ROCHESTER AREA SCHOOL DISTRICT

Leslie King <kingl@rasd.org>

Fwd: Further PSBA Guidance on RTKL Request and Appeals

1 message

Jane Bovalino <bovalinoj@rasd.org> Thu, May 11, 2017 at 1:40 PM
Reply-To: bovalinoj@rasd.org
To: Leslie King <kingl@rasd.org>

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---------- Forwarded message ----------
From: **Stuart Knade** <stuart.knade@psba.org>
Date: Fri, Apr 14, 2017 at 10:32 PM
Subject: Further PSBA Guidance on RTKL Request and Appeals
To: Stuart Knade <stuart.knade@psba.org>

TO SCHOOL SOLICITORS AND OPEN RECORDS OFFICERS

Dear Colleagues:

This guidance expands on guidance PSBA previously sent to you relating to a recent statewide Right-to-Know Law ("RTKL") request. For a more complete discussion of the applicable exemption from disclosing personal email addresses, please review the prior guidance at https://www.psba.org/2017/03/psba-offers-guidance-recent-right-know-request/. As always, we seek to provide resources and to assist our members in complying with the RTKL. In doing so, we offer help so agencies understand their obligations to requesters as well their obligations to third parties whose information may be the subject of RTKL requests.

The first part of this guidance is pragmatic. It's a dot your i's and cross your t's group of suggestions.

The rest of this guidance involves specific legal thoughts on a few issues which have arisen since, with references to applicable law, to assist you in providing responses to OOR or the courts. These address allegations of bad faith related to decisions made about deferred release of email addresses; appeals which may come up in response to denials based on the nonexistence of responsive records; and appeals which may come up if an agency grants a request but requires the requester to come inspect records on site during normal business hours and either make their own copies or purchase duplicates in paper or electronic formats at the time of the scheduled visit.

PSBA recommends that you submit legal argument to OOR regarding any bad faith allegation that has or may be raised against you. This need not be in affidavit/attestation form unless you are putting facts not of record in the affidavit/attestation. *Pennsylvania Game Commission v. Fennell*, 149 A. 3d 101 (Pa. Cmwlth. 2016).

If you are not a lawyer and any of this seems pertinent to your circumstances, remember to discuss it with your lawyer, because if you decide to deny records or you grant the request and then inadvertently provide an incomplete response, there may be an appeal of that denial.

IMPORTANT PRAGMATIC CONSIDERATIONS

There is a significant variation of experience and understanding of the RTKL and its procedures among Open Records Officers ("OROs") in Pennsylvania. Based on contacts with PSBA, here are some tips:

- **Responses**. Make sure your response letters comply with the RTKL. One way to do that is to make use of the sample Office of Open Records ("OOR") forms applicable to the type of response you are providing: http://www.openrecords.pa.gov/RTKL/Forms.cfm
- **Details.** When providing a final response, list or itemize each request and make sure your answers are complete whether you are granting or denying the request. Even an inadvertent omission may result in an appeal.
- **Requests for records that do not exist.** If there are no responsive records and you partially deny the request on this basis, there may be an appeal. The OOR will seek an attestation or affidavit of nonexistence. This must include information on what you did to search for responsive records as well as the explanation that you could not find them. Again, OOR has posted a sample form which can be used for this and takes you through the steps necessary to provide them with facts that support your case. **(see link at first bullet, above).**
- **Do you have to respond to a request for information?** Yes, if the information is found in public records you maintain either in paper or electronically. If such records do not exist, you may state this but a statement that records do not exist may be appealed. If that happens, you will need to comply with the affidavit/attestation requirements discussed in the prior paragraph on nonexistent records. To avoid litigation, several members have chosen to provide information which does not exist in any agency records. That is acceptable if you are not violating a third party's legal rights in providing the information. (See below).
- **What if you can ascertain what's requested, but the specific wording could result in a technical denial?** For example, what if the union officer is called a steward instead of a president? Provide access to the information with the corrected title. If you can ascertain from a request what someone wants, and there is a record documenting it, provide it.
- **What occurs when you are taking an extension for one or more parts of a multiple paragraph request but also providing a partial "final" response as to some paragraphs?** In *Office of the Governor v. Englekemier*, 148 A. 3d 522 (Pa. Cmwlth. 2016) Commonwealth Court was not clear as to whether agencies may provide partial responses during the thirty-day extension period. It did not explicitly decide this issue. Some OROs, to show good faith, answer everything they can in the notice of extension letter and then take the extension just as to identified information.

A problem is created when agencies include a partial denial in the response while taking an extension as to parts of the request. This may result in the need for the requester to file two appeals. Consider putting your complete answer into just a single final response when you are prepared to cover everything, allowing for a single appeal which will be more efficient for the agency, the requester and OOR. Be sure to carefully meet the requisite timelines.

BAD FAITH UNDER THE RIGHT-TO-KNOW LAW

Some agencies have provided information that does not exist in any agency records but which is known to them, e.g. the name of the union president or they have provided records which are exempt from access under the RTKL only after the requester appealed the denial. Some agencies decided not to litigate the appeal. PSBA's analysis indicates that this decision to provide exempt or legally confidential information pending an appeal does not meet the RTKL definition of bad faith at 65 P.S. §67.1305: "**Denial of access. --**A court may impose a civil penalty of not more than $1,500 if an agency denied access to a public record in bad faith."

<u>Solicitor Email Addresses and Bad Faith</u>

NOTE TO OROs: If your solicitor who handles RTKL matters for your agency consents to or recommends disclosure of his/her personal email address, then you may disclose it! Your solicitor and you do not have to accept email from anyone they choose to block, including us.

CAUTION: While school solicitors who handle RTKL matters, may not object to disclosing their personal email addresses, you should be careful about releasing other individuals' personal email addresses without notice. Per the prior guidance on this, even some agency-issued email addresses may be exempt under 65 P.S. §708(b)(6). Because the RTKL and the Pennsylvania Constitution require balancing tests be applied before you release certain information over an affected individual's objection, we suggest agencies need to be rigorous in the review of such requests.

PSBA's analysis concludes it is not bad faith to deny access to personal email addresses and it is not bad faith to decide to release a nonpublic record to avoid further litigation. Here's why:

Exemption under Section 708 (b)(6) for personal email addresses

As discussed in the earlier guidance in more detail, the RTKL expressly exempts personal email addresses from access (see discussion linked at https://www.psba.org/2017/03/psba-offers-guidance-recent-right-know-request/). Some recipients of the requests denied access to the email address of the lawyer who represents them in RTKL matters and then later voluntarily disclosed it. Central to a finding of bad faith is that the denial of access was to a "public record." The requester did not really argue that school solicitors' email addresses are "public records" as defined by the RTKL. "Public records," by definition, exclude records which are exempt pursuant to 65 P.S. §67.708(b) and 65 P.S. §67.102, definition of "public record." You have no duty under the RTKL to provide access to exempt records. 65 P.S. §67.701. It is not "bad faith" to properly claim an exemption and later choose to voluntarily disclose it even though not required by law.

Informational Privacy

In *Pennsylvania State Education Association v. Commonwealth, et al,* 148 A 3d 142 (Pa. 2016) ("*PSEA III*"), the Pennsylvania Supreme Court held that the RTKL does not override an individual's right to informational privacy. For many years, until overruled by the Supreme Court, the OOR and Commonwealth Court took the position that government agencies must disclose records containing public employees' home addresses unless a specific exception in Section 708(b) of the RTKL applied. In October 2016, the Supreme Court specifically held that individuals have a privacy interest in their home addresses which may not be violated unless the right to privacy is outweighed by a public interest favoring disclosure.

Applying this ruling recently, the Commonwealth Court made this observation:

> The right to informational privacy in one's home address is grounded in, *inter alia*, Article I, section 1 of the Pennsylvania Constitution. Id. at 150–51. **It is a right that belongs to each Pennsylvanian, that exists independent of the exemptions found in the RTKL, and that each agency must consider before disclosing personal information that falls within the scope of the right**. In an ideal situation, we would rely on those who claim the right to assert it timely. Because of the lack of meaningful procedural due process protections afforded to those whose private information is sought through the RTKL, that obligation must fall on the agencies that hold this information and have the wherewithal, in the context of the RTKL, to protect it from disclosure.

Department of Human Services v. Pennsylvanians for Union Reform, Inc., 154 A. 3d 431, 437 (Pa. Cmwlth. 2017). (emphasis supplied) (footnote omitted). As you can see, the court makes clear, an individual's constitutional right to privacy in personal information must be protected by agencies, OOR and courts reviewing requests under the RTKL.

In interpreting *PSEA III, the* OOR noted that informational privacy rights have been accorded to several distinct kinds of information:

> Although the Pennsylvania Supreme Court did not expressly define the types of ""personal information" subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass'n*, 148 A.3d 142, 2016 Pa. LEXIS 2337 at *27; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pennsylvania State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, addresses, social security numbers, and telephone numbers to be personal information subject to the balancing test).

Campbell v. Boyertown Area School District, Docket No. AP 2016-1966 (OOR December 29, 2016).

In *PSEA III*, the Supreme Court made several observations about informational privacy. It includes, among other things:

- Avoiding disclosure of personal matters.
- The right to be left alone.
- Government recognition and respect of the constitutionally protected privacy interests of Pennsylvania citizens when considering disclosure of personal information

It did not matter to the Court that citizen's home addresses may be easily found in other public records or through an Internet search. Each time an individual's informational privacy rights are implicated, a balancing test must be performed before a government agency provides such information pursuant to a RTKL request. The balancing test looks to "the nature of the privacy right and its important relationship to other basic rights." *PSEA III*. at 152. OOR and the courts reviewing such requests must "… apply a balancing test, weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure." *PSEA III* at 153.

It is PSBA's conclusion that the courts inevitably will rule that one's personal email address falls within the informational privacy protection of the Pennsylvania Constitution. This becomes important when you are considering whether you have unilateral discretion to release an email address over the owner's objection without performing a balancing test.

Discretion to release

65 P.S. §506(c)

The provisions of Section 506(c) permit an agency head to exercise discretion to release a record that is merely exempt from access under Section 708(b) of the RTKL. This discretion lies solely with the agency head, not the requester or others. Meanwhile, agencies are prohibited from exercising this discretion regarding some kinds of records, such as privileged or legally confidential records.

In *Heavens v. Pennsylvania Department of Environmental Protection*, 65 A. 3d 1069 (Pa. Cmwlth. 2013), Commonwealth Court noted:

> [w]hile public policy may or may not support an exercise of [an agency's] discretion to waive the … exception to disclosure here, the RTKL gives such discretion to [the agency], not the OOR or reviewing courts. … [w]e find no basis for Requester's argument that we can order release of the records under the RTKL where [the agency has proven by a preponderance of the evidence that it has a basis upon which to withhold them from the public.

Id. at 1177.

It is not "bad faith" to decline to exercise Section 506(c) discretion. When agency heads are considering exercising discretion to release:

- If the **only** consideration is that this is a personal email address which is exempt pursuant to 65 P.S. §708(b)(6); and
- If the agency head wishes to release the record over the email address owner's objection; then
- The agency head must first find "… that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access."

Conceivably, this public interest could extend to avoiding the costs associated with continuing to litigate a RTKL appeal.

Informational privacy

However, agencies do not have discretion to disclose records which are **prohibited** from disclosure under Pennsylvania law. If a personal email address is private information protected by the Pennsylvania Constitution, the agency must perform the balancing test described in PSEA III, which is more rigorous a standard than Section 506(c). In other words, when deciding to override an individual's constitutional right to informational privacy, the agency must find that the general public's interest in having access to this information outweighs the individual's privacy interest in keeping this information private.

PSBA cannot presently conclude that you have legal authority to turn over these solicitor email addresses if the solicitor objects. Certainly, your solicitor may say you should provide his or her email address rather than litigate the matter. But this does not mean that everyone whose email address is in the agency's possession would take this position.

Many people were unsure whether the Pennsylvania Constitution protected privacy in public employees' home addresses prior to the decision in *PSEA III.* Given that the legislature carved personal email addresses out of the definition of a public record and exempted them from access, it is more likely than not that Pennsylvania citizens have informational privacy rights in their personal email addresses. A requester's desire to create an email list of solicitors who represent educational entities in RTKL matters is very unlikely under *PSEA III* to justify overriding the individual privacy interest a person has in a personal email address. The Supreme Court said:

> To the contrary, nothing in the RTKL suggests that it was ever intended to be used as a tool to procure personal information about private citizens or, in the worst sense, to be a generator of mailing lists. Public agencies are not clearinghouses of "bulk" personal information otherwise protected by constitutional privacy rights. While the goal of the legislature to make more, rather than less, information available to public scrutiny is laudable, the constitutional rights of the citizens of this Commonwealth to be left alone remains a significant countervailing force.

PSEA III at 158.

Nonexistent records

A denial that no responsive records exist as to one or more components of a request is appropriate and it can be appealed. Be sure to conduct a good faith search in the first instance! If the agency later finds out that there are some responsive records, be responsive and provide them. One way to ensure you have covered all bases is to look at the sample affidavit/attestation on the OOR website, linked above, and to determine if you can swear to each component of that sample form. If the answer is yes, then any appeal will be sufficiently answered by your providing a **timely** completed and executed affidavit/attestation if nonexistence.

Copies of records

In a prior email guidance regarding a widespread request by a Florida company, PSBA shared its conclusion that OOR was **legally wrong** in saying that the RTKL **required** agencies to duplicate records, or to mail or to email copies upon request. The reasoning is that the RTKL is an "access" law, which requires that public records "shall be accessible for inspection and duplication in accordance with this act…. Public records … shall be available for access during the regular business hours of an agency." 65 P.S. §67.701(a). There is nothing in the RTKL that says that so long as you otherwise provide access to a record that you maintain electronically, you must do more than provide the electronic records on a thumb drive or a cd with the records on it, charge for the supplies you use for that, and make those available for pickup at the district offices. If you duplicate records for someone inspecting them, you may charge duplication fees. If you have notified a requester that the records "are available for delivery at the office of an agency and the requester fails to retrieve" them, you may dispose of them and keep any fees paid. 65 P.S. §67.905. You must provide certified copies upon request and payment of fees pursuant to 65 P.S. §67.904, but even that does not suggest the provision requires you to mail or email the certified copies.

However, based on early decisions and its uniform request form, OOR takes the position that requesters have a right to copies and a right to have them mailed or emailed. Commonwealth Court seems to assume this is true without having specifically addressed it, so this is unsettled as a matter of law. PSBA cautions that anyone choosing to take the position that a requester must inspect the records at the agency during normal business hours must be prepared to litigate this through at least the Commonwealth Court and possibly the Pennsylvania Supreme Court. If an agency does require requesters to inspect records at the agency, every request/requester must be treated the same way. Because many agencies have chosen to mail or email records rather than make this an issue, it was not mentioned in the initial guidance regarding this request but since it appears that some school districts have taken this position, we are addressing the issue now.

Please contact any of the attorneys with PSBA Legal Services if you have questions about the RTKL.

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