

IN THE SENATE OF PENNSYLVANIA

Appeal of Riches

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Senate RTK Appeal 04-2015

**FINAL DETERMINATION
December 15, 2015**

STATEMENT OF FACTS

On November 3, 2015, Jonathan Lee Riches (“Requester”) alleges that he filed a request (“Request”) pursuant to the Right-to-Know Law (“RTKL” or “Act”), 65 P.S. §§ 67.101 *et seq.*, with the “Open Records Officer” in the District Offices of Pennsylvania State Senators Christine Tartaglione, Anthony Hardy Williams, and Shirley Kitchen. In the alleged Request he sought the following documents: (1) “current Yearly Financial disclosure forms on Record” for Senator Christine Tartaglione; (2) “open public records of all of PA Senator Anthony Hardy Williams campaign Donors for his last Election on Record”; and, (3) “open Records of all Shirley Kitchen’s emails from her account at Kitchen@pasenate.com for October 2015, All October, these open records exist.” Office of Open Records, Final Determination, Dckt. No. AP 2015-2646.

Requester avers he did not receive a response to his Request in the statutorily proscribed time; therefore, he maintains his Request was deemed denied under the RTKL. Office of Open Records, Final Determination and Order, Dkt. No. AP 2015-2646; see 65 P.S. § 67.901. On November 20, 2015, the Requester erroneously¹ filed an

¹ The OOR has no jurisdiction to hear a RTKL appeal involving a legislative agency. See 65 P.S. §§ 67.102, 67.503.

appeal with the Office of Open Records (“OOR”), which office, on November 24, 2015, issued a Final Determination transferring the appeal to this Office. Office of Open Records, Final Determination, Dkt. No. AP 2015-2646; see 65 P.S. § 67.503.

On November 30, 2015, this Office notified the Senate Open Records Officer, Donetta M. D’Innocenzo, of the appeal, and by separate letter, set forth a briefing schedule for the parties. 65 P.S § 67.1102(a)(1). In response to this notification, the Senate Open Records Officer, on December 4, 2015, submitted to this Office an “Attestation that requests not received” along with a copy of the response that she provided to the Requester as required by the RTKL.

It is noteworthy that Requester has allegedly mailed² numerous RTKL requests to the “Open Records Officer” in various District Offices of Pennsylvania State Senators, rather than with the Senate Open Records Officer. Still further, it is noteworthy that Requester has filed his appeals with the Office of Open Records, rather than with the Senate Appeals Officer, who has exclusive jurisdiction over the initial appeal. 65 P.S. § 67.503(a), (c)(2). Because of these repeated erroneous filings, the Senate Open Records Officer has explicitly advised Requester to whom he should file original Senate RTKL requests, as well as any appeals thereof. In her response, she explicitly provided him

² An appeal can be dismissed as premature when the Requester did not provide evidence that the Request was actually mailed. “[P]roof that a Request was mailed creates a rebuttable presumption that the Request was received by the intended recipient.” Echevarria v. Phila. District Attorney’s Office, OOR Dkt. AP 2012-0340, March 30, 2012; Lawrence v. City of Phila. Dept. of Licenses & Inspections, OOR Dkt. AP 2011-1420, Nov. 22, 2011; Conci v. Allegheny County Jail, OOR Dkt. AP 2011-0404, April 29, 2011. Although not binding, decisions of the OOR are persuasive authority in Senate RTKL appeals. See 65 P.S. §§ 67.503, 67.1310(a); Bowling v. Office of Open Records, 75 A.3d 453, 457 (Pa. 2013). Requester offered no evidence that his requests were ever mailed.

with the link to the internet request form, as well as her email and mail contact information, along with the mail contact information of the Senate Appeals Officer. Additionally, she set forth with specificity the procedure provided for by law with respect to original RTKL filings, see 65 P.S. § 67.703, as well as the appeals process, see 65 P.S. § 67.1101, and requested that he comply with same. Senate Open Records Officer Attestation and Response, Dec. 3 and Dec. 4, 2015.

As to each record requested, the Right to Know Officer specifically responded as follows:

Records Relating to Senator Tartaglione

Despite concluding the requested current yearly financial disclosure forms are not legislative records under the RTKL and that the request could be denied on that basis, see 65 P.S. §§ 67.102, 67.303, the Senate Open Records Officer granted the request. The Open Records Officer advised the Requester that she has a copy of the 2014 Statement of Financial Interest filed by Senator Tartaglione, which is available under Pennsylvania law, see 65 Pa.C.S.A. § 1104(e), and is responsive to his request. The Senate Open Records Officer further advised the Requester that once he pays the copying and postage fees³, she will release the record and mail it to him. See 65 P.S. §§ 67.901, 67.1307; 65 Pa.C.S.A. § 1104(e). Senate Open Records Officer Attestation and Response to Senate RTK Request 1511301448, Dec. 3 and Dec. 4, 2015.

³ The Senate Open Records Officer set forth the fees as follows: copying fee of \$1.75 (7 pages at \$.25 per page) plus actual mailing costs of \$1.20 for 7 pages, totaling \$2.95.

Records Relating to Senator Williams

The Senate Open Records Officer advised the Requester that the records of campaign donors he seeks are not records of or within the possession of the Senate, and that consequently, he should have directed his request to the Open Records Officer for the Pennsylvania Department of State (“DOS”), Bureau of Elections, which possesses such records. The request was therefore denied and transferred to the DOS, the agency in possession of such records in accordance with 65 P.S. § 67.502(b)(1). The Senate Open Records Officer copied the DOS Open Records Officer on her response, and explicitly advised the Requester to directly make his request to the DOS Open Records Officer in writing. The Senate Open Records Officer also provided in this response the mail address for the DOS Open Records Officer, along with a link to the DOS’s campaign finance information on its website. Senate Open Records Officer Attestation and Response to Senate RTK Request 15113011448, Dec. 3 and Dec. 4, 2015.

Records Relating to Senator Kitchen

Citing sections 102 and 303 of the RTKL, the Senate Open Records Officer denied the request for Senator Kitchen’s emails, concluding these are not legislative records releasable under the RTKL. The Open Records Officer advised the Requester that similar requests in the past have been denied on the same grounds and cited accordingly.⁴ She also advised him of his appeal rights, with specific instructions of to whom he should

⁴ See Appeal of Carollo, Appeal 02-2012; Appeal of Krawczeniuk, Appeal 04-2009; Appeal of Scolforo, Appeal 01-2009 and Appeal 02-2009.

direct his appeal and the timeframe for filing an appeal and what to include in his appeal.

Senate Open Records Officer Attestation and Response to Senate RTK Request

1511301500, Dec. 3 and Dec. 4, 2015.

The requester did not avail himself of the opportunity to supply additional documentation or a Memorandum of Law in support of his appeal; however, he did provide limited statements of support in his appeal.⁵ With regard to the records pertaining to Senator Tartaglione, the Requester states in his appeal that because he never received a response to his request, it is a deemed denial and that “the records exist and I seek them.” With regard to the records pertaining to Senator Williams, the Requester states that he appeals the deemed denial of his request because Senator Williams did not respond. With regard to the records pertaining to Senator Kitchen, the Requester states that he appeals the deemed denial of his request for emails “Accountability like what Hillary Clinton did with her emails.” Office of Open Records, Final Determination, Dckt. No. AP 2015-2646.

DISCUSSION

This appeal is a consolidation of three separate requests for records from the Requester, Jonathan Lee Riches, who allegedly made requests for records pertaining to three State Senators: Christine Tartaglione; Anthony Hardy Williams; and, Shirley

⁵ It is questionable whether the Requester’s blanket statements that he appeals the “deemed denials” of his requests meet the requirements of the RTKL for stating the “grounds upon which the requester asserts that the record is a ...legislative record...” 65 P.S. § 67.1101(a). See Padgett v. PSP, 73 A.3d 644, 646-47 (Pa. Commw. Ct. 2013); see also, Saunders v. PA Dept. of Corrections, 48 A.3d 540, 542-43 (Pa. Commw. Ct. 2011).

Kitchen. The Senate Open Records Officer granted the request for current yearly financial disclosure forms relating to Senator Tartaglione and advised the Requester she would mail these once he pays the copying and postage fees. The Senate Open Records Officer denied the request for campaign finance records relating to Senator Williams, as these are not records of or in the possession of the Senate. Rather, the request should have been filed with the Open Records Officer for the Department of State's Bureau of Elections. The Senate Open Records Officer copied the DOS Open Records Officer on her response to the Requester and advised him that he must file a RTKL request with DOS for those records if he still seeks them. Finally, the Senate Open Records Officer denied the request for Senator Kitchen's email after concluding email is not a legislative record that is releasable under the RTKL, and provided him with specifics as to his right to appeal. Senate Open Records Officer Attestation and Response to Senate RTK Requests 1511301448, 15113011448, and 1511301500, Dec. 3 and Dec. 4, 2015. The Requester, who provided little, if any support, for his appeal to the alleged deemed denials, avers in each of the appeal documents that he is entitled to these records under the RTKL. Each request will be discussed separately.

Records Relating to Senator Tartaglione

The Senate Open Records Officer granted the request for Senator Tartaglione's current yearly financial disclosure forms; therefore, the appeal is dismissed in part as moot. In so doing, the Open Records Officer explained that although such a record is not a legislative record and not releasable under the RTKL, it is available under Pennsylvania

law, the Public Official and Employee Ethics Act (“Ethics Act”), 65 Pa.C.S.A. § 1104 (e). The Ethics Act provides as follows: “All statements of financial interests filed pursuant to the provisions of this chapter shall be made available for public inspection and copying during regular office hours, and copying facilities shall be made available at a charge not to exceed actual cost.” 65 Pa.C.S.A. § 1104 (e). Therefore, she processed the request and concluded the records are releasable under the Ethics Act, and she further advised the Requester she will release same once he pays the copying and postage fees. See 65 P.S. §§ 67.901, 67.1307; 65 Pa.C.S.A. § 1104(e); PennDOT v. Drack, 42 A.3d 355, 362 (Pa. Commw. Ct. 2012); In re Fagone v. City of Phila. Water Dept., OOR Dkt. AP 2015-1602, 2015 PA. O.O.R.D. LEXIS 1634, Oct. 14, 2015. Therefore, because the Open Records Officer granted the request on these grounds during the pendency of this appeal, the appeal is dismissed in part as moot.

Records Relating to Senator Williams and Senator Kitchen

The Requester’s appeal to the Senate as to these records is dismissed as premature because the Senate never received the Request prior to the filing of the appeal.⁶

An agency has five (5) business days to respond to a written request for records submitted pursuant to the RTKL. 65 P.S. § 67.901; see also, Commonwealth v. Donahue, 98 A.3d 1223, 1241 (Pa. 2014). Under the RTKL, an attestation made under penalty of

⁶ It is proper to note that the Senate Open Records Officer properly directed the request for Senator Williams’ campaign records to the appropriate Agency Open Records Officer in the DOS because campaign records are retained by the Pennsylvania DOS, not the Pennsylvania Senate. See 25 P.S §§ 2600 *et seq.*; 65 P.S. §§ 67.305(b), 67.502(b)(1), 67.901.

perjury may serve as sufficient evidentiary support. See Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011), *appeal denied*, 31 A.3d 292 (Pa. 2011); Moore v. OOR, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Averments in the attestation should be taken as true absent any competent evidence of bad faith by the agency. McGowan v. DEP, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014), *rehearing denied*, 2014 Pa. Commw. LEXIS 584 (Pa. Commw. Ct. Dec. 19, 2014) (citing Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

When the agency does not receive the Request prior to the appeal, it is proper to dismiss the appeal as premature. Riches v. County of Chester, OOR Dkt. AP 2015-2538, Dec. 7, 2015; Riches v. PA Dept. of Agriculture, OOR Dkt. AP 2015-2501, Dec. 4, 2015; Gilliam v. Allegheny County Police Dept., OOR Dkt. AP 2014-1096, Aug. 18, 2014; Ricca v. PA Dept. of Labor & Industry, OOR Dkt. AP 2013-1572, Sept. 12, 2013; Simone v. Kutztown Univ. of PA, OOR Dkt. AP 2013-0140, Feb. 22, 2013.

Here, the Requester allegedly sent his Request on November 3, 2015, and erroneously appealed the alleged deemed denial of same to the OOR on November 20, 2015. On November 24, 2015, the OOR transferred the appeal to the Senate Appeals Officer, who notified the Senate Open Records Officer of same on November 30.

On December 3, 2015, the Senate Open Records Officer attested she never received the Request underlying this appeal until she received the appeal documents on November 30. Therefore, the Senate Open Records Officer timely processed the Request, and on December 4, 2015, the Senate Open Records Officer sent a response to

the Requester along with a copy of her attestation. Senate Open Records Officer Attestation and Response, Dec. 3 and Dec. 4, 2015.

Because the Senate Open Records Officer did not receive the Request prior to this appeal, the appeal as to these records is dismissed as premature. The Requester is not precluded from filing an appeal to the Senate Open Records Officer's response pursuant to the requirements of the RTKL.

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Appeal of Riches

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Senate RTK Appeal 04-2015

FINAL DETERMINATION
December 15, 2015

ORDER

AND NOW, this 15th day of December 2015, the above-referenced appeal with regard to the request for financial documents relating to Senator Tartaglione is dismissed as moot because the Open Records Officer granted the request during the pendency of this appeal. With regard to the request for Senator Williams' campaign finance records and Senator Kitchen's emails, the appeal is dismissed as premature.



Megan Martin
Senate Appeals Officer

APPEALING THIS DECISION TO COMMONWEALTH COURT

Within 30 days of the mailing date of this final determination, either party to this action may appeal the decision to the Commonwealth Court. 65 P.S. § 67.1301. If you have any questions about the procedure to appeal, you may call the Prothonotary of the Commonwealth Court at 717-255-1600.