

**Department of Community and Economic Affairs (DCED)  
Appeal of the  
Office of Open Records Final Determination  
Issued on October 20, 2017**

On October 20, 2017, the Commonwealth's Office of Open Records issued a Final Determination requiring DCED to take further action in providing all responsive records within thirty days for a Right-to-Know Law request that was filed on behalf of the Chester Water Authority on August 16, 2017.

The attached document is DCED's November 20, 2017, appeal filed in the Commonwealth Court of Pennsylvania to the Office of Open Records Final Determination of October 20, 2017.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF COMMUNITY  
& ECONOMIC DEVELOPMENT,

Petitioner,

v.

NOLAN FINNERTY,

Respondent.

NO. \_\_\_\_ C.D. 2017

**PETITION FOR REVIEW**  
**(Appellate Jurisdiction)**

The Commonwealth of Pennsylvania, Department of Community and Economic Development (Department) petitions for review of the Final Determination of the Office of Open Records (OOR) in the matter of *Nolan Finnerty v. Pennsylvania Department of Community & Economic Development*, OOR Docket Number AP 2017-1786, dated October 20, 2017 and asserts, as follows:

1. This Court exercises appellate jurisdiction over this matter pursuant to Section 1301(a) of the Right to Know Law (RTKL), 65 P.S. § 67.1301(a), and Section 763(a)(2) of the Judicial Code, 42 Pa. C.S. § 763(a)(2).

2. This Court exercises independent and plenary review of questions of both law and fact in appeals from determinations of the OOR. The usual deferential standard of review on appeal from Commonwealth agencies does not apply; instead, the Commonwealth Court independently reviews OOR's orders and may substitute its own finding of fact for that of the OOR. The Court is entitled to the broadest scope of review and is not limited to the rationale offered in the OOR's written decision. *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Cmwlth. 2010), *affirmed*, 75 A.3d 453 (Pa. 2013).

3. The parties in this matter are the Petitioner, the Department, an executive agency of the Commonwealth of Pennsylvania, and the Respondent, Nolan Finnerty<sup>1</sup> (hereinafter, Finnerty).

4. By the OOR's Final Determination dated October 20, 2017, which is attached hereto as Exhibit "A," Finnerty's appeal filed with the OOR was granted.

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<sup>1</sup> Nolan Finnerty is an employee of the law firm of Conrad O'Brien PC

5. The OOR concluded that while the Department raised several prospective grounds for denying access to records in its correspondence, including the deliberative process exemption under Section 708(b)(10), the Department failed to identify the records responsive to the Request or the information alleged to be exempt from the records, and that the Department failed to submit evidence to support the application of these reasons for withholding access to the records.

6. Section 708(b)(10) of the RTKL provides that the following, in pertinent part, is exempt from access under the RTKL:

A record that reflects . . . [t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including **predecisional deliberations relating to a budget recommendation**, legislative proposal, legislative amendment, contemplated or **proposed policy or course of action** or any research, memos or other documents used in the predecisional deliberations.

65 P.S. §67.708(b)(10). (Emphasis added.)

7. The records directed to be provided per the OOR's Final Determination include client status reports (Status Reports) prepared for the Department by EConsult Solutions (EConsult), a contractor of the Department, and attorney billing records from McNees, Wallace and Nurick, a subcontractor of EConsult (McNees).

EConsult has been appointed by and is under contract with the Department to serve as the Act 47 coordinator for the City of Chester (City) to prepare and administer a plan (Plan) designed to relieve the City's financial distress and to provide such other financial, policy, and other recommendations to the City under the Act 47 Program.

Act 2014-199

8. The Status Reports include summaries prepared by EConsult solely for the Department's use, which include policy and budget recommendations and proposed courses of action in furtherance of the City's Plan.

9. A party asserting the attorney-client privilege must establish the following four elements:

(1) that the asserted holder of the privilege is or sought to become a client; (2) that the person to whom the communication was made is a member of the bar of a court, or his or her subordinate; (3) that the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing an opinion of law, legal services or assistance in a legal matter; and (4) that the claimed privilege has not been waived by the client.

*See Pennsylvania Department of Education v. Bagwell*, 131 A.3d 638 (Pa. Cmwlth. 2016)

10. The McNeese billing record portions of the Status Reports are protected by the attorney-client privilege. The Department is the client of McNeese. The

billing records were not shared with any third party, they reflect attorney meetings with individuals and the nature of the work being performed for the Econsult contract with the Department. The Department does not waive its privilege to this information.

11. The OOR erred when it concluded that the Department failed to meet its burden of proving the applicability of exemptions when the Department was denied an opportunity to complete its review of the records to determine all of the exemptions set forth in Section 708 of the RTKL and privileges recognized in the RTKL that applied.

12. If a request is so large that an agency does not have the ability to process the request in a timely manner given the enormous number of records requested, it would undermine the specific legislative intent that every record be reviewed so that free and open discussions can take place within government when a decision is being deliberated, and that agencies should be afforded a sufficient opportunity to conduct investigations to protect the Commonwealth's security interests and the public's privacy rights. See *Pennsylvania State Sys. for Higher Educ., Office of the Chancellor v. Ass'n of State College and Univ. Faculties*, 142 A.3d 1023 (Pa. Cmwlth. 2016)

**WHEREFORE**, the Petitioner, Commonwealth of Pennsylvania, Department of Community & Economic Development, requests that this Honorable Court remand the Final Determination issued by the Office of Open Records to address the validity of claimed exemptions and privileges now that the Department has completed its review of the requested records, or grant such other relief it deems just and proper under the circumstances.

Respectfully submitted,

Commonwealth of Pennsylvania,  
Department of Community &  
Economic Development

Christopher Houston,  
Chief Counsel

J. Quain  
Assistant Counsel

Dated: November 20, 2017

By: *Scott Longwell*

Scott W. Longwell  
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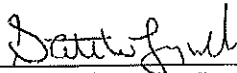


IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**PROOF OF SERVICE**

(Continued)

Served: Attorney General  
Service Method: First Class Mail  
Service Date: 11/20/2017  
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\_\_\_\_\_  
(Signature of Person Serving)

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Representing: Petitioner – Department of Community & Economic  
Development

# Appendix A



Requester that the prepayment of duplication fees associated with the Request was required. *See* 65 P.S. § 67.902(b); 65 P.S. § 67.1307(h). On September 6, 2017, the Department provided the Requester with an estimate of the duplication fees, which the Requester paid to the Department on September 12, 2017.<sup>1</sup>

On September 19, 2017, the Department purported to invoke a second thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b)(2). By correspondence dated September 22, 2017, the Requester objected to the subsequent extension.

On September 27, 2017, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On October 9, 2017, the Requester submitted a position statement, challenging the permissibility of the Department's second thirty-day extension and asserting that the requested records are public records under the RTKL.

On October 10, 2017, the Department submitted a position statement and a statement, made under the penalty of perjury, from Marita Kelley, the Deputy Director of the Department's Center for Local Government Services. On October 11, 2017, the Requester replied to the Department's submission.

### LEGAL ANALYSIS

"The objective of the Right to Know Law ... 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). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets,

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<sup>1</sup> The Department estimated the duplication fees to be \$212.50.

scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal; however, the decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof

as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Department asserts that it should be permitted to “take additional time for its collection and redaction of requested records after receipt of the [R]equester’s prepayment of duplication costs pursuant to Section 1307(h)” of the RTKL, particularly “where the [Department] has started processing the [R]equest but is unable to complete its response due to the size and scope of the [R]equest.” Section 902 of the RTKL lists seven reasons for which an agency may invoke an extension of time to respond to a records request. 65 P.S. § 67.902(a). Once an agency determines that it has a proper reason to extend the period to respond to a request, the agency is required to provide notice of that reason to the requester within five business days of its open records officer’s receipt of the request. 65 P.S. § 67.902(b)(1). “If the date that a response is expected to be provided is in excess of [thirty] days, following the five business days allowed for in [S]ection 901, the request for access shall be deemed denied unless *the requester has agreed in writing* to an extension to the date specified in the notice.” 65 P.S. § 67.902(b)(2) (emphasis added). Nothing in the RTKL permits an agency to unilaterally extend its time to respond to a request outside of the initial thirty-day extension permitted under Section 902(b)(1), even where the prepayment of fees is requested.<sup>2</sup> Because the Requester did not agree, in writing, to the subsequent extension

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<sup>2</sup> The Department also argues that “[t]he RTKL d[oes] not contemplate that a requester would unreasonably deny a request for additional time”; however, there is no indication that the Department asked the Requester for additional time to process the Request following his prepayment of fees. Rather, the Department attempted to unilaterally extend the response period for a second time on September 19, 2017, and the Requester objected to this purported extension three days later, on September 22, 2017.

invoked by the Department on September 19, 2017, the extension was invalid, and the Request was deemed denied on September 22, 2017.<sup>3</sup>

In its correspondence dated September 6, 2017,<sup>4</sup> the Department “reserve[d] the right” to assert any exemptions to production under the RTKL, such as, but not limited to, “the Department’s record exception found at [73 P.S. § 400.5106], the personal identification exception under §708(b)(6) of the RTKL, the deliberative process exemption found at §708(b)(10) of the RTKL, and the personal privacy and security protections under Article I Section I and VIII under the Pennsylvania Constitution.” Although the Department raises several prospective grounds for denying access to records in its correspondence, the Department does not identify the records responsive to the Request or the information alleged to be exempt from the records. Nor has the Department submitted evidence to support the application of these reasons for withholding access to the records. Furthermore, Ms. Kelley attests that the Department, as of October 6, 2017, “ha[s] not completed locating the full extent of responsive records due to the size, scope, and in some cases, the agency of the records requested.” Therefore, based upon the evidence provided, the Department has failed to meet its burden of proving that the requested records are exempt from disclosure under the RTKL. *See* 65 P.S. § 67.708(a).

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<sup>3</sup> In its position statement, the Department discusses the Commonwealth Court’s decision in *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638 (Pa. Commw. Ct. 2016), arguing that the facts in this case are distinguishable from those in *Bagwell* because the Department “did not delay its processing of the [R]equest and initiated its collection of records in good faith.” The Department further argues that an agency should be permitted to extend the time to respond to a request following its receipt of prepaid fees, so long as the agency continued to process the request in accordance with *Bagwell* and the request involves a voluminous amount of records. However, the decision in *Bagwell* does not grant an agency the ability to extend the response period outside of the initial thirty-day extension authorized in Section 902. Furthermore, the Court noted that “[a]n agency is not permitted to seek prepayment until it has reviewed the request, reviewed responsive records, and decided it is granting access to certain records reviewed.” 131 A.3d at 653. In other words, “an agency must assess [the] public status [of the records] before it has the right to demand prepayment under Section 1307(h) of the RTKL.” *Id.* The Department acknowledges that it had not, as of October 6, 2017, located and completed its review of all the records responsive to the Request.

<sup>4</sup> The Department explicitly states that this correspondence was not intended to be a final response to the Request.

## CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the Department is required to provide all responsive records within thirty days. 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 Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>5</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: 20 October 2017**

*/s/ Joshua T. Young*

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JOSHUA T. YOUNG, ESQ.  
APPEALS OFFICER

Sent to: Nolan Finnerty, Esq. (via e-mail only);  
Scott Longwell, Esq. (via e-mail only);  
Jennifer Fogarty, AORO (via e-mail only)

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<sup>5</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).