

## COMMUNICATIONS & MEDIA

# ALERT

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## Pennsylvania Supreme Court Expands Right-to-Know Requesters' Ability to Seek Attorneys' Fees for Bad Faith Denials

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On December 23, 2020, the Pennsylvania Supreme Court clarified an ambiguity in the state's Right-to-Know Law ("RTK Law"), expanding the situations in which a requester can seek attorneys' fees from an agency that denies a request in bad faith or based upon an unreasonable interpretation of the law. See *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, Nos. 76 MAP 2019, 77 MAP 2019, 2020 Pa. LEXIS 6488 (Dec. 22, 2020).

Until now, it was unclear whether obtaining a reversal of an appeals officer's review of an agency's decision was a prerequisite to a fee award. In its recent opinion, the Court held that such a reversal is not a prerequisite, and that prevailing requesters can obtain attorneys' fees on appeal for bad faith regardless of an appeals officer's determination. This ruling will allow requesters facing bad faith denials to consider more aggressively pursuing their requests on appeal even in situations where a court upholds an appeals officer's decision.

### BACKGROUND

Pennsylvania's RTK Law (65 P.S. § 67.101 et seq.) is intended to "empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). Under the law, anyone may submit a request for access to public records to a government agency, which then reviews and either grants or denies the request. If a request is denied, the requester can appeal to an "appeals officer" – usually (but not always) the Pennsylvania Office of Open Records ("OOR"). That appeals officer then issues a determination affirming or reversing the agency's denial. The appeals officer's decision is then

further appealable to either the local court of common pleas, or the Commonwealth Court, depending on the agency.

Although there are legitimate reasons an agency could deny a request – the law contains many exceptions to public access – agencies could also be tempted to deny a request for illegitimate reasons, such as the records simply being embarrassing or unfavorable to the agency. As a result, the law contains two provisions that allow for sanctions for agency bad faith. The first allows for a civil penalty of up to \$1,500. 65 P.S. § 67.1305(a). But the second is more aggressive, allowing a court to award the requester all of her costs and fees in prosecuting the request. 65 P.S. § 67.1304(a). It is the scope of this second sanction that was at issue in *Uniontown Newspapers*.

### DETAILS OF DISPUTE

The recent Supreme Court case originated in 2014, when a newspaper filed a request with the Pennsylvania Department of Corrections ("DOC") regarding the health effects of a toxic waste dumpsite on inmates in a nearby prison. The DOC denied the request, citing several alleged exemptions and privileges. The newspaper appealed to the OOR, which reversed the DOC's denial and ordered the production of all responsive records. The DOC did not appeal, and produced some documents as responsive records.

But soon afterwards, the newspaper raised objections to the adequacy of the DOC's response, eventually filing a petition for enforcement and additional records with the Commonwealth Court. In the end, the Commonwealth Court held that the DOC had acted in bad faith by failing to provide all responsive records. The Court awarded the requester both a \$1,500 civil

penalty and attorneys' fees and costs. The DOC appealed both the bad faith finding and the attorneys' fees award to the Pennsylvania Supreme Court.

#### ANALYSIS

The Supreme Court upheld both the bad faith finding and the attorneys' fees award, but it is the latter ruling that will have the widest application for requesters going forward. At issue was the precise language of the attorneys' fees provision of the RTK Law, which states that a court can award fees for an agency's bad faith or meritless denial "[i]f a court reverses the final determination of the *appeals officer*." 65 P.S. § 67.1304(a) (emphasis added). The DOC argued that the emphasized language meant that a requester could only obtain fees for bad faith if the agency prevailed before the OOR, the requester appealed to a court, and then the court reversed the OOR's decision. Such an interpretation would restrict requesters' abilities to obtain fees to situations in which the requester had lost before the OOR (which had not happened in *Uniontown Newspapers*).

The Supreme Court disagreed with the DOC and held that the phrases "final determination" and "determination" were ambiguous as they appeared multiple times in the statute, often with different meanings. In interpreting this ambiguity, the Court held that a fee award should be permissible for an agency's bad faith regardless of an appeals officer's decision for several reasons. First, the general purpose of the RTK Law is to afford greater access to public records, supporting a more liberal reading of the fee award provision. Second, the corresponding fee shifting provision of the prior Right-to-Know Act conditioned fees on the reversal of an agency's original determination and not on the reversal of the appeals officer's decision, and so it made sense to interpret the subsequent updated law in a similar way. Finally, the DOC's interpretation of the fee provision would lead to an absurd result by penalizing a requester for prevailing before the OOR, potentially allowing the most egregious acts of bad faith to escape sanction.

#### KEY TAKEAWAYS

In light of *Uniontown Newspapers*, requesters facing bad faith denials of access to public records in Penn-

sylvania can now more aggressively pursue their rights knowing that they will be able to seek costs and fees before an appellate court regardless of the appeals officer's decision. That said, requesters can only take advantage of the bad faith fee award provision if their requests meet the minimum requirements of the RTK Law and are not otherwise objectionable. For example:

- Requests should be as specific as possible regarding the subject matter, scope, and timeframe of the requested information.
- Requests should be submitted directly to an agency's open-records officer.
- Requests should be made via the agency's own RTK form or the OOR's standard form.
- Requesters should be aware of the deadlines to appeal denials, especially in instances when an agency fails to respond to a request and it is "deemed" denied.

Requesters should therefore be careful not to potentially shield an agency's bad faith denial with any of the above procedural defects. When in doubt regarding the specificity or validity of a request, or the timing of a submission, requesters may want to seek the advice of an attorney. ♦

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