

Emails can be “Records” of the Agency under the RTKL – (Section 701) – Types of Records

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As previously discussed, records in possession of a local agency are presumed public unless they are exempt under or protected by: 1) the RTKL exceptions set forth in Section 708; 2) other laws; 3) privilege; or 4) judicial order or decree. See 65 P.S. § 67.305. However, not every document is a “record” under the RTKL. Therefore, upon receiving a request, the first question that an Open Records Officer must answer is whether the requested document is a “record” under the RTKL.

The RTKL broadly defines a “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.” 65 P.S. § 67.102. To determine if certain material is a record, the RTKL imposes a two-part inquiry: (1) does the material document a “transaction or activity of the agency”; and (2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency.”

The question of whether a document is a record under the RTKL frequently arises when a requester seeks emails sent or received by agency employees and officers. As a general rule, emails are records under the RTKL if the subject matter of the emails documents a transaction or activity of the agency (i.e., discusses agency business).

This general rule applies to emails that are sent or received from a private computer or a private email account. In *Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011), the Commonwealth Court held that emails sent to and from a quorum of township supervisors, even if stored on their personal email accounts, were records of the agency because the records documented a transaction or activity of the township. In *Lusky v. Birdsboro Borough*, AP 2018-0940, the OOR ordered the borough to have its council members search their personal computers and devices for responsive records.

Conversely, emails are not considered records of an agency merely because they were sent or received using agency email addresses or by virtue of their location on an agency computer. In other words, if an employee discusses personal matters on an agency issued email account during working hours, those emails are not records. For example, in *Grove v. Penns Valley School District*, AP 2018-1345, the OOR found that employee’s emails discussing her wedding planning process were personal in nature and were not records of the District, even though they were sent to and from her agency issued email address.

Importantly, emails sent by private persons can become public records if they involve agency business. As the Commonwealth Court state in *Bagwell v. Pa. Dep’t of Educ.*, 76 A.3d 81, 90 (Pa. Commw. 2013), the “non-agency status of the creator or sender of records does not preclude their public status. Private persons and entities may create correspondence and send it to an agency, thereby potentially making it a record of the agency.”

Accordingly, if an email discusses agency business, it may be record under the RTKL. While these rules appear fairly straightforward, there are several unaddressed and disputed issue. For example, while *Mollick* held that emails exchanged between a quorum of officials are records even though they were sent on private email accounts, no appellate court has addressed whether such emails exchanged by less than quorum are records of an agency.

It is important to note that even if requested emails are determined to be records under the RTKL, they are not automatically public records subject to disclosure because they may still be exempt under or protected by: 1) the RTKL

exceptions set forth in Section 708; 2) other laws; 3) privilege; or 4) judicial order or decree. See 65 P.S. § 67.305.

Accordingly, if you ever receive a request for emails, you should seek legal advice before granting or denying the request.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.