

IN THE SENATE OF PENNSYLVANIA

Appeal of Riches

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Senate RTK Appeal 10-2015

FINAL DETERMINATION
January 19, 2016

STATEMENT OF FACTS

On November 30, 2015, Jonathan Lee Riches (“Requester”) allegedly filed a RTKL request to the “Open Records Officer” in the District Office of Pennsylvania State Senator Shirley Kitchen. In the alleged request he sought the following records: “open public records on total cost PA Senator Shirley Kitchen paid in 2014 to buy Febreeeze [Febreeze] for her office.” Office of Open Records, Final Determination, Dckt. No. AP 2015-2883.

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 22, 2015, the Requester erroneously¹ appealed this deemed denial to the OOR. Id. The OOR issued a final determination and transferred the appeal to this Office on December 24, 2015. Id.

On December 28, 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 January 4, 2016, 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. The Senate Open Records Officer advised the Requester there are no responsive records to this request and she

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

apprised him of his appeal rights. Senate Open Records Officer Attestation and Response to Senate RTKL Request 1512291100, Jan. 4, 2016.

It is noteworthy that since November 2015 the 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, the Open Records Officer 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. §

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). Here, the Requester offered no evidence that his requests were ever mailed. In fact, the Senate Open Records Officer notes that each original RTKL request, including the present 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, Jan. 4, 2016. 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.

67.1101, and requested he comply with same. Senate Open Records Officer Attestation and Response, Jan. 4, 2016. In her response, the Open Records Officer requested this appeal be dismissed as premature because a preponderance of the evidence supports that the Request was not properly addressed to the Senate as required by Section 703 of the RTKL. Further, the Senate Open Records Officer states in her response that because the Requester continues to file his requests and appeals in contravention of the requirements of the RTKL, the Requester's conduct is willful and negligent, and therefore, the Appeals Officer should "consider all legal remedies available." Id.

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 a sparse statement of support in his appeal.⁴

DISCUSSION

The Requester's appeal is dismissed as premature because the Senate never received the Request prior to the filing of the appeal.

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

⁴ It is questionable whether the Requester's blanket statement that he appeals the "deemed denial" of his request meets 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).

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 30 and erroneously appealed the alleged deemed denial of same to the OOR on December 22. On December 24, the OOR transferred the appeal to the Senate Appeals Officer, who notified the Senate Open Records Officer of same on December 28.

On January 4, 2016, the Senate Open Records Officer attested she never received the Request underlying the appeal until she received the appeal documents on December 28. Her attestation is supported by the fact that the request did not include the correct zip code for the Senate District Office. See Coy v. PSP, OOR Dkt. AP 2012-1787, Nov. 9, 2012. Therefore, the Senate Open Records Officer timely processed the Request, and on January 4, 2016, the Senate Open Records Officer sent a response to the Requester along with a copy of her attestation.

Because the Senate Open Records Officer did not receive the Request prior to the appeal, the appeal 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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ORDER

AND NOW, this 19th day of January 2016, the above-referenced 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.