

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John J. Tauro,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Department of Public Welfare,	:	No. 384 C.D. 2009
Respondent	:	Submitted: September 11, 2009

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: October 13, 2009

John J. Tauro (Tauro) petitions for review of the February 18, 2009 order of the Bureau of Hearings and Appeals (BHA) of the Department of Public Welfare (DPW) denying his exceptions to a decision denying his request for information under the Right-to-Know Law (RTKL).¹ The sole issue to be decided is

¹ Act of June 21, 1957, P.L. 390, *as amended*, formerly 65 P.S. §§ 66.1-66.9 (former RTKL). These sections have since been repealed and replaced by the Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104 (new RTKL). With the exception of Sections 101 and 102 of the RTKL, 65 P.S. §§ 67.101, 67.102 (related to the short title and definitions, respectively), which were effective immediately, the bulk of the provisions of the new RTKL took effect on January 1, 2009. The sections of the RTKL referenced herein reflect the text of the RTKL in effect at the time Tauro's request was made.

whether the DPW erred in denying Tauro's request for information under the RTKL. For the reasons that follow, we affirm the February 18, 2009 order.

The Allegheny County Court of Common Pleas issued an order directing Tauro to pay child support. At some point, his obligation to pay support ceased, but he was required to pay amounts deemed to be in arrears. Due to his failure to pay child support arrearages, his federal and state tax refunds and other assets were seized, and his driver's license was suspended. Tauro has challenged the seizures by various means. On October 9, 2008, Tauro submitted a written RTKL request to DPW as follows:

I would like copies of any writings; emails; or communications of any kind from the:

(1) Allegheny County Family Court, and/or Domestic Relations Sections of the court, to the Bureau of Child Support Enforcement, which communicated that I had an active child support collection case for the period 1999 through 2007.

(2) Any communications, described above, from the Bureau of Child Support Enforcement to The Department of Health and Human Services, Pennsylvania Dept of Treasury, and Pennsylvania Department of Transportation; with instructions to seize tax refunds, and suspend driving license, for the collection of child support.

On November 4, 2008, DPW denied Tauro's requests, stating that it did not possess documents that were responsive to his requests. Specifically, Tauro's request for records about his case was denied by DPW on the basis that such records are the property of the Allegheny County Court of Common Pleas and must be obtained

from that court. DPW also denied his request for communications to other agencies and departments about seizing his assets, as such communications are generated by a computer, and DPW has neither paper nor computer-readable copies thereof. Tauro filed exceptions with the BHA and requested a hearing. Hearings were held by the BHA relative to Tauro's RTKL request on November 26, 2008 and January 9, 2009. On February 18, 2009, the BHA denied Tauro's exceptions. Tauro filed a petition for review with this Court.²

On appeal, Tauro argues that the BHA relied solely on irrelevant testimony and ignored the provisions of Title 45 of the Code of Federal Regulations (CFR), misconstrued that the matter before it did not involve child support, and ignored or misconstrued that documents do exist. We disagree.

“The [RTKL] was ‘designed to permit the scrutiny of the acts of public officials and to make them accountable for their use of public funds.’” *Buehl v. Dep't of Corrections*, 955 A.2d 488, 493 (Pa. Cmwlth. 2008). To that end, Section 2 of the RTKL, 65 P.S. § 66.2,³ provides that “[e]very public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania.” One seeking copies of documents under the RTKL, “must establish that the requested documents were generated or kept by an agency^[1] and that they constitute ‘public records.’” *Pennsylvania State Univ. v. State Employees' Ret. Bd.*, 880 A.2d 757, 763 (Pa. Cmwlth. 2005) (footnote omitted), *aff'd*

² “This Court's review in a right-to-know case is limited to whether an error of law was committed, constitutional rights were violated or whether necessary findings of fact are supported by substantial evidence.” *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609, 614 n.4 (Pa. Cmwlth. 2009).

³ Repealed by Section 3102(2)(ii) of the Act of February 14, 2008, P.L. 6, effective January 1, 2009.

594 Pa. 244, 935 A.2d 530 (2007). Moreover, according to Section 2(e) of the RTKL, 65 P.S. § 66.2(e),

[w]hen responding to a request for access, an agency shall not be required to create a public record which does not currently exist or to compile, maintain, format or organize a public record in a manner in which the agency does not currently compile, maintain, format or organize the public record.

Digital-Ink, Inc. v. Dep't of Gen. Servs., 923 A.2d 1262, 1265 (Pa. Cmwlth. 2007).

Effective February 14, 2008, Section 102 of the new RTKL, 65 P.S. § 67.102, defines “public record” as “[a] record, including a financial record, of a Commonwealth . . . agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.” “Record” is defined by Section 102 of the new RTKL, 65 P.S. § 67.102, as:

[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

In the instant case, there is no question that, for purposes of the new and the former RTKL, DPW is an “agency” of the Commonwealth. *See* Section 102 of the RTKL (defining “agency” and “Commonwealth agency”); *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609 (Pa. Cmwlth. 2009). Nor is there any question that the documents sought by Tauro are public records.⁴ The sole question remaining,

⁴ On appeal, DPW argues in the alternative that the information requested by Tauro does not qualify as a public record because it is protected by law. We find that DPW has waived this

therefore, is whether the documents requested by Tauro were created, received or retained by DPW.

Tauro's RTKL request form indicates that he wanted paper copies of the documents he requested. RTKL Request Form at 1. According to DPW's witness, Mary Martin, Director of Field Operations for DPW's Bureau of Child Support Enforcement (BCSE), who the BHA deemed credible, information regarding child support orders is contained in the Pennsylvania Automated Child Support Enforcement System (PACSES), a computer system which exists pursuant to Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-69b, is certified by the Child Support Enforcement Office of the U.S. Department of Health and Human Services, and is implemented by state law.⁵ Notes of Testimony, January 9, 2009 (N.T.), at 7-8, 11-12, 18, 22, 28-31, Exs. A-5, C-6; BHA Op. at 4. Ms. Martin testified that federal and state agencies, including the Internal Revenue Service, the Pennsylvania Departments of Transportation and Labor and Industry, are required to interface with PACSES to effect child support enforcement actions nationwide. N.T. at 11-12, 17, 28.

According to Ms. Martin's testimony, BCSE is responsible for administering the PACSES system in Pennsylvania, pursuant to cooperative agreements entered into with the county courts. N.T. at 20, 23, 25-26, 32; Ex. A-5. However, the information in PACSES is entered into the system by the county court systems; here, the Allegheny County Court of Common Pleas, Domestic Relations Section. N.T. at 8, 10-11, 25, A-5. Ms. Martin testified that the courts input data, but

argument, having not raised it before now. Moreover, the BHA stated in its February 18, 2009 opinion that "there is no question that the requested documents are public records for the purposes of the RTKL." BHA Op. at 9.

⁵ Title IV-D requires states to establish comprehensive programs and automated data processing for child support enforcement and determinations of paternity as conditions for receiving state grants for services for needy families with children and child welfare services. 42 U.S.C. §§ 654, 654a.

the documents referenced do not actually appear in PACSES. N.T. at 13-14, 33-34. BCSE is able to view the information contained in PACSES, but cannot change the information, nor produce documents referenced therein. N.T. at 11-14. She added that child support enforcement actions are taken in Pennsylvania without the creation or issuance of any document by BCSE. N.T. at 28. Paper copies of the court orders about which information is entered into PACSES are maintained by the county courts. N.T. at 10-11, 32-33. The Domestic Relations Code supports Ms. Martin's assertion, in that it requires the domestic relations sections of the county courts to, *inter alia*, "keep a full and complete record of all support proceedings, including orders of the court." 23 Pa.C.S. § 4305(a)(5). Ms. Martin stated that, when DPW wants a copy of a court order, it must obtain it directly from the county court. N.T. at 10-11, 34.

Tauro presented no evidence that the records he requested are either possessed by or accessible to DPW. He presented a December 4, 2008 email from the U.S. Department of Health and Human Services in which he was advised that "[w]hen child support arrears reach the threshold per case type . . . states are allowed to certify the arrears to the Federal Office of Child Support Enforcement for income tax refund offset," and that "the State IV-D Agency has a copy of the [child support enforcement] order in its records." N.T. at 15-18, 22-24, Ex. A-4. Ms. Martin stated, however, that the county courts' domestic relations sections have, by cooperative agreement, been designated Pennsylvania's Title IV-D agencies. N.T. at 20-24, Ex. A-5. Accordingly, BCSE can only see the information in PACSES and, in order for Tauro to obtain copies of actual communications and orders, he must request them from the county court system. N.T. at 18, 32-33.

It is clear from the credible evidence of record that copies of writings, emails and communications requested by Tauro, to the extent that they exist, were not

created or received by DPW, nor are they in a form that can be produced by DPW. While it is true that DPW has access to data input relative to Tauro's case that is stored or maintained electronically in PACSES, DPW would not have the ability to provide Tauro with paper copies of the documents that make up his file. Moreover, under the law, DPW need not create nor compile a record that it does not have. Based upon the record, we find that there was substantial evidence to support DPW's denial of Tauro's RTKL request. The February 18, 2009 order of the Bureau of Hearings and Appeals of the Department of Public Welfare is, therefore, affirmed.

JOHNNY J. BUTLER, Judge

