

**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

IN RE APPEAL OF	:	
THE PHILADELPHIA DISTRICT	:	COMMONWEALTH COURT
ATTORNEY'S OFFICE	:	2627 CD 2015
	:	2641 CD 2015
FROM THE DECISION OF THE	:	
OFFICE OF OPEN RECORDS	:	COURT OF COMMON PLEAS
TO GRANT, IN PART, THE REQUEST	:	CASE NO. 150201556
OF RYAN BAGWELL	:	

OPINION

CARPENTER, J.

MARCH 31, 2016

The Philadelphia District Attorney's Office ("District Attorney") appeals this Court's October 27, 2015 Order affirming the decision of the Office of Open Records ("OOR") as well as this Court's December 2, 2015 Order granting Ryan Bagwell's ("Bagwell") request for issuance of a civil penalty.¹ For the reasons that follow, the Commonwealth Court should affirm.

Philadelphia District Attorney'S Office Vs B-OPFLD



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PROCEDURAL HISTORY

On October 2, 2014, Bagwell requested the following documents from the District Attorney under the Right to Know Law ("RTKL")²:

1. All record retention policies followed by the [District Attorney] between January 2013 and October 1, 2014;

¹ This set of appeals to the Commonwealth Court is closely related to a subsequent set of appeals by the District Attorney and the City docketed at 435 CD 2016 and 473 CD 2016.

² 65 P.S. § 67.101 et seq.

2. All policies and procedures pertaining to the backup and archiving of the [District Attorney's] e-mail servers that were in effect between July 1, 2013 and October 1, 2014;
3. All policies governing employee use of the [District Attorney's] computers and e-mail systems between July 1, 2013 and October 1, 2014;
4. All e-mails BJ Graham Rubin and Frank Fina exchanged with each other between July 1, 2013 and November 30, 2013 pertaining to my RTKL request that was received by the [District Attorney's] Open Records Officer on July 22, 2013;
5. All e-mails BJ Graham Rubin and Seth Williams exchanged with each other between July 1, 2013 and November 30, 2013 pertaining to my RTKL request that was received by the [District Attorney's] Open Records Officer on July 22, 2013;
6. All e-mails, memos and letters exchanged by the [District Attorney] and the City of Philadelphia's Office of Innovation and Technology between July 1, 2013 and October 1, 2014 regarding Mr. Fina's correspondence with Judge Barry Feudale;
7. All e-mails, memos and letters exchanged by the [District Attorney] and the City of Philadelphia's Office of Innovation and Technology between July 1, 2013 and October 1, 2014 pertaining to searching for e-mails on the city's e-mail servers and/or backup copies of the city's e-mail servers;
8. All e-mails, letters and memos pertaining to the [District Attorney's] transition from Lotus Notes e-mail platform to the Microsoft Exchange e-mail platform between January 1, 2013 and December 31, 2013;
9. All e-mails sent or received by Seth Williams between January 1, 2014 and October 1, 2014 pertaining to RTKL legislation in the Pennsylvania General Assembly, including but not limited to, Senate Bill 444.

On November 10, 2014, the District Attorney responded and denied the entire request, for varying reasons, discussed more fully below. On November 12, 2014, Bagwell filed a timely appeal with the OOR. After reviewing the submissions and arguments of both parties, the OOR determined that the District Attorney was required to provide "all records responsive to Items 1, 2, 6, 7 and 8 of the Request within thirty days." The OOR further determined that records responsive to the requests numbered 4, 5, and 9 were not the District Attorney's possession.

Following the OOR's decision, the District Attorney filed a timely Petition for Review to this Court, pursuant to Section 1302 of the RTKL. This Court issued a

Scheduling Order and conducted a hearing on September 11, 2015, wherein the parties were given an opportunity to present argument and evidence with regard to the instant open records requests. This Court held the matter under advisement and, on October 27, 2015, affirmed the decision of the OOR, addressing each of the requests separately. Additionally, in consideration of Bagwell's request for fees, costs, and penalties, pursuant to Sections 1304-1305 of the RTKL, this Court issued a Rule for December 1, 2015. On December 1, 2015, this Court conducted a hearing and found that the District Attorney's denial of Request #1 and Request #2 was in bad faith and consequently issued a \$500 civil penalty. On November 17, 2015 and December 7, 2015, respectively the District Attorney filed a timely Notice of Appeal to the Commonwealth Court of this Court's October 27, 2015 Order and December 2, 2015 Order.

DISCUSSION

Affirmance of the decision of the OOR

Request #1

In his first request, Bagwell requested all record retention policies followed by the District Attorney between January 2013 and October 1, 2014. The District Attorney denied this request on October 7, 2014, stating "as you are aware the [requests] are subject of independent litigation regarding motions you served on the DAO to compel Answers to Interrogatories which the Honorable Idee C. Fox denied on September 26, 2014....the RTKL was not intended to provide for disclosure of materials based on a plain attempt to circumvent a judge's discovery order." The OOR ordered production of the documents, correctly stating that the denial improperly refused disclosure because

the sole basis of the denial was based on the record's assumed intended use. This Court has conducted an independent review of all materials submitted, has heard argument, and has reviewed the submissions of Bagwell, the OOR, and the District Attorney and has found no error in the OOR's determination.

The District Attorney has asked this Court to review the OOR's decision for essentially the same reasons it submitted to the OOR, reciting an irrelevant history and factual context regarding Bagwell's request,³ and baldly arguing that this area of the law is "unsettled" even though, at the time of the request, the plain language of the statute reveals that the intended use of the document *shall not* be relevant to the determination of whether the items are public records subject to disclosure.⁴ Further, two *published* Commonwealth Court decisions specifically address the issue raised: *City of Allentown v. Brennan*, 52 A.3d 451 (Pa. Commw. Ct. 2012) and *Chester Cmty. Charter Sch. v. Hardy*, 38 A.3d 1079 (Pa. Commw. Ct. 2012). *See also, Playboy Enterprises v. Department of Justice*, 677 F.2d 931 (D.C. Cir. 1991).⁵

This Court takes issue with the District Attorney's implication in its brief that the holding of *Chester Community Charter School* is not precedential because it was reversed and remanded on other grounds. It is clear from the Supreme Court's Order remanding the matter back to the Commonwealth Court that the remand by the

³ Such factual context might only be relevant if there were some specific statutory exemption at issue, which there is not.

⁴ See 65 P.S. § 67.302(b).

⁵ In *Playboy Enterprises*, the Court held "We reject the argument that because the government's claim of privilege with respect to the Rowe Report had been sustained in discovery proceedings in other cases the District Court ought to have given "controlling weight" to those determinations. The short answer to the Department's contention is that the issues in discovery proceedings and the issues in the context of a FOIA action are quite different. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA."

Supreme Court was limited only to the issue that had been accepted on allocator. The Supreme Court held as follows:

AND NOW, this 28th day of August, 2013, the Petition for Allowance of Appeal is **GRANTED, LIMITED** to the following issue as framed by Petitioner: Does the Right-to-Know Law preclude a local agency from arguing on appeal to the Office of Open Records and to subsequent courts the bases for denying access to a requested record that were not specifically cited in the agency's initial denial of the request for access? The Commonwealth Court's decision is **VACATED** and the matter is **REMANDED** for reconsideration in light of *Levy v. Senate of Pennsylvania*, — Pa. —, 65 A.3d 361 (2013); see *Chester Cnty. Charter Sch. v. Hardy*, 38 A.3d 1079, 1087 (Pa.Cmwth.2012) (“Some of the records sought by Requester may reach beyond the governmental function performed by Management, but Charter School failed to so specify them in its written March 9, 2009, response.”), without prejudice to Petitioner's ability to raise its other issues in a timely request for discretionary review following the Commonwealth Court's disposition on remand

As of the date of this Opinion, this Court is unaware if any allocator has been accepted to address the relevant issue here and, accordingly, the Commonwealth Court's holding with regard to records subject to a separate discovery order vis-à-vis a RTKL request remains binding.

The District Attorney further argues that the records should not be disclosed based upon a footnote from the case of *Department of Health v. Office of Open Record*, 4 A.3d 803 (Pa. Commw. Ct. 2010), a case that *predates* both of the published Commonwealth Court cases that are directly on point and is factually inapposite to the instant matter.⁶

⁶ Specifically, at issue in the Department of Health regulations was the interpretation of a special exemption in Section 708(b)(17).

Request #2

In his second request, Bagwell requested all policies and procedures pertaining to the backup and archiving of the District Attorney's e-mail servers that were in effect between July 1, 2013 and October 1, 2014. The District Attorney denied this request for the same reasons as with Request #1 and the OOR ordered production of the documents under the same analysis as provided above. The District Attorney has asked this Court to review this decision for reasons identical to Request #1. Again, this Court has conducted an independent review and has found no error in the OOR's determination.

Requests #3-6

The parties have reached agreement with regards to Requests #3-6 and, thus, this Court will not review the OOR's decision with regard to these requests.

Request #7

In his seventh request, Bagwell requested all e-mails, memos and letters exchanged by the District Attorney and the City of Philadelphia's Office of Innovation and Technology between July 1, 2013 and October 1, 2014 pertaining to searching for e-mails on the city's e-mail servers and/or backup copies of the city's e-mail servers. The District Attorney denied this request, stating that it was "impossible" for the DA to determine whether the records could be provided because of the breadth of the request." The OOR ordered production of the documents, having found that the documents were sufficiently specific pursuant to the RTKL and reported case law,

including the factors set forth in *Mollick v. Township*, 32 A.3d 859 (Pa. Commw. Ct. 2011) and *Askew v. Pennsylvania Office of Governor*, 65 A.3d 989 (Pa. Commw. Ct. 2013).

The District Attorney has asked this Court to review the OOR's decision because it claims that the request is not specific enough because it seeks "years" worth of technology related correspondence. This Court has independently reviewed the request and found no error in the OOR's determination. The request meets the definition of a record pursuant to Section 102 of the RTKL and in accordance with Section 703, the request identifies and describes the records sought with sufficient specificity to enable the agency to ascertain which records are being requested. The universe of documents exchanged between the District Attorney and the City's Office of Innovation and Technology over 15 months relating to the topic of searching for emails or backup copies is specific enough for the District Attorney to respond in accordance with the RTKL.

Request #8

In his eighth request, Bagwell requested all e-mails, letters, and memos pertaining to the District Attorney's transition from the Lotus Notes e-mail platform to the Microsoft Exchange e-mail platform between January 1, 2013 and December 31, 2013. The District Attorney denied this request, again, because it was not specific enough. The OOR ordered production of the documents based upon the analysis set forth with regard to Request #7. The District Attorney has asked this Court to review this decision, again, because it argues that the request is not specific enough. This Court

has conducted an independent review and has found no error in the OOR's determination. The universe of documents pertaining to a transition from Lotus Notes to Microsoft Exchange over a one year period is specific enough for the District Attorney to respond in accordance with the RTKL.

Request #9

In his ninth request, Bagwell requested all e-mails sent or received by Seth Williams between January 1, 2014 and October 1, 2014 pertaining to RTKL legislation in the Pennsylvania General Assembly, including but not limited to, Senate Bill 444. The OOR determined that the DA had established that there were no responsive documents in the District Attorney's possession. This finding will not be disturbed and does not appear to be at issue in the instant Petition for Review.

Issuance of the civil penalty

The awarding of court costs and attorney fees and the issuance of civil penalties are governed by Sections 1304 and 1305 of the RTKL. Specifically, Section 1305(a) provides that "[a] court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith" and Subsection (b) provides that "[a]n agency or public official who does not promptly comply with a court order under this act is subject to a civil penalty of not more than \$500 per day until the public records are provided."⁷

⁷ 65 P.S. § 67.1305.

In assessing whether the District Attorney had acted in bad faith, this Court looked to the precedent set forth by the Commonwealth Court holdings in *City of Allentown v. Brenan*⁸ and *Chester Cmty. Charter Sch. v. Hardy*⁹. In *City of Allentown*, the Commonwealth Court cited to Section 305 of the RTKL, stating “[a] record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record,’ but that the presumption does not apply if ‘(1) the record is exempt under section 708 of the RTKL; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.’”¹⁰ In contemplating the purpose of the RTKL, however, the Court constrained the breadth of such disclosure exceptions by averring that they must be “narrowly construed.”¹¹ Further, the Court held that in denying a request, an agency is required to “include the specific reason for the denial and that an agency cannot assert, nor can a court consider, a different reason on appeal.”¹² Moreover, in *Chester Cmty. Charter Sch.*, the Court ruled that, pursuant to Section 302(b) of the RTKL, “a requester’s motive under the Right-to-Know Law has been made irrelevant by the legislature.”¹³ Section 302(b) specifically states that “[a] local agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.”¹⁴ As such, all entities within the purview of

⁸ 52 A.3d 451 (Pa. Commw. Ct. 2012).

⁹ 38 A.3d 1079 (Pa. Commw. Ct. 2012).

¹⁰ *City of Allentown v. Brenan*, 52 A.3d 451, 454 (Pa. Commw. Ct. 2012).

¹¹ *Id.*

¹² *Id.* at 455; see also 65 P.S. § 67.903(2).

¹³ *Chester Cmty. Charter Sch. v. Hardy*, 38 A.3d 1079, 1089 (Pa. Commw. Ct. 2012).

¹⁴ 65 P.S. § 67.302(b).

the RTKL are “bound by the directives of the legislature [. . .] and whether those directives are fair or wise is beyond the court's proper field of inquiry.”¹⁵

In the instant matter, the District Attorney denied Bagwell's Requests# 1-3 “because they relate to litigation involving the [District Attorney] and [Bagwell], specifically a judicial order denying [Bagwell's] motion to compel discovery requests.”¹⁶ The OOR determined that such denial was improper, pursuant to the provisions of the RTKL and the precedent set forth in *City of Allentown and Chester Cmty. Charter Sch*, and found that the records were subject to disclosure. Specifically, the OOR stated that

the fact that [Bagwell] and the [District Attorney] are litigants and there is a court order denying a motion to compel discovery does not prohibit [Bagwell] from seeking access to the records through the RTKL nor does the judicial order make the records non-public.¹⁷

Accordingly, the District Attorney was required to provide “all records responsive to Items 1, 2, 6, 7 and 8 of the Request within thirty days.”¹⁸ Upon presenting the Petition for Review to this Court, the District Attorney still had not provided the records required by the OOR and this Court found such continued non-disclosure to be an act of bad faith, as it was in contravention of the OOR determination as well as the existing precedent of the courts of this Commonwealth. As such, this Court properly imposed a \$500 civil penalty, pursuant to Section 1305(a) of the RTKL.

¹⁵ *Chester Cmty. Charter Sch. v. Hardy*, 38 A.3d 1079, 1089 (Pa. Commw. Ct. 2012).

¹⁶ See January 12, 2015 OOR Final Determination Letter at Page 2.


¹⁷ See January 12, 2015 OOR Final Determination Letter at Page 9.

¹⁸ See January 12, 2015 OOR Final Determination Letter at Page 13.

CONCLUSION

For the reasons set forth in this Opinion, the Commonwealth Court should affirm this Court's Order affirming the decision of the OOR as well as this Court's Order granting Bagwell's request for issuance of a civil penalty

BY THE COURT:



Carpenter, J.