[J-71-2011] [MO: 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 C.D. 2009, dated February 5, 2010 reversing the final determination of the Office of Open Records at No. AP-2009-0128 dated April 17, 2009
v.	:	
OFFICE OF OPEN RECORDS,	:	
Appellant	:	990 A.2d 813 (Pa. Cmwlth. 2010)
PENNSYLVANIA EMERGENCY MANAGEMENT AGENCY,	:	
Intervenor	:	ARGUED: September 13, 2011

DISSENTING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: August 20, 2013**

I commend the Court for undertaking the Herculean task of seeking to reconcile inconsistencies abounding in the Right To Know Law ("RTKL"). Nevertheless, for the reasons that follow, I respectfully dissent.

At the outset, I agree with the Majority that the statutory scheme devised by the General Assembly offers ambiguous directives regarding the appropriate standard and scope of review in RTKL matters. Engaging in statutory construction of the law, the Majority holds that judicial review of administrative agency appeals from the Office of Open Records ("OOR") is plenary and *de novo*, allowing reviewing courts to adopt an OOR appeals officer's findings of fact and legal conclusions when appropriate. See Majority Slip Op. at 36, 41. My position with respect to the proper review paradigm in RTKL matters is more closely aligned with that expressed in Madame Justice Todd's Dissenting Opinion. As Justice Todd develops, administrative agency review in matters

decided by the OOR plainly should be in the appellate jurisdiction of the Commonwealth Court (where Commonwealth agencies are involved) and in the courts of common pleas (where local agencies are involved), and the courts should defer to the OOR's role as factfinder in the first instance. I also agree with the Commonwealth Court that where the OOR does not hold a hearing, courts acting in their appellate capacities should remand to the OOR for additional findings of fact where necessary. See Bowling v. Office of Open Records, 990 A.2d 813, 820-22 (Pa. Cmwlth. 2010). By this paradigm, agencies may act as agencies, and courts as courts. I write separately to express several considerations that weigh in my decision to dissent from the Majority's disposition, in favor of the construction above outlined.

In my tenure on the Court, it is difficult to recall a statute that has so quickly generated so much litigation involving seemingly overlooked foundational matters. The plain language of the RTKL reveals little legislative attention paid to establishing a defined means of judicial review following administrative review. This lapse perhaps resulted from an expectation that the vast majority of disputes would be resolved at the agency level, as happens in other Commonwealth agency disputes, and would not put parties to the additional inconvenience, expense, and delay that judicial review – including direct review of fact-bound issues as of right in this Court – entails. While the expectation of streamlined agency review may have materialized to a degree, the deficiencies in the RTKL, combined with the OOR's apparent inefficacy and inconsistency in performing its regulatory task (a point to which I have written in the past), have left parties with the worst of worlds: an incomplete or unsatisfactory administrative process that all-too-often forces unready and fact-bound merits disputes into the court system. See Pa. State Educ. Ass'n v. Commonwealth, 50 A.3d 1263, 1278-81 (Pa. 2012) (Castille, C.J., concurring). As a result, the court system is faced

with foundational questions regarding the appropriate standard and scope of judicial review, as well as waiver, before a principled process of review may be conducted.

In this confused situation, the Majority adopts a construction of the statute, implicating *de novo* judicial review following the administrative process, a construction whose consequences the General Assembly could not have intended. Indeed, the ambitious timelines for disclosure in the RTKL suggest that the Legislature did not contemplate the circumstances that have unfolded. Pure *de novo* review of all issues (by the Commonwealth Court in its original jurisdiction, for instance) inevitably adds delay and builds expense into the process of accessing public records. As this Court explained in Mercury Trucking, Inc. v. Pennsylvania Public Utility Commission, 55 A.3d 1056, 1075 (Pa. 2012), *de novo* review in a court of the Commonwealth following administrative review diminishes the utility of administrative proceedings and pointlessly duplicates such proceedings, increasing the cost of litigation. Moreover, the *de novo* judicial review process implicates the structural loss of the OOR's developing expertise in interpreting the RTKL, from which the deferential review standard generally derives. See id.

Delay and expense is compounded when untold numbers of appeals are subject to the new procedure. Thus, the *de novo* procedure described by the Majority tasks the Commonwealth Court with holding evidentiary hearings in fact-bound routine matters involving record request disputes, forcing that court to step out of its traditional appellate role in administrative matters. See Mohamed v. Commonwealth, 40 A.3d 1186, 1200 (Pa. 2012) (Castille, C.J., dissenting). I question whether the General Assembly intended to burden that already-busy court with the duty to act as a trial court in matters that obviously should be resolved quickly and efficiently at the administrative level. See id. Moreover, in cases involving requests of Commonwealth agencies, I question

whether the General Assembly either contemplated or intended the consequence that this Court would then be obliged to entertain appeals as of right in cases where the disputes overwhelmingly are factual. To the extent that the statute may be read as intending a *de novo* review process in the Commonwealth Court, with this Court becoming the repository for appeals of right implicating review for error in RTKL matters, the legislative scheme borders on the absurd and unreasonable. Cf. Pennsylvania Gaming Control Bd. v. City Council of Philadelphia, 932 A.2d 869, 870 (Pa. 2007) (Saylor, J., dissenting, joined by Castille, J.) (a reordering of Supreme Court's functions has consequences regarding resources and procedures for Court and litigants, and should occur only upon very clear and deliberate terms). As with most other matters that commence at the administrative agency level, the proper role for the Supreme Court is to entertain appeals on its discretionary docket, when there are special and important reasons implicated, such as resolution of conflicting precedent, and consideration of legal questions of first impression or of substantial public importance. See Pa.R.A.P. 1114.[1] If the intent of the General Assembly was a measured decision to turn the Commonwealth Court into a trial court in these cases, and then to reposit direct appeals in RTKL matters in the Supreme Court, then this

[1] In light of these considerations, I also am unpersuaded by the suggestion of appellee Brian Bowling that the best means by which to implement the legislative intent of providing expeditious access to public records is for this Court to devise rules of appellate procedure by which resolution of RTKL matters would receive "preference." See Appellee's Brief at 20-21. Every class of claims or appeals that is "preferred" requires all other classes to be deferred. The preferred solution here is legislative, or failing that, administrative, not a judicial compounding of predicate failures.

Court will need to erect a screening mechanism to avoid the inevitable inundation of fact-bound appeals.[2]

What is plain beyond question is that the statute is in need of significant revision and refinement. Short of that, however, the OOR is statutorily positioned to implement the existing legislation in a manner that would bring order out of this chaos, and ensure a fairer and more timely review process. Remarkably, it appears that the OOR still has not promulgated regulations to govern the administrative appeal process. Instead, the OOR employs an appeals procedure described in its "Interim Guidelines" which significantly departs from administrative procedures employed by most other Commonwealth agencies, and which apparently was intended to address due process concerns. See 65 P.S. § 67.1102(b) (addressing applicability of 1 Pa. Code Part II -- General Rules of Administrative Practice and Procedure, and permitting OOR to adopt regulations, policies, or procedures "contrary" to those of Pennsylvania Code). These Interim Guidelines are not formal regulations promulgated in accordance with the process required by the Commonwealth Documents Law and the Commonwealth Attorneys' Act (which require, *inter alia*, a period of public comment and review by the Attorney General for form and legality). See 65 P.S. § 67.504(a); 45 P.S. §§ 1201-1208; 71 P.S. § 732-204(b). As mere informal policy, the OOR's guidelines are also

---

[2] The OOR's 2012 Annual Report indicates that over two thousand administrative appeals of denied record requests were filed in 2012, of which 56 percent were by citizens, 31 percent were by prisoners, 8 percent were by companies, 4 percent were by media, and 1 percent were by government officials. See Pa. Office of Open Records, *2012 Annual Report*, online at https://www.dced.state.pa.us/public/oor/2012AnnualReport.pdf (last accessed on July 12, 2013). In addition, the OOR addressed nearly 800 requests for OOR records and followed approximately 170 cases through the state courts. The report also notes that, since the first year of operations for the OOR, the number of administrative appeals has increased from 1,159 in 2009 to 2,188 in 2012, nearly doubling. Id.

vulnerable to frequent and potentially disruptive *ad hoc* amendment. Unfortunately, the RTKL permits the OOR to operate indefinitely under these Interim Guidelines and outside of the traditional administrative review process. See 65 P.S. § 67.1102(b). Concomitantly, the RTKL fails to articulate any failsafe procedures to vindicate litigants' due process rights during the OOR administrative process – again, the result is defaulting cases into the court system following what amounts to meaningless agency review.

I favor legislative refinement to address these concerns. The courts are not in a position to make the necessary adjustments to the RTKL in the case by case method available to us, and our decision regarding discrete aspects of the appellate review process can act as nothing more than a blunt tool where a scalpel is more appropriate. Furthermore, the endeavor is pointless given that the General Assembly can displace the judicial "Band-Aids" at any time by legislative action. Alternatively, I believe the RTKL can be construed as permitting the OOR a significant amount of discretion to formulate procedures, as its experience in implementation dictates: (1) to assist and direct Commonwealth and local agencies respecting how to provide access to public records; and (2) to provide for timely, meaningful and thorough administrative review of challenged Commonwealth and local agency decisions. See 65 P.S. § 67.504(a). I also believe that this Court is not powerless to impose some rationality in this area of law, if the present scheme persists.

To that end, if the General Assembly fails to make necessary adjustments and the OOR continues in its failure to establish a regulatory process of administrative review that ensures adequate due process for litigants within the limitations of the flawed authorizing statute, including a process to resolve factual disputes, I would entertain the alternative that all decisions of the OOR should be reversed *per curiam*

with a directive to provide such process, and then allow for meaningful appellate review of the agency decision in the proper court, with discretionary review for significant issues available in this Court.