

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Easton Area School District, :
 Appellant :
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 v. :
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The Express Times :
 No. 2042 C.D. 2011
 :
 Submitted: April 5, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: April 30, 2012

Easton Area School District (School District) appeals from an order of the Court of Common Pleas of Northampton County (trial court) affirming the determination of the Office of Open Records (OOR) to provide the Express Times (Requestor) with copies of all emails sent and received between October 1, 2010, and October 31, 2010, for the email addresses of nine school board members, the school board general email, and the district superintendent. For the reasons that follow, we affirm the decision of the trial court.

On March 2, 2011, Requestor submitted a request to the School District under the Right-to-Know Law (RTKL)¹ for “[a]ll emails sent and received between Oct. 1 and Oct. 31” for the email addresses of nine school board members,

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

the school district superintendent, and the general school board address. The School District denied the request, providing that “[t]he information does not meet the definition of a „public record.“ ... The record requested is protected by privilege and thus is not a Public Record. The record requested is protected by Federal or State law or regulation or judicial decree. Insufficiently specific.” (Reproduced Record [R.R.] at 8a.) The School District also cited a number of exemptions under Section 708(b) of the RTKL.²

Requestor appealed to the OOR, claiming that the emails were sent through a government computer system and any exempt information was redactable. In support of its denial of the requested records, the School District

² The School District cited the following Section 708(b) exemptions:

(1)(i) Disclosure would result in the loss of Federal or State funds by an agency or the Commonwealth. ... (6) It contains personal identification information. (7) It contains records relating to an agency employee. (8)(i) It pertains to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings. (9) It is the draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency. (10)(i)(A) It reflects the internal, pre-decisional deliberations of an agency. (10)(i)(B) It reflects strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation. ... (16) It is a record of an agency relating to or resulting in a criminal investigation. (17) It is a record of an agency relating to a noncriminal investigation. ... (21)(i) It is draft minutes of any meeting of an agency until the next regularly scheduled meeting of the agency. (21)(ii) It is minutes of an executive session and any record of discussions held in executive session. ... (26) It is a proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract ... (30) It identifies the name, home address or date of birth of a child 17 years of age or younger.

(R.R. at 8a-10a.)

submitted an affidavit from its Open Records Officer stating that the records were “internal working documents subject to on-going administrative review, analysis, and development.” (R.R. at 17a.) The affidavit also said that, because some of the emails referred to a particular student, those records were protected, as were emails containing personal identification information, employee evaluations and grievances, agency employment matters, and draft minutes of a meeting of the school board. It also noted that some of the emails were sent to the School District’s attorney for purposes of obtaining or providing legal advice and were, therefore, protected by the attorney-client privilege.

The OOR held that the School District did not establish that all the emails requested were exempt, but instead only “asserted a number of exemptions to protect „some emails,“” and did not specify which emails were protected from disclosure with regard to the predecisional deliberative, collective bargaining strategy, and negotiations and arbitration exceptions or the attorney-client privilege. Because the School District “failed to identify responsive records to correlate the exceptions to the emails at issue by describing the records at issue and showing how the exception applies,” these exceptions did not apply. (R.R. at 23a.) It found that the School District did demonstrate that some exceptions applied, including: “Section 708(b)(6) for personal identification information; Section 708(b)(7) for employee evaluations and grievances; Section 708(b)(9) for certain drafts listed; Section 708(b)(16) and (17) for complaints and investigative materials; Section 708(b)(21) for draft or Executive Session minutes; and Section 708(b)(30) for information identifying a minor.” (R.R. at 23a.) Additionally, the School District showed that some of the information was protected under the

Family Education Rights and Privacy Act (FERPA).³ As a result, the OOR granted Requestor’s appeal in part and denied it in part. The School District was ordered to disclose responsive emails to Requestor that were not expressly exempt under FERPA and the exceptions enumerated in Section 708(b)(6), (7), (9), (16), (17), (21), and (30) of the RTKL.

The School district appealed to the trial court and contended that: (1) the request was insufficiently specific under Section 703 of the RTKL⁴ because it provided no limitation with regard to subject matter, senders, or recipients; (2) emails of individual school board members were not public records under our decision in *In re Silberstein*, 11 A.3d 629 (Pa. Cmwlth 2010);⁵ and (3) the OOR erred in determining that certain exemptions did not apply to the request. As to the first issue, the trial court determined that the request was sufficiently specific because it “requested only emails to and from specific email addresses, or a defined period of time.” As to the second issue, the trial court held that because the emails were sent and received from School District email addresses and were

³ Family Education Rights and Privacy Act of 1974, 20 U.S.C. §1232g.

⁴ 65 P.S. §67.703.

⁵ *Silberstein* involved a RTKL request seeking, *inter alia*, all electronic or written correspondence between two township commissioners and township citizens regarding applications for development projects in the township. The issue was whether emails on the commissioners’ personal computers were public records in possession of the township and were therefore subject to disclosure. We held that emails on the private computers created by a single commissioner were not public records because they were not the transaction or activity of an agency. In *Mollick v. Township of Worcester*, 32 A.3d 359 (Pa. Cmwlth. 2011), we went on to hold that if the requested emails on a private computer were exchanged for the purpose of deliberation of the township’s business by a quorum of the supervisors within the meaning of the Sunshine Act, 65 Pa. C.S. §§701-716, then those records would be considered public records.

the property of the School District, *Silberstein* was inapplicable and the emails were public records. Finally, as to the third issue, the trial court determined that the School District failed to meet its burden of establishing the applicability of the exceptions it claimed, despite the opportunity to do so. The trial court affirmed the OOR's decision, and this appeal followed.⁶

The School District again argues that the request was not sufficiently specific under Section 703 of the RTKL; that the emails in question are not public records; and that in the event the request is deemed sufficiently specific, the School District should be granted an opportunity to review the records and assert all applicable exemptions under the RTKL. We resolved the first two issues in *Easton Area School District v. Baxter*, 35 A.3d 1259 (Pa. Cmwlth. 2011), involving a request for the same emails (with the only difference being that the request was submitted by a reporter from the Allentown Morning Call, rather than the Express Times) and held the request was sufficiently specific and the emails requested were public records. For the reasons set forth in that opinion, we agree with the trial court that the emails are public records and that the request was sufficiently specific.

This leaves only the issue of whether the School District should be afforded an opportunity to assert applicable exemptions. It argues that because the request was denied as being insufficiently specific, it did not believe that a

⁶ This Court's standard of review is limited to determining whether the trial court committed an error of law, violated constitutional rights, or abused its discretion. *SWB Yankees LLC v. Gretchen Wintermantel*, 999 A.2d 672 (Pa. Cmwlth. 2010). "The scope of review for a question of law under the [RTKL] is plenary." *Id.* (quoting *Stein v. Plymouth Township*, 994 A.2d 1179, 1181 n.4 (Pa. Cmwlth. 2010)).

response was required, and it should now be given an opportunity to review the records and argue specific exemptions.

Section 901 of the RTKL provides that, “[u]pon 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, legislative record or financial record.” 65 P.S. §67.901. “[A]gencies as a normal practice should raise all objections to access when the request is made if the reason for denying access can be reasonably discerned when the request is made. Otherwise, review will be piecemeal, and the purpose of the RTKL in allowing access to public records in a timely manner will be frustrated.” *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Cmwlth. 2010). Contrary to its argument that it seeks to assert these exemptions for the first time because the request for documents was not specific, the School District asserted these exemptions in its initial denial letter, so it is clear that the School District viewed these exemptions as “reasonably discerned when the request was made.” Because it was able to discern what the appropriate exemption was and failed to object below, we reject what is essentially a second opportunity to litigate claims that both the OOR and the trial court have already denied.

For the foregoing reasons, the order of the trial court is affirmed.

DAN PELLEGRINI, President Judge

Senior Judge Colins dissents.

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ORDER

AND NOW, this 30th day of April, 2012, the order of the Court of Common Pleas of Northampton County, dated September 26, 2011, at C-00480CV-2011-4775, is affirmed.

DAN PELLEGRINI, President Judge