November 13, 2009

Dear Client,

As part of our commitment to provide you with a legal resource that can offer cogent day-to-day advice and clear strategies for a secure future, we offer our pledge to also be your partner in information. We recognize the need for you to be immediately responsive to the changing requirements of the law, government regulations, and community needs. As such, our office will prepare Action Papers in response to the ever-changing laws and regulations affecting public education. Receipt of an Action Paper is an indication that your School District may want to consider changing a practice or policy. It also may indicate that your District is required by law to initiate or discontinue a practice or policy.

RIGHT TO KNOW LAW

E-MAIL

Our office continues to monitor the developments in the implementation of the Right To Know Law (RTKL) which took effect January 1, 2009. According to the Office of Open Records (OOR), 931 appeals to their office have been docketed as of October 29th. A number of the appeals have resulted in Final Determinations, which are opinions issued by OOR Appeal Officers. The Final Determinations are binding on the parties to the appeal and serve as guidance for others. A common theme developing in the OOR appeals centers on e-mail in general, and on an agency denying access to e-mail citing the pre-decisional deliberation exception specifically. As a number of the appeals involve e-mail communication by or between elected officials, we encourage you to share this update with the members of the School Board.

Can E-mail be a Record?

Fundamentally, the first question that should be answered in responding to a RTKL request is "Does the request seek a record?" The RTKL broadly defines a record 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

It is important to recognize that this definition is significantly broader than the definitions under Pennsylvania's Open Meeting Law, commonly referred to as the Sunshine Act. In short, a record which is open under the RTKL may not necessarily be something that is required to be discussed in public under the Sunshine Act. For example, a memorandum from the Superintendent to the faculty reminding them of the procedures for returning keys and materials to the office prior to leaving for the summer would be considered administrative action and not subject to the provisions of the Sunshine Act. This same memorandum, however, documents an activity of the agency and would be subject to disclosure under the RTKL. Likewise, an e-mail that is kept strictly between two board members may not run afoul of the Sunshine Act, but may be subject to disclosure under the RTKL if the e-mail "documents a transaction or activity" or was "created, received or retained…in connection with a transaction, business or activity of the agency".

The format of the communication among board members is essentially irrelevant under the RTKL. Local agencies have attempted to withhold all e-mail between elected officials arguing that "unless the e-mail is sent among a quorum of the Board, it does not need to be

disclosed, regardless of whether the communication involves business or activities of the School District." In Mollick v. Methacton SD AP 2009-0180, the OOR rejected this argument as well.

Blanket denials

A number of local agencies have lost on appeal to the OOR when issuing what the OOR has termed a "blanket denial." In Day v. East Stroudsburg Area School District AP 2009-0240 , Day sought "unrestricted electronic copies of any and all communications" generated by and between the superintendent, the administrative staff and the elected school board members following his ejection from the school board meeting on January 21, 2009. The District denied the request stating that the communications are exempt as pre-decisional communications between the administration and Board pursuant to 65 P.S. §67.708(b)(10)(i). In support of its denial, the District argued that the communications were "made to internally discuss District policies relating to decorum at public meetings and whether to notify and involve the school's legal counsel in this specific incident." The OOR rejected this argument stating "While it's possible that much of the information in the requested documents may be properly characterized as pre-decisional or deliberative, simply making a blanket denial on the basis [of] that exception fails to meet the burden of proof required in order to withhold the records." Blanket denials are being frequently rejected by the OOR in favor of examining individual records and redacting as appropriate. This can be a large task when voluminous e-mails may be involved.

Specificity of Request

Mollick v. Methacton SD also addressed whether a request for copies of communications is sufficiently specific so as to compel an answer from an agency. The OOR has been clear that "a request is not sufficiently specific if it does not set forth a subject matter for the communications, nor identify a specific and relatively limited number of people as the senders

and/or recipients of the communication." Importantly, this determination is NOT made based on the volume of records which may be responsive. A request may result in hundreds, if not thousands, of responsive records and still be sufficiently specific so as to compel a response.

Of the 36 requests made by Dr. Mollick, the OOR determined that 29 of his requests were sufficiently specific to compel the district's response. By way of example, the OOR determined that the requests for "Any and/or all **emails between any and/or all School Board members** regarding the Woodland project for the past 2 years" and "Any and/or all **emails between any and/or all School Board members** regarding the Arcola 5-6 Building projects for the past 2 years" were both sufficiently specific. The subject matter was limited, and the recipients were limited to the nine school board members. The OOR did, however, determine that a request for "Any and/or all emails between any and/or all School Board members regarding any business or activity of the School District for the past 6 years" was not sufficiently specific.

Non-Agency E-mail Addresses

A common practice among elected officials is to "bounce" their agency e-mail to a home or work e-mail account. The OOR has found that to the extent responsive e-mails are on personal or work computers, the records are still records of the local agency. Mollick v. Worcester Twp. AP 2009-0790. In addition to being records of the local agency, the OOR has established its "concern that the Legislative purpose of the RTKL is thwarted if agencies are permitted to route email to private companies or addresses over which they have no control and without retaining copies." Bowders v. York Twp. AP 2009-0087.

As to work e-mail accounts, in Bowders the OOR stated it cannot compel a private company (i.e. the elected official's employer) to search files and produce records because the private company is not subject to the OOR's jurisdiction. It did state, however, that if the

Township "continues to route its email to private email addresses in the future, this may be construed as obstructing the RTKL and is cautioned to cease this practice and maintain all agency email on servers over which it has control." As a result, in Bowders the Township had to conduct a search of 27 archive tapes at a cost estimated to be between $13,000 and $26,000.

As to records maintained on an elected official's personal computer or e-mail account, the OOR has held that e-mails of township supervisors are within the township's control even when on a township supervisor's personal computer. "To conclude otherwise would ignore the reality that the township supervisors are a crucial part of the township and as the *de facto* governing body, may compel themselves to furnish any and all copies of responsive e-mails." Mollick v. Worchester Township AP 2009-079. Obviously, the OOR would extend this analysis to school board members as well.

The Pre-Decisional Deliberations Exception

Of the approximately 30 exceptions to disclosure in the RTKL, one of the more frequently used, and frequently rejected by the OOR, is the Pre-Decisional Deliberations exception. Contributing to the difficulties in applying this exception is the initial ambiguity as to what is meant by "pre-decisional deliberations." The OOR has stated that "if interpreted broadly enough" the pre-decisional deliberations exception could "frustrate the intent of this new RTKL— enhanced access to government records." Day v. East Stroudsburg Area School District.

The OOR has held that the RTKL's pre-decisional deliberation exception is adapted from the court created "deliberative process privilege." This Pennsylvania Supreme Court created privilege was designed to facilitate "full and free communication and exchange in agency operations and practice." Lavalle v. Office of General Counsel of the Commonwealth, 564 Pa.

482,495, 769 A.2d 449, 457 (2001). The Supreme Court went on to state that "if governmental agencies were forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." Lavalle at 496, 449 A.2d at 457 (*internal citations omitted*). In recognizing this "deliberative process privilege" the Supreme Court established three conditions which must be met in order for the privilege to apply:

1) the communication must have been made before the deliberative process was completed; and

2) the communication must be deliberative in character in that it makes recommendations or expresses opinions on legal or policy matters; and

3) the information cannot be purely factual in nature.

Commonwealth v. Vartan, 557 Pa. 390, 733 A2d 1258 (1999).

Opinions, and not factual statements, are what are protected under this exception. The OOR believes that the legislature, in developing the RTKL, understood that absent such a protection, an administrator or a subordinate may be reluctant to issue his or her true opinion out of concern for the repercussions, especially if the opinion is unpopular. The OOR intends to apply the above three-part test when the "pre-decisional deliberation" exception is the basis for an agency's refusal to disclose a document, including an e-mail. The OOR has been quite clear that documented discussions *after* action has been taken do not qualify for the pre-decisional deliberations exception.

Guidance

It is clear that the OOR has determined that e-mails are records under the RTKL, and those that relate to agency business, regardless of the e-mail account used, are subject to

disclosure. In light of the decisions that have been issued by the OOR, our office strongly encourages individual boards to examine their use of e-mail in conducting district business. Whenever practical, do not use e-mail. In situations where e-mail is necessary, it is important to remember that the content of that e-mail could become subject to a RTK request. While legitimate exceptions to disclosure exist, reviewing and redacting large volumes of e-mail can become quite expensive and these costs cannot be passed on to the requester.

We discourage the use of non-district e-mail accounts to transact or communicate regarding district business. The OOR has established that this can be construed as obstructing the RTKL. Obstruction of the RTKL can subject a school district to attorneys' fees and costs of litigation if it determines the agency "willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith."

When e-mail communication is necessary, utilize school district e-mail accounts and limit the e-mail to the topic at hand. Treat each e-mail as if it is subject to disclosure remembering to keep the tone of e-mails cordial; there is no RTKL exception for "embarrassing."

As always, should you have any questions or should you require further guidance on a RTKL request, please do not hesitate to contact our office.

Best regards,

ANDREWS & PRICE