

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Earle Drack,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2365 C.D. 2007
	:	Submitted: May 2, 2008
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: June 11, 2008

Earle Drack (Petitioner) petitions, pro se, for review of the November 29, 2007, final determination by the Department of Transportation (DOT), affirming the denial of his request to review and inspect certain information and records pertaining to a speed control device under Pennsylvania’s Right-To-Know Law (the RTKL).<sup>1</sup> We now affirm.

On September 4, 2007, Petitioner made a written request to DOT’s RTKL Office for the production of certain records concerning the wireless speed detection system known as the ENRADD EJU-91.<sup>2</sup> Petitioner alleged that the requested

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<sup>1</sup> Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§ 66.1 – 66.9.

<sup>2</sup> Petitioner originally filed an RTKL request on March 26, 2007, for various documents pertaining to the ENRADD system but his request was denied as he failed to identify or describe the requested records with sufficient specificity. However, certain documents were provided to Petitioner **(Footnote continued on next page...)**

documents were “public records” because they were instrumental in fixing the right of due process for the motoring public and fixing the responsibilities of the motoring public in terms of compliance with the motor vehicle code. (R.R. at 9a). In addition, Petitioner asserted that due process and basic fairness dictated that the requested documents concerning DOT’s approval of the wireless speed detection system be made available to him. His RTKL request included the following documents:

- 1) A copy of the test report which was evaluated by PennDOT and served as part of the basis for the approval of the ENRADD EJU-91 Wireless speed detection system manufactured by YIS/Cowden of York, PA.
- 2) A copy of the Penn DOT process for approval of speed control devices.
- 3) A copy of the operator’s manual for the Wireless ENRADD system.
- 4) A copy of PennDOT’s written decision/order approving the wireless ENRADD system.
- 5) A copy of all documents which are referred to in the test report and approval decision, including appendices, other test procedures/reports, and written internal processes that are referenced, so a complete understanding of the test results and approval decision is possible.

(R.R. at 9a).

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**(continued...)**

without DOT’s acknowledgement that those documents were public records. Petitioner filed exceptions arguing that the requested documents were sufficiently identified. A final determination, issued on June 25, 2007, indicated that the request was correctly denied as Petitioner’s documents were not public records according to the RTKL. This final determination also indicated that it was not enough to allege that the requested materials will affect personal or property rights, but that the materials must fix rights, privileges, immunities, duties or obligations in order to constitute a public record.

By letter dated September 18, 2007, DOT's RTKL Official informed Petitioner that DOT required an additional thirty days to provide him with a final response to his request. The additional time was required in order to make a legal determination as to whether all of the requested documents were available under the RTKL and to gather documents from another location which might require redaction of certain information. Therefore, the deadline for responding to Petitioner's request was extended to October 18, 2007.

On October 18, 2007, the RTKL Official denied Petitioner's request for the documents because he concluded that the requested documents did not meet the definition of "public records" as required by the RTKL. However, acting within its discretion, DOT agreed to provide Petitioner with certain documents concerning the approval procedure for speed-timing devices, test procedures, lab tests, verification procedures and operation manuals. However, DOT noted that even though it was providing those documents to Petitioner, it was not acknowledging that they constituted "public records" pursuant to the RTKL. Subsequent to the denial of his request, on November 1, 2007, Petitioner filed exceptions.

In his exceptions, Petitioner argued, *inter alia*, that the requested documents met the RTKL required criteria for "public records" as they formed the basis for or constituted an order by DOT which "fixe[d] the right to due process of Pennsylvania motorists." (R.R. at 15a). Petitioner asserted that the order which "fixed" the right was DOT's order directing that the wireless speed detection system known as the ENRADD EJU-91 system be included on its list of approved speed control devices. Petitioner argued that due process rights dictated that a motorist should be able to

examine, understand and confront the basis for DOT's approval of such a device, and, thus, his request for such documents should have been approved by DOT.<sup>3</sup>

Petitioner's exceptions and DOT's responses thereto were then forwarded to a DOT Hearing Officer/ RTKL Exceptions Official. DOT's RTKL Exceptions Official issued a final determination and order dated November 29, 2007, concluding that Petitioner's RTKL request was properly denied. Thus, he affirmed the decision of the RTKL Official.

DOT's RTKL Exceptions Official compared Petitioner's present requests to his previous requests which were denied and noted that Petitioner's present request set forth a new theory as to why the requested documents constituted "public records" under the RTKL. He noted that Petitioner was now alleging that in a prosecution for a speed violation, there is a statutory presumption that a speed control device is accurate if it has been approved by DOT and calibrated by an approved station, and, therefore, the approval itself is the action that "fixes" the right to due process. Nonetheless, the RTKL Exceptions Official concluded that Petitioner's "new theory [was] really old wine in a new bottle" and ultimately confused the concept of "fixing" rights with "affecting" rights. (S.R.R. at 83b). Petitioner thereafter filed a petition for review with this Court.

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<sup>3</sup> DOT's counsel responded to Petitioner's exceptions by letter dated November 16, 2007. He noted that the earlier, June 25, 2007, final determination issued by the RTKL Exceptions Official in response to Petitioner's prior request for information relating to the ENRADD EJU-91 system controlled the disposition of these exceptions because the arguments were essentially the same. Thus, DOT's counsel asserted that the doctrine of collateral estoppel applied and precluded Petitioner from re-litigating the same issues. He noted that if there were any notable differences contained in the second set of exceptions, the reasoning expressed in DOT's earlier final determination was "nevertheless dispositive" of those differences. (R.R. at 21a). As Petitioner had again failed to demonstrate that his requested records met the definition of "public records," DOT's counsel recommended that the "new" exceptions be denied.

On appeal,<sup>4</sup> Petitioner argues that DOT erred in denying his request for certain documents regarding the ENRADD EJU-91 system because it based its denial on its incorrect assertion that an order or decision which merely “affects” the rights of a person is not a public record under the RTKL.<sup>5</sup> Petitioner specifically asserts that DOT erred when it: 1) interpreted the RTKL as not requiring it to produce his requested records; 2) issued its final determination denying his request because it was not based on a reasonable interpretation of the law; and 3) acted in willful and wanton disregard in denying his access to public records. We disagree with each of Petitioner’s assertions.

In the RTKL, the legislature codified and clarified the common law right of public access to public records. Section 2 of the RTKL generally provides that every “public record” of an agency shall be open for examination and inspection by any citizen of the Commonwealth. 65 P.S. § 66.2. The burden for establishing that the requested documents bear the characteristics of a “public record” rests upon the party seeking access to the records. See North Hills News Record v. Town of McCandless, 555 Pa. 51, 722 A.2d 1037 (1999). The RTKL defines a “public record” as:

Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute,

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<sup>4</sup> This Court's scope of review of a decision under the RTKL is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, and whether necessary findings of fact are supported by substantial evidence in the record. Digital-Ink, Inc. v. Department of General Services, 923 A.2d 1262 (Pa. Cmwlth.), petition for allowance of appeal denied, \_\_\_ Pa. \_\_\_, 936 A.2d 41 (2007).

<sup>5</sup> Petitioner filed an “amended reply brief” which he said corrected an unintentional mistake and included replies to counterstatements, an additional supplemental reproduced record, corrections of various spelling errors, grammar mistakes, formatting errors, an additional citation and correspondence from DOT.

order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons.

65 P.S. § 66.1.

There is no dispute that DOT is an agency pursuant to the RTKL. See 65 P.S. § 66.1(1). The issue in the present appeal concerns the definition of a “public record” according to the RTKL. The first part of the definition of a “public record” is not at issue in this case as Petitioner has not argued that his requested documents concerning the ENRADD EJU-91 system deal with the fiscal aspects of governance or are accounts, vouchers or contracts dealing with the receipts and disbursements by an agency. Instead, Petitioner argues that DOT erred in finding that Petitioner’s requested documents were not agency minutes, orders, or decisions that “fixed” rights and duties within the second part of the definition of public records.

Petitioner argues that the case law cited by DOT, specifically North Hills News Record, stands for the proposition that the term “affecting” is the same as “fixing” under the RTKL and that DOT incorrectly interpreted North Hills News Record to mean the opposite. Petitioner argues that DOT is bound by the language contained in North Hills News Record. Thus, because he argues that his requested records “affect” a person’s rights and duties, he asserts that his requested documents meet the definition of a “public record” as required by the RTKL. Furthermore, Petitioner argues that DOT has conceded the fact that the requested records “affect” rights and duties because it said as much in its final determination and it may not subsequently retract or limit that concession. Additionally, Petitioner argues that because DOT based its determination on an unreasonable and incorrect interpretation of the case law, it acted with willful or wanton conduct such that Petitioner is entitled to an award of attorney fees and costs of litigation.

However, we disagree with Petitioner's interpretation of the North Hills News Record case and his resulting conclusion that DOT erred in denying his RTKL request for documents concerning the ENRADD EJU-91 system.

Although Petitioner correctly quotes a sentence found within the Supreme Court's opinion in North Hills News Record, that one sentence does not correctly reflect the holding of the Court in that case. After considering the case in its entirety, with a focus on the Supreme Court's holding, we agree with DOT's interpretation and analysis of North Hills News Record and its application to the present case.<sup>6</sup> DOT correctly concluded that an agency action that merely "affected" a right or duty was not sufficient to create a "public record" or require disclosure under the RTKL. Moreover, DOT

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<sup>6</sup> In North Hills News Record, our Supreme Court invoked its extraordinary jurisdiction to determine whether audio tape recordings of a telephone call made to an emergency response center were "public records" according to the RTKL. All public requests for access to the tapes had been denied and an appeal to the trial court was filed. After argument, the trial court initially acknowledged that the language of the RTKL did not appear to require the disclosure of the tapes. However, based on a recent line of cases from this Court, the trial court found that the tapes qualified as public records. The trial court reasoned that in the cases decided by this Court, we had construed the RTKL "so broadly that it require[d] only that a record reflect some form of action by an agency that ha[d] an effect on someone."

In North Hills News Record, our Supreme Court considered this Court's past interpretations regarding the definition of "public records." The Supreme Court first noted that this Court had interpreted the definition to include not only records that contained some actual agency determinations fixing rights or duties, but also those materials that formed the basis for such determinations, materials that were essential decisional components and documents that were otherwise derived from the decisions. Our Supreme Court also noted that this Court had also construed the term "fixing" to mean, more generally, "affecting." The Supreme Court noted that despite such "expansive statements" regarding the definition of public records, this Court's decisions had recognized the definitional limits of the RTKL. It further noted that this Court appropriately observed that a decision fixing rights or duties was "just not the same as gathering information, notations, and evaluations that may or may not be utilized at some future time to fix rights and duties." North Hills News Record, 555 Pa. at 57, 722 A.2d at 1040. Ultimately, our Supreme Court reversed the trial court's decision, holding that the tape recordings were not "public records" and, hence, need not be disclosed under the RTKL.

correctly concluded that its approval of the ENRADD EJU-91 system order did not “fix” a motorist’s rights or duties.

In addition, we disagree with Petitioner’s assertion that DOT conceded the fact that the requested records “affected” rights and duties as required by the RTKL because of a single sentence found in its final determination. Again, one cannot focus on a single sentence contained in a paragraph or a document, reach a conclusion based on that particular sentence and not consider or disregard the context wherein that sentence was found. The RTKL Exceptions Official noted that Petitioner’s new theory properly focused on the concept of “fixing” rights, but that it ultimately confused “*fixing* with *affecting*.” (S.R.R. at 83b) (Emphasis in original). The RTKL Exceptions Official also noted that he agreed that DOT’s approval of the ENRADD EJU-91 system might “lead to an evidentiary presumption in a speeding prosecution” and that the approval could affect procedural rights. However, the RTKL Exceptions Official concluded that it was the court that “fixed” a defendant’s rights in such a prosecution and not the action by DOT in approving the ENRADD EJU-91 system. *Id.* Further, the RTKL Exceptions Official properly noted that a statutory presumption that a speed control device was accurate, if it had been approved by DOT and calibrated by an approved station, was an evidentiary matter to be addressed by the court rather than any action by DOT that “fixed” rights or duties according to the RTKL.

As noted above, the burden was on Petitioner to establish that the requested documents regarding the ENRADD EJU-91 system were public records. Based upon our review of the record above, we cannot say that DOT erred in concluding that the requested documents were not public records under the RTKL. Furthermore, Petitioner’s request for attorney fees and costs is denied.



Accordingly, the final determination of DOT is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge

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Department of Transportation,	:	
Respondent	:	

**ORDER**

AND NOW, this 11<sup>th</sup> day of June, 2008, the final determination of the Department of Transportation is hereby affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge