

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

31 WAP 2023

PENNCREST SCHOOL DISTRICT,
Respondent,

v.

THOMAS CAGLE,
Petitioner.

**BRIEF OF AMICI CURIAE THE PENNSYLVANIA NEWSMEDIA
ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS, AND THE CORNELL LAW SCHOOL FIRST AMENDMENT
CLINIC IN SUPPORT OF PETITIONER**

On appeal from the Commonwealth Court's Order of April 24, 2023 at 1463 MDA
2021, vacating the December 21, 2021 Order of the Court of Common Pleas of
Crawford County, Pennsylvania, Docket No. AD 2021-486 and remanding for
further proceedings

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STATEMENT OF THE QUESTIONS INVOLVED

Question: Did the Commonwealth Court err by remanding the Right to Know Law appeal for a review and determination about whether the School Board Members' social media accounts were official accounts?

Suggested Response: Yes.

Question: Is the Commonwealth Court's three-part test for determining whether a social media post is subject to access under the Right to Know Law erroneous?

Suggested Response: Yes

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STATEMENT OF INTEREST OF AMICI CURIAE

The Pennsylvania NewsMedia Association (“PNA”) is a Pennsylvania non-profit member corporation with its headquarters located in Harrisburg, Pennsylvania. The Association represents the interests of more than 300 daily and weekly newspapers, digital publications, and other media organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public. A significant part of the Association’s mission is to defend the media’s statutory rights of access to public records in Pennsylvania.

The Reporters Committee for Freedom of the Press (“Reporters Committee”) is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Cornell Law School First Amendment Clinic (“Cornell”) is housed within Cornell Law School and Cornell University. The Clinic’s Local Journalism Project provides pro bono legal representation, *amicus curiae* support, and counseling to aid news outlets, journalists, and other newsgatherers in their vital function of reporting important news and information to their communities. The Local Journalism Project

devotes significant resources to assisting journalists in their investigative efforts to hold government accountable, including through representing clients in public records and court access lawsuits.

Amici curiae PNA, the Reporters Committee, and Cornell (together, “Amici”) submit this brief pursuant to Pa. R.A.P. 531(b)(1)(i) in support of appellant, Mr. Cagle. Amici have a strong interest in ensuring that journalists are able to timely access information about matters of public concern under Pennsylvania’s Right to Know Law, 65 P.S. §§ 67.101 *et seq.* (“RTKL”). If allowed to stand, the decision below would significantly frustrate that ability by permitting lengthy delays for supplementation of the record despite clear proof that government officials are discussing official business via social media. For the reasons herein, Amici urge the Court to reverse the decision below and grant access to the record requested in this case.

Pursuant to Pa. R.A.P. 531(b)(2), Amici certify that no other person or entity other than Amici, their members, or counsel paid in whole or in part for the preparation of this brief, nor authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

The Right to Know Law (“RTKL”) facilitates the public’s ability to secure timely, efficient access to state and local government agency records. For good reason, the RTKL makes no distinction between various types of records and

construes the term “record” liberally to facilitate accountability through government oversight and public discourse. Under the plain language of the RTKL, a letter, an email, a phone bill, and a social media post all qualify as agency records subject to release if they meet a two-part inquiry: 1) they “document[] a transaction or activity of an agency[;]” and (2) were “created, received or retained . . . in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102.

The Commonwealth “Court’s decision” to create a fact-intensive, three-part test concerning disclosure of social media records that is difficult to apply deviates from the plain language of the RTKL and upends the law’s mandate of disclosure. Deploying this test will create inevitable delays and invite unpredictable outcomes, undermining the ability of the press and public to access information in a timely manner. By remanding to the Crawford County Court of Common Pleas for further development of the record—despite the fact that the county court already made the necessary findings of fact and conclusions of law—the Commonwealth Court contravened both the plain language and remedial intent of the RTKL.

The lower court’s holding rests on the faulty rationale that remanding for new evidence is especially warranted when a government official makes a social media posting, so that the appeals officer can determine whether the post was made

in the individual's "official capacity." This holding impermissibly writes a social media-specific process into the RTKL, encouraging agencies to invoke that argument to delay access, and to move communications to social media to evade access altogether. If affirmed, the decision below would significantly curtail the ability of the press to access records in a timely fashion, leading to unjustifiable delays in obtaining and timely reporting on information of public concern.

The RTKL was enacted to remedy decades of abysmal government transparency in the Commonwealth, an environment that fostered a culture of secrecy which has yet to be completely reversed. The law creates a presumption of access, sets strict timelines for responding to requests and resolving disputes, and places the burden of proof on agencies to establish that an exemption to disclosure applies. These burdens and procedures do not vary based on the exemption the agency invokes or the type of record sought. If the fact-finder's assessment of the evidence leads them to conclude that an agency's claimed exemptions do not apply—as the Office of Open Records ("OOR") found in this case—the agency must promptly release the requested record. Alternatively, the agency may appeal, in which case the reviewing court conducts a *de novo* review of the law and facts before it and renders a decision.

Although both the OOR and the Crawford County Court reviewed attestations and evidence submitted—and in the case of the county court, heard

oral argument concerning whether the social media posts qualify as records subject to disclosure—the Commonwealth Court determined this fact finding was insufficient. Despite the County Court’s well-reasoned reliance on closely analogous case law concerning access to records in public officials’ personal email accounts, the Commonwealth Court, in reviewing solely for an abuse of discretion, inexplicably remanded “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.” *Penncrest Sch. Dist. V. Cagle*, 293 A.3d 783, 802 (Pa. Commw. Ct. 2023).

Amici urge this Court to reverse the decision below and order the Commonwealth Court to promptly issue its decision on the record before it. A remand to the lower court is unnecessary, as is the three-part test the Commonwealth Court articulated and directed the county court to apply. Resolution of disputes under the RTKL must be swift and predictable to fully effectuate the core purposes of the remedial law. Access delayed can be access denied. Timely, efficient access to public information is a cornerstone of the RTKL, and critical to the exercise of First Amendment rights. Amici urge this Court to reinforce those access rights in this case.

ARGUMENT

I. The Commonwealth Court’s order remanding the case for further review by the County Court is antithetical to the RTKL’s plain text and remedial purpose.

As this Court has stated, the RTKL “empower[s] citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). In light of the RTKL’s transparency goals, the statute must be interpreted to provide maximal access to public records. *See Levy v. Senate of Pa.*, 65 A.3d 361, 380–81 (Pa. 2013). The starting point in any RTKL case is that records are presumed public. 65 P.S. § 67.305(a). Agencies bear the burden of proving an exemption applies, by a preponderance of the evidence. *Id.* § 67.708(a)(1). To meet that burden, agencies may present affidavits and other evidence to the fact-finder—typically the OOR—during the initial administrative appeal. *Id.* §§ 67.1101, 67.1102(a)(2). Then, the appeals officer must make a final determination within 30 days. *Id.* § 67.1101(b)(1). The parties have 30 days to appeal to the Commonwealth Court or a Court of Common Pleas, which reviews the record and issues findings of facts and law. *Id.* §§ 67.1301(a), 67.1302(a), 67.1303(b). As these provisions show, the RTKL creates a scheme of prompt disclosure of public records, aided by the timely and thorough submission of evidence at the fact-finding stage.

Contrasting the RTKL with its more restrictive predecessors sheds further light on the RTKL's purpose of facilitating timely, efficient access to records. Under the Right-to-Know-Act ("RTKA") in effect until 2002, requesters bore the burden of justifying why they were entitled to records, instead of the other way around. *Bowling v. Off. Of Open Recs.*, 75 A.3d 453, 455 (Pa. 2013). Agencies had no deadlines for responding to records requests. *Id.* If the agency denied a request, a requester could only challenge that denial by filing a lawsuit. *Id.* After the General Assembly amended the law in 2002, agencies had response deadlines, but requesters still bore the burden of justifying access and still had to file a lawsuit to obtain impartial, third-party review of denials. *Id.* The RTKA thus encouraged litigation, which created substantial delays, and imposed burdens on requesters that discouraged appeals and created significant barriers to public access. With the RTKL's 2008 enactment, the General Assembly sought to remedy this flawed system and significantly expand access to public records. *Id.* at 456. To accept the Commonwealth Court's holding in this case would be to undo those reforms, encouraging unnecessary, costly, and protracted litigation and delaying access to the point that it is no longer meaningful.

A. A framework for evaluating social media records already exists.

Although the Commonwealth Court stated that "no Pennsylvania court has addressed a RTKL request for records of social media activity," *Penncrest Sch.*

Dist., 293 A.3d at 793, at least one trial court has analyzed access to social media posts using the two-part inquiry outlined in the RTKL. In *Tom Ford & The Boro v. Mount Pocono Borough*, No. 5082-CV-2020 (Pa. Off. Open Rec. Dec. 13, 2020), appended hereto as Appendix A. The Monroe County Court of Common Pleas considered whether a RTKL requester could obtain records of a private Facebook Group. The Monroe County judge started his analysis by reviewing the definition of “record” under the RTKL. See 65 P.S. § 67.102; App’x A , ___ at 6–7). He then noted that while there were no appellate decisions on whether posts of a Facebook Group were subject to the RTKL, the court could look to the OOR for guidance. *Id.* at 7 (citing *Purdy v. Borough of Chambersburg*, OOR AP 2017-1229, 2017 WL 3587346 at *3 (Pa. Off. Open Rec. Aug. 16, 2017)).

In *Purdy* the OOR, in analyzing whether a mayor’s Facebook page contained records that must be disclosed under the RTKL, focused on the duties of a mayor under the Borough Code in determining that his posts about mayoral duties were subject to access. *Purdy*, 2017 WL 3587346 at *3 (“[T]he Borough operates through its elected representatives, including the Mayor, who are responsible for, among other things, economic development, community planning, maintenance, public safety and community service projects within the Borough.”). The OOR then utilized the RTKL’s established two-part inquiry in determining whether a Facebook post is a “record”: (1) whether the record documents a

“transaction or activity of an agency”; and, if so, (2) was the record “created, received or retained . . . in connection with a transaction, business or activity of [an] agency.” *Id.* The OOR emphasized that “the definition of ‘record’ must be liberally construed” during this analysis “because the RTKL is remedial legislation[.]” *Id.* Because the Facebook page contained “discussions and posts regarding activities within the Borough, including those relating to the police department and councilmembers[.]” and the Borough itself “operates through its elected representatives[.]” the OOR found it utterly “immaterial” to additionally determine whether the Borough had “oversight over” the page “or authorized the Mayor to maintain” it. *Id.*

The Monroe County judge adopted and applied the OOR’s framework from *Purdy*, including affirming that “because the RTKL is remedial legislation, the definition of ‘record’ must be liberally construed.” (App’x A at 7) (citing *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034–35 (Pa. Commw. Ct. 2011)). After reviewing the record from the OOR, the Monroe County Court found that even though the Facebook Group was not officially adopted by the Borough Council, “it was being used as a significant platform by a number of borough council officials and mayor to conduct economic development, community planning, maintenance, maintenance and community

service projects within the Borough.” *Id.* at 8–9. The Monroe County Court thus affirmed the OOR and ordered the records released.

The framework used by the OOR in *Purdy* creates a straightforward means of determining when the RTKL applies to social media postings by public officials. In contrast, the three-part standard enunciated by the Commonwealth Court is overly complex and favors denial, which would lead to inappropriate delays and denials inconsistent with the goals of the remedial RTKL.

B. The Purdy framework applies to this case.

Much like the Monroe County Court of Common Pleas, the Crawford County Court of Common Pleas applied the existing *Purdy* framework, applying that two-part inquiry to determine whether the posts are encompassed within the definition of “record.” *Penncrest Sch. Dist. v. Cagle*, A.D. No. 2021-486 (C.P. Crawford Cnty. Dec. 16, 2021) at 1. Here, the County Court correctly found that “the subject matter” of the School Board Members’ posts “goes to the core of the educational mission and responsibilities of the Penncrest school district.”² *Id.* at 4. School boards have the authority to make decisions about curriculum and courses

² The standard of review is *de novo*, but this Court has noted that “nothing in the RTKL . . . would prevent a Chapter 13 court from simply adopting the findings of fact and conclusions of law of an appeals officer when appropriate”. *Bowling*, 75 A.3d at 473. Amici respectfully suggest that this is such a case. The OOR’s review standard for social media posts is consistent with the remedial cornerstones of the law, bolstered by administrative expertise, and has been successfully applied for nearly a decade.

of study. *See, e.g.*, 24 Pa. Cons. Stat § 15-1512 (1949) (“The board of school directors in every school district . . . shall arrange a course or courses of study adapted to the age, development, and needs of the pupils.”).

The requested records in this case are Facebook posts and comments that indisputably relate to this core curricular duty of school boards. *See Penncrest Sch. Dist.*, 293 A.3d at 786 (requesting records “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 a school board member and the school board president). Applying an analysis similar to the one used by the Monroe County Court, the Crawford County Court determined that the posts clearly go “to the core of the educational mission and responsibilities of the Penncrest school board” because a board member “stat[ed] his intent to bring the matter up for discussion at the next Board meeting if it had not been resolved before then,” “reflect[ing] his belief as a Board member that” the library book display “was an activity for which the school board could take action” and “discussing action he intends to take in his official capacity before the next Board meeting.” *Penncrest Sch. Dist. v. Cagle*, A.D. No. 2021-486 (C.P. Crawford Cnty. Dec. 16, 2021) at 4. As the County Court correctly concluded, records created or maintained by public officials on their personal accounts still qualify as public

records accessible under the RTKL if they document agency activities or are received by agency members acting in their official capacity. *See* Opinion, *Penncrest Sch. Dist. v. Cagle*, A.D. No. 2021-486 (C.P. Crawford Cnty. Dec. 16, 2021) (citing *Mollick v. Township of Worcester*, 32 A.3d 859, 872 (Pa. Commw. Ct. 2011)); *Bagwell v. Pa. Dep’t of Educ.*, 76 A.3d 81, 89–90 (Pa. Commw. Ct. 2013).

In *Bagwell*, the Commonwealth Court ordered access to Pennsylvania State University emails, even though the university was not a state agency, because the emails in question were received by the state’s Secretary of Education while acting in his official capacity and performing a governmental function. *Bagwell*, 76 A.3d at 90 (“The non-agency status of the creator or sender of records does not preclude their public status.”). Similarly in *Mollick*, the Commonwealth Court ordered access to Supervisors’ emails stored on private servers because they documented township business. *Mollick*, 32 A.3d at 872–73. The same was true in *Barkeyville Borough v. Stearns*, where Borough Council members’ emails were found to constitute public records, “regardless of the fact that they were composed on personal accounts,” because “members were acting in their official capacity . . . while exchanging the emails in question” concerning “land development plans.” 35 A.3d 91, 95–96 (Pa. Commw. Ct. 2012) (refusing to find that “simply because

emails are in the personal accounts of individual Council members that they are not in the possession of the Borough”).

These holdings make clear that the RTKL must reach digital content like Facebook posts when they are created, received or retained by public officials in connection with their official duties to prevent the use of “private” communication tools to thwart the access and accountability envisioned by the RTKL.³ The standard enunciated by the OOR in *Purdy* and applied by the County Court, below, is consistent with these holdings and the foundational premise of the law: records dealing with government function must be accessible to enable accountability.

C. The Commonwealth Court holding conflicts with the timeframes enshrined in the law.

Amici further call this Court’s attention to one other particularly flawed and dangerous aspect of the Commonwealth Court’s decision: its reasoning that remanding to the lower court for the submission of additional evidence and further review is especially warranted for social media records. *See Penncrest Sch. Dist.*, 293 A.3d at 802 (remanding to expand the record “to resolve the foundational

³ The concept of public access following public function is also expressly enshrined in the RTKL with respect to third party government contractors. Section 506(d) makes clear that the law applies to records of private parties when the records directly relate to government functions performed under contract. 65 P.S. § 67.506(d). If the RTKL expressly reaches the records of *private* party contractors that relate to government functions, it cannot be interpreted to provide less access to records of *public* officials that relate to their official duties. On the contrary, the RTKL must be interpreted to enable more access by employing an efficient, timely review process that favors public access.

question of whether the social media activity at issue constitutes an agency record”). The court’s pronouncement, if allowed to stand, would write into the RTKL a rule specific to social media records, encouraging agencies to invoke it and delay disclosure, potentially for years, while litigation unfolds despite having failed to meet their burden of proof before the OOR. During this lengthy litigation process, records will become outdated, press and public attention will wane, and requests will be abandoned when the time and costs of litigation become too onerous.

This Court has rejected similar exemption-specific review standards and remands from the Commonwealth Court. *See ACLU of Pa. v. Pa. State Police*, 232 A.3d 654 (Pa. 2020) (rejecting the Commonwealth Court’s agency-deferential review standard related to public safety or public protection records); *Pa. State Police v. ACLU of Pa.*, 300 A.3d 386, 394 (Pa. 2023) (rejecting the Commonwealth Court’s “preferential treatment” for agencies who fail to meet the burden of proof).

If the General Assembly had intended to create a social media-exemption specific rule, it could have done so; instead, it applied the same evidentiary burdens, procedures, and strict timelines across the board. 65 P.S. § 67.708(a)(1), (b)(2). Under the RTKL’s plain text, any agency, invoking any exemption, must sustain its burden of proof before the fact-finder, or else promptly disclose the

requested records. To find otherwise rewrites the RTKL and undermines its mandate of disclosure, in violation of the rule that a court interpreting a statute must “ascertain and effectuate the intention of the General Assembly” by “giv[ing] effect to all its provisions.” 1 Pa. Cons. Stat. § 1921(a); *see also* 1 Pa. Cons. Stat. § 1922(2) (establishing presumption “[t]hat the General Assembly intends the entire statute to be effective and certain”).

The strict time limits imposed by the RTKL are a cornerstone of the remedial law and this factor must play a significant role in appellate review. This Court recently recognized as much in *ACLU v. Pennsylvania State Police*, 300 A.3d at 394. In *ACLU*, as here, the Commonwealth Court’s remand conflicts with the strict time limits of the remedial RTKL and its evidentiary burdens on the agency.

For this reason too, Amici urge this Court to reverse the decision below and remand for the Commonwealth Court to decide the case based on the record from the OOR and the County Court.

II. Press and public access to social media activity of government officials is necessary for government accountability.

If the Commonwealth Court’s decision is not reversed, both the news media and the public at large will feel its harmful effects. As this Court has held, the purpose of the RTKL is to promote “access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public

officials accountable for their actions.” *Levy*, 65 A.3d at 381. And “in a society in which each individual has but limited time and resources[,]” such scrutiny largely takes place through the press, which the public relies on to gather and disseminate facts about government operations. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). Press access must be timely to be meaningful, though, or else “the value of the right of access would be seriously undermined,” especially in the digital era and its 24-hour news cycle. *United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008). Journalists rely on timely access to records obtained via public records requests to inform their communities about their government’s actions and to hold officials accountable.

Access to the records created by officials via social media are also increasingly significant to public discourse in news deserts, where there is limited access to credible news sources. *See, e.g.*, Victor Pickard, *Revitalizing America’s News Deserts*, THE PROGRESSIVE MAGAZINE (Nov. 30, 2022), <https://progressive.org/magazine/revitalizing-americas-news-deserts-pickard/> [perma.cc/ADL4-M7GT]. Without local newspaper watchdogs, “[p]oliticos take liberties when it’s nobody’s job to hold them accountable.” Kriston Capps, *The Hidden Costs of Losing Your City’s Newspaper*, BLOOMBERG (May 30, 2018), <https://www.bloomberg.com/news/articles/2018-05-30/when-local-newspapers-close-city-financing-costs-rise> [perma.cc/U45F-FPK2].

The records at stake in this case concern one of the most hotly debated topics in school districts throughout the state and the country in recent years: which books students are permitted to read in public schools. News outlets throughout the state have extensively covered debates surrounding book banning efforts to inform the public and hold elected school board officials accountable. *See, e.g.,* Keely Doll, *Banned Books Are In The Spotlight Across the U.S. What Has Happened In Centre County?*, THE CENTRE DAILY TIMES (Oct. 5, 2023), <https://www.centredaily.com/news/local/education/article280155784.html> [perma.cc/6K8G-MJQ8]; Chris Ullery, *She Fought GOP Board On Censorship, Then Took Oath On Stack of Banned Books as New President*, BUCKS COUNTY COURIER TIMES (Dec. 5, 2023), <https://www.phillyburbs.com/story/news/local/2023/12/05/karen-smith-sworn-in-central-bucks-banned-books-bucks-county-lgbtq-school-board-pa/71813461007/> [perma.cc/UQV5-W75H]; Ivey DeJesus, *Furious Debate Over a Book Ban Reignites In Central Pa. School District*, PENNLIVE (Sept. 29, 2022), <https://www.pennlive.com/news/2022/09/after-news-report-a-furious-debate-over-a-book-ban-re-ignites-in-central-pa-school-district.html> [perma.cc/Q6R7-ZCC3].

This reporting illustrates the importance of public access to school district officials' business and underscores that such records must be timely provided under the RTKL. The records in this case, and social media postings more

generally, provide an important, often unfiltered window into public officials' positions on significant public policy issues. These records provide critical context and allow citizens to understand public officials' decisions and to seek changes in policy and at the ballot box. This kind of accountability is simply not possible without prompt, efficient access under the RTKL. If affirmed, the Commonwealth Court's decision and the standard it creates will lead to unnecessary delays and denials in conflict with the RTKL bedrock remedial principles.

CONCLUSION

For all the reasons stated above, Amici urge the Court to reverse the decision of the Commonwealth Court.

Dated: February 15, 2024

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CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that the above brief complies with the word count limits of Pa. R.A.P. 531(b)(1)(i) and 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains 5216 words, exclusive of the supplementary matter listed in Pa. R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2024, I electronically filed this brief with the Clerk of Court for the Supreme Court of Pennsylvania by using the PACfile electronic filing system. Notice was provided to the following via PACfile:

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IN THE SUPREME COURT OF PENNSYLVANIA

PENNCREST SCHOOL DISTRICT,
Petitioner,

No. 31 WAP 2023

v.

THOMAS CAGLE
Respondent.

APPENDIX A

DECEMBER 22, 2020 OPINION OF THE COURT OF COMMON PLEAS
OF MONROE COUNTY

Appendix A

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

TOM FORD and THE BORO, : No. 5082 CV 2020
Requester, :
vs. :
MOUNT POCONO BOROUGH, :
Respondent. :

OPINION

The Borough of Mount Pocono ("Borough") has filed a Petition for Review of the decision of the Pennsylvania Office of Open Records (OOR) directing the Borough to produce records of a Facebook account. The case began when Tom Ford, editor of local newspaper "The Boro", requested that the Borough produce records logged since April 16, 2020 under the "Moderate Group" tab of the "Mount Pocono Borough Updates by Council" Facebook Group. The OOR Appeals Officer granted Ford's request for production of the Facebook records. The Borough petitioned for review, alleging that the Appeals Officer erred in finding that the requested records constituted official records.

A *de novo* hearing was held on December 7, 2020. Mr. Ford did not appear. The Borough did appear and presented the testimony of Borough Council President Claudette Williams and Borough Mayor Michael Penn. Mount Pocono further submitted a brief and evidence of the Facebook Group's contents. *Borough Exhibit 1*.

FINDINGS OF FACT

1. On May 20, 2020, Tom Ford submitted a request pursuant to the Pennsylvania Right to Know Law, requesting:

Copy of all "Admin Activity" logged since 4/16/20 under the "Moderate Group" tab of the "Mount Pocono Borough Updates by Council" Facebook Group; all "Pending Posts" shown for that group on May 20, 2020 at the time of receipt of this request (you are advised to preserve such materials); all documents constituting or reflecting communications on or after 4/1/20 between, among, or including Bonnie Roberts Glamocak, Michael Penn, and/or Claudette Williams regarding that Group, including but not limited to [F]acebook messenger, private emails, and text messages (you are advised to preserve such materials).

Certified Record of Proceedings before the OOR, Appeal Filed by Tom Ford and "The Boro."

2. On May 26, 2020, the Borough denied the request, asserting that that no responsive records exist, and if they did exist, they would not be "records" as contemplated by the Right to Know Law. *Id.*, *Submission of the Borough of Mount Pocono to the OOR.*

3. The Borough informed the OOR on June 24, 2020 that it would locate and provide the records, but did not concede that it owned or operated the Facebook Group. It did not produce these records.

4. On July 24, 2020, the Borough informed the OOR that the records did not belong to the Borough, and that it had unsuccessfully attempted to locate and access responsive records.

5. On August 24, 2020, OOR Appeals Officer Jordan C. Davis, Esq. issued a Final Determination granting Tom Ford's request for records.

6. The Facebook Group was created by Claudette Williams in December 2014 and was used for her campaign for public office. The original title of the group was "Claudette for the People." Ms. Williams was elected to Borough Council in 2014 and at the time of the hearing was the President of the Borough Council.

7. In April 2019, Ms. Williams renamed the group "Mount Pocono Borough Updates by Council." She was president of Borough Council at that time. This was her personal decision; it was not discussed or approved by the Borough Council.

8. Bonnie Glamocak became the administrator of the page; she was not a Council member.

9. Bonnie Glamocak, Claudette Williams and Michael Penn were administrators of the group when Mr. Ford filed his request. Michael Penn was the Mayor of Mount Pocono at the time.

10. On April 16, 2020, the description of the group read as follows:

Mount Pocono Borough Council would like to open a platform to discuss things that are important to the community. On this page you will find Junior and Borough meeting updates, community events, and much more. Here we have the opportunity to support one another, voice concerns without fear of criticism and become the community our families deserve.

Submission of Tom Ford, cited by OOA in its opinion, page 6, fn.1.

11. Ms. Glamocak was removed as an administrator on May 20, 2020.

12. On June 30, 2020, after Tom Ford filed the records request, the name of the group was again changed, to "Mount Pocono Borough Residents."

13. The Facebook Group is currently described as follows:

The aim of this page is to engage residents of Mount Pocono Borough Council in an open platform to discuss things that are important to the

community and to keep residents of the Borough current on the happenings around the Borough and in the area. On this page, you may post and discuss community events, ideas, concerns, and much more—in a polite, supportive, constructive manner. Here, we have the opportunity to support one another, voice concerns without fear of criticism, and become the community our families and friends deserve. You must be a resident of Mount Pocono Borough to join this group. Disclaimer: This group is not affiliated with Borough government, nor does it communicate any official business, intent, or policy of the Borough of Mount Pocono. Its purpose is to independently encourage non-divisive, apolitical discussion, and neither the creation of nor the maintenance of this Group has been discussed or approved by Borough Council.

Attestation of Mayor Penn, cited on page 5 of the OOA decision.

14. Tom Ford's submissions to the appeals officer demonstrate several occasions on which Borough Council members posted about Borough matters:

a. On April 17, Bonnie Roberts Glamocak posted that she was "only helping to set this page up for the borough to use. I am not on the council. Any Claudette Williams material you may have seen posted was part of the transition. Be safe everyone!" Council member Stacy Stewart-Keeler "liked" this post. It was viewed by Claudette Williams, Council President, and Mayor Penn.

Certified Record of OOA Proceedings, Exhibit 6, Submission to OOA by Tom Ford,

b. Claudette Williams posted on April 19 about a Pop-Up Food Pantry, where "Mount Pocono Borough is trying to help feed senior citizens in this time of need"

Id.

c. Council Member Tom Neville posted on April 20 "responding to some of the questions asked of me by my neighbors" and signed the post "Council Tommy Neville"

Id.

d. Tom Neville posted again on May 5, seeking "local heat and air conditioning companies for estimates for work to be done at municipal building"

Id.

e. Claudette Williams posted on May 10 seeking assistance "identifying a family in need of food and support paying electricity bills" after an anonymous donation. The names of potential recipients of aid were directed to be emailed to "Council President Claudette Williams... or Mayor Michael Penn."

Id.

f. On May 19, Tom Neville requested feedback from residents about recreational fire pits in the borough.

Id.

g. On May 20, Claudette Williams notified residents of a possible upcoming water rate increase for the borough.

Id.

h. On May 25, Claudette Williams streamed the Memorial Day ceremonies in the Facebook Group to cut down on in-person attendance.

Id.

i. On June 5, Mayor Penn and Claudette Williams posted about the official Clean-Up Day and solicited volunteers.

Id.

j. On June 20, Claudette Williams communicated with a resident asking about procedure for council meetings.

Id.

k. On July 1, Tom Neville announced his plans to start a flea market on Borough property, sought input from Borough residents, and signed his name "councilman Tommy Neville."

Id.

15. Mayor Penn and six of the seven Council members, including President Williams, were members of the "Mount Pocono Borough Updates by Council" Facebook group at the time the Ford request was filed. *Id.*

DISCUSSION

A requester or local agency may file a petition with a court of common pleas for review of a final determination of a decision by an Office of Open Records Appeals Officer. 65 P.S. §67.1302(a). The Borough appealed the OOR's final determination on September 23, 2020. On appeal, the court's decision shall be based on the "evidence as a whole,"

and it shall "clearly and concisely explain the rationale for the decision." *Id.* The appropriate standard of review for a court reviewing decisions of an OOR Appeals Officer is *de novo* and the scope of review is plenary. *Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013).

I. Information in the Facebook Group as a Borough Record

The purpose of the RTKL is to "promote access to government information in order to prohibit secrets, permit scrutiny of the actions of public officials, and make public officials accountable for their actions." *Ali v. Philadelphia City Planning Comm'n*, 125 A.3d 92, 99 (Pa. Cmwlth. 2015). Under the RTKL, agency records are presumed to be public records and are required to be made available to a requester, unless the local agency can show a specific exception applies. 65 P.S. §§ 67.305, 67.708. 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 pursuant to law or in connection with a transaction, business or activity of the agency. The term includes...information stored or maintained electronically and a data-processed or image-processed document."

65 P.S. §65.102.

"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, LLC v. Wintermantel*, 45 A.3d 1029 1041 (Pa. 2012). 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." *Bowling v. Office of Open Records*, 990 A.2d 813,824 (Pa. Cmwlth. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The appeals officer determined that the statements and actions made through the Facebook Group constitute a public record of the Borough, and are therefore subject to disclosure under the RTKL. The Borough contests this finding and presented evidence and a brief in support of its position.

The Facebook Group involved here was not created by resolution of the Council. The question of whether its posts may be considered a "record" under the RTKL has not been addressed by our appellate courts. The OOR has noted that because the RTKL is remedial legislation, the definition of "record" must be liberally construed. A *Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Cmwlth. 2011). The OOR has ruled here and in earlier decisions that a Facebook Group does not have to be sanctioned by the government body as a whole to constitute a record of official business on matters such as "economic development, community planning, maintenance, public safety, and community service projects within the Borough." *Purdy v. Borough of Chambersburg*, OOR Dkt. Ap 2017-1229, 2017 PA O.O.R.D. LEXIS 1224, (citing 8 Pa.C.S. §§10A06, 10A07, which sets forth the powers and duties of borough mayors).

Claudette Williams testified that she is the President of Borough Council and that she created the Facebook Group when she ran for public office and titled it "Claudette for the People." She developed a food pantry for people in need after she became a Council member and wanted to advertise its services. She changed the name of the Facebook page to "Mount Pocono Borough Update by Council" to carry out her advertising plans. She was an administrator of the group, as was Bonnie Glamocak and Mayor Penn. Ms. Williams testified that the Facebook Group was not an official Facebook Group of the

Borough Council. She testified that the Group advertised the food pantry and provided inspirational messages to residents of the Borough.

The Borough offered Borough Exhibit 1, which contained screen shots of pages on the Facebook Group. These screen shots were from before and after Mr. Ford made his request. They do not specifically reference Borough Council projects or business, and include inspirational sayings and other offerings of general community interest. However, the exhibit did not include all postings during the relevant time period.

Michael Penn, the Mayor of the Borough, testified that he was a member and an administrator of the Facebook Group and that it was not an official platform for Borough Council business.

The record certified by the OOR shows other posts which Mr. Ford obtained from the site. These posts demonstrate that council members were posting in their official capacity as members of Council regarding matters concerning planning, maintenance, and community service projects. It should also be noted that the Group description and name were changed after Ford filed his records request, including the "disclaimer" which was added, stating that the page is not affiliated with the Borough Council. Six of the seven members of Council were members of the Facebook Group; the President of Council and the Mayor of the Borough were administrators of the site and it billed itself as "Mount Pocono Borough Updates by Council" at the time the request was made.

The content of the Facebook page shows that at the time of the request, it was being used as a significant platform by a number of borough council officials and mayor to conduct economic development, community planning, maintenance and community

service projects within the Borough. The Borough Council didn't officially adopt the page, but Ford demonstrated that six of the seven members of Council used it for Borough business. The Facebook Group therefore constituted public record under the Right to Know Law and the Final Determination by the OOR will therefore be affirmed.

II. Existence of Responsive Records

The Borough attempted to voluntarily comply with the request while this case was before the OOR. The Mayor reported to OOR that the records sought "do not exist." *Report of Mayor Penn before the OOR quoted in the OOR decision, page 7.* The Mayor's report states that "Facebook does not allow for date range selection of 'Admin Activity.'" *Id.* Mr. Ford requested "all Admin Activity logged since 4/16/20 under the 'Moderate Group' tab..." *Request of Tom Ford.* The OOR hearing officer found that the "Admin Activity" log of the Facebook Group is accessible using filters available on the site. The Borough will therefore be directed to "try again," as directed by OOR.

The Mayor's report also states that he was unable to obtain "Pending Posts" as of May 20, 2020 and at the time of receipt of the request. The OOR appeals officer found that the Borough could obtain pending posts that had not been accepted, and if necessary it could redact posts pending before April 16, 2020. If a post was accepted, it would no longer be available in "pending posts," but a record of its acceptance would be available in the "Admin Activity" log which the Borough is required to produce.

Finally, Mr. Ford's request clearly included "communications after 4/1/20 between, among, or including Bonnie Roberts Clamocak, Michael Penn and/or Claudette Williams regarding the group but not limited to Facebook Messenger, private emails, and text

messages..." (Emphasis added). The Mayor stated that he did not have such communications, but it is not clear that the Borough did a document request to the other Council members who were members of the Facebook Group. The Borough is therefore obligated to "contact members of its council who may possess responsive records" as noted by the appeals officer.

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

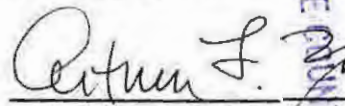
TOM FORD and THE BORO, : No. 5082 CV 2020
: Requester, :
: vs. :
MOUNT POCONO BOROUGH, :
: Respondent. :

ORDER

AND NOW this 22nd day of December, 2020, upon consideration of the Borough of Mount Pocono's Petition for Review of Decision of Pennsylvania Office of Open Records, the record certified by the Office of Open Records, the Borough's additional evidence and brief, **IT IS ORDERED** that:

1. The relief requested in the petition is **denied** and the decision of the Appeals Officer is **affirmed**.
2. Mount Pocono Borough shall provide Tom Ford and The Boro with the responsive records within (30) days. It may redact any information not subject to disclosure.

BY THE COURT:


ARTHUR L. ZULICK, J.

PROTHONOTARY
2020 DEC 22 PM 2:47
MONROE COUNTY, PA

cc: Tom Ford, Esq.
James Fareri, Esq
Office of Open Records, 333 Market Street, 16th Fl., Harrisburg, PA 17101-2234
ALZ2020-030