

IN THE SENATE OF PENNSYLVANIA

Appeal of Riches

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**Senate RTK Appeal 07-2015
Senate RTK Appeal 08-2015**

**FINAL DETERMINATION
January 7, 2016**

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 07-2015

On November 16, 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 Office of Pennsylvania State Senator Vincent Hughes. In the alleged Request he sought the following documents: (1) “open public records on total cost to run SenatorHughes.com for 2014.” Office of Open Records, Final Determination, Dckt. No. AP 2015-2775.

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 2015-2775; see 65 P.S. § 67.901. On December 7, 2015, the Requester erroneously¹ filed an appeal with the Office of Open Records (“OOR”), which office, on December 10, 2015, issued a Final Determination transferring the appeal to this Office. Office of Open Records, Final Determination, Dkt. No. AP 2015-2775; see 65 P.S. § 67.503.

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

On December 11, 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 18, 2015, submitted to this Office an “Attestation that requests not received” along with a copy of the response she provided to the Requester as required by the RTKL. In her response, the Senate Open Records Officer requested this appeal be dismissed as premature.

Appeal 08-2015

On November 19, 2015, the Requester allegedly filed a RTKL request with the “Open Records Officer” in the District Office of Pennsylvania State Senator Christine Tartaglione. In the alleged Request he sought the following documents: (1) “open records of total amount of sick days Christine Tartaglione took in 2012.” Office of Open Records, Final Determination, Dkt. No. AP 2015-2776.

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 7, 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 10, 2015. Id.

On December 11, 2015, this Office notified the Senate Open Records Officer 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 18, 2015, submitted to this Office an “Attestation that requests not received” along with a copy of the response 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 also be dismissed as premature.

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 and repeatedly advised Requester³ 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 he comply with same. Senate Open Records Officer Attestation and Response, Dec. 18, 2015.

² An appeal can be dismissed as premature when the Requester did not provide evidence 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. In fact, the Senate Open Records Officer notes that each original RTKL request allegedly filed by the Requester was improperly addressed, as it contained the wrong zip code for each Senate District Office. Senate Open Records Officer Attestation and Response, Dec. 18, 2015. See Coy v. PSP, OOR Dkt. AP 2012-1787, Nov. 9, 2012.

³ The Senate Open Records Officer, in her responses to Mr. Riches’ numerous RTKL requests, has been advising him of the correct filing process since December 4, 2015.

As to each record requested, the Open Records Officer processed the Request and specifically responded as follows:

Records Relating to Senator Hughes

The Senate Open Records Officer concluded the financial records associated with the registration of the website domain “senatorhughes.com” are available to the Requester under the RTKL. In her response, she explained that she will mail the records to him once he pays the requisite fees for this request and the outstanding fees for prior RTKL requests. Senate Open Records Officer Attestation and Response to Senate RTK Request 1512111431, Dec. 18, 2015.

Records Relating to Senator Tartaglione

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 1512111551, Dec. 18, 2015.

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, 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 16 and 19 and erroneously appealed the alleged deemed denial of same to the OOR on December 7. On December 10, the OOR transferred the appeals to the Senate Appeals Officer, who notified the Senate Open Records Officer of same on December 11.

On December 18, 2015, the Senate Open Records Officer attested she never received the Requests underlying these appeals until she received the appeal documents on December 11. Her attestation is supported by the fact that the requests did not include the correct zip codes for the various Senate District Offices. See Coy v. PSP, OOR Dkt. AP 2012-1787, Nov. 9, 2012. Therefore, the Senate Open Records Officer timely processed the Requests, and on December 18, 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. 18, 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
January 7, 2016

ORDER

AND NOW, this 7th day of January 2016, the above-referenced appeals are 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.