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OF OPEN RECORDS, RYAN MCFARLAND
AND PENNSYLVANIA AFL-CIO.

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COUNTY OF ADAMS VS. PENNSYLVANIA OFFICE
OF OPEN RECORDS, RYAN MCFARLAND
AND PENNSYLVANIA AFL-CIO.

1. The issue currently before the Court arises from a request by Ryan McFarland (“Requestor”), a representative of the Pennsylvania AFL-CIO, to County asking for “a list of all current elected municipal and school district officials in Adams County, along with their address, political party, and year term expires.” The County responded by providing the name of every elected official in the county including the political party and term of each official. The County, however, denied the request as it related to the addresses of the elected officials indicating that personal identification information, including the elected official’s home address, is protected by the official’s right to privacy.

2. [T]he Appeals Officer rejected the County’s argument that the information is protected from disclosure by a constitutional right to privacy. Notably, the Appeals Officer did not address the County’s procedural due process argument.

3. The difficulty with OOR’s argument arises in the reality that it is impossible for those individuals whose privacy rights are in jeopardy to challenge the release of their personal information when they do not have notice of the risk.

4. OOR next argues that the affected parties in this matter were provided with due process as required by the Pennsylvania Constitution and appellate authority. OOR argues that the County was “ordered” to notify the affected third parties of the litigation pending before the OOR.

5. This Court also notes, despite OOR’s argument, the absence of any “order” by OOR in the current litigation directing particular action by any party. Rather, the OOR appears to be referring to boilerplate correspondence sent by the OOR to the captioned parties notifying them of the appeal. The correspondence provides procedural guidance and identifies time periods for the submission of evidence and argument. Included with the information provided is a direction for the agency to notify affected parties of the appeal immediately and provide proof of that notice by the record closing date.

6. Acting in a quasi-judicial capacity, it is incumbent upon the appeals officer to create an adequate factual record.

7. The certified record in this matter, however, fails to include any proof third parties whose privacy interests are in jeopardy were aware of this litigation. Thus, the suggestion that the County had the obligation to provide notice to third parties does not excuse the failure of the Appeals Officer to recognize his or her duty to ensure third party rights were procedurally protected prior to issuing any decision impacting those rights.

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY,
PENNSYLVANIA, 2019-SU-907, COUNTY OF ADAMS VS.
PENNSYLVANIA OFFICE OF OPEN RECORDS, RYAN
MCFARLAND AND PENNSYLVANIA AFL-CIO.

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McFarland and Pennsylvania AFL-CIO

George, P. J., February 26, 2020

OPINION

The County of Adams (“County”) petitions for review of the final determination of the Pennsylvania Office of Open Records (“OOR”) which directed the County to provide the home addresses of all current elected municipal and school district officials in the county. County has appealed to this Court claiming the OOR failed to adequately weigh the constitutional privacy interests of the elected officials and that the proceedings before the OOR failed to adequately protect the due process rights of the affected elected officials. For the reasons discussed below, this matter will be remanded to the OOR for further proceedings.

Pennsylvania has adopted the Right-To-Know Law (“RTKL”), 65 P.S. § 67.101 *et seq.*, in order to promote access to official government information with the goal of prohibiting governmental secrets, permitting scrutiny of the actions of public officials, and holding public officials accountable for their actions. *Uniontown Newspapers, Inc. v. Pa. Dept. of Corrections*, 185 A.3d 1161, 1170 (Pa. Cmwlth. 2018). The law provides a multi-layered process which permits citizens to obtain public records from governmental agencies through requests to the agency and, if necessary, judicial review. The legislation further identifies the governmental agencies subject to its provisions as well as the records of each respective agency which are subject to disclosure. Under the RTKL, the OOR is established and charged with developing procedures for appeals before an appeals officer in order to promote justice, fairness, and the expeditious resolution of disputes concerning record disclosure. 65 P.S. § 67.1102.

The issue currently before the Court arises from a request by Ryan McFarland (“Requestor”), a representative of the Pennsylvania AFL-CIO, to County asking for “a list of all current elected municipal and school district officials in Adams County, along with their address,

political party, and year term expires.” The County responded by providing the name of every elected official in the county including the political party and term of each official.¹ The County, however, denied the request as it related to the addresses of the elected officials indicating that personal identification information, including the elected official’s home address, is protected by the official’s right to privacy. In support of the denial of home address information, the County cited *Pa. State Education Ass’n. v. Commonwealth*, 148 A.3d 142 (Pa. 2016) (holding that a public employee possesses a right to privacy in certain types of personal information including his or her home address).

The Requestor appealed the County’s refusal to provide home address information to the OOR. Pursuant to the RTKL, an Appeals Officer was appointed. In support of the appeal, Requestor claimed the names and addresses of municipal and school district officials are not protected under any exception in the RTKL. Requestor further noted the address information is otherwise regularly published as part of the election process and is being sought to evaluate whether the elected officials meet the residency requirements of their respective offices. The County countered claiming that an elected official’s prior disclosure of personal information during a respective election cycle does not open the door to future disclosure

¹ The certified record filed in this matter reveals that the County’s response improperly provided information beyond that which was requested. The County’s response included information concerning elected judicial officials who are neither municipal nor school district officials as those terms are defined. Common pleas judges and district magisterial judges are state officials under the Unified Judicial System pursuant to the Pennsylvania Constitution and statutory law, Pennsylvania Constitution Art. 5, Section 1 *et seq*; 42 Pa. C.S.A. § 301 *et seq*. Moreover, under the RTKL, local agencies and judicial agencies are defined separately with different criteria for the records subject to disclosure. In determining whether records are records of a local agency, as compared to a judicial agency, it is important to consider the subject matter of the record. *Grine v. County of Centre*, 138 A.3d 88, 95 (Pa. Cmwlth. 2016). The location of the record or an agency’s possession does not definitively determine whether a record is accessible to the public; rather, the character of the record is the controlling consideration. *Id.* As the information provided concerning judicial officials relates to personnel of the Unified Judicial System, the County’s disclosure of such information improperly exceeds their authority as the request for such information is properly forwarded to the Court’s RTKL Officer for consideration under the RTKL rules related to judicial agencies.

of current personal information. Relying on the Pennsylvania Constitution, the County further argued that privacy rights are at play and those rights are possessed by the individual elected officials rather than the County which cannot be vested with waiving those individual rights.²

The Appeals Officer did not conduct further hearing but relied upon the written arguments submitted by the respective parties. By written opinion, the Appeals Officer issued a final determination granting the appeal and directing the County to provide the requested addresses. In reaching a decision, the Appeals Officer recognized the need to balance an individual's interest in informational privacy with the public's interest in disclosure noting that personal information should only be released when the public benefit outweighs the privacy interest. In applying this test, the Appeals Officer concluded that unlike other cases where the appellate courts have protected personal information such as home addresses, the current request related to addresses of elected public officials. Distinguishing the current request from appellate precedent, the Appeals Officer concluded that a compelling public interest existed in favor of disclosure due to the public's interest in knowing that respective elected officials satisfy the residence requirements necessary to be elected to their positions under Pennsylvania law. As a result, the Appeals Officer rejected the County's argument that the information is protected from disclosure by a constitutional right to privacy. Notably, the Appeals Officer did not address the County's procedural due process argument.

Following the issuance of the final determination by the Appeals Officer, the County filed a Petition for Reconsideration claiming the mere existence of a statutory residency requirement, standing alone, was insufficient to infringe upon the privacy rights of the respective elected officials. In support thereof, the County noted such a boilerplate determination would essentially expose the personal information of

² See May 22, 2019 email correspondence between the County Solicitor and the Appeals Officer with copy to the Requestor.

every Pennsylvania resident to disclosure under the RTKL.³ The Petition for Reconsideration repeated the concern over the procedural due process rights of the individuals whose home address information was ordered to be disclosed. Following denial of the request for reconsideration, the County has filed appeal to this Court.

On appeal, the County raises two issues. Initially, they argue that the OOR failed to adequately balance the constitutional privacy interests of the elected officials against the mere existence of statutory residency requirements. Secondly, the appeal challenges the OOR's authority in ordering the County to disclose private data without providing meaningful due process protections to the affected individuals. Requestor has not filed any additional argument apparently relying on the discussion previously advanced in the record. However, the OOR requested, and has been granted, permission to file an *Amicus Curiae* Brief in response to the procedural due process issue raised by the County as the issue addresses their compliance with their statutory duty to implement and enforce the RTKL. 65 P.S. § 67.1310(a)(1)-(2). In their brief, the OOR argues that the County does not have standing to assert a due process claim on behalf of the affected third parties. They further argue that, contrary to County's argument, the affected third parties were provided with adequate procedural due process pursuant to the RTKL and in satisfaction of Pennsylvania constitutional protections. As the due process issue

³ The County suggested the current claim by the Requestor is a charade as it is extremely unlikely the AFL-CIO is truly concerned about the residency requirements of public officials in the County's many small municipalities. Rather, the County argues it is "painfully obvious that the AFL-CIO's intent, as a lobbying group, is to have the County use their resources and privately-held data to populate AFL-CIO mailing lists [to] assist in its lobbying efforts." See County's Petition for Reconsideration, pg. 3. While this argument may be an appropriate subject for legislative reconsideration of the RTKL provisions, under the current rendition of the law, it is inappropriate to determine the nature of the interest or the existence of a legitimate purpose in seeking disclosure as long as the record falls within the definition of a public record. *Neyhart v. Dept. of Corrections*, 721 A.2d 391, 393 (Pa. Cmwlth. 1998).

The more interesting consideration in the County's argument is the concern that the Appeals Officer's determination that the public interest in residency compliance is superior to the privacy rights of the individual potentially opens the floodgate to the personal information of every Pennsylvania citizen. In this regard, County notes that residency is a necessary determination for many eligibility requirements such as, inter alia, driver's license, hunting license, financial aid benefits, and street parking permits. County suggests if the Appeals Officer's determination is pursued to its logical conclusion, the privacy right of every citizen is in jeopardy.

affects the procedural stance of this litigation as it relates to the rights of necessary parties, it must be addressed prior to determining the substantive issues before the Court.

It is now beyond reproach that citizens within this Commonwealth have a constitutional right to privacy in one's home address in connection with RTKL requests. *State Educ. Ass'n. v. Com., Dept. of Comm.*, 148 A.3d 142, 158 (Pa. 2016). The right to informational privacy is guaranteed under the Pennsylvania Constitution and therefore may not be violated unless outweighed by public interest favoring disclosure. *Id.* Unquestionably, the privacy rights protected by the constitution are specific and distinct to each citizen within the Commonwealth. Indeed, the OOR recognizes as much in devoting a significant portion of their brief in support of their argument that the County does not have standing to raise such an individual right.

The difficulty with OOR's argument arises in the reality that it is impossible for those individuals whose privacy rights are in jeopardy to challenge the release of their personal information when they do not have notice of the risk. Although parties affected by the request have an interest in the grant or denial of a RTKL request for their personal address information, the RTKL does not make them parties to the request or the ensuing appeal process. Thus, they have no ability, absent notice of the proceeding, to assert their own right through intervention or other legal recourse.

Our courts have recognized that one may claim standing to vindicate the constitutional rights of another where an enjoyment of the third party's right is inextricably bound up with the activity intended to be pursued and there is some obstacle to assertion by the third party of that right. *Harrisburg School District v. Harrisburg Educ. Ass'n.*, 379 A.2d 893, 896 (1977). Unquestionably, the County is in possession of a significant amount of personal information which is private in nature and subject to protection. Arguably, the County is in a fiduciary relationship concerning custody of such information. *See generally Governor's Office of Administration v. Campbell*, 202 A.3d 890 (Pa. Cmwlth. 2019). As the current request implicates the County's stewardship as custodian of personal privacy information, their interest in ensuring the affected third party is given due process before the private information is released is inextricably bound to their opposition to the disclosure of the information.

More importantly, unless the parties affected are provided notice of the pending RTKL request, they have no independent means to protect their privacy interests. If there is an obstacle to the third party's ability to assert a right, that party's absence from court proceeding "loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available component." *Harrisburg School District*, A.2d at 896 (quoting *Singleton v. Wulff*, 428 U.S. 106, 116 (1976)). Indeed, the Supreme Court has condoned the ability of an organization to raise the individual rights of its membership in regard to protecting privacy interests under the RTKL. See *PSEA v. Com., Dept. of Community Dev.*, 50 A.3d 1263 (Pa. 2012); *State Educ. Ass'n. v. Com., Dept. of Comm.*, 148 A.3d 142 (Pa. 2016). Accordingly, the procedural due process concern, as raised by County, is properly before the Court.⁴

⁴ The conclusion that the County has standing to raise due process rights of the third parties affected by disclosure does not equate to those rights being adequately protected by the County for due process purposes. The reality is that third parties have rights individual to each which might not be recognized or otherwise fully protected by the responding agency. By way of example, the current appeal results from the OOR directing the County to release the addresses of the elected officials. Although the County has opposed that release on privacy grounds, statutory grounds prohibiting the release of addresses which are applicable to a number of individuals have not been raised by the County. Under the RTKL, release of the home addresses of law enforcement officers or judges is specifically prohibited. 65 P.S. § 67.708. Pennsylvania law provides a law enforcement officer is any person who is by law given the power to enforce the law when acting within the scope of that person's employment. Pa. R. Crim. P. 103. The term has been interpreted broadly to include even municipal code enforcement officers. See *Commonwealth v. Daugherty*, 829 A.2d 1273, 1277 (Pa. Cmwlth. 2003). The term certainly includes the Adams County District Attorney, 71 P.S. 732-206 (district attorney is chief law enforcement officer in the county), and the Adams County Sheriff. Additionally, less obvious circumstances may exist such as where a municipal or school board official is employed as a law enforcement officer in their primary employment unrelated to their office (i.e., a school board director who may be a county detective in a neighboring county). As previously mentioned, the RTKL also specifically prohibits the release of judicial officers' addresses. These individual rights, however, were not instantly preserved by the County and, presumably, had the County not filed appeal in this matter, the addresses of all the foregoing would have been released in violation of the RTKL. The reality that a responding agency cannot possibly comprehend all of the individual privacy or statutory rights of a third party affected by disclosure magnifies the need for third parties to receive notice of the RTKL request so their individual privacy rights can be fully protected.

OOR next argues that the affected parties in this matter were provided with due process as required by the Pennsylvania Constitution and appellate authority. OOR argues that the County was “ordered” to notify the affected third parties of the litigation pending before the OOR. They further argue the County cannot credibly argue lack of notice to affected third parties when it was they who were directed to provide the same. I find this argument unpersuasive for several reasons.

Initially, it is important to note that the RTKL recognizes the individual interests third parties may have in open records litigation. Specifically, Section 1101(c) of the RTKL⁵ provides that a “person other than the agency or requestor with a direct interest in the record subject to an appeal” may file a written request to provide information or appear before an appeals officer within 15 days following receipt of actual notice of the appeal. There can be little debate that this statutory language implies the importance and necessity of an affected third party’s right to notice of the RTKL proceedings which cannot be waived by an agency’s inaction.

This Court also notes, despite OOR’s argument, the absence of any “order” by OOR in the current litigation directing particular actions by any party. Rather, the OOR appears to be referring to boilerplate correspondence sent by the OOR to the captioned parties notifying them of the appeal. The correspondence provides procedural guidance and identifies time periods for the submission of evidence and argument. Included with the information provided is a direction for the agency to notify affected parties of the appeal immediately and provide proof of that notice by the record closing date. The notice, however, fails to provide any authority for that direction. An independent search by the Court has also failed to reveal the existence of any regulations adopted by the OOR providing such

⁵ 65 P.S. Section 67.1101

authority.⁶ As the direction requiring an agency to provide notice is neither an “order” by the OOR nor a procedural regulation or statutory requirement, one can only wonder what binding effect it has if not otherwise enforced by the appeals officer.

Critically, OOR’s claim that third party rights were protected by their direction to the County to provide notice to those third parties misses the point. As mentioned, the OOR is a quasi-judicial entity statutorily tasked with application of the RTKL in a manner which promotes justice, fairness, and expeditious resolution of disputes. As such, an appeals officer must consider procedural matters as the fact-finder in the first instance. *Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 59 (Pa. Cmwlth. 2016). Acting in a quasi-judicial capacity, it is incumbent upon the appeals officer to create an adequate factual record. *Id.* The importance of an appeals officer’s attention to procedural matters is evident in the OOR’s own notice of appeal which was provided to the parties. That notice recognizes the procedural obligations of the appeals officer as it requires the filing of proof of notice of the litigation to affected third parties prior to the closing of the record. The certified record in this matter, however, fails to include any proof third parties whose privacy interests are in jeopardy were aware of this litigation. Thus, the suggestion that the County had the obligation to provide notice to third parties does not excuse the failure of the Appeals Officer to recognize his or her duty to ensure third party rights were procedurally protected prior to issuing any decision impacting those rights. Accordingly, this matter will be remanded to the OOR for further proceedings which must include

⁶ The correspondence is signed by the Executive Director of OOR. After diligent search, this writer is unable to locate any authority vesting the Executive Director with such unilateral power. The language in the OOR’s notice of appeal is an apparent response to the Supreme Court’s criticism in *PSEA v. Com., Dept. of Comm.*, 50 A.3d 1263 (Pa. 2012), “We must remind the OOR, . . . , that the unique procedural posture of this case, including its status as a party-defendant, is the result of its repeated failure to promulgate adequate regulations to address the almost complete lack of procedural due process for individuals whose personal information is subject to disclosure under the RTKL.” In *State Educ. Ass’n v. Com., Dept. of Comm.*, 148 A.3d 142 (Pa. 2016), the Supreme Court once again reiterated its concern in regard to the lack of regulatory or legislative authority in this area. It is ironic in evaluating a RTKL issue, this Court is unable to find any public and transparent adoption of any regulatory authority or OOR policy concerning notice requirements despite the Supreme Court’s initial admonition approximately eight years ago.

appropriate notice, and opportunity to respond, to third parties whose privacy rights are affected by the records request. *See E.G., Pa. Dept. of Corr. v. Maulsby*, 121 A.3d 585, 593 (Pa. Cmwlth. 2015) (remanding a case to the OOR where third parties were inadvertently not notified that their information was at risk of disclosure).⁷

ORDER OF COURT

AND NOW, this 26th day of February, 2020, it is hereby Ordered that the appeal in this matter is granted. This action is remanded to the Pennsylvania Office of Open Records with the direction to proceed in a manner which ensures the due process rights of third parties affected by the disclosure are protected.

⁷ In remanding this case to the OOR, the Court declines OOR's invitation to order the County to provide notice to affected parties. Because the issue is not before the Court, this Opinion makes no comment on whether the OOR has authority to direct an agency to incur the cost of notice to affected third parties or by what standard the assignment of costs and notice responsibilities should be determined. In that regard, this Court shares the concern of the Supreme Court that the general assembly need address "the disjointed and scant procedural protections at both the request and appeal stages of the RTKL." *State Educ. Ass'n. v. Com., Dept. of Comm.*, 148 A3d 142, 160 (Pa. 2016). It is the legislature who is best suited to weigh the equities of requiring a local agency to incur significant cost in providing notice to affected parties in situations where requests may be motivated by profit or to generate mailing lists for political purposes rather than as a tool for transparency to the inner-workings of government.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below, the Register of Wills has granted letters, testamentary of or administration to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION**ESTATE OF EDITH VOELK, DEC'D**

Late of Liberty Township, Adams County, Pennsylvania

Executrix: Erica Hirsch, 45 Ocean Avenue, Apt. 7C, Monmouth Beach, NJ 07750

Attorney: Elizabeth B. Place, Esq., Skarlatos Zonarich, 320 Market Street, Suite 600W, Harrisburg, PA 17101

SECOND PUBLICATION**ESTATE OF JAMES C. BIGHAM, DEC'D**

Late of Hamiltonban Township, Adams County, Pennsylvania

Co-Executrices: Beverly J. Short, 11 Evergreen Trail, Fairfield, PA 17320; Heidi R. Shaw, P.O. Box 155, Fairfield, PA 17320

Attorney: Teeter Law Office, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF RONALD ELWIN BLONDIN, DEC'D

Late of the Borough of Carroll Valley, Adams County, Pennsylvania

Executor: Jamie Paul Blondin, 123 Susan Drive, Garner, NC 27529

Attorney: Matthew R. Battersby, Esq., Battersby Law Office, P.O. Box 215, Fairfield, PA 17320

ESTATE OF CARL W. ELICKER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrices: Carol P. Wilson, 186 Skylite Drive, Hanover, PA 17331; Lisa A. Elicker, 421 Gardners Station Road, Gardners, PA 17324

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, PA 17331

ESTATE OF MARY ANN LINDSEY, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executors: Diane M. Topper, 327 Ridge Avenue, McSherrystown, PA 17344; Michael J. Lindsey, 950 Westminster Avenue, Hanover, PA 17331

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, PA 17331

THIRD PUBLICATION**ESTATE OF JAMES E. ALVEBERG, DEC'D**

Late of Cumberland Township, Adams County, Pennsylvania

Executrix: Grace A. Watson, 4849 Greenwood Street, Brookhaven, PA 19015

Attorney: Teeter Law Office, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF BETSY A. FELDER, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Administrator: Thomas Meltzer, 700 Durant Street, Apt. 204, Chapelhill, NC 27517

Attorney: John A. Wolfe, Esq., Wolfe, Rice & Quinn, LLC, 47 West High Street, Gettysburg, PA 17325

ESTATE OF DOROTHY B. HELLER, DEC'D

Late of the Borough of Biglerville, Adams County, Pennsylvania

Personal Representative: Barry A. Heller, 107 Georgetown Road, Gardners, PA 17324

Attorney: Teeter Law Office, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF DEAN K. HESS, DEC'D

Late of Butler Township, Adams County, Pennsylvania

Co-Administrators: Cory K. Hess, 881 Yellow Hill Road, Biglerville, PA 17307; Devin Hess, 184 Nashville Boulevard, Spring Grove, PA 17362

Attorney: John A. Wolfe, Esq., Wolfe, Rice & Quinn, LLC, 47 West High Street, Gettysburg, PA 17325

ESTATE OF AGNES M. POHLMAN, DEC'D

Late of Mount Pleasant Township, Adams County, Pennsylvania

Co-Executors: Bruce E. Pohlman, 1633 Centennial Road, New Oxford, PA 17350; Marcia A. Wilcox, 374 Miller Road, Elizabethtown, PA 17022

Attorney: Robert E. Campbell, Esq., Salzman Hughes, P.C., 112 Baltimore Street, Gettysburg, PA 17325

ESTATE OF SARA M. SANDOE, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Susan P. Pizzuto, 820 Yellow Hill Road, Biglerville, PA 17307

Attorney: Puhl, Eastman & Thrasher, 220 Baltimore Street, Gettysburg, PA 17325

ESTATE OF BETTY L. TEAL, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executor: Troy L. Teal, c/o Duane P. Stone, Esq., Stone, Wiley, & Linsenbach, PC, 3 N. Baltimore Street, Dillsburg, PA 17019

Attorney: Duane P. Stone, Esq., Stone, Wiley, & Linsenbach, PC, 3 N. Baltimore Street, Dillsburg, PA 17019



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