

OOOR Determines that Records Submitted to the OOR are not Records “of” the OOR

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In *Friedman v. Pennsylvania Office of Open Records*, AP 2019-1182 (Aug. 28, 2019), the Office of Open Records (“OOOR”) discussed whether all records delivered to and in the possession of an agency are records “of” that agency and subject to a RTKL request. At issue in this case was an envelope and the transmittal letters contained therein that were delivered to the OOR by the Pennsylvania Public Utility Commission.

Section 102 of the RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of the agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of [an] agency.” 65 P.S. § 67.102. To determine whether the transmittal letters qualified as records “of” the OOR, the OOR concluded that it must consider the contents of the letters, rather than their location. *Grine v. Cnty. of Centre*, 138 A.3d 88, 95 (Pa. Commw. Ct. 2016) (“In discerning whether records qualify as records ‘of’ a particular agency, we consider the subject-matter of the records.”).

In *Highmark, Inc. v. Voltz*, 163 A.3d 485 (Pa. Commw. 2017), a case I am very familiar with, the Commonwealth Court analyzed whether rate information submitted by an insurance provider to the Pennsylvania Department of Health (“Department”) pursuant to statute constituted a record “of” the Department. The Court noted that information submitted to an agency voluntarily, without a legal requirement or an explicit request from the agency, would have only “a tenuous connection to any agency action.” *Id.*, at 495.

Similarly, in *Clearfield Cnty. v. Bigler Boyz Enviro., Inc.*, 144 A.3d 258, 265 (Pa. Commw. Ct. 2016) the court held that handwritten notes from two unsolicited phone calls to an individual agency official, who did not rely on the records to make a decision and did not share the records, or the information contained therein, with any other agency officials were not records “of” the agency.

Based on this precedent, the OOR concluded that the requested records were not records “of” the OOR because they did not document a transaction or activity of the OOR, they were not the records requested by the OOR, and neither the OOR nor the Appeals Officer reviewed or considered the redacted letters during the disposition of the underlying appeal.

This case is an important reminder that not all records in the possession of an agency are “of” the agency and subject to a RTKL request. However, as addressed in a future post, some unsolicited correspondence may be records “of” an agency. Accordingly, Open Records Officers should always work with their solicitors when responding to RTKL requests.

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.