

**IN THE SENATE OF PENNSYLVANIA**

**Appeal of Riches**

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**Senate RTK Appeal 05-2015**

**Senate RTK Appeal 06-2015**

**FINAL DETERMINATION**

**December 21, 2015**

**STATEMENT OF FACTS**

This appeal is a consolidation of appeals, all erroneously filed by the same Requester to the Office of Open Records and transferred to this Office.

**Appeal 05-2015**

On November 8, 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 Michael Stack<sup>1</sup> and Vincent Hughes. In the alleged Request he sought the following documents: (1) “all open records of Michael Stack’s emails from 10/1/15 to 11/1/15, these open emails exist”; and, (2) “all records of PA Senators Vincent Hughes telephone service provider name and his call detail from 10/1/15 to 11/15/15 – All the numbers incoming and outgoing on record on his work phone.” Office of Open Records, Final Determination, Dckt. No. AP 2015-2685.

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<sup>1</sup> Mike Stack is no longer a member of the PA State Senate and was not a member of the Senate at the time of this request; he is the Lt. Governor, duly elected last November and assumed office in January of this year.

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 2015-2685; see 65 P.S. § 67.901. On November 30, 2015, the Requester erroneously<sup>2</sup> filed an appeal with the Office of Open Records (“OOR”), which office, on December 1, 2015, issued a Final Determination transferring the appeal to this Office. Office of Open Records, Final Determination, Dkt. No. AP 2015-2685; see 65 P.S. § 67.503.

On December 2, 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 8, 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. She requested this appeal be dismissed as premature.

### **Appeal 06-2015**

On November 9, 2015, the Requester allegedly filed a RTKL request with the “Open Records Officer” in the District Offices of Pennsylvania State Senators Lawrence Farnese, Vincent Hughes and Dominic Pileggi. In the alleged Request he sought the following documents: (1) “open records of PA Senator Lawrence Farnese twitter account

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<sup>2</sup> The OOR has no jurisdiction to hear a RTKL appeal involving a legislative agency. See 65 P.S. §§ 67.102, 67.503.

including his user name and all the tweets he or his office posted on behalf of him in all of 2014”; (2) “open public records of all emails times/dates from 1/1/15 to 11/1/15 between PA Senator Vincent Hughes and PA Governor Tom Wolf”; and, (3) “open records on total amount of sick days Dominic F. Pileggi took in 2014 at the tax payers expense.” Office of Open Records, Final Determination, Dckt. No. AP 2015-2703.

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. Id. On December 1, 2015, the Requester erroneously appealed this deemed denial to the OOR. Id. The OOR issued a final determination and transferred the appeal to this Office on December 2, 2015. Id.

On December 3, 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 8, 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. In her response, she consolidated the two Requests described above and responded accordingly to the Requester. She requested this appeal be dismissed as premature.

It is noteworthy that Requester has allegedly mailed<sup>3</sup> 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 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. 8, 2015.

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

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<sup>3</sup> 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.

### **Records Relating to Mike Stack**

The Senate Open Records Officer denied the request for these 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.<sup>4</sup> She also advised him of his appeal rights, with specific instructions of to whom he should 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 1512021403, Dec. 8, 2015. She further advised him that because Mike Stack is the Lt. Governor, the Request should have been directed to the Open Records Officer for the Office of the Lt. Governor; she copied that office on her response. Id. The Senate Open Records Officer provided the Requester with the contact information for that office. Id.

### **Records Relating to Senator Hughes – Phone Records**

The Senate Open Records Officer advised the Requester of the provider of the telephone services but denied all other aspects of his request; she apprised him of his appeal rights. Senate Open Records Officer Attestation and Response to Senate RTK Request 1512021437, Dec. 8, 2015.

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

### **Records Relating to Senator Hughes – Emails**

The Senate Open Records Officer denied the request for these 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.<sup>5</sup> She also advised him of his appeal rights. Senate Open Records Officer Attestation and Response to Senate RTK Request 1512041000, Dec. 8, 2015.

### **Records Relating to Senator Farnese**

The Senate Open Records Officer denied the request for Twitter records, concluding same are not legislative records under the RTKL. She apprised the Requester of his appeal rights. Senate Open Records Officer Attestation and Response to Senate RTK Request 1512041027, Dec. 8, 2015.

### **Records Relating to Senator Pileggi**

The Senate Open Records Officer advised the Requester there are no responsive records, as Senate members do not accrue sick leave, and that even if there were, these would not be legislative records under the RTKL. She apprised him of his appeal rights. Senate Open Records Officer Attestation and Response to Senate RTK Request 1512041027, Dec. 8, 2015.

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<sup>5</sup> See Appeal of Carollo, Appeal 02-2012; Appeal of Krawczeniuk, Appeal 04-2009; Appeal of Scolforo, Appeal 01-2009 and Appeal 02-2009.

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.<sup>6</sup>

## DISCUSSION

The Requester's appeals are dismissed as premature because the Senate never received the Requests prior to the filing of the appeals.

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 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,

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<sup>6</sup> 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).

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 Requests on November 8 and 9, and erroneously appealed the alleged deemed denial of same to the OOR on November 30 and December 1. On December 1 and 2, the OOR transferred the appeals to the Senate Appeals Officer, who notified the Senate Open Records Officer of same on December 2 and 3.

On December 8, 2015, the Senate Open Records Officer attested she never received the Requests underlying these appeals until she received the appeal documents on December 2 and 3. Therefore, the Senate Open Records Officer timely processed the Requests, and on December 8, 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. 8, 2015.

Because the Senate Open Records Officer did not receive the Requests prior to these appeals, the appeals are 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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**FINAL DETERMINATION**  
**December 21, 2015**

**ORDER**

AND NOW, this 21<sup>st</sup> day of December 2015, the above-referenced appeals are dismissed  
as premature.



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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.