

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**CONSOLIDATED CASES
NO. 359 CD 2021
NO. 360 CD 2021**

LIZ EVANS SCOLFORO and THE YORK DISPATCH
Appellant

vs.

THE COUNTY OF YORK
Appellees

BRIEF FOR APPELLEE

**Appeal from the Order of the Honorable Clyde W. Vedder, Judge of the Court
of Common Pleas of York County, Pennsylvania, dated January 25, 2021
AND**

**Appeal from the Order of the Honorable Maria Musti Cook, Judge of the
Court of Common Pleas of York County, Pennsylvania, dated March 17, 2021**

Date: August 18, 2021

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COUNTER-STATEMENT OF JURISDICTION

The Commonwealth Court has jurisdiction over this consolidated appeal pursuant to 42 Pa. C.S.A. § 762, as it involves the interpretation and enforcement of the Right to Know Law, 65 P.S. § 67.101, 1301, 1302(d), et seq.

The Court also has jurisdiction over this matter pursuant to 42 Pa.C.S. § 762(a)(4), as the proceeding in the Court of Common Pleas was an appeal from a governmental agency other than a Commonwealth agency.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. WAS THE COURT CORRECT IN DETERMINING THAT THE PROTHONOTARIES AND THEIR EMPLOYEES ARE PERSONNEL OF THE JUDICIAL SYSTEM, AND AS A RESULT, THEIR WAGE AND SALARY RECORDS ARE RECORDS OF A JUDICIAL AGENCY, NOT ACCESSIBLE THROUGH THE COUNTY OPEN RECORDS OFFICE?**

Suggested Answer. Yes

- II. WAS THE COURT CORRECT IN DETERMINING THAT THE RECORDS OF THE PROTHONOTARY WERE RECORDS OF A JUDICIAL AGENCY AND THAT THE COUNTY DOES NOT HAVE THE AUTHORITY TO RELEASE SUCH RECORDS WITHOUT BEING DIRECTED BY THE JUDICIAL AGENCY?**

Suggested Answer. Yes.

- III. DID THE COURT CORRECTLY DETERMINE THAT NOT ALL OF THE REQUESTED RECORDS WERE FINANCIAL RECORDS PURSUANT TO 65 P.S. § 67.304 AND 65 P.S. § 67.102, AND AS A RESULT THE REDACTION WAS APPROPRIATE?**

Suggested Answer: Yes.

COUNTER-STATEMENT OF THE CASE

In or around July 28, 2020, the Appellant forwarded several emails and a formal request for information and documentation to the 19th Judicial District. The information sought salary, job title, length of employment, names, salary, and start and end dates of the employment of prothonotary staff. This request was denied by the 19th Judicial District and no appeal was taken to such denial.

Appellant also copied the County of York's Right to Know Office with the informal emails related to her request for information.

The Appellant eventually filed a formal Right To Know (hereinafter RTK) request with the County of York on August 11, 2020. A denial of the request was issued on August 14, 2020. Such response denied the request for documents stating that such records are judicial records under the law, and as such, the County may not provide or disclose such records belonging to the judicial agency.

Appellant filed an appeal to the County determination on or about August 31, 2020, to the Pennsylvania Office of Open Records (hereinafter "OOR"). On October 1, 2020, a Final Determination was issued by the OOR. The Final Determination denied the appeal on the basis that the Prothonotary's staff are "personnel of the unified judicial system" as is defined in Pa.R.J.A. § 102, and as a result, the OOR lacked jurisdiction over the appeal.

On October 16, 2020, a Petition for Reconsideration was filed by the Appellant with the OOR. Such Petition for Reconsideration was denied on October 30, 2020.

A Petition for Review to the York County Court of Common Pleas was filed by the Appellant on November 6, 2020.

On January 25, 2021, the Honorable Clyde W. Vedder entered a comprehensive Order and Opinion denying Appellants' Petition.

Judge Vedder's Order directed the County to refer the formal request to the Open Records Officer for the 19th Judicial District for further consideration. Based upon that Order, the Open Records Officer for the 19th Judicial District authorized the County to release the names, salaries and job titles of the employees, but not the start and end dates of employment of each employee. Such information was released to the Appellants on February 11, 2021.

On February 23, 2021, Appellants filed an appeal of the Order issued by The Honorable Clyde W. Vedder.

Appellant also filed an appeal to the Court of Common Pleas to the response directed to be provided by the Open Records Officer of the 19th Judicial District which was in compliance with the Order of Judge Vedder requiring the judicial agency's further consideration of the request. On March 17, 2021, The Honorable Maria Musti Cook entered an Order denying Appellants' appeal of 19th Judicial District Open Records Officer's determination. Appellants then filed an appeal to

that Order issued by The Honorable Maria Musti Cook. Such appeals were consolidated by the Commonwealth Court pursuant to PA R.A.P. § 513.

SUMMARY OF THE ARGUMENT

Presently before the Court are a set of consolidated appeals, which arose out of a request made to the York County Open Records Office for the following information:

- **Access (electronic copy) to salary records for all Prothonotary employees from Jan. 1, 2020, present, showing name, salary, job title and length of service, including start and end dates.**

It is the position of the County Open Records Office that prothonotary employees are the personnel of the unified judicial system pursuant to rule, statute and caselaw. As a result of this designation, the documents of the unified judicial system cannot be provided by the County Open Records Office.

The Courts of the Commonwealth have been clear that Judicial Records are subject to disclosure pursuant to Section 304 of the RTKL and the Rules of the AOPC Section 509, and as defined by 65 P.S. 67.102, and as a result, the York County Open Records Office does not have the authority to release such records.

ARGUMENT

I. THE COURT WAS CORRECT IN DETERMINING THAT THE PROTHONOTARIES AND THEIR EMPLOYEES ARE PERSONNEL OF THE JUDICIAL SYSTEM AND AS A RESULT THEIR WAGE AND SALARY RECORDS ARE RECORDS OF A JUDICIAL AGENCY NOT ACCESSIBLE THROUGH THE COUNTY OPEN RECORDS OFFICE.

Pursuant to the Pennsylvania Rules of Judicial Administration, court prothonotaries are personnel of the unified judicial system. Pa. R.J.A. No. 102. *Frazier v. Phila. County Office of the Prothonotary*, 58 A.3d 858, 859 (2012). Further, documents of the personnel of the unified judicial system are documents of the judicial agency. In *Frazier*, the requester sought a copy of an autopsy report and other information from the prothonotary's office. The Court held that under the Pennsylvania Rules of Judicial Administration, court prothonotaries are personnel of the unified judicial system. Pa. R.J.A. No. 102. As a result of the office and its staff being a part of the unified judicial system, the Court, in *Frazier*, found that the OOR does not have jurisdiction to hear appeals under the Right-to-Know Law related to requests of records of judicial agencies of the Commonwealth. 65 P.S. § 67.503(a). The *Frazier* reasoning and determination is applicable to this appeal. In fact, it is notable that the Appellant in this matter has previously acknowledged that the Prothonotary's office was an office of a Judicial Agency. As Appellant stated in her appeal documents:

Prothonotary employees are considered employees of a judicial agency.
See Frazier v. Phila. Cnty. Office of the Prothonotary, 58 A.3d 858 (Pa.

Commw. Ct. 2012) (“Under the Pennsylvania Rules of Judicial Administration, court prothonotaries are personnel of the unified judicial system ... [and], the OOR correctly determined that it did not have jurisdiction to hear Appellant’s appeal...”),and the Clerk of Courts, *see Faulk v. Phila. Clerk of Courts*, 116 A.3d 1183, 1187 (Pa. Commw. Ct. 2015). Both prothonotaries and clerks of court are considered officers of the courts under the Judicial Code, 42 Pa.C.S. § 2737(5); 42 Pa.C.S. § 2757(4), and are thus “personnel of the [unified judicial] system.” 42 Pa.C.S. § 102. (R. 052a-053a).

The Final Determination of the OOR also confirms that and the Appellant did not dispute that “prothonotaries and their employees are ‘system and related personnel’ pursuant to Pa. R.J.A. No. 102”; however, she now argues that prothonotaries should be considered “related staff” as discussed by the Pennsylvania Supreme Court in *Miller v. County of Centre*, 173 A.3d 1162 (Pa. 2017). (R. 008a).

The *Miller* case determined whether the District Attorney’s office was a judicial agency. As a result, the *Miller* case is not dispositive of the issue before the Court. As stated in *Miller v. Cty. of Ctr*, 135 A.3d 233 (Pa. Commw. Ct. 2016), aff’d, 643 Pa. 560, 173 A.3d 1162 (2017), the function of the District Attorney’s Office to enforce the law is prosecutorial in nature, not judicial. *Id.* p. 239. As a result, the District Attorney and its staff are not personnel of the Unified Judicial System and do not support the work or activities of the Court, unlike the prothonotary whose work and activities are considered functions of the Court system. As a result, the Appellant’s reliance upon *Miller* is misplaced.

Appellant argues on appeal that the prothonotary employees are “related staff” of the judiciary or should be treated as a “local agency” for RTK purposes in an

attempt to place jurisdiction of the matter with the Office of Open Records. (R. 071a-073a).

It should be noted that York County Local Rules of Court have determined that the Prothonotary and all of the employees of the office are “system and related personnel” of the Judicial Agency. York R.J.A. No. 102.

Appellant’s attempts to convince the Court that the Prothonotary and its staff should be treated as a “local agency” for the purposes of the RTKL is not supported by the Pennsylvania Rules of Judicial Administration or the RTKL. The controlling definitions in the RTKL which define a judicial agency as “a court of the Commonwealth or any other entity or office of the unified judicial system” 65 P.S. § 67.102, then looking to Pa. R.J.A. No. 102, which includes “personnel of the system” under “system and related personnel of the Courts” which clearly includes prothonotaries. The Courts have held that “personnel of the system” are deemed to be part of a “judicial agency” for purposes of the RTKL. *Com., Dep’t of Health v. Hanes*, 78 A.3d 676, 684 (Pa. Commw. Ct. 2013).

A local agency, as defined under the RTKL, would not encompass the prothonotary’s office as that conclusion would be contrary to the caselaw and definitions under the Pa.R.J.A.

Appellant also argues that the Court should look to the fact that the County of York pays the salary of certain staff members of the office of the Prothonotary, and as a result of that payment coming from the County, that the requested records are

records of the County. This argument has been repeatedly dismissed by the Courts as an improper basis for determining what agency has the authority to determine the disclosure of documents pursuant to the RTKL. In *County of Lehigh v. Pennsylvania Labor Relations Board*, the Court held that the fact that a county pays an employee's salary who works in a judicial office "does not affect his status as a judicial employee", *Id.* 507 Pa. 270, 274, 489 A.2d 1325, 1327 (1985).

II. THE COURT WAS CORRECT IN DETERMINING THAT THE RECORDS OF THE PROTHONOTARY WERE RECORDS OF A JUDICIAL AGENCY AND THAT THE COUNTY DOES NOT HAVE THE AUTHORITY TO RELEASE SUCH RECORDS WITHOUT BEING DIRECTED BY THE JUDICIAL AGENCY.

The Courts have held that where a record may be in the possession of the County, a local agency under the RTKL, and is a record of the Judiciary, does not of itself make it a local agency record. Additionally, possession of the record in and of itself does not provide the authority to determine whether it meets the definition of a local agency public record. Records may document an activity of more than one agency. Where such dual records are also under the control of the judicial agency and the rules of judicial administration would not permit disclosure of such records, they may not be disclosed by the County or dual record holder. *Grine v. County of Centre*, 138 A.3d 88, 100 (2016). Such determinations must be made by the Judicial Agency.

As stated in *Grine*, “the location of the record or an agency's possession does not guarantee that a record is accessible to the public; rather, the character of the record controls.” *Grine v. County of Centre*, 138 A.3d 88, 95 (2016).

A record does not need to be generated by the agency receiving a RTKL request to qualify as “of” that agency. *Bagwell v. Dep't of Educ.*, 76 A.3d 81 (Pa.Cmwlt.2013). *Grine v. Cty. of Ctr.*, 138 A.3d 88, 95 (Pa. Commw. Ct. 2016).

In *Grine*, the requester sought cell phone records, which the Court determined to be records “of the judicial agency and of the county”. The Court found that where the County was the agency that paid invoices for the use of cell phone service, and where the phone records involved the usage of cell phone services by judges, that they were not the “sole” records of the County, and as a result, by providing those records the County misapplied the RTKL in responding to the request. *Id.* at 99. Similar to the position of the Appellant in this matter, the County in *Grine* unsuccessfully argued that “as the agency that pays the invoices for the use of services, it is the sole agency whose activities are documented by responsive records”. *Grine* at 95.

The same reasoning is applicable here, the local agency would most likely have to provide those cell phone records created by employees of the local agency departments but would be unable to provide those same records that were created by or on behalf of the employees of the judicial agency without authorization and even

then they can only be released pursuant to the RTKL, with application of the Rules of Judicial Administration. 65 P.S. § 67.102, §67.304 and Pa. R.J.A. No. 102.

The Court further held in *Grine* that to preserve the separation of powers, a requester was unable to access records of activities of a judicial employee by seeking the records through the county or local agency. Allowing another agency to direct a judicial employee violated the separation of powers, because it interfered with the judiciary's oversight and supervision of judicial employees.

The Courts of the Commonwealth have determined that such a misapplication of the RTKL, as was evident in *Grine*, that results in the disclosure of judicial documents by a County or other local agency, “is a blatant violation of the separation of powers, a misuse of the RTKL and is unconstitutional. That by attempting to gain access to what is a judicial record by making the request through the County runs afoul of the protections under the RTKL and the Rules of Judicial Administration”. *Court of Common Pleas of Lackawanna Cty. v. Pennsylvania Office of Open Records*, 2 A.3d 810, 813-814 (Pa. Commw. Ct. 2010).

In *CCP of Lackawanna County*, the requester sought emails of the Director of the County Domestic Relations Office. In that matter, the argument was that as his salary was paid by the County and the email or computer system was provided to the Court by the County, that the County had access to the records and was compelled to provide them under the RTKL. The Court found that the fact that he was paid by the County and used the computer system provided by the County was

irrelevant in determining whether the requested documents were judicial or county records. *Court of Common Pleas of Lackawanna Cty. v. Pennsylvania Office of Open Records*, 2 A.3d 810, 813 (Pa. Commw. Ct. 2010).

In *Lackawanna County*, the AOPC correctly sought a declaratory judgment to confirm that the Pennsylvania OOR does not have the right to order the County to release information, documents or materials that pertain to court employees or court documents or employee records stored on county-provided equipment as well as requesting in the declaratory judgment that the OOR lacks jurisdiction over requests seeking such information, documents or materials. *CCP of Lackawanna County v. Pa. Office of Open Records*, 2 A.3d 810, 812 (Pa. Commw. Ct. 2010). The County's position in *Lackawanna* was that the records of the Prothonotary "were records of the County because the County had access to them and control over them" *Id.* at 812. The *Lackawanna* Court held that:

"[j]ust because the County provides logistic support to the courts does not mean that every record stored on what the County provides as part of its function to support the court makes it a County record -- those records always remain the records of the court. Otherwise, every record ever generated by a County court, including the draft opinions and law clerk memorandums, would be accessible through the RTKL simply by submitting the request to the County instead, an absurd result that would make Section 304 of the RTKL meaningless. *See* 1 Pa.C.S. §1921(a)."

Id. at 813 (2010).

The RTKL permits restrictive access to certain records of legislative agencies and judicial agencies. The process undertaken by those agencies to determine

whether a record is a “public record” is very different from the process undertaken by a local agency. Access to those agencies’ records is the most limited, and such limitations were specifically outlined by the legislature. A review of the RTKL clearly evidences that the judiciary has been provided additional rights under the RTKL that are not provided to local agencies. That is based upon the fact that only the Supreme Court is empowered to adopt procedural rules pertaining to judicial agencies. 42 Pa.C.S. § 1722 (the Supreme Court may adopt procedural rules involving “the administration of all courts and the supervision of all officers of the judicial branch....”). As permitted by 65 P.S. § 67.504(a) of the RTKL, our Supreme Court adopted Pa.R.J.A. 509, which governs responses to RTKL requests directed to judicial agencies. As stated therein, a judicial agency is defined as a court of the Commonwealth or any other entity or office of the unified judicial system. See 65 P.S. § 67.102. Only financial records of a judicial agency are subject to the RTKL pursuant to these sections.

Based upon statutory language and the case law, the records requested by Appellant are records of a judicial agency, although the County may have some access to such records, they are not in control of their release under the County application of the RTKL. 65 P.S. § 67.304.

Appellant’s discounting of the cases of *Frazier* and *Grine* is in error. The Appellant’s reliance upon *Miller v. County of Centre* only solidifies the determination of *Frazier*. As stated above, the *Frazier* Court found the prothonotary

was a judicial agency by application of the definitions pursuant to the Judicial Code and the Rules of Judicial Administration. The same analysis applied to the District Attorney's Office in *Miller*, resulted in the finding by the Court that the District Attorney's Office is not a judicial agency, this has been repeatedly upheld.

Here the Appellant, Scolforo, requested the records from the Judicial District, but when that request was denied, Appellant failed to exercise her rights of appeal to the 19th Judicial Districts determination. Such appeal would have followed 65 P.S. § 67.1301. This is a very different path than the Petition for Review, which was before the Court, which follows 65 P.S. § 67.1101. Even if such filings land in the same Court for determination, different issues are to be determined and different rules apply to each appeal or review process.

Appellant is keenly aware of the different application of the law to each appeal or review process as well as her likelihood of success had she followed the proper appeal path through the 19th Judicial District. The Appellant cannot pick and choose which path of appeal or review that she deems appropriate, or which may be more amenable to her request. Had Appellant filed the appropriate appeal to the denial of the Judicial Agency, the appeal would have followed the Pa.R.J.A. No. 509, Access to Financial Records, to determine whether such requested documents are financial records subject to disclosure. As a result, the appellate and review processes are not only very different, but the burdens and presumptions are very different as well.

The Honorable Court below correctly noted that the Appellant did not correctly appeal the decision from the Judicial Agency, and as a result, the determination of whether all of the requested information are indeed financial records of the Judicial Agency was not appropriately before the Court. (R. 199a).

Appellant attempts to argue that the County “has expended the effort to litigate three separate appeals for these records is strong evidence that the County is the local agency most affected” is completely misplaced. The fact that the Appellant appealed the determination of the County’s denial of the record requires the County to defend its position. The Appellant did not correctly appeal the determination of the Judicial Agency as was pointed out in Judge Vedder’s Order. (R. 199a). The County’s argument related to the Order of Court of March 17, 2021, is purely related to the fact the Honorable Judge Vedder in his order of January 25, 2021, directed further action by the County with the authorization of the 19th Judicial District. Further, as the Commonwealth Court then consolidated such matters, the County has an interest in the outcome or review of the Court Orders on appeal, but it must be noted that the determination by the Court of March 17, 2021, was based upon the law as it applies to Judicial Agencies and not local agencies, the County is clearly a local agency.

As summarized in *Grine*, “Judicial agencies may review requests to discern whether the requested records qualify as financial records that are subject to disclosure. By contrast, a local agency must presume the requested record is public and respond knowing it bears the burden of proving an exemption applies. The

presumption does not apply to a judicial agency until it is established that the record meets the definition for financial records. 65 P.S. § 67.305(b). These different approaches may lead to substantively different responses to the same RTKL request.” *Grine v. County of Centre*, 138 A.3d 88, 99 (2016).

It must be noted that Appellant’s counsel specifically indicated to the Appellant that “[T]he court has a legal duty to provide access to financial records, and if they won’t provide them informally, you should file a formal, written Rule 509 request with the county court’s appointed Records Administrator (see Rule 509(c)).” (R. 117a). This path was not followed by Appellant since she is aware that the RTKL “limits the records that a judicial agency must disclose to financial records”. 65 P.S. §67.304 and *CCP of Lackawanna County v. Pa. Office of Open Records*, 2 A.3d 810, 813 (Pa. Commw. Ct. 2010).

It must be noted that it was the Pennsylvania Supreme Court that issued Pa.R.J.A. No. 509 which is the sole access to financial records of the Judiciary Agencies. Such rule further set a process through a records manager of the Judicial Agency to apply such Rule as such Judicial Agency records and disclosure thereof are of a different process and procedure than those of a local agency. This Act was then referenced and adopted into the RTKL when such changes were passed in 2008. But the definition of such judicial records continues to follow the requirements of Rule 509, which has been incorporated into 65 P.S. § 67.102 and §67.304. Such

inclusion maintains the narrow definition of a financial record that may be requested from a Judicial Agency.

Judge Vedder in his comprehensive Opinion also stated that the Pennsylvania Constitution directs that the Prothonotary must be treated as personnel of the system as the office is “inextricably tied to the function of the Judiciary.” Pa. Const. Art. V. (R. 156a).

Despite the fact that the County may pay the salary of the Prothonotary’s employees one cannot ignore the rights provided to the Prothonotary pursuant to 16 P.S. §1620 and the supporting caselaw that evidences that any control the County may have with regard to salaries of such judicial employees is in “managerial representation of the judges” and they “sit on behalf of judges” and not in place of the judges. *Ellenbogen v. County of Allegheny*, 479 Pa. 429, 437, 388 A.2d 734 (1978). This further supports the conclusion that wage and salary records are judicial records not in the sole control of the County.

III. THE COURT CORRECTLY DETERMINED THAT NOT ALL OF THE REQUESTED RECORDS WERE FINANCIAL RECORDS PURSUANT TO 65 P.S. § 67.304 AND 65 P.S. § 67.102 AND AS A RESULT THE REDACTION WAS APPROPRIATE.

The Judicial Agency made a determination under the appropriate statutory provisions as to whether such requested documents are financial records of the agency.

The legislature distinguished between the rules of disclosure of the Judicial Agency and the Local Agency under the RTKL correctly acknowledging that the AOPC and rules of Judicial Administration will regulate the disclosure of all documents in which the Courts have an interest.

The Court correctly determined that 65 P.S. § 67.708(b)(6) is inapplicable to the request filed through the 19th Judicial District. Further, the RTKL has been distinctly defined under the Act and in application of such determination the requested records are in the possession of a judicial agency and application of 65 P.S. § 67.304 permitted redaction of the records to only include those of a financial nature under the Act.

Additionally, the County cannot be ordered to release the records that they retain on behalf of the judiciary, under 65 P.S. § 67.708(b) when all records of the judiciary must be released by the Judiciary after proper consideration under the law and application of 65 P.S. § 67.304 and Pa. R.J.A. No 509.

As a result, the records requested are not subject to disclosure by the County Open Records Office pursuant to the Right to Know Law, and the decision by the 19th Judicial District to the County Open Records Office to release a portion of the records of the judicial agency was a correct determination under the Act.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court affirm the lower court's order denying Appellants' Petition for Review.

Respectfully submitted,

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 APPELLEES :

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 APPELLANT : **No. 360 CD 2021**
 v. :
THE COUNT OF YORK :
 APPELLEES :

CERTIFICATE OF COMPLIANCE

I hereby certify 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 requires filing confidential information and documents differently than non-confidential information and documents.

s/ Michelle Pokrifka

MICHELLE POKRIFKA, ESQUIRE
Solicitor for York County, Pennsylvania