

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

LEHIGHTON AREA SCHOOL	:	
DISTRICT,	:	
	:	
Appellant	:	No. 19-0421
	:	
v.	:	Appeal from OOR Dkt. AP
	:	2018-2187
SIMON CAMPBELL,	:	
	:	
Appellee	:	

Eric J. Filer, Esquire	Counsel for Appellant
Simon Campbell	Pro Se
Charles R. Brown, Esquire	Counsel for Pennsylvania Office of Open Records

MEMORANDUM OPINION

Serfass, J. - December 30, 2019

Lehigh Area School District (hereinafter "Appellant" or "the District") initiated this action on March 1, 2019, with the filing of the "Appeal and Petition for Review of Decision of the Office of Open Records" seeking review of the January 30, 2019, decision of the Pennsylvania Office of Open Records (hereinafter "OOR") in AP 2018-2187. On May 28, 2019, Simon Campbell (hereinafter "Appellee") filed a "Notice of Non-Participation of Simon Campbell, Respondent" stating that he would rely upon the OOR's January 30, 2019, decision and that he would not participate in the instant action. On July 11, 2019, OOR filed a petition seeking leave of Court to file a brief as *Amicus Curiae* regarding the constitutional challenges raised by the District and, on July

15, 2019, this Court granted OOR's request. The *Amicus Curiae* brief of OOR was filed with this Court on August 15, 2019, and the District filed a reply brief on September 6, 2019. Upon consideration of the record in this case, the hearing held on this matter, and the briefs of the District and OOR, we make the following:

FINDINGS OF FACT

1. Appellant, Lehigh Area School District, is a Carbon County school district and a local agency under the Pennsylvania Right-to-Know Law (hereinafter "RTKL") with a principal administrative office located at 1000 Union Street, Lehigh, Carbon County, Pennsylvania;

2. Appellee, Simon Campbell, is an adult individual residing at 668 Stony Hill Road #298, Yardley, Bucks County, Pennsylvania;

3. On December 11, 2018, Appellee sent a Right-to-Know request to the District seeking the following: (1) a print screen or screenshot of any software program capable of opening a .PDF file that shows the word "redact" or "redaction" on the screen; (2) from the period of December 4, 2017, to the present, all information described in the five "WHEREAS" clauses of the District's resolution to retain the law firm of King, Spry, Herman, Freund & Faul (hereinafter "King Spry"); (3) from the period of December 4, 2017, to the present, all written communications

between agency officials that discuss the information sought in item (2); and (4) from the period of December 4, 2017, to the present, all written communications between King Spry and agency officials that discuss the information sought in item (2);

4. On December 19, 2018, Melanie Windhorn, the District's Open Records Officer, sent Appellee a written response indicating that two (2) of his requests were denied and that two (2) requests were at least partially granted;

5. On that same date, Appellee filed an appeal with the Office of Open Records and served a copy of the appeal on the District;

6. Appellee argued that his request was deemed denied as to all records on December 18, 2018, as the RTKL requires a response within five (5) business days;

7. On January 11, 2019, the District sent Appellee and the OOR its reply brief and five (5) discs of responsive documents, including more than four thousand (4,000) pages of emails with one hundred sixty-seven (167) emails that contained manual redactions, court filings, previous right-to-know requests, board minutes, and video footage;

8. The District's brief included the signed affidavits of Melanie Windhorn, William G. Schwab, Esquire, the District's solicitor, Brian Feick, the District's business manager, Rebecca A. Young, Esquire, of the King Spry Law Firm, and Lehigh Area

school directors Wayne Wentz, Stephen Holland, Larry Stern, Andrew Yenser, and Rita Spinelli;

9. The District also included a redaction log which detailed the type of content redacted and the reason(s) for each redaction;

10. The District argued that the redactions were proper under the RTKL as employee criticism exempt under the RTKL, legal advice or opinions protected by attorney/client privilege, student information which cannot be disseminated under the Family Educational Rights and Privacy Act of 1974, and I.T. login/password information exempt under the RTKL;

11. The District's brief included a request that the OOR hold a hearing to supplement the record regarding the redactions in order to meet its burden;

12. The OOR denied the District's request to hold a hearing and, on January 30, 2019, issued a final determination pursuant to which Appellee's appeal was granted in part and denied in part;

13. The OOR held that Appellee's request was deemed denied on December 18, 2018, that the District had demonstrated that the I.T. login/password information and the legal advice and opinions may be redacted, but that the District had not demonstrated that certain emails may be redacted as employee criticism or student information;

14. On March 1, 2019, the District filed an appeal of the OOR's final determination with this Court pursuant to 65 P.S. § 67.1302.

15. The District's appeal challenged the OOR's decision regarding the redaction of employee criticism and student information and claimed that the District was unconstitutionally denied substantive and procedural due process when the OOR denied the District's request for a hearing;

16. On May 28, 2019, Appellee filed a notice of non-participation stating that he would rely on the materials submitted to the OOR as well as the OOR's final determination;

17. On May 31, 2019, this Court held an evidentiary hearing in this matter;

18. Melanie Windhorn, the District's Right-to-Know Officer, testified regarding each of the fifty-three (53) emails which the District contends should be redacted to remove information directly related to Lehighton students and criticism of District employees;

19. Ms. Windhorn testified regarding thirty-one (31) of the subject emails and detailed that each of those emails contained student names and the names of parents who were discussing their student-children. See Exhibits 1-R, 2-R, 3-R, 5-R, 6-R, 7-R, 9-R, 10-R, 13-R, 14-R, 15-R, 18-R, 19-R, 20-R, 23-R, 34-R, 35-R, 38-R,

39-R, 40-R, 41-R, 42-R, 43-R, 44-R, 45-R, 46-R, 47-R, 48-R, 49-R, 51-R, and 53-R;

20. Ms. Windhorn testified regarding six (6) additional emails and detailed that each of those emails contained written criticism of various District employees. See Exhibits 4-R, 8-R, 11-R, 12-R, 36-R, and 37-R;

21. Exhibits 24-R, 25-R, 26-R, 27-R, 28-R, 29-R, and 30-R include written criticism of the District's solicitor, William G. Schwab, Esquire;

22. The District does not seek to have Exhibits 24-R, 25-R, 26-R, 27-R, 28-R, 29-R, and 30-R redacted;

23. Ms. Windhorn testified that Exhibits 16-R and 21-R include employee information, but she did not testify that those exhibits include written criticism of District employees, an employee performance rating, or any of the other disclosure exemptions regarding agency employees listed in 65 P.S. § 67.708(b)(7);

24. Ms. Windhorn testified that Exhibits 17-R, 22-R, 31-R, 32-R, and 33-R include the name of a parent of a Lehighton student;

25. Exhibits 17-R, 22-R, 31-R, 32-R, and 33-R do not include any direct reference to a Lehighton student;

26. Ms. Windhorn testified that Exhibit 50-R contained a written performance rating/review of a District employee;

27. Ms. Windhorn testified that Exhibit 52-R included the name and email address of a potential employee of the District; and

28. There is no evidence as to whether the individual referenced in Exhibit 52-R was or was not hired by the District.

CONCLUSIONS OF LAW

1. "[T]he 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, 1042 (Pa. 2012).

2. 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.Comm. 2010), aff'd, 75 A.3d 453 (Pa. 2013).

3. Appellant is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §§ 67.102 & 67.302.

4. Records in possession of a local agency are presumed public unless exempt under the RTKL or any other Federal or State law or regulation or protected by a privilege, judicial order, or decree. 65 P.S. §67.305.

5. The RTKL places the burden of proof on the local agency receiving the request to demonstrate that a record is exempt from

public access by a preponderance of the evidence. 65 P.S. § 67.708(a)(1).

6. Likewise, the burden of proof in claiming a privilege is on the party asserting that privilege. Levy v. Senate, 34 A.3d 243, 249 (Pa.Commw. 2011), aff'd in part, rev'd in part sub nom. Levy v. Senate of Pennsylvania, 65 A.3d 361 (Pa. 2013).

7. The RTKL exempts from disclosure certain records related to agency employees, including written criticisms of an employee, a performance rating or review, and the employment application of an individual not hired by the agency. 65 P.S. § 67.708(b)(7).

8. The local agency must affirmatively provide evidentiary support establishing that the requested records constitute a written criticism of an employee as "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." Office of Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa.Commw. 2013).

9. Appellant has demonstrated through Ms. Windhorn's testimony and the exhibits presented at the hearing that Exhibits 4-R, 8-R, 11-R, 12-R, 36-R, and 37-R include written criticisms of various District employees, and those documents shall be redacted as requested by the District. See 65 P.S. § 67.708(b)(7)(vi).

10. Appellant does not contest the unredacted disclosure of Exhibits 24-R, 25-R, 26-R, 27-R, 28-R, 29-R, and 30-R.

11. Appellant has demonstrated through Ms. Windhorn's testimony and the exhibits presented at the hearing that Exhibit 50-R contains a recommendation pertaining to the qualifications of an identifiable individual/District employee and that document shall be redacted as requested by the District. See 65 P.S. § 67.708(b)(7)(i).

12. Appellant has failed to demonstrate that Exhibits 16-R and 21-R include any information regarding agency employees that is exempt from disclosure under 65 P.S. § 67.708(b)(7), and those exhibits shall be released without redaction.

13. A record containing all or part of a person's personal e-mail address is exempt from disclosure. 65 P.S. § 67.708(b)(6)(i)(A).

14. Appellant has failed to demonstrate that Exhibit 52-R contains the employment application of an individual who was not hired by the District, but Appellant has demonstrated that this exhibit contains that individual's personal email address. See 65 P.S. §§ 67.708(b)(7)(iv) and 67.7086(i)(A).

15. The email address of the individual identified in Exhibit 52-R shall remain redacted as requested by the District, but the name of the individual shall be unredacted.

16. The RTKL exempts from disclosure any record identifying the name, home address, or date of birth of a child seventeen (17) years of age or younger. 65 P.S. § 67.708(b)(30).

17. The vast majority of student names would be exempt from disclosure by the District under the RTKL.

18. There is no evidence regarding the age of the students whose names the District seeks to redact.

19. The RTKL also exempts from disclosure any record, the disclosure of which would result in the loss of Federal or State funds by an agency. 65 P.S. § 67.708(1)(i).

20. The Family Educational Rights and Privacy Act of 1974 (hereinafter "FERPA") is a federal law that protects the privacy of student educational records by sanctioning school districts that have a policy or practice of permitting the release of education records without parental consent. 20 U.S.C. § 1232g(b)(1).

21. Educational records are those that contain information directly related to a student, and the statute does not require that an educational record be related to a student's academic performance. Easton Area Sch. Dist. v. Miller, 191 A.3d 75, 81 (Pa. Commw. 2018), appeal granted in part, 201 A.3d 721 (Pa. 2019).

22. Here, student names are information directly related to the student, and parent names are information directly related to the student when the parent is discussing that student.

23. When the parent is discussing student rights or student punishment without direct reference to the student, the parent's name is not directly related to the student, is not an educational

record, and does not fall under the exemption for records which would result in the loss of Federal or State funding if disclosed. See Easton Area Sch. Dist. v. Miller, 191 A.3d at 81 (“‘Directly’ means ‘in a direct manner.’”).

24. Therefore, Exhibits 1-R, 2-R, 3-R, 5-R, 6-R, 7-R, 9-R, 10-R, 13-R, 14-R, 15-R, 18-R, 19-R, 20-R, 23-R, 34-R, 35-R, 38-R, 39-R, 40-R, 41-R, 42-R, 43-R, 44-R, 45-R, 46-R, 47-R, 48-R, 49-R, 51-R, and 53-R shall be redacted as requested by the District to remove the names of students and the names of parents discussing their student-children.

25. However, Exhibits 17-R, 22-R, 31-R, 32-R, and 33-R include only the name of a parent with no mention of their student-children.

26. Therefore, Exhibits 17-R, 22-R, 31-R, 32-R, and 33-R are not directly related to any students, are not educational records, and shall be disclosed without redaction.

27. Regarding the District’s constitutional challenge, we begin with the recognition that all legislation enacted by the General Assembly carries a strong presumption of constitutionality, 1 Pa.C.S.A. §1922, and that any party challenging a statute’s constitutionality bears a heavy burden to demonstrate that the legislation clearly, palpably, and plainly violates the terms of the Constitution. Commonwealth v. Rabold,

951 A.2d 329, 340 (Pa. 2008); Commonwealth v. Burnsworth, 669 A.2d 883, 886 (Pa. 1995).

28. Furthermore, "the right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases." In re: R.D., 739 A.2d 548, 554 (Pa.Super. 1999).

29. The District's claim that its federal due process rights have been violated must fail because "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." Williams v. Mayor & City Council of Baltimore, 289 U.S. 36, 40 (1933).

30. "A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will." City of Trenton v. State of New Jersey, 262 U.S. 182, 187 (1923).

31. The District, as a political subdivision created by the General Assembly of Pennsylvania, may not assert a federal right to due process against the Commonwealth.

32. Regarding the District's right to due process under the Pennsylvania Constitution, "the essential elements of procedural

due process are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause." Bornstein v. City of Connellsville, 39 A.3d 513, 519 (Pa. Commw. 2012) (internal quotation marks omitted).

33. "Whether due process has been afforded must be examined in relation to the particular circumstances of each case." *Id.*

34. "[T]he expedited procedures established by the General Assembly in the RTKL for review of appeals before an OOR appeals officer are less formal and less robust than those that typically govern the administrative agency adjudicatory process." State Employees' Ret. Sys. v. Pennsylvanians for Union Reform, 113 A.3d 9, 20 (Pa. Commw. 2015), appeal granted, order vacated on other grounds, 165 A.3d 868 (Pa. 2017).

35. In every appeal filed with the OOR, the agency receives notice of the requester's appeal and both parties are given an opportunity to submit documentary evidence and testimonial affidavits. 65 P.S. § 67.1101(a).

36. The OOR appeals officer must issue a final determination within thirty (30) days, or the appeal is deemed denied. 65 P.S. § 67.1101(b)(2).

37. The appeals officer may conduct a hearing in that time, but the decision to hold or not to hold a hearing is not appealable. 65 P.S. § 67.1102(a)(2).

38. As stated above, the burden of proof is on the local agency receiving the request to demonstrate that a record is exempt from public access by a preponderance of the evidence, and "it is not incumbent upon OOR to request additional evidence when developing the record. Rather, it is the parties' burden to submit sufficient evidence to establish material facts." Highmark Inc. v. Voltz, 163 A.3d 485, 491 (Pa.Commw. 2017).

39. Further, a local agency has the right to appeal the decision of the OOR to the court of common pleas for the county where the local agency is located and that court shall issue a decision based upon the evidence as a whole. 65 P.S. § 67.1302(a).

40. Here, the District was provided with proper notice of the proceedings and a sufficient opportunity to present its case before the OOR.

41. The District exercised its right to de novo judicial review of the OOR's Final Determination of January 30, 2019, with the filing of an appeal in this Court on March 1, 2019.

42. The right to de novo judicial review fully satisfies due process and cures any alleged violation thereof. See Katruska v. Bethlehem Ctr. Sch. Dist., 767 A.2d 1051, 1056 (Pa. 2001); Lincoln Philadelphia Realty Assocs. I v. Bd. of Revision of Taxes of City & Cty. of Philadelphia, 758 A.2d 1178, 1187 (Pa. 2000).

43. We find that the District has failed to meet the substantial burden imposed upon those challenging the legitimacy of the statutes duly enacted by the people's representatives.

CONCLUSION

For the foregoing reasons, Appellant's "Appeal and Petition for Review of Decision of the Office of Open Records" will be granted in part and denied in part, and we will enter the following:

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CIVIL DIVISION**

LEHIGHTON AREA SCHOOL	:	
DISTRICT,	:	
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Appellant	:	No. 19-0421
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	:	2018-2187
SIMON CAMPBELL,	:	
	:	
Appellee	:	

Eric J. Filer, Esquire	Counsel for Appellant
Simon Campbell	Pro Se
Charles R. Brown, Esquire	Counsel for Pennsylvania Office of Open Records

ORDER OF COURT

AND NOW, to wit, this 30th day of December, 2019, upon consideration of the "Appeal and Petition for Review of Decision of the Office of Open Records" filed by Lehigh Area School District, and after hearing held thereon, and following our review of the District's "Trial Brief", the *Amicus Curiae* brief of the Pennsylvania Office of Open Records, and the District's reply brief in opposition thereto, and for the reasons set forth hereinabove, the appeal of Lehigh Area School District is **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. The District's appeal is granted as to exhibits 1-R, 2-R, 3-R, 5-R, 6-R, 7-R, 9-R, 10-R, 13-R, 14-R, 15-R, 18-R, 19-R, 20-R, 23-R, 34-R, 35-R, 38-R, 39-R, 40-R, 41-R, 42-R, 43-R, 44-R, 45-R, 46-R, 47-R, 48-R, 49-R, 51-R, and 53-R, and said exhibits

shall be provided to Appellee in redacted format, as proposed by the District, removing therefrom the names of Lehighton students and the names of parents discussing their student-children;

2. The District's appeal is granted as to exhibits 4-R, 8-R, 11-R, 12-R, 36-R, and 37-R, and said exhibits shall be provided to Appellee in redacted format, as proposed by the District, removing therefrom written criticisms of District employees;

3. The District's appeal is granted as to exhibit 50-R, and said exhibit shall be provided to Appellee in redacted format, as proposed by the District, removing therefrom the performance review of a District employee;

4. The District's appeal is granted in part as to exhibit 52-R, and said exhibit shall be redacted to remove therefrom only the personal email address contained therein;

5. The District's appeal is denied as moot regarding exhibits 24-R, 25-R, 26-R, 27-R, 28-R, 29-R, and 30-R, and said exhibits shall be provided to Appellee in unredacted format as the District does not contest such release;

6. The District's appeal is denied as to exhibits 16-R, 17-R, 21-R, 22-R, 31-R, 32-R, and 33-R, and said exhibits shall be provided to Appellee in unredacted format as the District has failed to demonstrate that the redactions are appropriate or that the records are exempt from disclosure;

7. In all other respects, the decision of the Pennsylvania Office of Open Records is affirmed and the District's appeal is denied; and

8. The exhibits referenced hereinabove shall be provided to Appellee in the specified format within thirty (30) days of the date of this order.

BY THE COURT:

Steven R. Serfass, J.