

OCT 24 2023

LEVIN LEGAL GROUP, P.C.
Michael I. Levin, Esquire
Attorney ID No. 21232
James J. Musial, Esquire
Attorney ID No. 71100
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006
Phone: (215) 938-6378
mlevin@levinlegalgroup.com
jmusial@levinlegalgroup.com

Pending before the Court is the Petition for Review of Final Determination of the Pennsylvania Office of Open Records filed by Coatesville Area School District (“Petitioner” or “School District”). Pursuant to this Court’s May 3, 2023 Order, Petitioner submits this Brief in Support of its Petition.

I History of the Case

Respondent, Beth Ann Rosica (“Respondent” or “Rosica”) submitted the subject Right-to-Know Law request (“Request”) to the School District on January 20, 2023. (See, Office of Open Records Certified Record (“Certified Record”), **OOR Exhibit 1**, at “Standard Right-to-Know Request Form.”) The Request included five separate requests, denominated as “Part A” through “Part E.” (**Id.**) By letter of January 26, 2023, the School District’s Open Records Officer informed Requester pursuant to Section 902 of the Right-to-Know Law (“RTKL”) that her Request had been received and the District would require up to an additional 30 days to provide a written response. (Certified Record, **OOR Exhibit 1**, at January 26, 2023 letter from Pamela Kiley, Open Records Officer (“Open Records Officer”).) The School District’s Open Records Officer timely responded to each part of the Request in her February 22, 2023 Response letter (“Response”) (Certified Record, **OOR Exhibit 1**, at February 23, 2023 Response letter from Open Records Officer.) The Response letter cited specific reasons along with citation to supporting legal authority in denying each of Requester’s five requests, pursuant to Section 903(2) of the RTKL. 65 P.S. § 67.903(3). (**Id.**) Requester appealed the School District’s Response to the Pennsylvania Office of Open Records (“OOR”) using the OOR’s online appeal form (“OOR Appeal Form”). (Certified Record, **OOR Exhibit 1**, at February 22, 2023 OOR “Appeal Confirmation” email.)

The OOR’s Appeal Form includes the following pre-printed boilerplate statement at the bottom of the form:

“I requested the listed records from the Agency named above. By submitting this appeal, I am appealing the Agency’s denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.”

(Id.) Rosica set forth the following statement on her OOR Appeal Form regarding the “Records at Issue in this Appeal:”

“Coatesville Area School District denied all 6 [sic] parts of the RTK request. They failed to provide any documents responsive to the request.”

(Id.) By its letter of February 22, 2023, the OOR notified the School District and Rosica of its receipt of her appeal. (Certified Record, **OOB Exhibit 2**, at February 22, 2023 OOR letter.) The OOR’s letter enclosed, among other things, a document entitled “The Right-to-Know Law Appeal Process,” which included as follows:

“Submissions to the OOR[.] Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer.”

(Id.) (emphasis in original). The OOR also issued a “Notice of Deadlines” to the parties that “Submissions in this case are currently due on March 3, 2023.” (Certified Record, **OOB Exhibit 2**, at “Notice of Deadlines.”) By letter of February 24, the OOR notified the parties that it was granting the School District’s request for an extension of time and advised that the parties “will have until March 10, 2023 to provide submissions in this matter.” (Certified Record, **OOB Exhibit 8**.) On March 10, 2023, the School District submitted its “Respondent’s Brief in Support of its Denial and in Opposition to Requester’s Appeal” (“School District’s OOR Brief”). (Certified Record, **OOB Exhibit 9**.) The School District’s OOR Brief also incorporated by reference the School District Open Records Officer’s February 22, 2023 Response “**setting forth the School District’s denials of Requester’s requests.**” (Id., at “**II. Legal Argument/Analysis.**”) (emphasis in original).

Rosica made no submission to challenge any of the School District’s reasons for denying each part of her Request.

On March 31, 2023, the OOR issued its Final Determination, and concluded that:

“For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and, within thirty days, the District is required to conduct keyword searched for “People’s

Light Theater” for Items A and B, and “People’s Light Theater” and “Alice in Wonderland” for Items C,D, and E, and provide all responsive records, with the redaction of any information made exempt under Section 708(b)(6)(i)(A) of the RTKL. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Chester County Court of Common Pleas. 65 P.S. § 67.1302(a).” (emphases in original)

(Certified Record, **OOR Exhibit 10**, at “Conclusion.”)

On May 1, 2023, the School District filed this statutory appeal seeking this Court to reverse the OOR’s Final Determination granting in part the Request, and to uphold the School District’s Response.

II. Questions Presented

Did the Office of Open Records err by granting in part Respondent’s Appeal of the School District’s Response to her Right-to-Know Law Request?

ANSWER: For the reasons set forth in the School District’s Petition for Review, its February 22, 2023 Response, and as follows: Yes.

III. Legal Argument

(A) Standard of Review

As the Commonwealth Court has held:

“[A] reviewing court, in its appellate jurisdiction, independently reviews the OOR’s orders and may substitute its own findings of fact for that of the agency. * * * Initially, we examine the statutory language providing for judicial review. Section 1301(a) of the Law provides that decisions of the reviewing court shall contain findings and conclusions based on the evidence as a whole. 65 P.S. § 67.1301(a). This express duty of fact-finding is consistent with a standard similar to *de novo* review.

Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa.Cmwlt. 2010). Moreover, “[T]he Law commands that **the usual deferential standard of review on appeal from Commonwealth agencies, such as the OOR, does not apply.** *Id.*, at 619 (emphasis added).

(B) **Scope of Review**

The Commonwealth Court further held that:

“The Law designates the record on appeal before a court as the request for public records, the agency's response, the appeal, the hearing transcript, if any, and the final written determination of the appeals officer. 65 P.S. § 67.1303(b). The Law does not expressly restrain a court from reviewing other material, such as a stipulation of the parties, or an *in camera* review of the documents at issue.

* * *

“In light of the discussion above, we conclude that Section 1303 of the Law was not intended to restrict a reviewing court's scope of review. Rather, ... a court is entitled to the broadest scope of review. The language in Section 1303 of the Law was intended to describe the record to be certified by the OOR to a reviewing court.”

Id., at 820, 822 (citations omitted).

(C) **Argument**

In addition to the reasons and supporting citations set forth in the School District's “Respondent's Brief in Support of its Denial and in Opposition to Requester's Appeal,” and its February 22, 2023 Response, each incorporated herein by reference, and included in the OOR's May 26, 2023 “Certified Record,” the School District asserts as follows.

(1) **Respondents' OOR Appeal Was Deficient and Should Have Been Dimissed**

In regard to appeals to the OOR from an agency's response to a requester's RTKL request, Section 1101(a) of the RTKL provides, in pertinent part:

“The appeal shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record **and shall address any grounds stated by the agency for delaying or denying the request.**”

65 P.S. § 67.1101(a) (emphasis added). Accordingly, “[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency's stated reasons for denying a RTKL request.” See, *Dep't of Corrections v. Office of Open Records*, 18 A.3d 429, 434 (Pa.Cmwlt 2011). The Court held that a requester has the burden on appeal “to

identify flaws in an agency's decision denying a request." *Id.* (emphasis in original). The Court continued:

"Consequently we agree with [the agency] that when a party seeks to challenge an agency's refusal to release information by appealing to Open Records, that party **must address any grounds stated by the agency** for ... denying the request." This is a typical requirement in any process that aims to provide a forum for error correction. We do not see it as a particularly onerous requirement, whether the requester has the benefit of legal counsel or is *pro se*."

Id. (emphasis added). The case involved an OOR appeal by a requester who had sought certain medical records from the Department of Corrections ("DOC"). The DOC denied the request due to lack of specificity, stating: "Your request fails to identify or describe the records that you seek with sufficient specificity to enable the RTKL Office to ascertain which records that you seek. Consequently, your request is denied pursuant to 65 P.S. § 67.703." *Id.* RTKL Section 703 provides in relevant part: "A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested" *Id.*, at n.2. The requester's sole challenge to the DOC's denial of his request was stated as: "The above Pa. right to know requests are public." *Id.*, at 430.

The Court held that the requester's appeal failed to comply with Section 1101(a) of the RTKL. It concluded its opinion as follows:

"Here, Requester's written appeal to Open Records was clearly deficient. We agree with Open Records that it does have a certain amount of discretion on how to address and remedy a deficient appeal. In this case, however, Open Records simply ignored the deficiency and even failed to address DOC's demurrer in its final determination. Open Records, therefore, should not have proceeded, as it did, to decide Requester's appeal in its deficient form. We, therefore, are compelled to reverse Open Records' final determination in this case."

Id., at 434.

In the present case, Respondent expressed no challenge whatsoever to the School District's denial of her RTK request. As noted in Section I, above, she identified the "Records at Issue in this Appeal" as follows:

"Coatesville Area School District denied all 6 [sic] parts of the RTK request. They failed to provide any documents responsive to the request."

(Certified Record, **OOR Exhibit 1**, at February 22, 2023 OOR "Appeal Confirmation" email.)

Respondent made no effort to "address any grounds stated by the agency for ... denying the request." *Dep't of Corrections*, supra at 434. She failed to meet her burden "to identify flaws in [the School District's] decision denying [her] request." *Id.*

Several Commonwealth Court decisions make clear that a requester seeking to appeal an agency's denial of a RTKL request must satisfy **both requirements** set forth in Section 1101(a) of the RTKL. For example, in *Saunders v. Pa. Dep't of Corrections*, 48 A.3d 540, 542 (Pa.Cmwlth. 2012) the Court, relying upon *Dep't of Corrections v. Office of Open Records*, held that:

"Section 1101 of the RTKL, 65 P.S. § 67.1101, requires that a party appealing a denial shall "state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for ... denying the request."

The Court then added that:

"Once the Department asserted that the requested records were exempt from disclosure under Section 708, Petitioner was required by Section 1101 to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access. Petitioner failed to do so."

Id., at 542-543 (emphasis added) (cited and quoted with approval in *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa.Cmwlth. 2013). Also, in *Barnett v. Pa. Dep't of Pub. Welfare*, 71 A.3d 399 (Pa.Cmwlth. 2013) the Court applied *Dep't of Corrections* to find that a requester did satisfy both portions of Section 1101(a) of the RTKL. The Court began:

"The appeal shall state the grounds upon which the requester asserts that the record is a public record . . . and shall address any grounds stated by the agency for . . .

denying the request." *Id.* (emphasis added). In Department of Corrections, this Court examined "the clear and unambiguous language chosen by the General Assembly in Section 1101(a) of the RTKL" and held that it is "statutorily required that a requester specify in [an] appeal to [OOR] the particular defects in an agency's stated reasons for denying a RTKL request." Department of Corrections, 18 A.3d at 434."

Barnett at 403-404 (italics in original) (footnote omitted). The Court recited the requester's specifically articulated challenges to each one of the agency's denials of his four-item RTKL request. *Id.*, at 404-406. The Court then held that:

The OOR erred by summarily dismissing Requester's OOR Appeal on the basis that it did not address DPW's reasons for denying the Request. As shown by the foregoing recitation, Requester's OOR Appeal does address the reasons given by DPW in denying his RTKL Request, and includes his arguments as to why those reasons are flawed. Department of Corrections, 18 A.3d at 434. Although Requester does not discuss any specific subsections of Section 708(b) of the RTKL, this does not render the OOR Appeal deficient. Requester's statement in his OOR Appeal that the records are public records that 'do not qualify for any exemptions under [S]ection 708, are not protected by privilege, and are not exempted under any Federal or State law or regulation,' is sufficient under these circumstances."

Id., at 405-406. As noted in Section 1, above, the OOR Appeal Form in the present case includes the following pre-printed boilerplate statement:

"I requested the listed records from the Agency named above. By submitting this appeal, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific."

(Certified Record, **OOR Exhibit 1**, at February 22, 2023 OOR "Appeal Confirmation" email.)

Even assuming arguendo that this boilerplate statement serves as well as the requester's statement in *Barnett*, made in lieu of "discuss[ing] any specific subsections of Section 708(b) of the RTKL," Respondent Rosica nevertheless has failed to state any "arguments as to why [the School District's reasons for denial] are flawed." *Barnett* at 405-406. Accordingly, Respondent's OOR appeal was deficient and should have been denied entirely. Another illuminating case is *Keystone Nursing &*

Rehab of Reading, LLC v. Simmons-Ritchie, 222 A.3d 1226, (2020 Pa. Commw. Unpub. LEXIS 8 * (Pa.Cmwlt. 2020) (Memorandum Opinion), appeal denied, 263 A.3d 245 (Pa. 2021). In this case, the Court relied upon *Dep't of Corrections* to find that the requester's appeal was sufficient under Section 1101(a) of the RTKL. The Court stated as follows:

"Requesters' appeal met the requirements set forth in Section 1101(a)(1) of the RTKL. Section 1101(a)(1) provides that on appeal, a request must "state the grounds upon which the requester asserts that the record is a public record . . . and . . . address any grounds stated by the agency for delaying or denying the request." 65 P.S. § 67.1101(a)(1). The OOR concluded Requesters **satisfied the first part of Section 1101(a)(1)** by submitting the OOR's standard electronic appeal form, which states "the records do not qualify for any exemptions under [Section] 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation." The OOR further concluded Requesters satisfied **the second part of Section 1101(a)(1)** by "attach[ing] a written rationale to [the] appeal identifying each exemption invoked by the Department, [and] asserted [their] belief that the exemptions do not apply." Thus, the OOR found Requesters' appeal "sufficient under Section 1101(a) of the RTKL."

Id., at *7-*8 (internal record citations omitted) (emphases added). The Court continued:

"The standard electronic appeals form, **coupled with Requesters' written submission**, satisfy the requirements set forth in Section 1101(a)(1). In these submissions, Requesters asserted that the Withheld Records are not exempt from disclosure and set forth their rationale for believing that the asserted exemptions do not apply. Accordingly, we affirm the OOR's finding that Requesters satisfied the requirements of Section 1101(a)(1) because Requesters identified what they believe to be "flaws in an agency's decision denying a request." *Dep't of Corr.*, 18 A.3d at 434."

Id., at *15. (emphasis added). The Court has applied the same requirements to overrule an OOR Final Determination that an appeal was sufficient. In *ACLU of Pa. v. City of Pittsburgh*, 116 A.3d 1189, 2015 Pa. Commw. Unpub. LEXIS 382 * (Pa.Cmwlt. 2015) (Memorandum Opinion), appeal denied, 128 A.3d 1207 (Pa. 2015), the Court stated that:

"The ACLU argues that this Court's holding in Saunders is flawed because it requires requesting parties to do the impossible and articulate why records that are already presumed public should not be exempt, even when the agency's denial did not provide any substantive information and just listed exemptions contained in the Law. Essentially, the ACLU is asking this Court to overrule Saunders, which this Court will not do."

Id., at *14.

In light of Respondent Rosica's failure to "address any grounds stated by the agency for ... denying the request," as required by Section 1101(a) of the RTKL and controlling caselaw, the OOR erred in failing to find her appeal deficient and denying it in its entirety.

(2) The OOR Improperly Made Presumptions of Fact Not Based on the Record

The School District's Response included as a reason for its denials that the Request did not identify any "record" or "public record" of the School District and was insufficiently specific. (Certified Record, **OOR Exhibit 1**, at February 23, 2023 Response letter from Open Records Officer.) Citing relevant legal authority, the School District noted that the Requester did not meet her burden to identify any "transaction or activity" of the School District and that the information requested was "created, received, or retained in connection with the activity" of the School District. (*Id.*) In other words, her Request set forth no subject matter for her Request. To the contrary, Respondent requested various kinds of records that included the terms "People's Light Theater," "Alice in Wonderland," "mask" and "drag queen." (Certified Record, **OOR Exhibit 1**, at "Standard Right-to-Know Request Form.") In its Final Determination, the OOR noted that "Items A and B of the Request do not contain a subject matter but, instead contain a single keyword ["People's Light Theater"]". (*Id.*, at p.) It stated that "the District argues that ["People's Light Theater"] is not a transaction or activity of the District." (*Id.*, at p.9) It then stated that: "However, the District does not provide supporting evidence." (*Id.*) The OOR erred in making these findings because nowhere in its Response did the School District affirmatively state that "People's Light Theater" was "not a transaction or activity of the School District." Rather, the School District's Responses to Part A and Part B stated that the Request "does not identify any records or public records of the School District and is insufficiently specific and overly broad." (Certified Record, **OOR Exhibit 1**, at February 22,

2023 Response letter from Open Records Officer.) As stated above, the Response cited relevant legal authority that the Requester did not meet *her burden* to establish that the information she sought was a “public record.” The Response to both Part A and B of the Request stated that “To establish that sought-after information is a public record, **the requester must meet a two-part test**: (1) the information must document a transaction or activity of the agency, and (2) the information must be created, received, or retained in connection with the activity of the agency.” *Pa. Office of Atty. Gen. v. Philadelphia Inquirer*, 127 A.3d 57, 60-61 (Pa.Cmwlth 2015) (as cited in *Philadelphia Dist. Attorney’s Office v. Cwiek*, 169 A.3d 711, 717 (Pa.Cmwlth 2017) (emphasis added). As the Commonwealth Court also held in *Barkeyville Borough v. Stearns*, 35 A.3d 91, (Pa.Cmwlth. 2012):

“**The burden of proving that a requested piece of information is a “public record” lies with the requester.** 65 P.S. § 67.102, defines “public record,” in pertinent part, as “[a] *record* . . . of a Commonwealth or local agency.” (Emphasis added)

Id., at 94 (d emphasis added). The Court continued:

“‘Record’ is expressly defined in the RTKL, as follows:

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.* This definition contains two parts. First, the information must “document a transaction or activity of the agency.” Recently, this Court, in *Second Chance*, interpreted “documents” to mean “proves, supports [or] evidences.” *Second Chance*, 13 A.3d at 1034-35; *Bari*, 20 A.3d at 641. Second, the information must be “created, received, or retained” in connection with the activity of the agency.”

Id., at 95 (emphasis in original). Accordingly, the OOR erred in assigning the burden to the School District to “provide supporting evidence” that the Request’s Parts A and B did not document a transaction or activity of the School District. The OOR further erred in going outside the record to research “People’s Light Theater” and determining that it is a “non-profit theater located in Chester

County,” and then determining further that, “There is no evidence to show that this distinct keyword does not pertain to any District business or activity.” (Certified Record, **OOR Exhibit 10**, p. 9) In addition to erring by placing a burden on the School District to “provide supporting evidence” that the “People’s Light Theater” is “not a transaction or activity of the School District,” the OOR erred in advocating for Respondent Rosica who failed to meet her burden that what she ought was a “public record.” This is not the function of the OOR. As Justice Wecht stated in recounting the history of the RTKL in his concurring and dissenting opinion in *Uniontown Newspaper, Inc. v. Pa. Dep’t of Corrections*, 243 A.3d 19, 41-42 (Pa. 2020):

“With the adoption of the RTKL, the General Assembly removed the authority to review an agency’s response from the ‘agency head’ and instead created a **quasi-judicial administrative appeal mechanism, by which a neutral ‘appeals officer’** designated by the Office of Open Records (for Commonwealth and local agencies) ... reviews the underlying denial and “[i]ssue[s] a final determination on behalf of the Office of Open Records or other agency.” *Id.* §§ 67.1101(a)-(b), 1102(a)(4).” (emphasis added).

Accordingly, the OOR erred in determining that the keyword “People’s Light Theater” sufficiently documented an activity or transaction of the School district.

The foregoing applies as well to the OOR’s determination in regard to Part C of the Request that “[N]o evidence was provided by the District to show that the distinct keyword ‘People’s Light Theater’ does not indicate some business of the District.” (*Id.*, at p. 12) The OOR erred as well in determining that the keyword “‘Alice in Wonderland’ is a common work of literature and film **that could** relate to a variety of District activities.” (*Id.*) (emphasis added). In other words, it might, or might not, relate to some undefined activity of the School District, according to the OOR. The OOR erred in applying the same, by reference to its determinations as to Parts A, B and C, to Parts D and E of the Request.

IV. Conclusion.

For the reasons set forth above, as well as those set forth in the School District's RTKL Response and in its OOR Brief, the School District requests this Honorable Court issue an Order reversing the Final Determination of the OOR granting in part the Respondent's RTKL Request and upholding the School District's Response.

Date: October 19, 2023

Respectfully submitted:

Levin Legal Group, P.C.

/s/ James J. Musial
Michael I. Levin, Esquire
Attorney ID No. 21232
James J. Musial, Esquire
Attorney ID No. 71100
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

*Attorneys for Coatesville Area School
District*

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that I served the foregoing “BRIEF IN SUPPORT OF PETITION FOR REVIEW OF FINAL DETERMINATION OF THE PENNSYLVANIA OFFICE OF OPEN RECORDS” by first-class U.S. mail, postage prepaid, upon the following on the date indicated below.

Beth Ann Rosica
338 West Miner Street
West Chester, PA 19382

Commonwealth of Pennsylvania
Office of Open Records
Attn: Erika Similo, Appeals Officer
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Date: October 19, 2023

/s/ James Musial
*Attorney for Coatesville Area School
District*