



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>STEPHEN BAGWELL,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2016-1169</b>
	:	
<b>MONTOURSVILLE AREA</b>	:	
<b>SCHOOL DISTRICT,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Stephen Bagwell (“Requester”) submitted a request (“Request”) to the Montoursville Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking e-mails exchanged by the District’s school board members. The District denied the Request, arguing that the e-mails are not records of the District. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the District is required to take further action as directed.

**FACTUAL BACKGROUND**

On May 26, 2016, the Request was filed, seeking “[a]ll emails sent by [School Board Director] Denise Johns between & including March 1<sup>st</sup> 2016 and April 15<sup>th</sup> 2016. Any email sent by [School Board Director] Bob Logue to Denise Johns in the same time period.” On June

2, 2016, the District invoked a thirty-day extension time to respond the Request. *See* 65 P.S. § 67.902. On June 21, 2016, the District denied the Request, stating the responsive e-mails do not constitute records of the District. *See* 65 P.S. § 67.102 (defining “record” of an agency).

On July 8, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 20, 2016, the District submitted a position statement, stating that twenty-two responsive e-mails were identified; however, the District argued that none of the e-mails are records subject to the RTKL because they do not document a transaction, business or activity of the District. The District explained that seven of the twenty-two e-mails were sent to two school board members, and these e-mails contained information regarding a building project, security matters, board updates, email password inquiry, and a response to a constituent. Next, the District explained that the remaining e-mails relate to procedures for interviewing applicants for a vacant school board position, hiring a new superintendent, and addressing security matters, and the District argued these e-mails are exempt from disclosure because they reflect the internal, predecisional deliberations of the District. 65 P.S. § 67.708(b)(10)(i)(A). The District further argued that e-mails concerning scheduling executive sessions are exempt under Section 708(b)(21) of the RTKL, as these represent records of discussions held in executive discussion. 65 P.S. § 67.708(b)(21)(ii). Lastly, the District asserted that with the exception of one email to a constituent, all responsive e-mails were internal to the District. In support of its denial, the District submitted the sworn affidavit of Brandy Smith, Open Records Officer for the District.

On August 5, 2016, following the Requester's agreement to an extension of time to issue the Final Determination, the OOR ordered the District to submit the responsive records for *in camera* inspection. On August 12, 2016, the District submitted the withheld e-mails for *in camera* inspection.

### LEGAL ANALYSIS

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

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

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

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

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

### **1. The responsive e-mails are records of the District**

The District has identified twenty-two e-mails in response to the Request, but argues that these e-mails are not subject to disclosure because they are not records of the District. Specifically, the District argues that the e-mails do not document a transaction or activity of the District and were not created, received or retained in connection with a transaction, business or activity of the District. *See* 65 P.S. § 67.102 (defining “record”). Additionally, the District argues that seven e-mails (E-mails 1, 5, 9, 13, 14, 15 and 18) are not records of the District because they were not exchanged by a quorum of voting officials (*i.e.*, District school board members).

The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. To determine if certain material is a record, the RTKL imposes a two-part inquiry: (1) does the material document a “transaction or activity of the agency”; and (2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency.” See 65 P.S. § 67.102; *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034- 6 35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of a record must be liberally construed. *Id.*; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*13 (Pa. Commw. Ct. 2012).

E-mails are not considered records of an agency merely because they were sent or received using agency e-mail addresses or by virtue of their location on an agency computer. See *Meguerian v. Office of the Attorney General*, 86 A.3d 924, 930 (Pa. Commw. Ct. 2013); *Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012). Instead, the e-mails must document a transaction or activity of the agency. See *Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011). Further, “[w]hile an individual school member lacks the authority to take final action on behalf of the entire board, that individual acting in his or her capacity, nonetheless constitutes agency activity when discussing agency business.” *Baxter*, 35 A.3d at 1264.

In support of its argument that the withheld e-mails are not records under the RTKL, the District submitted the sworn affidavit of Ms. Smith, who attests to the following:

(b) ... I inquired of the District's Technology Coordinator, Paul Smith, whether the [District] was in possession, custody, or control of any emails responsive to [the] [R]equest.

(c) Mr. Smith provided to me eighteen emails sent by Director Johns and four separate emails sent by Director Logue to Director Johns.

(d) The eighteen emails sent by Director Johns consisted largely of messages related to scheduling executive sessions and/or informational conferences and factual inquiries with respect to Board updates, a construction project, the procedure for hiring a new superintendent, the procedure for appointing a new Director and security issues.

(e) Board updates are internal informational notices designed to inform the Directors what is happening in the [District].

(f) Seven of the emails by Director Johns were sent to fewer than two other Directors and those emails consisted of one email relating to information regarding a construction project, one email relating to the procedure to be used in hiring a new superintendent, two emails regarding security, one email relating to Board updates, one email response to a constituent and one email was an inquiry regarding email passwords.

(g) In this District, a quorum is five Board Members

(h) Of the remaining emails sent by Director Johns, two emails related to the procedure to be used to interview applicants for a vacant Board seat, five emails related to the procedure for hiring a new superintendent, two emails related to scheduling non-public meetings and two emails related to security.

(i) The four emails sent by Director Logue to Director Johns related to the hiring of a new superintendent, the procedure for filling a vacant Board seat and an inquiry related to a construction project.

(j) With the exception of the email from Director Johns to a constituent [Email 18], all of the above-referenced emails were internal to the District in that they were sent to Board Members, District employees and the District's solicitor.

(k) All of these emails were exchanged prior to any official decision being made by the Board on security, the appointment of a new Director or the hiring of a new superintendent.

(l) With the exception of the email to the constituent and those emails related to scheduling non-public meetings, Board updates and email passwords, each of the responsive emails expressed an opinion on policy matters that were related to

decisions to be made later by the Board on security matters, the appointment of a new Director and the hiring of a new superintendent.

(m) None of the emails found by Mr. Smith were created with the authority of the [District] or were later ratified, adopted, or confirmed by the Board of School Directors.

Additionally, the District cites to *In re: Silberstein*, where the Commonwealth Court found that certain e-mails located on an individual township commissioner's personal computer were not records of the agency. 11 A.3d 629, 633 (Pa. Commw. Ct. 2011). The Court held that since the township commissioner was an individual public official with no authority to act alone on behalf of the agency, the e-mails at issue, contained on his personal computer, were not records of the agency, as they were not "produced with the authority of [the agency] ... or ... later ratified, adopted or confirmed by ... [the] township." *Id.* The District also cites to *Mollick*, where the Commonwealth Court held that e-mails sent to and from a quorum of township supervisors, even if stored on their personal e-mail accounts, would be records of the agency because the records documented a transaction or activity of the township. 32 A.3d at 872-73.

The instant matter is distinguishable from *Silberstein* and *Mollick*. First, the records sought are e-mails sent by Director Johns and sent by Director Logue to Director Johns from the District-issued e-mail accounts, and there is no evidence that the e-mails were contained on their personal computer or personal e-mail accounts. Second, there is no requirement that records must be exchanged between a quorum of board members to document a transaction or activity of an agency. Records of an individual school board member, despite that member lacking authority to take final action on behalf of the District, can document agency activity when agency business is discussed. *Baxter*, 35 A.3d 1259, 1264 (Pa. Commw. Ct. 2012).

Based upon the evidence provided by the District, as well as the OOR's *in camera* review of the records, the twenty-two responsive e-mails each document a transaction or activity of the

District. The e-mails here relate to a construction project, security concerns, the hiring of a new superintendent, the procedure for appointing a new School Director, Board updates, an e-mail account validation inquiry, responding to a constituent's e-mail, and scheduling executive sessions. All twenty-two e-mails were created, received or retained in connection with these District activities. *See* 65 P.S. § 67.102. Because the District has not raised any additional reasons for withholding E-mails 1, 7, 10, 13, 14, 15, 18, 20, 22, these e-mails are records subject to disclosure. *See* 65 P.S. § 67.305(a).

**2. The District has not proven that E-mails 4 and 12 reflect discussions held in executive session**

The District argues that E-mails 4 and 12 are exempt under Section 708(b)(21)(ii) of the RTKL, which exempts from disclosure “[m]inutes of an executive session and any record of discussions held in executive session.” 65 P.S. § 67.708(b)(21)(ii). Although the term “executive session” is not defined in the RTKL, it has been defined in Pennsylvania's Sunshine Act, 65 Pa.C.S. §§ 701-716, which must be read *in pari materia* with the RTKL. *See Schenk v. Twp. of Centre*, 893 A.2d 849, 853 (Pa. Commw. Ct. 2006), *appeal dismissed as improvidently granted* 975 A.2d 591 (Pa. 2009).

Under the Sunshine Act, an “executive session” is defined as a “meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting.” 65 Pa.C.S. § 703. To qualify for exemption from open meeting requirements, an executive session and its purpose must be announced at a public meeting. *See* 65 Pa.C.S. § 708(b). The announcement must also disclose the purpose and scope of the executive session. *See Butler v. Indian Lake Borough (In re Appeal of Lyons)*, 14 A.3d 185 (Pa. Commw. Ct. 2011).

For each of the e-mails withheld as discussions held in executive session, the District attests that the e-mails relate to scheduling an executive session. Based on the *in camera* review of the records at issue, the responsive e-mails do in fact relate to the scheduling of an executive session. However, the District did not submit evidence showing that the scheduling of an executive session was discussed at an actual executive session.<sup>1</sup> As a result, the District has not met its burden of proof that the Emails 4 and 12 reflect discussions held during executive sessions and therefore, are subject to disclosure under 65 P.S. § 67.708(b)(21).

**3. The District has not proven that E-mails 2, 3, 6, 8, 11, 16, 17, 19 and 21 reflect the internal predecisional deliberations of the District**

The District argues that E-mails 2, 3, 5, 6, 8, 9, 11, 16, 17, 19 and 21 (eleven e-mails) reflect the internal, predecisional deliberations of the District. Section 708(b)(10) of the RTKL exempts from disclosure records reflecting:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). An agency must show three (3) elements to substantiate this exception: (1) the deliberations reflected are “internal” to the agency; (2) the deliberations reflected are predecisional, *i.e.*, before a decision on an action; and (3) the contents are deliberative in character, *i.e.*, pertaining to proposed action and/or policy-making. *See Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Commw. Ct. 2013); *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP

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<sup>1</sup> The topic of scheduling an executive session is not among the statutorily authorized reasons that a board may hold an executive session.

2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. Pa. Dep't of Comm. & Econ. Dev.*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 385-386 (Pa. Commw. Ct. 2014).

The OOR has conducted an *in camera* review of the aforementioned eleven e-mails claimed to be exempt under section 708(b)(10) of the RTKL.<sup>2</sup> The *in camera* review shows that E-mails 2, 6, 8, 9, 21 related to the hiring of a new superintendent and, with the exception of E-mail 9, were e-mailed by Director Johns and Director Logue to all school board members and the superintendent; E-mails 3, 11, 19, 21 addressed the procedure of appointing a new school director and were e-mailed by Director Johns and Director Logue to all school board members; and E-mails 5, 16, 17 covered security issues and, with the exception of E-mail 5, were e-mailed by Director Johns to the District solicitor, District employees, and all school board members.

Ms. Brandy attests that these eleven e-mails “were internal to the District in that they were sent to Board Members, District employees and the District’s solicitor.” Accordingly, the District has established that the eleven e-mails in question were exchanged between District officials, employees and are, therefore, internal to the District.

Next, the District must establish that the e-mails are predecisional and deliberative in nature. In order for a record to be deliberative in character, it must make recommendations or express opinions on legal or policy matters and not be purely factual in nature. In addition, an agency must “submit evidence of specific facts showing how the information relates to a deliberation of a particular decision.” *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367. In *McGowan v.*

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<sup>2</sup> Section V(E)(13) of the OOR Procedural Guidelines provides that “[r]eferences to specific records submitted for in camera inspection, or the contents of such records, in the Final Determination will be ... by reference to generic descriptions or characterizations as set forth in the in camera inspection index.” As such, the OOR’s written analysis is constrained to generic descriptions of the withheld records.

*Pa. Dep't of Env'tl. Prot.*, an agency's affidavit specifically detailed the manner in which the withheld documents related to that agency's contemplation of a future course of agency action. 103 A.3d 374. Here, the District has submitted evidence demonstrating that the eleven e-mails are predecisional and deliberative in nature. In relevant part, Ms. Smith attests the following:

(k) All of these emails were exchanged prior to any official decision being made by the Board on security, the appointment of a new Director or the hiring of a new superintendent.

(l) [Email 2, 3, 5, 6, 8, 9, 11, 16, 17, 19 and 21] expressed an opinion on policy matters that were related to decisions to be made later by the Board on security matters, the appointment of a new Director and the hiring of a new superintendent.

(m) None of the emails found by Mr. Smith were created with the authority of the [District] or were later ratified, adopted, or confirmed by the Board of School Directors.

Based on the evidence provided, as well as the OOR's *in camera* review of the records, the District has demonstrated that E-mails 2, 3, 5, 6, 8, 9, 11, 16, 17, 19 and 21 are internal to the District, pertain to a proposed action (security matters, the hiring of a new superintendent, and the procedure of appointing a new Director), and reflect deliberations (opinions on security matters, the hiring of a new superintendent and appointing of a new Director).

As noted above, however, E-mails 2, 3, 6, 8, 11, 16, 17, 19 and 21 were circulated among all of the District's school board members. Thus, the issue becomes whether the exception to the exemption applies. Section 708(b)(10)(ii) of the RTKL states that "[a] record which is not otherwise exempt from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 [relating to open meetings] shall be a public record." 65 P.S. § 67.708(b)(10)(ii). Accordingly, two requirements must be met for the record to be subject to the exception to the exemption: 1) it must be presented to a quorum; and 2) for deliberation. As discussed above, E-mails 2, 3, 6, 8, 11, 16, 17, 19 and 21 were presented to a quorum of the

District school board members and were the subject of deliberation by these school board members.<sup>3</sup> As such, the exception to the exemption applies and E-mails 2, 3, 6, 8, 11, 16, 17, 19 and 21 are subject to public access in their entirety.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the District is required to disclose the responsive emails except for E-mails 5 and 9 within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Lycoming County of Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>

**FINAL DETERMINATION ISSUED AND MAILED: November 3, 2016**

/s/ Bina Singh

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APPEALS OFFICER  
BINA SINGH

Sent to: Stephen Bagwell (via e-mail only);  
Benjamin Landon, Esq. (via e-mail only)

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<sup>3</sup> To list two examples, E-mail 3 contains a communication from a board member which includes the phrase "[i]n my opinion ..." while E-mail 8 contains communication from a board member which includes the phrase "I was hoping ...". This type of language indicates that deliberations were occurring.

<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).