

THE NEW RIGHT TO KNOW LAW: APPEALS

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The authors wish to emphasize that the opinions and analysis in this outline are their own and not those of the Commonwealth Court.

TABLE OF CONTENTS

I. Chapter 11: Appeal of Agency Determinations	...1
A. Filing of Appeal	...1
B. Disposing of Initial Appeal to Appeals Officer	...1
Hearing	...1
No Hearing	...1
Decision	...1
II. Chapter 13: Judicial Review	...2
A. Filing of Judicial Appeal	...2
B. Court Decisions	...2
Contents	...2
Analysis	...3
C. Possible Procedural Issues	...3
Discovery	...3
Intervention	...4
Record	...4
Remand or Enlargement of Record	...4
Privilege	...4
In-Camera Review	...5
Post-Trial Practice	...6
D. Further Appeals	...7
As of Right	...7
Effect	...7
Standard of Review	...7
II. Monetary Awards	...7
A. Court Costs and Attorneys' Fees	...7
B. Civil Penalty	...8

Agency Bad Faith	...8
Immunity	...8
C. Fee Limitations	...9
Postage	...9
Fee Reproduction Costs	...9
D. Miscellaneous	...9
Prohibitions	...9
Practice and Procedure	...9

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I. CHAPTER 11: APPEAL OF AGENCY DETERMINATIONS

A. Filing of appeal

File with: Office of Open Records or designated appeals officer.

When: Within 15 days of mailing of agency response, or
Within 15 days of deemed denial date.

Include: Grounds for asserting record is public record, and
Agency's grounds for denying or delaying request.

B. Disposing of initial appeal by appeals officer

Hearing: Discretionary;

Admission of evidence "reasonably probative and relevant";

Hearing officer may consult with agency counsel;

Procedures follow 1 Pa. Code Pt. II (relating to administrative practice and procedure), unless special rules adopted by agency;

Procedural rulings made on basis of justice, fairness and the expeditious resolution of the dispute.

No hearing: Cannot compel;

Party other than requester or agency with knowledge may make timely written request to provide info or appear.

Decision: Written explanation of reasons;

Final order;

Appeal within 30 days of mailing date or deemed denial.

II. CHAPTER 13: JUDICIAL REVIEW

A. Filing of judicial appeal (Sections 1301, 1302, 1303)

File with: Commonwealth Court for Commonwealth agencies;
County court for local agencies.

What: Petition for review or other document set by rule.

When: Within 30 days of mailing date of appeal denial, or
Within 30 days of deemed denial date.

Effect: Stays release of record upon appeal

Service: On agency, requester, Office of Open Records or other
appeals officer.

Opportunity to respond;

In manner reasonably assured to give notice to parties.

- Airo Die Casting v. Westmoreland County Bd. of Assessment Appeals, 706 A.2d 1279 (Pa. Cmwlt. 1998) (holding timely service of tax assessment appeal by certified mail, return receipt requested sufficient);
- Gilmore v. Dep't of Transp., 590 A.2d 1369 (Pa. Cmwlt. 1991) (explaining in dictum notice of appeal could be perfected by first class mail, in addition to other means including personal service by hand delivery and acceptance of service);
- McNeilis v. Dep't of Transp., 546 A.2d 1339 (Pa. Cmwlt. 1988) (holding statutory appeal of license suspension shall be served by certified mail, return receipt requested).

B. Court decisions (Sections 1301, 1302)

Contents: De novo review;

Findings and conclusions;

Based on “evidence as a whole”;

Clear and concise explanation of rationale;

Penalties, costs, attorney fees.

Analysis: Duty of fact-finder;

“Reasoned decision” standard;

Credibility determinations of conflicting testimony based on some matter of record, the presence of which can be verified;

- Daniels v. Workers’ Comp. Appeal Bd. (Tristate Transp.), 574 Pa. 61, 828 A.2d 1043 (2003) (decision is “reasoned” if it allows for adequate appellate review without further elucidation under the applicable review standards);
- Supervalu, Inc. v. Workers’ Comp. Appeal Bd. (Bowser), 755 A.2d 715 (Pa. Cmwlth. 2000) (where decision summarizes the evidence and testimony, identifies the credible witnesses, and provides the basis upon which the determination is made, the “reasoned decision” requirement is satisfied).

Analysis: Statutory interpretation;

In pari materia interpretation (1 Pa. C.S. §1932)

- Schenck v. Twp. of Ctr., Butler County, 893 A.2d 849 (Pa Cmwlth.), appeal granted, 591 Pa. 707, 918 A.2d 749 (2006) (since RTKL and Sunshine Act, 65 Pa. C.S. §§701-716, both relate to information regarding actions by government agencies, they must be construed together).

C. Possible Procedural Issues

Discovery: Pa. R.C.P. not applicable;

Probably not permitted.

- Appeal of Borough of Churchill, 525 Pa. 80, 575 A.2d 550 (1990) (rules of civil procedure do not apply in statutory appeals)

in general and tax assessment appeals in particular; however, county court may adopt local rules governing post-trial practice);

- In re Appeal of Penn-Delco Sch. Dist., 903 A.2d 600 (Pa. Cmwlth. 2006), appeal denied, 591 Pa. 739, 921 A.2d 499 (2007) (same).
- Shultz v. Bd. of Supervisors of Jackson Twp., 505 A.2d 1127 (Pa. Cmwlth. 1986) (discovery not available in proceedings under RTKL).

Intervention: Left to the discretion of the trial judge.

- Snyderman v. Pa. Liquor Control Bd., 682 A.2d 1322 (Pa. Cmwlth. 1996)(in absence of authority for intervention in statutory appeal, determination left to county court); Pa. R.A.P. 1531 governs intervention before Commonwealth Court.

Record: Limited on appeal to: request;
agency response;
initial appeal filed;
hearing transcript, if any; and
final written determination of appeals officer.

Remand/enlargement of record: RTKL does not address;

Probably inconsistent with expeditious resolution of dispute and limited record on appeal.

Privilege: Defined by RTKL, Section 102:

[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the Speech and Debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.

Recent cases addressing privilege:

- Tribune-Review Publ'g Co. v. Dep't of Cmty. & Econ. Dev., 580 Pa. 80, 859 A.2d 1261 (2004) (Supreme Court acknowledged it has not adopted deliberative process privilege);
- LaValle v. Office of Gen. Counsel, 564 Pa. 482, 769 A.2d 449 (2001) (internal, deliberative aspects of agency decision making not subject to public scrutiny);
- Ben v. Schwartz, 556 Pa. 475, 729 A.2d 547 (1999) (declining to recognize executive privilege at common law);
- Schenck v. Twp. of Ctr., Butler County, 893 A.2d 849 (Pa. Cmwlth.), appeal granted, 591 Pa. 707, 918 A.2d 749 (2006) (attorney-client, attorney work product privileges);
- Maleski by Chronister v. Corporate Life Ins. Co., 641 A.2d 1 (Pa. Cmwlth. 1994) (attorney work product).
- Commonwealth ex rel. Unified Judicial Sys. v. Vartan, 557 Pa. 390, 733 A.2d 1258 (1999) (plurality opinion) (deliberative process privilege protected disclosure of deliberations impacting the Court's constitutional duty to administer courts and provide court facilities);
- Hartman v. Dep't of Conservation & Natural Res., 892 A.2d 897 (Pa. Cmwlth. 2006) (privacy privilege not absolute).

In camera review: RTKL does not address;

Undertaken without analysis in cases:

- LaValle v. Office of Gen. Counsel, 564 Pa. 482, 498 n.14, 769 A.2d 449, 459 (2001) (sound policy would support availability of in camera review by Commonwealth Court where appropriate, and perhaps, on proper demand);
- Parsons v. Pa. Higher Educ. Assistance Agency, 910 A.2d 177 (Pa. Cmwlth. 2006) (Commonwealth Court retained jurisdiction over request to PHEAA for expenses vouchers to conduct in camera review, if necessary, over redacted information);

- Weiss v. Williamsport Area Sch. Dist., 872 A.2d 269 (Pa. Cmwlth. 2005) (common pleas court reviewed school documents in camera to determine whether public records);
- Commonwealth ex rel. v. Dist. Attorney of Blair County, 823 A.2d 147 (Pa. Super. 2003) (on remand, common pleas court reviewed autopsy report in camera to determine whether Commonwealth established release of report would hinder homicide investigation);
- York Newspapers, Inc. v. City of York, 826 A.2d 41 (Pa. Cmwlth. 2003) (common pleas court conducted in camera review of documents upon which parties could not agree);
- Scranton Times v. Scranton Parking Auth., 54 Pa. D.&C. 4th 90 (C.C.P. Lackawanna 2001) (common pleas conducted in camera review of undercover vehicle listings for purposes of parking violation forgiveness).
- In camera review, although not authorized by the RTKL, is consistent with Section 552(a)(4)(B) of the Freedom of Information Act, 5 U.S.C. §552(a)(4)(B). That section authorizes a district court to examine agency records in camera to determine whether the records at issue are exempt from disclosure.

In camera review declined:

- Schenck v. Twp. of Ctr., Butler County, 893 A.2d 849 (Pa. Cmwlth.), appeal granted, 591 Pa. 707, 918 A.2d 749 (2006).

Post-trial practice: County courts may adopt post-trial statutory appeal practices not inconsistent with constitution or laws of the Commonwealth.

- Appeal of Borough of Churchill, 525 Pa. 80, 575 A.2d 550 (1990) (county court has right to regulate practices before it by permitting or refusing to permit exception in tax assessment appeal so long as practices are not in derogation of constitutional or state or federal law);
- But see Pa. R.C.P. No. 227.1 (motions for post-trial relief may not be filed in appeals from final adjudications of local or Commonwealth agencies).

D. Further Appeals

Appeal as of right: From county court to Commonwealth Court (local agencies).

From Commonwealth Court to Supreme Court (Commonwealth agencies), probably discretionary.

42 Pa. C.S. §§762, 763 and 20 Pennsylvania Appellate Practice, §21:1-6.

Effect of further appeal: Not stay records release;

Seek ancillary relief under Pa. R.A.P. 1732.

- Riddle v. Commonwealth, Dep't of Transp., 583 A.2d 865 (Pa. Cmwlth. 1990) (although Vehicle Code provides for an automatic supersedeas on appeal to common pleas court from suspension of motor vehicle license, the supersedeas is not automatic on further appeal to Commonwealth Court).

Standard of review: 2 Pa. C.S. (relating to Administrative Law and Procedure in general and standard of review in particular) shall not apply unless specifically adopted by policy or regulation.

Procedure: 2 Pa. C.S. Ch. 7 applies (relating to judicial review of Commonwealth and local agency determinations in general and scope of review and disposition on appeal in particular)

- Hartman v. Dep't of Conservation and Natural Res., 892 A.2d 897, 900 n.3 (Pa. Cmwlth. 2006) (standard of review on further appeal under RTKL).

III. Monetary Awards (Sections 1304-08)

A. Court costs and attorneys' fees (Section 1304)

Agency acted with willful or wanton disregard of right to access in bad faith, or

Denial not based on reasonable interpretation of law.

Court may impose sanctions for frivolous appeals

Court may impose other penalties and costs in accordance with the rules of court.

Cases discussing monetary awards:

- Newspaper Holding, Inc. v. New Castle Area Sch. Dist., 911 A.2d 644 (Pa. Cmwlth. 2006) (newspaper awarded attorneys' fees where school district unreasonably refused to release settlement agreement which specifically provided for disclosure under the Law);
- Parsons v. Pa. Higher Educ. Assistance Agency, 910 A.2d 177 (Pa. Cmwlth. 2006) (newspaper awarded attorneys' fees where agency failed to examine requested records and refused to disclose records on basis of trade secret exemption although records contained no trade secrets).
- David C. Jenkins v. County of Chester, (Pa. Cmwlth., No. 1305 C.D. 2005, filed August 22, 2007), appeal denied, __ Pa. __, 940 A.2d 367 (2007) (attorneys' fees denied where Commonwealth Court determined agency had no obligation to provide public records in format requested).

B. Civil Penalty (Sections 1305, 1306)

Agency Bad Faith: Penalty not more than \$1500;

Failure to comply with court order, court may impose fine of \$500 per day until records provided.

Immunity:

Except as provided in §§1304-05, agency, public official or public employee not liable for civil penalties;

Not liable for civil or criminal damages for complying with record retention schedule.

C. Fee limitations for reproduction of records (Sections 1307, 1308)

Postage: Limited to actual mailing costs;

Reproduction fees: Agencies must publish list of fees approved by Open Record Office; fees for enhanced electronic access permitted;

Certain circumstances, agency may waive fees or require pre-payment.

Recent cases addressing fees:

- Weiss v. Williamsport Area Sch. Dist., 872 A.2d 269 (Pa. Cmwlth. 2005) (school district's fee of 25¢ per page for copying public record reasonable);
- York Newspapers, Inc. v. City of York, 826 A.2d 41 (Pa. Cmwlth. 2003) (county could not charge labor costs for searching or gathering public records);
- Inkpen v. Roberts, 862 A.2d 700 (Pa. Cmwlth. 2004) (deed and mortgage records not public records under RTKL; fee limitations do not apply to non-public records)
- David C. Jenkins v. County of Chester, (Pa. Cmwlth., No. 1305 C.D. 2005, filed August 22, 2007) (unpublished), appeal denied, ___ Pa. ___, 940 A.2d 367 (2007) (county "white cards" containing property information public records; however, fee limitations did not apply to compact disc version also containing non-public information)
- Hessley v. Campbell, 751 A.2d 1211 (Pa. Cmwlth. 2000) (county did not have just and proper cause to charge \$300 to copy voter registration information where requester provided diskettes and offered to pay for time to copy records).

D. Miscellaneous (Sections 1308, 1309)

Prohibitions: Agency cannot limit number of requests;

Agency cannot require reason for request.