

**[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 entered on
v.	:	February 5, 2010 at No. 936 C.D. 2009,
	:	reversing the final determination of the
	:	Office of Open Records at No. AP 2009-
	:	0128 dated April 17, 2009
OFFICE OF OPEN RECORDS,	:	
	:	990 A.2d 813 (Pa. Cmwlth. 2010)
Appellant	:	
	:	ARGUED: September 13, 2011
	:	
PENNSYLVANIA EMERGENCY	:	
MANAGEMENT AGENCY,	:	
	:	
Intervenor	:	

DISSENTING OPINION

MADAME JUSTICE TODD

DECIDED: August 20, 2013

I respectfully dissent. The Right to Know Law (“RTKL”)¹ contains a number of inconsistent provisions, making a determination of the proper standard of review exceedingly difficult, and calling for the General Assembly to set forth a clear articulation of the proper standard and scope of review of Office of Open Records (“OOR”) decisions. In the absence of such guidance, however, I submit that issues concerning the granting or denial of access to public records should be reviewed by appellate

¹ 65 P.S. §§ 67.101 *et seq.*

courts pursuant to the traditional, and issue specific, standards of review set forth below. My reasoning follows.

Initially, I note that the RTKL, by its plain language, makes the provisions of 2 Pa.C.S. inapplicable to the statute.² Section 704, 2 Pa.C.S. § 704,³ which is entitled “Disposition of appeal,” and which purportedly sets forth a standard of review, is contained in 2 Pa.C.S.⁴ As such, by the clear and unambiguous terms of the RTKL, the General Assembly intended Section 704 to be inapplicable to the RTKL. Thus, while the General Assembly did not set forth in the RTKL an express statement of the applicable standard of review to be applied when reviewing determinations by the OOR, it made clear what it could not be.

² “The provisions of 2 Pa.C.S. (relating to administrative law and procedure) shall not apply to this act unless specifically adopted by regulation or policy.” 65 P.S. § 67.1309.

³ “After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence.” 2 Pa.C.S. § 704.

⁴ While embraced in our decisional law as a “standard of review,” Section 704 is not truly a standard of review as that jurisprudential concept is traditionally understood. A standard of review is an articulation of the level of deference, or the degree of scrutiny, to be given by a reviewing court to the lower tribunal’s decision. Commonwealth v. Walls, 592 Pa. 557, 564, 926 A.2d 957, 961 (2007). Additionally, a standard of review is issue specific. Depending upon the question before the court, traditional standards include *de novo*, abuse of discretion, and clearly erroneous. Distilled to its essence, Section 704 instructs that a Commonwealth agency’s adjudication must be affirmed unless the court finds the adjudication is violative of the constitution or the law, contains procedural irregularities, or where findings of facts lack a basis. Section 704 does not purport to explain the level of deference to be given to the lower tribunal’s decision; rather, it appears to act as a limitation on the types of issues that an appellate court may consider. Thus, Section 704 is not instructive in explaining the appropriate degree of deference to be accorded a lower tribunal’s decision.

As the proper standard of review is not set forth in the RTKL, and as the General Assembly has declared that provisions of 2 Pa.C.S., including Section 704, are inapplicable to the RTKL, there exists an open question regarding the proper standard of review to be applied in these instances. In the absence of direction by the General Assembly, our Court is free to establish an appropriate standard of review. See In re Doe, 613 Pa. 339, 353-54, 33 A.3d 615, 624 (2011).

I find certain factors to be influential in determining the proper standard of review. First, as noted by the Commonwealth Court, the most recent iteration of the RTKL reflects an intent by the legislature that issues regarding access to public records be conducted in an expeditious and efficient manner. Bowling v. Office of Open Records, 990 A.2d 813, 822-23 (Pa. Cmwlth. 2010). A pure *de novo* review by appellate courts of all issues would add delay and expense to often unrepresented requesters seeking access to public records. Furthermore, while certain determinations by the OOR will surely constitute pure questions of law, and, thus, be subject to *de novo* review, other questions will involve the application of fact to law, entailing some discretion on the part of the OOR. See, e.g., 65 P.S. § 67.102 (determining confidential nature of information includes whether disclosure of information would cause substantial harm); id. (determination of trade secret); 65 P.S. § 67.706 (determining whether redaction appropriate); 65 P.S. § 67.708 (determining exemptions from access including reasonable likelihood of physical harm and public safety). Finally, the General Assembly mandates that when a request for access to a record is denied, the appeals officer who considers the appeal shall issue a “final determination” on behalf of the OOR or other agency. 65 P.S. § 67.1102(a)(4). In my view, these aspects of the RTKL counsel towards a reviewing court giving at least some degree of deference to an OOR decision.

Based upon these considerations, and recognizing that the proper standard of review to be applied by a reviewing court is issue specific, I conclude the following standards should be applied by reviewing courts under the RTKL. First, when reviewing factual determinations, an appellate court should be bound by factual findings made by the appeals officer where they are supported by competent evidence of record.⁵ Pure questions of law should be reviewed without deference to the appeals officer under our traditional *de novo* standard. Finally, an appeals officer's ultimate determination, regarding whether the release of specific information is appropriate, should be reviewed under the abuse of discretion standard. See id. Under this standard, an abuse of discretion "requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous." Paden v. Baker Concrete Constr. Inc., 540 Pa. 409, 412, 658 A.2d 341, 343 (1995). Yet, it is important to understand that the abuse of discretion standard, while deferential, is not without teeth. Indeed, an "abuse of discretion standard includes review of whether the judgment exercised was unreasonable." Commonwealth v. Walls, 592 Pa. 557, 565, 926 A.2d 957, 962 (2007).

In my view, this approach to judicial review is not only consistent with the goals of the RTKL, but also accords OOR decisions a certain level of deference to which they

⁵ I recognize that the RTKL provides that a court's decision is to "contain" findings of fact and conclusions of law based upon the evidence as a whole. 65 P.S. § 67.1301(a). Yet, an appeals officer is not required to hold a hearing and this decision is not appealable. 65 P.S. § 67.1102(a)(2). Reconciling these seemingly conflicting provisions of the RTKL, I conclude that, where an appeals officer decides not to hold a hearing, the Commonwealth Court may engage in independent fact finding, consistent with its mandate to render a decision with findings of facts, but, where an appeals officer holds a hearing, the officer's factual findings should be subject to a review of whether they are supported by the competent evidence.

are entitled. Thus, I would remand this matter to the Commonwealth Court to review the determination of the OOR under the standards of review set forth above.