**[J-36-2012] [MO: Saylor, J.]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

| | | |
|---|---|---|
| THE PENNSYLVANIA STATE EDUCATION ASSOCIATION, by LYNNE WILSON, General Counsel, WILLIAM MCGILL, F. DARLENE ALBAUGH, HEATHER KOLANICH, WAYNE DAVENPORT, FREDERICK SMITH, JAMIE MCPOYLE, BRIANNA MILLER, VALERIE BROWN, JANET LAYTON, KORRI BROWN, AL REITZ, LISA LANG, BRAD GROUP, and RANDALL SOVISKY, | : | No. 59 MAP 2010 |
| Appellants | : | Appeal from the Order of the Commonwealth Court at No. 396 MD 2009, dated September 24, 2010 |
| v. | : | |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT, OFFICE OF OPEN RECORDS, and TERRY MUTCHLER, Executive Director of the Office of Open Records, | : | |
| Appellees | : | |
| PENNSYLVANIA ASSOCIATION OF SCHOOL RETIREES, URENEUS V. KIRKWOOD, JOHN B. NYE, STEPHEN M. VAK, AND RICHARD ROWLAND and SIMON CAMPBELL, Intervenors | : | ARGUED: April 10, 2012 |

## CONCURRING OPINION

**MR. CHIEF JUSTICE CASTILLE** **DECIDED: August 21, 2012**

I join the Majority Opinion. I write separately to note primarily that this case illustrates some of the problems regarding due process afforded third parties to a record request under the Right-to-Know Law, to which I adverted in SWB Yankees L.L.C. v.

Wintermantel, 45 A.3d 1029 (Pa. 2012). Here, appellants -- the Pennsylvania State Education Association ("PSEA") and individual affected teachers -- emphasize that teachers whose home addresses are subject to requests for school district records are not parties in the initial disclosure process and, generally, have no right or opportunity to seek review by the Office of Open Records ("OOR") or in court of a decision to release this personal information affecting only them individually. Appellants' Brief at 17. The Majority agrees that an adequate administrative or judicial process is not provided under the terms of the Right-to-Know Law and, therefore, holds that filing a declaratory judgment action against the OOR in the Commonwealth Court's original jurisdiction was appropriate. Majority Slip Op. at 24. I agree with the Majority's assessment and resolution of this matter.

In my SWB Yankees concurrence, I expressed the concern that the Right-to-Know Law provides an inadequate procedure by which private parties affected by a record request would be able to participate in the administrative process and subsequent judicial review of an OOR adjudication. Although arguably the more appropriate party in interest, SWB Yankees did not receive notice of the initial record request, and did not participate either in the agency's decision to deny access to the records or in the requestors' appeal to the OOR. SWB Yankees intervened in the matter only after the OOR ordered release of the entity's records by filing an appeal from the OOR's adjudication to the court of common pleas. As I explained in my concurrence, subsequent judicial review in this Court appeared materially affected by how the matter proceeded through the administrative process, as SWB Yankees pursued relief on grounds limited to those specific issues addressed by the agency and the OOR in proceedings in which SWB Yankees did not participate. As a result, on appeal to this Court, the parties did not address foundational notions on which the

decision may have turned, such as whether the requested information was a "public record" in the first instance. Id. at 1045 & n.2, 1048 (Castille, C.J., concurring). Cf. Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc., 13 A.3d 1025, 1031 (Pa. Cmwlth. 2011) (entertaining requestor's argument that claim was waived because raised for first time by agency and third party, as intervenor, in trial court upon appeal from OOR adjudication; ultimately rejecting waiver argument based on conclusion that agency preserved claim in its denial letter and during OOR appeal); Signature Info. Solutions, L.L.C. v. Aston Township, 995 A.2d 510, 514 (Pa. Cmwlth. 2010) (Right-to-Know Law does not permit agency that has given specific reason for denial of records request to assert different reason for denial on appeal).

The gaps in the administrative and judicial review process existing in the Right-to-Know Law to which I adverted in SWB Yankees again are at the center of the present dispute. Beyond the immediate question of whether PSEA may call upon the Commonwealth Court to exercise its original jurisdiction and decide this matter under the Declaratory Judgment Act, I am persuaded that appellants correctly identify substantial due process concerns, especially regarding notice to and the right to appeal by third parties affected by a Right-to-Know Law request (*i.e.*, not the requestor or the agency to which the request is made). Appellants' Brief at 19-20; 23-24; accord Lutz v. City of Philadelphia, 6 A.3d 669, 671-72 (Pa. Cmwlth. 2010) ("grievant police officers, have no means to restrict access to the information in the records [related to grievance arbitration awards] or appeal a decision by the City to release any or all of that information").

Moreover, from a review of this Court's decisional law and that of the Commonwealth Court -- the numerosity of reported decisions (and pending disputes) itself is testament to the problems created by the statute -- it appears that these gaps in

the statutory scheme have left the OOR floundering about in determining its identity, its role, and even its position in actual disputes. For example, in this appeal, the OOR takes the position that notice to school employees regarding a request for disclosure of personal information should be addressed at a local level, via regulations promulgated by individual school districts. OOR's Brief at 9, 12 (citing 65 P.S. §§ 67.504(a), 67.1101(a)). The OOR's position appears to have some support in the plain language of the provisions it cites, because Section 504(a) grants local agencies the authority to "promulgate regulations and policies necessary for the agency to implement [the Right-to-Know Law]." See 65 P.S. § 67.504(a); but see 65 P.S. § 67.1101(a) (authorizing filing of appeal by requestor). But, the Right-to-Know Law also authorizes the OOR to "promulgate regulations relating to appeals involving a Commonwealth agency or local agency." See 65 P.S. § 67.504(a); see also 65 P.S. § 67.1102(b) ("Procedures. -- The Office of Open Records . . . may adopt procedures relating to appeals under this chapter."). As a practical matter, the OOR may be in the best position to devise an adequate procedure governing all appeals to the OOR that complies with and promotes uniformity in the OOR's administration of the Right-to-Know Law. As applied here though, the downside of the approach advocated by the OOR is obvious: individual school districts do not have the OOR's expertise regarding enforcement of the Right-to-Know Law necessary to implement an adequate policy; school districts may or may not adopt policies in time to address record requests; and the school districts' action is likely to result in a patchwork of policies that may or may not resolve due process concerns. Accordingly, I am skeptical of the OOR's apparent decision to abdicate its potential role as the agency responsible for adopting regulations that facilitate the appeal process and its administration of the Right-to-Know Law, uniformly and in accordance with its expertise. See, generally, 65 P.S. § 67.1310(a).

A further example of what may be termed the OOR's growing pains under the statute it administers is its insistence that it is not a proper party in original jurisdiction actions or, for that matter, in appeals from its determinations, because it is asserted that the OOR is simply a quasi-judicial tribunal created to serve as adjudicator of disputes and with no direct interest in the matters before it. See OOR's Brief at 7 (citing East Stroudsburg Univ. Found. v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010) (OOR performs only adjudicatory function and, therefore, lacks "standing" to defend its decision on appeal); Pa. State Police v. Office of Open Records, 5 A.3d 473, 476 n.3 (Pa. Cmwlth. 2010) (same, but also noting that Commonwealth Court had deemed OOR interested party prior to East Stroudsburg decision)); see also Housing Auth. of City of Pittsburgh v. Van Osdol, 40 A.3d 209, 212 (Pa. Cmwlth. 2012) (after being named appellee, OOR advised court that it would not file brief or appear at argument); Dep't of Corrections v. Office of Open Records, 18 A.3d 429, 432 (Pa. Cmwlth. 2011) (OOR filed *amicus curiae* brief addressing issue of whether it properly considered requester's appeal). The OOR's assertion is simplistic and unrealistic, given its other roles within the statutory scheme, such as adopting regulations and issuing advisory opinions; in these respects, it is not unlike any other Commonwealth agency. See, e.g., 65 P.S. §§ 67.504(a); 67.1310(a). Nonetheless, the Commonwealth Court here sanctioned the OOR's view of its role, also citing the decision in East Stroudsburg.[1]

---

[1] The Commonwealth Court addressed the OOR's participation as a party in the East Stroudsburg appeal from its adjudication, and that decision's progeny, as an issue of "standing." 995 A.2d at 507. But, "the core of the concept of standing is that a person who is not adversely affected in any way by the matter **he seeks to challenge** is not aggrieved thereby and has no right to obtain a judicial resolution of his challenge." Commonwealth, Pa. Game Comm'n v. Commonwealth, Dep't of Env. Res., 555 A.2d 812, 815 (Pa. 1989) (emphasis added). In the East Stroudsburg appeal, as here, the OOR was not mounting any challenge but was in a defensive posture; accordingly, an (continued…)

Commonwealth agencies which act in an adjudicatory capacity may also act as parties in appeals to the Commonwealth Court from the agency's adjudication. See, e.g., Dep't of Labor & Ind., Bureau of Workers' Comp. v. Workers' Comp. Appeal Bd. (Crawford & Co.), 23 A.3d 511 (Pa. 2011) (appeal naming agency that rendered adjudication; agency did not file brief); Riverwalk Casino, L.P. v. Pa. Gaming Control Bd., 926 A.2d 926, 935 (Pa. 2007) (appeal naming agency that "serves as a quasi-judicial body with fact-finding and deliberative responsibilities"; agency filed brief defending its decision); see also Rendell v. Pa. State Ethics Comm'n, 983 A.2d 708 (Pa. 2009) (declaratory judgment action against agency concerning agency's interpretation of governing statute in advisory opinion). Administrative agencies commonly establish "walls of division" between their prosecutory staff and adjudicative functions "necessary to ensure that their administrative procedures comport with due process." Stone and Edwards Ins. Agency, Inc. v. Commonwealth, Dep't of Ins., 648 A.2d 304, 308 (Pa. 1994). Absent "actual commingling" of these functions, the quasi-judicial character and impartiality of the administrative agency in its adjudicatory capacity is not compromised, and a party's right to due process is not violated. Id. Indeed, the Right-to-Know Law

---

(…continued)
inquiry into its "standing" in that appeal was misplaced. Indeed, in support of its decision, the Commonwealth Court relied on cases in which the agency at issue was an appellant, without apparent appreciation of the procedural posture of the cases. The Commonwealth Court's extrapolation to cases in which the agency is in a defensive procedural posture, whether in the Commonwealth Court's original or appellate jurisdiction, is questionable. Moreover, even where the agency is seeking to bring legal action, standing is a fact-intensive matter, of which the party's agency status and role in the statutory scheme are but factors. See, e.g., id. at 815-16; Pa. Gaming Control Bd. v. City Council of Philadelphia, 928 A.2d 1255, 1265-66 (Pa. 2007) (agency has standing to request that elected officials be enjoined from submitting ballot question to Philadelphia electorate on election day). But see id. at 1273 (Castille, J., dissenting) ("Board, a bureaucratic entity, lacks standing to seek to enjoin the right of the People to vote on a proposed change to their City Charter").

authorizes the OOR to appoint staff attorneys, other than appeals officers, to perform those functions of representing the OOR in the Commonwealth Court. 65 P.S. § 67.1310(d); see, e.g., Lyness v. Commonwealth, State Bd. of Medicine, 605 A.2d 1204, 1211 (Pa. 1992) ("fatal defect here lies in the administrative regulations, and the loose interpretation afforded those regulations by the [State Board of Medicine,] which defect can be readily cured by placing the prosecutorial functions in a group of individuals, or entity, distinct from the Board which renders the ultimate adjudication"); George Clay Steam Fire Engine & Hose Co. v. Pa. Human Relations Comm'n, 639 A.2d 893, 901 (Pa. Cmwlth. 1994) ("commission did not commingle its functions because the regulations require the commissioners to make final adjudications whereas the commission's staff finds probable cause").

Partly because of the statutory gaps and the OOR's related "identity crisis," the Commonwealth Court's jurisprudence also betrays uncertainty regarding that court's own role in the legislative scheme. In this instance, the result of the Commonwealth Court's decision was that a significant number of persons, the only persons whose privacy was directly affected by the OOR's decision, were left with no legal recourse. Accord Lutz, supra; see also Chester Cmty. Charter Sch. v. Hardy, 38 A.3d 1079, 1084 (Pa. Cmwlth. 2012) (sanctioning *ex parte* communication between requestor and appeals officer because "Right-to-Know Law provisions are directed at protecting the requester's rights, not the agency's"). In light of these concerns, I would encourage the Commonwealth Court to be more vigilant concerning the rather obvious, serious flaws in the Right-to-Know Law, which leaves courts to decipher the General Assembly's efforts in this area of law. The Commonwealth Court, as the front line of the judiciary in these matters, should be mindful of its impact on the real people affected by the requests, along with the effects on the agency responding (oftentimes unevenly) to record requests.

Mr. Justice Baer joins the opinion.