Appeals to Court are Not Court Orders that Prevent Subsequent RTKL Requests for the Same Records (Sections 305 and 1302)

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The goal of this blog is to make Open Records Officers aware of their duties and obligations under the RTKL and to publicize interesting and important Office of Open Record determinations that highlight rules and procedures that are not intuitive and must be read and understood so that the "mistakes" discussed in these determinations can be avoided. The OOR's recent determination in *Walker v. Lancaster District Attorney's Office*, AP 2019-0234 (April 16, 2019), is a good example of the OOR making a determination that may be correct, but probably does not make sense to an Open Records Officer who does not closely follow developments in the RTKL. This determination confirms that Open Records Officers must always comply with the statutory requirements of the RTKL and should only deny RTKL requests if the denial is supported by an exemption under the RTKL.

In the *Walker* case, the Requester sought certain payment vouchers from the District Attorney's Office ("Office"). The Office denied the Request pursuant to the Controlled Substances Forfeiture Act. On appeal, the Office changed its argument because, upon reviewing the records sought by the Requester, the Office determined that the requested records were part of a previously made RTKL request by the Requester that was appealed to the Office of Open Records and then subsequently appealed to the Court of Common Pleas. The Office argued that records were subject to pending action and that the Requester should not be permitted to circumvent the appeal process by filing a new RTKL Request. In other words, the Office argued that because the requested records were subject to a pending appeal between the identical parties, the Requester could not submit another RTKL request for those records. The Office did not pursue its argument that the vouchers were exempt under the Controlled Substances Forfeiture Act.

The OOR rejected the Office's "impermissible attempt to circumvent the appeal process" argument, stating that, although records may be the subject of pending litigation, such a scenario does not automatically preclude a requester from making a RTKL request for the records. Instead, under Section 305 of the RTKL, 65 P.S. § 67.305, only a court order that specifically makes the records exempt or expressly precludes release of the records through a RTKL request protects records from access. *See e.g., Fennick v. Pocono Mountain Sch. Dist.*, AP 2009-0684 (holding that an order stating "[a]ll proceedings relating to Daniel Fennick's Right-to-Know Requests … are hereby stayed until further order of the Court" bars access through RTKL).

In this case, while there was a pending appeal for identical records before a court, the Office did not submit any evidence of a court order prohibiting the release of the records through a RTKL request. Unfortunately for the Office, when submitting evidence in this case, it relied solely on the "process" argument and it did not resubmit its evidence from the previous case to support withholding records pursuant to that Controlled Substances Forfeiture Act. Accordingly, because it rejected the "process" argument, the OOR directed the Office to provide Requester with the records.

Though not addressed, this determination indicates the OOR will interpret Section 1302(b) of the RTKL, which states that an appeal of an OOR determination "shall stay the release of documents" until a decision by the court is issued, narrowly and in a way that does not stay subsequent RTKL requests for identical records that are subject to an appeal before a court.

The *Walker* determination serves as a good, if harsh, reminder that agencies must respond to every request pursuant to the procedures set forth in the RTKL and raise every argument supporting the denial of the request. In this case, the

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Office's argument that the Request was invalid because the requested records were subject to a pending appeal makes sense. However, to be safe, it could have, and probably should have, also repeated its arguments and resubmitted the evidence from the prior appeal.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.

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