

Steven N. Goudsouzian, Esquire
Attorney ID No. 74831
Stephanie J. Steward, Esquire
Attorney ID No. 206616
2940 William Penn Highway
Easton, PA 18045
Telephone: (610) 253-9171
Fax: (610) 559-9281
E-mail: Steven@SNG-LAW.com

**IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

TRICIA MEZZACAPPA,)
 APPELLANT)
 v.) **C-0048-CV-2020-1089**
))
BOROUGH OF WEST EASTON,)
 APPELLEE)

ORDER OF COURT

AND NOW, this _____ day of _____ 2020, after
consideration of the evidence and the submissions of the parties, Appellant, Tricia
Mezzacappa’s appeal is **DENIED**, and the January 9, 2020 decision of the Office
of Open Records is **AFFIRMED**.

BY THE COURT:

_____)
J.

Steven N. Goudsouzian, Esquire
Attorney ID No. 74831
Stephanie J. Steward, Esquire
Attorney ID No. 206616
2940 William Penn Highway
Easton, PA 18045
Telephone: (610) 253-9171
Fax: (610) 559-9281
E-mail: Steven@SNG-LAW.com

**IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
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COURT OF COMMON PLEAS
CIVIL DIVISION
NORTHAMPTON COUNTY, PA

TRICIA MEZZACAPPA,)
 APPELLANT)
 v.)
))
BOROUGH OF WEST EASTON,)
 APPELLEE)

C-0048-CV-2020-1089

 **COPY**

**BRIEF IN SUPPORT OF RESPONSE OF APPELLEE, BOROUGH OF
WEST EASTON, TO THE APPEAL AND PETITION FOR REVIEW OF
THE DECISION OF THE OFFICE OF OPEN RECORDS FILED BY
APPELLANT, TRICIA MEZZACAPPA**

AND NOW, here comes Appellee, the Borough of West Easton, by and through its counsel, Goudsouzian & Associates, and submits this “Brief in Support of Response of Appellee, Borough of West Easton, to the Appeal and Petition for Review of the Decision of the Office of Open Records Filed by Appellant, Tricia Mezzacappa” as follows:

I. Procedural Background

By the present matter, West Easton resident Tricia Mezzacappa (“Appellant”), seeks judicial review of a January 9, 2020 decision of the Office of Open Records (“OOR”), denying her appeal from the Borough’s denial of two separate records requests under the Right-To-Know Law (“RTKL”) at 65 P.S. § 67.101 et seq. Both requests are for documents she sought relative to West Easton Borough Council member Matthew Dees’ efforts to encourage municipalities to pass resolutions in support of amendments to the RTKL related to ‘vexatious requesters’ following the Borough’s passage of such a resolution on May 13, 2019.¹

The requests at the center of this appeal followed Appellant’s request, dated August 20, 2019, seeking in part “[a]ny and all documents, text messages, emails, etc. that 1,400 agencies are backing the vexacious [sic] rtk [sic] resolution and that it has been forwarded by PSAB² to the PA House of Representatives; [and] the names of the 1,400 agencies who are ‘backing’ the resolution.” The Borough denied that request on August 27, 2019, stating in part as follows:

¹ Pennsylvania House Bill 1931-2019,¹ which proposes to amend the RTKL to include a procedure whereby governmental agencies can seek relief from vexatious requesters. Under the Bill, vexatiousness may be ascertained from “the number of requests filed; the scope of the requests; the nature, content, language or subject matter of the requests; the nature, content, language or subject matter of other oral and written communications to the agency from the requester; a pattern of conduct that amounts to an abuse of the right to access records under [the RTKL] or an interference with the operation of the agency” and any other relevant information.” HB 1931-2019, §906(a)(3). The Bill was referred to the State Government Committee on October 15, 2019, and is currently pending there.

² The Pennsylvania State Association of Boroughs.

Based on a thorough examination of records in the possession, custody and control of the Borough of West Easton and Council Vice-President, Matthew Dees, the records you requested do not exist in the possession, custody and control of West Easton Borough. Mr. Dees was sharing his information learned via phone calls with the rest of [C]ouncil and residents attending the July 8, 2019 [C]ouncil meeting.

Appellant's Exhibit A.

Following this denial, Appellant filed the first of two requests at issue in this appeal. The first request, dated August 30, 2019, stated:

In accordance with your denial of records in the 8/27/19 response, I would like the phone records that you claim exist between [C]ouncil members and the alleged 'backing' of PSAB and its 1,400 members for Mr. Dees['] vexacious [sic] RTK requester resolution, as stated in the July 8 meeting minutes. The phone records should be from all cell phones or borough phones that were used to communicate about this official matter from May 2019 through the present.

Id.

Appellant filed the second request on September 4, 2019, seeking:

copies of any and all emails sent from VP of Council Matthew Dees['] email matt241@rcn.com from April 2019 through June 2019 to any person or organization, agency, school or municipality which discusses vexacious [sic] RTK requesters, a "problem resident[,] a need to change the Right-to-Know law, Gregg Township, Londonberry [sic], Monroeville, a RTK Law resolution, and all replies he received in response to them.

Id.

On September 11, 2019, Appellee informed Appellant that it would need additional time to response to her request, and on October 11, 2019, the Borough denied both requests in writing on the grounds that the records sought do not exist.

Appellant appealed both decisions to the Office of Open Records on October 30, 2019. The Office of Open Records consolidated the matters, numbered 2019-2056 and 2019-2057 respectively, invited the parties to supplement the record, and directed the Borough to give notice of the appeal to interested parties pursuant to 65 P.S. § 67.1101(c).

The parties filed supplemental information as directed, pursuant to which the Borough filed affidavits by their Open Records Officer, Joan Heebner, and by Borough Council Vice-President Matthew Dees, as to the non-existence of the requested records. Then, on December 3, 2019, Appellant sought the OOR's permission to submit further information, and the request was granted. The Borough responded to Appellant's late filing on December 13, 2019, and on January 7, 2020, the Borough submitted an additional affidavit in response to a request by the OOR for additional information.

Upon consideration of all the submissions, the OOR issued a written decision dated January 9, 2020, denying the appeal based upon a finding that the Borough had proven the non-existence of the requested records. This appeal to the Court of Common Pleas followed.

II. Standard of Review

The Right-to-Know Law governs public access to government records.

The Right-to-Know Law is remedial in nature and 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 . . . The object of the Right-to-Know Law is to empower the citizens of the Commonwealth with access to information concerning government activities. The Right-to-Know Law is not a mechanism for an individual to access private or nonpublic information; it is a procedure for individuals to access public records.

22 SUMM. PA. JUR. 2D MUNICIPAL AND LOCAL LAW § 5:1 (2d ed.).

The Right-to-Know Law defines a “record”; it provides a procedure by which a citizen may make a request to access records; and it provides a procedure for a governmental entity, such as a municipality to respond thereto. 65 P.S. § 67.101 et seq. When an entity denies a request, the Right-to-Know Law provides a mechanism for appeals to the Office of Open Records in the first instance. Id. Appeals from decisions of the Office of Open Records may then be taken to the Courts. Id. A Common Pleas Court hearing an appeal from a decision of the Office of Open Records sits de novo, and their review is plenary. 22 SUMM. PA. JUR. 2D MUNICIPAL AND LOCAL LAW § 5:29 (2d ed.) The Court “may substitute its own findings of fact for that of the agency or rely upon the record created below.” Id.

III. Argument

A. Appellant Has a Long History of Serial Right-to-Know Filings and is Subject to an Order of This Court Requiring Leave of Court Before Filing Proceedings Against West Easton, Council Members and Employees.

Appellant Tricia Mezzacappa has a long history of making requests of the Borough under the RTKL. In 2019, Appellant submitted 101 request forms seeking

more than 500 documents. Thus far in 2020, the Borough has received 16 separate request forms from her. *See also* Certified Record at 128-129³ (December 13, 2019 Supplemental Affidavit of Joan Heebner, which in part references Appellant's threats to "bury" Ms. Heebner in RTKL requests and other abuses of the RTKL.)

The pending appeal is one of eight (8) Office of Open Records appeals between the parties that have come before this Court since 2011. Appellant has also filed Right-to-Know requests of the school district that is Mr. Dees' full-time employer. The scope and number of Appellant's RTKL requests demonstrate an abuse of the law; and the nature of many of her suggests a pattern of retaliatory use of the law. In the instant case, Borough Councilman Matthew Dees undertook the promotion of Vexatious Requester legislation aimed at just this kind of behavior, and Appellant responded to his undertaking by filing a series of RTKL requests, two of which are the subject of the instant appeal.

On March 19, 2019, after extremely lengthy proceedings in two consolidated Open Records appeals between the parties docketed in the Northampton County Court of Common Pleas at 2011-11066 and 2013-12530, the Honorable Stephen G. Baratta entered an Order of Court which directed in part that Appellant "is prohibited from filing any further actions, petitions, motions or otherwise against the Borough of West Easton or any of its representatives, including but not limited

³ Certain documents appear in the Certified Record multiple times, but are referenced herein only once, the first time they appear in the record.

to, any members of Borough Council, any employees of the Borough of West Easton, and any agents of West Easton without leave of Court.” Exhibit A.

While the right to appeal from a decision of the Office of Open Records is statutory, the Order entered by this Court on March 19, 2019 is binding upon Appellant. Yet, as the record reflects, Appellant filed the instant litigation in derogation of the Court’s Order, without first obtaining leave of Court to do so. Accordingly, Appellees respectfully request that the pending appeal be stricken as violative of Judge Baratta’s March 19, 2019 Order of Court.

B. The Documents Requested at 2019-2057 are Not Records and Thus are Not Subject to Disclosure Under the Right-to-Know Law.

The Right-to-Know Law governs public access to the records of governmental agencies. The Law 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. 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.

65 P.S. § 67.102.

In the appeal at 2019-2056, Appellant requested all emails sent by Mr. Dees to “any person or organization, agency, school or municipality” relative to

vexatious requesters under the RTKL and a resolution seeking action by the legislature to amend the RTKL to address vexatious requesters.

Indeed, Mr. Dees sent emails from his personal email address to certain individuals in order to promote municipalities to pass resolutions like the one passed by the Borough in May 2019, calling for changes to the RTKL to address the issue of vexatious requesters. In some of those emails, Mr. Dees identified himself as a member of Borough Council, and referenced the Borough's passage of their Resolution. However, the emails he sent were not at the behest of, with the blessing of, or under the authority of the Borough, nor were they a transaction of activity of the Borough. They were the efforts of Mr. Dees, in his individual capacity, to get other governmental agencies to adopt their own Vexatious Requester Resolutions, and for the legislature to make changes to the RTKL. As such, these emails were not 'agency activity,' and were not 'records' of the Borough.

Notably, none of the emails that have been produced include any statement that Mr. Dees was acting on behalf of the Borough, joined by the Borough, or joined by any other Borough official in his mission to get other governmental agencies to act. Rather, in his mass email of April 24, 2019, he stated, "I am reaching out to other public entities, county by county," and he further stated, "I am hoping that you will draft and approve a Resolution similar to the one I have

attached.” Certified Record at 40; *see also* Certified Record at 47. The evidence submitted by Joan Heebner corroborates the fact that Mr. Dees acted of his own accord and not by, on behalf, at the behest or with the blessing of the Borough. At Paragraph 4 of her attestation in this matter (2019-2056), she stated as follows: “When Mr. Dees became aware of all the RTK requests I was receiving he mentioned that he might research the RTKL. I told him that was fine BUT to please leave me totally out of it . . . Mr. Dees respected that request and did not involve me in any way.” Certified Record at 65. Then, in response to a request by the OOR officer for more information, Ms. Heebner drafted an email, dated November 13, 2019, stating that “[t]he West Easton Borough Council did pass the resolution, however, other than Matthew Dees, no one else worked on this problem. In other words, Mr. Dees did the research on his own, then presented his information to council and council passed the resolution[.]” Certified Record at 71. This clarifies that while the Borough considered and passed its own ordinance, it was not involved in any advocacy efforts to promote legislative change.

The evidence is consistent with and supports Mr. Dees’ affidavit in this case, which states in part that he reached out to other governmental agencies to promote vexatious reporter legislation “on [his] own and without approval or council, or with the knowledge/help of anyone else on council.” Moreover, none of the evidence presented by Appellant contradicts or otherwise disproves the evidence

presented by the Borough. Pages 88 through 90 are emails from municipal officials to Mr. Dees, which plainly support the fact that he worked by himself, of his own accord, to promote the passage of RTKL legislation.

Certain documents submitted by Appellant make some reference to, were received or sent by Ms. Heebner; but they either underscore or do nothing to disprove the fact that Mr. Dees undertook the promotion of RTKL legislation as a personal project. Page 81 of the Certified Record is a November 21, 2019 email from the Gregg Township Secretary to various Gregg Township officials, asking them to conduct a search of their emails for certain terms, one of which is “Heebner.” Certainly, even if one were to assume that this is a reference to Joan Heebner of West Easton, nothing about that email or the responses thereto suggest that she or any other Borough official conducted any activity on behalf of the Borough to promote a change to the RTKL. *See also* Certified Record at 130, Supplemental Affidavit of Matthew Dees, dated December 12, 2019.

Ms. Heebner did forward a document to the Gregg Township Secretary on May 13, 2019, to which she received responses on May 15, 2019 and May 22, 2019. These appear to have to do with RTKL requests, but nothing about them indicates that they had to do with RTKL legislation and to conclude otherwise would assume facts not of record. Ms. Heebner’s May 22, 2019 response to the Gregg Township Secretary references a meeting with their local representative

about the RTKL. Indeed, she is the Borough's RTKL officer and as such, she has first-hand experience with the difficulties presented by handling those requests in high volume or scope. However, nothing in her email suggests that she, or any other Borough member worked, in their official capacity, on promoting RTKL legislation, and again, to conclude otherwise would assume facts not of record.⁴

On June 25, 2019, Ms. Heebner received an email from the Gregg Township Secretary regarding the passage of a resolution, to which she replied that she had forward to the same to Mr. Dees. The Gregg Township Secretary then followed up with a pleasantry to Ms. Heebner, and Ms. Heebner to the Gregg Township Secretary. While the nature of the resolution is not referenced, even if one were to circumvent the Rules of Evidence, assume a fact not of record, and conclude that referenced resolution had to do with the RTKL, it is preposterous to argue that the receipt of a wayward communication amounts to agency activity on

⁴ The same meeting is referenced in an email from Mr. Dees to various governmental agencies, set forth at page 114 of the Certified Record. His email makes clear that he and Ms. Heebner met with their representative in person to discuss their difficulties with voluminous RTKL requests; which again, is well within the scope of Ms. Heebner's duties as the RTKL Officer for the Borough. The remainder of the email, set forth in the singular first person, confirm that Mr. Dees undertook the actions described therein of his own accord. At page 116 of the Certified Record contains another email from Mr. Dees to various governmental agencies, which references a potential meeting with the Borough's Senator, and his intention to ask Ms. Heebner to attend to provide RTKL data. However, whether or not that meeting ever occurred is not known.

behalf of the Borough, or that it makes any of the requested materials ‘records’ under the RTKL.⁵ Certified Record at 83 – 85.⁶

Documents submitted by the Appellant which appear at pages 91 through 100 of the Certified Record are addressed to an undated (redacted) OOR opinion finding in favor of Appellant and against the Borough, wherein the Borough’s past practice of deleting their internet browser histories is referenced. This matter has nothing to do with the instant case and should be summarily disregarded.

The instant matter has to do with the non-existence of records, not because they were deleted by the Borough, but because they were never records in the custody and control of the Borough, which is plainly established by the relevant evidence. Likewise, the documents appearing at pages 101 to 103 reference RTKL proceedings between Appellant and Gregg Township, which if relevant to show anything, are demonstrative of Appellant’s misuse of the RTKL. Nor are Appellant’s email submissions to the OOR officer at page 105 through 113 of the Certified Record relevant to this case, except perhaps to show that Appellant has a personal animus toward the Borough and its officials. At page 118 of the Certified

⁵ Personal communications are not records under the RTKL simply because they are sent or received from a telephone or computer belonging to a governmental agency. Easton Area Sch. Dist. v. Baxter, 35 A.3d 1259 (Pa. Commw. 2012).

⁶ Likewise, a reference in an email to Mr. Dees regarding the author having spoken to Ms. Heebner about the RTKL Resolution does not make Mr. Dees’ communications activity of the Borough and therefore records of the Borough. Certified Record at 88. When someone calls the Borough, Ms. Heebner answers the telephone. Someone looking for Mr. Dees might call the Borough.

Record, Mr. Dees shared Mayor DePaul's email address with an official from the Borough of Centerville. The title of the email is "West Easton's Rep at PSAB Conference." This email is general in nature and in no way related to the subject matter of the RTKL requests at issue.

Mr. Dees' promotion of a Vexatious Requester Resolution was well within his right as a private citizen. It is of no moment that he reached out to officials that he knows by virtue of his position with the Borough because any private citizen has that same right; nor does the public nature of the subject make his personal communications records of the Borough, again, because any private citizen has that same right. The operative fact in determining whether the subject emails are documents under the RTKL, is whether Mr. Dees was acting in his official capacity on behalf of the Borough when he reached out to promote the Vexatious Requester Resolution. There is no evidence to support that conclusion, and to take the fact of his role as a member of Borough Council as 'evidence' in that regard effectively strips Mr. Dees, of the exercise of his right as a private citizen to promote legislative change in the Commonwealth.

To extent that Mr. Dees mass email dated April 24, 2019, which is set forth at page forty (40) of the Certified Record, includes a reference at the bottom directing questions to Borough Manager Joan Heebner, Ms. Heebner's affidavit in this case disavows her involvement in the promotion of RTKL legislation, and the

record, as discussed herein, supports that disavowal. In her role as the RTKL Officer for the Borough she did communicate and meet with officials from time to time about the RTKL, but the only person to get involved in promoting legislation was Mr. Dees, of his own accord and not on behalf of the Borough.

The fact of an individual's affiliation with a governmental agency does not make their every communication a "record" under the RTKL. "A distinction must be made between transactions or activities of an agency which may be a 'public record' under the RTKL and the emails or documents of an individual public office holder." In re Silberstein, 11 A.3d 629, 633 (Pa. Commw. 2011).

As noted by the OOR, "an individual acting in his or her capacity . . . constitutes agency activity when discussing *agency business*." Office of Open Records Final Determination Dated January 9, 2020, fn.5 quoting Easton Area School District v. Baxter, 35 A.3d 1259, 1264 (Pa. Commw. 2012). Here, Mr. Dees was promoting the adoption of legislation relating to vexatious requesters under the RTKL as a matter of personal interest. He was not transacting official business, nor was he engaged in agency activity. Consequently, the subject documents were not 'records' under the RTKL; they were not required to be retained; and they are not subject to disclosure under the RTKL. As such, Appellee respectfully requests that the decision of the Office of Open Records be affirmed as

to 2019-2057, based upon on the finding that the requested documents are not “records” as defined at 65 P.S. § 67.102.

C. The Requested Documents Do Not Exist.

The OOR denied both requests at issue in this matter on the basis that the requested documents did not exist. Turning first to Appellant’s request for phone records, the record demonstrate that the request was erroneously based on a misconception of the Borough’s response to her request of August 20, 2019, seeking in part “[a]ny and all documents, text messages, emails, etc. that 1,400 agencies are backing the vexacious [sic] rtk [sic] resolution and that it has been forwarded by PSAB to the PA House of Representatives”

In their denial of that request on August 27, 2019, the Borough stated that the records did not exist “in the possession, custody and control of West Easton Borough,” and that “Mr. Dees was sharing *his information learned via phone calls with the rest of [C]ouncil and residents attending the July 8, 2019 [C]ouncil meeting.*” As noted by the OOR, Joan Heebner’s affidavit makes it clear that italicized portion of the foregoing sentence was not a claim by Ms. Heebner that there were any phone calls between council members on the subject of vexatious requesters. If one reads the subject sentence to refer to phone calls with “the rest of Council and residents” the phrase “attending the July 8, 2019 Council Meeting” is rendered meaningless.

Construed properly, the highlighted phrase references the act that in the course of his personal efforts to encourage the passage of RTKL reform, Mr. Dees garnered information from phone calls with unidentified people, and he shared that information with “the rest of Council and residents attending the July 8, 2019 Council Meeting.” As such, Appellant’s August 30, 2019 request for phone records between council members is plainly based on an erroneous reading of the August 27, 2019 records request denial and seeks records that never existed.

The non-existence of any such phone records is further substantiated by the affidavits submitted in case 2019-2057. Ms. Heebner’s affidavit of November 12, 2019 restates the content of her August 27, 2019 denial letter, and confirms that upon receipt of the August 30, 2019 request, she reached out to Mr. Dees to inquire as to whether he had any records that would satisfy the request, to which he replied that he did not, as reflected in his own affidavit in case 2019-2057.

As to case 2019-2056, to the extent that the requested emails may be deemed ‘records’ under the RTKL, the evidence demonstrates that they do not exist. Page Fifteen (15) of the Certified Record is an email from Matthew Dees to Joan Heebner dated September 20, 2019. It states:

With regard to the Mezzacappa RTK Request dated 9/4/19, in which she seeks emails, or other records pertaining to a Vexatious Requester Resolution, I have retained no records. Upon the PSAB and PSATS⁷ organizations adopting their own resolutions regarding Vexatious

⁷ Pennsylvania Association of Township Supervisors.

Requester changes in the existing law, I believed my personal correspondence to be moot . . . No records exist in my custody or control.

Certified Record at 15.

While it is true that Appellant has obtained some emails through records requests made to other government agencies, the OOR noted in their decision that the possession of these emails by these agencies is not proof that the emails exist in the records of the Borough. Nor does the fact that these documents were turned over by other government agencies deem them records of the Borough subject to retention and disclosure under the RTKL.

To the extent that Mr. Dees sent communications to officials at their business email addresses, these government agencies may have viewed them as ‘records’ for their purposes as a recipient governmental agency. However, another government agency’s decision to retain and turn over a document pursuant to an RTKL request is not dispositive as to whether the same document is a record subject to retention and disclosure by another Borough. Agency activity occurred when the Borough passed their own Vexatious Requester Resolution at a public meeting on May 13, 2109; and agency activity occurred when Mr. Dees reported on his personal efforts to promote the passage of resolutions by other municipalities, and the activity around the state related to the legislative effort at public meeting on July 8, 2019. The minutes of these meetings and the resolution

passed by the Borough are records under the RTKL, they are subject to retention and disclosure and they are a part of the Certified Record in this matter.

However, when Mr. Dees reached out to entities of his own accord to promote a legislation change at the state level, that was a matter of personal activism. Mr. Dees, in his individual capacity, sent emails to officials of governmental agencies in their official capacities. For this reason, the emails are records of the recipient agencies, but they are not records of the Borough, which was not a party to their sending. Consequently, they were not retained, and they did not exist at the time the request was made.

D. The Requested Documents Are Exempt Records Not Subject to Disclosure Under the RTKL.

While Appellant is steadfast that any email or telephone communications that Mr. Dees had in the course of his personal efforts to promote vexatious requester legislation are not Borough records under the RTKL, to the extent that the Court may deem otherwise, such records would be exempt from disclosure under Section 67.708(b)(10)(i), providing exemptions for:

(A) The internal, predecisional deliberations of an agency, its members, employees or officials or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including pre-decisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

65 P.S. § 67.708(b)(10)(i)(A-B).

The party asserting an exception under Section 708(b) bears the burden of demonstrating the applicability of the exception by a preponderance of the evidence. Pennsylvania Dep't of Educ. v. Bagwell, 114 A.3d 1113, 1122 (Pa. Commw. 2015). In order to demonstrate the applicability of the exception set forth at 65 P.S. § 67.708(b)(10), the asserting party “must show: (1) the information is internal to the agency; (2) the information is deliberative in character; and, (3) the information is prior to a related decision, and thus predecisional.” Id.

[I]nformation that constitutes ‘confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice’ is protected as deliberative . . . Records satisfy the ‘internal’ element when they are maintained internal to one agency or among governmental agencies . . . to demonstrate that the withheld documents are deliberative in character, an agency must ‘submit evidence of specific facts showing how the information relates to deliberation of a particular decision

Id. at 1123.

In this case, Mr. Dees researched the issue of vexatious requesters and drafted a resolution, which the Borough then passed. It’s plainly evident that any communications he undertook prior to the passage of the Borough’s resolution were deliberative and pre-decisional, as they were plainly related to policymaking,

opinions and advice as between the Mr. Dees and other governmental agencies. Accordingly, there can be no question that these communications were internal.

Thereafter, when Mr. Dees reached out to other governmental agencies to promote the passage of vexatious requester resolutions and legislative change, those communications were in the nature of a “strategy used to develop or achieve the successful adoption of a . . . legislative proposal or regulation.” Id. Mr. Dees did in fact, research, plan, conduct outreach and strategize to effectuate the successful adoption of a legislative proposal and resolutions by other governmental agencies, and under the RTKL, anything that might constitute a record related thereto is protected from disclosure.

An agency must demonstrate the applicability of an exemption by a preponderance of the evidence. West Chester University of Pennsylvania v. Schackner, 124 A.3d 382 (Pa. Commw. 2015). Here, the precise subject matter of Mr. Dees’ emails was the successful adoption of a legislative proposal, which is expressly excluded from disclosure under the RTKL.

IV. Conclusion

“The purpose of the Right-to-Know Law is to scrutinize the acts of public officials and to make officials accountable in their use of public funds . . . The Right-to-Know Law is not a mechanism for an individual to access private or nonpublic information; it is a procedure for individuals to access public records.”

22 SUMM. PA. JUR. 2D MUNICIPAL AND LOCAL LAW § 5:1 (2d ed.). In the instant case, Appellant made requests for the emails and telephone records of Borough Council member Matthew Dees relative to his efforts to encourage the passage of legislation relative to vexatious requesters under the RTKL, and she filed the instant appeal in derogation of a Court Order issued in two consolidated OOR appeals before this Court, directing that she obtain leave of Court before bringing suit against Appellee. Consequently, this action should be dismissed.

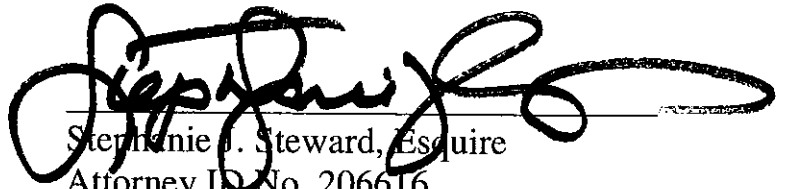
In the absence of dismissal, the evidence is clear that decision of the OOR should be affirmed. First, the evidence demonstrates that Mr. Dees' advocacy for passage of RTKL legislation was a personal quest not undertaken by, with, on behalf of, or with the blessing of the Borough. To the extent that Ms. Heebner communicated about the RTKL or participated in any meeting with regard to the same, she did so in her capacity as the RTKL Officer and the Secretary of the Borough, and not for the purpose of promoting legislative change. Mr. Dees acted alone in his right as a private citizen, a right that does not go away merely because someone is a public official. Any documents relating to Appellant's email request were not retained by Mr. Dees because he sent them in his personal capacity. For that reason, they are not records, they were not subject to retention rules; and they did not exist at the time the request was made.

The telephone records requested by Appellant never existed, either at the time the request was made or at any time prior thereto, because Mr. Dees did not communicate by telephone with other Council members with regard to the vexatious requester legislation. When a request is made for a record that does not exist, “an agency shall not be required to create [the] record . . . or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705. Given that the subject records do not exist, and did not exist when the request was made, Appellant is not entitled to relief. Moreover, she is not entitled to relief, because even if the records existed, they are exempt from disclosure under 65 P.S. § 67.708(b)(10)(i). For all of the foregoing reasons, Appellee requests that this Honorable Court deny the present appeal in its entirety and affirm the decision of the Office of Open Records.

Respectfully submitted:



Steven N. Goudsouzian, Esquire
Attorney ID No. 74831
2940 William Penn Highway
Easton, PA 18045
610-253-9171

A handwritten signature in black ink, appearing to read 'Stephanie J. Steward', with a long horizontal flourish extending to the right.

Stephanie J. Steward, Esquire
Attorney ID No. 206616
2940 William Penn Highway
Easton, PA 18045-5283
610-253-9171
Attorneys for Appellee

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I, the undersigned counsel, certify that this filing complies with the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* requiring the filing of confidential information pursuant to procedures outlined therein.

Date: 3.2.2020

A handwritten signature in black ink, appearing to read 'Stephanie J. Steward', written over a horizontal line.

Stephanie J. Steward, Esquire
Goudsouzian & Associates
Attorney ID No. 206616
2940 William Penn Highway
Easton, PA 18045-5283
610-253-9171
Attorney for Appellee

Steven N. Goudsouzian, Esquire
Attorney ID No. 74831
Stephanie J. Steward, Esquire
Attorney ID No. 206616
2940 William Penn Highway
Easton, PA 18045
Telephone: (610) 253-9171
Fax: (610) 559-9281
E-mail: Steven@SNG-LAW.com

**IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

TRICIA MEZZACAPPA,)
 APPELLANT)
 v.) **C-0048-CV-2020-1089**
))
BOROUGH OF WEST EASTON,)
 APPELLEE)

CERTIFICATE OF SERVICE

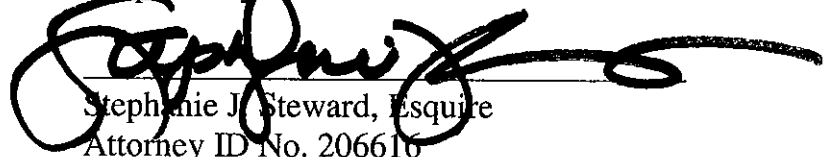
I, Stephanie J. Steward, Attorney for Appellee, Borough of West Easton, hereby certify that I am this day serving the foregoing “Brief in Response to Appeal and Petition of the Decision of the Office of Open Records” upon the persons indicated below, by email and first-class mail, which service satisfies the requirements of Pa. R.C.P. 440:

Tricia Mezzacappa
817 Ridge Street
West Easton, PA 18042
Tricia817@ptd.net

Charles Rees Brown, Chief Counsel
Commonwealth of PA-Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
CharleBrow@pa.gov

Respectfully submitted:

March 2, 2020



Stephanie J. Steward, Esquire
Attorney ID No. 206616
Attorney for Plaintiff
2940 William Penn Highway
Easton, PA 18045-5283
Telephone: (610) 253-9171