "trappings" treats social media differently from all other information potentially subject to the RTKL. This holding cannot be squared with

the law's text. The RTKL supplies one definition—and *only* one—for the term "record." 65 P.S. § 67.102.

"Generally, the best indication of legislative intent is the statute's plain language." *Bowling*, 75 A.3d at 466. Here, the RTKL's universal definition of "record" makes clear that it applies regardless of a document's "physical form or characteristics," and it expressly contemplates "information stored or maintained electronically." 65 P.S. § 67.102. It does not matter under the RTKL whether a Facebook page has, for example, the District's logo, just as it would not matter if a memorandum is on the District's letterhead. There is no dispute that emails on officials' private accounts can be subject to the RTKL, a proposition accepted by the District and endorsed in other cases by the Commonwealth Court. *See* (R.R. 127a); *Stearns*, 35 A.3d at 99. It should likewise make no difference whether a social media post appears on a personal or government-owned account.

The Commonwealth Court erred when it created a test that treats social media differently from other information under the RTKL.

B. The Commonwealth Court's crabbed view of when information "documents" agency "activity" cannot be squared with the statute.

The Commonwealth Court narrowly defined how a record may "document" an agency's "transaction, business, or activity" for purposes of the RTKL. It began by focusing on the verb "document," which it had already defined narrowly in non-social-media cases to mean whether material will "prove, support, or evidence" an

agency action. (App. A at 7.) *See, e.g.*, *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 91 (Pa. Commw. Ct. 2013) (collecting cases). In a contraction of its prior precedent, the Commonwealth Court also held that material cannot "document" an agency activity if is "merely informational." (App. A at 7.)

The Commonwealth Court's narrow definition for "document," particularly as constrained by the decision below, is at odds with the far broader definition for "document" and the presumption that the RTKL be liberally construed. *See supra* Part I.B.1; *Levy*, 65 A.3d at 381. Moreover, the narrow definition below is inconsistent with numerous other portions of the RTKL. For example, the statute expressly provides that records may include "map[s]" and "photograph[s]," refuting the Commonwealth Court's suggestion that posts that are "informational in nature" cannot document an agency's activity. (App. A at 28.) Similarly, in *Reese v. Pennsylvanians for Union Reform*, this Court found that a "list" of government employees "qualifies as a 'record' under the RTKL." 173 A.3d 1143, 1158, n.22 (Pa. 2017). Maps, photographs, and lists are all informational in nature and would likely not be subject to disclosure under the Commonwealth Court's standard.

The Commonwealth Court's distinction between statements that prove or support an agency action and those that are "informational" is also refuted by numerous RTKL exemptions. For example, the RTKL exempts from disclosure some but not all government records submitted to an agency by private parties, such

as those "that constitute[] or reveal[] a trade secret." 65 P.S. § 67.708(b)(11). These documents often say nothing on their face about the agency, but the reason for and the fact of their existence in government files nevertheless reveal important aspects of an agency's oversight or its capture with respect to regulated entities. *E.g.*, *Smith on Behalf of Smith Butz, LLC v. Pa. Dep't of Envtl. Prot.*, 161 A.3d 1049, 1063–66 (Pa. Commw. Ct. 2017). The RTKL also exempts some "environmental reviews, audits or evaluations made for . . . an agency" and some "museum materials, or valuable or rare book collections." 65 P.S. §§ 67.708(b)(22), (24). These records are also informational in nature.

Because "each section of [the RTKL] must be read in conjunction with one another and construed with reference to the entire statute," these exemptions foreclose the Commonwealth Court's manufactured distinction between informational documents and those proving or supporting a formal agency action or decision. *Bowling*, 75 A.3d at 466. If the Commonwealth Court's standard were correct that informational documents are not "records," the Legislature would have no reason to create these statutory exemptions. The exemptions would become mere surplusage, which violates the principles of statutory construction. *See, e.g.*, *Pa. State Police v. Grove*, 161 A.3d 877, 894, n.18 (Pa. 2017).

The Commonwealth Court erred because the RTKL includes "informational" material within the definition of a record and within exemptions to certain records

that are informational.

C. The Commonwealth Court's "official capacity" requirement has no support in the text or structure of the RTKL.

The Commonwealth Court erred by incorporating an "official capacity" requirement into the test for determining whether social media posts constitute records under the RTKL. As used by the Commonwealth Court, this "official capacity" analysis hinges on whether an official's statement is directly authorized, adopted, or ratified by the agency, or is in the agency's best interests. (App. A at 29.)

The Commonwealth Court offered no textual justification for importing this "official capacity" requirement, which it has also applied in other cases not involving social media. *See, e.g.*, *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1264 (Pa. Commw. Ct. 2012). The words "official capacity" do not appear anywhere in the RTKL. And although the Commonwealth Court cited to precedent under 42 U.S.C. § 1983, that is a civil rights statute permitting suit against individuals in their official or private capacity. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). It does not remotely resemble the RTKL and there is no indication that the Legislature intended to model the RTKL on Section 1983.

The structure of the RTKL also refutes the "official capacity" requirement fashioned by the Commonwealth Court. The RTKL makes clear that even informal discussions "of an agency, its members, employees or officials" can constitute "records," irrespective of whether those discussions lead to an agency decision or

advance the agency's interests. 65 P.S. § 67.708(b)(10)(i). In particular, under the RTKL's deliberative-process exemption, officials' informal discussions may be withheld from public disclosure, but only if those discussions are both "predecisional" and "internal" to the agency. 65 P.S. § 67.708(b)(10)(i). If they are not, the discussions are presumed to be "records" under the RTKL that must be released. For example, in *Chester Water Authority v. Pennsylvania Department of Community & Economic Development*, this Court treated "documents reflecting communications among the Department [and outside consulting] firms related to the potential sale of [a] water authority" as "records" under the RTKL and held that they were not shielded by the deliberative-process exemption because outside consultants were privy to them. 249 A.3d 1106, 1109, 1112–13 (Pa. 2021).

If the Legislature wanted to incorporate the Commonwealth Court's "official capacity" standard into the definition of record, it would have said so. The fact it did not is fatal to the Commonwealth Court's standard.

III. Even if the RTKL were ambiguous, the standard below is erroneous because it is at odds with the RTKL's purpose, creates incentives for officials to evade the law, and weakens judicial oversight in RTKL cases.

Although the problems with the Commonwealth Court's standard begin with the RTKL's text and structure, they do not end there. Even if some aspects of the RTKL were ambiguous, the term "record" must be considered in light of "the mischief to be remedied" by the law, "the object to be attained," and "the

consequences of a particular interpretation." *Bowling*, 75 A.3d at 466 (*citing* 1 Pa.C.S. § 1921(c)). In each of these respects, the Commonwealth Court's standard cannot be sustained.

First, the test devised by the lower court would improperly prevent critical access to information about how our government is working. This directly conflicts with the Legislature's goal of creating "a dramatic expansion of the public's access to government documents." *Miller v. Cnty. of Centre*, 173 A.3d 1162, 1168 (Pa. 2017). Under the Commonwealth Court's interpretation of "record," it would be perfectly lawful for government officials to discuss public business in writing with each other, lobbyists, and other influential constituents in secret, even as they sit in government offices in front of government computers, so long as they are exchanging messages or making statements on non-governmental social media accounts. This result would frustrate the RTKL's goal of "empowering citizens by affording them access to information concerning the activities of their government," including less formal statements like those often found on social media, in text message, or on email. *Miller*, 173 A.3d at 1168.

For example, the Commonwealth Court's standard would shield from disclosure statements like those made in New Jersey by aides for then-Governor Christie. Before partially shutting down the George Washington Bridge in 2013 for political reasons, one aide told another through a private account, "Time for some

traffic problems in Fort Lee." Andy Kroll & Molly Redden, *Chris Christie's Bridge Scandal, Explained*, MOTHER JONES (Jan. 8, 2014, 8:54 AM).[6] Those statements were enormously important with respect to government actions and motivation. But under the Commonwealth Court's standard, they would not be "records" because they were not directed or required by—and absolutely did not further the interest of—the Governor's office.

Far from making Pennsylvania among those states with the strongest open records laws, the Commonwealth Court's standard would make the state an anomaly among its peers. *See, e.g.*, SB 1, PN 1583 - Pa. Legis. J., No. 89, Sess. of 2007-2008, *Bill on Third Consideration and Final Passage*, at 1405 (Pa. 2007) (Sen. Pileggi) (describing drafters' awareness of best practices around the country and attempt to be among states with the broadest transparency laws). Notably, in collecting cases regarding access to public records on private email accounts, the Vermont Supreme Court has identified the Commonwealth Court's "official capacity" requirement as an outlier. *See Toensing v. Att'y Gen.*, 178 A.3d 1000, 1006 (Vt. 2017).

Second, the Commonwealth Court's standard would create perverse incentives for public officials to use private accounts to conduct public business,

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[6] *Available at* https://www.motherjones.com/politics/2014/01/chris-christie-bridge-traffic-jam-emails/.

even though they are frequently less secure. *See generally* Nat'l Inst. of Standards and Tech., *Guidelines on Electronic Mail Security* (2007) (explaining the risks of common emails and the extra safety configurations official accounts have).[7] That concern is particularly salient in the context of a school district's records, which may involve personal, sensitive information about minors and their families.

Third, by narrowing the scope of documents that qualify as "records" subject to the RTKL, the Commonwealth Court's standard weakens the ability of requesters and courts to test whether the government has met its burden under the RTKL to justify withholding documents. Where an agency withholds a document on the ground it is protected from disclosure by an exemption or privilege, it has an obligation to produce an affidavit that includes an "[a]dequate description of responsive records" and how their disclosure would trigger one of the statute's exceptions. *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 377 (Pa. Commw. Ct. 2013). *See ACLU of Pa.*, 232 A.3d at 669 (citing *Carey*'s "clear guidance" with approval). Yet no agency would bother with this process—and its potential during litigation to trigger *in camera* review—if the agency could simply treat the document as not a "record" and avoid referring to it altogether in correspondence with a requester.

[7] *Available at* https://doi.org/10.6028/NIST.SP.800-45ver2.

In this respect, the court's standard further entrenches the information gap in open records disputes. A requester's inherent lack of knowledge and the government's incentive to hide already "seriously distort[]" the playing field. *Vaughn v. Rosen*, 484 F.2d 820, 823, 824 (D.C. Cir. 1973). As this Court has recognized, particularly in OOR proceedings that lack discovery and that are intended to be non-adversarial, bureaucracies have a tendency to protect themselves. *See ACLU of Pa.*, 232 A.3d at 666–67. It would also stymy the ability of *in camera* review to serve as "an essential check against the possibility that a privilege [or exception] may be abused." *Id.* at 670.

The information gap between requesters and the government is yet another reason why the Commonwealth Court's standard—and in particular its reliance on Section 1983 case law for an "official capacity" requirement—is misplaced. In a Section 1983 action, a plaintiff involved in the incident that gave rise to the claim may have some knowledge of the facts and can further rely on the discovery process to determine how a social media account is used. Fed. R. Civ. P. 34. In contrast, a requester likely does not have prior knowledge of the information he or she is requesting and OOR proceedings lack a discovery process. The Commonwealth Court's standard would leave the requester with "the unenviable task of blindly countering the agency's" allegation that a document does not meet the definition of a "record." *ACLU of Pa.*, 232 A.3d at 666. Neither the requester nor the OOR would

be able to review discovery or an affidavit from the party with all of the knowledge if the Commonwealth Court's standard is upheld.

Finally, the Commonwealth Court's standard is not necessary to protect the legitimate personal privacy interests of government officials and employees. For example, the RTKL already exempts from disclosure "[n]otes and working papers prepared by" a public official if they are "used solely for that official's . . . own personal use." 65 P.S. § 67.708(b)(12). The Legislature has also crafted exemptions for sensitive information obtained in the employee-employer relationship and more general information about an individual's health, financial, and similar personal information. *Id.* § 67.708(b)(5), (6), (7), & (30).

The RTKL likewise exempts from disclosure all material whose release is prohibited by another federal or state law, including when it is necessary to protect the person's privacy rights under Article I, Section 1 of the Pennsylvania Constitution. *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 731 (Pa. 2020); *Pa. State Educ. Ass'n v. Com., Dep't of Cmty. & Econ. Dev.*, 148 A.3d 142, 157–58 (Pa. 2016). *See Trib.-Rev. Pub. Co v. Bodack*, 961 A.2d 110 at 117 (Pa. 2008). The existence of these exceptions demonstrates that the Legislature has already considered and accommodated legitimate privacy interests where they exist. Those privacy concerns are not at issue in this case because the requested records address only communications about school board business.

In addition to these substantive privacy protections, the RTKL provides procedural mechanisms for ensuring that government officials, employees, and other third parties whose interests are at stake in a public records request receive timely notice and an opportunity to be heard. *See* 65 P.S. §§ 67.707, 67.1101; OOR Statement of Policy 2–3, 8–9 (last revised Sept. 29, 2015).[8] Contrary to the Commonwealth Court's suggestion, this third-party-notice process is a longstanding feature, not a bug, of Pennsylvania's open records regime. (App. A at 8.) *See, e.g.*, *Cent. Dauphin Sch. Dist. v. Hawkins*, 286 A.3d 726, 729, n.1 (Pa. 2022).

Moreover, officials who want to avoid the burden of having to comply with requests that they search for and disclose business-related social media posts and correspondence on personal accounts can simply refrain from using non-government accounts to conduct this official business or they can forward copies of any work-related posts or correspondence to their agency accounts for preservation. For example, federal law requires employees exchanging email on non-governmental accounts to nevertheless "ensure that Federal records sent or received on such systems are preserved." 36 C.F.R. § 1236.22(b).

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[8] *Available at* https://www.openrecords.pa.gov/Documents/RTKL/AORO_Guidebook.pdf.

The Commonwealth Court's decision is contrary to the RTKL's purpose, weakens the judiciary's ability to conduct oversight, and would lead to results at odds with the Legislature's intent to bring sunshine to the public's business.

CONCLUSION

For the foregoing reasons, the Court should reverse the Commonwealth Court's decision and reinstate the Court of Common Pleas' order affirming OOR's determination that the District must disclose all responsive records, including the Facebook posts by Valesky and DeFrancesco.

Respectfully submitted,

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February 15, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pa. R.A.P. 2135 because it contains less than 14,000 words, exclusive of those materials identified as excepted from the word limit in subpart (b) of the rule.

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

/s/ Brian T. Cagle
Brian T. Cagle, Esq.

IN THE SUPREME COURT OF PENNSYLVANIA

PENNCREST SCHOOL DISTRICT, Appellee, v. THOMAS CAGLE, Appellant.	: : : : : : : : :	No. 31 WAP 2023

PROOF OF SERVICE

I hereby certify that on this 15th day of February, 2024, I am serving the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121, pursuant to the Order of the Supreme Court of Pennsylvania dated January 6, 2014, at Judicial Administration Docket No. 418:

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APPENDIX A

April 24, 2023 Opinion and Order of the Commonwealth Court

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Penncrest School District, Appellant	:	
	:	No. 1463 C.D. 2021
v.	:	Argued: October 12, 2022
Thomas Cagle	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE STACY WALLACE, Judge

OPINION
BY JUDGE DUMAS

FILED: April 24, 2023

Penncrest School District (Penncrest) appeals the order from the Court of Common Pleas of Crawford County (trial court), which denied Penncrest's petition for review and essentially compelled disclosure of the records requested by Thomas Cagle (Cagle) under the Right-to-Know Law (RTKL).[1] Upon review, we vacate the order below, remand with instructions, and dismiss Cagle's application for relief as moot.

I. BACKGROUND

In May 2021, a high school library in Penncrest displayed at least six books addressing LGBTQ+ issues in anticipation of Pride Month. A third party photographed the displayed books and then publicly posted the photograph, apparently on that person's own Facebook[2] social media account. Cagle's Answer

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

[2] "Facebook is a social networking website. Users of that Web site may post items on their

to Pet. for Judicial Rev. (Answer), 10/27/21, Ex. C. The third party purportedly commented, "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.*; Penncrest's Reply to Cagle's New Matter, 11/3/21, ¶ 35. Valesky commented: "This is on display at Maplewood High School. Besides the point of being totally evil, this is not what we need to be teaching kids. They aren't at school to be brainwashed into thinking homosexuality is okay. Its [sic] actually being promoted to the point where it's even 'cool.'" Answer, Ex. C. Subsequently, 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.*, Ex. D.

A few days later, a local newspaper published an article about the above

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Facebook page that are accessible to other users, including Facebook 'friends' who are notified when new content is posted." *Carr v. Dep't of Transp.*, 230 A.3d 1075, 1077 n.1 (Pa. 2020) (cleaned up); *Owens v. Centene Corp.*, No. 20-CV-118, 2021 WL 878773, at *5 (E.D.N.Y. filed Mar. 9, 2021) (explaining that a post viewable by the "public" is depicted with a "globe" icon). *Cf. Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019) (distinguishing between Facebook profiles and pages in resolving the existence of state action). Recipients of a post may "like" or comment on a post. *Id.* at 674. "Each like or comment identifie[s] the name of the personal profile or page of the authoring party." *Id.* (cleaned up). Generally, a Facebook user may "block" another person on that user's profile or page, which prevents that person from commenting. *Lindke v. Freed*, 37 F.4th 1199, 1202 (6th Cir. 2022), *petition for cert. filed*, (U.S. Dec. 29, 2022) (No. 22-611).

Generally, federal court decisions are not binding on this Court. *NASDAQ OMX PHLX, Inc. v. PennMont Secs.*, 52 A.3d 296, 303 (Pa. Super. 2012) (*NASDAQ*). However, we typically follow Supreme Court or "Third Circuit precedent in preference to that of other jurisdictions" in resolving a federal issue. *Id.* (citation omitted). But if the Third Circuit has not ruled on a particular issue, we may seek guidance from other federal circuits and district courts. *Id.* It is well settled that we may cite Superior Court cases for their persuasive value. *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 653 n.20 (Pa. Cmwlth. 2021).

social media posts. Office of Open Records (OOR) Op., 8/24/21, at 5-6. The article stated that Valesky intended to bring the matter up at the June 2021 Board meeting. *Id.* at 8.

In June, 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. Pet. for Judicial Review (Pet.), 9/16/21, Ex. A, at 2; *see also id.* at Ex. C, at 1 (alleging that the "posts and comments were later made private or removed").[3] In support, Cagle 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 Ex. C, at 1. Penncrest countered that "LGBTQ+ rights . . . were not" and have not been on the Board's agenda. *Id.* at Ex. D; OOR Op. at 7 (same).

Penncrest's open records officer denied Cagle's requests for the above records. Ltr., 7/7/21.[4] In relevant part, Penncrest essentially denied the request on the basis that no such posts or comments existed for any Penncrest-owned Facebook accounts. *Id.* ¶¶ 3-6.[5]

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[3] The request stated that any information identifying a student could be redacted. *See generally Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 731 (Pa. 2020) (plurality) (holding that the "students' right to informational privacy" "must be considered" in resolving a RTKL request). "Third parties whose personal information is contained within a public record must be afforded notice and an opportunity to be heard in a record request proceeding." *Id.* at 733.

[4] Penncrest provided responsive emails from Valesky's and DeFrancesco's Penncrest email accounts. Ltr., 7/7/21. Penncrest also stated that Valesky and DeFrancesco had no responsive "information from their personal email accounts." *Id.*

[5] Penncrest's petition for review alleges that although Penncrest uses its official "Facebook

Cagle timely appealed to the OOR, which granted relief to Cagle. 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), *appeal filed*, (Pa. Cmwlth., No. 715 C.D. 2021, April 16, 2021). OOR Op. at 7. Per OOR, those decisions 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.* Rather, OOR 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.* at 8.

Penncrest timely appealed to the trial court, which held argument. At argument, the parties disputed whether Cagle's requests were directed to the *personal* social media accounts of Valesky and DeFrancesco, as at that time, Penncrest "did not have its own . . . social media page." N.T. Hr'g, 11/16/21, at 4-5, 11. Cagle argued that at the time, Board members "made Facebook a significant platform for discussing [Penncrest] business, and they regularly post[ed] that . . . business on Facebook." *Id.* at 13.

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 . . .

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page to publicize its activities . . . Penncrest does not intend that its Facebook page be used as a public forum or limited public forum." Pet. at ¶ 15 (cleaned up) (referencing Penncrest's social media policy). Subsequently, Cagle argued that Penncrest's social media policy "wasn't in effect yet" at the time of the posts in question. Notes of Testimony (N.T.) Hr'g, 11/16/21, at 13. But Cagle's argument is inaccurate. Penncrest adopted the policy on June 13, 2019, and revised it on July 8, 2021. Pet., Ex. F, at 1. Cagle probably intended to argue that the *revisions* were not in effect, but no party identified the revisions.

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. Trial Ct. Op., 12/16/21, at 3. 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.* at 4.

Penncrest timely appealed and timely filed a court-ordered Pa. R.A.P. 1925(b) statement, which did not raise a First Amendment claim. *See* U.S. Const. amend. I; Pa. R.A.P. 1925(b) Statement, 1/18/22, at 1-3 (unpaginated). The trial court did not file a Rule 1925(a) opinion.

II. ISSUES

Penncrest raises three issues.[6] First, Penncrest contends that social media posts and comments made to or from the Board members' personal social

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[6] Penncrest's brief violates Pa. R.A.P. 2119(a), which requires that the argument section of its brief "be divided into as many parts as there are questions to be argued[.]" Pa. R.A.P. 2119(a). Penncrest raises three issues but divides its brief into four parts. *See* Penncrest's Br. at 5, 11-26. Also, Penncrest apparently argues that Board members do not lose their First Amendment right to express their opinions on matters of personal interest. Penncrest's Br. at 11-13; *see* Cagle's Br. at 21-22 (criticizing Penncrest's argument as both "confusing and illogical"). Because Penncrest failed to raise this issue in its Rule 1925(b) statement, Penncrest waived the issue for appellate review. *See City of Phila. v. Lerner*, 151 A.3d 1020, 1024 (Pa. 2016).

But even if the issue was preserved, it lacks merit. Penncrest's argument misapprehends the nature of the right: the First Amendment "prohibits only *governmental abridgment* of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (emphasis added); *S.B. v. S.S.*, 243 A.3d 90, 104 (Pa. 2020); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 902 (Pa. 2020); *Oberholzer v. Galapo*, 274 A.3d 738, 754 (Pa. Super.), *appeal granted*, 286 A.3d 1232 (Pa. 2022). The threshold inquiry in any First Amendment challenge is the existence of a state action, *e.g.*, a statute, an ordinance, or a court order, abridging speech. *Halleck*, 139 S. Ct. at 1928; *Wolf*, 227 A.3d at 902-03; *Oberholzer*, 274 A.3d at 754 (explaining that following the identification of the state action, the challenging party must prove the state's restriction on speech is content-based). Penncrest fails to identify the state action at issue, let alone address whether the state action is content-based or content-neutral. *See Wolf*, 227 A.3d at 902-03; *Oberholzer*, 274 A.3d at 754; *accord* Penncrest's Br. at 12 (stating Penncrest "does not regulate speech for members" of the Board).

media accounts are not related to the business of the Board or Penncrest. Penncrest's Br. at 5. Second, Penncrest claims that Board members acting in their capacity as private citizens are able to express their personal opinions by posting or commenting on matters of personal interest via their personal social media accounts without creating a record subject to disclosure. *Id.* Third, Penncrest argues that public attendees of a Board meeting who opine about the Board members' social media posts and comments do not create a record. *Id.*

III. DISCUSSION[7]

Before addressing Penncrest's initial issue, we divide our discussion into several sections to facilitate our disposition. First, we present a general overview of the RTKL process. Specifically, we examine how the RTKL defines "record," including how a "record" must document a transaction or activity of an agency. Second, we review the disclosure of social media activity under the RTKL and similar statutes. This review also addresses conflicting federal precedents in an analogous context. Third, we distill and apply the applicable principles to this case.

A. General Overview of the RTKL

The RTKL "is designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *ACLU*, 232 A.3d at 656 (cleaned up). Under the RTKL, an agency must provide access to a public record upon request. *Cent. Dauphin Sch. Dist. v. Hawkins*, 286 A.3d 726, 741 (Pa. 2022). If the agency wishes to deny a request, then the agency must prove by a preponderance of

[7] Because the trial court was the Chapter 13 reviewing court, we review the trial court's order for an abuse of discretion, which includes an error of law. *Am. C.L. Union of Pa. v. Pa. State Police*, 232 A.3d 654, 662-63, 665 (Pa. 2020) (*ACLU*). For ease of disposition, when we refer to a "post," the term may also include other relevant social media activity, including comments and other electronic forms of communicating on such platforms.

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.*, 75 A.3d 453, 457 (Pa. 2013).[8]

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." 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."

1. "Documents a Transaction or Activity"

With respect to the first phrase, we defined "documents" as "proves, supports, or evidences." *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 91 (Pa. Cmwlth.

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[8] Section 708(a)(1) states: "The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). Section 901 states, "Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request." *Id.* § 67.901.

The *Bowling* Court noted that under the statutory predecessor to the RTKL, *i.e.*, the Right-to-Know Act (RTKA), Act of June 21, 1957, P.L. 390, *as amended, formerly* 65 P.S. §§ 66.1-66.9, repealed by the Act of February 14, 2008, P.L. 6, the burden was on "the *requester* to establish that requested records were public records that he or she was entitled to inspect." *Bowling*, 75 A.3d at 455 (emphasis added). Subsequently, the General Assembly enacted the RTKL, which shifted the burden to the *agency*. *Id.* at 457; *accord ACLU*, 232 A.3d at 669. Section 1101(a)(1) of the RTKL, however, 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, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request." 65 P.S. § 67.1101(a)(1). Section 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.* § 67.305.

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) (*en banc*) (*Second Chance*). For example, this Court held that personal emails sent or received using an agency email address or located on an agency's computers are not "records." *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1264 (Pa. Cmwlth. 2012). We 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.*

Similarly, in *Pennsylvania Office of Attorney General v. Bumsted*, 134 A.3d 1204 (Pa. Cmwlth. 2016), we resolved whether "personal emails sent and received on [an agency's] email address" were "records" under the RTKL. *Bumsted*, 134 A.3d at 1208. The *Bumsted* Court noted that "emails not involving the agency business being sent, received[,] or retained in violation of agency policy regarding use of a work email address for personal emails does not transform that information that was not a . . . record into a . . . record under the RTKL." *Id.* at 1209. Because the requester sought pornographic emails, the *Bumsted* Court reasoned that such emails "cannot relate to any [agency] transaction or activity" and therefore reversed the OOR. *Id.* (cleaned up).

The *Bumsted* Court also posited that "if private emails that have nothing to do with an agency's business are somehow transformed into public records," then that raises privacy issues. *Id.* at 1209 n.10. Agency "employees and third parties who received or sent those emails," the *Bumsted* Court reasoned, "would be required to be given written notice and a meaningful opportunity to object at the request stage to the disclosure of their emails to establish that their release would be an unwarranted invasion of their privacy." *Id.*

2. "In Connection With a Transaction, Business, or Activity"

As for the second phrase, we held that a "record" includes "information created by a private contractor *in connection* with its contractual obligations to the agency." *W. Chester Univ. of Pa. v. Browne*, 71 A.3d 1064, 1068 (Pa. Cmwlth. 2013) (emphasis added); *Second Chance*, 13 A.3d at 1035 (same). For example, in *Browne*, the requester sought from a university the benefit plan of one of the university's contractors. *Browne*, 71 A.3d at 1066. The OOR granted the request, reasoning that the information was "directly related to a contract delegating a governmental function . . . ." *Id.* (cleaned up). The *Browne* Court explained that the benefit plan documented a relationship between the contractor and *its* employees. *Id.* at 1068. But the benefit plan did not relate to any relationship between the contractor and the *agency*, *i.e.*, the benefit plan was "not created *in connection* with [the contractor's] contract with the university." *Id.* (emphasis added and cleaned up). Thus, the *Browne* Court reversed the OOR, reasoning that the contractor's benefit plan did "not document a transaction or activity of the university, nor was it created, received[,] or retained by the university." *Id.* (cleaned up).

Similarly, in *Second Chance*, the trial court ordered the agency to disclose the names, birthdays, and hire dates of a private contractor's employees that provided services to the agency. *Second Chance*, 13 A.3d at 1027. The agency appealed, arguing that it did not possess such information. *Id.* at 1036. The *Second Chance* Court agreed, reasoning that the trial record did not indicate that (a) the agency possessed or created such information, or (b) the information originated from the agency. *Id.* at 1035-36. The Court, however, remanded for further proceedings to resolve whether the requested information was directly related to the contractor's performance of a governmental function under the agency's contract. *Id.* at 1040.

Thus, in cases involving third-party contractors, we have construed the phrase "in connection with" to be related to the contractors' performance of a governmental function. *See Browne*, 71 A.3d at 1068; *Second Chance*, 13 A.3d at 1040. 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. *See Browne*, 71 A.3d at 1068; *Second Chance*, 13 A.3d at 1040.

3. "Of the Agency"

Third, 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[.]" *See* Section 102 of the RTKL, 65 P.S. § 67.102; *Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 715 n.7 (Pa. 2009). In the context of the RTKL, we have explained that the "preposition 'of' indicates a record's origin, its owner or possessor, or its creator." *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.* at 90.

We have examined whether emails of an elected public official were "of the agency," and thus within the scope of the RTKL. For example, in *In re Silberstein*, 11 A.3d 629 (Pa. Cmwlth. 2011), we addressed whether emails on a township commissioner's personal computer were subject to the RTKL. *Silberstein*, 11 A.3d at 630, 633.[9] We held that the commissioner was not a governmental agency

[9] In *Silberstein*, the requester unsuccessfully sought from the township, among other items, emails between a township commissioner and citizens of the township. *Silberstein*, 11 A.3d at 630.

and had "no authority to act alone on behalf of the" township. *Id.* at 633. The 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* York Township, as the local agency, nor would the record have been created, received[,] or retained pursuant to law or in connection with a transaction, business or activity *of* York Township." *Id.* (emphases in original). The *Silberstein* Court thus affirmed the denial of a request for such emails unless those items "were produced with the authority of [the township], as a local agency, or were later ratified, adopted or confirmed by" the township. *Id.*

Similarly, in *Mollick v. Township of Worcester*, 32 A.3d 859 (Pa. Cmwlth. 2011), the requester sought emails stored on the township supervisors' personal email accounts, asserting that "deliberation of township business by a quorum of the [three township] supervisors is an activity of the township." *Mollick*, 32 A.3d at 872 (cleaned up).[10] The *Mollick* Court distinguished *Silberstein* by reasoning that the requester was not requesting emails in which the township supervisor "acted individually, alone, or communicated only with an outside third party." *Id.* at 873. Accordingly, the *Mollick* Court held that "if two or more township

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The township did not disclose any responsive emails on the commissioner's personal computer. *Id.* On appeal, the requester argued that the commissioner is an elected public official, and, as such, is an agency actor and subject to the township's control. *Id.* at 632. The requester thus reasoned that public records may be located on the commissioner's personal email account and computer. *Id.* The commissioner countered that "a distinction 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." *Id.* at 633.

[10] We acknowledge that *Mollick* involved the intersection of the Sunshine Act, 65 Pa. C.S. §§ 701-716, and The Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. § 65101-68701. For purposes of our discussion here, very simply, under the RTKL, a record includes a discussion of township business between a quorum of township supervisors. *See Mollick*, 32 A.3d at 872 & n.21, 874.

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 . . . ." *Id.* at 872. Thus, those exchanged emails would be records "of the township." *Id.* at 872-73.[11]

In *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Cmwlth. 2012), the Court addressed personal emails between borough council members. *Stearns*, 35 A.3d at 93. The *Stearns* Court explained that the emails at issue were public records of the borough, as such emails were created "by public officials, *in their capacity* as public officials, for the purpose of furthering [b]orough business." *Id.* at 97 (emphasis added). The Court therefore affirmed disclosure under the RTKL. *Id.* at 98.[12]

In contrast to township commissioners, township supervisors, and borough council members above, in *Baxter*, we addressed a RTKL request for all emails from nine school board members, among other people. *Baxter*, 35 A.3d at

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[11] The *Mollick* Court, however, held that it could not resolve whether the emails exchanged between a quorum of the township supervisors constituted "deliberation of township business" under the Sunshine Act *Mollick*, 32 A.3d at 875 (cleaned up). We concluded that the township's open records officer erred as a matter of law by failing to conduct a good faith review of the requested emails to determine whether such emails were "for the purpose of deliberation of the township's business by a quorum of the supervisors." *Id.* (cleaned up). The Court therefore remanded and instructed the open records officer to conduct that good faith inquiry. *Id.* Thus, it appears that "personal" emails, *i.e.*, emails not deliberating township business, between a quorum would not be "public records." *See id. Cf. Bumsted*, 134 A.3d at 1209.

[12] Unlike *Mollick*, however, the *Stearns* Court did not address whether, in order to qualify as "furthering borough business," it was necessary to find that a quorum or majority of the borough council was required to transact borough business. *See Mollick*, 32 A.3d at 875. The *Stearns* Court also did not discuss whether the emails "were produced with the authority of [the borough], as a local agency, or were later ratified, adopted or confirmed by" the borough. *See Silberstein*, 11 A.3d at 633. However, those issues may not have been before the *Stearns* Court. *See Maloney v. Valley Med. Facilities, Inc.*, 984 A.2d 478, 485-86 (Pa. 2009) (noting that all "decisions are to be read against their facts").

1260. In relevant part, the school district opposed the request, citing *Silberstein*. *Id.* at 1261. Specifically, the district contended that "because individual school board members do not have the authority to act on behalf of the [s]chool [d]istrict, any emails to or from those individuals absent ratification or adoption by the [s]chool [d]istrict do not constitute activity of the *agency* and are not records." *Id.* at 1262 (emphasis in original). However, the *Baxter* Court summarily held that while "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." *Id.* at 1264 (emphasis added and footnote omitted).[13]

In sum, with respect to the disclosure of emails of individual public officials, this Court's precedents are in apparent tension. On one hand, the individual public official must be acting in an official capacity, *i.e.*, acting with the authority of the agency. *See Baxter*, 35 A.3d at 1264; *Stearns*, 35 A.3d at 97. On the other hand, in order to be acting with the authority of the agency, we have suggested that the individuals must have the authority to bind the agency. *See Mollick*, 32 A.3d at 872; *Silberstein*, 11 A.3d at 633.

Although these cases provide useful guidance, email differs from social media as a method of communication. *Cf. Oberholzer*, 274 A.3d at 752 (explaining

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[13] The *Baxter* Court cited *Stearns* in support. *Baxter*, 35 A.3d at 1264. As discussed herein, *Stearns* addressed the issue of emails between members of a borough council, unlike the instant school board, which is subject to the Public School Code of 1949, Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §§ 1-101 to 27-2702. The *Baxter* Court, however, did not explain why it seemingly rejected the *Silberstein* Court's reasoning that an individual public official must have some authority to "act on behalf" of the agency or that the requested information must be produced with the authority of, or otherwise later ratified by, the agency. *See Silberstein*, 11 A.3d at 633. The *Baxter* Court also did not address the *Mollick* Court's reasoning that a township requires a quorum of supervisors in order to conduct business, albeit in the context of the Sunshine Act. *See Mollick*, 32 A.3d at 872-73.

that each medium of expression may require a different analytical framework). Wooden application of principles extracted from our email cases to social media activity may be unwise. *See Maloney*, 984 A.2d at 486. Accordingly, we examine the disclosure of social media activity under the RTKL and similar statutes, as well as when such activity could be considered official state action.

B. Disclosure of Social Media Activity as a Public Record

We begin our discussion with Pennsylvania decisions. Next, we review non-Pennsylvania decisions, including analogous federal precedents.

1. Pennsylvania Jurisprudence

Although no Pennsylvania court has addressed a RTKL request for records of social media activity, the OOR has addressed it in two cases: *Purdy*, 2017 WL 3587346; and *Boyer*, 2018 WL 4293461, which is currently on appeal before this Court. *See* Penncrest's Br. at 14-15; Cagle's Br. at 17. Briefly, in both cases, the OOR granted the request for access to social media posts. *Purdy*, 2017 WL 3587346, at *3; *Boyer*, 2018 WL 4293461, at *4.

In *Purdy*, the requester sought from the borough all Facebook posts and comments from the mayor's private Facebook account. *Purdy*, 2017 WL 3587346, at *1. The borough opposed the request, arguing that the requester sought "records of a private Facebook account because the account was not created, administered[,] or required by the" borough. *Id.* The OOR granted the request, reasoning that the mayor's page (1) contained "discussions and posts regarding" borough activities, and (2) was linked to the borough's page. *Id.* at *3 (citing *Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017), *aff'd sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019)). The OOR considered "immaterial" that the borough had no oversight and did not authorize the mayor's Facebook account. *Id.*

In *Boyer*, the requester solicited from the borough extensive information[14] from the mayor's "public figure" Facebook page. *Boyer*, 2018 WL 4293461, at *1.[15] The borough opposed, arguing that the requester sought records of a private Facebook account not controlled by the borough. *Id.* at *3. Citing *Purdy*, the OOR rejected the borough's argument. *Id.* The OOR maintained that it was required to examine the content of the Facebook page to determine whether it was "used as a significant platform by an elected official to conduct official business." *Id.* The OOR defined "official business" as including the statutory "powers and duties of borough mayors." *Id.*

Following review of the page, the OOR held that "[n]early all of the postings on the face of the page" 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." *Id.* at *4 (cleaned up). Despite the mayor's Facebook page not being authorized by the borough, the OOR reasoned that the mayor "possesse[d] his own set of responsibilities and powers in overseeing the borough as its mayor, and it is apparent that he uses this Facebook page in his role as mayor as a tool to foster community action and engagement." *Id.* (cleaned up). The OOR granted the request, the court of common pleas reversed, and the

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[14] The requested information included all comments, posts, and other electronic messages. *Boyer*, 2018 WL 4293461, at *1.

[15] The *Davison* Court explained the differences between "personal Facebook profiles, which are for non-commercial use and represent individual people," and Facebook "pages" that "help businesses, organizations, and brands share their stories and connect with people" and are "managed by people who have personal profiles[.]" *Davison*, 912 F.3d at 673 (cleaned up).

Further, a Facebook profile is "a private account limited to [5,000] 'friends.'" *Lindke*, 37 F.4th at 1201. A person may convert a Facebook profile to a Facebook "page, which has unlimited 'followers' instead of friends." *Id.* (cleaned up). A Facebook page may be public or private, and a page can be categorized as a "public figure" page. *See id.*

requester's appeal is pending before this Court.

We glean the following. In both decisions, the OOR examined whether (1) the public official's page had the "trappings" of an official agency page, and (2) the contents of the posts reflected agency activities or business. *See Purdy*, 2017 WL 3587346, at *3; *Boyer*, 2018 WL 4293461, at *4. In addressing whether the posts reflected agency activities or business, the OOR considered the public official's statutory duties and powers. *Boyer*, 2018 WL 4293461, at *4.

The OOR's consideration of a public official's statutory obligations seemingly reflects two concerns. First, the concern that a request could encompass a public official's private social media activity using agency resources, *i.e.*, social media activity not documenting an agency's transaction or business. *Cf. Bumsted*, 134 A.3d at 1209 (rejecting request for private emails); *Baxter*, 35 A.3d at 1264 (holding that personal emails using agency resources are not records). Second, the concern that a request for social media activity could encompass *unauthorized* activity by a public official. *See Purdy*, 2017 WL 358734, at *3; *Boyer*, 2018 WL 4293461, at *4. Accordingly, a request for social media activity must reflect activity produced with the agency's authority or otherwise ratified by the agency. *Cf. Silberstein*, 11 A.3d at 633 (denying request for personal emails absent those two conditions); *Stearns*, 35 A.3d at 97 (compelling disclosure of emails created by public officials in their official capacity). In considering the contours of whether such activity was authorized, we have examined whether a public official had the authority to bind the agency. *Cf. Silberstein*, 11 A.3d at 633; *Mollick*, 32 A.3d at 872-73 (opining that emails exchanged between quorum of supervisors may constitute agency business). *But cf. Baxter*, 35 A.3d at 1264 (holding that although an individual school board member has no authority to bind the board, emails to or from

that member in that member's official capacity may be agency business).

2. Non-Pennsylvania Jurisprudence

Having summarized existing Pennsylvania jurisprudence, we next discuss non-Pennsylvania cases. First, we discuss a case from Washington state. Second, we summarize conflicting federal precedents addressing whether an individual public official's social media activity constitutes official state action.

Outside of Pennsylvania, few courts have addressed the disclosure of a public official's social media activity in an RTKL context. For example, a Washington state court resolved whether posts on a city council member's personal Facebook page were subject to disclosure under that state's RTKL equivalent. *West v. Puyallup*, 410 P.3d 1197, 1199 (Wash. Ct. App. 2018). Under Washington law, a public record is "any writing . . . containing information relating to the conduct of government or the performance of any governmental or proprietary function . . . prepared, owned, used, or retained by any state or local agency." *Id.* at 1201 (cleaned up). Initially, the *West* Court concluded that social media activity is a form of written communication that can convey information. *Id.* at 1201-02. Next, the *West* Court reviewed the public official's Facebook posts, which "were merely informational and did not directly address" governmental conduct or performance. *Id.* at 1202. Due to insufficient appellate briefing, the Court presumed that at least some of the posts related to governmental functions. *Id.*

The *West* Court then examined whether the council member prepared the posts on her personal Facebook page in her scope of employment, *i.e.*, "prepared by a government agency." *Id.* at 1202-03. The Court considered three factors: "whether (1) her position required the posts, (2) the city directed the posts, or (3) the posts furthered the city's interests." *Id.* at 1203 (cleaned up). The *West* Court stated

that although the council member's posts "referenced various issues" and occasionally linked to the city's official Facebook posts, they essentially disseminated "general information about the city." *Id.* at 1199-1200, 1204. The Court added that the page itself "was used to provide information to [the member's] supporters." *Id.* at 1204. The *West* Court acknowledged the informational nature of the council member's posts, but held that any benefit to the city was too attenuated to establish that she "was acting within the scope of employment or her official capacity . . . ." *Id.*

Federal circuits have addressed whether a public official was acting in an official capacity when engaging in social media activity, specifically in resolving liability under 42 U.S.C. § 1983.[16] Very simply, when "a state official acts in the ambit of his personal, private pursuits, section 1983 doesn't apply." *Lindke*, 37 F.4th at 1202 (cleaned up). "But the caselaw is murky as to when a state official acts personally and when he acts officially. That imprecision is made even more difficult here, since [courts] must [resolve the issue] in a novel setting: the ever-changing world of social media." *Id.* In other words, case law does not clearly differentiate "between public officials' governmental and personal activities." *Id.* (emphasis omitted). Although Section 1983 differs from the RTKL, both analytical frameworks address whether a public official's action is taken in his or her official capacity. *Compare Leshko*, 423 F.3d at 340, *with, e.g.*, *Stearns*, 35 A.3d at 97.

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[16] The Third Circuit has comprehensively discussed the two categories of state actions claims, as well as the three broad tests used to resolve the existence of a state action in this circuit. *See Leshko v. Servis*, 423 F.3d 337, 340 (3d Cir. 2005); *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009); *see also NASDAQ*, 52 A.3d at 303. Briefly, the "first category involves an *activity* that is significantly encouraged by the state or in which the state acts as a joint participant," and the "second category of cases involves an *actor* that is controlled by the state, performs a function delegated by the state, or is entwined with government policies or management." *Leshko*, 423 F.3d at 340 (emphases in original).

Although the federal circuits have attempted to clarify the Section 1983 case law in this novel medium, they have not settled on a uniform framework. The absence of uniformity derives from how each circuit resolves Section 1983 claims. In other words, the circuits' varied approach to social media activity is less about some profound disagreement and more about each circuit having to adhere to their own unique precedents.

For example, the Sixth Circuit focuses on the Facebook account as a whole, and not on any particular post, in resolving whether a public official runs the account as an official or personal account. *Lindke*, 37 F.4th at 1203. In *Lindke*, Freed was appointed a city manager and revised his Facebook account to reflect his new position. *Id.* at 1201.[17] He also listed the city's website "as his page's website," the city's email address "as his page's contact information, and the city hall address as his page's address." *Id.* (cleaned up).

The *Lindke* Court described Freed as an active Facebook user who (a) shared photos of his child's birthday, visits to community events, and his family's picnics; and (b) posted about "the administrative directives he issued as city manager," and COVID-19 city policies, public health measures, and statistics. *Id.* Lindke responded by criticizing the COVID-19 posts in the comments section. *Id.* at 1201-02. Freed deleted the criticism and eventually blocked Lindke, which led to this suit. *Id.* at 1202.

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[17] Freed used to have a private Facebook profile limited to his "friends," but "he grew too popular for Facebook's 5,000-friend limit on profiles." *Lindke*, 37 F.4th at 1201. Before he was appointed as a city manager, Freed converted his profile to a "'page,' which has unlimited 'followers' instead of friends," and categorized his page as for a "public figure." *Id.*; *see also Davison*, 912 F.3d at 673 (explaining that "unlike personal Facebook profiles, which are for non-commercial use and represent individual people, Facebook Pages . . . help businesses, organizations, and brands share their stories and connect with people. Pages are managed by people who have personal profiles . . . ." (cleaned up)).

In resolving whether Freed was acting in his official capacity, the *Lindke* Court examined whether Freed's ban was "entwined with governmental policies or subject to the government's management or control," *i.e.*, whether Freed acted "pursuant to his governmental duties or cloaked in the authority of his office." *Id.* at 1203 (cleaned up). The Court explained that to resolve whether Freed's "act is fairly attributable to the state[,] we need more background than a single post can provide." *Id.* (cleaned up). Accordingly, the Court examined Freed's social media "page or account as a whole [and] not each individual post." *Id.*

In reviewing the account as a whole, the *Lindke* Court inquired into whether Freed ran "his Facebook page as an official" or as a "personal pursuit." *Id.* In other words, the issue was whether Freed's social media activity was (1) part of his actual or apparent duties, or (2) "couldn't happen in the same way without the authority of the office." *Id.* (cleaned up). In addressing this issue, the *Lindke* Court considered the following nonexclusive factors: whether (1) state law requires the office holder to maintain a social media account; (2) state funds are used in running the account; (3) the account belongs to the state or office itself; and (4) operating the account requires the authority of the office, *e.g.*, the office holder instructs government staff to operate the account. *Id.* at 1203-04.

Applying the above factors, the *Lindke* Court held that Freed's page did not belong to the office, was created prior to Freed taking office, would not be transferred to a successor office holder, and was maintained solely by Freed and not any government employees. *Id.* at 1204-05. Further, Freed's city manager duties did not include operating a Facebook page. *Id.* Although Freed believed that regular communication was "essential to good government," that belief "can't render *every* communication state action." *Id.* at 1205 (emphasis in original). Accordingly, the

Sixth Circuit held that Freed "didn't transform his personal Facebook page into official action by posting about his job. Instead, his page remains personal—and can't give rise to section 1983 liability." *Id.* at 1207; *see also id.* at 1206 (reasoning that Freed's "posts do not carry the force of law simply because the page says it belongs to a person who's a public official").

The Sixth Circuit acknowledged that the Second, Fourth, Eighth, and Eleventh Circuits focus "on a social-media page's purpose and appearance" and find state action exists if the presentation of that account "is connected with the official's position." *Id.* at 1205-06.[18] The *Lindke* Court rejected that focus, essentially reasoning that Sixth Circuit precedent required more than a facial examination. *See id.* at 1206.

We briefly discuss the approaches taken by the Fourth, Eighth, and Ninth Circuits.[19] In *Davison*, the Fourth Circuit reasoned that the public official created and administered the social media account at issue to further her duties as an elected official. *Davison*, 912 F.3d at 680. She used the account to notify the public about official activities and solicit the public's input on various policy issues. *Id.* The *Davison* Court also held that the account had "the trappings of her office," including a "governmental official" category and her official email address and telephone number. *Id.* The Fourth Circuit thus held that the official's social media ban was a state action for Section 1983 purposes. *Id.* at 681.

The Eighth Circuit also reviewed a public official's social media

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[18] *See Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), *vacated*, 141 S. Ct. 1220 (2021); *Davison*, 912 F.3d at 680; *Campbell v. Reisch*, 986 F.3d 822, 826 (8th Cir. 2021); *Charudattan v. Darnell*, 834 F. App'x 477, 482 (11th Cir. 2020) (*per curiam*).

[19] The Second Circuit decision was vacated, and the Eleventh Circuit decision is non-precedential. Following *Lindke*, the Ninth Circuit issued its decision in *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022), *petition for cert. filed*, (U.S. Oct. 4, 2022) (No. 22-324).

account and concluded that the official had essentially used it for campaigning. *Campbell*, 986 F.3d at 823. Upon being elected, the official sporadically "tweeted[20] about her work as a state representative" and "specific legislation," and used her account "to engage in discourse about political topics and/or to indicate her position relative to other . . . officials." *Id.* at 824 (cleaned up). Notwithstanding such posts, the *Campbell* Court held that the official's post-election use of the social media account was substantially similar to her pre-election use, and therefore the official's ban was not a state action. *Id.* at 826.[21]

In *Garnier*, the Ninth Circuit similarly examined whether two school board members' use of their social media accounts furthered their official duties. *Garnier*, 41 F.4th at 1170. In that case, the board members created their accounts to promote their campaigns for office. *Id.* at 1163. After winning, the members revised their accounts to reflect their current office and posted about various school district "goings-on," school board meetings, and important board decisions. *Id.*

The *Garnier* Court reviewed the members' social media accounts' appearance and their content, and it held that the members acted as state actors when they blocked constituents. *Id.* at 1171. First, the members identified themselves as public officials in their accounts and the overwhelming content of the posts were devoted to publicizing official board activities. *Id.* Second, they used "their social media pages as official outlets" for performing their board duties, which "had the purpose and effect of influencing" others. *Id.* (citation omitted). Third, the

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[20] The term "tweet" is defined as a "*post* made on the Twitter online message service," which is a social media platform. *Tweet*, Merriam-Webster (emphasis added).

[21] The *Campbell* Court distinguished *Davison* on the basis that the official's infrequent social media use for official government activity was outweighed by the frequency of posts emphasizing "her suitability for public office." *Campbell*, 986 F.3d at 827. Thus, somewhat similar to the Sixth Circuit, the *Campbell* Court also considered the volume of posts.

members' "management of their social media pages related in some meaningful way to their governmental status and to the performance of their duties." *Id.* (cleaned up). The *Garnier* Court rejected the members' arguments that their accounts were campaign pages and that the state did not fund or authorize them. *Id.* at 1172. With respect to the latter, the Ninth Circuit held that their accounts did not contain any disclaimer that the members' statements were not made in an official capacity. *Id.*

C. Application of the RTKL to Social Media

With that background in mind, we begin by summarizing Penncrest's argument in support of its first issue and then discuss our framework for applying the RTKL to social media activity. On appeal, Penncrest argues that although Valesky and DeFrancesco are public officials, they created the social media posts on their personal social media accounts in their personal capacities. Penncrest's Br. at 14-15, 20. In Penncrest's view, even if their personal social media posts reflect Penncrest's activities, those posts are not "records" under the RTKL. *Id.* at 17. Penncrest reasons that the posts "did not document, prove, support, or evidence any [Penncrest] transaction or activity . . . ." *Id.* Penncrest similarly explains that the posts "were not created, received, or retained in connection" with any Penncrest transaction or activity. *Id.* at 17-18.

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;[22] (2) it was created, received, or

[22] *See, e.g.*, *Baxter*, 35 A.3d at 1264 (excluding personal emails); *Bumsted*, 134 A.3d at 1209 (precluding pornographic emails).

retained in connection with an agency's transaction, business, or activity;[23] and (3) it was created by, originated with, or possessed by the agency.[24]

In Pennsylvania, the OOR held that information on a borough mayor's private social media account were records because they discussed borough activities. *Purdy*, 2017 WL 3587346, at *3. The OOR similarly held that information from a borough mayor's "public figure" Facebook account were records "of the borough" because the account, although not authorized by the borough, was used to engage the community. *Boyer*, 2018 WL 4293461, at *4.

In Washington, the *West* Court examined whether the public official's position required the posts, the city directed the posts, or the posts furthered the interests of the city. *West*, 410 P.3d at 1203. The Court rejected the record request because, *inter alia*, the posts did not further the city's interests and the council member was not acting in her official capacity. *Id.* at 1204.

Federal circuits have identified various factors in resolving whether a public official's social media activity constituted state action, *i.e.*, was in the scope of his or her official capacity. *See, e.g.*, *Lindke*, 37 F.4th at 1203; *Davison*, 912 F.3d at 680; *Campbell*, 986 F.3d at 826; *Garnier*, 41 F.4th at 1170. The Sixth Circuit reviews the Facebook account "as a whole" and "not each individual post" to resolve whether the public official used the account in an official or personal capacity.

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[23] *See, e.g.*, *Browne*, 71 A.3d at 1068 (explaining that a private contractor only had to disclose information created in connection with the agency's governmental functions).

[24] *See, e.g.*, *Bagwell*, 76 A.3d at 91; *Silberstein*, 11 A.3d at 633 (excluding a public official's personal emails as they did not prove, support, or evidence agency activity and would not be created, received, or retained by the agency); *Stearns*, 35 A.3d at 96-97 (holding personal emails at issue exchanged between borough council members were records "of the borough"); *Baxter*, 35 A.3d at 1264 (holding that emails to or from an individual school board member may be records of the board if that individual acted in an official capacity). *Cf. Mollick*, 32 A.3d at 872-73 (remanding to resolve whether emails exchanged between two township commissioners would be information "of the township" under the Sunshine Act and The Second Class Township Code).

Lindke, 37 F.4th at 1203. Therefore, the Sixth Circuit examines, *inter alia*, whether state law requires the office holder to maintain a social media account; state funds are used to run the account; the account belongs to the person or the office itself; and operating the account requires the authority of the office. *Id.* at 1203-04.

In contrast, three other circuits weigh the contents of the social media posts more heavily, in addition to examining the purpose and appearance of the account as a whole. *See Davison*, 912 F.3d at 680 (noting the posts furthered the public official's duties by notifying the public about official activities and requesting the public's input on policy issues); *Campbell*, 986 F.3d at 826 (concluding the vast majority of posts both pre- and post-election were campaign-related); *Garnier*, 41 F.4th at 1171 (stating that the vast majority of posts were for official activities).

If a public official posts on the agency's official, authorized social media account, then the RTKL analysis appears relatively straightforward. Presumptively, such posts would be public records. However, if a public official posted a personal social media post, *e.g.*, a family birthday, wedding, or other gathering, on the agency's social media account, the post probably would not be a record.[25] A record must document an agency transaction or activity and be created in connection with agency business. *See Baxter*, 35 A.3d at 1264.

But we are not faced with such a seemingly straightforward analysis. Instantly, we must resolve whether a public official's public post on his *personal* social media account is an agency "record." *See* 65 P.S. § 67.102.[26] As the *Lindke*

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[25] We emphasize that suggested holdings to hypothetical examples are *dicta*. For one thing, the content of posts is not necessarily so easily categorized as either "personal" or "not personal."

[26] As noted herein, the posts at issue were flagged "public," and thus viewable by the public before the posts were flagged "private" or removed. No party has argued that the change in status of the posts, *i.e.*, from public to private or deletion, is a basis for non-disclosure. Further, no party has argued that the mere act of "sharing" a third-party's post is outside the scope of the RTKL.

Court colloquially framed the issue: "the caselaw is murky as to when a state official acts personally and when he acts officially" in the novel medium of social media. *See Lindke*, 37 F.4th at 1202.

Under our email jurisprudence, we would consider whether the school board member created the post with the school board's authority or the post was later ratified by the school board, *Silberstein*, 11 A.3d at 633, *i.e.*, in the school board member's official capacity. *See, e.g.*, *Mollick*, 32 A.3d at 872-73; *Baxter*, 35 A.3d at 1264; *Stearns*, 35 A.3d at 97.[27] But applying jurisprudence resolving email, *i.e.*, a medium that typically has one sender and limited recipients, may be inapt when the general public can view a social media post, like the posts at issue. *See Owens*, 2021 WL 878773, at *5.

Plainly, the issue is whether a school board member's public social media post documents a transaction or activity *of the school board*, or is created in connection with a transaction, business, or activity *of the school board*. *See* 65 P.S. § 67.102. If a school board member creates a social media post in connection with school board business, is it presumptively a record even if the post was made on the member's personal social media account? Does or should the answer change if the post was private?

We acknowledge the facial appeal of merely examining the content of the board member's social media post to ascertain whether the post proves, supports, or evidences a transaction or activity of the school board. But such an examination seemingly deemphasizes whether that board member acted in an official capacity. For example, consider a board member discussing a bad day at work by publicly posting on that person's personal social media account. Such a post seemingly

[27] In some cases, we have reasoned that a public official cannot be acting in an official capacity unless that official had the authority to bind the agency.

documents the agency's transaction or activity that day but does not suggest whether the agency authorized or otherwise ratified the post. *Cf. Silberstein*, 11 A.3d at 633; *Mollick*, 32 A.3d at 872-73.[28]

After careful consideration of the available jurisprudence, we hold that in resolving whether a school board member's social media post was "of an agency" under the RTKL, we must consider the following nonexclusive factors.[29] First, we examine the social media account itself, including the private or public status of the account, as well as whether the account has the "trappings" of an official agency account. *See Purdy*, 2017 WL 3587346, at *3; *Boyer*, 2018 WL 4293461, at *4; *Lindke*, 37 F.4th at 1203-04; *Davison*, 912 F.3d at 680; *see also Campbell*, 986 F.3d at 826 (holding that social media account at issue was private). We must also consider whether the school board member has an actual or apparent duty to operate the account or whether the authority of the public office itself is required to run the account. *See Lindke*, 37 F.4th at 1203-04 (discussing additional elements for each factor); *Boyer*, 2018 WL 4293461, at *4 (acknowledging the agency did not authorize the social media account but noting the public official used the account to fulfill the mayor's duties). Focusing *only* on the trappings of the account, *i.e.*, its appearance or purpose, is likely not dispositive, as we must also examine the universe of responsive posts. *Compare Campbell*, 986 F.3d at 826 (noting that private social media account occasionally used for official agency activity does not necessarily

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[28] We acknowledge that a "private" Facebook profile may have up to 5,000 friends, but we decline to address the issue of whether a so-called "private" post on such a profile is *de facto* "public," let alone whether a "private" Facebook page with unlimited followers is "public."

[29] The weight given to each factor is left to the factfinder. *Cf. Charlie v. Erie Ins. Exch.*, 100 A.3d 244, 251 (Pa. Super. 2014); *NASDAQ*, 52 A.3d at 305. To be clear, the tribunal must consider the factor and may give it whatever weight it deems fit, but it must not reject outright any consideration of the factor. *See Purdy*, 2017 WL 3587346, at *3 (stating it was "immaterial" that the agency did not authorize the official's social media account).

transform the private account into an agency account), *with Garnier*, 41 F.4th at 1163 (discussing private accounts that transformed into agency accounts because, *inter alia*, the vast majority of posts addressed agency activity).[30]

Second, in examining the school board member's social media posts,[31] we consider the following. Initially, whether such posts prove, support, or evidence a transaction or activity *of an agency*. *See* 65 P.S. § 67.102. *Cf. Silberstein*, 11 A.3d at 633 (rejecting disclosure of commissioner's personal emails unless the agency authorized or later ratified the emails); *Mollick*, 32 A.3d at 875 (remanding to resolve whether emails between a quorum of township supervisors were for township business). In resolving the above, the content of the posts may be reviewed to address whether the posts were merely informational in nature, *i.e.*, did not directly prove, support, or evidence the agency's governmental functions. *See* 65 P.S. § 67.102 (defining a record as information documenting a transaction or activity of the agency). *Cf. Bumsted*, 134 A.3d at 1209 (rejecting request for private emails); *West*, 410 P.3d at 1202, 1204 (holding that posts (1) briefly referencing various agency issues, and (2) referencing and linking to posts of official agencies, were "merely informational and did not directly address the 'conduct' or 'performance' of governmental functions"); *cf. also Campbell*, 986 F.3d at 826 (considering the volume and content of agency versus non-agency posts on the account); *Garnier*, 41

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[30] For example, assume a public official inadvertently publishes (or shares) a personal post on the agency's official social media account but immediately deletes the post. It seems questionable as to whether that post is subject to disclosure under the RTKL. *Cf. Bumsted*, 134 A.3d at 1209 (holding personal emails sent or received on an agency email address are not records); *Baxter*, 35 A.3d at 1264 (explaining that personal emails using agency resources are not records). If private posts or other communications on a social media platform implicate the privacy interests of third parties, then it appears they would be entitled to written notice. *See Bumsted*, 134 A.3d at 1209 n.10.

[31] By "posts," we also refer to other relevant social media activity, including comments and other electronic forms of communicating on such platforms.

F.4th at 1171 (same). We also address whether the posts were created, received, or retained by law or *in connection with* a transaction, business, or activity of an agency. *See* 65 P.S. § 67.102. *Cf. Browne*, 71 A.3d at 1068 (rejecting request for documents outside the governmental function of the agency); *Second Chance*, 13 A.3d at 1040 (remanding to clarify whether requested information was in connection to agency's performance of a governmental function).

Third, we consider "official capacity" with regard to the account and the posts.[32] Although the RTKL does not explicitly define "official capacity," we previously addressed whether the information at issue was produced under the agency's authority or subsequently ratified, adopted, or confirmed by the agency, *i.e.*, authorized activity. *See Silberstein*, 11 A.3d at 633. We explained that the information at issue must be created, received, or retained by public officials in their official capacity, *i.e.*, scope of employment, as public officials. *See Stearns*, 35 A.3d at 97; *Baxter*, 35 A.3d at 1264; *accord West*, 410 P.3d at 1203. *Cf. Lindke*, 37 F.4th at 1202 (expressing a need to differentiate a public official's governmental and non-governmental activities); *Davison*, 912 F.3d at 680 (noting that if social media activity occurs in the course of performing an official duty, then it is more likely to be considered state action); *Campbell*, 986 F.3d at 824 (holding that a public official's actions outside the scope of employment, *i.e.*, in the scope of personal pursuits, are not state actions). We may consider whether the agency required the posts, the agency directed the posts, or whether the posts furthered the agency's

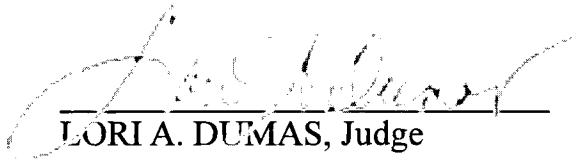
[32] The first two factors of the framework do not explicitly address authorization. Assume a third party, without authorization, copied all of the "trappings" of the agency's official social media account and copied (or shared) the agency's official posts. Alternatively, assume an agency official acted without authorization and posted a qualifying post on the agency's social media account. At least with the former, it appears difficult to conclude that the RTKL would compel disclosure of deleted comments, etc., when the third party acted without the agency's authorization or ratification.

interests. *See West*, 410 P.3d at 1203; *Davison*, 912 F.3d at 680.

Instantly, based on the above, we respectfully disagree with the trial court's holding that it "does not matter" if the social media post was on a public or private account. *See* Trial Ct. Op. at 3. We also disagree with the court to the extent it suggested that merely because a board member expressed his views about board business in a social media post, he created a public record. *Id.* at 4. We hold the court must address, among other factors, whether that board member acted in an "official capacity." *See, e.g.*, *Baxter*, 35 A.3d at 1264. Thus, we remand to the trial court, as the initial Chapter 13 reviewing court, to expand the record as it deems necessary to resolve the foundational question of whether the social media activity at issue constitutes an agency record subject to disclosure under the RTKL based on the framework announced herein. *See Bowling*, 75 A.3d at 476. Nothing within our decision precludes the trial court from reaching its prior holding.

IV. CONCLUSION

For these reasons, we vacate the trial court's December 16, 2021 order and remand for further proceedings consistent with our decision. Because of our disposition, we do not address Penncrest's remaining issues. We dismiss Cagle's application for relief as moot.



LORI A. DUMAS, Judge

Judges McCullough, Covey and Wallace dissent.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Penncrest School District, Appellant	:	No. 1463 C.D. 2021
v.	:	
Thomas Cagle	:	

ORDER

AND NOW, this 24th day of April, 2023, we vacate the December 16, 2021 order entered by the Court of Common Pleas of Crawford County and remand for further proceedings as set forth in our decision. Thomas Cagle's application for relief is dismissed as moot. Jurisdiction relinquished.

LORI A. DUMAS, Judge

Certified from the Record

APR 24 2023

And Order Exit

APPENDIX B

December 16, 2021 Opinion and Order of the Court of Common Pleas of Crawford County

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

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cc: Attorney George Joseph
Attorney Brian Cagle

APPENDIX C

August 24, 2021 Final Determination of the Office of Open Records

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
THOMAS CAGLE,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2021-1442**
	:	
PENNCREST SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Thomas Cagle ("Requester") submitted a request ("Request") to Penncrest School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking emails and Facebook posts from the personal accounts of two District School Board members. The District partially denied the Request, arguing that no responsive emails exist and that no Facebook posts or comments exist for District Facebook accounts. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted**, and the District is required to take additional action as directed.

FACTUAL BACKGROUND

On June 17, 2021, the Request was filed, seeking:

1. All written correspondence (including e-mails) from David Valesky to Penncrest School District officials, employees, or students regarding homosexuality, including e-mails originating from Mr. Valesky's personal e-mail account, between January 1, 2020 through June 13, 2021.

2. All written correspondence (including e-mails) from Luigi DeFrancesco to Penncrest School District officials, employees, or students regarding homosexuality, including e-mails originating from Mr. DeFrancesco's personal e-mail account, between January 1, 2020 through June 13, 2021.

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, 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, or electronic resources, between January 1, 2020 through June 13, 2021, including 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.

On July 13, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the District partially granted the Request, providing responsive emails from District-owned email accounts. The District denied the remainder of the Request, arguing that Mr. Valesky and Mr. DeFrancesco were asked to provide responsive emails and that neither Board member provided responsive emails to the District. The District further denied the Request, stating that no responsive Facebook posts or comments exist for District-owned Facebook accounts.

On July 26, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 9, 2021, the District submitted a position statement, arguing that the District appropriately responded to the portion of the Request seeking emails, while also arguing that the requested Facebook comments and posts are not records of the District because they are not

connected to District business.[1] Accompanying the submission were the sworn affidavits of Kenneth Newman, Assistant Superintendent for the District, and Denise M. Gable, Open Records Officer for the District. The Requester did not submit additional evidence on appeal.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id*. Here, neither party requested a hearing.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65

[1] As the record in this matter closed on August 4, 2021, the District's submission was filed late. On August 9, 2021, the Requester filed an objection, arguing that the District's late submission should not be made part of the record in this appeal. In order to develop the record in this matter and fairly and expeditiously resolve this dispute, the District's submission has been accepted by the OOR. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as "such proof as leads the fact-finder … to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, "[t]he burden of proving a record does not exist … is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The District argues that no responsive Facebook posts or comments exist on any District-owned or controlled social media accounts. Additionally, the District argues that it contacted Mr. Valesky and Mr. DeFrancesco regarding the Request, and that both individuals indicated that no responsive records exist. In support of the District's position, Ms. Gable attests the following:

> 3. I reviewed the District's social media accounts and comments with regard to the matters that were the subject of the request and found no records which satisfy the request.
>
> 4. Consistent with the records request, I made inquiry of Board member, David Valesky, and Board member, Luigi DeFrancesco, for copies of any Facebook posts or comments on their individual social media accounts. I was informed that no records exist on their personal accounts which satisfy the request.

> 5. Having received this information from the individual Board members, I appropriately responded to the Right-to-Know Request on behalf of the District.

Under the RTKL, an affidavit made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Here, the District has addressed the fact that no responsive records exist with regard to the District's social media accounts; however, in her affidavit, Ms. Gable did not address whether Mr. Valesky and Mr. DeFrancesco were asked and performed a search of their personal email accounts for responsive emails. *See Pa. Office of Attorney General v. The Philadelphia* Inquirer, 127 A.3d 57 (Pa. Commw. Ct. 2015) ("What makes an email a 'public record,' then, is whether the information sought documents 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.'"); *see also Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012); *Barkleyville Borough v. Sterns*, 35 A.3d 91 (Pa. Commw. Ct. 2021). As Items 1 and 2 of the Request specifically seek emails from the personal email accounts of Mr. Valesky and Mr. DeFrancesco, the District has not met its burden of proving that the requested emails do not exist within its possession, custody or control.

The Requester argues that the District's School Board members are using personal social media and email accounts to comment on and discuss District business. With his appeal to the OOR, the Requester provided copies of relevant Facebook posts from both Mr. Valesky and Mr. DeFrancesco, one of which the Requester asserts has been commented on by another District School Board member, as well as a May 28, 2021 article from the Meadville Tribune that references Mr. DeFrancesco and Mr. Valesky both sharing a Facebook post of a District book

display, with Mr. Valesky also offering his view regarding the book display and the teaching of homosexuality by the District's high school.

The District argues that to the extent that any Facebook or other social media posts or comments exist, they are not records of the District as they do not document a transaction, business or activity of the District. *See* 65 P.S. §67.102 (defining "record"). The District further argues that "[t]here was no agency business associated with the high school library book displays nor was there any issue or item on the business agenda of the Board of School Directors relating to the LGBTQ+ community," but rather, "[i]ndividual Board members, to the extent that they made any Facebook or other social media posts or comments relating to the same would be doing so not in their official capacity as Board members, but in their individual capacities only."

The OOR must determine whether the Request seeks records of the District as defined by the RTKL. Section 102 of the RTKL defines a "record" as "[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a "transaction or activity of an agency"; and, if so, 2) was the material "created, received or retained ... in connection with a transaction, business or activity of [an] agency." *Id*.; *see also Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc*., 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of "record" must be liberally construed. *See A Second Chance, Inc.*, 13 A.3d at 1034; *Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012).

In support of the District's position that the requested Facebook posts and comments are not records of the District, Mr. Newman attests as follows:

> 2. In my capacity as Assistant Superintendent, I am familiar with the monthly agendas for both the Board's work session and public Board meetings.
>
> 3. During the Spring of 2021, and specifically during the months of April, May and June of 2021, the agenda items for the Board, including the work session and the Board meeting, did not include any agenda item addressing the Maplewood High School library book displays or specific or related to the book display involving LGBTQ+ community matters.
>
> 4. I am aware that during the June 2021 work session and Board meeting, the Board received a number of public comments addressing the Maplewood High School library book display issue and the LGBTQ+ issues within the District.
>
> 5. Even after the public comments received by the Board, neither the book display itself nor the LBGTQ+ issue has been placed as an agenda item on either the work session or public board meetings of the Board of School Directors of the Penncrest School District.

While the District argues that the requested records are not records of the District because the Facebook accounts are personal and not connected to the District, in *Purdy v. Borough of Chambersburg*, OOR Dkt. AP 2017-1229, 2017 PA O.O.R.D. LEXIS 1224, the OOR held that in determining whether a Facebook page is a record of the agency, it was "immaterial whether or not [an agency] has oversight over the Facebook page or authorized [an officer] to maintain such an account." Rather, the OOR looks at whether the content of the Facebook page shows that it is used as a significant platform by an elected official or employee to conduct or discuss official business, such as, "among other things, economic development, community planning, maintenance, public safety and community service projects within the [agency]." *Id*.; *see also Boyer v. Wyoming Borough*, OOR Dkt. AP 2018-1110, 2018 PA O.O.R.D. LEXIS 1100.

Here, the District has not identified any responsive Facebook posts or comments, but instead argues that if posts and comments exist, they would not be records of the District. Although

Mr. Newman attests that while the issue of the book display involving LGBTQ+ community matters has not been on the School Board's agenda, it was discussed during the June 2021 work session and Board meeting. Additionally, the Meadville Tribune article states that Mr. Valesky planned to "bring the matter up at the next [District] School Board meeting – which [was] scheduled for June 14 – assuming it has not been resolved before then." Therefore, posts and comments by current District School Board members regarding the book displays and homosexuality document a transaction or activity of the District, as they are related to issues that concern the District and have been brought to the District's School Board during its public meetings. *See DeBartola v. Johnstown Redev. Auth.*, OOR Dkt. AP 2019-1868, 2019 PA O.O.R.D. LEXIS 1946 ("[A] board member, acting alone, may create official records when they are communicating with other public officials or otherwise acting in some official capacity and discussing agency business"). As the District has not set forth any additional reasons for withholding the records under the RTKL, they are subject to public access. *See* 65 P.S. § 67.305(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the District is required to provide all responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Crawford County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating

this matter, the OOR is not a proper party to any appeal and should not be named as a party.[2] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: August 24, 2021

/s/ Kathleen A. Higgins

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KATHLEEN A. HIGGINS
DEPUTY CHIEF COUNSEL

Sent to: Thomas Cagle (via email only);
Brian T. Cagle, Esq. (via email only)
Denise M. Gable (via email only);
George Joseph, Esq. (via email only)

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