

BOROUGH OF BATH,	:	IN THE COURT OF COMMON
Petitioner,	:	PLEAS
	:	
v.	:	NORTHAMPTON COUNTY,
	:	
MICHAEL LONG,	:	PENNSYLVANIA
Respondent.	:	CIVIL DIVISION
	:	

RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO APPOINT COURT EXPERTS

COMES NOW, Respondent Michael Long, pro se, and submits this Reply Brief in further support of his Motions.

I. INTRODUCTION

1. Purpose of Reply

- a. This Reply Brief addresses the procedural and substantive arguments raised by Petitioner in their briefs opposing Respondent's motions.

2. Summary of Argument

- b. Petitioner contends that Respondent's briefs were untimely filed and that the relief sought is not permitted under the Pennsylvania Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 et seq. Respondent asserts that the briefs were timely filed in accordance with the Court's scheduling orders and that the requested relief is both appropriate and necessary to ensure a fair adjudication of this appeal.

II. ARGUMENT

A. Respondent's Briefs Were Timely Filed and Should Be Considered

3. The Court's Orders Provided Reasonable Time for Brief Preparation

c. September 24, 2024 Pretrial Scheduling Order

On September 24, 2024, this Court issued a Pretrial Scheduling Order outlining a timeline for briefing to commence after the disposition of Respondent's Motion for Leave to Appeal Nunc Pro Tunc. The order included a handwritten note stating:

"All current outstanding motions shall be submitted on brief on the October 15, 2024 argument list."

d. September 27, 2024 Clarifying Order

On September 27, 2024, the Court issued an additional order:

"Within seven (7) days of the date of this Order, the parties shall file and serve a praecipe containing a list of the outstanding motions to be submitted on brief on the October 15, 2024 argument list."

e. No Immediate Deadline for Brief Submission

The September 27 order did not set a deadline for the submission of briefs themselves but only for the filing of the praecipe listing the motions to be argued. During the September 24 pretrial conference, the Court acknowledged Respondent's pro se status and verbally indicated that additional time would be provided for brief preparation.

4. Petitioner's Assertion of Untimeliness Is Unfounded

f. No 24-Hour Briefing Requirement

Petitioner suggests that Respondent was required to file briefs within 24 hours of the September 24 pretrial conference. Such an expectation is unreasonable and unsupported by the Court's orders. It would be impracticable for any litigant,

especially a pro se party, to prepare comprehensive briefs and exhibits within such a short timeframe.

g. Misinterpretation of Court Orders

Petitioner's interpretation appears to stem from an incorrect application of standard rules without considering the specific context and instructions provided by the Court.

The alleged deadline would precede the Court's own order dated September 27, rendering that order ineffective.

5. Respondent Complied with the Court's Directives

a. Timely Filing of Praecipe and Briefs

Respondent filed the praecipe listing the outstanding motions and submitted the required briefs well in advance of the October 15, 2024 argument date. This compliance aligns with the Court's orders and the verbal instructions provided during the pretrial conference.

b. Adequate Time for Review

The timeline allowed for thorough preparation of the briefs, which included extensive exhibits, while providing ample time for the Court and Petitioner to review the submissions before the scheduled argument.

6. No Prejudice to Petitioner

c. Opportunity to Respond

Petitioner received Respondent's briefs with sufficient time to prepare responses, which they have filed accordingly.

d. Interests of Justice

Dismissing Respondent's motions on procedural grounds would undermine the interests of justice, particularly given the Court's accommodations for Respondent's pro se status and efforts to ensure fairness.

7. Equity and Justice Favor Consideration of the Briefs

e. Recognition of Pro Se Litigants

Courts often provide leeway to pro se litigants to ensure access to justice.

(*See Commonwealth v. Williams*, 151 A.3d 621, 624 (Pa. Super. Ct. 2016)).

f. Substantive Issues Over Technicalities

The Court should prioritize resolving the substantive issues presented rather than dismissing them on procedural technicalities, especially when Respondent has acted in good faith to comply with the Court's directives.

A. The Court Has Authority to Grant the Requested Relief, and Respondent Did Not Waive Issues by Raising Them First on Appeal

8. Court's Authority Under the RTKL and Applicable Law

g. Broad Scope of Review

The RTKL grants the Court broad authority to conduct a full de novo review.

(*Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013)).

h. Power to Expand the Record

The Court may expand the record if necessary. (*Bowling*, 75 A.3d at 477). The Pennsylvania Supreme Court has recognized the right of courts to ensure the proper application of the RTKL and the production of public records. (*SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012)).

9. Respondent Did Not Waive Issues by Raising Them First on Appeal

Petitioner asserts that Respondent waived certain arguments by not presenting them before the Office of Open Records ("OOR"). This assertion is incorrect.

i. **Issues Were Raised During OOR Proceedings**

Respondent raised concerns about the following during the OOR appeal process:

- i. **DriveLocker's Involvement:** Questioned the hiring of DriveLocker, an IT consultant, and its role in the RTKL request process. (See OOR Record, Exhibit 3, Page 4).
- ii. **Email "Scrubbing" Discussions:** Expressed concerns about potential email deletion and the Borough's discussions on "Email Scrubbing." (See OOR Record, Exhibits 7, 8, and 9).
- iii. **Discrepancies Between Affidavit and Records:** Highlighted inconsistencies in the Borough's responses, including initial claims of non-existence of records followed by later disclosures. (See OOR Record, Exhibit 11, Page 3).
- iv. **Improper Privilege Assertions:** Requested in-camera review due to concerns about mislabeling factual communications as privileged. (See OOR Record, Exhibit 14, Page 4).
- v. **DriveLocker's Extensive Billing:** Submitted invoices demonstrating the extent of DriveLocker's involvement and raised concerns about overlapping timeframes with ongoing appeals. (See OOR Record, Exhibit 17).

j. **Preservation of Issues for Appeal**

By raising these issues before the OOR, Respondent preserved them for appeal. The record demonstrates that these concerns were properly presented and are appropriately before this Court.

10. The Relief Sought Is Permitted Under the RTKL

k. Authority to Appoint Experts

While the RTKL does not explicitly mention the appointment of experts, it does not prohibit it. The Court's broad authority under 65 P.S. § 67.1302(a) allows it to "take any action that may be deemed necessary or appropriate for the proper disposition of the matter."

l. Necessity for Expert Assistance

Given the complex technical and financial issues involved, the appointment of a Digital Forensics Specialist and a Forensic Accountant is necessary to:

- i. Determine the scope and applicability of the attorney-client privilege.
- ii. Assess potential exceptions to the privilege, such as the crime-fraud exception.
- iii. Evaluate the integrity and completeness of the records provided.
- iv. Investigate potential financial irregularities related to the Borough's handling of RTKL requests.

C. Expert Testimony Is Necessary for a Fair Adjudication

11. Potential Crime-Fraud Exception

m. Importance of Expert Analysis

Expert analysis is crucial to determine if the crime-fraud exception to the attorney-client privilege applies, which would directly impact the Borough's privilege claims.

n. Relevance to the Case

The possibility of misconduct, including suspicious financial activities and record alterations, necessitates a thorough examination by qualified experts.

12. Analysis of "Factual Material"

o. Compliance with OOR's Final Determination

The OOR's Final Determination requires the Borough to review records for non-exempt factual information. Experts can assist in assessing whether the Borough has complied with this order and whether redacted content is appropriately privileged.

13. Evaluating Evidence Integrity and Financial Irregularities

p. Digital Forensics Specialist

- i. To examine electronic records for potential tampering, deletion, or alteration.
- ii. To assess the integrity of email chains and recover any missing communications relevant to the case.

q. Forensic Accountant

- i. To analyze financial records for discrepancies, double-billing, or questionable transactions.
- ii. To verify the accuracy of cost claims made by the Borough related to RTKL requests.

D. The Borough's Conduct Supports the Need for Expert Involvement

14. History of Non-Compliance and Obstruction

r. Pattern of Behavior

The Borough has demonstrated a pattern of delayed responses, incomplete disclosures, and attempts to conceal communications, raising concerns about the completeness and integrity of the records provided.

s. Specific Instances

- i. Inconsistent financial reporting.

- ii. Redacted email chains with missing content.
- iii. Extensive involvement of third-party consultants during ongoing appeals.

15. Ensuring a Fair Adjudication

t. Uncovering Potential Misconduct

Expert involvement will help ensure that all relevant facts are thoroughly examined and that any potential misconduct is uncovered.

u. Upholding RTKL Principles

This is essential to uphold the RTKL's purpose of promoting transparency and accountability in government.

E. Respondent's Pro Se Status and the Interests of Justice Warrant Expert Appointment

16. Leveling the Playing Field

v. Lack of Specialized Knowledge

As a pro se litigant, Respondent lacks the specialized knowledge to fully assess complex technical and financial issues inherent in this case.

w. Necessity of Expert Assistance

Court-appointed experts can provide the necessary expertise to ensure a fair evaluation and assist the Court in making informed decisions.

17. Public Interest

x. Transparency and Accountability

The public has a significant interest in the transparent functioning of government entities. Thorough examination of the issues promotes trust in the legal process and government accountability.

y. Deterring Future Misconduct

Addressing potential misconduct through expert analysis can deter future abuses and reinforce the importance of compliance with the RTKL.

III. CONCLUSION

18. For the foregoing reasons, Respondent respectfully requests that this Honorable Court:

- a. Consider the briefs as timely filed;**
- b. Grant the relief sought in Respondent's motions, including the appointment of court experts; and**
- c. Grant any other relief the Court deems just and proper.**

Respectfully submitted,



/s/ Michael Long
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Dated: October 15, 2024

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief was served upon the following counsel of record on this 15th day of October 2024, via email:

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/s/ Michael Long

Michael Long

October 15, 2024