

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

LEHIGHTON AREA SCHOOL DISTRICT,	:	
Appellant	:	
vs.	:	No. 18-2625
DAVID BRADLEY,	:	
Appellee	:	
vs.	:	
LEHIGHTON AREA EDUCATION	:	
ASSOCIATION, PSEA/NEA and	:	
LEHIGHTON AREA EDUCATIONAL	:	
SUPPORT PROFESSIONALS	:	
ASSOCIATION, PSEA/NEA,	:	
Intervenors	:	

Civil Law - Right-to-Know Law ("RTKL") - Request Directed to Local Agency - Appeal from Final Determination of the State Office of Open Records ("OOR") - Scope and Standard of Review on Appeal - Notice to Affected Third Parties - Standing of Association to Intervene to Assert Procedural Due Process Rights of its Members - Sufficiency of Document Request - Duty of Local Agency to Provide Records Requested - Agency Records Located on Private Email Accounts - Privileged and Confidential Information

1. On appeal to the Court of Common Pleas from a final determination of the State Office of Open Records ("OOR"), the scope of review is "broad," with the court having the discretion to rely upon the record created before the OOR or to expand the record and create its own. The standard of review is *de novo* with the court being the ultimate finder of fact.
2. In a school district's appeal from a final determination of the OOR, directing the release of thousands of emails, some of which allegedly contain privileged and confidential employee information, an Association to which the employees belong has standing to intervene on behalf of its members, has standing to intervene on behalf of its members, and the right to participate in any hearings or appeals regarding

the requested emails in order to protect its members' rights to procedural due process and privacy.

3. The Right-to-Know Law ("RTKL") requires local agencies to make available upon written request public records owned by, or within the possession or control of the agency, unless such records fall within specific, enumerated exceptions or are privileged.
4. Under the RTKL, records which are owned or possessed by, or subject to the control of a local agency, and which document a transaction or activity of the agency and were created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency, are presumed to be public records subject to disclosure, unless protected by a specific exception or privilege. The burden of disproving this presumption is upon the local agency by a preponderance of the evidence.
5. Emails created by public officials in their capacity as public officials for the purpose of furthering agency business - even if created or transmitted using a personal email account on privately owned equipment - are records of the agency in which the agency has an ownership interest. Further, such records are presumed to be public records under the RTKL.
6. As a threshold matter, records requested from a local agency must be described with sufficient specificity to enable the agency to ascertain which records are being requested. Whether a request meets this specificity requirement is determined under a three-part balancing test which considers whether the request identifies: (1) the subject matter of the request; (2) the scope of the documents sought; and (3) the timeframe for the records sought.
7. The RTKL does not permit a local agency to deny a request for record information because of the burden or expense of searching for and producing the information requested, however, the fact that a request is burdensome is a factor in considering whether the request is sufficiently specific.

8. A request to a school district for all emails created, sent or received by four school officials over a forty-seven consecutive day period, but which fails to identify the subject matter of the request, and which consequently would require the district to separately examine in excess of 7,700 emails potentially responsive to the request to determine if any are agency records subject to disclosure, if any contained exempt, privileged or other objectionable material subject to redaction, and if any affect third parties entitled to receive notice before release of the record, was unreasonably and unnecessarily burdensome since to comply would require the district's open records officer to expend in excess of three months working full-time to conduct even a cursory review, at an expense to the district in excess of \$10,000.00, which burden would be substantially reduced if the subject matter of the request had been disclosed. Accordingly, the district properly denied the request on the basis of insufficient specificity.

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SUPPORT PROFESSIONALS	:	
ASSOCIATION, PSEA/NEA,	:	
Intervenors	:	
William G. Schwab, Esquire	Counsel for Appellant	
Eric J. Filer, Esquire	Counsel for Appellant	
David Bradley	Pro Se	
Jesika A. Steuerwalt, Esquire	Counsel for Intervenors	

MEMORANDUM OPINION

Nanovic, P.J. - January 9, 2019

Is a Right-to-Know request which fails to identify the subject matter of the request and requires the local agency to examine thousands of documents to determine which, if any, are subject to disclosure under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104, unreasonably and unnecessarily burdensome and, consequently, properly denied on the basis of insufficient specificity. This, ultimately, is the principal issue presented by the Lehigh Area School District ("School District") in its appeal from a final determination of the State Office of Open Records ("OOR").

FACTUAL AND PROCEDURAL BACKGROUND

On July 11, 2018, David Bradley ("Bradley"), a duly elected member of the Lehigh Area School Board, requested the School District, a local agency under the RTKL, to provide him with copies of "all emails created, sent or received" by School Board President Larry Stern, Superintendent Jonathan J. Cleaver, High School Principal Susan Howland, and High School Vice Principal David Hauser "between the dates of May 25, 2018 and July 10, 2018." A separate request was made with respect to each of these School District officials. The requests did not identify the subject matter of the request or limit the emails to those by and between School officials.

Each of these requests was denied on July 18, 2018, by Melanie H. Windhorn, the School District's Open Records Officer, for lack of specificity. The Requester appealed the School District's denial to the Pennsylvania Office of Open Records on the same date, July 18, 2018. Thereafter, without holding a hearing, but after providing the parties with an opportunity to supplement the record, in response to which the School District submitted a position statement supported by the July 30, 2018, affidavit of its Open Records Officer, the OOR appeals officer issued a final determination dated August 10, 2018, granting the appeal and directing the School District to provide all requested records to the Requester within thirty days.

The School District filed an Appeal/Petition for Review from the OOR's final determination on September 7, 2018, and requested an evidentiary hearing. In this appeal, the School District noted that in excess of 7,700 emails were potentially responsive to the requests and that included within the emails requested was privileged and confidential information exempt and/or barred from disclosure under the RTKL and the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, "including educational matters, student discipline, domestic matters, employees, labor issues, and litigation." (Appeal, ¶¶8, 18). In addition to claiming that the requests as submitted lacked sufficient specificity to enable the School District to ascertain which records were being requested and would impose an undue burden on the District, the District's appeal claimed that the OOR failed to consider or address the need to redact or withhold information as exempt, privileged or otherwise excluded from public access under state and federal law. Cf. Levy v. Senate of Pa., 65 A.3d 361, 383 (Pa. 2013) (allowing a legislative agency to claim exemptions in an appeal pending before the senate appeals officer, who serves in the same role as the OOR for appeals by local agencies, even if not previously claimed in the agency's initial written denial).

On September 14, 2018, the Lehigh Area Education Association, PSEA/NEA ("Education Association") and the

Lehigh Area Educational Support Professionals Association, PSEA/NEA ("ESP Association") sought leave to intervene in the School District's appeal, citing their belief that at least some of the emails directed to be released by the OOR contained "personal information about employees represented by the Education Association and/or the ESP Association that is or may be exempt from disclosure under the Right-to-Know Law and/or other laws," and that no notice, opportunity to be heard, or any other participation rights had been afforded those employees whose personal information was or could be contained in the emails ordered to be released in derogation of their rights to procedural due process. (Petition to Intervene, ¶¶15, 21); see also Pa. State Educ. Ass'n ex rel. Wilson v. Commonwealth, Office of Open Records, 110 A.3d 1076, 1087 (Pa.Cmwlt. 2015) (*en banc*) (recognizing the right of public school employees to procedural due process when their personal information is requested under the RTKL including, at a minimum, notice of the request to affected employees, the opportunity to object prior to the release of the personal information, and the ability to participate in any hearings or appeals regarding such request), rev'd on other grounds by Pa. State Educ. Ass'n v. Commonwealth, Dept. of Cmty. and Econ. Dev., 148 A.3d 142 (Pa. 2016). This request was granted by order dated October 16, 2018, no opposition to the intervention having been filed in response to

a rule to show cause issued on September 18, 2018. See also National Solid Wastes Management Association v. Casey, 580 A.2d 893, 899 (Pa.Cmwlth. 1990) ("In determining whether the Association has standing to maintain this action, we are mindful that an association may have standing even in the absence of injury to itself. An association may have standing solely as the representative of its members and may initiate a cause of action if its members are suffering immediate or threatened injury as a result of the contested action.").

A *de novo* hearing on the appeal was held on November 29, 2018, in which the documents identified in Section 1303(b) of the RTKL¹ were incorporated by reference. See Bowling v. Office of Open Records, 75 A.3d 453, 474, 476-77 (Pa. 2013) (holding that when a court of common pleas reviews a determination issued by the OOR with respect to a Right-to-Know request directed to a local agency, the standard of review is *de novo*, not deferential, with the court having the authority to substitute its own findings of fact for those made by the OOR appeals officer; the scope of review is "broad" or plenary with the court having the discretion to rely upon the record created below or to expand the record and create its own; and that the court is the ultimate finder of fact).

DISCUSSION

The RTKL "is remedial legislation 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” Commonwealth v. Engelkemier, 148 A.3d 522, 529-30 (Pa.Cmwlth. 2016). In furtherance of government transparency for these purposes, Section 302(a) of the RTKL provides that “[a] local agency shall provide public records in accordance with this act.” 65 P.S. § 67.302(a). “[U]nder the RTKL, agency records are presumed to be public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific, enumerated exceptions or are privileged.” 65 P.S. § 67.305; Office of the District Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1129 (Pa.Cmwlth. 2017), *appeal denied*, 174 A.3d 560 (Pa. 2017). “The burden of proving that a record of a . . . local agency is exempt from public access shall be on the . . . local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1); Bagwell, 155 A.3d at 1130. Moreover, because the RTKL is remedial in nature, “in determining whether a record is exempt from disclosure under the RTKL, exemptions from disclosure must be narrowly construed so as not to frustrate the remedial purpose of the RTKL.” Bagwell, 155 A.3d at 1130.

“Upon receipt of a written request for access to a record, an agency shall make a good-faith effort to determine if the

record requested is a public record . . . and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request." 65 P.S. § 67.901; Bagwell, 155 A.3d at 1130. If the request is denied, "whether in whole or in part, the denial shall be issued in writing and shall include, *inter alia*, (1) a description of the record requested and (2) the specific reasons for denial, including a citation of supporting legal authority." 65 P.S. § 67.903; Bagwell, 155 A.3d at 1130 (quotation marks omitted). Except in limited circumstances, the burden on a local agency to comply with a request is in and of itself not a sufficient basis to deny the request. Engelkemier, 148 A.3d 530 (citing Dep't of Env'tl. Prot. v. Legere, 50 A.3d 260, 265 (Pa.Cmwlth. 2012)). Nevertheless, and even though the power granted requesters by the RTKL is inquisitorial and investigative, it is constrained by the terms of the law itself. Bagwell, 155 A.3d at 1138-39.

As a threshold matter, a written request for information under the RTKL "should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested and shall include the name and address to which the agency should address its response." 65 P.S. § 67.703; Bagwell, 155 A.3d at 1142. "[I]t is the requester's responsibility to tell an agency what records he or

she wants.” Mollick v. Township of Worcester, 32 A.3d 859, 871 (Pa.Cmwlth. 2011). In Pennsylvania Dep’t of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121 (Pa.Cmwlth. 2015), the Court set forth a three-part balancing test to evaluate whether a request is sufficiently specific, examining whether the request identifies: (1) the subject matter of the request; (2) the scope of the documents sought; and (3) the timeframe for the records sought. *Id.* at 1125; see also Bagwell, 155 A.3d at 1143.

“[T]he requirement that a requester identify the subject matter of a request necessitates that a requester identify the transaction or activity of the agency for which the record is sought,” and provide “a context to narrow the search.” Bagwell, 155 A.3d at 1143 (citation and quotation marks omitted); Pennsylvania Office of Inspector General v. Brown, 152 A.3d 369, 372-73 (Pa.Cmwlth. 2016). “[T]he requirement that a requester identify the scope of the documents sought necessitates that a requester identify a discrete group of documents either by type . . . or recipient.” Bagwell, 155 A.3d at 1143 (citation and quotation marks omitted). The requirement that the requester identify the timeframe for the records sought requires the requester to identify “a finite period of time for which records are sought.” Bagwell, 155 A.3d at 1143 (citation and quotation marks omitted).

Moreover, not all information or documents in the

possession of an agency are accessible to the public under the RTKL: only those which are "public records." 65 P.S. § 67.302(a). A "public record" is defined in the RTKL as a

record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708[, 65 P.S. § 67.708]; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.

65 P.S. § 67.102 (definition of "public record") (emphasis added). The term "record" is further defined in the RTKL as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

65 P.S. § 67.102 (definition of "record") (emphasis added). With respect to the definition of a "record," the Court in Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa.Cmwlth. 2012), noted:

This definition contains two parts. First, the information must "document a transaction or activity of the agency." Recently, this Court, in Second Chance [i.e., Allegheny County Department of Administrative Services v. A Second Chance, Inc.], 13 A.3d 1025 (Pa.Cmwlth. 2011)], interpreted "documents" to mean "proves, supports [or] evidences." Second Chance, 13 A.3d at 1034-35; Bari, 20 A.3d at 641 [i.e., Office of the Governor v. Bari, 20 A.3d 634, 641 (Pa.Cmwlth.

2011)]. Second, the information must be "created, received, or retained" in connection with the activity of the agency.

Id. 95.

At the hearing held on November 29, 2018, the School District's evidence established that during the timeframe requested, the Superintendent's email account maintained by the School District covered approximately 3,490 emails, the Principle's account contained approximately 2,354 emails, and the Vice Principal's account had approximately 1,864 emails, for a total of approximately 7,708 emails. The School District's evidence also established that Mr. Stern did not maintain an email account with the School District, that Mr. Stern was unwilling to turn over all of his personal emails to the School District, and that without knowing the subject matter of the request, Mr. Stern was unable to determine if there was anything he was required to turn over. See also Affidavit of the School District's Open Records Officer, Melanie H. Windhorn, dated July 30, 2018.²

Under the Pittsburgh Post-Gazette tripartite test, Bradley has clearly identified the scope of the documents sought (*i.e.*, emails) and a finite period of time - between May 25, 2018 and July 10, 2018 - a period of forty-seven days. Significantly, however, the subject matter of the request - the transaction or activity of the agency for which documents are sought - is

notably absent. Yet, this information, in this case, is critical to letting the School District know what information and what documents are being requested among thousands, which emails to look for, and to determine whether each email is a record within the RTKL's meaning of that term, and, if so, whether it contains exempt, privileged or other objectionable material and, if affecting third parties, who else has to be notified. See 65 P.S. § 67.1101(c) (providing a person other than the agency or requester with a direct interest in the record subject to an appeal with an opportunity to participate in the appeal). Without knowing the subject matter of the request, before responding to the request as submitted, the School District must individually sift through thousands of emails to determine whether each in fact contains information evidencing any transaction or activity of the School District (*i.e.*, is a "record" subject to disclosure), and to further assure that confidential and/or privileged information involving not only itself, but of third parties, is not improperly disseminated. As testified to by the School District's Open Records Officer, given the volume of documents potentially responsive to the request, a cursory review alone of these documents would take an estimated three months working full time to accomplish, at an expense to the School District in excess of \$10,000.00.

The RTKL does not permit a local agency to deny a request for record information because of the burden or expense of searching for and producing the information sought, however, the fact that a request is burdensome is a factor in considering whether the request is sufficiently specific. Commonwealth, Pennsylvania Department of Environmental Protection v. Legere, 50 A.3d 260, 265 (Pa.Cmwlth. 2012). "[W]here a request is sufficiently specific an agency cannot escape its obligations under the RTKL by claiming that the way the agency maintains or organizes its information, standing alone, renders a request overbroad or burdensome." Bagwell, 155 A.3d at 1145 (citations omitted). "However, an open-ended request that fails to give a local agency guidance in its search for the information sought may be so burdensome that the request will be found overbroad under the RTKL." Bagwell, 155 A.3d at 1143. "[A] burden stemming from an agency's organization and maintenance of its information, as opposed to a request seeking a vast array of documents without sufficiently specific guidance to the agency about what was sought, will not be weighed against the requester and permit an agency to deny access to information pursuant to the RTKL." Bagwell, 155 A.3d at 1145 (citation omitted).

For the School District to respond to the request as submitted, it must individually review and manually examine over 7,700 emails to determine what each contains and whether its

contents are subject to disclosure, in whole or in part, under the RTKL. The burden imposed on the School District in undertaking such a review and examination is a result not of the time and effort of locating and producing specific identifiable documents containing requested information, but of reviewing and examining thousands of documents to determine whether each contains any information that might be subject to disclosure under the RTKL. This burden is an unnecessary and unreasonable one resulting from the breadth of the request and the number of documents involved, and not from the manner in which the School District maintains or organizes its information. See Mollick v. Twp. of Worcester, 32 A.3d 859, 871 (Pa.Cmwlth. 2011) (concluding request for all emails transmitted by and between Township supervisors on their personal computers and/or via their personal email accounts regarding any Township business and/or activities for the past one and five years was insufficiently specific because the failure to specify what category or type of Township business or activity for which information was sought would place an unreasonable burden on the Township to examine all emails for an extended time period without knowing, with sufficient specificity, to what Township business or activity the request related); Pittsburgh Post-Gazette, 119 A.3d at 1126 (holding that a request for "[a]ll of the emails of the Acting Secretary of Education Carolyn Demaresq

as they pertain to the performance of her duties as Acting Secretary" for a period of approximately one year was insufficiently specific because it failed to identify the subject matter of the request - i.e., the transaction or activity of the agency for which information was sought - and, in particular, did not provide a context by which the request could be narrowed). And while an extremely short timeframe may under extraordinary circumstances compensate for an otherwise overbroad request, we are not convinced that such is the case here where notwithstanding the relatively short period of forty-seven days, over 7,700 documents must be individually examined. Cf. Baxter, 35 A.3d at 1265 (finding request for all emails sent or received by any school board member and the school district superintendent during a thirty-day period and which encompassed 3,500 responsive documents to be sufficiently specific because of short timeframe and the absence of evidence that compliance would impose an unreasonable burden on the school district).

CONCLUSION

Whether a request for records under the RTKL is sufficiently specific to enable a local agency to ascertain which records are being requested needs to be reviewed on a case-by-case basis under the totality of the circumstances and not simply upon the face of the request. Bagwell, 155 A.3d at 1144-45. Here, with in excess of 7,700 emails being potentially

responsive to the request and with no subject matter provided to provide any context for the School District to narrow its search, the expense and burden to the School District of reviewing the content of thousands of documents, not knowing what it is searching for and necessarily requiring it to make judgments whether a disclosable transaction or activity of the District is referred to, rendered the request unduly burdensome.

BY THE COURT:

P.J.

¹ The record on appeal to the court "shall consist of the request, the agency's response, the appeal filed under Section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." 65 P.S. § 67.1303(b). In Bowling v. Office of Open Records, 75 A.3d 453 (Pa. 2013), the Pennsylvania Supreme Court determined that this language which describes the scope of the court's review on appeal does not limit the record on appeal, but merely "describes the record to be certified" by the OOR to the reviewing court. 75 A.3d at 474, 476-77.

² The records requested of the School District's Superintendent, High School Principal and High School Vice Principal are accessible to the School District and in its possession since these emails were processed through a School District provided email system made available to these officials and for which each was required to sign a confidentiality agreement as a condition of using the system. In contrast, the emails of Mr. Stern are under a personal email account to which the School District claims to have no access and are ones which Mr. Stern has refused to provide to the School District for review in making its response to the request.

As a general matter, emails to and from a public official, whether transmitted using a taxpayer funded email account on publicly owned equipment, or via a personal email account on privately owned equipment, are not *per se* subject to disclosure under the RTKL. This is so because a record is "information. . . that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency," and "personal emails that do not do so are simply not records." 65 P.S. § 67.102 (definition of "record"); Easton Area Sch. Dist. v. Baxter, 35 A.3d 1259, 1264 (Pa.Cmwlth. 2012), *appeal denied*, 54 A.3d 350 (Pa. 2012). The record must be a record of the agency and not merely a personal record maintained by an individual public official solely for personal reasons; an individual member of a governing body (e.g., borough council, township board of supervisors, school board of directors) is not a governmental entity, has no authority to act alone on behalf of the local agency, and has no obligation to keep records of

every email, note or conversation in which he or she discussed agency matters on their private computers. See In re Silberstein, 11 A.3d 629, 633 (Pa.Cmwlth. 2011); Barkeyville Borough v. Stearns, 35 A.3d 91, 97 (Pa.Cmwlth. 2012). The foregoing notwithstanding, "[w]hile an individual school board member lacks the authority to take final action on behalf of the entire board, that individual acting in his or her official capacity. . . constitutes agency activity when discussing agency business." Baxter, 35 A.3d at 1264. Consequently, "emails created by public officials, in their capacity as public officials, for the purpose of furthering [agency] business" are records of the agency in which the agency has an ownership interest. Barkeyville Borough, 35 A.3d at 97.

Assuming the emails requested here discuss School District business and were created by School officials in their position as public officials, such emails meet the definition of the term "record" found in Section 102 of the RTKL. See Barkeyville Borough, 35 A.3d at 95. However, "[i]n order to be subject to disclosure, this record also must be a public record, which is defined as, '[a] record. . . of a Commonwealth or local agency that: (1) is not exempt under Section 708 [Exceptions for public records]; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.'" 65 P.S. § 67.102 (definition of "public record"); Baxter, 35 A.3d at 1260. "The burden of proving that a requested piece of information is a 'public record' lies with the requester." Barkeyville Borough, 35 A.3d at 94.

With respect to meeting this requirement, as a matter of law, agency records not only in the physical possession of a local agency, but also those in its constructive possession (*i.e.*, those subject to the control of the agency), are presumed to be a public record under the RTKL. Barkeyville Borough, 35 A.3d at 96. Additionally, because a school district carries out its duties through a school board of directors made up of individual members, records in the personal accounts of individual board members are in the possession of a district, by and through its individual board members, and are therefore presumptively public records under Section 305 of the RTKL, 65 P.S. § 67.305. See Barkeyville Borough, 35 A.3d at 96. Nevertheless, whether such records need to be produced in response to a RTKL request depends on whether this presumption of being a public record is rebutted, and further on whether any applicable exemption or privilege exists, including but not limited to that concerning internal, pre-decisional deliberations of an agency pursuant to 65 P.S. § 708(b)(10)(i)(A). See Barkeyville Borough, 35 A.3d at 98 n.6; Baxter, 35 A.3d at 1264.