



## **FACTUAL BACKGROUND**

On August 7, 2009, the Requestor filed a request with the County. Specifically, she sought:

Any record relating to “the directive of the President Judge”, referred to in Thomas C. Abrahamsen, Esquire’s June 29, 2009 letter . . . that Chester County and/or Chester County Justice Center purportedly follows regarding criminal background checks or current and potential employees.

On August 11, 2009, Thomas C. Abrahamsen, Esquire, timely responded on behalf of the County and denied the request as duplicative of the Requester’s August 3, 2009 request.<sup>1</sup> The County also asserted that the Requester had not identified any record of the local agency as “record” is defined by the RTKL as something that “documents a transaction or activity of an agency.” The County advised that the request be made to the Open Records Officer for the judicial agency, not the local agency. Finally, the County contended that one cannot use the RTKL to make discovery requests, citing *Tapco, Inc. v. Township of Neville*, 695 A.2d 460 (Cmwlth. Ct. 1997).

The Requestor filed a timely appeal with the OOR on August 18, 2009 and granted additional time for OOR to issue a Final Determination. On September 21, 2009, the County again asserted that the Requester could not use the RTKL to make discovery requests and is required to designate a Record. The County asserted that it “would not honor further requests in the nature of a discovery request.” The County did attach e-mails that it stated were “the only documents on the subject identified in the request.” The Requestor reviewed the provided emails and stated as follows:

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<sup>1</sup> The Requestor had another appeal involving the County docketed at 2009-0691. In that appeal, the Requestor was seeking copies of records relating to an Order issued by the County purportedly ordering that “no one with a felony conviction can work in the [Chester County] Justice Center.”

In reviewing the documents, it appears that there was some email correspondence that took place between September 25, 2008 and October 29, 2008 regarding the procedures for the background check. It appears that Karen K. Florentine [Director of Human Resources for the County] received some questions about the background check procedures, to which she responds in her October 29, 2008 email. The emails, if any, regarding questions about background check procedures were not included in Mr. Abrahamsen's response. If the County can produce the related emails or can provide an affidavit as required under the RTK Law that no such emails exist, then we will withdraw our appeal.

The OOR invited the County to respond and requested a sworn affidavit of non-existence from the County if the requested records did not exist. In response the County advised the OOR that the Requester's law firm "has filed a Federal law suit against the County and some of its employees the subject matter of which includes the request made by Ms. Wentworth under the [RTKL]." The County argued that, therefore, "pursuant to section 3101.1 of the [RTKL] [the OOR] does not have any further jurisdiction over the request." The Requester countered stating that the referenced law suit does not constitute an appeal from any OOR Final Determination. She asserted that section 3101.1 "does not even speak to the Office of Open Records' jurisdiction, let alone foreclose it, under the circumstances presented."

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The County is a local agency subject to the RTKL. *See* 65 P.S. § 67.301.

Here, the County provides some records responsive to the Request, but fails to confirm or deny whether any additional responsive records existed. Instead, the County

asserts that because the Requester has filed a Federal law suit, the subject matter of which includes the request, the OOR does not have jurisdiction over the Request pursuant to Section 3101.1 of the RTKL.

Section 3101.1 states: “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.” The County did not indicate with which federal or state law the RTKL purportedly conflicts. It asserts only that there is a pending federal lawsuit regarding the subject matter of the request. It appears that the County is arguing discovery rules supersede the RTKL, that the two means of access to records cannot be used in conjunction with each other, and that therefore, the OOR has no jurisdiction over the appeal. However, the County fails to provide any support for this implied assertion. The County fails to identify any provision in the RTKL providing that a conflict with another law regarding public access of a local agency’s records divest the OOR of jurisdiction to issue a final determination regarding the request for access. A conflict with another law may render a record that is otherwise public under the RTKL non-public. However, the OOR retains the jurisdiction to make that determination when the request is to a local agency except as provided in section 503(d). 65 P.S. §67.1310. The County does not argue that section 503(d), regarding jurisdiction over appeals relating to access to criminal investigative record in possession of a local agency of a county, applies. Therefore, the OOR has the authority to issue this Final Determination.

In the original denial letter the County asserted that the request did not identify a record that “documents a transaction or activity of the agency” and that the RTKL cannot be used to make discovery requests. The County cited *Tapco, Inc.*, 695 A.2d 460

(Cmwlth. Ct. 1997). It did not otherwise support its assertion. The assertion regarding the RTKL and discovery requests has already been addressed above and found unsupported. The RTKL is not eclipsed merely because a discovery request or lawsuit is in play. Therefore, the only question is whether the request is for a record of the County.

*Tapco* is not controlling as to whether the requested email records are records of the County. In *Tapco*, the Commonwealth court mentions, as *dicta*, the following: “Tapco’s requests read like discovery requests rather than Right-to-Know Act requests.” *Id.* at 461. The Court continues, “[r]ather than requesting accounts or vouchers that it wants to examine, Tapco wants the Township to conduct a records search and produce certain documents.” *Id.* However, as there was no challenge to the form of the request the *Tapco* Court heard the appeal despite remarking that the trial court could have properly “quashed the request.” *Id.*

*Tapco* pre-dates the current RTKL. Significant differences exist between the prior right to know act in effect at the time *Tapco* was decided, the 2002 amendments to the prior act and the current RTKL. A record of the agency under the old law and the 2002 amendments was defined as “any account, voucher or contract . . . and any minute, order or decision by an agency . . . .” The current RTKL significantly expands the definition of record. Section 102 of the RTKL, defines the term “record” as:

“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.”

E-mails sent or received by an agency are records of the agency. See *Lacoff v. Owen J. Roberts Schl. Dist.*, OOR Dkt. AP 2009-0679; *Campbell v. Centre County*,

OOR Dkt. AP 2009-0373; *Day v. East Stroudsburg Area Schl. Dist.*, OOR Dkt. AP 2009-0240; *Bowders v. York Township*, OOR Dkt. AP 2009-0087. Therefore, the request is for a record of the County.

A record in the possession of a local agency is presumed to be a public record unless: (1) the record is exempt under Section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other federal or state law or regulation or judicial order or decree. *See* 65 P.S. 67.305. It is the agency, and not the requester, that bears the burden of overcoming the presumption of openness. The County does not provide any legal or factual grounds to support a finding that the records are protected from disclosure by any of the above. The County has not submitted a sworn statement that the identified related emails do not exist. Therefore, the OOR finds that the County has not met its burden and the appeal is granted. The County is required to release any responsive emails or, in the alternative, provide the Requestor with a sworn statement subject to penalty of perjury that no responsive records exist other than those already provided.

### **CONCLUSION**

For the foregoing reasons, this appeal is **granted**, and the County is required to release any responsive requested records or in the alternative, to provide the Requestor with a sworn statement that no other responsive records exist in its possession or control. The parties are advised that this is a Final Determination and is binding on the parties. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Court of Common Pleas, Chester County. All parties must be served with notice of

the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1302.

FINAL DETERMINATION ISSUED: October 27, 2009

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

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APPEALS OFFICER  
AUDREY BUGLIONE, Esq.

Sent to:  
Carla Wentworth, Esquire  
Thomas Abrahamsen, Esquire