



FINAL DETERMINATION

IN THE MATTER OF: :
 :
JACK BRUBAKER and :
THE LANCASTER NEW ERA :
Complainants :
 :
v. : **Docket No.: AP 2009-0104**
 :
COUNTY OF LANCASTER, :
Respondent :

INTRODUCTION

Jack Brubaker, a reporter for *The Lancaster New Era*, filed a right-to-know request with the County of Lancaster (“Lancaster”) pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.* Mr. Brubaker requested autopsy reports for two individuals and Lancaster denied access citing section 67.708(b)(20) which exempts autopsy records from disclosure under the RTKL. Mr. Brubaker timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth below, the appeal is **granted** and Lancaster is required to take further action as outlined below.

FACTUAL BACKGROUND

Mr. Brubaker filed an RTK request dated February 9, 2009 with Lancaster seeking “Autopsy reports for Charles Carl Roberts, who died Oct. 2, 2006 and Luis David Villifane, who died Nov. 19, 2008.” On February 13, Dory Crater, Open Records

Officer, responded as follows: “On February 11, 2009, the Open Records Officer received your request for the coroner’s reports for Charles Carl Roberts, who died on October 2, 2006; and Luis David Villifane, who died on November 19, 2008. Your request has been granted pursuant to the Right to Know Law Section 708 (b) (20). Attached are the two reports.”

The reports were not attached. Lancaster provided only cover sheets that list the name, date and time and place, cause and manner of death. In granting the request, Lancaster cited an exemption to disclosure and withheld the actual autopsy reports, but did not inform Mr. Brubaker that his request was partially denied, or of his appeal rights.

Mr. Brubaker appealed stating that he requested autopsy reports, received only cover sheets and relied upon Penn Jersey Advance, Inc. v. Grim, 962 A.2d 632 (PA 2009) as a legal basis for access. The OOR called Ms. Crater, seeking any other correspondence to Mr. Brubaker related to his request.

On March 17, 2009, Ms. Crater responded in writing, stating that Mr. Brubaker was provided with the names of the deceased individuals, and the causes and manners of death in accordance with 65 P.S. § 67.708(b)(20). She confirmed that her letter dated February 11, 2009 was the only official response from Lancaster. She recounted a discussion with Mr. Brubaker wherein he stated that he should have received the full report in accordance with Penn Jersey, *supra.* Ms. Crater wrote,

“In footnote 2 of the *Penn Jersey* case, the Pennsylvania Supreme Court acknowledged that the new Right to Know Law provided an exception from public access for certain records relating to autopsies. The Court noted that the events of the *Penn Jersey* case occurred prior to the new Right to Know Law going into effect. The Court specifically stated “we express no opinion at this time on the relationship between the Coroner’s Act and the Right to Know Law.” Therefore, the County of Lancaster determined that the *Penn Jersey* case was not applicable to Mr. Brubaker’s request...”

Lancaster relies upon 65 P.S. §67.708(b)(20) which exempts from disclosure:

“An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.”

Mr. Brubaker, and the *Lancaster New Era*, granted an extension to the OOR to issue this Final Determination.

LEGAL ANALYSIS

Pursuant to section 67.503(a), the OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). Lancaster is a local agency subject to the RTKL, 65 P.S. §67.302.

The RTKL defines a “record” as follows: “Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document,” 65 P.S. §67.102.

The RTKL defines a “public record” as follows: “A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege,” 65 P.S. §67.102 (emphasis added).

Section 67.903 requires agencies to provide information regarding a denial of access: “If an agency’s response is a denial of a written request for access, whether in whole or in part, the denial shall be issued in writing and shall include:

- (1) A description of the record requested.
- (2) The specific reasons for the denial, including a citation of supporting legal authority.
- (3) The typed or printed name, title, business address, business telephone number and signature of the open-records officer on whose authority the denial is issued.
- (4) Date of the response.
- (5) The procedure to appeal the denial of access under this act.”

Lancaster’s response cited an exemption to disclosure and withheld records while stating that the request was granted. Although it partially denied Mr. Brubaker’s request, Lancaster failed to provide specific reasons for partially denying the request or the procedure to appeal denial of access. It therefore failed to comply with the procedural requirements of the RTKL in its response to Mr. Brubaker. This error caused no harm in the instant appeal.

Section 1251 of the Coroner’s Act requires that “every coroner, within thirty (30) days after the end of each year, shall deposit all of his official records and papers for the preceding year in the office of the prothonotary for the inspection of all persons interested therein.” 65 P.S. §67.306. The Penn Jersey case addressed whether an autopsy report is one of the “official records and papers” required to be filed under this section of the Coroner’s Act, and the Court held that these records were in fact “official records and papers.”

Autopsy reports have a long and split history in Pennsylvania courts. In 1996, the Superior Court ruled determined that autopsy reports are “official records of the coroner’s office” and thus should be released under the Coroner’s Act. See In re Dillon, 674 A.2d

(Pa. Super. Ct. 1996) later cited favorably by the Supreme Court. *See In re Buchanan*, 880 A.2d 568, 576-77 (Pa. 2005). The Commonwealth Court took the opposite position, holding that autopsy reports are not “official records” covered by the Act and that the statute only requires coroners to disclose documentation of the cause of death and whether the death resulted from foul play. *See Johnstown Tribune Publ’g Co. v. Ross*, 871 A.2d 324, 330-31 (Pa. Commw. Ct. 2005).

In *Penn Jersey*, the Supreme Court reversed the Commonwealth Court’s ruling holding that an autopsy is an official duty of a coroner. The Court stated that “[i]t follows logically that a coroner’s resulting autopsy reports constitute ‘official records and papers’ within the meaning of [the Act].” Recognizing the increased access the public would have to potentially privileged information, the Court explained that trial courts would be able to address these types of “legitimate” concerns to limit access to autopsy reports based on privacy or privilege grounds where warranted.

In a footnote, the Supreme Court noted the RTK law took effect on January 1, 2009 and therefore had no application to the underlying events of the *Penn Jersey* Case. The Court stated:

We note that section 708(b)(20) of the recently effective Act 3 of 2008, the Right-to-Know Law,” provides an exception from public access for certain records relating to autopsies. See 65 P.S. §67.708(b)(2)). The Right-to-Know Law further provides that “if the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply.” See 65 P.S. §67.3101. The Right-to-Know Law became effective on January 1, 2009 and thus has no application to the events underlying this case. Accordingly, we express no opinion at this time on the relationship between the Coroner’s Act and the Right-to-Know Law.

The Supreme Court unequivocally held in *Penn Jersey* that autopsy reports are official records of the Coroner to be filed within 30 days after the end of each year “for

the inspection of all persons interested therein.” It is the view of the OOR that the mandate of the Coroner’s Act continues to govern public access to autopsy reports, which the Court has deemed to be an “official record” of the Coroner’s Office. Thus, as official records of the coroner’s office autopsy reports are public record, as defined under the RTKL, as of the date of required filing - 30 days after the end of each year. If a citizen requests an autopsy report, and it has been filed with the prothonotary in accordance with the Coroner’s Act, the record is a public record and available under the RTKL. If the autopsy report has not yet been filed under the Coroner’s Act, the autopsy report may be protected under Section 708(b)(20) of the RTKL until made public as governed by the provisions of Coroner’s Act. In this case, the requested records are public record under the RTKL when they have been deposited with the prothonotary’s office as required by the Coroner’s Act.

CONCLUSION

For the foregoing reasons, this appeal is **granted** and Lancaster is required to supply the requested information to Mr. Brubaker in accordance with the provisions of the Coroner’s Act as outlined above. Further, Lancaster is cautioned regarding its failure to follow the requirements of the RTKL. As stated above, Mr. Brubaker was not informed that his request was partially denied or of the legal reason for same. He was not informed of his appeal rights as required by section 67.903. Although this was not the subject of the appeal, Lancaster must take immediate steps to come into compliance with the RTKL.

The parties are advised that this is a Final Determination. Within thirty (30) days of the mailing date of this determination, it may be appealed to the Lancaster

County Court of Common Pleas. In the event of an appeal for judicial review, all parties must be served with notice of the appeal. The Office of Open Records shall be served notice in accordance with Section 1301 and have an opportunity to respond to any appeal for judicial review.

The parties are advised that this Final Determination will be posted on the Office of Open Records website at: <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED ON: April 17, 2009

A handwritten signature in black ink, appearing to read 'Dena Lefkowitz', written in a cursive style.

APPEALS OFFICER
DENA LEFKOWITZ, Esq.