

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

IN RE:

BARKLEYVILLE BOROUGH

CV NO 906-2010

OPINION OF COURT

AND NOW, this 7 day of Jan, 2011, the Court has before it the Petition for

Review of the Decision of the Pennsylvania Office of Open Records, filed on behalf of Barkleyville Borough in the above-captioned matter. A hearing was held on July 30, 2010, at which hearing the Petitioner was represented by Raymond H. Bogaty, Esq. Intervening at the hearing in support of the Office of Open Records' decision, as per Order of this Court dated July 30, 2010, were Wallace and Leanne Stearns, represented by Lawrence P. Lutz, Esq. The Court has considered the arguments of the parties and the appropriate authorities, and now makes the following Findings of Fact and Conclusions of Law.

*Procedural History*

On June 2, 2010, the Pennsylvania Office of Open Records issued a Final Determination granting the appeal of Interveners and ordering the Borough to turn over certain correspondence between Borough council members. On June 28, 2010, the Borough filed appeal from Final Determination with this Court. At the hearing on July 30, the Court granted the Interveners leave to intervene on the grounds that the Office of Open Records did not have standing to argue in defense of its own judgment. An evidentiary hearing was held on November 30, 2010, at which time the Court took evidence on the sole issue of whether emails discussing Borough business were sent between the personal computers of council members.

### *Factual Background*

The records requested are emails sent back and forth between certain Borough council members, which are alleged to discuss council business. At the evidentiary hearing, the Petitioner stated that he was seeking records of Borough business relating to certain land development projects. Petitioner asserted that council members had been conducting Borough business via personal email accounts, which were accessed on their personal home computers. Petitioner testified that he had personal knowledge of the existence of such emails, although he also stated that he had no personal knowledge as to whether the emails still existed, or had been deleted.

On direct, the Petitioner read into the record the contents of several emails, sent between the personal accounts of council members, which appeared to discuss Borough business. These emails, offered by Petitioner as Exhibits 1 and 2, contain discussions of zoning issues as they relate to development projects within the Borough, as well as discussions of compliance with other state and county regulations.

The Court also heard testimony from several council members. These witnesses uniformly testified that they did at some point receive emails at their personal accounts which discussed the business of the council. Each witness also testified that they either could not recall whether these emails still existed on their computers, or that they had deleted any emails relating to council business. Each council member ultimately testified that some discussion of council business had taken place via emails in personal accounts which were accessed via personal computers. Indeed, one witness stated that council members were affirmatively directed to cease such communications following the open records request which precipitated this dispute.

### *Analysis*

Pennsylvania's Right to Know Law provides for judicial review of a final determination of the Office of Open Records within thirty (30) days. 65 P.S. §67.1302(a). On such appeal, the record shall consist of the request itself, the Borough's response, the appeal, the hearing transcript, the final determination, and any hearing that the Court has taken on the matter. 65 P.S. §67.1303(b); *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa.Cmwlth. 2010). The Court may supplement the record through hearing, remand, stipulation of the parties, *in camera* review of evidence, or other means. *Id.* at 820. In reviewing the matter, the Court may substitute its own factual findings for those of the Office of Open Records. *Id.* at 818.

The Pennsylvania Right to Know Law requires local agencies to provide access to public records. 65 P.S. 67.302. Thus, the Court must determine whether the emails sought are public records within the control of a local agency.

A "record" as the term is contemplated by the law is defined 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. 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.

As the term is contemplated by the law, the emails at issue in this case are clearly "records." They are "information, regardless of physical form." They "document a transaction or activity of an agency," in that they contain discussions of council business by council members. Indeed, as Exhibits 1 and 2 indicate, the emails go beyond simply

documenting council business; council business was being directly conducted via email. Crucially, the emails were created and received by council members acting in their capacity as council members, and not as private individuals.

Finally, under the Right to Know Law, to qualify as a "record" the emails must have been "created, received or retained" either pursuant to law, or in connection with the business or activities of the Borough Council. Clearly this is the case. The emails were created by council members and received by other council members in connection with the business of the Borough, in that the emails carried out such business.

Thus, having determined that the emails sought document activities of the Borough Council, and were created and received in connection with the business of the Borough, the Court finds that the emails sought are "records" within the meaning of 65 P.S. §67.102.

The Borough relies heavily on the recent decision of the York County Court of Common Pleas in *In Re: Silberstein*, No. 2009-SU-004714-08 (York County, Apr. 9, 2010), for the proposition that the emails are not "records." The Court finds that case to be inapposite. *Silberstein* found that the communications between a council member and a member of the public were not "records" because they did not document a "transaction or activity of the agency." *Id.* at 14. The communications sought in that case were emails between a council member and citizens of the municipality. Here, the requested communications were between two council members. Furthermore, and unlike in *Silberstein*, the communications were made between the council members in their capacity as council members: they very clearly relate to the carrying out of council business. There is a marked distinction between communications in which a council

member comments on council activity to a citizen, and communications in which council members carry out the activities of the agency.

Having determined that the emails sought are "records," the Court must next determine whether they constitute "public records" under the Right to Know Law. A "record" of any political subdivision, municipal agency, or board, that is not specifically exempt under Pennsylvania or Federal law, and is not protected by privilege, is a "public record" under the Right to Know Law. 65 P.S. §67.102. The council is clearly a political subdivision, pursuant to the Statutory Construction Act. 1 Pa.C.S.A. §1991. The emails are not protected by attorney-client privilege or the work product doctrine. Furthermore, they are not exempt under the very limited provisions of 65 P.S. §67.708(b).

The Borough relies heavily on the assertion that the emails in question exist on the personal computers of the council members, and may even have been deleted from these computers following access. Indeed, every council member to testify at trial stated either that they had deleted any such emails, or that they could not recall if any such emails still existed on their home computers. Counsel for the Borough appears to assert that if the emails have been deleted, they are beyond the reach of the Right to Know Law.

This line of argument ignores the reality of electronic communication. To the extent that the emails can be said to "exist" in the physical sense of the word, they continue to exist regardless of whether a copy of the email on the recipient's computer has been deleted. From the moment it is transmitted, the information exists in the possession of the email server, and may be accessed from any computer with an internet connection. The fact that the emails were accessed from the home computers of council members does not mean that they were stored exclusively on these computers, or that

allowing the Petitioners access to the emails is an invasion of privacy akin to a physical intrusion of the home. Thus, the fixation on the "presence" of the emails on the home computers is irrelevant. Regardless of where they may have been accessed, read, printed or deleted, the emails in question continue to exist, they are public records within the control of the Borough and its agents, and they fall within the scope of the Right to Know Law.

The reasoning of our Supreme Court in *Tribune-Review Publishing v. Westmoreland County Housing Authority*, 833 A.2d 112 (Pa. 2003) is particularly germane.<sup>1</sup> When confronted with a similar issue, the Supreme Court stated:

"[W]e believe that lack of possession of an existing writing by the public entity at the time of a request pursuant to the Act is not, by itself, determinative of the question of whether the writing is a "public record" subject to disclosure. A writing is within the ambit of the Act if it is subject to the control of the agency. *If the preparation of a writing, such as a litigation settlement document, by an attorney for an agency or by an attorney-in-fact for the agency's insurer is not viewed as preparation by the agency, any public entity could thwart disclosure required by the Act by having an attorney or an insurer's attorney prepare every writing that the public entity wishes to keep confidential.* Hence, "agency possession or control is prerequisite to triggering any duties under the [Freedom of Information Act]." *Kissinger v. Reporters Committee*, 445 U.S. 136, 151, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980). "If FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's powers to move documents beyond the reach of the FOIA requester." *Id.* at 159, 100 S.Ct. 960 (Brennan, J., concurring and dissenting)."

833 A.2d at 118. (citations omitted; emphasis added).

While the Supreme Court in that case was concerned with the use of the attorney work product doctrine to thwart the aims of the open records law, the reasoning

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<sup>1</sup> Although that case was decided prior to the February 1, 2009 revision to the Right to Know Law, there is nothing in the revisions that would appear to alter the reasoning set forth by the Supreme Court therein.

cc: Lawrence P. Lutz, Esq.  
Raymond H. Bogaty, Esq.

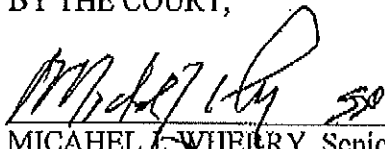
employed in that case is bears strongly on the issue at hand. If a municipality could exempt its official business from the scrutiny of the Open Records Law simply by conducting business over personal email accounts, the Open Records Law would cease to have any relevance in the municipal context. Clearly, the legislature cannot have intended this result.

The essential reality of this dispute is that the Borough chose to conduct its business through private email accounts in such a way as to bring emails contained in those accounts within the definition of public records under the Right to Know Law. The fact that the council members preferred to utilize personal email accounts as their chosen medium for carrying out the business of the Borough does not change the fact that the emails are plainly documents relating to such activities.

### *Conclusions*

For the reasons stated above, the Court finds that the Final Determination of the Office of Open Records is not in error and shall be affirmed.

BY THE COURT,

  
MICHAEL J. WHERRY, Senior Judge  
Specially Presiding

cc: J. Lute, Esq 724.285-5944  
R. Bogaty, Esq 724.458-1552

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

IN RE:

BARKLEYVILLE BOROUGH

CV NO 906-2010

ORDER OF COURT

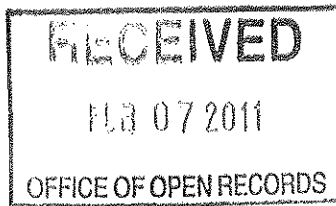
AND NOW, this 9 day of JANUARY, 2011, in accordance with the <sup>Order</sup> Opinion of Court issued this same date, it is hereby ORDERED and DECREED as follows: that the Final Determination of the Office of Open Records is hereby AFFIRMED; and that Intervenors' petition for attorney's fees is hereby GRANTED in the amount of three thousand, four hundred and thirty-two dollars and seventy-one cents (\$3,432.71).

PROTOSTANT AND  
CLERK OF COURTS  
2011 JAN 10 AM 11:14  
RECORDED  
FILED

BY THE COURT,

Michael J. Wherry  
MICHAEL J. WHERRY, Senior Judge  
Specially Presiding

cc: Lawrence P. Lutz, Esq. (724) 285-5944  
Raymond H. Bogaty, Esq. (724) 468-1552

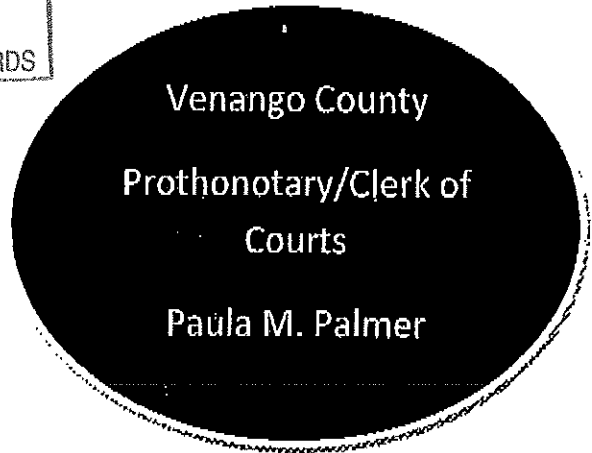


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# FAX

TO: Cindy

FROM: Penny

DATE: 2/7/11

FAX #: 717-425-5343

PAGES: 9

RE: As requested

COMMENTS: \_\_\_\_\_

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# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF:</b>	:	
	:	
<b>WALLACE AND LEANNE STEARNS,</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2010-0404</b>
	:	
<b>BARKEYVILLE BOROUGH,</b>	:	
<b>Respondent</b>	:	

### INTRODUCTION

Mr. and Mrs. Wallace Stearns (collectively the “Requester”) submitted a request pursuant to the Right to Know Law (the “RTKL”), 65 P.S. §67.101, *et. seq.*, with Barkeyville Borough (the “Borough”) seeking correspondence from council members and council minutes. The Borough granted access to the minutes, but denied the request for correspondence stating that the requested records did not exist. The Requester filed a timely appeal with the Office of Open Records (the “OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted** and the Borough is required to take further action.

### FACTUAL BACKGROUND

The Requester filed a request with the Borough on April 26, 2010 seeking the following: “All e-mails, faxes, hand written notes from – to Bill Coursen, Randy Martin, Guy Surrera, William Valdeselse” and council minutes from March through December

2010. (“Request”). On April 27, 2010 the Borough granted access to the minutes, but denied the request for correspondence stating that the Requester had previously been advised that “there were no e-mails, faxes or handwritten notes.” (“Denial”). On May 5, 2010 the Requester appealed to the OOR asserting that they had been told that e-mails do exist and may be on personal computers. The Requester addressed only the denial of the e-mails; therefore, the issue on appeal is limited to the request for e-mails and does not include the request for faxes or handwritten notes.

On May 17, 2010 Raymond Bogaty, Esquire responded on behalf of the Borough stating that the Borough's computer “is not often used for correspondence and at least up to this point has not been the best functioning piece of equipment.” The Borough provides the Affidavit of William Coursen, Borough Council President, who states, under penalty of perjury, as follows:

1. “The e-mail records requested by [the Requester] do not exist in the possession, custody or control of the Borough...” Affidavit, ¶ 3.

2. “Additionally, in my capacity as Open Records Officer, I requested copies of e-mails that would fit within the [] request from individual members of Council. I have received no response from Council members.” Affidavit, ¶ 4.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). A record in the possession of a Commonwealth or local agency is presumed to be public unless it is exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305.

The RTKL requires the agency open records officer to receive requests submitted

to the agency and to “direct the requests to other appropriate persons within the agency.” 65 P.S. § 67.502(b). The OOR previously discussed *Lukes et al. v. DPW*, 2009 Pa. Commw. LEXIS 452 (June 3, 2009) and noted that “the Commonwealth Court recognized that physical possession of a record is not the litmus test of an agency performing its duties of disclosure, rather it is *control*.” See *Mollick*, OOR Dkt. AP 2009-0438, p. 9. E-mails of an agency's governing individuals reflecting agency business are within the agency's control even if the e-mails are located on personal computers. *Id.* at pp. 8-10. In the instant matter, e-mails reflecting Council business that are in the possession of individual Council members and located on their personal computers are within the Borough's control.

The Borough provided evidence that it directed the request to “other appropriate persons within the agency,” i.e. the individual members of Council. However, the fact that no response was received from those Council members is not sufficient evidence to find that no e-mails exist. Therefore, the Borough is required to retrieve existing responsive e-mails from individual members of Council, if any exist, and provide them to the Requester.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted** and the Borough is required to retrieve existing responsive e-mails that are in the possession, custody or control of individual Council members and provide them to the Requester. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Venango County Court of Common Pleas. All parties must be served with notice of the appeal. The Office of Open Records also

shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED:** June 2, 2010

A handwritten signature in black ink, appearing to read 'Audrey Buglione', written in a cursive style.

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**APPEALS OFFICER  
AUDREY BUGLIONE, ESQUIRE**

**Sent to:  
Wallace and Leann Stearns, Raymond Bogaty, Esquire**