

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jason Kokinda,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	
	:	
	:	No. 1146 C.D. 2013
County of Lehigh	:	Submitted: September 27, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY¹

FILED: January 8, 2014

Jason Kokinda (Requester) appeals, pro se, from the Lehigh County Common Pleas Court’s (trial court) April 25, 2013 order denying his Right-to-Know Law (RTKL)² request. Requester presents one issue for this Court’s review: whether records exist if they substantially, but not fully, match the initial, narrow request. We vacate and remand.

By letter dated July 3, 2012, Requester made a RTKL request to the Lehigh County Prison seeking “Lehigh Co. Attorney visitation log book entries of Dennis G. Charles of 441 Linden St., Allentown, PA visiting Jason Kokinda #0141075 of L.C.P., from July 21, 2009 to February 17, 2010. Or certification that the only entries are during Nov. 9-12, 2009; twice.” Lehigh County Right-To-Know Request Form. On July 11, 2012, Lehigh County (County) responded to the request, in accordance with Sections 901 and 902 of the RTKL, 65 P.S. §§ 67.901 and 67.902,

¹ This opinion was reassigned to the Authoring Judge on October 30, 2013.

² Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101–67.3104.

stating that certain factors applied and that there would be a formal written response approving or denying the request on or before August 10, 2012. On August 9, 2012, the County issued its formal response denying Requester's request pursuant to Sections 708(b)(3) and 102 of the RTKL, 65 P.S. §§ 67.708(b)(3) and 67.102. Specifically, the County denied the request because

the disclosure creates a reasonable likelihood of endangering the safety and physical security of the prison. . . . [and] because the log book does not list who Attorney Charles was going to see releasing the document would violate the attorney-client privilege of whomever he was there to see

County's Formal Response. The County advised Requester of his right to appeal its response to the Pennsylvania Office of Open Records (OOR) within 15 business days.

On August 20, 2012, Requester appealed to the OOR. On August 23, 2012, the OOR issued a Final Determination dismissing Requester's appeal because he failed to include a copy of his request and/or the County's response. The OOR's Final Determination advised Requester that he could re-file the appeal, including all required documents, unless the 15-day appeal period had expired. It also notified Requester that he could file an appeal with the trial court within 30 days of the mailing date of the Final Determination.

On September 21, 2012, Requester appealed to the trial court.³ On April 25, 2013, the trial court held that although Requester did not include a copy of his request and the OOR's response, those documents were not needed because the trial court conducted a *de novo* review. The trial court denied Requester's request pursuant to Section 705 of the RTKL, 65 P.S. § 67.705, because the records did not

³ Requester erroneously listed the OOR as the defendant, but this error was subsequently remedied by the trial court's January 8, 2013 order which substituted the County as the defendant.

exist, and the County was not required to create them. Requester appealed from the trial court's order to the Superior Court. By July 2, 2013 order, the Superior Court transferred the matter to this Court.⁴

Requester argues that records exist under the RTKL if the requested records substantially, but not fully, match the initial, narrow request. The County asserts that because Requester failed to include a copy of his original RTKL request and a copy of the County's response when he filed his appeal with the OOR, and did not do so when the OOR gave him the opportunity to correct the deficiency, Requester has failed to exhaust his administrative remedies, and accordingly, the trial court lacked jurisdiction to consider the appeal on its merits.

Initially, we note that the OOR's Final Determination dismissed Requester's appeal for failure "to include a copy of the Request and/or agency Response." OOR's Final Determination. However, the Final Determination also included the following paragraph:

You may re-file the appeal unless fifteen (15) business days have elapsed since the denial or deemed denial of your request for records. You must include **all** required components/documents, including any submitted in this case, **if the appeal is re-filed. Within thirty (30) days of the mailing date of this Final Determination, you may appeal or petition for review to the [trial court]. . . .**

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This Court's standard of review is limited to determining whether the trial court committed an error of law, violated constitutional rights, or abused its discretion. *SWB Yankees LLC v. Gretchen Wintermantel*, 999 A.2d 672, 674 n. 2 (Pa.Cmwlth.2010), *aff'd*, 615 Pa. 640, 45 A.3d 1029 (2012). 'The scope of review for a question of law under the [RTKL] is plenary.' *Id.* (quoting *Stein v. Plymouth Township*, 994 A.2d 1179, 1181 n. 4 (Pa.Cmwlth.2010)).

McClintock v. Coatesville Area Sch. Dist., 74 A.3d 378, 381 n.8 (Pa. Cmwlth. 2013).

Id. (second emphasis added). Consequently, the OOR provided Requester the option of either re-filing his appeal with the OOR or appealing to the trial court. Requester chose to appeal to the trial court. The sole issue before the trial court should have been whether Requester’s appeal was properly dismissed for failure to include a copy of the request and/or agency response. The trial court ruled that “since [its] standard of review is *de novo* in nature, [Requester’s] failure to include a copy of his request does not divest [it] of jurisdiction.” Trial Ct. Op. at 5. Thereafter, the trial court ruled on the merits of the appeal and held that “[s]ince [the County] is not required to create a record which does not already exist, [Requester’s] request must be denied.” Trial Ct. Op. at 6.

The County argues here, as it did before the trial court, that because the OOR adopted Interim Guidelines which require appeals to include the request and the response thereto, Requester has failed to perfect his appeal by not adhering to the OOR Interim Guidelines. *See* County Br. at 6. We disagree.

“It is well settled that regulations not promulgated pursuant to the Commonwealth Documents Law⁵ have no force or effect and may not form the basis of an agency’s action.” *Cmty. Country Day School v. Dep’t of Educ.*, 414 A.2d 428, 431 (Pa. Cmwlth. 1980). Our Supreme Court expressly held: “The OOR, has not adopted regulations . . . rather, it has only adopted ‘Interim Guidelines’ **that do not constitute duly promulgated regulations.**” *Bowling v. Office of Open Records*, ___ Pa. ___, ___, 75 A.3d 453, 471 n.20 (2013) (emphasis added). Thus, the OOR’s dismissal of Requester’s appeal on the ground that he failed to follow the OOR’s Interim Guidelines was without any legal basis.

The trial court, relying on *Chester Community Charter School v. Hardy ex rel. Philadelphia Newspaper, LLC*, 38 A.3d 1079 (Pa. Cmwlth. 2012), determined

⁵ Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§ 1102–1602, 45 Pa.C.S. §§ 501–907.

that it had jurisdiction to hear the appeal because its standard of review is *de novo*. Although a *de novo* review may cure certain defects, it cannot remedy the OOR's legal errors in dismissing Requester's appeal and not fulfilling its statutory obligation to review the merits of the case. *Id.*

The issue of whether an appellate court can address the merits of a RTKL case without the OOR first considering the merits was addressed by this Court in *Barnett v. Department of Public Welfare*, 71 A.3d 399 (Pa. Cmwlth. 2013), wherein this Court explained:

We recognize that this Court has concluded that, when reviewing an OOR appeal from a Commonwealth agency's denial of a RTKL request in our appellate jurisdiction, we subject the matter to independent review, and that we are 'entitled to the broadest scope of review.' *Bowling* [*v. OOR*, 990 A.2d 813, 820 ([Pa. Cmwlth.] 2010), *aff'd*, ___ Pa. ___, 75 A.3d. 453 (2013)]. However, this Court's decision in *Bowling* does not mandate that we eliminate **the statutory requirement that the OOR first consider a requester's appeal on the merits before we undertake appellate review**. A final determination on the merits permits this Court to perform effective appellate review in accordance with the standard and scope of review set forth in *Bowling*. Here, there is no final determination on the merits, but merely a summary dismissal of Requester's OOR Appeal. There was no opportunity for either Requester or [the agency] to present any evidence to support each party's respective position. Under these circumstances, we believe that the better approach in this matter is to permit the OOR the opportunity to follow the procedures set forth in the RTKL and issue a final determination on the merits before we exercise review.

Id. at 407 (emphasis added). Here, the OOR dismissed the case giving Requester the option to refile with it or appeal to the trial court. Requester appealed from the OOR's decision. On appeal, the trial court addressed the filing requirements then proceeded to decide the merits notwithstanding the fact that the OOR never disposed of, or ruled on the merits. Because there is a "statutory requirement that the OOR

first consider a requester's appeal on the merits **before** . . . appellate review[,]” the trial court's order is vacated. *Id.* at 407 (emphasis added). Accordingly, we remand this matter to the OOR for the parties to present evidence so the OOR can make a determination on the merits of Requester's appeal.

For all of the above reasons, the trial court's order is vacated and the matter is remanded to the OOR to allow the parties the opportunity to present evidence in support of their respective positions upon which the OOR can make a determination on the merits.

ANNE E. COVEY, Judge

