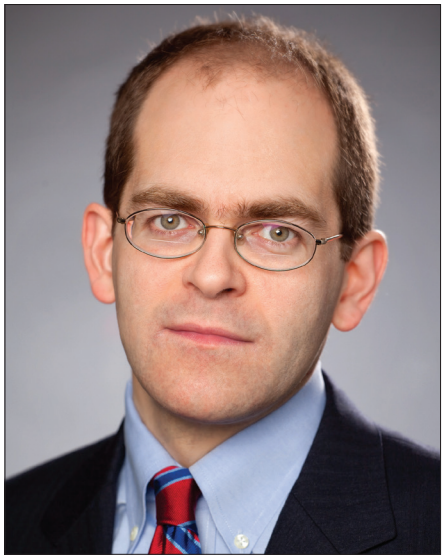
Tuesday, January 28, 2014

PENNSYLVANIA LawWeekly

www.thelegalintelligencer.com An ALM Publication

From Fort Lee to Bowling v. Office of Open Records

By Jonathan W. Hugg



Clark Hill attorney **Jonathan W. Hugg**

In New Jersey, the Christie administration is learning the hard way about the power of open records laws. Reporters broke the "Bridgegate" story after initially obtaining government emails through a request f or public records. These included the now infamous exchange between a Christie aide and a Christie political appointee agreeing that it was "time to create some traffic problems in Fort Lee," which triggered days of commuter havoc there as payback against the mayor of Fort Lee.

Every lawyer dreams of finding such priceless proof of conspiracy. Now scandal may have crippled a frontrunner for a presidential nomination and his opponents—legal and political—can exploit the resulting paralysis and harm to Gov. Chris Christie's credibility. The simple act of sending a freedom of information request sparked this conflagration.

On this side of the Delaware River, in its August 2013 decision in Bowling v. Office of Open Records, 75 A.3d 453 (Pa. 2013), the Pennsylvania Supreme Court multiplied the power of Pennsylvania's 2008 Right-to-Know Law, 65 P.S. §§ 67.101 et seq., as a weapon against similar overreaching by state and local officials. The Supreme Court accomplished this by dramatically expanding the standard and scope of review of requests for public documents under the RTKL—what evidence a court can consider when it hears an RTKL appeal, and how the court weighs it.

The Supreme Court held that the standard of review is de novo, non-deferential and independent, and that the scope of review is plenary. As a result, aggrieved citizens and businesses can request an evidentiary hearing when the government denies access, rather than having a court simply read a cold administrative record. They can also ask the court to reevaluate the evidence instead of just accepting the findings of the bureaucrat who denied the request for records.

To put Bowling in context, making an RTKL request is straightforward and inexpensive. A legal resident of the United States, including a corporation (or counsel), sends a request for records to a local government body or a state agency. The state Office of Open Records has a uniform request form to facilitate this, although verbal requests are permissible.

As with any discovery request, simple and clear language is less objectionable. However, an agency cannot limit the number of records sought or require disclosure of the requester's motive. Critically, the RTKL expansively defines "records" as "information, 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." Not many government-written materials escape the broad scope of this description.

The agency has five business days to respond, although it can self -grant an extra 30 days. An agency can only deny a request on the ground that it is allegedly disruptive if there are repeated requests that impose an unreasonable burden. Generally, appeals from

continued on page 2

continued from page 1

denials lie with the OOR, which appoints a specially trained appeals officer, who is a lawyer. The requester must initially explain why the record sought is public and address the agency's grounds (if any) for denying the request.

The agency may respond, and the OOR appeals officer may, but need not, conduct an evidentiary hearing. The appeals officer has 30 days to issue a written decision, which is a final, appealable order. Further appeals lie with the county court of common pleas where the request was to a local agency, or to the Commonwealth Court where the request was to a state agency.

Brian Bowling, a reporter from the Pittsburgh Tribune-Review, requested access to invoices and contracts from a state agency, the Pennsylvania Emergency Management Agency. These records related to purchases using grant funds from the federal Department of Homeland Security. PEMA provided the documents but redacted the identities of all of the recipients of the goods and services it had bought. PEMA cited reasons of homeland security, national defense and public safety. (Perhaps not insignificantly, the equipment consisted not only of obviously sensitive materials like biohazard devices, but also bungee cords, thus suggesting that PEMA's redactions were indiscriminate, and that PEMA thereby turned itself into an easy target for an appellate reversal.)

Bowling appealed to the OOR. After reviewing memoranda from Bowling and PEMA, but without holding a hearing, an OOR appeals officer affirmed. Because PEMA is a state agency, Bowling then filed a petition for review in the Commonwealth Court. The OOR and PEMA argued for the deferential review typically afforded the decisions of administrative agencies. This is, basically, a "government knows best" test amounting to little more than a rubber stamp.

The Commonwealth Court, however, rejected this restrictive approach and reversed in an en banc opinion. The Commonwealth Court concluded that it could review the determination of the OOR under a fresh, de novo standard, that it had a duty independently to review the OOR, and that it could substitute its own factual findings f or those of the OOR, in Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Commw. Ct. 2010). The Supreme Court granted allocatur to the OOR and affirmed.

Justice Seamus P. McCaffery authored the Supreme Court's four-justice majority opinion. Justice Thomas G. Saylor joined him but also filed a concurrence. Chief Justice Ronald D. Castile and Justice Debra Todd dissented.

The majority opinion aggressively reiterated that the RTKL changed prior law to broaden access to public records. Under the RTKL, government records are presumptively public and available for review. To withhold public records, the burden is on the government agency to prove by a preponderance of the evidence that the requested record is privileged, exempt from disclosure under federal or state law, regulation or judicial order or decree, or falls within one of the exceptions to disclosure enumerated in the RTKL. The Supreme Court held that courts, not the OOR, are the ultimate finders of fact under the RTKL. Indeed, courts may "expand the record" as necessary on appeal.

By allowing lower courts to expand the record on appeal, disregard the findings of the OOR, and instead make their own factual findings, Bowling empowers citizens and businesses by providing them with authority to request that state and local governments prove in court, at an evidentiary hearing, why they are allegedly entitled to withhold records. Citizens and businesses may seek an opportunity to introduce evidence, cross-examine government officials, and accuse them of a cover-up and bad faith. The result is that citizens and businesses will have more opportunity than ever to put the government on trial and obtain useful inside information from officials. Indeed, the risks of proceeding in open court and the resulting publicity will likely deter the suppression of documents by the government.

In Pennsylvania, disputes with state and local authorities may not involve Machiavellian political retribution, as they seem to in New Jersey. However, the stakes are still high, and especially for outsiders, there is of ten a similar feeling that some unknown force lurks behind the scenes controlling outcomes. Practical redress is difficult. Lawsuits and discovery are expensive and time-consuming, and there is usually some form of sovereign, government or official immunity hindering an award of damages, which in any event only punishes misconduct after the f act. However, recent history across the Delaware River proves that the forced release of a trove of incriminating emails can immediately push officeholders onto the defensive and transform the terms of a conflict or debate.

The casual, candid ease with which civil servants may gossip in writing about depriving citizens and businesses of their rights makes for compelling and disquieting news copy—and also for great evidentiary admissions and litigation intelligence. With Bowling, now more than ever, the RTKL is a powerful equalizing force in clashes with state and local government.

Jonathan W. Hugg is a Member of Clark Hill PLC's Litigation Practice Group. He concentrates on commercial and appellate litigation, with an emphasis on financial institution, regulatory enforcement, municipal, and lender liability matters. He has served as special counsel to numerous local agencies and also represents businesses and individuals in disputes with government. **You can contact him at jhugg@clarkhill.com or (215) 640-8547.**