

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Andrew Staub and The Citizens' Voice :  
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: :  
v. : No. 2140 C.D. 2012  
: Argued: September 12, 2013  
City of Wilkes-Barre and LAG :  
Towing, Inc. :  
: :  
Appeal of: City of Wilkes-Barre :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE ANNE E. COVEY, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY PRESIDENT JUDGE PELLEGRINI FILED: October 3, 2013

The City of Wilkes-Barre (City) appeals the order of the Court of Common Pleas of Luzerne County (trial court) directing the City, pursuant to Section 1304(b) and (c) of the Right-to-Know Law (RTKL),<sup>1</sup> to pay ten percent (10%) of the

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<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §67.1304(b), (c). Section 1304(b) and (c) states:

**(b) Sanctions for frivolous requests or appeals.**—The court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to an agency or the requestor if the court finds that the legal challenge under this chapter was frivolous.

**(c) Other sanctions.**—Nothing in this act shall prohibit a court from imposing penalties and costs in accordance with applicable rules of court.

costs incurred by The Citizens' Voice newspaper with respect to litigating its right-to-know request. We affirm.

The penultimate issue in this case is what an agency's obligation is to secure a record so that it may make the required determination under Section 506(d) of the RTKL to a request made for records in the possession of a third party. On July 22, 2011, Andrew Staub, a former reporter for The Citizens' Voice (collectively, Newspaper) filed a right-to-know request with the City seeking all records from April 1, 2005, to that date, including tow reports and receipts, pertaining to city-directed tows executed by LAG Towing, Inc. (LAG) pursuant to the contract between LAG and the City. On July 29, 2011, Jim Ryan (Ryan), the City's Open Records Officer, notified the Newspaper that it was extending the response period for 30 days to allow LAG to compile the requested records.

On August 29, 2011, the City notified the Newspaper that LAG had informed the City that it would not be turning over any records because it was LAG's belief that the records were not accessible under the RTKL, but that the City made no determination in that regard because LAG had not given it any records for review. Attached to that notification was an e-mail that Timothy Henry (Henry), the City Attorney, received from LAG's attorney, that stated, "[i]t does not appear that such documents are accessible under the [RTKL] and therefore, even if they existed, they would not be subject to production in response to this request." (Reproduced Record (R.R.) at 7.)

On September 9, 2011, the Newspaper appealed to the Office of Open Records (OOR) and LAG intervened. On January 27, 2012, after mediation failed,

the OOR issued an order granting the appeal and issued an order requiring the City to provide all responsive records within 30 days. The OOR specifically provided that “[t]his Final Determination is binding on all parties....” (R.R. at 40.) None of the parties appealed the OOR’s order.

On May 3, 2012, the Newspaper filed a petition to enforce the OOR’s order in the trial court seeking the award of attorney fees and costs, citing Sections 1302 and 1304 of the RTKL.<sup>2</sup> At a hearing, Ryan testified that his normal practice after receiving a request for records is to have city administration search for the records, but because the records were not in the City’s possession, he just forwarded the request to LAG and then forwarded to the Newspaper LAG’s response that was sent to the Henry.

Henry testified that he spoke with Leo Glodzik (Glodzik), LAG’s owner, on one or two occasions and believed that there may not be responsive records, but he

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<sup>2</sup> 65 P.S. §§67.1302, 67.1304. The petition alleged that the trial court had jurisdiction to enforce the OOR’s order under Section 1302 which states, in pertinent part:

**(a) General rule.**—Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b) or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located....

65 P.S. §67.1302(a). The petition also alleged that the trial court could impose attorney fees and costs under Section 1304(b) and (c). None of the parties have ever challenged the trial court’s jurisdiction to entertain the petition under Section 1302 or its authority to impose the instant attorney fees and costs under Sections 1302 and 1304 of the RTKL.

never spoke with the owner again after Ford, LAG's attorney, became involved. He stated that he knew fairly early on, by August 29, 2011, at the latest, that LAG may not have responsive records, but that he was never completely sure whether LAG had responsive records or not until December 16, 2011, when LAG, by correspondence, stated that it did not ordinarily maintain the requested records but had saved records from August 2011 after the request had been served on the City. He testified that he did not execute an affidavit<sup>3</sup> that the requested records did not exist because they were not in the City's possession and that he expected either Glodzik or Ford to execute such an affidavit.

Glodzik, LAG's owner, testified that none of the requested records existed from April 2005, the beginning of the contract with the City, until July 22, 2011, the time of the request. He stated that he contacted the City's Chief of Police each month and asked if he needed any information from the records, and that all of the records were destroyed at the end of the month. He testified that after the July 22, 2011 records request, he kept more accurate records and kept the receipts. Glodzik stated that he never told anyone from the City that no records existed before July 22, 2011.

The trial court found that LAG had engaged in willful and wanton misconduct by arguing that the information in the requested records was confidential

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<sup>3</sup> Under Section 705 of the RTKL, an agency is not required to create a record that does not currently exist and under Section 708, an agency has the burden of proving that a record does not exist. 65 P.S. §§67.705, 67.708. This Court has held that an agency may satisfy its burden of proving the nonexistence of a requested record by an unsworn attestation by the person who searched for the record or a sworn affidavit of the nonexistence. *Moore v. Office of Open Records*, 992 A.2d 907, 908-09 (Pa Cmwlth. 2010).

when it knew that the records did not exist at that time. The trial court also found that while the City responded that it did not possess any responsive records, it did not indicate that LAG did not have any records when it knew early on that there was a possibility that no records existed. The trial court determined that LAG failed in its duty to disclose the nonexistence of the requested records and that the City failed in its duty to determine whether such records existed.<sup>4</sup> Accordingly, the trial court directed LAG to pay 90% of the Newspaper's costs in litigating this matter and directed the City to pay 10% of those costs and the City filed the instant appeal.<sup>5</sup>

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<sup>4</sup> Specifically, the trial court stated:

[T]o know for sure all Attorney Henry had to do was ask Leo Glodzik at that time whether he in fact had the responsive records. [The City] let LAG take the lead in the RTK litigation having a good idea that LAG had no records and failed to ensure that either LAG provide an affidavit of no records or notify the Citizens Voice or OOR mediator that LAG did not have any records which the Citizens Voice was requesting. At best, this showed a lack of oversight by [the City] or its tower LAG with regard to its RTK responsibilities. At the very least, after OOR's final determination on January 27, 2012, the City, having been ordered to "provide" all responsive records within thirty (30) days, had an obligation to disclose the information it had pertinent to the existence or nonexistence of the records.

I find that both LAG and [the City] showed a willingness to engage in frivolous litigation.

(R.R. at 222-23.)

<sup>5</sup> In a local agency appeal, the Court's standard of review is limited to determining whether the trial court's findings of fact are supported by competent evidence or whether the trial court committed an error of law or abused its discretion in reaching its decision. *Allegheny County Department of Administrative Services v. Parsons*, 61 A.3d 336, 342 (Pa. Cmwlth. 2013). Our scope of review under the RTKL is plenary. *Id.*

In this appeal, the City argues that the trial court erred in imposing any of the costs against it because it discharged its duty under the RTKL by asking LAG to turn over any records that should have been released under the RTKL and because LAG had the ultimate burden of releasing the requested documents under the RTKL.

Section 506(d) of the RTKL states, in pertinent part:

**(d) Agency possession.—**

**(1) A public record that is not in the possession of an agency but is in the 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.**

\* \* \*

**(3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee established under section 1307(b) and shall remit the fee to the party in possession of the record if the party duplicated the record.**

65 P.S. §67.506(d)(1), (3) (emphasis added). Under this provision, the agency is required to take reasonable steps to secure the records from the agency and then make a determination if those records are exempt from disclosure. If the third party refuses to produce the records because they are not directly related to the governmental contract, the third party may refuse to turn those records over to the governmental

agency on that basis. The agency shall then inform the requestor of the reason for the denial and the requestor can take an appeal to the OOR.<sup>6</sup>

In this case, the City did not fully discharge its duty under the RTKL by merely forwarding the records' request to LAG and then forwarding LAG's response to the Newspaper regarding the records' existence or exemption status under the RTKL, or by forwarding whatever records LAG ultimately produced when it complied with the OOR's order. Instead, as the statutory possessor of the records under Section 506(d)(1), the City had a duty to independently ascertain the existence or nonexistence of the records in LAG's possession. The City's actions in this case,

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<sup>6</sup> When that occurs:

The presumption of public nature shared by records in possession of a local agency does not apply to records that are in possession of a third party.... [*Allegheny County Department of Administrative Services v. A Second Chance, Inc.*, 13 A.3d 1025 (Pa. Cmwlth. 2011) (*ASCI I*)]. Generally, the local agency bears the burden of proving a record is exempt from disclosure. [*Kaplan v. Lower Merion Township*, 19 A.3d 1209 (Pa. Cmwlth.), *appeal denied*, 612 Pa. 693, 29 A.3d 798 (2011)]. Third-party contractors in possession of requested records are placed in the shoes of a local agency for purposes of the burden of proof when the contractor performs a governmental function on behalf of the agency, and those records directly relate to the contractor's performance of that function. *SWB Yankees, LLC v. Wintermantel*[, 615 Pa. 640], 45 A.3d 1029 (2012) (noting third-party contractor is recast as an agency for purpose of interpreting Section 506(d) and RTKL definitions); *ASCI I* (recognizing participating third party shares burden of proving exemptions).

*Allegheny County Department of Administrative Services*, 61 A.3d at 342. "[T]he burden [is] on third-party contractors whose records fall within Section 506(d)(1) to prove by a preponderance of the evidence that the records are exempt." *ASCI I*, 13 A.3d at 1042.

acting merely as a conduit between the Newspaper and LAG, were not sufficient to discharge its duty under the RTKL. As a result, the trial court did not err in imposing a further duty upon the City and in directing the City to pay a portion of the sanctions imposed under Section 1304.<sup>7</sup>

Accordingly, that portion of the trial court's order imposing ten percent (10%) of The Citizens' Voice's litigation costs upon the City is affirmed.

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DAN PELLEGRINI, President Judge

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<sup>7</sup> Moreover, it is clear that the trial court erred in imposing attorney fees and costs under Section 1304(b) because that section only authorizes the imposition of such sanctions for frivolous requests or appeals, and the City did not submit a request or file an appeal in this case. While Section 1304(c) provides that that section does not prohibit a court from imposing such sanctions "in accordance with applicable rules of court," the trial court does not cite any court rule authorizing the imposition of the instant attorney fees and costs.

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**ORDER**

AND NOW, this 3<sup>rd</sup> day of October, 2013, that portion of the order of the Court of Common Pleas of Luzerne County, dated October 16, 2012, at No. 8294 of 2012 imposing ten percent (10%) of The Citizens' Voice's litigation costs upon the City is affirmed.

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DAN PELLEGRINI, President Judge