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31 WAP 2023

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.

REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The District's response is most notable for what it does not say. It omits the central fact that this case involves multiple District officials' communications regarding a photograph and post made by a District contractor, and with respect to District policies and practices for which the officials are ultimately responsible. The District barely talks about the text of the Right to Know Law ("RTKL"), 65 P.S. §§ 67.101 et seq., and it ignores entirely Cagle's arguments about the ordinary meaning of terms used in the RTKL and the law's structure. The District also does not engage with Cagle's arguments about the legislative record or dispute that the RTKL was intended to be more, not less, transparent than its predecessor. Moreover, the District offers no response to the many ways in which the Commonwealth Court's decision will invite agency abuse, shield wrongdoing, and limit judicial oversight.

What little the District does say in no way justifies the Commonwealth Court's standard for identifying "records" subject to disclosure, particularly in the social media context. Instead, the District opens with a First Amendment theory that was concededly waived, and it starts its argument with an entire section on a U.S. Supreme Court decision that interprets an inapposite federal civil rights law. In lieu of statutory text and structure, the District also insists on an "official capacity" requirement and other limitations on the definition of "record" that have no home in the RTKL. The decision below should be reversed.

ARGUMENT

I. The District's immaterial arguments cannot overcome the RTKL's text and structure.

The text and structure of the RTKL foreclose the Commonwealth Court's standard for identifying a "record." (Appellant's Br. 11–25.) Four school board members, who are District officials, shared or discussed a Facebook post by a District contractor about a school library display and "what we need to be teaching kids." (R.R. 25a–29a, 94a.) The posts led to significant media attention, preceded contentious board meetings where members addressed the same issue, and were ultimately followed by the adoption of a more restrictive District policy on school books. Under the RTKL's plain language, the Facebook posts at issue in this case are therefore records because they (1) "document[] a transaction or activity of" the District, and (2) were "created, received or retained" "in connection with a transaction, business or activity of" the District. 65 P.S. § 67.102. (*See* Appellant's Br. 12–18.) Moreover, the posts must be disclosed because the District has possession, custody, or control of the information, either directly or at minimum through its officials. *See* 65 P.S. § 67.901; (Appellant's Br. 18–20.)

In response, the District largely avoids discussing the RTKL's text, including provisions surrounding the RTKL's use of the term "record." For example, although the District initially cites the actual definition of "record" (Appellee's Br. 22), it then reverts from that statutory text to quotes from Commonwealth Court decisions—

including in this case—that much more narrowly *describe* the RTKL's text, particularly with respect to an "official capacity" requirement that appears nowhere in the RTKL. (*See, e.g.*, Appellee's Br. 21–25, 27–29.) In lieu of statutory text, the District also quotes from a treatise that clearly refers to the Sunshine Act, not the RTKL, when discussing "official action." (*See id.* at 21 (*citing* 65 Pa. C.S. § 703).)

The District's efforts in this respect are no stand-in for the RTKL's actual text, and this Court is of course not bound by the Commonwealth Court's analysis in this case, or by its prior case law imposing an "official authority" requirement to discern what constitutes a "record" for the RTKL. *See Toensing v. Att'y Gen.*, 178 A.3d 1000, 1006 (Vt. 2017) (summarizing state approaches to defining records for open records requests and identifying the "official authority" requirement in *In re Silberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011), as the only outlier); (Appellant's Br. 24–25, 27). As set forth in Cagle's brief, this Court should resolve the appeal in a manner that corrects lower-court confusion. (*See* Appellant's Br. 20–25.)

Furthermore, the District has no response to Cagle's reliance on the ordinary meaning of RTKL terms, as evidenced by numerous dictionary definitions. (*See* Appellant's Br. 14–15, 17.) The District also does not address several arguments that Cagle made about how the Commonwealth Court's standard for identifying a record would render other parts of the RTKL superfluous. (*See* Appellant's Br. 22–25.)

What little the District does say about the RTKL's text is of no help to it. All parties agree, for example, that the RTKL "does not require an agency to 'create' a non-existent 'record.'" (Appellee's Br. 23; *accord* Appellant's Br. 15.) The relevant question is whether the Facebook posts and comments between school board members—which indisputably exist—are, in fact, records. Similarly, the District's retort that a "record" under the RTKL is not necessarily a "public record" if it is otherwise exempt from disclosure (Appellee's Br. 19–21) is irrelevant: the District has never argued that an RTKL exemption applies here, and it concedes that it waived any First Amendment rationale to resist disclosure (*id*. at 7 n.3).

The District's emphasis on the administrative appeal feature built into the RTKL is also misplaced. (Appellee's Br. 20–21.) That feature provides that requesters appealing an agency's denial "shall state the grounds upon which the requester asserts that the record is a public record." 65 P.S. § 67.1101(a)(1). It does not in any way lessen the RTKL's emphatic presumption that agency records are public and subject to disclosure. Instead, the appellate provision sets procedural guideposts akin to a pleading requirement that helps inform OOR and the agency of the requester's rationale. *Cf. Saunders v. Dep't of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012) (explaining that if an agency denied disclosure pursuant to specific exemptions, the requester on appeal should address those exemptions under section 1101(a)).

At bottom, it is a cardinal rule of statutory construction that when "the words of a statute are clear . . . , the letter of it is not to be disregarded," and that every statute must "be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. § 1921(a), (b). *See, e.g.*, *Freedom Medical Supply*, 131 A.3d 977, 983 (Pa. 2016); *Meyer v. Comm. Coll. of Beaver Cnty.*, 93 A.3d 806, 813 (Pa. 2014). The text and structure of the RTKL require reversal.

II. The District misconstrues the RTKL's legislative history.

The legislative history of the RTKL reflects the drafters' familiarity with best practices nationwide and their firm resolution to make Pennsylvania one of the most transparent states in the country. (Appellant's Br. 27.) *See* SB 1, PN 1583 - Pa. Legis. J., No. 89, Sess. of 2007-2008, Bill on Third Consideration and Final Passage, at 1406 (Pa. 2007) (Sen. Pileggi). Because "the true foundation of government reform is a strong open records law," the drafters required new levels of governmental transparency to "give[] the public the ability to review government actions, to understand what government does, to see when government performs well, and *when government should be held accountable*." SB 1, PN 1583 at 1405 (emphasis added).

Again, the District's response fails to wrestle with this history. To the extent it does address the legislative record, the District badly misconstrues it.

Specifically, the District emphasizes that an earlier legislative draft of the RTKL defined "record" to mean "any document maintained by an agency . . .

whether public or not," and that when the RTKL was ultimately adopted, this language had been omitted. (Appellee's Br. 11 (quoting "definition of 'record' in Senate Bill No. 1 of 2007, at Printer's No. 772").) In the District's telling, this distinction between the draft and ultimate law is evidence that legislators intended to shield "private documents under agency control" from disclosure. (Appellee's Br. 11–12.)

The draft language to which the District points—defining record to include any document "whether public or not"—was a holdover from the RTKL's predecessor, the Right-to-Know Act ("RTKA"). That law had such a narrow definition of public records and led to such limited public access that the Legislature eventually expanded its scope to require disclosure of certain additional documents, "whether public or not." HB 2100, PN 4128 – Pa. Legis. J., No. 2100, Sess. of 2001-2002, at 3 (Pa. Oct. 29, 2001), *codified in* 65 P.S. § 66.1 (2002).[1] When the Legislature ultimately adopted the RTKL in 2007, it eliminated this antiquated language altogether and replaced it with the overhauled definitions of "public record" and "record" at issue here. SB 1, PN 1509 - Pa. Legis. J., No. 89, Sess. of 2007-2008, at 6 (Pa. Oct. 29, 2007).

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[1] Since its inception in 1957, the RTKA had defined "public record" to include only an "account, voucher or contract dealing with the receipt or disbursement of funds by an agency. . . and any minute, order, or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons," until it was repealed and replaced by the broader RTKL. 65 P.S. § 66.1 (1957); 65 P.S. § 66.1 (2007).

Nothing about this history suggests the Legislature intended to take a step backward on transparency when it adopted the RTKL. To the contrary, the *expanded* definition of public record in the RTKL made that earlier RTKA language superfluous. And as the District concedes elsewhere in its brief, the final version of the RTKL still recognizes that not all "records" held by an agency are "public records." (Appellee's Br. 23, 33.) *See* 65 P.S. § 67.102 (defining "public record" and "record" separately); 65 P.S. § 67.708(b)(12) (noting that certain "[n]otes and working papers prepared by" a public official, among other documents subject to exemptions, are "record[s]" under the RTKL but not "public record[s]" subject to disclosure if they are "used solely for that official's . . . own personal use"). Thus, the ultimate version of the RTKL adopted addresses all matter of records, whether they are inside a government building, stored in a personal file cabinet, or posts on a personal Facebook account. That language controls here.

In any event, the "unexplained disappearance" of words from an early draft of a bill is a "mute intermediate legislative maneuver[]" that is not a "reliable indicator[] of [legislative] intent." *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). The 2007 drafters of the RTKL took out the "whether public or not" phrase without any specific explanation, and they never resurrected that language in the subsequent eight iterations of the law. This one-time change in language "cannot overcome" the

"more persuasive evidence" of the drafters that Cagle has cited. *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982).

III. *Lindke v. Freed* and the state action doctrine are inapplicable to the RTKL, and if anything, they undermine the District's position.

The District devotes a substantial share of its response to *Lindke v. Freed*, 601 U.S. 187 (2024), and *Lindke*'s treatment of the state-action doctrine. (Appellee's Br. 12–19.) The state-action doctrine considers whether a government official has acted in his official capacity such that the official can by held liable under 42 U.S.C. § 1983 for violating an individual's federal constitutional rights. The District cannot, however, identify a single instance in which Pennsylvania courts interpreting the RTKL, or any federal court applying the Freedom of Information Act ("FOIA"), 5 U.S.C § 552, have linked the state-action doctrine at issue in *Lindke* to an open records law. *Cf. Ctr. for Medicare Advocacy, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 3:10-CV-645 MRK, 2011 WL 2119226, *6 (D. Conn. May 26, 2011) (rejecting "attempt to graft the Fourteenth Amendment's 'state action' requirement onto the standard for determining whether a document is an 'agency record' under" FOIA). For good reason: *Lindke* is far afield and does not help the District.

In *Lindke*, the U.S. Supreme Court considered a social media user's claim brought pursuant to 42 U.S.C. § 1983. The user alleged that he had a First Amendment right to comment on a city manager's social media page because the manager operated the page as a public forum, and the user claimed that the manager

violated his right to speak by deleting the user's comments and ultimately blocking him from posting further comments to the page. 601 U.S. at 193. While blocked, the user retained access to view the manager's posts. *Id.*

The U.S. Supreme Court began by explaining that Section 1983 "protects against acts attributable to a State, not those of a private person." *Id.* at 195. It ultimately held that "a public official's social-media activity constitutes [this requisite] state action under § 1983"—and may therefore render the official liable for damages and other relief—only "if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Id.* at 198 & 202 n.2. The Court remanded the case for application of this test to the facts.

Unlike Section 1983, the RTKL's designation of a "record" does not hinge on whether the record demonstrates or constitutes "state action," as that term is used in the federal civil rights context. 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. (Appellant's Br. 24–25 (*citing* 65 P.S. § 67.708(b)(10)(i)).)

Similarly, 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). *See* 65 P.S. § 67.102 (including as public record information "received" by the agency). These documents often say nothing on their face about the agency, and they are not created by agency officials. Yet 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. (Appellant's Br. 22–23 (*citing, 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 District's reliance on *Lindke*, and the related "official capacity" standard endorsed by the Commonwealth Court, cannot be squared with this and other examples from the RTKL's text.

Section 1983 and the RTKL differ in other substantial ways as well. A Section 1983 plaintiff alleges injury from state officials who acted in their official capacity—that is, under "color of state law," 42 U.S.C. § 1983—but misused their authorized power to violate the plaintiff's constitutional rights. The plaintiff, a victim of government malfeasance, usually has basic knowledge of the conduct and injury and can use the discovery process to gather further details necessary to demonstrate state action. In contrast, a RTKL requester often has very limited knowledge of the official's conduct—the precise reason why the requester files an RTKL request—and may have no access to discovery in administrative OOR proceedings. *See Am. Civil Liberties Union of Pa. v. Pa. State Police*, 232 A.3d 654, 666 (Pa. 2020)

(explaining that, as a result of the asymmetry of the RTKL process, "the requesting party has the unenviable task of blindly countering the agency's attempt to persuade OOR that an exception applies"). Unlike a Section 1983 case, which could end in a judgment for damages against state officials, the RTKL is intended to generate the disclosure of public records, not monetary relief or an assignment of liability.

Finally, even if Section 1983 precedent were analogous to the RTKL's requirements, *Lindke* still would not help the District. It would, in fact, do the opposite. *Lindke* cautioned that an "official cannot insulate government business from scrutiny" under Section 1983 "by conducting it on a personal page," stating, for example, that "a mayor would engage in state action" sufficient to satisfy Section 1983 "if he hosted a city council meeting online by streaming it only on his personal Facebook page." *Id.* at 202 n.2. In the current case, four District officials and a contractor used personal pages to discuss District policy. (R.R. 25a–29a, 94a.)

The Court also recognized that the Facebook page at issue in that case might be "'mixed use'—a place where [the manager] made some posts in his personal capacity and others in his capacity as city manager." *Id.* at 202. Because blocking on Facebook "operated on a page-wide basis," the Court cautioned that "a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts." *Id.* at 204. It would turn the RTKL on its head to conclude it bars access to public officials'

communications about public business on personal accounts, as occurred here, (R.R. 12a, 57a, ¶ 35, 61a–62a), when *Lindke* confirms that public officials could be sued under 42 U.S.C. § 1983 if they violate individuals' constitutional rights using those same personal accounts.

This language in *Lindke* thus refutes the District's claim that, consistent with *Lindke*, "[i]t is not what was said in . . . board members' social media accounts that matters nearly as much" in this case "as where it was said." (Appellee's Br. 17.)

IV. Any First Amendment argument is waived and meritless.

The District opens its summary of argument by invoking the First Amendment, and it repeatedly cites that constitutional provision and related precedent throughout its brief. (*See* Appellee's Br. 10; *id*. at 16 ("official capacity" argument); *id.* at 34 (argument regarding chilling of speech).)

The District never raised its First Amendment argument below and thus the Commonwealth Court found the District did not preserve it for appellate review. (*See* Appellant's Br., App. A. at 5.) It is well-established that "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a); *Kelley v. Muller*, 912 A.2d 202, 203–04 (Pa. 2006) (vacating decision addressing constitutional issues for the first time on appeal because they were not raised in the common pleas court or in the Pa. R.A.P. 1925(b) statement). Similarly, in the context of the RTKL, the District had an obligation to assert any exemption

or other basis for withholding in the trial court. *See ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 664–65 (Pa. 2020) (recognizing that reviewing court is the factfinder in RTKL disputes). *Cf. Maydak v. U.S. Dep't of Just.*, 218 F.3d 760, 764–65 (D.C. Cir. 2000) (explaining that in the FOIA context, "as a general rule, [the Government] must assert all exemptions at the same time, in the original district court proceedings"). Any other outcome would substantially prejudice Cagle, who is entitled under the RTKL to a speedy response yet has already waited almost three years for the records in dispute.

In any event, the Commonwealth Court concluded that "even if the issue [were] preserved, it lacks merit." (*See* Appellant's Br., App. A. at 5.) It explained that the District had not sufficiently demonstrated a First Amendment violation, and that any such argument would be at odds with the District's prior concession that "Penncrest 'does not regulate speech for members.'" *Id.* (*citing* Penncrest Commw. Ct. Br. 12). Moreover, the District has never explained why the First Amendment would allow agency officials to discuss agency business in secret, as happened here, or how that position could possibly be squared with the RTKL and the Sunshine Act, 65 Pa. C.S. §§ 701–716, which governs public meetings.

At minimum, the District—as a party seeking to resurrect a waived argument—should at least go beyond its bare assertion of a constitutional argument and address the merits concerns raised by the Commonwealth Court and obvious on

the fact of its brief. That the District does not do so in this Court simply confirms that the Court should adhere to its practice of declining to consider waived arguments.

V. The District's policy arguments are unavailing, and it ignores overwhelming countervailing considerations.

The District's undeveloped, one-paragraph claim that the Court should affirm because the policy "ramifications of Cagle's request are unimaginable," (Appellee's Br. 34), shows that the District fundamentally misunderstands the purpose of the RTKL as a tool "to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *ACLU of Pa.*, 232 A.3d at 656 (internal quotation marks omitted). The District's sky-is-falling assertion, which fails to respond to Cagle's arguments about the practical effects of this case and the workability of the standard he urges (*see* Appellant's Br. 30–31), should be rejected.

Reversing the decision below would not chill employee's protected speech or open the door to inspections of public employees' social media accounts "for any post, at anytime, whatsoever." (Appellee's Br. 34.) Cagle has never argued for that standard, nor would the RTKL permit it. Instead, as Cagle explained, to constitute a record under the RTKL, information must document an agency's activity and be created or received in connection with that activity. *See* 65 P.S. § 67.102; (Appellant's Br. 13.)

In this case, Cagle seeks the social media communications of school board members with each other and constituents on matters involving homosexuality as it

relates to some aspect of the District's work, including its "students, . . . curriculum, physical [resources]," or "electronic resources." (R.R. 24a.) Those communications referred to a post by a District contractor about a school book display, and they were followed by contentious board meetings on the same subject and a change to district policy regarding library books. (R.R. 25a–27a, 29a, 140a, 163a–166a).

Accordingly, under the RTKL's definition of "record," even with a reversal in this case, a government employee's purely personal documents, whether on social media or otherwise, will remain just as they are today: not covered by the RTKL. And just as the school board members in this case have already concededly searched their personal email accounts for responsive records, they could have easily done the same with their Facebook accounts. (*See* R.R. 81a–84a; Appellee's Br. 5 n.2. *See also* Br. of *Amici* in Support of Appellee 9–10 (conceding it is already standard practice for an open records officer to contact agency officials in possession of potentially responsive document).)

In contrast to the District's policy arguments, a host of countervailing practical considerations support interpreting the RTKL's definition of "record" to encompass the posts at issue here. (*See* Appellant's Br. 25–32.) The District ignores those considerations entirely. For example, the District does not address the precedent cited by Cagle from other states, or dispute that the Commonwealth Court's crabbed interpretation of "record" renders Pennsylvania an outlier among its

peers. (*See id.* 14, 27.) It does not respond to Cagle's contention that the Commonwealth Court's narrow reading of a "record" would hamper OOR and judicial oversight of RTKL responses. (*See id*. 28–30.) And the District does not dispute that under the Commonwealth Court's decision, 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. (*See id*. 27–28.) In short, the District has given this Court no reason to distort a clearly written Commonwealth statute that was intended to improve government transparency.

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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May 2, 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 7,000 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.

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IN THE SUPREME COURT OF PENNSYLVANIA

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

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I hereby certify that on this 2nd day of May, 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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