DOWNINGTOWN AREA SCHOOL DISTRICT	:	IN THE COURT OF COI
Petitioner	:	CHESTER COUNTY, PENNSYLVANIA
v.	:	NO. 2024-02199-CS
TARA ADAMS		
Respondent	:	

MEMORANDUM OPINION AND ORDER

Before the Court is the Petition of the Downingtown Area School District (District) for Review of the Final Determination of the Pennsylvania Office of Open Records ("OOR"). Based on our review and the reasoning as detailed below, we affirm.

On November 2, 2023, Respondent, Tara Adams (Adams or Requestor), submitted a request to the District under the Right to Know Law, 65 P.S. § 67.101 et seq. ("RTKL"), seeking:

> 1. For the time period of March 1, 2023 to November 1, 2023, all emails sent to and from the email addresses: mnass@dasd.org (Michelle Nass), kbarker@dasd.org (Kurt Barker), iFalconio@dasd.org (Jason Falconio), lraines@dasd.org (Lauren Raines), jbrown@dasd.org (Justin Brown), and rodonnell@dasd.org (Robert O'Donnell) containing the following search term(s): TP USA, Moms for Liberty, [minor's name redacted] and/or hate group.

(Request). Ms. Nass, Mr. Barker, Mr. Falconio, Ms. Raines, and Mr. Brown are employees of the District. Mr. O'Donnell is the District's Superintendent. The minor, whose name has been redacted, is the Requestor's child.

On November 27, 2023, the District's open records officer responded and denied the Request. Thereafter, on December 18, 2023, Adams filed her appeal with the OOR. Following briefing and supplementation of the record, the OOR issued a Final Determination on February 15, 2024, granting in part and denying in part the appeal. On March 14, 2024, the District appealed from the portion of the Final Determination that had granted Adams relief. The parties have submitted briefs, and the matter is ripe for decision.

The purpose of the RTKL is 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." *A.C.L.U. of Penn. V. Penn. State Police*, 232 A.3d 654, 656 (Pa. 2020). When disputes arise regarding the disclosure of records, "agencies and reviewing courts must begin from a presumption of transparency" and exemptions are construed strictly. *Id.* On appeal from the OOR's Final Determination, the Court conducts a *de novo* review. *Bowling v Off. of Open Recs.*, 75 A.3d 453, 474 (Pa. 2013).

The requester has the burden of proof to establish that requested records are public records.

The District first contends that the OOR shifted the burden of proof from the Requestor to the District when determining whether the requested emails were records. Records are defined 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. The RTKL imposes a two-part inquiry to determine whether requested information is a record: 1) does the material document a "transaction or activity of an agency?" and 2) if so, was the material "created, received or retained ... in connection with a transaction, business or activity of [an] agency?" *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa.Cmwlth. 2011); 65 P.S. § 67.102. Because the RTKL is remedial legislation, the definition of record is liberally construed. *Id.*; *Gingrich v. Pa. Game Comm'n,* No. 1254 C.D. 2011, 2012 WL5286229 *5 (Pa.Cmwlth. 2012) (unpublished) ("[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]").

In *Barkeyville Borough v Stearns*, 35 A.3d 91 (Pa.Cmwlth. 2012), the Commonwealth Court identified three sections of the RTKL that must be considered when assessing whether a record is a public record.

> Section 102 of the RTKL, 65 P.S. § 67.102, defines "public record," in pertinent part, as "[a] *record* ... of a Commonwealth or local agency." (Emphasis added.) Section 305 of the RTKL, 65 P.S. § 67.305, provides, in pertinent part, that "[a] *record* in the possession of a Commonwealth agency or local agency shall be presumed to be a public record." (Emphasis added.) Finally, Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1), provides:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, *shall be considered a public record of the agency* for purposes of this act. (Emphasis added.)

Id. at 94. The burden is on the requester to prove that material requested is a public record. *Id.* ("The burden of proving that a requested piece of information is a 'public record' lies with the requester."); *Bowling* at 455 ("the burden still rested upon the requester to establish that requested records were public records that he or she was entitled to inspect"). Furthermore, once the requester has met its burden, an agency may claim an exemption under section 708(b) of the RTKL or any other applicable law, order or privilege. *Cent. Dauphin Sch. Dist. v. Hawkins*, 286 A.3d 726, 741 (Pa. 2022) ("A 'public record' is defined as, *inter alia*, a record of a local agency that: "(1) is not exempt under section 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. The agency bears the burden of proving any claimed exemption. *Bowling* at 457 ("To justify a determination to deny a requester access to a requested record, the relevant government agency bears the 'burden of proving ... by a preponderance of the evidence' that an exception applies."); 65 P.S. § 67.708(a).

Emails exchanged between District employees may be records as defined by the RTKL.

The District contends that because the employees named in the Request do not have authority to make final decisions on behalf of the District, their emails cannot constitute records and would have the Court terminate its inquiry with this finding. A record, however, is simply information, which may be stored or maintained electronically, that documents a transaction or activity of an agency and that is created, received or retained in connection with a transaction, business or activity of the agency. Email qualifies as a method of storing or maintaining information electronically. The identity of the sender or receiver of email is not an area of inquiry when determining whether email qualifies as a record. To the contrary, the RTKL directs that the content of the email be examined to determine whether it documents a transaction or activity of the agency.

The District relies on *In re Silberstein*, 11 A.3d 629 (Pa.Cmwlth. 2010), and *Easton Area School Dist. v Baxter*, 35 A.3d 1259 (Pa.Cmwlth. 2011), to support its argument that only school board members and school superintendents can be considered, in certain circumstances, to be engaging in a transaction or activity of a school district when sending or receiving emails. However, this reliance is misplaced.

In *Silberstein*, an attorney requested documents from York Township, including written correspondence and electronic communications between Commissioner Silberstein and the citizens of York Township. York Township produced records stored on its computers, but not those documents stored on Silberstein's personal computer. On appeal, the Commonwealth Court held that email and documents on Silberstein's personal computer were not subject to disclosure. The Commonwealth Court reached this conclusion by determining that Silberstein was not a governmental entity under section 102 of the RTKL[1] and that he was "an individual public official with no authority to act" for the Township without approval. *Id.* at 633. The Court held that any email and/or documents Silberstein created on his personal computer would not have been "created, received or retained" for the township and were therefore not records. *Id.* Also, since Silberstein lacked authority to act for the Township without its approval, the Court found that any document he created could not be a "transaction ... or activity of York Township." *Id.* The Court found that the documents maintained on Silberstein's personal computer could only be considered public records if they were either produced with York

[1] A local agency is "[a]ny local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity[.]" 65 P.S. § 67.102.

Township's approval or were afterward "creat[ed], ratified or adopted" by the township. *Id.* In *Silberstein*, the Court was not called upon to decide whether the email of township employees sent and received using township email addresses and stored on the township's computers could be public records. *Silberstein* is not dispositive of the issues before this Court.

In *Baxter*, a reporter requested all emails sent and received by nine school board members, the superintendent, and the general school district between October 1 and 31, 2010, using the school district's email addresses, stored on the school district's server, and which were the school district's property per its Acceptable Use Policy. On appeal, the Commonwealth Court was presented with the question of whether emails located on an agency owned computer and using agency email addresses were automatically classified as public records. The Easton School District, relying on *Silberstein*, argued that "because individual school board members do not have the authority to act on behalf of the School District, any emails to or from those individuals absent ratification or adoption by the School district do not constitute activity of the agency and are not records." *Baxter* at 1262. This argument was rejected by the Court, which held "[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, nonetheless,

constitutes agency activity when discussing agency business." *Id.* at 1264. The Court held that emails were not automatically deemed records "just because they were sent or received using an agency email address or by virtue of their location on an agency-owned computer." *Id.* at 1264. The Court explained that "a record is 'information ... that documents a transaction or activity of an agency,' and personal emails that do not do so are simply not records." *Id.* In *Baxter*, the Commonwealth Court looked to the content of the email to determine whether it involved an agency transaction or activity and established that the use of an agency email address and the location of an email on an agency device does not render the personal email of a school board member or school superintendent a public record. It was not the identity of the correspondent that was determinative, but rather the content of the email that the Court considered. Because the reporter's request was for email sent to and/or received from school board members and the school superintendent, the Court discussed its decision in the context of emails sent and received by school board members and the school superintendent and did not address emails sent and received by school employees. *Baxter* is not dispositive of the issues before this Court.

Interestingly, one case cited by and relied upon by the Court in *Baxter* did address the status of the email of an agency employee and

concluded that the email of a public official and of an employee were subject to the same content review when considering whether the message constituted a public record.

> In *Denver Publishing Co. v. Board of County Commissioners of Arapahoe*, 121 P.3d 190 (Colo.2005), the Colorado Supreme Court analyzed a trial court order that required disclosure of all email communications between a county recorder and assistant chief deputy. The Court explained that **"[t]he simple possession, creation, or receipt of an e-mail record by a public** official or **employee is not dispositive as to whether the record is a 'public record.' The fact that a public employee** or public official **sent or received a message while compensated by public funds or using publicly-owned computer equipment is insufficient to make the message a 'public record.'** " *Id.* at 199. It held that **to be public record, the requested emails had to have "a demonstrable connection to the performance of public functions."** Id. at 203.

Baxter at 1263 (emphasis added).

Adams relies on *Barkeyville Borough v. Wallace and Leanne Stearns*, 35 A.3d 91 (Pa.Cmwlth. 2012), and *Mollick v. Twp. Of Worcester*, 32 A.3d 859 (Pa.Cmwlth. 2011), to support her position that employee emails may be public records under the RTKL.

In *Barkeyville*, the Commonwealth Court held that emails between borough council members constituted public records where the emails were furthering the borough's business regardless of whether the emails were stored on the council members' personal computers. In distinguishing *Barkeyville* from *Silberstein*, the Court observed that:

> [t]he main issue in *Silberstein* was whether emails or documents on a township commissioner's personal

> computer were public records. This Court held that email created individually by the township commissioner could not be records as they were not "of" a local agency.

Id. at 96-97 (internal citations omitted); *See* 65 P.S. § 67.102 (a public record is a "record ... of a Commonwealth or local agency ... ") *Barkeyville* is instructive because the Court, upon finding *Silberstein* inapplicable, observed that to determine whether the council members' emails constituted public records, "we must analyze only whether the emails are 'of' the Borough in accordance with Section 102 of the RTKL." *Id.* at 97.

> "[T]he word 'of' is a preposition, used generally to indicate the object's origin, its owner or possessor, or its creator." *Second Chance,* 13 A.3d at 1035–36; *see Bari,* 20 A.3d at 643. Holding that certain information in *Second Chance* was not subject to disclosure under the RTKL, we opined as follows:
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> > There is nothing in the record to indicate that the information in question originated with [the] County, that [the] County has any ownership or possessory interest in the information, or that [the] County played any role in creating the information. Indeed, the [requested information] appear[s] to be information that only [Second Chance] created, possesses, or owns.
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> *Second Chance,* 13 A.3d at 1035–36.
>
> In this instance, we conclude that the emails between individual Council members are "of" the Borough. The emails sought by Requesters are emails *created* by public officials, in their capacity as public officials, for the purpose of furthering Borough business. The Borough created the information sought, because, as previously discussed, the individual Council members make up the Borough government. As a result, the Borough has ownership in the emails.

Barkeyville at 97. While *Barkeyville* provides this Court with an analytical framework, it is not dispositive of the issue before us, because, like the other cases cited by the parties, it does not address the status of employee emails.

In *Mollick*, the Township appealed when the trial court determined that emails transmitted by and between the Township Supervisors on their personal computers and/or using their personal email addresses were records. Upon review, the Commonwealth Court stated:

> regardless of whether the Supervisors herein utilized personal computers or personal email accounts, if two or more of the Township Supervisors exchanged emails which document a transaction or activity of the Township, and which were created, received, or retained in connection with a transaction, business, or activity of the Township, the Supervisors may have been acting as the Township, and those emails could be 'records' 'of the Township.' As such, any emails that meet the definition of 'record' under the RTKL, even if they are stored on the Supervisors' personal computers or in their personal email accounts, would be records of the Township.

Id. at 872-73. Here, again, the Commonwealth Court focused on the content of the emails, and not the identity of the senders, and, because the Court in *Mollick* was not called upon to address the status of employee emails, *Mollick* is not dispositive of the issue before us.

Using the *Barkeyville* analysis, we consider whether the emails Adams requested are "of" the District in accordance with section 102 of the RTKL. Adams requested emails sent to and from six email addresses, five of which are used by District employees and the sixth is used by the

District's Superintendent. The requested emails were created and/or received by employees or the Superintendent of the District, using their District emails, and stored on a District computer. The information requested originated with the District, the District has an ownership interest in the information, and the District played a role in creating this information. The emails are "of" the District.[2] It remains to be determined whether the information requested documents a transaction or activity of the District and otherwise meets the definition of a record.

Lending support to the conclusion that an agency employees' email may be a record are two cases, *Pennsylvania Office of Atty. Gen. v. Philadelphia Inquirer*, 127 A.3d 57 (Pa.Cmwlth. 2015), and *Meguerian v. Office of the Atty. Gen.*, 86 A.3d 924 (Pa.Cmwlth. 2013). In *Office of the Atty. Gen. v. Inquirer*, a request was originally made for emails to or from the accounts of three former Office of the Attorney General employees, and the request was later amplified to include the email accounts of eleven employees, all present or former employees. The request was denied because the records sought were of a personal nature and did not involve agency business. In analyzing the request, the Court did not focus on the status of the sender/receiver of the email, but rather concluded that "[w]hat makes an email a 'public record' then,

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[2] "[T]he word 'of' is a preposition, used generally to indicate the object's origin, its owner or possessor, or its creator." *Barkeyville* at 97.

is whether the information sought documents an agency transaction or activity, and the fact whether the information is sent to, stored on or received buy a public or personal computer is irrelevant in determining whether the email is a 'public record.'" *Id.* p. 62.

In *Megurian*, a request was made for emails of a current employee of the Attorney General's Office. The Commonwealth Court again looked to the subject-matter of the records to determine whether they qualified as records of the agency. *Id.* at 930 ("For emails to qualify records 'of' an agency, we look to the subject-matter of the records."). The request was denied because the records sought related to the employee's former employment and were therefor not related to the business of the Attorney General's office. The Court once again did not consider whether the employee who had sent or received the requested email had decision making authority at the agency, but rather concerned itself with the content of the emails.

In addition, section 708 of the RTKL sets forth several types of records that are exempt from access which refer to employees. For example,

> (b) ... the following are exempt from access by a requester under this act:
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> * * *
>
> (10)(i) A record that reflects:
>
> (A) The 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.
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> * * *
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> (12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.
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> * * *
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> (14) Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.

65 P.S. § 67.708. The maxim *expressio unius est exclusio alterius* applies here. "[T]he express mention of a specific matter in a statute implies the exclusion of others not mentioned." *W. Penn Allegheny Health Sys. v. Med. Care Availability & Reduction of Error Fund*, 11 A.3d 598, 605–06 (Pa.Cmwlth. 2010). The legislature, having addressed and exempted from access records of certain employee activities or forms of documentation, could have exempted all employee emails, but did not do so.[3]

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[3] We recognize that exemptions must be established by an agency only after a requester has established that a record is sought. However, if all employee emails were intended to be exempt because employees are not decision makers or do not have authority to act on behalf of the agency, logically, the exemption would have been identified at section

Contrary to the District's assertion, an agency's employee's email may be a record depending upon its content. Personal emails, regardless of the use of an agency email address and/or agency computer, are not records. However, an email sent or received by an employee as part of his/her duties as an employee for the purpose of furthering the agency's business is a record, unless subject to exemption under section 708.

The Request meets the test for specificity, and Adams met her burden to prove the Request was for records as defined by the RTKL.

The District maintains the Request was insufficiently specific because it failed to provide a subject matter and instead improperly relied on keywords. The Commonwealth Court has directed:

> When considering a challenge to the specificity of a request under Section 703 of the RTKL, this Court employs a three-part balancing test, examining the extent to which the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought.

Pennsylvania Dep't of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121, 1124 (Pa.Cmwlth. 2015). The three prongs are weighed to determine if on balance the request meets the specificity requirement of the RTKL. *Com. v. Engelkemier*, 148 A.3d 522, 531 (Pa.Cmwlth. 2016). In *Engelkemier*, the Court considered whether a keyword list was a correct

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708. Notably, the definition of a record does not include a limitation that addresses decision makers or those with authority to act on behalf of any agency.

response to an agency's request for a limited subject matter. The Court observed that the requester could choose to respond with a keyword list, but a "keyword list is not necessarily a substitute for a properly-defined subject matter(s) – *i.e.*, a particular transaction or activity of an agency." *Id.* The Court continued stating "[i]f terms on a list are too general or too broad, a requester runs the risk that the request will be rejected for lack of specificity[.] ... A clearly-defined subject matter, such as 'liquor privatization,' by contrast, has a better chance of passing the specificity test." *Id.* The requester in *Engelkemier* did not state a subject matter, but rather relied on keywords to identify the subject matter, and the Commonwealth Court held this to be sufficient. The Request is not flawed because Adams relied on keywords, rather than stating a subject matter.

The District also maintains that the keywords, TP USA, Moms for Liberty, [minor's name redacted] and/or hate group, do not relate to a transaction or activity of the agency. Although these keywords do not include the term 'club,' Adams disclosed in briefing before this Court that her request is directed to a club at Downingtown High School West (DHSW), specifically the TP USA club. Adams contends the keywords reference agency business, that business being student clubs on the DHSW campus. Adams was not required to state her purpose or motivation when making the Request because "the purpose or

motivation underlying a request–is not a relevant consideration under the RTKL." *Engelkemier*, 148 A.3d at 531. Adams was not required to disclose that she was seeking information on club activity when she submitted the Request.

The District states TP USA is not recognized as the name of any student club in the District,[4] and consequently the Request does not concern a transaction or activity of the agency. Nonetheless, the formation and oversight of clubs on the campus of DHSW relates to the

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[4] The District attached the Affidavit of Superintendent O'Donnell to its Reply Brief at Exhibit 2. Dr. O'Donnell attested that TP USA is not the name of a student club in the District, and that there was formerly a student club named Patriotic Veterans Club, for which an application was taken out but never returned to change the name to TP Veterans Club. Further, Dr. O'Donnell attested that neither Ms. Nash nor any other staff, faculty or employee is an advisor to any club known as TP USA or the TP Veterans Club. Attached to Dr. O'Donnell's Affidavit was a section of the District's Policy Manual. We have considered this Affidavit because it concerns a fact, i.e., that the Requester was seeking information about club activity, which the District claims was first brought to its attention in the Requester's Brief. Generally, the record on a RTKL appeal consists of the request, the agency's response, the appeal, any hearing transcript, and the final, written determination of the appeals officer. 65 P.S. 67.1303(b). However, "a court reviewing a decision in a statutory appeal possesses the inherent right to employ rules for procedure and practice before it so long as the rules do not conflict or violate the laws of the Commonwealth or the United States. ... The rationale in *Borough of Churchill* supports a conclusion that, in the absence of a specific restriction, a court deciding a statutory appeal has the inherent authority to take reasonable measures to ensure that a record sufficient for judicial review exists." *Bowling* at 822. In contrast, the papers attached to the District's Reply Brief at Exhibit 1, which relate to a subsequent RTKL request submitted to the District by a different requester, have not been considered because they are unrelated to the matter before us.

activity of the agency as demonstrated by the section of the Policy Manual the District appended to its Reply Brief. The Policy defines extracurricular activities as "those programs that are sponsored or approved by the Board and are conducted wholly or partly outside the regular school day; are marked by student participation in the processes of initiation, planning, organizing, and execution[.]" Additionally, the Policy mandates that staff members be assigned for the support of extracurricular activities and addresses the superintendent's participation in the process.[5] A club that is not sponsored or approved by the Board is not be an extracurricular activity under the Policy, but as a solely student-created and student-led activity, may still meet on campus when class is not in session. According to the Policy, the District "maintains a limited open forum where secondary students may meet for voluntary student-initiated activities unrelated directly to the curriculum, regardless of the religious, political, philosophical or other content of the speech related to such activities." Dr. O'Donnell's Affidavit, ¶ 7. The Policy makes clear that the regulation of student led organizations that meet on District property, regardless of whether they have club status, is an activity of the District.

[5] "Any extracurricular activity shall be considered under the sponsorship of this Board when it has been approved by the Board upon the recommendation of the Superintendent."

Adams has established that her Request sought records as defined by section 102 of the RTKL. The subject matter, scope, and timeframe are sufficient to allow the agency to ascertain which records are being requested. The Request is not directed to personal information, but rather to agency activity. Email communications by and between District employees as part of their duties as employees for the purpose of furthering the agency's business are records, unless subject to exemption under section 708. The District has not cited any exemption under section 708.

For the reasons as discussed, we enter this

ORDER

AND NOW, this 3rd day of September, 2024, it is ORDERED that the Final Determination of the Pennsylvania Office of Open Records at Docket No. AP 2023-3028 is affirmed, and the District is required to provide responsive records, except those that identify a minor below the age of 17, within ten days of the date this Order is entered.

BY THE COURT:

Anthony T. Verwey, J.