



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ERIC FIKRY,	:	
Complainant	:	
	:	
v.	:	Docket No.: AP 2010-0338
	:	
ALLEGHENY COUNTY DEPARTMENT	:	
OF ADMININSTRATIVE SERVICES	:	
	:	
Respondent	:	

INTRODUCTION

Eric Fikry (the “Requester”) filed a right-to-know request (the “Request”) with the Allegheny County Department of Administrative Services (“County or Department of Administrative Services”),¹ pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.*. He sought access to a number of records. The County did not respond within five days and the Request was deemed denied. The Requester filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted** and the County is required to take action as set forth below.

¹ While the Request was made to the Department of Administrative Services, the County states that the “agency” to which the Request was actually made is the executive branch of Allegheny County. The executive branch consists of the elected County Executive, the appointed County Manager and the various executive departments, including the Department of Administrative Services.

FACTUAL BACKGROUND

The Requester filed the Request with the County via e-mail on March 22, 2010

seeking the following:

1. Policies, memoranda, or other documents reflecting what information or data is available to or accessible by Administrative Services, including but not limited to whether and how long Administrative services stores electronic mail for county officials and county employees.
2. Policies, memoranda, or other documents reflecting whether Administrative Services has access to information, electronic mail, or other data to or from, or concerning the following: Dan Onorato, Mark Flaherty, John Weinstein, Ted Puzak, Bill Gallagher, Timothy Johnson, Jennifer Liptak, Cheryl Bateman, or other employees, directors or trustees of the Retirement Board of Allegheny County (“Retirement Board”). If so please produce any policies, memoranda, or other documents reflecting what information Administrative Services has access to, including the scope, type, and dates of that information.
3. Policies, memoranda, or other documents reflecting the procedures that Administrative Services follows in response to request under the Right-to-Know Law.
4. Electronic mail that was (1) sent to, copied to, or sent from any email address containing “@btkmc.com”, “@sbtklaw.com”, or “@blbglaw.com”; and that (2) contains any of the following terms: [the request listed 25 different terms relating to elections, campaigns, and contributions].
5. To the extent not covered by Request number 4 above, paper records, data files, and electronic mail sent to, received from, or concerning any attorney or employee of the law firms of Barroway Topaz Kessler Meltzer & Check LLP (or its predecessors, including Schiffrin Barroway Topaz & Kessler, LLP) or Bernstein Litowitz Berger & Grossman LLP, and also concerning either of the following subjects:
 - a. The political candidacy or potential political candidacy of any individual for office in the Allegheny County government or the government of the Commonwealth of Pennsylvania, including but not limited to the offices of Governor, County Executive, County Treasurer, and County Controller; and
 - b. Political contributions or donations in support of the political candidacy or potential political candidacy of any individual for office in the Allegheny County government or the government of the Commonwealth of Pennsylvania, including contributions or donations made directly to the candidate or to political organizations (including but not limited to any political action committee, “friends of” committee, or campaign committee) acting in support of the candidate.

6. Communication between Administrative Services and the Retirement Board Concerning:
 - a. Document retention policies
 - b. Data or email retention policies
 - c. The new Right to Know law signed by Gov. Edward G. Rendell on February 14, 2008
 - d. Responses to any requests made under that law

The Requester filed an appeal with the OOR on April 16, 2010, claiming that he had not received a response from the County within five business days. In response, the County claimed that the appeal was premature because the Request was not submitted until March 23, 2010 and that a 30 day extension letter it sent out on March 30, 2010 was timely. Documents submitted to the OOR demonstrated that the Request was submitted to the County on March 22, 2010 at 4:26 p.m. prior to close of business (4:30 p.m.). Since the County did not submit any documentation evidencing that the Request was received after 4:30 p.m., the OOR determined that the Request was submitted on March 22, 2010. The County did not respond by March 29, 2010, therefore, the Request was deemed denied and the appeal timely.

Following the filing of the appeal, the County notified the Requester in an April 29, 2010 letter that it would provide access to responsive records to sub-requests 1, 2, 3, 5(b) and 6(a-c). With respect to sub-request 4, the County stated that no records exist as the Request applies to Timothy Johnson, Director Department of Administrative Services or Dan Onorato, Allegheny County Chief Executive. It noted that it did not undertake a search of the records of other independent Allegheny County Offices which have their own open records officers. With respect to sub-request 5(a), the County stated that no records exist as the Request applies to public officials and employees of the County. It again noted that it did not undertake a search of the records of other independent

Allegheny County Offices which have their own open records officers. The County stated that no records responsive to 6(d) exist. There was no evidence provided to the OOR that the County provided any affidavits in support of the letter.

On July 12, 2010, the Requester notified the OOR that he had been provided with 22 pages of redacted responsive documents. After viewing the records provided, the Requester subsequently claimed that the response was facially deficient because all the records requested had not been provided. He also claimed that the County had refused to perform a good faith search for all the requested records in response to his Request and as a result had improperly withheld documents relating to County employees.

Specifically, he argues that the County is required under the RTKL to search electronically-stored information responsive to sub-requests 4-5. He contends that he was not provided with any of the requested polices or memoranda and that he was not provided with e-mails that were referenced within the e-mails he was provided. He also challenged the redactions that were based on attorney-client privilege.

In response to these claims, the County states that the Request in part was for emails of the Allegheny County Controller, the Allegheny County Treasurer, the Allegheny County Council and the Retirement Board of Allegheny County.² The County points out that each of these entities are separate agencies with separate open records officers. The County proposes that the Requester should request the documents from the open records officer for each agency.

² The County stated that the County structure is analogous to the Commonwealth structure. The County Executive is equivalent to the Governor, the County Controller to the Auditor General, the County Treasurer to the Commonwealth Treasurer, the County Council to the General Assembly and the Retirement Board to the Public Employee Retirement Commission.

The County indicates that the e-mail systems of each agency resides on the County's servers which are maintained by the Division of Computer Services, which is within the Department of Administrative Services. The County claims that it responded to the Request by providing the Requester with copies of emails under its care, custody, or control. The County states that it cannot provide copies of emails under the care, custody, or control of the other agencies because they are not records of the County. The County argues that none of the executive departments, including the Department of Administrative Services, have authority to review, copy or disseminate or otherwise control the e-mail of the Independent agencies or their employees wherever those records may be stored. The County reasons that the equipment is the County's, but the records are within the care, custody and control of the other agencies.

It argues that the County had no authority to invade the electronic files of those independent agencies. It asserts it has no more authority to retrieve them from a server than it would to go to those independent offices and rifle through their filing cabinets in search of responsive records. In short, the County reasons it has no independent right to violate the ownership of these records.

In addition, the County submitted the affidavit of Timothy Johnson, Director of Administrative Services and Right-to-Know Officer. The affidavit was executed under penalty of perjury. He affirmed that the entities are separate agencies with their own open records officers. He stated that the protocol followed for the emails is similar to the filing system for hard copy documents retained by the other agencies. He asserted that filing cabinets are the property of the agency and the County has no authority to review, copy, disseminate or otherwise control the hard copy documents stored by the

independent agencies in the agency-owned filing cabinets. Neither the affidavit nor the letter submitted to the OOR addressed the redactions or gave any legal support for them.

LEGAL ANALYSIS

The [RTKL] is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010).

Under the RTKL, an appeals officer is required “to review all information filed relating to the request.” 65 P.S. 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. 65 P.S. 67.1102(a)(2). The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. 65 P.S. § 67.1102(a)(2).

The Office of Open Records 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. § 67.302. The RTKL defines a “public record” as:

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.

The RTKL defines a “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.

65 P.S. §67.102.

Here, there is no question that the requested records are records of various local agencies. Further, the County does not dispute that it is in possession of the requested records. The issue focuses on whether an agency is required to provide access to public records of another agency that are in its possession. The OOR determines that it is.

Under the RTKL, agencies are required to provide access to public records that are in their custody, possession, or control. *See* 67 P.S. §§ 701 and 901. The public nature of a record is not determined by who or what agency is in possession of a record, it is based on the contents of that record. A record does not become non-public because an agency other than the one that generated that record possesses it. A public record is public regardless of what agency holds that record.

Here, the County states that the requested records reside on its servers. As such, they are in its possession. While it counters that it does not have ownership, custody, or control of those records, possession of public records alone is sufficient to require access under the RTKL. *See* 65 P.S. 67.701 and 901. The County is required to provide access to all public records in its possession regardless of whether it generated or produced those documents. *See* Section 701. This requirement does not preclude the County from seeking guidance from the independent agencies regarding whether certain exemptions apply with respect to the requested records.

The County counters by claiming that it cannot acquire records from a computer server any more than it can look through the agencies' filing cabinets. This analogy is factually flawed. Just as the County is required to release any public records in its files it is required to release any public records housed on its servers. The OOR is not directing the County to invade another agencies file cabinets or servers, it is directing the agency to release any public records in its possession as is required by the law. Further, adopting the County's proposed interpretation would allow agencies to shield public records from public review by simply transferring them to another agency. Such a result would thwart the maximum access purpose of the RTKL. *See Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Commw. 2010).

CONCLUSION

For the foregoing reasons, the appeal is **granted**. Within thirty (30) days, the County is required to provide the Requester with all public records responsive to the Request, regardless of whether it generated the records and regardless of whether they are another agency's records. To the extent that the requested records do not exist, the County is directed to provide the Requester with an affidavit to that affect. The affidavit should be executed under penalty of perjury by a person with first hand knowledge of the facts contained within the affidavit. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Common Pleas Court of Allegheny 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 §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED AND MAILED July 30, 2010



**APPEALS OFFICER
NATHANAEL J. BYERLY, ESQUIRE**

Sent to:
Erik Fikry, Esquire
Michael J. Wojcik, Esquire