IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis Roddy,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Office of the Governor,	:	No. 561 M.D. 2020
Respondent	:	Heard: November 24, 2020

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COHN JUBELIRER **Filed: December 15, 2020**

Dennis Roddy (Petitioner) has filed a Petition to Enforce Final Determination of Office of Open Records (Petition to Enforce) against the Pennsylvania Office of the Governor (Office). On November 24, 2020, this Court held a hearing via WebEx videoconferencing on the Petition to Enforce. A summary of the facts of this case are set forth below.

Petitioner submitted a request to the Office pursuant to the Right-to-Know Law (RTKL)[1] on February 28, 2020, seeking copies of emails sent by Julie Slomski (Slomski)[2] between March 1, 2015, and December 31, 2019. (Petitioner's Ex. P-1.) Specifically, Petitioner sought emails from Slomski containing the following terms: Logistics Plus, Berlin, Laughlin, Badhams, Erie Public Schools, Erie Schools, Fabrizi, Fabrizio, Aleksandrowicz, Casillo, Petrungar, John Hawkins,

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

[2] Slomski is a former official in Governor Tom Wolf's administration and was a candidate for Pennsylvania Senate District 49 in the November 3, 2020 General Election. Slomski lost the election.

and $14 million. After notifying Petitioner that additional time was needed to respond pursuant to Section 902(b)(2) of the RTKL, 65 P.S. § 67.902(b)(2), the Office denied Petitioner's request as insufficiently specific, and Petitioner filed an appeal with the Office of Open Records (OOR).

On July 28, 2020, the OOR issued a Final Determination finding the request was sufficiently specific, granting Petitioner's request, and ordering the Office to provide the Requested Records in 30 days, which was August 27, 2020. (Petitioner's Ex. P-3.) On August 27, 2020, the Office's open records officer Marc Eisenstein (Mr. Eisenstein) sent Petitioner a letter stating that the documents had been compiled, but that the files were too large to send via email and would be provided via the United States Postal Service. (Petitioner's Ex. P-4.) The Office stated in this letter that it may not produce some records and/or would be making redactions from the records listing a variety of reasons. In particular, the Office cited the following RTKL provisions: Section 102 of the RTKL, which excludes from the definition of "public record" a record that is, among other things, exempt from disclosure under Section 708 of the RTKL or protected by a privilege, 65 P.S. § 67.102; Section 708(b)(2), which exempts from disclosure records that, if disclosed, would jeopardize or threaten public safety or preparedness or public protection, 65 P.S. § 67.708(b)(2); Section 708(b)(6), which exempts from disclosure certain personal identification information, 65 P.S. § 67.708(b)(6); Section 708(b)(7), which exempts from disclosure certain records relating to an agency employee, 65 P.S. § 67.708(7); Section 708(b)(10), which exempts records from disclosure that would reflect "[t]he internal, predecisional deliberations of an agency," 65 P.S. § 67.708(b)(10); and Section 708(b)(28), which exempts from

disclosure records or information associated with the application for or receipt of social services, 65 P.S. § 67.708(b)(28).

On September 11, 2020, Petitioner sent a demand letter to the Office indicating that he would seek to enforce the Final Determination if the records were not provided by September 16, 2020. (Petitioner's Ex. P-5.) Petitioner further maintained that, having not previously asserted any exemptions, Office could not do so now. On the same day, Thomas Howell, Esq. (Howell) of the Governor's Office of General Counsel sent Petitioner an e-mail stating that the Office had "identified and retrieved approximately 3000 pages of public records responsive to [Petitioner's] request," and was not intending to appeal or withhold records. However, Howell, citing "a technological limitation," proposed to send the records via a FTP[3] site by the next week. (Petitioner's Ex. P-6.) Petitioner assented to this plan. On September 16, 2020, Howell emailed Petitioner's counsel stating that he hoped to forward a link to the FTP site later in the day and to begin populating the site with records shortly thereafter. (*Id.*) The Office also indicated that it would add the remainder of the records to the FTP site as they became available. In his Petition to Enforce, Petitioner alleges that, on September 21, 2020, the Office produced 249 pages of "heavily redacted" records. (Petition to Enforce ¶ 12.)

As no further records were produced after September 21, 2020, Petitioner filed the Petition to Enforce on October 6, 2020, which is the matter currently before the Court. Petitioner alleges that, although the Office has provided 249 pages of documents, approximately 3,000 pages of documents have been identified that the Office is required to disclose. Petitioner further asserts that, to the extent

[3] FTP stands for File Transfer Protocol.

the Office is now asserting exemptions to support the redactions, it cannot do so because the Office waived the exemptions by not raising them initially. Petitioner seeks an order from this Court compelling the Office to produce the remainder of the requested documents. In addition, Petitioner avers that the Office has acted in bad faith and, therefore, seeks an imposition of a civil penalty and attorney's fees in accordance with the RTKL.

The Office filed an Answer and New Matter on November 10, 2020. Therein, the Office denies that records were "heavily redacted" and states that the records initially provided included 249 pages, of which 38 pages contained redactions of substance. The remaining pages included only redactions of personal identification information (*e.g.*, email addresses and telephone numbers).[4] The Office also states that, as of November 10, 2020, it has produced 992 pages of records, with only minimal redactions (249 pages on September 21, 2020, 335 pages on October 15, 2020, 184 pages on October 23, 2020, and 224 pages on October 29, 2020). It denies that there was any waiver, maintaining it could not have known what exemptions or privileges would apply given that "the universe of potential documents [was] unknown" at the time of the Officer's initial response. (Answer and New Matter ¶ 19.) The Office further asserts that its delay in producing the requested documents was caused by its office being closed due to the COVID-19 pandemic, and "that a nearly unbounded request for records containing apparently unrelated keywords [required] significant time to review and

[4] This is an apparent recognition of the fact that "[t]he right to informational privacy is guaranteed by Article I, Section 1 of the Pennsylvania Constitution, and may not be violated unless outweighed by a public interest favoring disclosure." *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 157-58 (Pa. 2016). *See also City of Harrisburg v. Prince*, 219 A.3d 602, 605 (Pa. 2019).

produce." (*Id.* ¶ 24.) As New Matter, the Office challenges Petitioner's standing, the sufficiency of the claim, and this Court's jurisdiction.

In Joint Stipulations filed prior to the November 24, 2020 hearing, the parties state that "[s]ince the filing of the Petition [to Enforce], [the Office] has uploaded four other sets of responsive documents to the website: on October 15, 2020, October 23, 2020, October 29, 2020, and November 20, 2020[,]" and that "[i]n total, [the Office] has produced 1,216 pages of redacted records as of November 20, 2020." (Joint Stipulations ¶¶ 12-13.) At the hearing, Mr. Eisenstein testified that his search for records through "Relativity," which is the Office's eDiscovery software, indicated that there are approximately 3,900 pages of records that need to be produced.

Initially, the Court notes that questions have been raised regarding this Court's role in the enforcement process and the extent to which the Office can now seek to withhold or redact records sought by Petitioner based on asserted privileges or exemptions under the RTKL. This Court entered an order dated October 20, 2020, stating that this matter would be governed by Pennsylvania Rule of Appellate Procedure 3761, which was recently amended on October 17, 2020, to add subsection (b), which provides:

> **(b) Enforcement of Final Determinations of the Office of Open Records**.
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> (1) Petition. When a party to a proceeding before the Office of Open Records seeks to enforce a final determination regarding a record requested from a Commonwealth Agency, Legislative Agency, or Judicial Agency, it may initiate proceedings in the Commonwealth Court by filing a petition to enforce.
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> (2) Caption. The petition shall name as the petitioner the party seeking relief. The government unit alleged not to have complied with the final determination and all others who participated in the

proceedings before the Office of Open Records shall be named as respondents.

(3) Form. The petition shall be divided into consecutively numbered paragraphs. Each paragraph shall contain, as nearly as possible, a single allegation of fact or other statement.

(4) Content. The petition shall state the basis for the jurisdiction of the Court, identify the parties, state the date that the final determination was entered, state the material facts giving rise to the need for judicial review, and include a short statement of the relief sought.

(5) Final determination. A copy of the final determination sought to be enforced shall be attached to the petition as an exhibit.

(6) Verification. The petition shall be verified.

(7) Service. The petitioner shall serve the petition in the manner prescribed by the Pennsylvania Rules of Civil Procedure for service of original process and shall file the return or certificate of service prescribed by those rules.

(8) Hearing and Notice. Upon the filing of a petition to enforce, the Court will issue an order setting a date for a hearing and a date by which the respondent(s) must answer the petition. The petitioner shall serve the Court's order upon the respondent in the manner prescribed by Pa.R.A.P. 121 and 122.

(9) Discovery. Discovery shall be allowed only upon leave of court.

(10) Relief. Following the hearing, the Court will enter such orders as may be appropriate.

Pa.R.A.P. 3761(b). The Official *Note* to Pa.R.A.P. 3761 further provides that:

> Pa.R.A.P. 3761 implements *Pennsylvania Human Relations Commission v. School District of Philadelphia*, . . . 732 A.2d 578, 581 ([Pa.] 1999), in which the Court held that "just as enforcement proceedings are not originally commenced in Commonwealth Court, they are also in the appellate, rather than the original, jurisdiction of the court. It then follows that the rules of appellate procedure, rather

> than the rules of civil procedure, govern enforcement proceedings in Commonwealth Court." This analysis was confirmed in *Department of Environmental Protection v. Township of Cromwell*, . . . 32 A.3d 639 ([Pa.] 2012). Petitions for enforcement are not within any other provisions of the Rules of Appellate Procedure. Thus absent Pa.R.A.P. 3761, there would be no clear method of presenting enforcement actions to the Commonwealth Court.

Specifically with regard to Enforcement of Final Determinations of the Office of Open Records, the amended *Note* explains:

> Pa.R.A.P. 3761(b) provides the method for seeking compliance with a final determination of the Office of Open Records in the Commonwealth Court. This differs from proceeding in the courts of common pleas, where the method to obtain judicial review of alleged failure to comply with a final determination of the Office of Open Records may be an action in mandamus or other petition authorized by local rule. *Capinski v. Upper Pottsgrove Township*, 164 A.3d 601 (Pa. Cmwlth. 2017). Use of this petition is appropriate when the final determination **was not appealed**. If an appeal was taken and the order affirmed by the Commonwealth Court, enforcement is not of the final determination of the Office of Open Records, but rather of the order of the Commonwealth Court.
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> Because the petition in Pa.R.A.P. 3761(b) is similar to the petition for enforcement of a government unit's own orders described in Pa.R.A.P. 3761(a), both are deemed to be addressed to the appellate jurisdiction of the Commonwealth Court, and thus appealable to the Supreme Court only by filing a petition for allowance of appeal. *Township of Cromwell*, 32 A.3d at 649; *School District of Philadelphia*, 732 A.2d at 581.

(Emphasis added.)

The use of the Petition to Enforce is, therefore, appropriate as there is no dispute that the Office did not appeal the OOR's Final Determination. Because it was not appealed, the validity of the final determination may not be collaterally challenged during an enforcement proceeding. *See Interstate Traveller Servs., Inc.*

v. Dep't of Env't Res., 406 A.2d 1020 (Pa. 1979) (per curiam); *Dep't of Env't Res. v. Wheeling-Pittsburgh Steel Corp*., 375 A.2d 320, 324-25 (Pa. 1977) (where no appeal taken, party is precluded from attacking the validity or content of either the order or the underlying regulations in an enforcement proceeding) (citation omitted).

While the Office did claim in its New Matter that Petitioner lacks standing to bring this Petition to Enforce, fails to state a claim upon which relief may be granted, and that this Court lacks jurisdiction over this matter, during the hearing, the Office appeared to withdraw these arguments. We note that the amendments to Pa.R.A.P. 3761 just clarified the well-settled principle that, "[a]s a party to the underlying proceeding, [a requester] may seek enforcement of the OOR's Disclosure Order through a petition to enforce. *See, e.g., Dep't of Aging v. Lindberg*, . . . 469 A.2d 1012 (Pa. 1983) (a party other than issuing agency may seek enforcement of agency's order)." *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr*., 151 A.3d 1196, 1203 (Pa. Cmwlth. 2016). Additionally, "[a]n appellate court may grant relief in order to enforce [the] OOR's final determinations. *See, e.g., Wishnefsky v. Dep't of Corr*., . . . (Pa. Cmwlth., No. 582 M.D. 2014, filed July 8, 2015) (permitting relief in the nature of mandamus); *Crockett v. Se. Pa. Transp. Auth*., . . . (Pa. Cmwlth., No. 2295 C.D. 2011, filed Sept[.] 11, 2012) (same)." *Uniontown Newspapers*, 151 A.3d at 1203.

Turning to the merits of the Petition to Enforce, this Court recognizes that the COVID-19 pandemic has made responding to open records requests more difficult, and further that there appear to be a large number of records that need to be produced in this case. Nevertheless, Petitioner first submitted his records request in February of 2020, and it is now December of 2020, and all the records

have not yet been produced. Further, it appears that the Office did not begin to produce larger volumes of the requested records until after Petitioner filed the Petition to Enforce. Additionally, the records that the Office has produced contain redactions without providing the basis for the redactions.

With regard to whether the Office can now make substantive redactions to the records, Petitioner argues that, having failed to appeal the order of the OOR or previously raise any exemptions or privileges, the Office cannot now raise any legal arguments that the records or portions of the records are exempt from disclosure under the RTKL. In support of his position, Petitioner cites to *Department of Environmental Protection v. Legere*, 50 A.3d 260 (Pa. Cmwlth. 2012). In *Legere*, the Department of Environmental Protection (DEP) had appealed to this Court the final determination of the OOR. DEP had denied a records request, in part, on the basis that the request was not sufficiently specific; the OOR disagreed. The OOR found that the request was sufficiently specific and that DEP had not provided sufficient evidentiary support for its general assertions that any records that would be produced would be subject to exemptions under Section 708(b). DEP argued on appeal to this Court that it was not possible to discern reasons for denying access to the records and to provide evidence in support thereof without reviewing each of the particular records at issue, which it had not done. As such, DEP claimed that it should still be able to assert the exemptions to particular records if they apply. In rejecting this argument, this Court stated that:

> As noted by the OOR in its final determination, DEP ha[d] direct knowledge of the information contained in the Section 208 determination letters and related orders. No evidence was offered to support the application of the exemptions under the RTKL. It should be noted that had DEP undertaken the search that it was required to

> perform to meet its obligations under the RTKL, it would have located the required records and would have been able to discern any applicable exemptions related to the specific records located at that time. We will not reward DEP's failure to timely adhere to the RTKL by granting it yet another opportunity to impede access to the records.

Legere, 50 A.3d at 267. Petitioner argues that, here, if the Office had timely located the required records, it could have asserted privileges and exemptions before the OOR and sought to exempt certain records from disclosure. Having failed to do so, Petitioner argues that, like DEP in *Legere*, the Office cannot now assert any privilege over the documents requested by Petitioner.

In his Answer to New Matter, Petitioner also cites *Pennsylvania Department of Education v. Bagwell*, 131 A.3d 638 (Pa. Cmwlth. 2016). In *Bagwell*, the Department of Education (DOE) and the Pennsylvania State University (Penn State) petitioned for review of a final determination of the OOR directing the release of records without privilege-based exemptions or redactions, which DOE had not established a right to take through an affidavit presented to the OOR. On appeal, the Court rejected DOE's attempt to issue an "interim response," demanding prepayment of the copying fees that reserved the right to assert privileges in the future. In doing so, this Court held that DOE "was not permitted to reserve its reasons for withholding or redacting records to a future response outside the 30-day extension period." *Id*. at 654. This Court explained that "[t]his Court consistently **requires** agencies to raise and defend **all** applicable exemptions before the initial fact-finder . . . . or **lose that opportunity**." *Id*. at 655 (citing *Legere*, 50 A.3d at 267) (emphasis added).[5] Nonetheless, the Court was clear that

[5] Petitioner inadvertently attributes this quote to *Pennsylvania Department of Education v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Cmwlth. 2015). (Petitioner's Answer to New Matter at 2.)

DOE's waiver did not impact the right of Penn State, as a third party, to challenge the release of the record, stating "[i]t is now well-established that agencies are not permitted to waive a third party's interest in protecting the records." *Id.* at 650.

In support of its claim that it can assert applicable exemptions and privileges under the RTKL, the Office takes the position that a request for thousands of pages of documents containing particular words is substantively inapposite to a request for specifically identified forms, which was the case in *Legere*. The Office denies that "an Agency's response constitutes a 'waiver' of privileges or exemptions, particularly where the universe of potential documents is unknown and cannot be substantively determined at the time of such response." (Answer and New Matter ¶ 17.)

In both *Legere* and *Bagwell*, the agencies were not permitted to raise privileges or exemptions that had not been raised before the initial fact-finder. While *Legere* and *Bagwell* involved appeals of final decisions of the OOR challenging the merits of the OOR's decisions, the Office here did not appeal the decision of the OOR. That does not alter the application of this principle for the following reasons. Given the **limited scope** of enforcement proceedings, this Court must enforce the **unappealed** OOR Final Determination, which did not provide for any redactions of the Requested Records. It is only through an appeal of an OOR final determination to this Court that a party can litigate the merits of the determination, including any redactions and privileges **presented to the OOR**. Moreover, this principle applies even when an agency **asserts** that a request is insufficiently specific, if that assertion is not credited, or that the response involves large volumes of materials. In such cases, this Court has explained that an agency's inability to ascertain what exemptions or privileges may apply, did not

excuse the agency from its obligation to produce the records. *Pennsylvania State Sys. of Higher Educ. v. Ass'n of State College and Univ. Faculties*, 142 A.3d 1023, 1031 (Pa. Cmwlth. 2016) (*APSCUF*), *petition for allowance of appeal denied*, 166 A.3d 1218 (Pa. 2017). There, the Court concluded that an agency in such circumstances should not be "foreclosed from carrying out its statutory duty to determine whether exemptions apply when it is incapable of reviewing the requested documents within the time-period it is given." *Id.* Thus, in *APSCUF*, the Court held that when an agency claims not to be able to review documents in order to ascertain what, if any, exemptions or privileges could apply, the agency is "to provide the OOR with a valid estimate of the number of documents being requested, the length of time . . . require[d] to conduct this review, and if the request involves documents in electronic format[,] the agency must explain any difficulties it faces when attempting to deliver the documents in that format." *Id.* at 1032. With this information, "the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply." *Id.* Having concluded that the request in *APSCUF* had been sufficiently specific, the Court vacated and remanded the matter for the OOR, which had previously rejected the agency's asserted exemptions as being unsupported, "to make determinations in accordance with th[e Court's] opinion." *Id.* Unlike in *APSCUF*, the Office did not make any assertion of exemption or privilege before OOR or otherwise seek to utilize the process described in *APSCUF* before the OOR.[6] Accordingly, the Office's after-the-fact assertion of exemptions or privileges in contravention of a final determination of the OOR is impermissible.

[6] The fact that it only took 30 days after the OOR's Final Decision for the Office to identify and compile the Requested Records, and identify the types of privileges and/or

Nonetheless, this Court recognizes the important privacy rights implicated by the disclosure of the personal and private information of third parties, which is a concern also acknowledged by both parties during the hearing in this matter. In *Pennsylvania State Education Association v. Department of Community and Economic Development*, 148 A.3d 142, 158 (Pa. 2016) (*PSEA*), the Supreme Court reaffirmed its longstanding holding that "[t]he right to informational privacy is guaranteed by Article 1, Section 1 of the Pennsylvania Constitution, and may not be violated unless outweighed by a public interest favoring disclosure." In *Easton Area School District v. Miller*, 232 A.3d 716, 733 (Pa. 2020), the Supreme Court explained that, pursuant to its holding in *PSEA* and its progeny:

> [t]hird parties whose personal information is contained within a public record must be afforded notice and an opportunity to be heard in a record request proceeding. [*City of Harrisburg v. Prince*, 219 A.3d 602, 619 (Pa. 2019)]. Before the government may release personal information, it must conduct a balancing test to determine whether the right of informational privacy outweighs the public's interest in dissemination. *PSEA*, 148 A.3d at 144. It is the obligation of the agency disseminating the requested record to perform the balancing test, unless legislative pronouncements or prior decisions of Pennsylvania courts have already done so. [*Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017)]; *Prince*, 219 A.3d at 619. Pursuant to a PSEA balancing test, constitutional considerations may necessitate redaction of personal information not otherwise permissible under the RTKL. *Reese*, 173 A.3d at 1159.

The Supreme Court further noted that "this constitutional balancing test is a common law principle and not a statutory requirement, but is frequently implicated within RTKL record requests and litigation" and "subsequent to *PSEA*, [an] agency

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exemptions that could comply, shows that it could have been possible for the Office to have followed the *APSCUF* process before the OOR.

responsible for disseminating a public record should perform the balancing test, though the test may also be subsumed within a legislative pronouncement or decision of court." *Id.*[7]

Petitioner does not object to redactions based on the privacy rights of third parties. We, therefore, grant the Petition to Enforce in part as follows. The Office is directed to upload to the FTP site the Requested Records with redactions only for the personal private information of third parties, as protected by *PSEA*, and provide Petitioner an exemption log identifying the bases for these redactions within 30 days of this Court's Order. Following the uploading of all of the Requested Records to the FTP site as directed above, Petitioner shall have 20 days to review the Requested Records and exemption logs and advise the Office of any objection to the redactions taken. The parties are directed to make a good faith effort to resolve any disputes that may arise and shall file a joint status report with the Court no later than February 16, 2021. Until this process is completed, the Court is unable to make a determination as to whether the imposition of a civil

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[7] The General Assembly codified some informational privacy rights into the RTKL, exempting from disclosure, in relevant part,

> [t]he following personal identification information:
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> (A) A record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number[s].
>
> (B) A spouse's name, marital status or beneficiary or dependent information.
>
> (C) The home address of a law enforcement officer or judge.

65 P.S. § 67.708(b)(6)(i)(A-C). That being said, "constitutionally protected privacy interests must be respected even if no provision of the RTKL speaks to protection of those interests." *PSEA*, 148 A.3d at 156.

penalty and/or attorney's fees would be appropriate, and, therefore, the Petition for Enforcement's request for such relief is denied without prejudice to be reasserted at a later time, if necessary.

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RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis Roddy, Petitioner	:	
v.	:	
Pennsylvania Office of the Governor, Respondent	:	No. 561 M.D. 2020

O R D E R

AND NOW, this 15th day of December, 2020, upon consideration of the Petition to Enforce Final Determination of Office of Open Records (Petition to Enforce) filed by Petitioner Dennis Roddy, the response by Respondent Office of the Governor, and the hearing held on November 24, 2020, the Petition to Enforce is **GRANTED IN PART** and **DENIED IN PART** in accordance with the foregoing opinion.

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RENÉE COHN JUBELIRER, Judge

Order Exit
12/15/2020