**COURT OF COMMON PLEAS**
**PHILADELPHIA COUNTY**
**CIVIL TRIAL DIVISION**

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| **PHILADELPHIA DISTRICT ATTORNEY'S OFFICE** | : | |
| **v.** | : | **No.** 170802099 |
| **NOLEN** | : | |

**ORDER**

AND NOW, this 26th day of January 2018, upon consideration of the appeal of the Philadelphia District Attorney's Office to the July 24, 2017 Final Determination of the Pennsylvania Office of Open Records, and after briefing and argument, it is hereby ORDERED that the appeal is DENIED.

The District Attorney's Office ("DAO") is directed to ask the First Judicial District to provide it with a current copy of the requested documents. The DAO further is to perform a good-faith effort to determine whether the requested documents are in the possession of the City, in which case the DAO shall direct the requestor to the appropriate person there in conformity with 65 P.S. § 67.502(b)(1) (2008). The DAO shall take these actions within 30 days of the docketing of this order.

BY THE COURT:

Asse F. E

J.

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## OPINION

This Right to Know Law ("RTKL") appeal presents the novel issue whether a governmental agency that signed a written contract with other public entities is required to obtain a copy of the agreement if it does not actually possess it at the time of the request. The Pennsylvania Office of Open Records ("OOR") answered this question in the affirmative, and required the Philadelphia District Attorney's Office ("DAO") to provide copies of current agreements related to the Preliminary Arraignment Reporting System ("PARS") to the requester, Austin Nolen. This Court affirms the decision of the OOR. For the reasons discussed below, the Court holds that the DAO constructively possesses the requested documents and must provide responsive records within 30 days of the docketing of this opinion.

## FACTS

On March 18, 2017, requestor-appellee Austin Nolen filed a request with the DAO, pursuant to the Pennsylvania RTKL, 65 P.S. 66.101, *et seq.*, seeking:

I. The current agreement between the Philadelphia Police Department, Municipal Court, District Attorney's Office and other partners governing the Preliminary Arraignment Reporting System (PARS).
II. The current agreement governing access by Immigration and Customs Enforcement to PARS.

Standard Right-to-Know Request Form ("Request"), Reproduced Record ("RR") at 25.

PARS is an information technology system used to transmit information from arrest through arraignment among the City of Philadelphia Police Department, the DAO and the Municipal Court of the First Judicial District ("FJD"). Attestation by Opens Record Officer Douglas Weck ("Weck Attestation"), RR at 47:¶5. City police use the system to transmit information about a criminal arrest to the DAO for a charging decision. *Id.* The DAO uses the system to file charges in Municipal Court, triggering the scheduling of a preliminary arraignment. *Id.* At the preliminary arraignment, bail is set and recorded in PARS. *Id.* The Common Pleas Court's electronic case management system extracts data from PARS, allowing criminal cases to proceed in the trial court. *Id.*

On May 17, 2017, the DAO responded to the Request, stating that, after a good-faith search, it had determined that it had no responsive records in its possession, custody or control. RR at 27. Nonetheless, "as a courtesy," the DAO provided Mr. Nolen with a copy of a PARS Extension of End-User License Agreement among the City, FJD, DAO and the United States Department of Homeland Security Immigration and Customs Enforcement ("ICE").[1] RR at 27, 29-35. The DAO further advised Mr. Nolen of its understanding that the originals of "agreements governing partners to PARS are maintained by Deputy Court Administrator Kevin Cross" of the FJD. *Id.* at 28. The DAO accordingly redirected Mr. Nolen to the FJD "to inquire about access to those documents." *Id.* The response was silent regarding whether the DAO had investigated if the City retained a copy of the requested documents.

Mr. Nolen sought reconsideration of the DAO's determination. On May 19, 2017, the DAO denied the request for reconsideration. While the DAO admitted it had the ability to

[1] The agreement that was produced was sent by fax from Hon. Marsha Neifield, the President Judge of Municipal Court on February 25, 2011. RR at 29-35.

"make a courtesy request of the records from the First Judicial District," the DAO's Open Records Officer stated that he lacked any power to "impose an obligation on them to turn records over to" the DAO. "Therefore," he concluded, "I do not have effective control over them." *Id.* at 37.

There is no evidence of record that the DAO asked the FJD for a copy of documents responsive to the Request, which include a contract to which the DAO is a party. Nor is there evidence that the DAO asked the Police Department, another of the signatories to the requested agreement, for a copy. *See* Weck Attestation, RR at 47-49, and Letter from Weck to City Open Records Officer, RR at 53 (stating only that the City's PARS Technical Lead does not have a copy "of any current agreements as best as I [Weck] have been able to tell.")

Mr. Nolen timely appealed to the OOR. *Id.* at 16-22. On May 30, 2017, the DAO notified the City and the FJD of the pendency of the appeal before the OOR. *Id.* at 51-54. Neither chose to intervene in the matter.

On July 24, 2017, the OOR issued its Final Determination. *Id.* at 71-80. The OOR held that the DAO constructively possessed the requested documents and must provide copies of them to Mr. Nolen. *Id.* at 76, 79.

The DAO appealed to this Court on August 22, 2017. After briefing, the Court heard argument on January 18, 2018.

## DISCUSSION

### A. Standard and Scope of Review

The standard of review in appeals to the Court of Common Pleas from final OOR determinations is *de novo*; the scope of review is plenary. *Bowling v. Office of Open Records,* 75 A.3d 453, 476-77 (Pa. 2013).

## B. The OOR Correctly Determined that the DAO Constructively Possesses The Requested Documents

### 1. *Existence of Responsive Documents*

The objective of the RTKL "is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel,* 45 A.3d 1029, 1041 (Pa. 2012). The RTKL presumes records in an agency's possession are "public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific enumerated exceptions or are privileged." *Bowling*, 75 A.3d at 457 (*citing* 65 P.S. §§ 67.305(a), 67.701(a), 67.708(b)).

An agency evaluating an RTKL request must first determine whether the requested records exist. *Dental Benefits Providers, Inc. v. Eiseman,* 86 A.3d 932, 936 (Pa. Cmwlth. Ct. 2014). The RTKL defines "records" as:

> 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.

65 P.S. § 67.102 (2008). The DAO concedes that responsive documents exist. RR at 28, 48:¶ 8.

### 2. *Constructive Possession*

The next question is whether responsive documents are within the possession, custody or control of the agency to which the request was directed, such that it may be obligated to disclose them. *Dental Benefits Providers,* 86 A.3d at 936. No evidence exists that the DAO actually possesses responsive documents or has them in its custody or control. Weck Attestation, RR at 48:¶¶ 6, 9. The issue before the Court therefore is whether the DAO constructively possesses the requested documents.

Under the RTKL, constructive possession of documents may be imposed directly under Section 901. *See Dental Benefit Providers,* 86 A.3d at 937-939. Section 901 of the RTKL requires an agency, upon receipt of a written request for access to a record, to "make a good faith effort to determine . . . whether the agency has possession, custody or control of the identified record. . . ." 65 P.S. § 67.901 (2008). The Commonwealth Court has recognized constructive possession under Section 901 "as a means of access so agencies cannot frustrate the purposes of the RTKL by placing their records in the hands of third parties to avoid disclosure." *Dental Benefits Providers,* 86 A.3d at 938. Courts may not infer constructive possession "from the mere availability of the records to an agency upon request." *Id. (citations omitted).* "The litmus test under Section 901 remains whether the records document a transaction of the agency to which the request was directed. . . ." *Id.*

Mr. Nolen seeks a copy of current agreements to which the DAO is a party. Further, the DAO admittedly uses the system licensed pursuant to requested agreements to obtain information so it can make a charging decision, and to file charges in Municipal Court. Weck Attestation, RR at 47:¶5. Based on the DAO's own description, there can be no doubt that requested agreements document transactions of the DAO and thus are in its constructive possession.[2]

[2] The requestor also relies on Section 506(d) of the RTKL. That section deals with situations where a public record is in the possession of a private party with whom the agency has contracted to perform a governmental service. 65 P.S. §67.506(d)(1) (2008), *see also, e.g., Dental Benefit Providers,* 86 A.3d at 939. This case does not involve a private third party providing governmental services. Instead, it concerns agreements among multiple public agencies: the DAO, the City Police Department, the FJD and ICE. Therefore, the Court holds that Section 506(d) is inapplicable.

The DAO's reliance on *Sturgis v. Department of Corrections,* 96 A.3d 445 (Pa. Cmwlth. Ct. 2017); *Brown v. Pennsylvania Office of the Governor,* No. 1379 C.D. 2016, 2017 WL 2951701 (Pa. Cmwlth. Ct. July 11, 2017); and *Stover v. Philadelphia District Attorney's Office,* No. 1952 C.D. 2016, 2017 WL 3995913 (Pa. Cmwlth. Ct. Sept. 12, 2017) is misplaced. All three of those cases concern inmates who were seeking documents related to their conviction, incarceration or sentencing. The Commonwealth Court held in *Sturgis* that the Department of Corrections had no obligation to contact the DAO to obtain a copy of the requestor's judgment of sentence. *Sturgis,* 96 A.3d at 448. The Court held in *Brown* that the Governor's Office had no obligation to produce records, which were not in its possession, custody or control, concerning the prison at which the requestor was incarcerated. Finally, in *Stover,* the Commonwealth Court held that the requested records of an inmate's conviction and sentence were judicial records not disclosable under the RTKL. None of these cases involved the production of agreements among multiple government agencies, which was signed by the agency to which the request was directed. Moreover, not one of the cited cases involved constructive possession.

### C. The FJD's Determination that Mr. Nolen Was Not Entitled To the Records Has No Preclusive Effect

After the DAO determined that the requested documents were in the possession of the FJD and redirected Mr. Nolen to that entity, Mr. Nolen filed a RTKL request to the FJD's Open Records Officer. The FJD denied the request, which Mr. Nolen appealed to the FJD Court Administrator. Mr. Nolen's appeal was denied. The Court Administrator explained that only financial records of a judicial agency are subject to the RTKL. RR at 82. He further stated that the requested documents "are not financial documents in that they reference data sharing protocols and are not 'account(s), voucher(s) or contract(s) dealing with: (i) the receipt or

disbursement of funds by an agency; or (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property." *Id. (citation omitted).* Mr. Nolen did not appeal the FJD's decision.

The DAO argues that the FJD's decision has preclusive effect. For collateral estoppel to apply, however, the issue the FJD decided must be identical to the issue presented to the OOR. *Office of Disciplinary Counsel v. Kiesewetter,* 889 A.2d 47, 50-51 (Pa. 2005). It is not. Section 304 of the RTKL requires judicial agencies to provide only financial records in response to RTKL requests, so the only issue before the FJD Administrator was whether the requested documents are financial records. 65 P.S. § 67.304 (2008). In contrast, as discussed above, the RTKL obligates the DAO to produce any responsive documents in its possession, custody or control, unless it proves that an exemption applies. This inquiry is quite different from the one the FJD undertook, and therefore the FJD's decision has no preclusive effect.

### D. The Court Is Not Requiring the DAO to Unconstitutionally Meddle In the FJD's Affairs

The DAO finally argues that any order that requires the FJD to turn over the requested documents unconstitutionally meddles in its affairs. It is indisputable that the judiciary is a separate branch of government from the executive, and that neither this Court nor the DAO can compel the FJD to provide the DAO with a copy of documents responsive to Mr. Nolen's request. *See, e.g., L.J.S. v. State Ethics Comm'n,* 744 A.2d 798, 800 (Pa. Cmwlth. Ct. 2000) ("Neither the General Assembly nor the executive branch of government, acting through an administrative agency may constitutionally infringe upon the powers or duties of the county judiciary.")

It also is indisputable that the purpose behind the constructive possession doctrine is to prevent a government agency from gamesmanship when responding to RTKL requests. *Dental Benefits Providers,* 86 A.3d at 938. In this case, the DAO signed a current written contract or contracts with the City and the FJD. These contracts govern the sharing of information among those entities and between those entities and ICE. While the DAO admitted that it could ask the FJD for a copy of responsive documents, RR at 37, the DAO's attestation omits any mention of any such request. RR at 47-49. At a minimum, the DAO is obligated to ask the FJD to provide it with a current copy of the requested documents, which again are contracts to which it is a party.[3]

Similarly, the DAO states only that the City's PARS Technical Lead does not have a copy of any current agreements relating to PARS. *See* Weck Attestation, RR at 47-49, and Letter from Weck to City Open Records Officer, RR at 53 (stating only that the City's PARS Technical Lead does not have a copy "of any current agreements as best as I [Weck] have been able to tell.") The DAO is at best obscure about what efforts it made to determine whether the City retains a copy of the requested documents. The Court accordingly also finds that the DAO failed to perform its obligation to make a good-faith effort to determine whether, vis-à-vis the City, the requested documents are under its control or constructive possession.

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[3] It is hard to conceive why the DAO would not want a copy of a contract that sets forth its contractual relationship with the City, the FJD and ICE. Its failure to seek a copy for its own use raises questions about whether it has avoided asking the FJD or the City for a copy of the documents to frustrate the purposes of the RTKL. The fact that the FJD faxed a previous version of the contract to the DAO also suggests that the DAO may have put the documents in the hands of a third party to avoid exposing them to sunlight. *See* RR at 29-35; L. Brandeis, *Other People's Money* (1914), at 92 ("Sunlight is said to be the best of disinfectants.")

## CONCLUSION

For all the foregoing reasons, the Court denies the appeal of the Philadelphia District Attorney's office. An order follows.

BY THE COURT:

Abbe F. Fletman, J.