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BOROUGH OF BATH, Petitioner,	:	IN THE COURT OF COMMON PLEAS
	:	NORTHAMPTON COUNTY,
	:	PENNSYLVANIA
v.	:	
	:	CIVIL DIVISION
MICHAEL LONG, Respondent.	:	
	:	NO. C-48-CV-2024-01039

**BRIEF IN OPPOSITION TO RESPONDENT’S MOTION FOR LEAVE TO APPEAL
NUNC PRO TUNC**

AND NOW COMES Petitioner Borough of Bath (“Petitioner” or “Borough”), who, by and through its undersigned legal counsel, files, in accordance with N211(c), this Brief in Opposition to Respondent’s Motion for Leave to Appeal *Nunc Pro Tunc*.

I. STATEMENT OF FACTS.

This matter arises under the Pennsylvania Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* On May 17, 2023, Respondent Michael Long (“Requester” or “Respondent”), *pro se*, filed a RTKL request (“Request”) to the Borough, seeking certain alleged public records. The Borough partially granted responsive public records, and the Requester filed a statutory appeal to the Office of Open Records (“OOR”) per the RTKL for the documents not granted. Following proceedings before an OOR Appeals Officer, on November 3, 2023, the OOR Appeals Officer issued a final determination in the matter of *Michael Long v. Bath Borough*, OOR Dkt. AP 2023-1598 that, in relevant part, impermissibly (1) refashioned the Request so it seeks certain additional alleged public records not covered by the actual original Request, (2) required the

Borough to conduct a supplemental search for additional alleged public records, and (3) required the Borough to provide the “factual material” within identified confidential communications protected by the attorney-client privilege.

On November 17, 2023, the Borough filed a Petition for Reconsideration with the OOR, arguing that the OOR erred in (1) impermissibly refashioning the Request to seek certain alleged public records between less than the entire group of listed persons; (2) potentially granting access to such potential records other than emails; and (3) potentially granting access to part(s) of identified privileged records that would reveal attorney-client privileged communications.

The OOR issued a final order partially granting reconsideration of its Final Determination in response to the Borough’s Petition for Reconsideration,¹ and, on January 12, 2024, the OOR issued a Final Determination Upon Reconsideration in the matter docketed as *Long v. Bath Borough*, OOR Dkt. AP 2023-1598R that no longer refashioned the Request to cover certain alleged public records not covered by the actual Request or a supplemental search but required the Borough “to review the records and email attachments claimed to be protected by the attorney-client privilege to determine whether they contain non-exempt factual information...” On February 9, 2024, per the RTKL, the Borough filed the instant statutory appeal of the Final Determination Upon Reconsideration to this Court, docketed here at *Borough of Bath v. Michael Long*, C-48-CV-2024-01039.

On March 1, 2024, Respondent filed a document titled “Cross-Appeal of and Petition for Review of Final Determination upon Reconsideration Dated January 12, 2024, Issued by Pennsylvania Office of Open Records at OOR Docket No. AP 2023-1598.” Because

¹ The Borough filed appeals of the OOR’s Final Determination and of its final order partially granting reconsideration, which were docketed before this Court at *Borough of Bath v. Michael Long*, C-48-CV-2023-09734 and *Borough of Bath v. Michael Long*, C-48-CV-2023-10559. By order dated August 28, 2024, the Honorable Abraham P. Kassis issued an order dismissing these appeals as moot.

Respondent's purported cross-appeal was not timely, the Borough, on March 18, 2024, filed a Motion to Quash Respondent's cross-appeal. Following argument on August 20, 2024, the Honorable Abraham P. Kassis, on August 28, 2024, issued an order granting the Borough's Motion to Quash Cross-Appeal because Respondent's purported cross-appeal "is facially untimely."

On May 13, 2024, Respondent filed a "Motion for Leave to File Appeal Nunc Pro Tunc Due to Court Error to Dismiss Petitioner's Appeal for Lack of Jurisdiction" ("Motion") in which he presents a variety of factual assertions. On May 17, 2024, the Borough filed a verified response in opposition to Respondent's Motion. On September 5, 2024, Respondent filed a Praecipe for Argument under N211, along with a supporting brief.

During a September 24, 2024 conference before the Honorable Jennifer R. Sletvold, the parties agreed that the instant motion could be decided on the briefs, and, on September 24, 2024, Judge Sletvold issued an order providing that "All current outstanding motions shall be submitted on brief[s] on the October 15, 2024 argument list."

II. STATEMENT OF THE QUESTIONS INVOLVED.

A. Where Respondent bears the burden of establishing that extraordinary circumstances exist to justify an appeal *nunc pro tunc* and Respondent has not established any fact warranting relief *nunc pro tunc*, should Respondent's Motion seeking to appeal *nunc pro tunc* be denied?

SUGGESTED ANSWER: Yes.

III. ARGUMENT.

This matter is a statutory appeal from a final determination of the OOR under the RTKL. As a statutory appeal under the RTKL, the PA Rules of Civil Procedure do not apply. *See Borough of W. Easton v. Mezzacappa*, 74 A.3d 417, 420 (Pa. Commw. 2013) ("The Pennsylvania Rules of

Civil Procedure do not apply to statutory appeals, such as an appeal under the RTKL”); *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1033 (Pa. Commw. 2011). Similarly, the PA Rules of Appellate Procedure also do not apply to statutory appeals under the RTKL. *See* Pa.R.A.P. 103; *see Chambersburg Area Sch. Dist. v. Dorsey*, No. 2012-849 (C.P. Franklin May 18, 2012) (Walsh, J.) (noting, in the context of a Right-to-Know Law appeal, that neither the PA Rules of Civil Procedure nor the PA Rules of Appellate Procedure apply), *aff’d* 97 A.3d 1281 (Pa. Commw. 2014). The RTKL only permits parties to file appeals of final determinations issued by the OOR “[w]ithin 30 days” of when the final determination is issued. *See* 65 P.S. § 67.1301(a); 65 P.S. § 67.1302(a).

In the present case, the OOR issued a final determination upon reconsideration in *Long v. Bath Borough*, OOR Dkt. AP 2023-1598R on January 12, 2024, giving each party the opportunity to file an appeal no later than Monday, February 12, 2024 to file an appeal. Petitioner filed a timely appeal on February 9, 2024. Respondent failed to timely file an appeal, and, although his purported cross-appeal (which itself was untimely) was denied, now seeks relief to file an appeal *nunc pro tunc* – 91 days after the appeal period lapsed. Respondent’s Motion should be denied.

“Where the legislature has fixed a time period within which an appeal may be filed, that period is **mandatory and may not be extended as a matter of grace or indulgence.**” *Olson v. Borough of Homestead*, 443 A.2d 875, 878 (Pa. Commw. 1982) (emphasis added); *see also Coshey v. Beal*, 366 A.2d 1295, 1297 (Pa. Commw. 1976) (stating that “the timeliness of an appeal goes to the jurisdiction of the body appealed to and its competency to act”). “[N]unc pro tunc relief may only be granted in limited circumstances.” *In re Borough of Riegelsville from Bucks Cnty. Bd. of Assessment & Revision of Taxes*, 979 A.2d 399, 402 (Pa. Commw. 2009). As an exception to the general rule prohibiting the extension of an appeal deadline, appeals *nunc pro*

tunc may be permitted due to a showing of “extraordinary circumstances involving fraud or its equivalent, duress, or coercion caused the delay in filing an appeal.” *Id.*

Courts look to whether a party seeking relief *nunc pro tunc* can demonstrate that

(1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant's counsel; (2) the appellant filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay.

Criss v. Wise, 781 A.2d 1156, 11659 (Pa. 2001); *see, e.g., Montgomery Cnty. v. Brock*, 286 A.3d 402 (Pa. Commw. 2022) (unreported) (denying a request to appeal a RTKL matter *nunc pro tunc* filed approximately 100 days after the statute of limitations had lapsed); *DeGenes v. Court of Common Pleas of Allegheny County*, No. SA-405 (O’Brien, J.) (applying *Criss* in the context of denying a request to appeal a RTKL decision *nunc pro tunc*),² *aff’d* No. 654 C.D. 2013, 2013 WL 5777884 (Pa. Commw. 2013) (unreported), *petition for allowance of appeal denied* 624 Pa. 698 (2014), *petition for writ of certiorari denied* 135 S.Ct. 231 (U.S. 2014).

As a threshold matter, Respondent has not presented any evidence for this Court’s consideration as to the merits of his Motion. Accordingly, Respondent has not made any factual showing that extraordinary circumstances exist here.

Even if, *arguendo*, Respondent could present evidence with respect to his Motion, Respondent’s failure to timely file an appeal was not the result of non-negligent circumstances. Respondent’s motion seeks to file a late appeal of a final order issued by the OOR, and the Prothonotary Fee Schedule available on the Northampton County website³ provides that there is a filing fee associated with filing appeals or otherwise commencing an action. Because the

² Available at <https://dcr.alleghenycounty.us/Civil/View/DOCUMENTS/CVPDD002S308F538.pdf>.

³ https://www.norcopa.gov/corecode/uploads/document6/uploaded_pdfs/corecode/Northampton%20County-Civil_Prothonotary%20Fee%20Schedule%20As%20of%20%20Jan%201,%202024%20-%20website_1013.pdf (last accessed Oct. 2, 2024).

Borough and Respondent each could have filed an appeal of the underlying final determination per 65 P.S. § 67.1302(a), such appeals would have been docketed in separate dockets with *each party* responsible for the payment of its own filing fees. Although Respondent claims that he was “erroneously informed by court staff that a filing fee was required,” *see* Motion at 3, if court staff informed Respondent that a filing fee was required, court staff accurately informed Respondent that a filing fee was required. As Respondent’s Motion operates under the mistaken impression that he did not have to submit a filing fee with his appeal, Respondent has only his own negligence to blame for not timely submitting his appeal.

Respondent also appears to argue that there was a breakdown in court operations because he was not able to pay a filing fee “by cash or money order at the late hour.”⁴ *See id.* In his declaration accompanying the Motion, Respondent states that “he intended to pay the filing fee by credit card” and that he “was not aware of” that credit cards would not be accepted. *See* Exhibit D to Motion at ¶5. Ignorance of the Prothonotary Fee Schedule – publicly posted on the Prothonotary’s website – cannot be said to constitute a non-negligent circumstance justifying *nunc pro tunc* relief.

Finally, Respondent argues that he prepared “appeal documents” as “evidenced by the computer print history from February 12, 2024” and referencing Exhibit E to the Motion. Exhibit E, however, appears to be a screenshot of two items filed by the *Borough* on February 9, 2024, rather than any documentation “showing the preparation of appeal documents” as alleged. Tellingly, Respondent has not even attached a copy of his proposed appeal to the instant Motion, and, as a result, the *Borough* is without knowledge as to what aspect(s) of the underlying final

⁴ To the extent that the information provided in Exhibit A to the Motion is accurate, it appears that Respondent arrived at the Northampton County Courthouse approximately a half hour prior to closing on February 12, 2024. The decision to wait until the last minute to attempt to file an appeal is, again, not a non-negligent circumstance on the part of Respondent justifying *nunc pro tunc* relief.

determination Respondent seeks to appeal. As there is no evidence of record demonstrating that Respondent has even attempted to create appropriate appeal documents, *nunc pro tunc* relief should be denied here.

Additionally, one of the factors a court must consider in deciding whether to grant *nunc pro tunc* relief is whether the request for *nunc pro tunc* relief was filed shortly after the expiration of the appeal deadline. *See Criss*, 781 A.2d at 1159. Here, the statutory deadline to file an appeal of the OOR's final determination expired on February 12, 2024, Respondent waited three months (91 days) to file the instant Motion. Where an agency attempted to file a *nunc pro tunc* appeal of a final determination issued by the OOR a little over three months after the statute of limitations had passed due to the impact of COVID-19, the Commonwealth Court affirmed a trial court's decision to deny *nunc pro tunc* relief. *See Montgomery Cnty.*, 286 A.3d 402 at *4. As Respondent waited several months after the statute of limitations expired to take action to file the instant motion seeking *nunc pro tunc* relief, this Court should find that *nunc pro tunc* relief is not warranted here.

Finally, the Borough is prejudiced by Respondent's delay. First, as no copy of Respondent's purported appeal has been included in any of his filings thus far, the Borough has no knowledge as to what issue(s) Respondent intends to appeal from the OOR's January final determination. Additionally, as Respondent filed the instant Motion in the Borough's appeal, the instant Motion has unnecessarily delayed the resolution of the Borough's appeal. Because the Borough is prejudiced by Respondent's delay in filing an appeal, *nunc pro tunc* relief should be denied.

B. The Borough's appeal was served properly.

Grasping at straws, Respondent argues that the Borough's timely appeal is "jurisdictionally defective" because it was not served via certified mail as purportedly required under Pa.R.A.P. 1514(c). However, Respondent ignores the fact that this matter is a statutory appeal and that, as a result, the Pennsylvania Rules of Appellate Procedure do not apply. *See* Pa.R.A.P. 103; *see Chambersburg Area Sch. Dist. v. Dorsey*, No. 2012-849 (C.P. Franklin May 18, 2012) (Walsh, J.) (noting, in the context of a Right-to-Know Law appeal, that neither the PA Rules of Civil Procedure nor the PA Rules of Appellate Procedure apply), *aff'd* 97 A.3d 1281 (Pa. Commw. 2014). While 65 P.S. § 67.1303(a) requires that parties "shall be served notice of actions," the RTKL is silent as to the manner of serving notice. Even if, *arguendo*, Pa.R.A.P. 1514(c) applied to this matter, this section permits parties to be served via First Class Mail under Pa.R.A.P. 121(b). Further, the Borough's appeal filed on February 9, 2024, was timely filed and the Borough's service of its appeal on Respondent has nothing to do with Respondent's failure to file an appeal by February 12, 2024. Accordingly, the portion of Respondent's Motion seeking to dismiss the Borough's appeal for lack of jurisdiction lacks merit and should be denied.

IV. CONCLUSION.

For the foregoing reasons, the Borough respectfully asks this Honorable Court to deny Respondent's Motion for Leave to File Appeal Nunc Pro Tunc Due to Court Error and to Dismiss Petitioner's Appeal for Lack of Jurisdiction.

I 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

require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

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Dated: October 10, 2024

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	:	PENNSYLVANIA
v.	:	CIVIL DIVISION
MICHAEL LONG,	:	
Respondent.	:	NO. C-48-CV-2023-10559

CERTIFICATE OF SERVICE

I, J. Chadwick Schnee, Esq., certify that, on this 10th day of October, 2024, I have served a true and correct copy of the attached Brief in Opposition to Respondent's Motion for Leave to Appeal *Nunc Pro Tunc* on the person listed below via First Class Mail:

Michael Long
220 Creek Road
Bath, PA 18014
Respondent, pro se



J. Chadwick Schnee, Esq.