



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAMES MOLLICK	:	
Complainant	:	
	:	
v.	:	Docket Nos. AP 2009-0790
	:	
WORCESTER TOWNSHIP	:	
Respondent	:	
	:	

INTRODUCTION

Mr. James Mollick, (the “Requester”) submitted a request to Worcester Township (the “Township”) seeking records related to the “2 minute rule” pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The Township denied the request. The Requester appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Requester’s appeal is **granted in part** and **denied in part** and the Township is required to take further action.

FACTUAL BACKGROUND

On August 13, 2009, the Requester submitted a right-to-know request to the Township seeking the following:

1. I would like to review any and/or all emails transferred to and/or from Supervisor John Harris regarding the genesis, formation, implimentation [sic], enforcement and/or maintenance of the Board’s limitation on public commentary, specifically the “2 minute rule”, regardless as to whether they were transmitted and/or received on

- personal computers and/or personal email accounts for the past 2 years. This would include emails to or from any and/or all Township staff.
2. I would like to review any and/or all emails transferred to and/or from Supervisor Art Bustard regarding the genesis, formation, implimentation [sic], enforcement and/or maintenance of the Board's limitation on public commentary, specifically the "2 minute rule", regardless as to whether they were transmitted and/or received on personal computers and/or personal email accounts for the past 2 years. This would include emails to or from any and/or all Township staff.
 3. I would like to review any and/or all emails transferred to and/or from Supervisor Steve Quigley regarding the genesis, formation, implimentation [sic], enforcement and/or maintenance of the Board's limitation on public commentary, specifically the "2 minute rule", regardless as to whether they were transmitted and/or received on personal computers and/or personal email accounts for the past 2 years. This would include emails to or from any and/or all Township staff.
 4. I would like to review any and/or all emails transferred to and/or from Township Manager John Cornell regarding the genesis, formation, implimentation [sic], enforcement and/or maintenance of the Board's limitation on public commentary, specifically the "2 minute rule", regardless as to whether they were transmitted and/or received on personal computers and/or personal email accounts for the past 2 years. This would include emails to or from any and/or all Township staff.
 5. I would like to review any and/or all emails transferred to and/or from Assistant Township Manager Eunice Kriebel regarding the genesis, formation, implimentation [sic], enforcement and/or maintenance of the Board's limitation on public commentary, specifically the "2 minute rule", regardless as to whether they were transmitted and/or received on personal computers and/or personal email accounts for the past 2 years. This would include emails to or from any and/or all Township staff.

He asked that the records be provided in electronic medium if available. (the "Request"). On August 20, 2009 Eunice C. Kriebel, the Township's Assistant Open Records Officer, denied the requests as repeat requests under section 506 of the RTKL which have "placed an unreasonable burden upon the Township." The Township referred to the Requester's previous request of July 13, 2009. The Township incorporated each of its responses for the July 13, 2009 request and provided the Affidavit of Eunice Kriebel stating that she conducted a search of "Township email accounts from April 2009 to the time of the requests and [did] not located any emails pertaining to the '2-minute rule.'"

The Township also asserted that a request cannot seek records on personal computers created prior to January 1, 2009 because the RTKL cannot be construed to operate retroactively.

The Township stated that the requests “can be read to also request emails from sources outside the Township staff.” The Township advised that two Supervisors “commenced using Township-sponsored emails [sic] accounts, which could be accessed and searched by the Township beginning in April 2009.” Ms. Kriebel attests that prior to April 2009, the “Township Supervisors utilized their own personal or business computers and email accounts to communicate with Township staff and outsiders.” She further stated, “This custom and practice pre-dated my employment as Assistant Township Manager and to my knowledge existed as long as electronic communications were utilized by individual Supervisors.”

The Requester timely appealed. He asserted that his request was not disruptive and was distinct from the July 13, 2009 request because it included emails to and from Township staff, members of the public, and/or other officials from neighboring townships and not just emails between Supervisors. He also stated that his request was more specific in that it requests emails concerning the “genesis, formation, implementation, enforcement and/or maintenance of the Board’s limitation on public commentary, specifically the ‘2 minute rule.’”

In response to the Appeal, Joseph M. Bagley, Esquire, provided the affidavits of James J. Garrity, Esquire, Township Solicitor, and John Cornell, Township Open Records Officer. The Township asserted that the records in possession of the Township are protected by the attorney-client privilege or attorney work-product privilege or are internal, pre-decisional deliberations of the Township to its Solicitor and protected by section 708(b)(10)(i). Garrity Affidavit, ¶¶ b, d and e. The Township asserted that it does not maintain a privilege log and is not required to do so under the RTKL. Garrity Affidavit, ¶ f. The Solicitor also reiterated that the request was disruptive and identical to the July 13, 2009 request.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for Commonwealth and local agencies. 65 P.S. §67.503(a). The Township is a local agency subject to the RTKL and required to disclose public records. 65 P.S. §67.301. Records in possession of a local agency are presumed to be “public” unless: (1) the record is exempt under Section 708(b); (2) the record is protected by a legal privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305.

Section 102 of the RTKL, defines the term “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.”

First, the Township’s assertion that the RTKL cannot be construed to operate retroactively fails. The RTKL does not preclude requesters from submitting requests for records created prior to the effective date, and to construe the statute in that manner would leave individuals without a mechanism to obtain those public records. *See Mollick v. Worcester Twp.*, OOR Dkt. AP 2009-0438. The analysis in *Mollick*, OOR Dkt. AP 2009-0538 is fully adopted and incorporated herein. Therefore, records, including emails, created prior to 2009 are subject to the RTKL.

Second, the request is disruptive in so much as it requests six emails between the Supervisors and Township Manager or the Solicitor that were identified by the Township in response to the July 13, 2009 request. The July 13, 2009 request was for the following records:

1. I would like to have any and/or all emails referred to by John Harris at the April 7, 2008 Worcester Board of Supervisors Meeting regarding the “2 minute rule”, between Supervisors John Harris and/or Art Bustard and/or Steve Quigley, regardless as to whether it was transmitted on their personal computers and/or personal email accounts.
2. I would like to have any and/or all emails between Supervisors John Harris and/or Art Bustard and or Steve Quigley regarding the “2 minute rule”, regardless as to whether it was transmitted on their personal computers and/or personal email accounts for the past 2 years.
3. I would like to have any and/or all notes, memo’s, faxes, letters, and/or written documentation of any kind between Supervisors John Harris and/or Art Bustard and/or Steve Quigley and/or Township manager John Cornell and/or Eunice Kriebel regarding the “2 minute rule” referenced by John Harris at the April 7, 2008 Worcester Board of Supervisors Meeting, for the past 2 years.

In the course of that appeal, the Township identified six emails dated January 20, 2008 or July 18, 2008 that it withheld as exempt from disclosure by the attorney-client privilege. The OOR determined that those emails were properly withheld. See *Mollick v. Worcester Township*, OOR Dkt. AP 2009-0731. Therefore, to the extent that the August 13, 2009 request seeks those records, the request was properly denied under section 506(a) of the RTKL. However, the August 13, 2009 request also seeks records that are not those between the Supervisors, but rather to or from the Supervisors and others outside the Township staff. The Township provided the sworn affidavit of its open records officers, Eunice Kriebel and John Cornell that there were no responsive records on the Township sponsored email accounts. Therefore, the appeal as to any records that exist on the Township sponsored email accounts is denied.

However, the Township fails to meet its burden of proving that the August 13, 2009 request is repetitive or disruptive regarding any responsive records that exist on the Supervisors’ personal or business computers and email accounts. Section 506(a) provides that an agency may

“deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.”

The July 13, 2009 request sought responsive emails between Supervisors regarding the “2 minute rule” that exist on the Supervisors’ personal or work computers. Therefore, to the extent the August 13, 2009 request seeks the emails between the Supervisors that exist on their personal or work computers it is repetitive of the July 13, 2008 request. However, the OOR does not find that the request is disruptive because the August 13, 2009 request is more specific, and although some responsive records may exist that respond to both requests, it is not the same request. In addition, it is not a repeated request, but rather one follow-up request attempting to clarify the July 13, 2009 request. The Township was previously directed to provide the records *between* the Supervisors that exist on their personal computers in the final determination, *Mollick v. Worcester Township*, OOR Dkt. AP 2009-0731 and it is directed to do so again, if it has not already done so. The August 13, 2009 request also seeks those records that are to and from the Supervisors and/or Township staff to/from those *outside* the Township. Those records are not necessarily encompassed within the July 13, 2009 request and must also be provided as discussed below.

The RTKL requires the agency open records office 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). A local agency is defined as “[a]ny local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.” 65 P.S. § 67.102. The Township’s provides no evidence that it directed the request to “other appropriate persons within the agency,” i.e. the Supervisor, Manager, and Open Records Officer whose emails were the stated subject of the request to the extent the records existed on their personal or work

computers. 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. As the OOR found in *Mollick*, “e-mails of Township Supervisors are within Township control.” *Id.* at p. 10. This was true even though the emails were located on the Supervisor’s personal computer. *Id.* at pp. 8-10. The OOR found that “[t]o 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. . . .” *Id.* at p.10.

Therefore, to the extent the Supervisors, Manager or Assistant Manager have responsive emails on their personal or work computers those records are records of the Township. The Township has not identified those records and the OOR cannot determine whether the records are exempt under any of the cited exemptions. Therefore, the Township is required to retrieve the records from its Supervisors and Managers and provide them to the Requester, subject to identification and redaction of any non-public information or provide a sworn affidavit of nonexistence from each Supervisor and Manager identified in the Request.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part**. The appeal of the denial of the six emails and those email indentified in response to the July 13, 2009 request is denied as repetitive. The appeal of the denial of the records existing on the Supervisors’ or Managers’ personal computers is granted. The Township is required to retrieve those records and provide them subject to redaction of any non-public information. 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 Montgomery County Court of Common Pleas. 65 P.S. §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: October 13, 2009

A handwritten signature in black ink, appearing to read 'Audrey Buglione', written over a horizontal line.

**AUDREY BUGLIONE, ESQ.
APPEALS OFFICER**

Sent to: James L. Mollick, MD; Joseph Bagley, Esq., Counsel for Worcester Township