

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1021 CD 2020

PUBLICSOURCE and NICOLE BRAMBILA

Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF PUBLIC HEALTH

Respondent.

On Appeal from the Final Determination of the Office of Open Records
dated September 18, 2020 at Docket No. AP 2020-1182

REPLY BRIEF OF PUBLICSOURCE AND NICOLE BRAMBILA

Counsel of records for these Parties:

Paula Knudsen Burke (No. 87607)
The Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Phone: 202.795.9310
Facsimile: 202.975.9310
pknudsen@rcfp.org

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INTRODUCTION

This case raises an issue of fundamental importance regarding the public’s right to be informed about pneumonia and influenza deaths in Pennsylvania, particularly in light of the ongoing COVID-19 pandemic. The case pertains to PublicSource and Nicole Brambila’s Right to Know Law request (“RTKL Request”) to the Pennsylvania Department of Health (“DOH” or “Respondent”) for “pneumonia and influenza deaths in Pennsylvania from county and date for 2015, 2016, 2017, 2018, 2019 and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and Prevention.” R.R. 1a.

PublicSource and Nicole Brambila (“Petitioners”) write to address two aspects of Respondent’s brief. First, Respondent claims that Act 77 is not applicable to this appeal because it was not in effect at the time of appeal and because there is a strong presumption against the retroactive application of statutes. This argument contravenes the purpose of Act 77 and the very essence of the RTKL. Second, Respondent’s brief ignores Petitioners’ argument that the RTKL’s exemptions for medical data and other personal information do not apply to the requested data. Respondent appears to cede this point entirely.

The competent evidence below is clear: none of the exemptions invoked by Respondent apply to Petitioners’ RTKL Request. Moreover, Respondent’s withholding of essential information about COVID-19 undermines the RTKL’s goal of informing the public. For these reasons, Petitioners respectfully ask the Court to reverse the Office of Open Record (OOR)’s September 18, 2020 Final Determination; or, in the alternative, allow Petitioners to supplement the record before this Honorable Court; or, in the alternative, remand the matter back to the OOR for a full evidentiary hearing pursuant to Pa.R.A.P. 1542, including testimony and argument on

the matter of bad faith and attorneys' fees provided by sections 67.1304 and 67.1305 of the RTKL.

ARGUMENT

I. Respondent's argument regarding Act 77 contravenes the purpose of that Act and the RTKL.

In its Legal Argument to the OOR on August 11, 2020, Respondent argued that the requested records are confidential under Section 15 of the Disease Prevention and Control Law of 1955, 35 P.S. §§ 521.1 *et seq.* ("DPCL").¹ Petitioners' brief explained that Act 77, a law passed by the Pennsylvania legislature in July 2020, permits disclosure of certain data that relate to disaster declarations, creating an exception to the provisions of the DPCL establishing the confidentiality of records of diseases. Pet. Br. 13 (citing 71 P.S. §§ 720.301 *et seq.*). The influenza and pneumonia data requested in this case, to the extent it was used by Respondent in making COVID-19-related decisions, is "data used by a Commonwealth agency for any rules, policies or actions taken by the Commonwealth agency" and is therefore considered a "public record" under the RTKL. Pet. Br. 13 (citing 71 P.S. § 720.305.). Therefore, Petitioners' brief concluded that the data is a public record and is not exempt from disclosure under the DPCL. Pet. Br. 13. In its reply brief, Respondent claims that Act 77 is not applicable because it was not in effect at the time of appeal and because there is a presumption against the retroactive application of statutes. Resp't Br. 12-13. This argument contravenes the intent of the Pennsylvania legislature in passing Act 77 and the RTKL.

¹ Section 15 of the DPCL reads: "State and local health authorities may not disclose reports of diseases, any records maintained as a result of any action taken in consequence of such reports, or any other records maintained pursuant to this act or any regulations, to any person who is not a member of the department or of a local board or department of health, except . . . where necessary to carry out the purposes of this act."

Petitioners agree with Respondent that Act 77's effective date was July 27, 2020 and that Act 77 includes the following provision:

“This article shall apply as follows:

(1) For the duration of any disaster declaration or any renewal of a disaster declaration until the disaster declaration expires or is terminated by executive order, proclamation or operation of law.

(2) In addition to the provisions of paragraph (1), for the disaster declaration issued by the governor on March 6, 2020, published at 50 Pa.B. 1644 (March 21, 2020), all requests for records received by a Commonwealth agency since March 6, 2020, shall be treated as if the request for the record had been received by the agency on the effective date of this section.”

71 P.S. § 720.306.

While retroactivity is generally disfavored, when the legislature has made clear its intention, as was the case with Act 77, retroactive application of a statute is warranted. *Com v. Thomas*, 51 A.3d 255, Super 2012, appeal denied 63 A.3d 1247, 619 Pa. 704. The text of Act 77 reflects an intent to make information about COVID-19 available to the public with requests beginning on March 6, 2020 and continuing through the effective date. Notably, the legislature did *not* include any language barring retroactive application or laying out an interpretation as suggested by Respondent. Compare *Keystone Coal Min. Corp. v. W.C.A.B. (Wolfe)*, 673 A.2d 418 (Pa. Commw. Ct. 1996) (in analyzing whether a law was meant to apply prospectively or retroactively, the court reviewed a section of the law that strongly implied “that Act 44's provisions are *not* to be retroactively applied”). There is no such language allowing for an interpretation as proffered by Respondent.

Additionally, Representative Seth Grove, the lead sponsor of Act 77, stated during a House panel that the Act was designed “to make sure we have the maximum amount of understanding of why mitigation orders are being done, what’s the data behind that . . .”. Hearing Before the Pa. House State Gov’t Comm. (Mar. 9, 2021) (Statement of Rep. Seth

Grove). Therefore, it would be illogical to include within the purview of Act 77 only *requests* pending on the effective date, but not *appeals* pending on that date; for those are both requests for information about COVID-19 made during the duration of the disaster declaration.

Furthermore, the RTKL provides a right to appeal to the OOR, or beyond, to a court with jurisdiction. By declaring that requesters who had exercised their statutorily guaranteed right to an appeal after July 27, 2020 arbitrarily places an unjustified barrier between similar RTKL requests. If one RTKL request to the DOH was “pending” on July 27, 2020 and another one was appealed that same day—and both sought the same public information—the appealing requester would suffer only due to timing.

However, Respondent erred by concluding that, merely because Petitioners filed their appeal to the OOR in a timely manner, their request about COVID-19 information was not covered by Act 77. Resp’t. Br. 13. Respondent argued, “It is apparent that the General Assembly intended for the Act to apply to all *requests* received since March 6, 2020 that had not been responded to or *appealed* as of July 27, 2020; as well as *requests* made subsequent to the effective date of the Act, for the duration of the disaster declaration. Therefore, as PublicSource’s appeal was pending before the OOR when Act 77 was enacted, the Act does not apply retroactively to the instant appeal.” *Id.* To the contrary, Respondent merely asserts that there is a “strong presumption against the retroactive application of statutes in the Commonwealth,” Resp’t. Br. 12, but this ignores the remedial nature of the Right to Know Law. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d*, 75 A.3d 453 (Pa. 2013) (the RTKL is “remedial legislation 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. Commw. Ct. 2010), *aff'd*, 75 A.3d 453 (Pa. 2013). Accordingly, “exemptions from disclosure must be narrowly construed.” *Id.*²

For these reasons, Act 77 applies to the instant case and precludes the DOH from asserting confidentiality under the DPCL.

II. Respondent’s brief ignores Petitioners’ argument that the RTKL’s exemptions for medical data and other personal information do not apply to the requested data.

In its partial denial of Petitioners’ RTKL request, the DOH cited 65 P.S. § 67.708(b)(5), which applies to “[a] record of an individual’s medical, psychiatric or psychological history or disability status . . . or related information that would disclose individually identifiable health information.” R.R. 4a. The DOH also cited 65 P.S. § 67.708(b)(6)(i)(A), which applies to “[a] record containing all or part of a person’s Social Security number, driver’s license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.” *Id.* As explained in their brief, Petitioners never asked for information of this kind. And, to the extent that such information was contained in the requested records, the RTKL requires the DOH to redact any confidential information. *See* Pet. Br. 12 (citing 65 P.S. § 67.706).

Respondent’s brief did not explain why identifying information could not simply be redacted from the requested records. *See* Resp’t Br. In fact, in a surprising omission, Respondent’s brief did not address 65 P.S. § 67.708(b)(5) at all. *Id.*

² Moreover, the general legal presumption against retroactive application of statutes is most relevant in the criminal context. As noted by the Congressional Research Service, “Congress has much greater leeway to enact retroactive legislation in the civil sphere than in the criminal sphere.” Congressional Research Service, *Retroactive Legislation: A Primer for Congress* (Aug. 15, 2019), <https://perma.cc/CR6G-62Y4>.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Honorable Court to reverse the OOR's September 18, 2020 Final Determination; or, in the alternative, allow Petitioners to supplement the record before this Honorable Court; or, in the alternative, remand the matter back to the OOR for a full evidentiary hearing pursuant to Pa.R.A.P. 1542, including testimony and argument on the matter of bad faith and attorneys' fees provided by sections 67.1304 and 67.1305 of the RTKL.

Respectfully submitted,
/s/Paula Knudsen Burke

Paula Knudsen Burke (No. 87607)
The Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
pknudsen@rcfp.org

Dated: May 3, 2021
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I hereby certify that the Principal Brief of Petitioners complies with the length requirements of Pa.R.A.P. 2135. According to the word count of the word processing system used to prepare this brief, the brief contains 2,094 words.

/s/ Paula Knudsen Burke
Paula Knudsen Burke

Dated: May 3, 2021

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Paula Knudsen Burke
Paula Knudsen Burke

Dated: May 3, 2021