

FINAL DETERMINATION

DATE ISSUED AND MAILED: June 26, 2024

IN RE: *Carmine Bloise v. McKeesport City*, OOR Dkt. AP 2024-1367

On May 16, 2024, Carmine Bloise (“Requester”) submitted a request (“Request”) to McKeesport City (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* seeking copies of the policies governing the City Police Department. The City did not respond within five business days of receiving the Request, and the Request was, therefore, deemed denied on May 23, 2024. 65 P.S. § 67.901. On May 28, 2024, the Requester filed an appeal with the Office of Open Records (“OOR”). Despite receiving notice of the appeal, the City failed to provide any evidence or argument in this appeal.

Local agencies have the burden of proving that records are exempt from access. 65 P.S. § 67.708(a)(1). Here, the City did not comply with the RTKL by timely responding to the Request, nor did the City participate on appeal by submitting legal argument or evidence in support of withholding records. After the record closed without a submission from the City, the OOR afforded the City additional time to submit evidence.¹ To date, no submission has been made by the City. Accordingly, the City did not meet its burden of proof under the RTKL. 65 P.S. § 67.305.

Since January 2023, the OOR has received 10 appeals (including the current appeal) involving the City. The City did not respond to any of the requests and was only involved in two appeals before the OOR. The appeals are as follows:

- Vaughn Fisher v. McKeesport City, OOR Dkt. AP 2024-1282
- Tory Wegerski and KDKA-TV v. McKeesport City, OOR Dkt. AP 2024-0432
- Tory Wegerski and KDKA-TV v. McKeesport City, OOR Dkt. AP 2024-0431
- Patricia Cortese and PropLogix v. McKeesport City, OOR Dkt. AP 2023-2852 - the request was deemed denied and the City participated on appeal
- Patricia Cortese and PropLogix v. McKeesport City, OOR Dkt. AP 2023-2079
- Blair Droskey and Sebring & Associates v. McKeesport City, OOR Dkt. AP 2023-1781
- Blair Droskey and Sebring & Associates v. McKeesport City, OOR Dkt. AP 2023-1780
- Joe Lopretto v. McKeesport City, OOR Dkt. AP 2023-0425 – the request was deemed denied and the City participated on appeal
- Michael Wereschagin and Pittsburgh Post-Gazette v. McKeesport City, OOR Dkt. AP 2023-0376

¹ Additionally, the City was contacted via telephone by OOR administrative staff regarding the lack of an evidentiary submission or legal argument.

In April 2023, OOR staff contacted the City and notified them of its failure to participate in appeals and that information required under the RTKL was missing from the City's webpage. The City cited delivery to a spam box as the cause for the failed participation and also said the required information would be added to the City's webpage. In subsequent months, the City again failed to respond to requests or participate in appeals. On October 11, 2023, the OOR sent a letter notifying the City that it had not been complying with the RTKL when it failed to respond to specified RTKL requests and be involved in the appeals before the OOR. The letter also pointed out the City's failure to comply with the RTKL by adding information to its webpage explaining how to make a RTKL request to the City. Since then, there is no indication that the City has responded to any RTKL requests and it has only been involved in one appeal. Additionally, there is no indication that the City has posted any RTKL information in its webpage.

Under the RTKL, courts are permitted to impose sanctions and civil penalties if they conclude that an agency has acted in bad faith. 65 P.S. §§ 67.1304-1305. A finding of bad faith may be appropriate where an agency fails to perform its statutory duties. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161, 1172 (Pa. Commw. Ct. 2018), *aff'd*, 243 A.3d 19 (Pa. 2020) (bad faith involves failing to perform a good faith search and review of records to ascertain if the requested material exists or if any exclusion applies prior to denial of access); *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Commw. Ct. 2017) (a finding of bad faith was warranted where the agency based a denial on the identity of the requester, refused to provide a legal rationale for denial and did not perform a good faith search).

Although the OOR has made such findings, only the courts have the authority to impose sanctions on agencies. *See* 65 P.S. § 67.1304; *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013) ("As we observed, Section 1304 of the RTKL permits a Chapter 13 court to award costs and attorneys' fees, and to impose sanctions, after the court, not the appeals officer, makes relevant factual findings and legal conclusions.... Section 1304(a)(1) requires a court to make factual findings regarding whether an agency denying access to records acted 'willfully or with wanton disregard' or 'otherwise ... in bad faith.'"); *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 138 (Pa. Commw. Ct. 2019) *aff'd in part*, 255 A.3d 385 (Pa. 2021) ("the statute is clear that only a court may make a finding regarding an agency's bad faith"); *Uniontown, supra* ("[t]he RTKL reserves bad faith determinations for disposition by Chapter 13 Courts").

Here, based on the record, the City's repeated failure to respond to RTKL requests and consistently be involved in appeals combined with its apparent refusal to post information on its webpage can only be interpreted as direct disregard for the RTKL. An agency cannot ignore a clear statutory mandate that directly impacts public interest as a whole. For these reasons, the OOR believes that the City has acted in bad faith and that a judicial finding of bad faith by a reviewing court would be appropriate here. Additionally, an award of sanctions and civil penalties by a court could be appropriate following judicial review. *See Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1142 (Pa. Commw. Ct. 2017) (finding that a trial court did not err in finding that an agency acted in bad faith when it "failed to conform to the duties imposed by the RTKL in several respects," including the failure to make a good faith search for responsive records).

For this reason, the appeal is **granted**, the City is required to provide the requested records to the Requester within thirty days. Within thirty days of the mailing date of this Final Determination, either party may appeal or petition for review with the Allegheny County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per 65 P.S. § 67.1303, but as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.² All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

Issued by:

/s/ Catherine R. Hecker

CATHERINE R. HECKER
APPEALS OFFICER

Sent to: Carmine Bloise
J. Josh Elash, Esq.

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).