

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Municipality of Monroeville :
 :
 v. : No. 2123 C.D. 2012
 :
 Earle Drack, : Submitted: May 24, 2013
 :
 Appellant :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: July 16, 2013

This is an appeal from the Allegheny County Court of Common Pleas' (trial court) order that denied access to speed-timing device calibration information in possession of a third-party contractor requested pursuant to the Right-to-Know Law (RTKL).¹ The Municipality of Monroeville (Municipality), from whom the information was requested, asserted it did not possess the records. Rather, the information was in the possession of a private contractor, YIS/Cowden Group, Inc. (YIS). Although it reasoned the records pertained to a governmental function, the trial court held the information was not accessible under the RTKL because it did not directly relate to a governmental function. Based upon our case law, we must reverse the trial court's holding in that regard. However, we agree with the trial court that an award of fees and costs, or penalties is not appropriate at this stage. We remand for further proceedings consistent with this opinion.

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

I. Background

Earle Drack (Requester), representing himself, submitted a request to Municipality seeking the following:

1. Any correspondence (including email, fax, and/or letters) in the Municipality of Monroeville's (including, but not limited to, Monroeville Police Department) possession relating to ENRADD speed timing devices. Such devices are manufactured by YIS/Cowden and are utilized by local police departments for citing motorists for speed related offenses.
2. Receipts and/or correspondence pursuant to purchase, maintenance, or calibration/test for ENRADD devices.
3. The exact procedure used to calibrate/test each ENRADD device every 60 days.
4. Any correspondence (including email, fax, and/or letters) and/or records (including notes) related to a demonstration of ENRADD in fall of 2008. That demonstration, for identification sake, had a representative of PennDOT present as well as a news team from WTAE Team 4.
5. Any ENRADD training materials, including training manual(s) and video(s).
6. Any ENRADD operations materials, including operator's manual(s) and video(s).

Certified Record (C.R.) at Item # 1, Ex. 1 (emphasis added) (Request).

Municipality partially denied the Request, stating its response was in accordance with an unpublished decision² by a panel of this Court in 2008 prior to

² Drack v. Dep't of Transp., (Pa. Cmwlth., No. 2365 C.D. 2007, filed June 11, 2008) (unreported) (holding requester failed to prove similar records fell within the narrow categories of public records defined in the former RTKL, Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§66.1-66.9 (repealed)).

enactment of the current RTKL. Municipality did not cite any exemptions, privileges or exceptions enumerated under Section 708(b) of the RTKL, 65 P.S. §67.708(b), in its response.

Requester appealed to the Office of Open Records (OOR), arguing “[n]o valid exceptions are cited, nor are any legal reasons offered for the refusal to grant access to all the requested records.” C.R. at Item #1, Ex. 3 (requester’s appeal). Both parties supplemented the record. Municipality submitted an affidavit of its Open Records Officer regarding possession of the records.³

The OOR issued a final determination granting access to the records sought. The OOR also noted Municipality failed to comply with Section 903 of the RTKL, 65 P.S. §67.903 (relating to denial requirements). In addition, relying on Signature Information Solutions, LLC v. Aston Township, 995 A.2d 510 (Pa. Cmwlth. 2010), the OOR held that Municipality could not raise new defenses based on exceptions in the RTKL.

Municipality appealed the final determination to the trial court, asserting the OOR erred in failing to determine if responsive records exist in YIS’s possession or “if they are proprietary in nature.” C.R. at Item #1, Pet. for Rev. ¶12.

³ The Open Records Officer’s affidavit also contained the following averment addressing the exception at Section 708(b)(17) of the RTKL, 65 P.S. §67.708(b)(17), for information related to a noncriminal investigation: “The demonstration of ENRADD in the fall of 2008 was performed as noncriminal investigation for safety procedures.” Tr. Ct., slip op., 10/10/12, Attachment 3 (Affidavit of Open Records Officer dated 11/21/11).

The trial court held a hearing at which James Cowden of YIS (Cowden) provided testimony telephonically.

Cowden testified YIS contracted annually with Municipality to perform calibration testing of ENRADD devices. YIS is certified and approved by the Department of Transportation (PennDOT) to calibrate the devices. YIS does not supply Municipality with any calibration procedures along with the contract. Tr. Ct. Hearing, Notes of Testimony, (N.T.), 4/13/12, at 6. He testified YIS follows the calibration procedure set forth in the Pennsylvania Code at 67 Pa. Code §105.56.⁴ However, he acknowledged PennDOT does not publish all the procedures. N.T. at 18-20. Significantly, in addition to the Pennsylvania Code provision, YIS uses notes to train technicians on calibration. N.T. at 8, 17-18, 22-23, 25-26.

Specifically, Cowden testified YIS has the following responsive records: “we have notes when we train technicians, as we’re training them, we have notes that they can use as they’re learning to do these different devices. We have notes on all the timing devices.” Id. at 23. Cowden testified YIS also had “procedures” that technicians have to look up to see “which device uses what.” Id. By way of example, Cowden elaborated on re-direct, “[i]t would say hook the device up here, test this sensor, test this sensor, run these speeds, verify that your speeds are all correct.” Id. at 25. Cowden explained the notes are for training the

⁴ This provision of the Pennsylvania Code, entitled “Manner of calibration and testing,” specifies the calibration requirements for certain devices. For each specified device, (e.g., Model TK 100 Excessive Speed Preventor), the regulation lists the required equipment and the calibration procedure. Subsection (e) of the regulation pertains to ENRADD, manufactured by YIS. Subsection (f) provides that “other devices” shall be calibrated and tested under manufacturer specifications. 67 Pa. Code §105.56(f).

technicians so they can become licensed to calibrate each of the different devices. Id. at 26. YIS provides the notes to the technicians so they have them, and are able to refer to them when testing the equipment for accuracy. Id. at 31.

Also important, Cowden testified “the procedures [for testing and calibration] are not all written out in there [referring to the Pennsylvania Code].” N.T. at 20. He explained that Section 105.56 is the part of the Code that regulates YIS; the manufacturers then send in information to PennDOT. N.T. at 21. Cowden advised he does not know why PennDOT only posts such information in a bulletin, “[w]hy it’s not in [Section] 105 I can’t answer.” Id.

After admitting that YIS provides its testing technicians with written notes as part of training, N.T. 20-21, 26, Cowden advised he would need to consult with his partners to assess whether YIS would disclose the training materials to Municipality. Subsequently, YIS notified Municipality by letter that it deemed the materials proprietary in nature, and “hav[ing] no governmental interest.” See C.R. at Item #4 (YIS letter responding to trial court’s inquiry as to whether it would voluntarily supply notes, appended to May 14, 2012 Order of trial court requesting supplemental briefs regarding the letter).⁵

The accommodating trial court also accepted additional evidence in the form of affidavits from Municipality, attested by its Open Records Officer and

⁵ In its supplemental brief, Municipality cited Section 708(b)(11) of the RTKL, 65 P.S. §67.708(b)(11), protecting proprietary information, seeking a remand to the OOR to address that exception.

its Chief of Police. The Chief of Police and the Open Records Officer attested that all records in Municipality's possession were provided to Requester. The Chief of Police also attested that Cowden represented to him "that the procedure to calibrate/test the ENRADD devices is set forth in Title 67 Chapter 105, specifically section 56 of the Pennsylvania Code." C.R. at Item #11.

Based on the expanded evidentiary record, the trial court made its own findings and conclusions, which supplemented background information adopted from the OOR final determination. The trial court reversed the OOR's determination.⁶ The trial court found Municipality contracts with YIS to perform calibration of the non-radar speed timing devices the police use. The trial court also determined that the calibration of devices constitutes a governmental function. However, the trial court reasoned the records were not accessible under Section 506(d) of the RTKL because the training notes did not directly relate to the calibration.

Because it determined the records outside Municipality's possession could not be reached through Section 506(d), the trial court did not address any substantive defenses in its opinion. Consequently, the trial court did not consider

⁶ In the course of the appeal to the trial court, Requester submitted the records Municipality provided to him, including records related to the contract for calibrating the ENRADD devices, and past calibration forms. Subsequent to the OOR issuing its final determination, Municipality provided an operator's manual for ENRADD to Requester.

the exceptions to disclosure that the OOR deemed waived, or YIS's claim that the notes were proprietary in nature.⁷

II. Discussion

In a local agency appeal, our standard of review from the trial court is “limited to determining whether findings of fact are supported by competent evidence or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision.” Kaplin v. Lower Merion Twp., 19 A.3d 1209, 1213 n.6 (Pa. Cmwlth.), appeal denied, 612 Pa. 693, 29 A.3d 798 (2011). Our scope of review under the RTKL is plenary. Dep't of Admin. Servs./ASCI v. Parsons/WTAE-TV, 13 A.3d 1025 (Pa. Cmwlth. 2011) (en banc) (ASCI I).

Records in the possession of a local agency are presumed public unless they are: (1) exempted by Section 708 of the RTKL; (2) protected by privilege; or, (3) exempted “under any other Federal or State law or regulation or judicial order or decree.” Section 305 of the RTKL, 65 P.S. §67.305. Municipality is a local agency under Section 102 of the RTKL, 65 P.S. §67.102. However, the records at issue here are in possession of YIS, a third-party contractor. Therefore, our analysis focuses on whether these records may become accessible to the public under Section 506(d)(1) of the RTKL.

The only records at issue are the training notes YIS provides to its technicians who calibrate and test the devices used by Municipality's police

⁷ The trial court also denied the *pro se* Requester's undocumented claims for bad faith attorney's fees and costs under Section 1304(a) of the RTKL, 65 P.S. §67.1304(a).

department. Municipality does not contest the trial court's conclusion that calibration of speed timing devices to ensure their accuracy, as required by the Pennsylvania Code, constitutes a governmental function. However, it argues the training notes in YIS's possession do not directly relate to that function. We begin by analyzing Section 506(d) of the RTKL.

A. Third Party Records, Section 506(d)

Section 506(d) provides a means of access to records that are not in an agency's possession, custody or control provided the third party in possession has a contract with the agency to perform a governmental function, and the information directly relates to the performance of that function. Allegheny Cnty. Dep't of Admin. Servs./A Second Chance Inc. v. Parsons, 61 A.3d 336 (Pa. Cmwlth. 2013) (ASCI II). Specifically, Section 506(d)(1) provides:

A public record that is not in the possession of an agency but is in possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. §67.506(d)(1)(emphasis added).

Our Supreme Court explained the reach of Section 506(d)(1) as follows:

Section 506(d)(1) ... recasts certain third-party records bearing the requisite connection to government as public records 'of the [government] agency ...' [quoting the definition of record in Section 102 of the RTKL, 65 P.S. §67.102] to require that ... the materials actually be 'of

such agency’ in the first instance would undermine the clear aim of Section 506(d)(1).

SWB Yankees, LLC v. Wintermantel, __ Pa. __, __, 45 A.3d 1029, 1044 (2012). Section 506(d) thus puts a third party in the same position as an agency for purposes of access under the RTKL only when two elements are met: (1) the third party performs a governmental function on behalf of the agency; and, (2) the information sought directly relates to that function. Id.

1. Governmental Function

The trial court reasoned that ensuring proper calibration of speed timing devices is a governmental function. Further, Municipality did not dispute that the calibration services YIS performs for it constitute a governmental function. See Tr. Ct., slip op., 10/10/12, at 2 (“[Municipality] appears to concede the calibration of timing devices constitutes a ‘governmental function.’”).

However, in reaching its conclusion regarding governmental function, the trial court relied upon one of our earlier decisions interpreting this provision, holding all contracts carry out governmental functions because “the government always acts as the government.” E. Stroudsburg Univ. Found. v. Office of Open Records, 995 A.2d 496, 504 (Pa. Cmwlth. 2010) (ESU Foundation). Our Supreme Court criticized this broad interpretation in Wintermantel. While offering a “reasonably broad construction,” the Court construed governmental function in this context as delegation of a “non-ancillary undertaking of government.” Id. at __, 45 A.3d at 1042. In light of our Supreme Court’s interpretation of Section 506(d), we reconsider whether calibration of speed timing devices is sufficiently governmental.

Section 3368 of the Vehicle Code, 75 Pa. C.S. §3368, governs the use of speed timing devices by law enforcement. PennDOT prescribes regulations for calibrating and testing these devices for accuracy. However, PennDOT does not perform the calibration or oversee the calibration. Rather, law enforcement, such as Municipality’s police department, is responsible for calibration of the devices.

Section 3368 authorizes local law enforcement to use certain speed timing devices. The statute places the burden on law enforcement to periodically test and calibrate the authorized devices to ensure that speeding violations can be competently prosecuted. In the event law enforcement elects to use a speed timing device, the device must be calibrated within 60 days of the violation. See 75 Pa. C.S. §3368(d). Section 3368(d) further provides “the calibration of electronic devices ... shall also include the certification and calibration of all equipment, timing strips and other devices which are actually used with the particular electronic device being certified and calibrated.” Id.

Our Supreme Court interpreted the legislative policy underlying Section 3368 as “defin[ing] the limits of a local municipality’s power to enforce the speed limit laws,” and Section 3368 thus restricts municipalities to only certain non-radar devices. Commonwealth v. DePasquale, 509 Pa. 183, 501 A.2d 626 (1985) (overturning conviction for driving excessive speed when municipality prosecuted using evidence from certain devices outside its statutory authorization); see also Commonwealth v. Wachter, 486 A.2d 463 (Pa. Super. 1984) (enforcement of speed restrictions is reserved to local municipalities through Vehicle Code).

Applying the analysis in Wintermantel, we hold the function of ensuring the accuracy of speed timing devices is sufficiently governmental in nature. Municipality contracts with YIS to perform calibration of speed timing devices every 60 days. YIS establishes the accuracy by submitting certificates of accuracy to Municipality.

The accuracy of the devices is not merely incidental or ancillary to the governmental function of enforcing traffic offenses under the Vehicle Code. Instead, establishing accuracy is a necessary precondition to successful prosecution of speeding violations. As a matter of proof, a municipality must establish the accurate calibration of any speed timing devices. Commonwealth v. Kaufman, 849 A.2d 1258 (Pa. Super. 2004). Thus, Municipality police rely upon the accuracy of speed timing devices in order to successfully prove speeding violations.

Ultimately, Municipality is responsible for the accurate calibration of the speed timing devices it elects to use. Municipality's contract with YIS for calibration services is necessary to perform its speed law enforcement role. Therefore, this contracted function is inseparable from a governmental purpose. Consequently, we agree with the trial court's conclusion on this prong.

2. Directly Relates

We next consider whether the records sought directly relate to the performance of the governmental function. The records cannot be incidental to preparation for the contract, or to the contractor's day-to-day operations unrelated to the services performed. The records must "directly relate" to carrying out the

governmental function.” ASCI II, 61 A.3d at 341 (quoting ESU Foundation, 995 A.2d at 504, regarding direct relationship prong).

Consistent with persuasive reasoning in Harrisburg Area Community College v. Office of Open Records, (Pa. Cmwlth., No. 2110 C.D. 2009, filed May 17, 2011) (unpublished) (en banc) (HACC), we disagree with the respected trial court that the records do not directly relate to a governmental function of calibration.

In HACC, the requester, an attorney who represented clients charged with driving under the influence (DUI), sought training curricula used to teach police officers about making DUI arrests. HACC submitted an affidavit in which its affiant stated, “[b]ased upon my professional experience and judgment [as director of Municipal Police Officer Education and Training Commission], a disclosure of the Commission’s DUI curriculum in response to this RTKL request would be reasonably likely to jeopardize or threaten the Commission’s statutorily-mandated public protection activity.” Id., slip op. at 14. This Court found the conclusory affidavit insufficient. Further, the DUI training materials were deemed records reflecting a governmental function of making DUI arrests.

Here, the governmental function is the calibration of speed timing devices to ensure accuracy. The calibration training notes document the governmental function of calibrating speed timing devices upon which speeding citations are issued. Thus, following the same reasoning, we reach a similar result to the one we reached in HACC.

Training records of how technicians are trained to calibrate the speed timing devices directly relate to the function of calibrating the devices. How the devices are calibrated is relevant to calibration services, and training technicians to calibrate them is necessarily and directly tied to the calibration. Accordingly, we hold the training materials, including notes, directly relate to the governmental function, and are reachable under Section 506(d).

However, that does not end the inquiry. Only “public records” that are not protected by any exemption are accessible under the RTKL.

B. Exemptions

Municipality raised substantive grounds for protecting the records to the OOR, but the OOR declined to consider them based upon this Court’s holding in Signature Information Solutions (holding agency cannot change basis for denial on appeal from its initial denial). Specifically, Municipality raised the Predecisional Deliberative exception in Section 708(b)(10) of the RTKL, 65 P.S. §67.708(b)(10), and the Noncriminal Investigative exception in Section 708(b)(17) of the RTKL, 65 P.S. §67.708(b)(17). After the OOR issued its final determination, our Supreme Court overruled the Signature waiver rule in Levy v. Senate of Pennsylvania, __ Pa. __, 65 A.3d 361 (2013).

In addition, during Municipality’s appeal before the trial court, YIS claimed the training notes are exempt as proprietary. Municipality put the trial court on notice of this defense in its Petition for Review, and briefed it as directed

by the trial court after YIS raised the exception. From our review of the record, it does not appear that Municipality preserved any other substantive defenses.

In light of the foregoing, we remand to the fact-finder (here, the trial court) to consider the affirmative defenses preserved in the proceedings before it. The trial court, as the fact-finder here, should rule on them in the first instance. We leave to the thoughtful discretion of the trial court whether to receive additional evidence regarding any substantive exemptions preserved. See ASCI I (remand to fact-finder, trial court, in part to allow further consideration of affirmative defense to disclosure).

C. Fees and Penalties

As to Requester's claim for bad faith, seeking attorney fees and costs, we affirm the trial court. Pursuant to Section 1304(a) of the RTKL, a court may award reasonable attorney fees and costs to a requester if it reverses the agency determination, and finds either: (1) willful or wanton disregard and/or bad faith in the agency's denial; or, (2) the agency's defenses were not based on a reasonable interpretation of law. See 65 P.S. §67.1304(a). Because the trial court agreed with the agency's determination, it did not award fees. See Tr. Ct. Section 1925(a) Op., 12/17/12, at 3. In addition, Requester did not establish that Municipality denied the record in bad faith. However, as this case is remanded for further proceedings, and Requester may ultimately prevail on the merits, our ruling is without prejudice to any future claims for fees and costs that are contingent on the outcome.

III. Conclusion⁸

For all these reasons, we reverse the trial court's determination that the notes used to train technicians about calibration do not directly relate to the governmental function of calibrating speed timing devices. We affirm the trial court's disposition of Requester's bad faith claim, and for penalties, fees and costs. We remand with instructions that the trial court consider the exception for proprietary information in Section 708(b)(11) of the RTKL, as well as any other affirmative defenses reasonably called to the attention of the trial court, but not decided on the merits.

ROBERT SIMPSON, Judge

⁸ Municipality filed a motion to strike Requester's reply brief. Essentially, Municipality asserts the arguments in the reply brief are largely duplicative of those in Requester's brief in chief. Rule 2113 of the Pennsylvania Rules of Appellate Procedure allows an appellant to file a brief in reply to matters raised by appellee's brief and not previously addressed in appellant's brief. Based on our review of the briefs submitted, we conclude Requester's reply brief conforms to Pa. R.A.P. 2113. Accordingly, we deny the motion and do not strike the brief.

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ORDER

AND NOW, this 16th day of July, 2013, the order of the Allegheny County Court of Common Pleas is **AFFIRMED IN PART**, and **REVERSED IN PART**. The order is **AFFIRMED** as to the trial court’s determination on fees and costs, without prejudice, and is **REVERSED** in all other respects. This matter is **REMANDED** for further proceedings in accordance with this opinion.

The Municipality of Monroeville’s Application to Strike Appellant’s Reply Brief is **DENIED**.

Jurisdiction is relinquished.

ROBERT SIMPSON, Judge