



Leslie King <kingl@rasd.org>

Fwd: Campbell RTKL Request

1 message

Jane Bovalino <bovalinoj@rasd.org>
Reply-To: bovalinoj@rasd.org
To: Leslie King <kingl@rasd.org>

Thu, May 11, 2017 at 1:42 PM

Jane W. Bovalino, Ed.D.
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----- Forwarded message -----

From: **Emily Leader** <emily.leader@psba.org>
Date: Tue, Mar 28, 2017 at 8:43 PM
Subject: Campbell RTKL Request
To: Emily Leader <emily.leader@psba.org>

TO: School Solicitors and Open Records Officers

RE: Simon Campbell request sent by first class mail to 821 entities

March 28, 2017

Dear Colleagues:

PSBA has heard from many of you about the statewide Right-to-Know Law (RTKL) request made this week by Simon Campbell. Per his website, he mailed this to public school districts, charter schools, CTCs, IUs and public universities and community colleges. Mr. Campbell encouraged you to review a 16-minute video in which he tells you that he's willing to have you create a record on agency letterhead which provides answers to his request. He suggests that all the items requested are public record or should be released based on exercise of agency discretion. He asks that you save him time by providing him items electronically, putting your agency name in the subject line, etc. He indicates that those of you who are considering denying any of this request will see him in a court of law and the court of public opinion.

WHILE I AM PROVIDING YOU MY THOUGHTS/GUIDANCE ON YOUR RESPONSE TO THIS REQUEST BELOW, THIS REQUEST ALSO GIVES US AN UNUSUAL OPPORTUNITY TO GATHER AND PROVIDE INFORMATION ON HOW THE RTKL IMPACTS YOU:

Good news:H.R. 50

On March 21, 2017, the Pennsylvania House of Representatives unanimously adopted House Resolution 50, which directs the Legislative Budget and Finance Committee to conduct a comprehensive review of the fiscal impact of the RTKL on agencies and to make recommendations on amendments to the law. The house recognized that agencies are devoting scarce resources to responding to RTKL requests. Here is a link to the resolution which PSBA fully supports: <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=H&billTyp=R&billNbr=0050&pn=0425>

HELP!

Even though it is true that Mr. Campbell always receives my emails from one or more of you and can later request this information from you, I think it would be very informative if all of you would provide PSBA with the following information:

1. How much time did it take each agency employee who worked on the request to locate responsive records, redact them if necessary, duplicate or scan them, refile them if necessary and prepare the written response to this request?
2. What was the total cost in salary and benefits to your school entity to have your employees devote such time to this request?
3. Did you involve an attorney and how much did you spend on legal fees associated with this request?

This would give us up to date pertinent information that allows us to demonstrate the actual costs associated with responding to a single statewide request. Note: One business manager spent around two hours responding to this in the manner suggested by Simon but notes that it would have taken longer if their database did not already segregate different payroll deductions into different files.

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REVIEW OF MR. CAMPBELL'S REQUEST AND APPLICABLE LAW

NOTICE: To ensure you are not unpleasantly surprised, and to be safe, PSBA recommends you take a thirty-day extension and provide each of your unions with a copy of this request, inviting them to provide you with any legal objections by a deadline which leaves you sufficient time to provide your final response to Mr. Campbell. Based on my review of the request, however, I am giving you my opinion on what a final response is likely to be.

INFORMATIONAL PRIVACY:

It is possible that individuals could claim they have a privacy interests in some of the requested information pursuant to the decision in *Pennsylvania State Education Association v. Commonwealth, et al*, 148 A 3d 142 (Pa. 2016).

The Court held individuals have a constitutional right to privacy in their home addresses under Article 1, Section 1 of the Pennsylvania Constitution. In general, individuals have a right to "informational privacy" which may not be violated unless this right is outweighed by a public interest favoring disclosure." The Court found that in this case there is no public interest in disclosing the school employees' home addresses in response to this request which outweighs their interest in privacy in their home addresses. It noted, "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."

If someone asks for individuals' private information which is in the school district's possession, you should deny the request unless the requester provides sufficient information to establish the public interest outweighs the privacy interest. Remember that things like salaries and other compensation are public. However, home addresses are not. We do not have an exhaustive list of what is covered and what is not covered by the right to informational privacy. For those

non-lawyers receiving this, you will certainly need to get legal advice when you want to assess whether informational privacy rights are implicated by a request under the Right-to-Know Law.

Request #1: The e-mail address and fax number the agency uses to receive RTKL requests.

This is public record. All of you are required by the RTKL to post this at your agency and on your website. 65 P.S. §67.504. If, by chance, you do not have a fax number at all, you need to explain in your response that there are no fax numbers in existence.

Conclusion regarding Request #1: Provide access to this.

Request #2: The e-mail address of the agency solicitor(s) that represents the agency in RTKL disputes.

NOTE: Part of this response also is relevant to Request #3.

- As to attorneys who are not actually employees/staff within your school district, it is my opinion that their private email addresses are exempt from access.
 - 65 P.S. §67.708(b)(6) makes personal identification information exempt from access, to include “personal email addresses.” Such private citizen email addresses, even if found in agency records, are exempt from access and would have to be redacted.
- As to attorneys employed by the district, individual email addresses may also be exempt from access. Per the case cited by Mr. Campbell:

...we conclude that the OOR correctly determined that the e-mail addresses at issue could be divided into two categories: those e-mail addresses that were not held out to the public or publicly accessible and those that were held out to the public as places where faculty and coaches could be contacted. As OOR held and consistent with our case law applying the personal identification information exemption to agency-issued e-mail addresses, we agree with that differentiation and with OOR's determination that the **former type of e-mail addresses should be protected from disclosure** and the latter should be subject to disclosure.

Pennsylvania State System of Higher Education v. The Fairness Center, No. 1203 C.D. 2015 at 1. (Pa. Cmwlth. March 30, 2016) OPINION NOT REPORTED.

Conclusion regarding release of email addresses: If your district puts on its website individual email addresses, those addresses which are responsive to this request must be provided. If, however, there is a general email address or a “send a message” link from the website which is how the public would contact agency employees, it is that information that you should provide. All email addresses that are personal to an individual are exempt from access.

Request #3: The name, agency-issued e-mail address, and agency building address (i.e. work address) of all agency employees who are presidents of local Unions with whom the agency has a currently enforceable collective bargaining agreement, and the full name of each associated Union.

- Caution: It is possible that your unions will raise arguments about granting this request and you should consider their position in addition to this should they have notice of this request. Except for email addresses, it unclear to me at this point what the legal arguments against providing their president's names, union names and district mailing address, but I could be surprised.
- Names of employees are per se public record and so is the position of an employee. 65 P.S. §67.708(b)(6)(ii).

- Records in your possession are presumed to be public unless they are exempt under the RTKL, privileged or exempt under law or judicial orders. Although position of “union president” is not an agency position, the name of the president of each of your unions is likely included in agency records in your possession, together with the full name of the union. Thus far, the courts have not suggested that writing to a public employee at a work mailing address implicates privacy concerns.
- Email addresses are public or not public in accordance with the information provided regarding Request #2. If you publish them on your website, the record is a public record in my opinion. If not, it is not.

Conclusion: Evaluate any legal arguments/objections made by your employees regarding this request. It is likely you will decide that records showing the name, work address where mail would be received by the employee and the full name of the local are public and should be provided. Regarding emails, it is likely the comments on Request #3, above apply.

Request #4: In electronic format only (i.e. pdf or .doc file or similar): copies of all collective bargaining agreements that the agency has negotiated with any and all local Unions which are currently enforceable. Please note I do not request, and will not accept as responsive, any paper copies.

- Collective bargaining agreements are public records. Under the RTKL, “A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists.” 65 P.S. §67.701 (a).
- Mr. Campbell only wants your collective bargaining agreement if you have it in electronic form. He states any other form would be nonresponsive.
- Mr. Campbell states in his video that he will not pay for paper collective bargaining agreements but will pay for a USB stick or CD if the file is too large to email.

Conclusion: If you maintain electronic copies, disclose them. If you do NOT maintain electronic copies of your CBA:

- You have the legal right to say that you have no responsive records to his request as stated because you do not maintain these electronically; or
- You could contact Mr. Campbell and explain you only have hard copies and offer to mail them to him if he will in fact pay to get them; or
- You can scan and send them electronically to be nice to Mr. Campbell.

Request #5: For each of the following school years: 2015-2016, 2014-2015, and 2013-2014: please send me the first and last dates that the agency cut payroll (i.e. paid its employees) for its collective bargaining unit employees (presumably it'll be a date in September and the following June for each school year).

It is likely that you have records which would show Mr. Campbell this information for each year and that these would be public records. Oddly, he does not seem to know most nine month employees are paid year-round and that many unionized employees work year-round, e.g., in support staff positions.

Request #6: For each local Union with whom the agency has a currently enforceable collective bargaining agreement, please extract the necessary financial/transaction information from agency computer databases, agency banking records, or agency human resources/payroll records; and release information sufficient to evidence the following sought-after aggregated data:

- a. For the date range 7/1/15 to 6/30/16: the total amount of union dues and/or fair share fees that were deducted from collective bargaining unit employees' paychecks and remitted to the local union, and the name of the local Union the money was sent to.**
- b. For the date range 7/1/14 to 6/30/15: the total amount of union dues and/or fair share fees that were deducted from the collective bargaining unit employees' paychecks and remitted to the local union, and the name of the local Union the money was sent to.**
- c. For the date range 7/1/13 to 6/30/14: the total amount of union dues and/or fair share fees that were deducted from collective bargaining unit employees' paychecks and remitted to the local union, and name of the local Union the money was sent to.**

Re: Request #6, I do not seek any employee's name nor do I care to know the amounts of dues/fees that was associated to any employee. It is only aggregated data that I seek in Request #6.

It is the case that information contained in electronic files constitutes records of an agency and you must provide access to it if it is public just as you would provide access to a public record pulled from a file cabinet. *PA Department of Environmental Protection v. Cole*, 52 A. 3d 541 (Pa. Cmwlth. 2012). It is likely you have public records with this information and that you can provide redacted information from financial records which would provide Mr. Campbell with the information he wants, the total amount of union dues and fair share fees remitted to each local union for each year.

Some may question whether this data, even if readily available, constitutes aggregated data as defined by the RTKL. Because this has been defined in cases more broadly than would be suggested by the statutory definition, consider looking at a recent OOR decision on this, *Reading Eagle v. PA Dept. of Health*, AP 2017-0042 (OOR March 9, 2017).

<http://www.openrecords.pa.gov/Documents/FinalDet/26368.pdf>

In addition, if you must perform research and compile data to respond to the request, i.e., if it cannot simply be pulled from the electronic records, that could be treated as requiring you to create a record:

... diagnosis information located in multiple inmate medical files does not constitute data of inmates' diagnoses by type unless DOC compiles the information from each file. DOC has no duty to perform research in response to a RTKL request to compile the diagnoses data sought.
... That is tantamount to creation of a record, contrary to Section 705 of the RTKL, 65 P.S. § 67.705.

Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections, 151 A. 3d 1196 (Pa. Cmwlth. 2016).

Conclusion regarding Request #6: If this data can be extracted from your records, whether it is totaled or in separate records covering a period, I recommend providing it.

Mr. Campbell's Video Suggestions and Template for Granting his Entire Request in a Format Pleasing to Him and PSBA Suggested Considerations

- CAMPBELL: Please itemize your final response by request number. PSBA: This is a best practice and recommended to be sure that you in fact have responded to each request or subparagraph to a request.
- CAMPBELL: Put your agency name in the subject line of your email so he does not have to figure out who is responding. PSBA: Your call.
- CAMPBELL: Inform him in your response what date your ORO received the request. PSBA: Absolutely do this.
- CAMPBELL: Do not send paper in the mail. Send everything electronically. He hates paper and mail. PSBA: If the records exist in electronic form, send them in that form. If not, it is your call whether you choose to scan and send it electronically or copy and send it by mail.
- CAMPBELL: Because individual private or agency-provided email addresses which are not on your website are likely contained in other agency records, they are now public records. PSBA: Not true. They are exempt under 65 P.S. §67.708(b)(6).
- CAMPBELL: If you deny me these records, I will see you in court and will publicly criticize you. PSBA: Do what is legally correct, transparent, and best for your agency.
- CAMPBELL: You do not have to provide me with all the records containing responsive information if you put the answers on agency letterhead. PSBA: Your call whether you want to accept this as a more efficient way to provide responses or not.
- CAMPBELL: I'll take an approximate date, within a week, as to when you cut the first and last paycheck of the year. PSBA: We imagine you do not need to approximate since most employees will be paid year-round and you likely have the paydays on a calendar for each of the relevant years.
- CAMPBELL: RTKL is not a confidentiality statute. Even if you think a record is exempt, exercise your discretion provided for by the law and grant this request. PSBA: A three-part test applies to 65 P.S. § 67.506 and every part must be met before the agency head exercises this discretion:
 - Disclosure of the record may not be prohibited by Federal or State law or regulation, judicial order or decree; and
 - The record cannot be protected by a privilege; and
 - The head of the agency must determine that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.

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