

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

ANDREW STAUB and : Civil Division - Law
THE CITIZENS VOICE, :
Petitioners :
vs. :
CITY OF WILKES-BARRE and :
LAG TOWING, INC., :
Respondents : No. 8294 of 2012

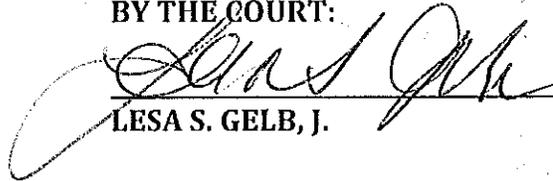
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2012 OCT 19
10:08 AM

ORDER

AND NOW, this 16th day of October, 2012, It is hereby **ORDERED AND DECREED** that LAG Towing and the City of Wilkes-Barre should pay the Citizens Voice for the time it spent to litigate this frivolous matter, to be divided ninety percent (90%) to LAG Towing and ten percent (10%) to the City of Wilkes-Barre.

The Prothonotary is directed to serve notice of the entry of this Order pursuant to Pa.R.C.P. 236.

BY THE COURT:



LESA S. GELB, J.

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OPINION

Jurisdiction

This Court has jurisdiction under the Pennsylvania Right to Know Law, 65 Pa. C. S. §67.101 et seq. pursuant to sections 1302 and 1304. Section 1304 of the Act is entitled “Court Costs and Attorneys Fees” and under Section (b), “the Court may award reasonable attorneys fees and costs of litigation or an appropriate portion thereof to an agency or to the requestor if the Court finds that the legal challenge under this chapter was frivolous.” Further, under Section (c) entitled “Other sanctions”—“the Court is not prohibited from imposing penalties and costs in accordance with applicable Rules of Court.”

Background

This matter arises out of an incident in which a reporter, Andrew Staub of the Citizens Voice, filed a Right to Know request on July 22, 2011 seeking “all records, including towing reports and receipts from LAG Towing (LAG), pertaining to city-

directed tows executed as a result of the contract between LAG Towing and Wilkes-Barre" from April 1, 2005 to the present. On or about August, 29, 2011, counsel for the Citizens Voice was advised by letter from Jim Ryan, City Clerk from Wilkes-Barre and its Right to Know Officer, that LAG Towing and legal counsel would not turn over any records as it was their belief that the records were not accessible under the Pennsylvania Right to Know Law. An e-mail dated August 29, 2011 was attached to the August 29, 2011 letter from LAG Towing's counsel which advised in relevant part that: "It does not appear that such documents are accessible under the Right to Know Law, and, therefore, even if any existed, they would not be subject to production in response to this request."

The Citizens Voice and Andrew Staub filed an appeal to the Office of Open Records (OOR). A mediation followed after which a final determination was made by the Office of Open Records dated January 27, 2012. The decision stated in pertinent part that all records had to be turned over, and that

"providing towing services relating to the City's enforcement of its ordinances, laws or other lawful directives is the performance of a governmental function." See East Stroudsburg University Foundation et al v. Office of Open Records, 995 A.2d 496, 504 (Pa. Commw. Ct. 2010) appeal denied, 20 A.3d 490 (Pa. 2011). Under Section 506 (d), all records directly related to the City's towing contract with LAG are presumptively public records. Allegheny County Dep't of Admin Servs. v. A Second Chance, Inc., 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011)."

Wilkes-Barre City was ordered to provide all responsive records within 30 days with all personal identification information redacted.

According to LAG, no responsive towing records or receipts were available before August 1, 2011.

Interestingly, on September 21, 2011, LAG Towing, by and through its legal counsel, requested to intervene in the appeal, a request which was subsequently approved by the Office of Open Records.

Testimony at the sanctions hearing of July 31, 2012 by counsel for Citizens Voice, Michael Cosgrove, Esquire, was that he only became aware that there were no records pre-dating August 1, 2011 on approximately December 22 or December 23, 2011.

The testimony of Leo Glodzik, the owner of LAG Towing, on July 31, 2012 was that he knew in July 2011 that he had no records, although he did not do a thorough search until November 2011.

The testimony of Attorney Timothy Henry, City Solicitor for Wilkes-Barre City, was that in July, 2011 he knew that there was a possibility that there were no records based on his conversations with Mr. Glodzik in July 2011 but made no further inquiry after LAG Towing and his counsel took over the litigation and let them attempt to get the records.

Neither the City of Wilkes-Barre nor LAG Towing ever advised the Citizens Voice that the records it had been seeking did not exist.

An agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of non-existence of the record. Moore v. Office of Open Records, 992 A.2d 907, 908-909 (Pa. Commwlth. 2010).

On July 31, 2012, at the sanctions hearing, Attorney Henry testified he was aware that an affidavit would have fulfilled this requirement; RTK Officer Jim Ryan testified that he was also aware of this.

The legal bills for the time in question continued to accrue while the Citizen's Voice attempted to get the towing records and receipts for April 2005 to July 2011 which simply didn't exist, and which LAG and the City of Wilkes-Barre knew did not exist.

Attorney's Fees

As stated earlier, Section 1304 of the RTKL 65 P.S. §67.1304 provides the following:

(b), " the Court may award reasonable attorneys fees and costs of litigation or an appropriate portion thereof to an agency or the requestor if the Court finds that the legal challenge under this chapter was frivolous."

Further, under Section (c) Other sanctions- Nothing in this act shall prohibit a Court from imposing penalties and costs in accordance with applicable Rules of Court.

Based on Section 1304 of the RTKL, the trial court must find a willful and wanton disregard of access on the agency's part, an unreasonable interpretation of the law, or a frivolous appeal. Barkeyville Borough v. Stearns 35 A.3d 91 (Pa. Commwlth. 2012)

This Court finds that LAG Towing engaged in willful and wanton misconduct when it litigated a matter frivolously. Specifically, the Defendant, LAG Towing, Inc.,

argued that the information contained in its records was confidential proprietary information when, according to LAG itself, those records did not exist at the time the statement was made. It is beyond comprehension that it was purported that the towing records had confidential proprietary information contained within them when counsel for LAG never reviewed such documents because Leo Glodzik admitted that no such documents existed. Therefore, no such documents could have ever been reviewed and these non-existent records could not contain confidential or proprietary information.

The appeal by LAG Towing to the RTK request was frivolous when all that was necessary was an Affidavit indicating that there were no responsive records.

Additionally, the City of Wilkes-Barre responded to the RTK request that it did not possess any responsive records. But what the City did not do is indicate that LAG did not have any responsive records when it knew early on that LAG did not have the records, or as Attorney Henry indicated "he knew it was a possibility that LAG Towing, Inc. had no responsive records to the request fairly early on in this matter" (P. 46, L. 5-7 of the Transcript dated 7/31/12). To know for sure all Attorney Henry had to do was ask Leo Glodzik at that time whether he in fact had the responsive records. Wilkes-Barre let LAG take the lead in the RTK litigation having a good idea that LAG had no records and failed to ensure that either LAG provide an affidavit of no records or notify the Citizens Voice or OOR mediator that LAG did not have any records which the Citizens Voice was requesting. At best, this showed a lack of oversight by Wilkes-Barre of its tower LAG with regard to its RTK responsibilities. At the very least, after the OOR's final determination on January 27,

2012, the City, having been ordered to "provide" all responsive records within thirty (30) days, had an obligation to disclose the information it had pertinent to the existence or non-existence of the records.

I find that both LAG and the City of Wilkes-Barre showed a willingness to engage in frivolous litigation.

Conclusion

For the foregoing reasons, this Court has determined that LAG Towing and the City of Wilkes-Barre should pay the Citizens Voice for the time it spent to litigate this frivolous matter. The amount of the Citizens Voice bill is \$8,898.64 and it is to be divided ninety percent (90 %) to LAG Towing and ten percent (10 %) to Wilkes-Barre City.

(Order entered separately on Page 6-7.)