VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

BRADY C. TOENSING, Plaintiff v. THE ATTORNEY GENERAL OF VERMONT, Defendant	Docket No. 500-6-16 Cncv

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This action for declaratory and injunctive relief arises from a public records request. Plaintiff Brady C. Toensing seeks copies of communications between certain state officials and employees and other individuals from the Office of the Attorney General (Defendant). While Defendant produced records kept on the state computer system, it did not search for or produce any responsive documents kept on private email and text messaging accounts. Now before the court is Defendant's motion for summary judgment. Brady C. Toensing, Esq. represents himself. William E. Griffin, Esq. represents Defendant.

The following facts are undisputed. On December 11, 2015, Toensing submitted a public records request to the Attorney General's Office (AGO) seeking any communications over a four-year period starting January 1, 2011, between nine listed AGO officials and employees and 30 other individuals and organizations. The AGO's search identified 13,629 emails that were subsequently consolidated into 1,129 email chains. After the search was completed, the AGO reviewed the records and undertook a rolling production of documents to Toensing. The AGO completed its response and production of documents in April 2016, identifying documents it was withholding and the grounds for doing so. In total, Defendant spent more than 250 hours of staff time reviewing the documents and responding to the request. On April 28, 2016, Defendant sent a final consolidated response to Toensing's request.

Toensing then filed an administrative appeal with the Deputy Attorney General on the grounds that the private email accounts and private text messaging accounts of the nine listed AGO employees should have been searched for records responsive to his request. That appeal was denied on June 17, 2016. Toensing contends that the Attorney General's Office was obligated to search the private emails and text messages of AGO staff and to produce documents that respond to his search request—that is, any

communications these state employees may have had on their personal accounts with the identified individuals and organizations.[1]

The threshold issue in this case is purely a question of law: whether the Public Records Act requires an agency to search its employees' email and text message communications on private accounts or devices, or to have its employees search those accounts or devices, in response to a records request. This question, apparently one of first impression in Vermont, primarily involves a matter of statutory interpretation. In interpreting a statute, Vermont courts are guided by the following general rules of statutory construction:

> When interpreting statutes, the bedrock rule of statutory construction is to determine and give effect to the intent of the Legislature. We effectuate this intent by first examining the plain meaning of the language used in light of the statute's legislative purpose. If that plain language resolves the conflict without doing violence to the legislative scheme, there is no need to go further. But if the literal meaning of the words is inconsistent with legislative intent, the intent must prevail. Such inconsistency occurs if applying the precise wording of a statute produces results which are manifestly unjust, absurd, unreasonable or unintended, or conflicts with other expressions of legislative intent. The legislative intent is most truly derived from a consideration of not only the particular statutory language, but from the entire enactment, its reason, purpose and consequences. Finally, where there are similar statutes in other jurisdictions, we are also guided by the interpretations of those statutes.

Delta Psi Fraternity v. City of Burlington, 2008 VT 129, ¶ 7, 185 Vt. 129 (alterations in original) (quotations and citations omitted); *see also* In re Carroll, 2007 VT 19, ¶ 9, 181 Vt. 383 (noting that Vermont courts determine legislative intent by considering "the whole statute, the subject matter, its effects and consequences, and the reason and spirit of the law").

The Public Records Act provides that "[a]ny person may inspect or copy any public record of a public agency . . . ." 1 V.S.A. § 316(a). "Public agency" or "agency" means "any agency, board, department, commission, committee, branch, instrumentality, or authority of the State . . . ." 1 V.S.A. § 317(a)(2). "[P]ublic record" or "public document" is defined as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). The Act's statement of policy advocates for "free and open examination of records" despite the potential for "inconvenience or

[1] Toensing purports to dispute a number of Defendant's undisputed facts, but does not comply with Rule 56(c). Thus, those facts are deemed admitted.

embarrassment," but also recognizes that "[a]ll people . . . have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer." 1 V.S.A. § 315.

While the Act's definition of "public record" is undoubtedly broad—indeed, even "sweeping," *see* Herald Ass'n, Inc. v. Dean, 174 Vt. 350, 353 (2002)—its scope does not extend so far as to mandate the search of state officials' or employees' private email or text messaging accounts upon request. The Act permits one to inspect or copy "any public record *of a public agency*." 1 V.S.A. § 316(a) (emphasis added). "Public agency" is defined in terms of institutions, rather than individuals, which patently implies that a record must be in the custody or control of the agency to be subject to search or disclosure. 1 V.S.A. § 317(a)(2). Language in other sections of the Act compels the same result. *See, e.g.*, 1 V.S.A. § 316(g) ("[a] *public agency* having the equipment necessary to copy *its public records* . . ") (emphasis added); id. § 316(i) ("[i]f an *agency maintains public records* in an electronic format . . .") (emphasis added).

Perhaps more importantly, such an interpretation raises serious privacy concerns that implicate the First and 14th Amendments as well as Article 11. For example, as Defendant observes, the personal email accounts of elected officials in particular are likely to contain communications related to political campaigns and elections. A search of those emails would undermine the First Amendment's traditionally stringent protection of political speech. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339–40 (2010); Buckley v. Valeo, 424 U.S. 1, 14 (1976). The stated legislative purpose of the Public Records Act plainly contemplates a balancing between "free and open examination of records" and the privacy rights of state officials and employees. 1 V.S.A. § 315. There is surely a privacy interest in one's personal communications conducted on private accounts. *See* Competitive Enter. Inst. v. United States Envtl. Prot. Agency, 12 F. Supp. 3d 100, 123 (D.D.C. 2014) ("[T]he Court does not see why an agency official's personal email address—in which he or she would obviously have a powerful privacy interest—would become any less private [because] of the fact that it was used when it should not have been."). Under Toensing's logic, the private communications accounts of any and all public officials and employees would be subject to search upon request. Given the language of the statute and the stated purpose, that cannot be a result the legislature intended or even contemplated.

Aside from the constitutional privacy considerations, implementation of such a search and disclosure would be problematic at best, and the Act contains no provision addressing those practical concerns. As Defendant points out, it is unclear how the State could simply force its officials and employees to search their own private email or text messaging accounts, or turn over access to such accounts to a third party. Such a search would also likely be burdensome and subject to disparate methods of implementation, depending on the various types of email and messaging systems involved and who would conduct the search. Had the legislature intended the scope of the Public Records Act to include that type of search, it would have provided additional procedures to deal with these concerns.

Other authorities, which this court finds persuasive, further support this conclusion. In one case cited by Defendant, a California appellate court held that writings of city officials sent or received on their private devices and accounts and which undisputedly related to city business were not "public records" under the California Public Records Act. City of San Jose v. Superior Court, 225 Cal. App. 4th 75, 89, 91 (2014).[2] That conclusion relied heavily on the fact that, like Vermont's Act, the California Act defined "agency" in terms of "government bodies themselves," and does not mention "individual members or representatives of any public body . . . ." Id. The court also rejected the requester's contention that the city had control over its employees "by virtue of the parties' relationship." Id. at 91. While the court openly recognized the "serious concern" presented by the fact that city council members could "conceal their communications on public issues by sending and receiving them on their private devices from private accounts," it stated that "such conduct is for our lawmakers to deter with appropriate legislation." Id. at 90.

As Toensing observes, the language of the California Act at issue in San Jose is not identical to the Vermont Act. The California Act provides that "every person has a right to inspect any public record," and defines "public record" to include "any writing relating to the public's business if it is 'prepared, owned, used, or retained by any state or local agency.'" Id. at 86–87 (citing Cal. Gov't Code §§ 6252(e), 6253(a)). Toensing thus argues that the California Act is narrower, as the Vermont Act defines "public record" as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). But this contention fails to consider that the Vermont Act is also narrower in that it provides a right to access "any public record *of a public agency*," 1 V.S.A. § 316(a) (emphasis added), while the California Act refers only to "any public record . . . ." Cal. Gov't Code § 6253(a). Both statutes permit access only to records *of public agencies*; that requirement is simply phrased differently in the respective statutes.

Another case, relied upon in San Jose, is similarly persuasive. *See* In re Silberstein, 11 A.3d 629, 632–33 (Pa. Commw. Ct. 2011). In Silberstein, someone requested electronic communications between citizens and commissioners serving on the township board. The township, as in the present case, produced writings in its possession and control, but did not consider those writings made on computers maintained solely by a commissioner. The requester argued that elected officials should not be permitted to shield public records related to township activity by using a third-party email address on a personal computer, and that public officials are "agency actors . . . subject to . . . [t]ownship control." Id. at 632.

[2] The court observes that the San Jose decision has been pending appeal for over two years since the California Supreme Court granted review in 2014. *See* City of San Jose v. Superior Court, 326 P.3d 976 (Cal. 2014). The current or potential legal status of an out-of-state decision does not prohibit this court from citing it as persuasive authority nor, in this context, does it diminish its persuasive value. Indeed, courts may even rely on dissents as persuasive precedent. *See*, *e.g.*, Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 246 (2008) ("Although the decision of the California Supreme Court and the dissenting opinion of Chief Judge Kaye [in a New York Court of Appeals decision] reflect the minority position, we believe that they nevertheless represent the most persuasive sister state precedent.").

The appellate court affirmed the trial court's ruling that those communications were not "public records" under Pennsylvania's "Right-to-Know Law." Id. at 633. The Pennsylvania law provides that commonwealth and local agencies "shall provide public records in accordance with this act." 65 Pa. Stat. §§ 67.301, 67.302. The law further defines "record" as "[i]nformation, 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," and defines "public record" as "[a] record . . . of a Commonwealth or local agency" that is not exempt or privileged. 65 Pa. Stat. § 67.102. The court reasoned:

> [A] distinction must be made between transactions or activities of an agency which may be a "public record" under the [Right-to-Know Law] and the emails or documents of an individual public office holder. As pointed out by the trial court, Commissioner Silberstein is not a governmental entity. He is an individual public official with no authority to act alone on behalf of the Township.
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> Consequently, emails and documents found on Commissioner Silberstein's personal computer would not fall within the definition of record as any record personally and individually created by Commissioner Silberstein would not be a documentation of a transaction or activity *of* York Township, as the local agency, nor would the record have been created, received or retained pursuant to law or in connection with a transaction, business or activity *of* York Township. In other words, unless the emails and other documents in Commissioner Silberstein's possession were produced with the authority of York Township, as a local agency, or were later ratified, adopted or confirmed by York Township, said requested records cannot be deemed "public records" within the meaning of the [Right-to-Know Law]as the same are not "of the local agency".

Silberstein, 11 A.3d at 633 (emphasis in original). In Silberstein, as in San Jose, the fact that the statute permitted disclosure only of public records "of" the agency was crucial.[3] Similarly, here, the private emails and text messages of officials and employees of the

[3] The court observes that Pennsylvania's Right-to-Know Law further provides that records "in the possession of" an agency are presumed to be public records, and that a request for access requires an agency to make a good faith effort to determine if the record requested is a public record "and whether the agency has possession, custody or control of the identified record . . . ." 65 Pa. Stat. §§ 67.305(a), 67.901. While the Silberstein court observed that these provisions represent "safeguards to protect against the possibility that an agency may attempt to shield public records from disclosure by simply storing the records on a computer that is not in the physical possession of the agency," that does not diminish the persuasive value of that decision to this case.

Attorney General's Office are not public records "of a public agency." Consequently, they are not subject to disclosure under Vermont's Public Records Act.

Toensing cites a number of cases where courts have held or suggested that communications in private email and text messaging accounts are records subject to disclosure under the governing public records acts. This court does not find those cases persuasive. In City of Champaign v. Madigan, 992 N.E.2d 629, 639 (Ill. App. Ct. 2013), an Illinois appellate court held that city council members' communications from personally owned electronic devices made during city council meetings were subject to disclosure under that state's FOIA. However, that court also stated that communications from an individual city council member's personal electronic devices "do not qualify as 'public records'" unless they pertained to public business and were effectively controlled, in some manner, by the "public body." Id. at 639. "Thus, if the communication, which pertains to the transaction of public business, was sent or received during the time a city council meeting was in session, *i.e.,* during the time the individual city council members were functioning collectively as the "public body," then the communication is a "public record" and thus subject to FOIA." Id. at 639–40. Madigan does not present an analogous framework to be of guidance.

McLeod v. Parnell, 286 P.3d 509 (Alaska 2012) involved former Alaska Governor Sarah Palin's use of personal email accounts to conduct state business. However, the actual issue decided by the Alaska Supreme Court was whether "public records" under that state's Public Records Act included those records which are "appropriate for preservation" under the state's Records Management Act. It appears Alaska's statutory scheme in this area is unique and sufficiently distinguishable from Vermont to be of no useful guidance here.

In Bradford v. Dir., Employment Sec. Dep't, 83 Ark. App. 332 (2003), a former state official sought unemployment benefits after he resigned from his position, claiming he had good cause to leave because then-Arkansas Governor Mike Huckabee's staff asked him to violate the state's FOIA by communicating with the governor at his private email address rather than his official one. In concluding that the claimant left work voluntarily without work-related good cause, the court found "nothing in the [FOIA] that specifies that the communication media by which the public's business is conducted are limited to publicly owned communications." Id. at 345. The court also noted that emails between the governor and others that involved the public's business were subject to public access "whether transmitted to private email addresses through private internet providers or whether sent to official government email addresses over means under the control of the State's Division of Information Services." Id. at 345. As no analysis was provided for this proposition, this court deems it unpersuasive.

Another decision cited by Toensing resulted from an action by the Competitive Enterprise Institute challenging the sufficiency of the EPA's response to a FOIA request for information related to former EPA administrator Lisa Jackson's use of a secondary email account to conduct government business. Competitive Enter. Inst. v. United States Envtl. Prot. Agency, 12 F. Supp. 3d 100 (D.D.C. 2014). It unclear how that decision helps Toensing's cause in any way. The "secondary" email account at issue

there was not a personal email account, but an account which the EPA administered and which used an "epa.gov" domain. Id. at 107. Therefore, it has no relevance to the present case. In upholding the redaction of personal email addresses from certain documents, the court there suggested that requesters would not be impeded by the redaction "since they can simply ask for work-related emails and agency records found in the specific employees' personal accounts; requesters need not spell out the email addresses themselves." Id. at 122. As Defendant correctly observes, however, this statement is dicta and offers no useful analysis.

A more recent decision involved a FOIA action brought against a federal agency for refusal to search a private email account maintained by its director at a nongovernmental organization. Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, 827 F.3d 145 (D.C. Cir. 2016). The D.C. Circuit found that to be an improper withholding of alleged agency records, noting that "[i]f the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced." Id. at 149. The court also observed that the government's argument was "inconsistent with the purpose of FOIA." Id. at 150. ("If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control."). However, the D.C. Circuit offered no analysis of any statutory language in explaining its decision. Furthermore, as Defendant observes, that case involved an organizational email account rather than a personal email account, so the same personal privacy concerns at issue here were not implicated.

Finally, Landmark Legal Found. v. E.P.A., 959 F. Supp. 2d 175 (D.D.C. 2013) is similarly unhelpful. There, the plaintiff sought records regarding proposed rules and regulations, including those contained on personal email accounts. However, the EPA failed to dispute allegations that personal accounts were being used to conduct official business, and apparently presented no argument that FOIA does not extend to searches of personal email. *See* id. at 182–83. Consequently, there was no legal analysis of that issue. Like the other cases cited by Toensing, Landmark offers no helpful guidance to the present case.

To be sure, the idea that state officials and employees can avoid valid public records requests merely by conducting official work-related communications on private email and text messaging accounts is a serious and, frankly, disturbing concern. Through its decision today, the court does not seek to diminish that concern, but only to point out that it "is a matter for the Legislature, not the courts, to decide." San Jose, 225 Cal. App. 4th at 96; *see also* id. at 97 ("The obstacles noted by petitioners—the legal and practical impediments attendant to the extra task of policing private devices and accounts—would also be addressed more appropriately by the Legislature or the agency, not the courts."); Madigan, 992 N.E.2d at 640 ("If the General Assembly intends for communications pertaining to city business to and from an individual city council member's personal electronic device to be subject to FOIA in every case, it should

expressly so state. It is not this court's function to legislate. Indeed, such issues are legislative matters best left to resolution by the General Assembly.").[4]

The court concludes that the communications on private email and text messaging accounts requested by Toensing are not subject to search or disclosure under the Public Records Act. Because of its resolution of this issue, the court need not address the other issues raised by the parties.

Order

Defendant's Motion for Summary Judgment is granted.

SO ORDERED.

Dated at Burlington this 8th day of February, 2017.

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Robert A. Mello
Superior Court Judge

[4] Toensing's allegation that the Attorney General's Office selectively responds to public records requests for private email communications is also concerning. Certainly, the Public Records Act itself does not strictly *preclude* state agencies from searching or disclosing employees' or officials' emails located on private accounts in response to a records request. If it does so, an agency or other government entity should be consistent in its approach. In any event, this does not inform the court's analysis of whether the Public Records Act *mandates* a search or disclosure of such communications.