



July 19, 2021

Via email only

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RE: Request for Advisory Opinion

Dear Mr. Herrold:

The Office of Open Records (“OOR”) is in receipt of your request for an Advisory Opinion concerning an email from a member of the public to a township secretary that discusses an upcoming public meeting. Specifically, you ask whether this email is subject to the Right-to-Know Law (“RTKL”).

The OOR declines to issue an advisory opinion in this matter, as there is ample caselaw on the issue. The definition of “record” is set forth in Section 102 of the RTKL, 65 P.S. § 67.102, 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.” If a document meets the definition of “record” under the RTKL, it is presumed to be a public record, 65 P.S. § 67.305(a).

Emails or other communications constitute “records” of an agency “if the subject-matter of the records relate to the agency’s operations.” *Pa. Office of the Attorney Gen. v. The Phila. Inquirer*, 127 A.3d 57, 63 (Pa. Commw. Ct. 2015). Moreover, the definition of “record” must be liberally construed in order to effectuate the purpose of the RTKL. *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Commw. Ct. 2011).

Outside of the above-referenced cases, you may wish to consult the OOR’s Docket Search feature on its website (<https://www.openrecords.pa.gov/Appeals/DocketSearch.cfm>), where you can locate Final Determinations issued by the OOR on the subject. Additionally, a PowerPoint presentation that references various cases interpreting the definition of “record” is attached to this response.

Respectfully,

/s/ Kyle Applegate
Kyle Applegate
Chief Counsel

cc Elizabeth Wagenseller, Executive Director
Nathanael Byerly, Deputy Director

From: Andrew Herrold
To: [DC, OpenRecords](#)
Subject: [External] Advisory Opinion Request
Date: Thursday, July 15, 2021 10:51:01 AM

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.*

Good morning. I serve as the solicitor for several townships. A question recently arose as to whether an email sent from a public citizen to the Township secretary regarding an upcoming public meeting was subject to the RTKL. The email referenced a specific issue that was going to be discussed at an upcoming meeting. Another resident then requested records related to that specific matter. My question is whether the email from the private citizen that was sent to the TWP is subject to Right to Know. No litigation regarding this matter is currently pending before either a court or OOR. You may feel free to me at the contact information below

Thank you for your assistance.

Very Respectfully,

Andy Herrold

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pennsylvania

OFFICE OF OPEN RECORDS

Erik Arneson, Executive Director

Right to Know Law Legal Update

PA State Association of Boroughs

Presented by Nathaniel Byerly and George Spiess

OOR Update

- Numbers
 - Appeals
 - 1,400 appeals through end of July
 - Average last five years has been around 2,500 per year
 - RTKL requests
 - Increasing requests to OOR for OOR records
 - 900 to 1,000 per year
- Legal Issues
 - More complex
 - Revisiting issues
- New Location – 333 Market Street 16th Floor, Harrisburg, PA 17101

Resources

- Daily Emails
- Twitter
- Updated Court Decisions Chart
- Searchable case database
 - Alert us to court appeals/decisions
- Searchable AORO database
 - Alert us to changes with AOROs
- Webinars
- Annual Training

Issues

- Record of the Agency
- Affidavits
- Outstanding Fees
- Home Addresses and Right to Privacy
- Good Faith Search vs. Bad Faith
- Cost of RTKL
- Other cases worth review

Two Separate RTKL Issues

- What is a record
- What is a public record

- A case by case fact specific determination.

Statutory Definition

§ 102

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”
- Includes transitory records

Case Law: In re Silberstein, 11 A.3d 629 (Pa. Cmwlth. 2011)

- Request was for electronic communications or written correspondence between two Commissioners and various third parties (citizens, contractor, private attorneys).
 - Records of the agency? No
 - Why not?
- A distinction must be made between transactions or activities of an agency which may be a public record under the RTKL and the emails or documents of an individual public office holder.
- Because a Commissioner is not a governmental entity but is an individual public official with no authority to act alone on behalf of the agency.
- Unless the emails and other requested documents were produced with the authority of York Township as a local agency or were later ratified adopted or confirmed by the Township they are not records of the agency.

Case Law: Mollick v. Worcester Township, 32 A.3d 859 (Pa. Cmwlth. 2011)

- Request was for emails sent on personal devices between Township Supervisors discussing Township business.
- Key legal point: Emails exchanged between a quorum of elected public officials discussing agency business or activity are records of the agency.
 - Records of the agency? Yes
 - Why?
- Because the device used doesn't matter.
- Because on their face the requests sought information that documents an activity of the Township through its Supervisors in connection with the business of the township. Unlike Silberstein, the emails being sought were exchanged between two of the three supervisors. Requestor was not seeking emails in which a supervisor acted individually, alone, or communicated only with an outside third party. Therefore these are records of the agency.

Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa. Cmwlth. 2012)

- Request was for all emails, faxes, and handwritten notes between council members regarding land development plans.
 - Records of the agency? Yes.
 - Why?
- Because the emails were between council members discussing borough business. Those discussions involved borough activity, namely the borough's consideration of land development plans. Thus, because the emails were created by council members, in connection with their positions as public officials, the e-mails requested met the definition of record found in the RTKL.

Easton Area School District v. Baxter, 35 A.3d 1259 (Pa. Cmwlth. 2012)

- Request was for copies of all emails sent and received between Oct. 1 and Oct. 31 from email addresses of board members, the superintendent, and the school district.
 - Records of the agency? Yes.
 - Why?
- Because while an individual school board member lacked the authority to take final action on behalf of the entire board, that individual acting in his or her official capacity constituted agency activity when discussing agency business. Personal emails that do not document a transaction or activity of the agency are not records.
- Emails were not considered "records" under the RTKL just because they were sent or received using an agency email address or are on an agency-owned computer.

Office of the Attorney General v. the Philadelphia Inquirer, 127 A.3d 57 (Pa. Cmwlth. 2015)

- Request was for all emails that were "of a personal nature and involve[] pornographic or otherwise inappropriate material" to or from the accounts of three former OAG employees.
 - Record of the agency? No.
 - Why not?
- Because personal email that violates agency policy does not become a record of the agency.
- Broadly worded test for agency (government entity): "For emails to qualify as records of an agency, we only look to see if the subject matter of the records relate to the agency's operations."
- None of the requested emails remotely related to OAG operations or any "transaction" or "activity" of that agency. The emails only related to personal activity of individuals.

Clearfield County v. Bigler Boyz, 144 A.3d 258 (Pa. Cmwlth. 2016)

- Request for handwritten notes made by a County Commissioner concerning two unsolicited phone calls received from private individuals regarding the replacement of one company with another as the county's one primary HAZMAT response team.
 - Records of agency? No.
 - Why not?
- Because, as in Silberstein, the notes were not "produced with the authority of" the County or later "ratified, adopted or confirmed by" the County
- Because the notes documented citizen input, which was communicated to an individual commissioner
 - who did not rely on the information to make a decision
 - who did not share the notes or their contents with other Commissioners
 - who was not authorized to speak for or bind the County regarding a proposal that was never acted upon

General Observations

- Governmental entity will involve different analysis than an elected public official
- Personal or public device does not matter; its the character/subject matter of the record
- Communications between public officials (boards and councils) and outside third parties less likely to be records unless later used for agency business
- Communications between elected officials (boards and councils) and other officials more likely records of the agency

Affidavits

- Insufficient to say: The agency looked. They do not have any records.
- Level of detail critical to meeting burden
- Establish a nexus between the exemption and any redactions
 - Who
 - What
 - Where
 - When
 - How
 - Why

Affidavits

- Who looked for records
- Who did they talk to as part of search for records – custodian, officials, contractors, person with knowledge, etc.
- Where did they look
- When did they search
- Why did they look there
- What did they find or not find – mention retention policy
- Where else could the records be - private devices
- Why does the agency not have them if it should
- What keywords were used as part of the search

Moore v. Department of Corrections, 2017 Pa. Commw. Unpub. LEXIS 704, 177 A.3d 1073

- Request was for records that DOC claimed did not exist.
 - DOC provided affidavit to OOR that stated that:
 - “no responsive records exist within the Department’s custody, possession or control”
 - the AORO “reviewed [Moore’s] request and researched it”
- Court held that this was conclusory and generic
 - More details are needed and at a minimum should include a description of the records the AORO reviewed

Gregg Twp. v. Grove, 2018 Pa.Comm.w.Unpub. LEXIS 343; 2018 WL 3097074

- Request was for footage from security cameras in building used for municipal offices
 - Agency denied claiming release would threaten public safety and endanger safety of the building (b)(2) and (3)
- Court held agency did not meet burden and video was public
 - Why?
 - Affidavit was silent as to what was depicted in video
 - Affidavit referred generally to all the cameras but failed to explain why footage from one camera will jeopardize safety
 - Affidavit did not explain how the cameras are used to enhance public safety – monitored some contemporaneously
 - Affidavit did not address whether info could be redacted
 - Affidavit had conclusory statements without explaining details about how security will be jeopardized

Brown v. DOC, 2017 Pa. Commw. Unpub. LEXIS 653, 177 A.3d 1066

- DOC denied a request for records due to outstanding fees
- Court said that DOC failed to show the requestor owed outstanding fees
- Affidavit stated:
 - Records were copied and prepared for Requestor
 - Requestor had not paid
 - He had an outstanding balance
- Affidavit should have also identified the documents that were copied as well as the number of pages included in the charge

Personal Information and the Right to Privacy

- Balancing Test in PSEA: Individuals have a constitutional right to privacy in their home address, and, therefore, home addresses are not subject to disclosure unless the public interest outweighs an individual's right to privacy.
- Butler Area School District v. PFUR 172 A.3d 1173 (Pa. Cmwlth 2017)
 - The Property List is well-established as a public record to which the public has a right of access. Moreover, the address of an assessed property is an essential component of the assessment for tax purposes. In other words, as discussed below, a list of assessed properties is of little use without the addresses of the properties. Nevertheless, the public nature of the Property List does not necessarily conflict with an individual's right to informational privacy under our state constitution. Based on statute and case law, we hold addresses contained in the Property List are not personal in nature.
- How has the OOR applied the balancing test

Personal Information and the Right to Privacy

- When has the OOR ordered release of home addresses
 - Residency Requirements
 - *Beh v. Pennsylvania Liquor Control Board*, OOR Dkt. AP 2017-1779 (Court Appeal Pending)
 - Public Health/Safety
 - *Conway v. Pittsburgh Water and Sewer Authority*, 2016-1832
- Other information OOR has ordered released
 - Tax parcel ID numbers - *Dinniman v. Pennsylvania Department of Environmental Protection*, OOR Dkt. AP 2017-1973
 - Names of government employees - *Stookey v. Unionville-Chadds Ford School District*, 2016-2072
 - Property owner names - *Signature Information Solutions Inc. v. Mt. Lebanon School District*, 2016-2043
 - County of residence - *Campbell v. Governor's Office of Administration*, 2016-1968

Bad Faith vs. Good Faith Search

- Uniontown Newspapers v. DOC, 2018 Pa. Commw. LEXIS 189

- Elements of a good faith search:

- AORO has a duty to advise all custodians of potentially responsive records about the request
- AORO has a duty to obtain all potentially responsive records from those in possession
- AORO has duty to contact agents within its control, including third party contractors
- AORO has duty to review the records and assess their public nature

“It is axiomatic that an agency cannot discern whether a record is public or exempt without first obtaining and reviewing the records.”

Failure to search records in an agency’s possession for responsive records during the request stage constitutes bad faith

An agency’s failure to locate responsive records until motivated by litigation evinces bad faith, meriting consideration by a fact-finder.

Cost to Implement RTKL

- Legislative Budget and Finance Committee's Review of RTKL's Fiscal Impact
 - Findings:
 - Most agencies receive few requests
 - Most requests are easily fulfilled
 - Most fulfilled at a low cost
 - Only a small percentage are appealed
- Tips related to Reviews findings:
 - Every request does not need legal review
 - Legal invoices are subject to RTKL
 - Recommend training for AOROs

Other Issues

- Court opinions and orders are judicial records - Philadelphia DA Office v. Stover, 176 A.3d 1024 (Pa. Cmwlth. 2017)
- Protective orders and RTKL Requests - Barosh v. City of Philadelphia, 2018 Pa. Commw. Unpub. LEXIS 259
- Donation and donor records - City of Harrisburg v. Prince, 186 A.3d 544 (Pa. Cmwlth. 2018)
- FERPA and education records - Easton Area School District v. Miller, 2018 Pa. Commw. LEXIS 320
- Act 22