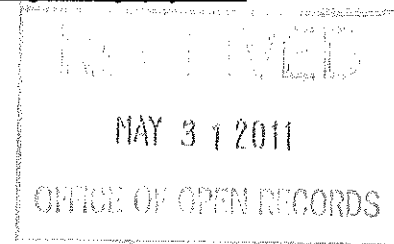




**KINGSPRY**

[ryoung@kingspry.com](mailto:ryoung@kingspry.com)

May 26, 2011



Mr. James Deegan  
c/o The Express-Times  
30 North 4<sup>th</sup> Street  
Easton, PA 18042

Lucinda Glinn, Esquire  
Office of Open Records  
Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg PA 17120-0225

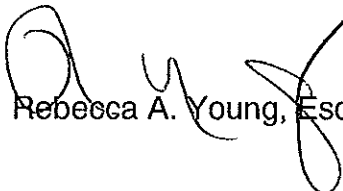
Re: The Express-Times v. Easton Area School District  
OOR Dkt. AP 2011-0359

Dear Mr. Deegan and Attorney Glinn:

Enclosed for service is a time-stamped copy of the Notice of Appeal and Petition for Review of Decision of the Office of Open Records file in the above-captioned matter.

Please contact me if you have any questions or concerns.

Very truly yours,

  
Rebecca A. Young, Esquire

RAY/smg  
Enclosure

Cc: Mr. John Castrovinci, Director of Human Resources  
John E. Freund, III, Esquire

F:\Users\KingSpry Clients\E\EASTON AREA SD\RIGHT TO KNOW REQUESTS\McEvoy request for emails 2011 (Express Times)\Ltr to Counsel enc. EASD Appeal 5.26.2011.doc

KING, SPRY, HERMAN, FREUND & FAUL, LLC • ATTORNEYS & COUNSELORS AT LAW  
ONE WEST BROAD STREET • SUITE 700 • BETHLEHEM, PA 18018 • TEL: 610-332-0390 • FAX: 610-332-0314

ALLENTOWN ❖ BETHLEHEM ❖ STROUDSBURG

[www.kingspry.com](http://www.kingspry.com)

IN THE NORTHAMPTON COUNTY COURT OF COMMON PLEASE  
COMMONWEALTH OF PENNSYLVANIA

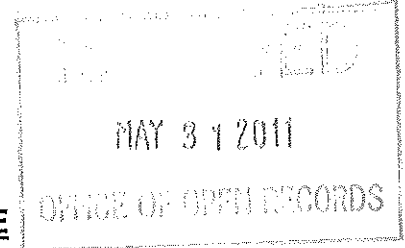
Easton Area School District,  
Appellant

No. CV 2011-4775

v.

The Express-Times,  
Appellee

COPY



PRAECIPE FOR APPEARANCE

TO THE PROTHONOTARY:

Please enter my appearance on behalf of EASTON AREA SCHOOL DISTRICT  
in the above case.

KING, SPRY, HERMAN, FREUND & FAUL

A handwritten signature in black ink, appearing to read "Rebecca A. Young".

Rebecca A. Young, Esquire  
Atty ID: 83845  
One West Broad Street, Suite 700  
Bethlehem, PA 18018  
(610) 332-0390

FILED

MAY 26 2011

8:58 AM  
HOLLY RUGGIERO  
CLERK OF COURT  
CIVIL/PROTHONOTARY

IN THE NORTHAMPTON COUNTY COURT OF COMMON PLEAS  
COMMONWEALTH OF PENNSYLVANIA

Easton Area School District,  
Appellant

v.

The Express-Times,  
Appellee

No. CV 2011-4775

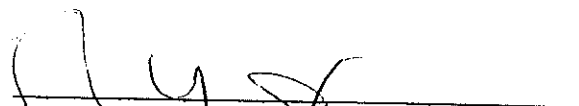
COPY

PRAECIPE TO LIST FOR ARGUMENT

TO THE CLERK OF COURTS, CIVIL DIVISION:

Please list this appeal, filed by the Easton Area School District, for argument on September 6, 2011. Pursuant to Rules N211 and N1028, Appellant's brief in support of this appeal was filed on May 26, 2011.

KING, SPRY, HERMAN, FREUND & FAUL, LLC

  
John E. Freund, III, Esquire  
Attorney I.D. No. 25390  
Rebecca A. Young, Esq.  
Atty ID: 83845  
One West Broad Street, Suite 700  
Bethlehem, PA 18018  
(610) 332-0390

FILED

MAY 26 2011

8:58 AM

HOLLY RUGGIERO  
CLERK OF COURT  
CIVIL/PROTHONOTARY

IN THE NORTHAMPTON COUNTY COURT OF COMMON PLEAS  
COMMONWEALTH OF PENNSYLVANIA

FILED  
MAY 31 2011  
OFFICE OF CLERK OF COURTS

Easton Area School District,  
Appellant

v.

The Express-Times,  
Appellee

.....

No. CV 2011-4775

ORDER

AND NOW, this 26<sup>th</sup> day of May, 2011, pursuant to the attached Notice and Petition for Review of an Agency Determination, it is hereby ORDERED as follows:

1. The Appellee shall file a written response to the attached Petition within 20 days; and

2. Oral argument is scheduled for the 6<sup>th</sup> day of September 2011 at 9:00 am/pm in Courtroom 1 of the Northampton County Courthouse located at 669 Washington St., Easton, Pennsylvania 18042.

BY THE COURT

/s/ Edward G. Smith  
J.

Cc: Rebecca A. Young, Esq.  
James Deegan, c/o The Express-Times

FILED

AND NOW THIS 26<sup>th</sup> DAY OF May, 20 11  
RULE ISSUED AS ABOVE  
HOLLY RUGGIERO, PROTHONOTARY  
PER [Signature], DEPUTY  
Lawler

MAY 26 2011  
8:58 AM  
HOLLY RUGGIERO  
CLERK OF COURT  
CIVIL/PROTHONOTARY

IN THE NORTHAMPTON COUNTY COURT OF COMMON PLEAS  
COMMONWEALTH OF PENNSYLVANIA

Easton Area School District,  
Appellant

v.

The Express-Times,  
Appellee

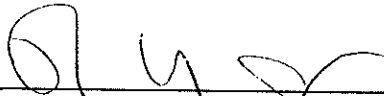
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No. CV 2011  
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NOTICE OF APPEAL

Notice is hereby given that the Easton Area School District, Appellant, hereby appeals the decision of the Office of Open Records dated April 27, 2011 relative to the Appellee's request for records, pursuant to the Right to Know Law, 65 P.S. § 67.1302.

Respectfully submitted,

KING SPRY HERMAN FREUND & FAUL, LLC

By:   
\_\_\_\_\_  
Rebecca A. Young, Esq.  
Attorney I.D. 83845  
John E. Freund, III, Esq.  
Attorney ID 25390  
One West Broad Street, Suite 700  
Bethlehem, PA 18018  
Phone: 610-332-0390  
Attorneys for Appellant

**FILED**

MAY 26 2011

HOLLY RUGGIERO  
CLERK OF COURT  
CIVIL/PROTHONOTARY



A true and correct copy of Appellee's request ("Request") is attached as Exhibit A and incorporated by reference.

3. The District denied the Request. A true and correct copy of the District's response is attached hereto as Exhibit B and incorporated by reference.

4. Appellee appealed the denial to the Office of Open Records ("OOR") for the Commonwealth of Pennsylvania. The appeal and the District's response are attached hereto as Exhibit C and incorporated by reference.

5. The Office of Open Records granted Appellee's appeal in part and denied it in part by a Final Determination issued on April 27, 2011. A true and correct copy of the final determination is attached hereto as Exhibit D and incorporated by reference.

6. The final determination incorrectly determined that the request for public records is sufficiently specific to allow an Agency response.

7. The final determination incorrectly determined that the requested email correspondence is a public record.

8. The final determination incorrectly determined that relevant exemptions do not apply to the Request.

9. Appellant believes and therefore avers that the Final Determination must be overruled.

10. The standard for review for this Court is whether the District's decision to deny access to the documents was just and proper.

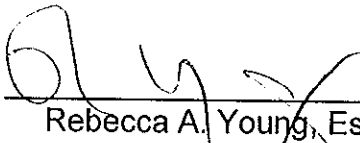
11. Pursuant to 65 P.S. §67.1302(b), this Petition shall serve as a stay for the release of information until this Honorable Court has rendered a decision.

WHEREFORE, Appellant prays this Honorable Court to issue an Order as follows:

1. Granting the Appellant's request and reversing the decision of the OOR;
- and
2. Entering any other relief as is necessary and just.

Respectfully submitted,

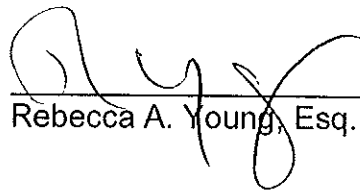
KING SPRY HERMAN FREUND & FAUL, LLC

By:   
\_\_\_\_\_  
Rebecca A. Young, Esq.  
Attorney I.D. 83845  
John E. Freund, III, Esq.  
Attorney ID 25390  
One West Broad Street, Suite 700  
Bethlehem, PA 18018  
Phone: 610-332-0390  
Attorneys for Appellant

**VERIFICATION**

Rebecca A. Young, Esq., deposes and says that she is the Attorney for the Appellant herein and is duly authorized to take this verification on its behalf and further verifies that the statements made in the foregoing are true and correct to the best of her knowledge, information and belief. She understands that false statements herein are made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsifications of authorities.

Date: 5-29-11

  
\_\_\_\_\_  
Rebecca A. Young, Esq.

IN THE NORTHAMPTON COUNTY COURT OF COMMON PLEAS  
COMMONWEALTH OF PENNSYLVANIA

Easton Area School District,  
Appellant

No. CV 2011

v.

The Express-Times,  
Appellee

CERTIFICATE OF SERVICE

I, Rebecca A. Young, Esq., hereby certify that on May 26, 2011, a true and correct copy of the foregoing Notice of Appeal and Petition for Review of a Decision of the Office of Open Records was served upon all parties and counsel in interest by U.S. first-class mail, postage prepaid, at the address listed below:

James Deegan  
c/o The Express-Times  
30 N. 4<sup>th</sup> St.  
Easton, PA 18042

**FILED**

MAY 26 2011

Lucinda Glinn, Esq.  
Office of Open Records  
Keystone Building  
400 North St., 4<sup>th</sup> Floor  
Harrisburg PA 17120-0225

**HOLLY RUGGIERO**  
CLERK OF COURT  
CIVIL/PROTHONOTARY

KING, SPRY, HERMAN, FREUND & FAUL, LLC

By. \_\_\_\_\_



Rebecca A. Young, Esq.  
Attorney for Appellant, Easton Area School District  
One West Broad Street, Suite 700  
Bethlehem, PA 18018  
610-332-0390



insufficiently specific, and that the records are not public by law, privilege and a number of RTKL exceptions. Specifically, the District asserted the following exceptions: (1) their disclosure would result in a loss of funding (Section 708(b)(1)); (2) the records contain personal identification information (Section 708(b)(6)); (3) the records constitute agency employee records (Section 708(b)(7)); (4) the records are negotiation/bargaining records (Section 708(b)(8)); (5) the records are drafts (Section 708(b)(9)); (6) the records reflect internal, predecisional deliberations (Section 708(b)(10)); (7) the records constitute investigative records (Sections 708(b)(16) and (17)); (8) the records contain draft and executive session minutes (Section 708(b)(21)); (9) the records are proposals (Section 708(b)(26)); and (10) reflect information of a minor, (Section 708(b)(30)).

The Requester timely appealed, asserting the records are public because they are sent and received on District email addresses and that any exempt information can be redacted from the emails at issue.

The District supplemented the record with a letter from its counsel, asserting the appeal should be dismissed because the appeal was filed by a different employee of the Requester than submitted the Request. The District also argues that the Request is insufficiently specific and responsive emails are exempt. The District asserts that the fact the Request was submitted by a reporter of the Requester and appealed by the Managing Editor renders the appeal improper. With regard to specificity, the District argues that the lack of a subject-matter for the Request renders it insufficiently specific under Section 703 as interpreted by *Mollick v. Methacton Sch. District*, OOR Dkt. AP 2009-0180, 2009 PA O.O.R.D. LEXIS 287 and *Urbina v. Office of the Governor*, OOR Dkt. AP 2009-0972, 2009 PA O.O.R.D. LEXIS 708, as both require subject-matter limited to business and activities of the agency. The District argues that without

limitation on the subject-matter or senders/recipients other than the email address box identified, the Request does not contain sufficient detail to enable an answer.

The District argues that emails of individual Board members are not records “of” the District under *In re Silberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011) because the action of a single person does not bind the agency as a whole. Therefore, the District argues all emails of the nine Board members are not subject to disclosure under the RTKL.

With regard to the substantive exemptions, the District supplied a notarized affidavit of John Castrovinci, the Open Records Officer (“ORO”) for the District, regarding the predecisional deliberative characteristics, privileged nature, and student information protected by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, (“FERPA”) and its regulations, 33 C.F.R. § 99.3, within some of the emails. In particular, Castrovinci attests that “some of the emails” contain information regarding: employee grievances and evaluations; labor relations matters; drafts of policies, bills or resolutions; complaints or investigations; draft minutes and minutes of Executive Sessions; proposals pertaining to agency procurement; and personal identification information and information traceable to minors/students. The District did not correlate each exception to any specific group of emails and did not address redaction.

### LEGAL ANALYSIS

The RTKL is “designed 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.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal.

The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing and the OOR has the requisite and necessary information before it to adjudicate the matter.

The District is a local agency subject to the RTKL and required to disclose public records. *See* 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days to the requester. 65 P.S. § 67.901. The District asserts insufficient specificity, a number of exceptions to disclosure, and argues the emails of individual Board members are not subject to the RTKL.

As an initial matter, the OOR assesses the District's argument that the appeal should be dismissed because a reporter submitted the Request while an editor filed the appeal pertaining to the Request. However, it is clear on the face of the Request that it was submitted on behalf of *The Express-Times*, the Requester, and there is no dispute that the person who filed the appeal is Managing Editor for *The Express-Times*. The party is thus the same and offers no grounds for dismissal.

**1. The Request is sufficiently specific**

Section 703 provides that a request "should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested...." 65 P.S. § 67.703. The OOR notes from the outset that there is no "bright line standard" or "weighing of factors test" that determines whether a request is sufficiently specific, and this

determination is made on a case-by-case basis through evaluating a number of factors, such as time restrictions, subject matter, date restrictions, parties involved and types of records. *Rizzuto v. DOC*, OOR Dkt. AP 2010-1173, 2011 PA O.O.R.D. LEXIS 3.

With regard to requests for "all emails," the OOR applies a totality of the circumstances test. *See Iverson v. Montgomery County*, OOR Dkt. AP 2011-0071, 2011 PA O.O.R.D. LEXIS 83 (outlining the factors for assessing specificity). In this case, the type of records at issue is email and the Request identifies a specific time-frame and senders/recipients. The limited timeframe and identified senders/recipients is sufficient for the OOR to discern which records are sought. "If the OOR can determine what the Requester sought, it will find the request to be sufficiently specific." *See Lauff v. Fort Cherry School District*, OOR Dkt. AP 2010-0128, 2010 PA O.O.R.D. LEXIS 180 (finding request for "any and all" correspondence to be sufficiently specific given other factors). Thus, the Request is sufficiently specific to trigger a response.

## 2. *Silberstein* does not apply to agency-issued email addresses

The District argues that, pursuant to *Silberstein*, emails of individual School Board members are not capable of binding the agency, and therefore are not records "of" the District. The OOR declines to construe the decision so expansively as the Commonwealth Court did not hold that records of an individual agency official can never constitute records "of" that agency. *See, e.g., Wyrick v. Dickinson Township*, OOR Dkt. AP 2011-0169, 2011 PA O.O.R.D. LEXIS 171 (involving emails between agency employees). There is no dispute that the emails at issue in this appeal are to and from agency-issued email addresses, and therefore are presumptively agency-related records. *Silberstein* pertains to emails sent and received by agency officials on personal computers/email accounts, not agency-issued email accounts, and therefore does not apply to the facts presented here.

### 3. The District did not establish all emails are exempt

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a)(1) states: “[t]he burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. §67.708(a)(1). Preponderance of the evidence has been defined as “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001). The District asserted a number of exemptions to protect “some emails.”

The District submitted the Affidavit from Castrovinci applying the exceptions to some of the emails at issue. However, the Affidavit does not specify which emails are exempt as predecisional deliberative emails, or as attorney-client privileged correspondence. For example, the Affidavit states “some of the requested emails are from or to the District’s counsel for the purposes of obtaining or providing legal advice,” but alleges nothing further with regard to the privilege and fails to identify which emails are privileged. The Affidavit advises that some of the emails contain information that is protected by the exceptions under Section 708(b) without explaining which emails are exempt and why.

The District did not supply or substantiate sufficient facts to show that all of the emails sought are exempt under the named statute, privilege and exceptions. Nor does the District explain why the emails cannot be redacted to provide partial records. As the District failed to meet its burden of proof that *all* responsive emails are protected, the District is required to disclose responsive emails subject to redaction for exempt information.

In its Affidavit, the District set forth sufficient facts to establish the following exceptions by substantiating that some emails contain the information expressly exempt thereunder: 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. By attesting that some emails contain this expressly exempt information, the District met its burden of proof because the District need only attest that the records contain the expressly exempt information, *i.e.*, personal email addresses. Likewise, the District substantiated that some of the information is traceable to students for their education records, which is sufficient to show FERPA applies.

The District failed to identify responsive records and correlate the exceptions to the emails at issue by describing the records at issue and showing how the exception applies. *Cf. Dunbar/Lower Perkiomen Val. Reg. Sewer Auth. v. Lower Providence Tp.*, OOR Dkt. 2010-0552, 2010 PA O.O.R.D. LEXIS 645. Accordingly, the District did not meet its burden as to the following exceptions: Section 708(b)(7) and (b)(17) for non-listed records; Section 708(b)(8); Section 708(b)(10); Section 708(b)(26). Therefore, the District cannot withhold any emails pursuant to these exceptions.

The District also failed to set forth sufficient facts to show that emails to and from counsel for legal advice qualify as attorney-client privileged. To establish the attorney-client privilege, the District must show that all responsive records qualify as “confidential communications” under the four-part test outlined in *Slater v. Rimar*, 462 Pa. 138, 338 A.2d 584, 589 (1975). *See Fazlollah v. Phila. Hous. Auth.*, OOR Dkt. AP 2010-1189, 2011 PA. O.O.R.D. LEXIS 18. Having failed to meet the test here, emails to and from counsel cannot be withheld.

## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part and denied in part** and the District is required to disclose responsive emails to the Requester within thirty (30) days, from which information expressly exempt under FERPA and the following exceptions may be redacted: Section 708(b)(6); Section 708(b)(7); Section 708(b)(9); Section 708(b)(16) and (17); Section 708(b)(21); and Section 708(b)(30). This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Northampton County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: April 27, 2011**



**LUCINDA GLINN, ESQ.  
APPEALS OFFICER**

Sent to: Jim Deegan; Rebecca Young, Esq.

IN THE NORTH HAMPTON COUNTY COURT OF COMMON PLEAS  
COMMONWEALTH OF PENNSYLVANIA

Easton Area School District,  
Appellant

v.

The Express-Times,  
Appellee

No. CV 2011-4775

COPY

**BRIEF IN SUPPORT OF APPEAL AND PETITION FOR REVIEW OF DECISION OF  
THE OFFICE OF OPEN RECORDS**

A. History and Facts

On March 2, 2011, Appellant, Easton Area School District ("District") received a request for from Colin McEvoy ("Appellee") under the Right to Know Law, 65 P.S. §67.101 et seq., which demanded the following documents:

All emails sent and received between Oct. 1 and Oct. 31 for the following e-mail addresses:

mcginleys@eastonsd.org  
boe@eastonsd.org  
fisherp@eastonsd.org  
hessj@eastonsd.org  
mandarinom@eastonsd.org  
myersk@eastonsd.org  
reillyt@eastonsd.org  
vulcanop@eastonsd.org  
ellisonk@eastonsd.org  
holzbergerj@eastonsd.org  
bilottis@eastonsd.org

FILED

MAY 26 2011

8:58 AM

HOLLY RUGGIERO  
CLERK OF COURT  
CIVIL PROTHONOTARY

The District denied the Request. Appellee appealed the denial to the Office of Open Records ("OOR") for the Commonwealth of Pennsylvania. The Office of Open Records granted Appellee's appeal in part and denied it in part by a Final Determination issued on April 27, 2011. The District has appealed the OOR decision and presents this brief in support of its position.