

[J-71-2011][M.O. – McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BRIAN BOWLING,	:	No. 20 MAP 2011
	:	
Appellee	:	Appeal from the Order of the
	:	Commonwealth Court at No. 936 CD
v.	:	2009 dated February 5, 2010 reversing
	:	and remanding the order of the Office of
	:	Open Records at No. AP 2009-0218
OFFICE OF OPEN RECORDS,	:	dated April 17, 2009
	:	
Appellant	:	
	:	
	:	
PENNSYLVANIA EMERGENCY	:	
MANAGEMENT AGENCY,	:	
	:	
	:	
Intervenor	:	ARGUED: September 13, 2011

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: August 20, 2013

I join the majority opinion, subject to a few modest differences in the reasoning. For example, in considering what deference may be due to determinations under Section 1102 of the RTKL, 65 P.S. §67.1102, the majority focuses on the deference associated with determinations which are discretionary by nature. See Majority Opinion, slip op. at 23-24. There are other potentially relevant legal tenets encompassing deference, however, such as the principle that reviewing courts generally will lend a degree of deference to interpretations or constructions by administrative agencies of their enabling statutes. See, e.g., Nw. Youth Servs., Inc. v. DPW, ___ Pa. ___, ___, 66 A.3d 301, 311-12 (2013). Accordingly, to the extent that OOR determinations reflect a consistent and reasonable approach in fleshing out the

boundaries of the statutory exemptions from disclosure in the myriad factual scenarios arising on a daily basis before the agency, I would favor the affordance of some deference to these administrative-level developments. Along these lines, I do not believe that these sorts of boundaries are as concretely apparent from the face of the statute as may be inferred from the majority opinion. See Majority Opinion, slip op. at 24-25.

Despite these differences, I join the majority in lending our support for the Commonwealth Court's approach to judicial review of Office of Open Records determinations. Along with all other Justices, I find that the RTKL contains materially inconsistent directives relevant to the standard and scope of review to be applied, and the Commonwealth Court's implementation of a modified de novo review incorporating a flexible remand option appears to make the best of this situation, pending needed legislative refinement.¹ Consistent with the majority opinion, I read the RTKL as affording appeals officers wide latitude to issue determinations which may test the limits of due process, while leaving it to the Commonwealth Court to assure that this constitutional mandate ultimately is vindicated.

¹ In my view, the positions reflected in the dissenting opinions, while perhaps reflecting more conventional (and even better) policy and practices, represent too great a departure from the statutory directives, in particular, the investiture in the intermediate court of the responsibility to delineate factual findings. See 65 P.S. §67.1301(a).