

# OFFICE OF THE PROTHONOTARY

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CASE NUMBER 2009-sn-2892-08

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**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA**

County of York,  
Petitioner

No. 2009-SU-2892-08

vs.

Right to Know Appeal

Ted Czech,  
Respondent

Appearances: For the County: Michael Flannelly, Esquire  
For Ted Czech: Niles Benn, Esquire

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

AND NOW, this 10<sup>th</sup> day of December, 2009, this matter is before the Court on the Petition filed by the County of York seeking to overturn the Final Determination of the appeals officer of the Commonwealth's Office of Open Records which granted a request by Respondent Czech for release of certain information. For the reasons that follow, we conclude that the appeals officer committed errors of law and that her findings are not supported by substantial evidence. We therefore REVERSE the decision of the Office of Open Records and hold that the County does not have to release addresses or cross streets to where units were dispatched.

**Findings of Fact:**

1. On April 10, 2009, Respondent Ted Czech made a request to York County for "time response logs from York County 911 for December 2008 and January and February 2009 with addresses included, i.e., where the units dispatched were headed."
2. York County Solicitor Michael Flannelly responded to Mr. Czech's request by letters dated April 14, 2009 and April 15, 2009. The first letter explained what

information is included in the County's time response logs, which do not include addresses; and the second letter referenced the specific portion of the Right to Know Law that deals with time response logs.

3. On April 28, 2009 Mr. Czech appealed the denial of his request for incident addresses to the Pennsylvania Office of Open Records (OOR).

4. York County submitted an affidavit from Cindy Dietz, 911 Director for York County, with its brief to the OOR. The affidavit included a definition of "time response logs" provided by PA NENA<sup>1</sup>. The definition provided by PA NENA did not include destination addresses, only response times.

5. The County also submitted pages 415 and 416 of the House Legislative Journal in support of its position to the OOR. The pages submitted included an exchange between Representatives Fairchild and King prior to the passing of the Right to Know Law (RTKL) that documents a discussion about the definition of a "time response log" as it pertains to the RTKL.

6. York County's "911" center is an emergency dispatch agency with calls coming into the center being answered by emergency dispatch personnel, pursuant to section 708(18)(i) of the RTKL.

7. The OOR did not conduct a hearing.

8. On May 22, 2009, the OOR issued its final determination and opinion granting Mr. Czech's appeal and concluding that time response logs include destination addresses.

9. York County filed a Petition for Review of Final Determination on June 10, 2009.

10. An Amicus Curiae Brief was filed in support of the County's position by the

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PA NENA is the Pennsylvania Chapter of the National Emergency Number Association.

Pennsylvania Coalition Against Domestic Violence on June 25, 2009.

11. An Amicus Curiae Brief was filed in support of the County's position by Pennsylvania Chapter, Associated Public-Safety Communications Officers, Inc. on June 26, 2009.

12. An Amicus Curiae Brief was filed in support of Mr. Czech's position by the Pennsylvania Newspaper Association on August 21, 2009.

13. Argument was originally scheduled for June 30, 2009. Upon request and by agreement of the Parties, argument was continued several times.

14. Argument was held before this Judge on October 21, 2009.

**Discussion:**

***Appeals Process Generally:***

Pennsylvania's Right-to-Know Law provides for judicial review of the final determination of the state's Office of Open Records. 64 P.S. Sec. 67.1302(a). The requestor or the local agency may file a petition for review with the court of common pleas within thirty (30) days of the date of the final determination of the OOR. 65 P.S. § 67.1302 (a). York County, the local agency, timely filed its petition for review with this Court.

When an appeal is taken from the OOR's final determination, the "[r]ecord before a court shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." 64 P.S. Sec. 67.1303(b). In the present case, no hearing was held by OOR, so there is no transcript of proceedings before the appeals officer. We interpret section 1303(b) to also preclude the taking of additional testimony by a court reviewing the case, and as requiring that the court's decision be based on the record submitted from the appeals proceeding.

A court's decision is to contain findings of fact and conclusions of law based upon the evidence as a whole, and the court is to clearly and concisely explain the rationale for the decision. 64 P.S. Sec. 67.1301(a). Notably absent from the Law is the scope and standard of review that the court is to employ in reviewing the final determination of the appeals officer.

***Scope and Standard of Review:***

In the context of judicial appeals, our appellate courts have explained the concepts of "scope" of review and "standard" of review:

"Scope of review" and "standard of review" are often-albeit erroneously-used interchangeably. The two terms carry distinct meanings and should not be substituted for one another. "Scope of review" refers to "the confines within which an appellate court must conduct its examination." *Coker v. S.M. Flickinger Company, Inc.*, 533 Pa. 441, 450, 625 A.2d 1181, 1186 (1993). In other words, it refers to the matters (or "what") the appellate court is permitted to examine. In contrast, "standard of review" refers to the manner in which (or "how") that examination is conducted. In *Coker* we also referred to the standard of review as the "degree of scrutiny" that is to be applied.

*Morrison v. Commonwealth of Pennsylvania, Dept. Of Public Welfare*, 538 Pa. 122, 646 A.2d 565 (1994). If we borrow from case law decided under the old Right-to-Know law, our scope of review of decisions by the hearing officer would be limited to deciding whether constitutional rights have been violated, whether an error of law has been committed, and whether necessary findings of fact are supported by substantial evidence. *McElfresh v. Department of Transportation*, 963 A.2d 582

(Pa.Cmwth. 2008).

The Petition for Review filed by the County does not assert violation of any constitutional rights, so our review will be limited to whether OOR committed an error of law and whether findings of fact were supported by substantial evidence in the record. When considering questions of law, the scope of review is plenary, and the standard of review is *de novo*. *Rendell v. Pa. State Ethics Commission*, \_\_\_ A.2d. \_\_\_, 2009 W.L. 4193782 (Pa. 2009). When considering issues of fact, our scope of review is plenary, in that we can consider the entire contents of the record, *U.S. Bank Nat. Ass'n. v. Powers*, \_\_\_ A.2d \_\_\_, 2009 W.L. 4547572 (Pa.Super. 2009), and our standard of review is whether the appeals officer abused her discretion and whether the hearing officer's decision is supported by substantial facts.

***Waiver of Argument by County:***

The OOR noted that the County failed to provide the specific reasons for its denial of Mr. Czech's request pursuant to 65 P.S. § 67.903. (Final Determination, p. 2.) Mr. Czech argues that due to this failure the County waived its right to argue its position.

"The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local

agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). We find that the OOR's finding of fact, if that's what it is, that the County failed to provide specific reasons for denying Mr. Czech's request is not supported by the evidence. The County's first letter was sent on April 14, 2009, indicating that some information would be provided, but addresses would not be. A second letter was sent on April 15, 2009.<sup>2</sup> Taken together as a whole, the letters state a reason for the denial and cite to the specific part of the statute that tends to support its denial. The first letter defined what the County considered to be included in York County's time response logs. It is hard to fault the County for not providing more comprehensive legal citations in the second letter for its position, since there is a dearth of legal authority on the precise point raised by the request. Both letters were a part of the record with the OOR and when viewed as a whole, the letters meet the requirements of a denial provided in the statute.<sup>3</sup> We therefore reject Mr. Czech's argument that the County has waived any objection because it failed to provide an appropriate response under the statute.

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The RTKL requires that the agency respond within five(5) days of a request for information. Mr. Czech's request is dated April 10, 2009 making the last of the County's letters fall within the five day requirement.

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65 P.S. § 67.903 requires: (1) description of the requested record (2) reasons for the denial including a citation to legal authority (3) information of the open-records officer (4) date of the response and (5) how to appeal the denial.

***Evidence in the Record:***

In this case OOR did not conduct a hearing. The evidence submitted consisted of the County's affidavit from Cindy Dietz, a portion of the legislative history of the RTKL, the letters sent to Mr. Czech by the County Solicitor in response to his request, and Mr. Czech's submission of a time response log from Lancaster County. Initially, we note that consideration of the log from Lancaster County by the hearing officer to determine what information must be disclosed (Final Determination, p. 3, 4) was clear error. What other counties may or may not consider information suitable to be released has no bearing on what is legally required to be disclosed by the RTKL upon request. Section 67.102 of the Law, not individual county preference, defines what a "public record" is:

"Public Record". 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.

Excluded from the definition of "public record" are "(18)(i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings." 65 P.S. Sec. 67.708(18)(i). "Time response logs" are, therefore, exceptions to the exception for what is a "public record." Our conclusion that

consideration by the appeals officer of another county's policy was error is further supported by the plain wording of the RTKL which provides that an agency has the discretion to make "any otherwise exempt record accessible for inspection and copying...". 65 P.S. Sec. 67.506(c). The fact that another county's agency may exercise such discretion in no way changes the definition of "public record" which must be made available or what information may be exempt from inspection.

***"Time Response Log" – Statutory Construction:***

Both parties agree that the RTKL does not provide a definition for the term "time response logs." The appeals officer, without any legal support, concluded that the "County is required to release all 'time response log' information under the RTKL." (Final Determination, p. 4, 5.) That conclusion is clearly erroneous, in that the information would only have to be provided if it was not exempt under the RTKL, or, in other words, it would only be provided if the information was included in the definition of what a "time response log" is. The hearing officer then concluded that "absent a clear statutory definition, the OOR has been vested with the authority to interpret the RTKL...". (Final Determination, p. 5.) That interpretation must be made within the bounds of the law, however.

We, therefore, have to examine whether the hearing officer's interpretation of the statutory term "time response logs" is correct. Because the statute does not

provide a definition of the term "time response logs", we must turn to rules of statutory construction to determine the meaning. According to 1 Pa. C.S.A. § 1903(a) "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition." 1 Pa. C.S.A. § 1903(a).

We conclude that the term "time response logs" is a technical word or phrase. As used in the statute, the term "time response logs" is only referred to in the context of 911 records. As referenced in the legislative history submitted by the County, a discussion of "time response logs" occurs during a discussion of 911 records or calls. The only evidence of what a "time response log" consists of, apart from the legislative discussion, was submitted by the County from the Pa NENA, and the definition did not include addresses or cross streets. Indeed, the plain meanings of the terms "time" and "response" include nothing about addresses in their definitions. This is practically conceded by the requester's own request, which asked for "time response logs ... with addresses included..." (County of York Open Records Request Form), by which Mr. Czech apparently believed that the plain meaning of "time response logs" did not include addresses. The industry definition would be consistent with the plain meaning of the words. As a term of art in the

industry, we find the definition submitted by the County to be compelling evidence of what is intended by the term "time response logs."<sup>4</sup> We find further support for our conclusion in the legislative discussion concerning the term which was referred to by the appeals officer.

The appeals officer committed further error by concluding that "time response logs" information includes addresses because "the County does not deny that the addresses can be produced." In essence, the appeals officer concluded that because the County maintains and can produce the information, it must do so. There is no such requirement in the RTKL, as even a cursory glance at section 708 would demonstrate. Indeed, there is much information maintained by 911 centers which is not required to be produced under the Law. 65 P.S. Sec. 67.708(18).

The OOR supported its conclusions by referring to the fact that providing the logs without address or cross street information would be "meaningless." (Final Determination, p. 5). Again, without any supporting evidence, the appeals officer determined that "without the cross street it would be impossible to determine whether or not the response times listed in the log were within acceptable

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See, e.g., *Sackett v. Nationwide Mutual Ins. Co.*, 940 A.2d 329 (Pa. 2007)(finding "purchase" of UM/UIM coverage to be a term of art in the auto insurance business and giving deference to Insurance Commissioner's interpretation of the term); *Zablow v. Board of Educ. Of School Dist. Of Pittsburgh*, 729 A.2d 124 (Pa. Commw. Ct. 1999)(finding "civil service examination" to be a term of art and applying only its technical meaning as an exam administered by the Civil Service Commission).

parameters." *Id.* Initially, the purpose for which a requester wants the records is not a relevant consideration as to whether the information should be provided. 65 P.S. Sec. 67.302(b). Similarly, the intended use of the records by the requester is not relevant in determining what information is subject to disclosure under the statutory definition of "public record". Additionally, contrary to the findings of the OOR, we do not find that the log is "meaningless" without address information. The time response logs, as the name implies, include response times for how quickly units are dispatched when a call comes in to the center; how quickly the unit responded to the dispatch, how long the unit spent on the scene, and how quickly the unit returned to service. The logs could easily be used to help centers fix appropriate staffing levels and indicate to centers where additional response units might be necessary, among many other uses. The fact that the information required to be disclosed does not suit the purposes of the requester is not a relevant consideration.

***Address Information - Privacy Concerns:***

The "legislative intent" discussion mentioned by the appeals officer (Final Determination, p. 4) shows a concern for privacy surrounding releasing address information of individuals who may well be victims in a particular responding incident. The discussion distinguished between information in "time response logs" and "incident logs" which may well contain additional identifying information, but

which would not be subject to inspection. Indeed, the RTKL is concerned with such privacy issues. See for instance, information exempt from disclosure pursuant to sections 708(b)(16)(v) (victim information); 708(b)(17)(vi)C (constitute an unwarranted invasion of privacy); 708(b)(6)(i) (personal identifying information).

Our appellate courts, when faced with similar privacy concerns, have come down on the side of individual privacy concerning personal identifying information. (See *Tribune Review Publishing Co. v. Bocack*, 599 Pa. 256, 961 A.2d 110 (2008) (redact phone numbers); *Pa. State Ed. Ass'n ex rel Wilson v. Commonwealth*, 981 A.2d 383 (Pa.Cmwlth 2009) (addresses of school teachers are private.) In *Wilson*, the Commonwealth Court determined there was an independent right of privacy, apart from statutory construction, grounded in the state Constitution concerning matters in which one has a legitimate expectation of privacy. The Court noted that it is generally accepted that an individual has a legitimate expectation of privacy in his home address. In that case, it was the home addresses of the public employees themselves. Here, it is the home addresses of those individuals forced to use the emergency services of the County, for, sometimes, very personal reasons. The expectation of privacy is even more compelling in the case at bar.

Consequently, we conclude that apart from our analysis of the statutory construction of the RTKL, the individual right of privacy in one's home address, as expressed by the Commonwealth Court in *Wilson*, precludes release of address

information.

***Burden of Proof:***

Finally, the OOR concluded that the County failed to prove by a preponderance of the evidence that addresses are protected under section 708(b)(18) of the Act. Because we find the conclusion of the OOR, that the term "time response logs" includes addresses, is erroneous, we find that the County did not have the burden of proving that addresses were protected, because that information would not have been excepted from the exception to disclosure pursuant to section 708(18). The plain words of the RTKL, to which the County initially cited, state that 911 records, except for the time response logs, are to be exempted from disclosure under the Act.

***Cross Street Information:***

Respondent indicated that he may be satisfied with cross street information, and, indeed OOR found that at a minimum the County must release cross street information when requested to provide time response logs. (Final Determination, 5.) This would provide more useful information to the requester, while safeguarding the privacy of the individuals involved in the calls. While this compromise may be an enticing way for the parties to resolve the issue themselves, as a judicial solution, it

would be contrary to the legal analysis and statutory interpretation discussed above. In short, releasing the cross street information is not supported by statutory interpretation of the RTKL. The appeals officer's conclusion that cross street information is subject to disclosure and inspection is also clearly erroneous. As discussed previously, we do not find that the term "time response logs" includes destination addresses in any form, cross street, nearest intersection, or otherwise.

The OOR stated in its final determination that York County is already providing cross street information on an internet site that is available to the public. (Final Determination p. 4, 5). Assuming this to be true,<sup>5</sup> it is not relevant to the definition of "time response logs" and the information included in that definition. The RTKL only provides for time response logs to be a public record. Again, if an agency wants to provide additional information through other means or to a requester, discretionary action does not change what is required under the statute.

**Conclusions of Law:**

1. The appeals officer erred by considering evidence of what Lancaster County provides in its "time response logs".
2. The appeals officer erred in concluding that the County was required to

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This appears to be true for traffic accident/incident information only, not for other responders.

release all information included with "time response logs" which were maintained.

3. The appeals officer erred in her interpretation of what information was included in a "time response log".
4. The appeals officer erred in concluding that because the County maintained additional address information with a "time response log" that the additional information was subject to disclosure and inspection.
5. The appeals officer erred in concluding that the usefulness or non-usefulness of the information supplied by the County was a relevant consideration in determining what information was subject to disclosure and inspection.
6. The term "time response log" is a term of art which does not include address or cross street information.
7. Individuals in this Commonwealth have an independent constitutionally protected right of privacy in their home addresses.
8. Necessary findings of fact made by the appeals officer are not supported by substantial evidence.
9. The appeals officer made errors of law involving the statutory interpretation of the Right-to-Know Law, as noted above.

**Conclusion:**

For the reasons set forth above, we REVERSE the Final Determination of the Office of Open Records. We SUSTAIN the appeal of the County of York and direct that only the following information need be disclosed by the County:

The time the call was received by the 911 center;

The time the dispatcher contacted or dispatched an agency for a response;

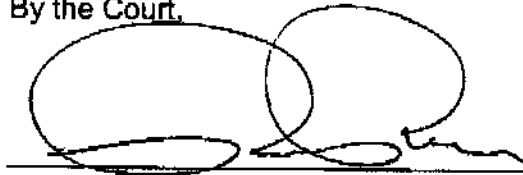
The time the dispatched agency responded;

The time the dispatched agency arrived on the scene;

The time the dispatched agency became available for other calls.

We direct that a copy of these finding shall be sent to counsel for the parties and to the Office of Open Records, Audrey Buglione, Esquire, Appeals Officer, and that courtesy copies be sent to counsel for the various *amicus* who filed matters in this case.

By the Court,



Richard K. Renn, President Judge