TUCKER | ARENSBERG Attorneys

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In This Issue

Tucker Arensberg PC

1500 One PPG Place
Pittsburgh, PA 15222
412.566.1212

2 Lemoyne Drive
Lemoyne, PA 17043

tuckerlaw.com

FOURTH GRADER'S SEXUAL ASSAULT CLAIM PRESERVED UNTIL 18TH BIRTHDAY

Nicole B. v. Sch. Dist. of Philadelphia, 237 A.3d 986 (Pa. 2020). The Pennsylvania Supreme Court held that, when a fourth-grade student alleged that he was sexually assaulted in school, the 180-day period to file a claim under the Pennsylvania Human Relations Act is extended and does not expire until after the student reaches 18, the age of majority.

BACKGROUND

N.B. alleged that when he was eight years old, attending fourth grade at a public school within the Philadelphia School District ("District"), he was bullied and sexually assaulted in a bathroom by three classmates. Over two years after learning of the incident, N.B.'s parents asserted claims against the District under the PHRA, for failing to protect N.B. Under Pennsylvania law, N.B. and his family were required to exhaust their administrative remedies by pursuing an administrative hearing under the PHRA, before they could seek monetary damages in court.

However, the PHRA requires claims to be filed within 180 days, and the District argued that the claims asserted by N.B.'s family were time-barred. The Pennsylvania Human Relations Commission agreed and rejected the family's claims as untimely. Both the Philadelphia Court of Common Pleas and the Pennsylvania Commonwealth Court, on appeal, agreed that the PHRA claims were untimely. The family argued that because N.B. was a minor, a provision of the PHRA allowing equitable tolling, or extension, of the 180-day period should allow N.B. the ability to bring the claims after his 18th birthday, when he reached the age of majority. The family's argument relied on Pennsylvania's Minor Tolling Statute, which preserves a minor's ability to assert a civil claim after the minor has reached adulthood, despite any applicable statute of limitations. The family raised the same arguments on appeal to the Pennsylvania Supreme Court.

DISCUSSION

The Pennsylvania Supreme Court considered whether the equitable tolling allowed by the PHRA also includes minority tolling under the Minor Tolling Statute. The Supreme Court acknowledged competing precedent in this area, under which some courts have held that equitable tolling does include minority tolling and other courts have held that it does not. The Court held, due to this competing precedent, that the term "equitable tolling" in the PHRA is ambiguous, and that the Court had the power to resolve the ambiguity.

In a 4-3 decision, the Pennsylvania Supreme Court held that equitable tolling under the PHRA does include minority tolling under the Minor Tolling Statute. In its opinion, the Court expressed concern that if equitable tolling were interpreted not to include minority tolling, then children were at the mercy of their parents or guardians to assert their rights. The Court found this problematic for children without parents, or with less-than-vigilant parents, and explained:

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children, already some of our most vulnerable citizens, should not be subject to the whim or mercy of parents or guardians with respect to the assertion of their legal rights.

Furthermore, resort to equitable tolling for minors is particularly critical for certain populations of children, such as the homeless, youth whose parents are themselves minors, and children with disabilities or in foster care, who have special needs and who routinely do not have anyone serving as a "parent" to advocate on their behalf. Thus, an interpretation excluding minors from the doctrine of equitable tolling would be fatal to the rights of many children subjected to discrimination.

PRACTICAL ADVICE

The 180-day period to file a discrimination claim under the PHRA does not apply to minor students, who have until age 18 to file such claims. Therefore, school districts may be subject to lawsuits alleging discrimination which occurred up to thirteen or fourteen years ago. This decision highlights the need for school districts to keep accurate and thorough records regarding students. School districts should also keep this decision in mind when reviewing their document retention policies.

WHAT EVERY SCHOOL BOARD MEMBER SHOULD KNOW BEFORE USING SOCIAL MEDIA

As an elected school board member, you are looked to as a community leader and are expected to take a leadership role in representing your school district's interests. In fulfilling this role, many school board members communicate with colleagues, district employees, and members of the public via email, text messages and social media. However, board members must understand that these communications can be subject to a request for records under the Pennsylvania Right-to-Know Law ("RTKL"). As explained in this article, Pennsylvania courts and the Office of Open Records ("OOR") recognize that school board members may create official records of their school district subject to a RTKL request when they are communicating with other public officials or otherwise acting in some official capacity and discussing agency business on social media.

1. POSTS USED AS PLATFORMS TO PERFORM OR DISCUSS DISTRICT BUSINESS ARE RECORDS OF THE DISTRICT

The RTKL requires that a school district make public records available for inspection. Section 102 of the RTKL 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.

With respect to social media accounts, unofficial accounts can be subject to a RTKL request. In fact, the OOR has concluded that "it is immaterial whether or not the [agency] has oversight over the Facebook page or authorized the [officer] to maintain such an account." *Purdy v. Chambersburg Borough*, AP 2018-1229. Instead, the OOR will look at whether the content of the social media page shows that it is used as a significant platform by an elected official or employee to conduct or discuss official business. *Id.*

2. POSTS MADE IN A BOARD MEMBER'S OFFICIAL CAPACITY ABOUT DISTRICT ISSUES ARE RECORDS OF THE DISTRICT, EVEN IF MADE ON A PERSONAL ACCOUNT

Posts discussing school district affairs on an official social media account (e.g., Jane Doe, School Board Member) are likely to be records of the school district, even if the account was not approved by the school district. For example, in *Schultz v. Montgomery County*, AP 2020-1280, the OOR concluded that the records requested of a County Commissioner's account were records of the County because the social media account contained discussions and posts regarding activities of the Commissioner, in his capacity as the County Commissioner.

Similarly, in *Purdy v. Chambersburg Borough*, AP 2018-1229, the OOR concluded that a Facebook page was a record of the Borough because it was listed on the Borough's official website and contained the link "Find the Mayor on Facebook." In addition, the page contained discussions and posts regarding activities within the Borough, including those relating to the police department and councilmembers, and contained contact information for the Borough. Accordingly, the OOR held that requested Facebook posts and associated comments, including messages sent via Facebook messenger, were subject to public access.

Finally, in *Boyer v. Wyoming Borough*, AP 2018-1110, the OOR determined that a Facebook page titled "Joseph Dominick Mayor of Wyoming," was a record of the Borough because nearly all of the postings consisted of the Mayor's opinion on news stories involving the Borough and political entities affiliated with the Borough, announcements of Borough council meeting times and places, and discussion on topics of public interest within the Borough.

Accordingly, any school board member with an official social media account should expect that any posts or communications made from that account will be subject to a RTKL request.

3. POSTS MADE IN PERSONAL CAPACITY ON PERSONAL ACCOUNTS ARE NOT RECORDS OF THE DISTRICT

On the other hand, not every social media post is a record of the District. A board member's communications made on a personal social media account and made in his or her personal capacity are not records of the District and are not subject to public access, even if certain posts reflect District activities.

In *Chirico v. Cheltenham Township School District*, AP 2018-0391, the school board president publicly read a statement regarding another school board member's Facebook post to hold a "Cover Our Schools in Prayer" event on school Property. A requester subsequently sought information about the other school board members' Facebook accounts, including their viewing history and messages regarding the "Prayer" post.

In this case, the OOR determined that individual school board member's personal Facebook accounts were not records of the agency and not subject to the RTKL. Critically, these Facebook pages were not linked to the District's webpage. Moreover, each school board member submitted a sworn statement that they only maintained personal Facebook pages and, when they posted or commented on their pages, they did not hold themselves out as commenting as school board members. For example, one board member stated that she maintains "a Facebook page and she identifies her comments on Facebook as my personal comments and not comments on behalf of the Board or the School District."

Interestingly, one board member acknowledged that he had been contacted by members of the public on matters concerning the District, but he asserted that the contents of the communications were not shared with other school board members and that he did not rely on the communications (and the information contained in those communications) when making any decisions as a board member. The OOR concluded that, under these facts, the board members' social media accounts, and the communications contained therein, were not records of the District.

Accordingly, to the extent that board members maintain personal social media accounts, are clearly communicating in their personal capacities, and are not sharing these communications with other board members or relying on these communications when making any decisions as a board member, the OOR is unlikely to find that the social media accounts are records of the District.

4. COMMUNICATIONS REGARDING DISTRICT BUSINESS ARE SUBJECT TO ACCESS

It's important to emphasize while purely personal communications may be beyond the reach of a RTKL request, it is difficult for a board member to have a purely personal comment about the school district that they represent. The general rule is that individual communications by a board member, whether via email or social media, regarding agency business can be records of the district. For example, in *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Commw. Ct. 2012), the

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Commonwealth Court explained that communications between agency officials may be public records when the records are "created by public officials, in their capacity as public officials, for the purpose of furthering [agency] business." Accordingly, a board member may create official records when they are communicating with other public officials or otherwise acting in some official capacity and discussing agency business.

In *Debartola v. Johnstown Redevelopment Authority*, AP 2019-1868, the requester sought posts and messages contained on a private Facebook page maintained by the Authority's Vice Chairman. The OOR concluded that because the Vice Chairman was capable of creating records of the Authority and the Authority had not submitted any evidence that it had undertaken a search to determine if any of the responsive Facebook posts were records of the Authority, the Authority must, in conjunction with the Vice Chairman, review and provide to the requester any posts discussing or documenting Authority business.

Accordingly, private communications by a Board member regarding District business are subject to a RTKL request even if made in a private social media forum.

5. PROCEDURE FOR GATHERING RECORDS

As noted above, in many cases communications made on a private social media account will be deemed to be a record of the school district. However, because the account is private, the school district has no way of directly accessing those records. The courts and OOR have explained that if a request is made for communications made by one board member via a social media account that the District cannot unilaterally access, the District's open records officer must contact that board member and ask him or her to produce any records that might document official activity. If any records are located, they must be turned over to the district's open records officer for review.

The open records officer will then examine those records and provide those which it determines meet the definition of an agency record and are not otherwise exempt from access under the RTKL. *See In re Silberstein*, 11 A.3d at 633-634 ("Therefore, this Court believes that a right-to-know request directed to a local agency… requires that the local agency's open-records officer inquire of its public officials…as to whether the public official is in possession, custody or control of a requested record that could be deemed public.").

Accordingly, the board member is obligated to pull responsive records and turn them over to the school district's open records officer what will determine what is public.

PRACTICAL ADVICE

While this article could not address every intricacy of social media accounts under the RTKL, the important thing to remember is that your posts could be deemed to be a record of the District and subject to a RTKL request. Accordingly, if you have any questions about a particular situation, you should discuss the matter with your solicitor.

DISSIDENT BOARD MEMBER NOT DEPRIVED OF CIVIL RIGHTS BY COLD SHOULDER OF MAJORITY

Kathleen Wright Croft v. Donegal Township, 2021 WL 1110567 (W.D. Pa. 2021) (A township supervisor's motion for a preliminary injunction against her fellow supervisors was denied upon finding that she was not deprived of access to information necessary to her role as an elected official).

BACKGROUND

In 2017, Kathleen Croft was elected to a four-year term on the Board of Supervisors of Donegal Township. According to Croft, after the 2019 municipal election, three supervisors formed a "majority faction" of the five-member Board and, in conjunction with the attorney appointed by that group as Township solicitor, used their positions to oppress and discriminate

against Croft for publicly disagreeing with them over issues of Township governance. In particular, Croft maintained that the Board majority intentionally singled her out by depriving her of information and that other supervisors discussed Township business among themselves outside of public meetings in order to deprive her of meaningful participation in Township affairs.

As a result, Croft filed a suit in federal court alleging that those persons (1) unlawfully retaliated against Croft for her outspoken views on local political matters, in violation of the First Amendment; (2) unlawfully discriminated against her because of her political views, in violation of the Fourteenth Amendment's Equal Protection Clause; (3) unlawfully "deprived" her constituents of their votes by impeding Croft's ability to perform her duties as an elected supervisor in violation of the Fourteenth Amendment's Due Process Clause; (4) violated Pennsylvania's Second-Class Township Code; and (5) violated Pennsylvania's Sunshine Act. She then requested the court to enter a preliminary injunction effectively directing the majority faction to cease and desist the allegedly protracted and ongoing campaign of retaliation against Croft.

DISCUSSION

The court denied Croft's request for a preliminary injunction. The court began with an analysis of Croft's First Amendment retaliation claim. The First Amendment prohibits retaliation against elected officials for speech pursuant to their official duties only whenever the retaliation interferes with their ability to adequately perform their elected duties. In this instance, although Croft did not always have access to information at the time and in the manner of her choosing, she was able, like the other supervisors, to go to the Township offices, inspect records, discuss issues with her constituents, communicate with Township employees, and voice her opinion at public meetings and in executive session.

Additionally, with respect to negotiations between the Township and the Donegal Township Police Association regarding renewal of the police union contract, Croft wanted more regular and more detailed updates on the process, but, by the time the new contract came up for a vote in December 2020, she had been provided with the information she required and had sufficient time to study it before casting her vote. Consequently, the court concluded that Croft's ability to perform her elected duties had not been hindered.

The court next reviewed and rejected Croft's Equal Protection Clause claim that the majority's practice of treating Croft differently was irrational and served no legitimate purpose. The court observed that it was not irrational that a politician would treat a political ally differently than a political opponent.

Lastly, the court found no basis to Croft's Due Process Clause claim, concluding that there was no evidence that the majority's alleged retaliatory conduct effectively denied Croft her vote.

PRACTICAL ADVICE

Many boards of school directors have adopted statement of operating principles to work as a group, respectful of individual opinions, and to acknowledge, value and respect other member's opinions in an effort to collaborate and build team consensus in decision-making. Unfortunately, fulfillment of these principles is not universal among all school boards or individual school directors. A dysfunctional dynamic among school directors can impede effective decision-making and have negative effect among school district stakeholders.

The suit and decision in the Croft case demonstrates that all dissimilar treatment among a board of elected officials does not necessarily give rise to the proverbial "federal case." However, the case is instructive in that court intervention in the supervisors' affairs was avoided primarily by the circumstance that the dissident official was provided access to information, records and staff necessary to fulfilling her role as a supervisor. Even where disagreements exist among officials, those differences of opinion generally should not result in the withholding information or access from an official that is provided or available to others.

SCHOOL DISTRICTS ARE NOT REQUIRED TO IDENTIFY EMPLOYEES WHO ARE SUBJECT TO DISCIPLINE UNLESS AND UNTIL THEY ARE DEMOTED OR DISCHARGED

Highlands School District v. Rittmeyer, -- A.3d --, 2020 WL 7061810, 163 C.D. 2020 (Pa. Commw. Dec. 3, 2020). Commonwealth Court holds that school districts are not required to disclose the names of employees when issuing a statement of charges or in response to a request for records made pursuant to Pennsylvania's Right-to-Know Law.

BACKGROUND

The Requester submitted two RTKL requests seeking information about employees who were placed on unpaid leave, including their name, job title, length of employment, salary and a statement of the charges that resulted in the disciplinary action. In its response, the District denied access to the employees' names and the statements of the charges. Requester appealed the denial of names.

At issue in this case is the applicability of Section 708(b)(7)(viii) of the RTKL, which excludes "records relating to an agency employee," including "information regarding discipline, demotion or discharge contained in a personnel file" from public disclosure. 65 P.S. §67.708(b)(7)(viii). This exemption does "not apply to the final action of an agency that results in demotion or discharge." *Id.*

Requester appealed the denial of access to the employees' names, but not the denial of the statements of charges because the OOR has recognized that statements of charges are exempt under Section 708(b)(7)(viii) of the RTKL. See *Green v. West Jefferson Hills School District*, AP 2019-1372 (statement of charges constitutes information regarding discipline, demotion or discharge that was contained in the employee's personnel file and was not the "final action" of the District).

In *Rittmeyer*, the OOR concluded that Section 708(b)(7)(viii) was inapplicable to the requested names of the employees subject to the statement of charges because the names of public employees are generally public information. The OOR did not consider it relevant that the Requester was specifically seeking the names of employees who were placed on leave and issued statements of charges.

The District appealed to the Court of Common Pleas of Allegheny County ("Trial Court") which rejected the OOR's rationale for granting access to the names. The Trial Court found that Section 708(b)(7)(viii) exempted the names because, while public employees' names are generally public information, "it is not a random name that is requested, but the name of an employee in connection with disciplinary action." The trial court concluded that an absurd result would occur if Section 708(b)(7)(viii) of the RTKL exempted the statement of charges against the employees but required the disclosure of their names.

DISCUSSION

On appeal to the Commonwealth Court, Requester conceded that both a description of the conduct and the employees' identities would be "statements in the employees' personnel file" subject to non-disclosure under Section 708(b)(7)(viii). However, Requester argued that Section 708(b)(7)(viii) is inconsistent with certain provisions of the School Code and Sunshine Act that require disclosure and, therefore, trump the exception set forth in Section 708(b)(7)(viii). In making this argument, Requester relied on Section 3101.1 of the RTKL which provides that if there is a conflict between the RTKL regarding access to records and any other Federal or State law, the provisions of the RTKL do not apply. 65 P.S. §67.3101.1.

Accordingly, the issue before the Commonwealth Court was whether the School Code or the Sunshine Act pose any conflict with Section 708(b)(7)(viii). Requester first argued that Section 708(b)(7)(viii) of the RTKL is inconsistent with Section 1127 of the School Code, which sets forth the procedure that a school board must follow prior to dismissing a professional employee. Section 1127 generally provides that before a tenured professional employee, like a teacher, is dismissed by the school board, the school board must provide that employee with a detailed statement of charges upon which the employee's proposed dismissal is based and hold a hearing, after providing proper notice, where

the employee is given an opportunity to be heard. *See* 24 P.S. §11-1127.

To comply with this section, the Commonwealth Court has held that the school board must "resolve to demote the employee and to furnish him with a written statement of the charges prior to the hearing." *School District of Philadelphia v. Jones*, 139 A.3d 358, 368 (Pa. Cmwlth. 2016) (*en banc*) (*quoting Patchel v. Wilkinsburg School District*, 400 A.2d 229, 232 (Pa. Cmwlth. 1979)). Many school boards comply with this requirement by passing a "*Jones*" resolution that does not identify the employee subject to the investigation.

Requester argued that the Court should interpret Section 1127 of the School Code to also require the disclosure of a professional employee's identity in order to initiate the disciplinary process. However, in rejecting this argument, the Court noted that Section 1127 contains "no provision relating to public access to records" and "contains no language whatsoever mandating public disclosure of the identity of the employee subject to the initiation of the disciplinary process." Accordingly, the Court found that there was no conflict between Section 1127 of the School Code and Section 708(b)(7)(viii) of the RTKL.

Requester's second argument was that the names were public because Section 708(b)(7)(viii) conflicts with the Sunshine Act. The Sunshine Act generally provides that official action and deliberations of a school board must take place at a meeting that is open to the public. The Sunshine Act contains several exceptions to this general rule, including one set forth in Section 708(a)(1) of the Sunshine Act, which provides that a school board may hold executive sessions closed to the public to discuss employment matters, including the discipline of an employee. 65 Pa.C.S. §708(a)(1). While the discussion can take place in private, Section 708(c) mandates that official action on that discussion take place in public. 65 Pa.C.S. §708(c).

In rejecting Requester's second argument, the Court held that the Sunshine Act was consistent with Section 708(b)(7)(viii). Specifically, the Court found that although the discussions concerning an employee's discipline may be conducted in an executive session that excludes the public, the school board's resolution initiating the disciplinary process must be voted upon at a public meeting. Importantly, however, the Court noted that "no provision of the Sunshine Act mandates that such a resolution must entail public disclosure of the name of the employee subject to discipline."

Accordingly, the Court found that the School Code and the Sunshine Act do not mandate disclosure of the employees' identities prior to such "final action of an agency that results in demotion or discharge." Accordingly, since the employees' names were statements in the employees' personnel file subject to non-disclosure under Section 708(b)(7) of the RTKL, the Court found that these names were properly redacted.

PRACTICAL ADVICE

This decision is important for two reasons. First, it confirms that Districts are not required to provide the names of employees facing discipline in response to a RTKL request. In addition, it confirms that the process adopted by many school districts of omitting an employee's name when issuing a statement of charges is permitted by the School Code and Sunshine Act. As noted by the Court, the identity of the employee subject to discipline will not remain confidential in perpetuity. The caveat in Section 708(b)(7)(viii) of the RTKL states that the exemption from public access "shall not apply to the final action of an agency that results in demotion or discharge." 65 P.S. § 67.708(b)(7)(viii). Accordingly, if the disciplinary process ultimately results in demotion or discharge, then records relating to that final action will be exempt from disclosure under the RTKL.

The *Rittmeyer* decision provides some clarity for school districts when dealing with employment issues. Nevertheless, school districts should work with their administrators and solicitors to ensure compliance with these matters.

TUCKER ARENSBERG Attorneys MUNICIPAL AND SCHOOL LAW GROUP

Matthew M. Hoffman *Co-chair*
412.594.3910
mhoffman@tuckerlaw.com

John T. Vogel *Co-chair*
412.594.5622
jvogel@tuckerlaw.com

Frederick J. Wolfe
412.594.5573
fwolfe@tuckerlaw.com

Robert L. McTiernan
412.594.5528
rmctiernan@tuckerlaw.com

Steve R. Bovan
412.594.5607
sbovan@tuckerlaw.com

Katherine A. Janocsko
412.594.5564
kjanocsko@tuckerlaw.com

Irving S. Firman
412.594.5557
ifirman@tuckerlaw.com

Gavin A. Robb
412.594.5654
grobb@tuckerlaw.com

Kenneth G. Scholtz
412.594.3903
kscholtz@tuckerlaw.com

Weston P. Pesillo
412.594.5545
wpesillo@tuckerlaw.com

Thomas P. Peterson
412.594.3914
tpeterson@tuckerlaw.com

Richard B. Tucker, III
412.594.5562
rtucker@tuckerlaw.com

Christopher Voltz
412.594.5580
cvoltz@tuckerlaw.com

Ashley S. Wagner
412.594.5550
awagner@tuckerlaw.com

Daniel C. Conlon
412.594.3951
dconlon@tuckerlaw.com

William Campbell Ries
412.594.5646
wries@tuckerlaw.com

David Mongillo
412.594.5598
dmongillo@tuckerlaw.com

TUCKER ARENSBERG Attorneys
MUNICIPAL AND SCHOOL LAW GROUP

Tucker Arensberg, P.C. 1500 One PPG Place Pittsburgh, PA 15222 412.566.1212

tuckerlaw.com

Tucker Arensberg's Municipal and School Law Group represents local school districts and municipalities in a variety of legal matters. Our attorneys are solicitors or special counsel for several school districts/jointures and municipalities in Western Pennsylvania. In addition, our attorneys serve as special labor counsel to numerous school districts and municipalities in Western Pennsylvania and have held appointments as special counsel to school boards, zoning boards, civil service commissions and other municipal sub-entities.

The range of services called for in our representation of public bodies is quite broad. Included in that range are: public and school financing, including the issuance of bonded indebtedness; labor, employment and personnel issues; public bidding and contracting; school construction and renovation; taxation, including real estate, earned income and Act 511; pupil services and discipline; zoning and land use and litigation and appellate court work.

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