



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

SCOTT PIERCE,
Complainant

v.

MORRIS TOWNSHIP,
MORRIS TOWNSHIP FIRE CO.
Respondents

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Docket No. AP 2009-0116

INTRODUCTION

Scott Pierce submitted a request to Morris Township (“Township”) and Morris Township Fire Company (“Fire Co.”) seeking five types of documents related to the operation of the Fire Co. pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The Township denied the request based on non-possession; the Fire Co. denied access alleging that it is not subject to the RTKL. Mr. Pierce filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, Mr. Pierce’s appeal is **granted in part** and **denied in part** as to the Fire Company, which is required to take action as directed, and **denied** as to the Township.

FACTUAL BACKGROUND

On February 2, 2009, Mr. Pierce submitted his right-to-know request to the Township seeking the following five types of documents:

- (1) Copies of Fire Department/Company rules, regulations, procedures, most commonly referred to as “by-laws,” (“Bylaws”);

(2) Copies of what is commonly referred to as “Tripp Sheets”, which may have an alternate title. Any document which includes the names of individuals who responded to a particular Department/Company call from October 2008 through Jan. 31, 2009, (“Tripp Sheets”);

(3) For inspection, any and all financial records, **not** including tax returns, for the years 2005 through and including 2008, specifically including an accounting of all checks written from any and all accounts, the name of vendor or individual the check was written to, deposits and source, monthly bank statements for each account, any document indicating a cash reimbursement or payout, any document indicating distribution of services or product in exchange for services, all bills paid by the Department/Company which were paid in cash, documentation of all expenses for the Department/Company as well as all revenue to the Department/Company, (“Financial records”);

(4) Copies of all written communication and email between Morris Township Fire Department/Company, its officers, and the DCNR, DEP, Morris Township or its officers, Pine Township or its officers, and Pennsylvania State Police in 2008 and 2009, (“Emails”); and

(5) Meeting minutes of Morris Township Fire Department/Company for the years 2007, 2008, and 2009 (“Minutes”).

(“Request”). With respect to the Bylaws and Tripp Sheets, he advised that their existence is not in question because he has been shown select copies of the documents.

On February 4, 2009, William Hebe, Township Solicitor, timely responded “No such documents in the possession of the Township.” (“Township Denial”). A procedural flaw in its response, the Township Denial did not identify the Open Records Officer for the Township, did not restate the Request, and did not include the required appeal information.

Mr. Pierce submitted an identical request to the Fire Co. on February 11, 2009. On February 16th, within the five business days, Mr. Hebe timely responded:

I am the solicitor for the Morris Township Fire Department. I respond to your letter which was received by the Fire Department on February 11, 2009. The Morris Township Fire Department is not an agency as that term is defined in Section 703 of the Act. The Fire Department was not created by or pursuant to a statute which declares in substance that it performs or has its purpose the performance of an essential governmental function.

(“Fire Co. Denial”). Again, the Denial was deficient in that it did not include instructions for appeal, nor include the substance of the Request or set forth legal support for its Denial.

Mr. Pierce timely appealed both Denials to the OOR, which was received on February 24, 2009. In his appeal, Mr. Pierce notes that both Denials were deficient under Section 903 of the RTKL and did not identify the Open Records Officer, Irene Heatley (“Appeal”). He advised that the records are public because the Frequently Asked Questions part of the OOR website identifies local fire companies as local agencies under the RTKL. He further advises that under the Second Class Township Code, 53 P.S. §66830(b), the Board of Supervisors may make rules for governance of the fire companies within its township, and that the Township is responsible to ensure that fire services are provided within the Township, including funding. 53 P.S. §66553(c). He notes that under the Township Code, the Township “shall require any emergency services organizations receiving township funds to provide the township an annual itemized listing of all expenditures of these funds before the Township may consider budgeting additional funding.” *Id.*

In response to the OOR’s request for additional information regarding the relationship between Morris Township Fire Co. and Morris Township, Mr. Hebe supplied two affidavits. Regarding the relationship between the Fire Co. and the Township, an affidavit by Irene Heatley, Township Secretary and ORO, was supplied. (“Heatley Affidavit”). She attests that there is no contract between the Township and the Fire Co. and that the Fire Co. was incorporated as a non-profit corporation, without participation by the Township. She further attests that the Fire Co. serves Morris Township, Duncan Township and Cogan House Township, and is obligated to serve neighboring counties. [*Heatley Affidavit*, ¶5.] The only Fire Co. document over which the Township has control, is the annual report referred to in 53 P.S. §66803(a); the remaining documents sought in the Township Request are not within the Township’s possession or control.

[*Heatley Affidavit*, ¶¶6-13] Although the Fire Co. receives funding from the Township, she attests that there is no overlapping governance between the two entities. [*Heatley Affidavit*, ¶8.]

The Fire Co. supplied a notarized affidavit of Melanie Herb, Secretary of the Fire Co., in which she attests the Township and Fire Co. are separate entities (“Herb Affidavit”). She also attests that the Fire Co.’s records are protected in part by HIPAA and the privacy provisions of the Pennsylvania Constitution. However, no reference was made to which of the five types of records requested the exceptions pertained.¹ On March 26, for the first time, Mr. Hebe submitted legal argument explaining the application of the alleged statutory exception of HIPAA and constitutional privacy (“March 26 Hebe Letter”). Solicitor Hebe also submitted the Fire Co.’s amended Articles of Incorporation showing the Fire Co. to be a 501(c)(3) non-profit organization separate from the Township. He again contends that the Fire Co. is not an agency and has no right to Fire Co. records except for the single financial report the Township is willing to provide.

LEGAL ANALYSIS

The Solicitor for the Township and the Fire Co. asserted that RTKL did not apply to the Fire Co. because it was not an agency under the RTKL. The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. Records of a local agency are presumed to be “public” unless: (1) the record is exempt under Section 708(b); (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. Neither the Township nor the Fire Co. asserted any exceptions to support their Denials. Because the Township has shown through the Heatley Affidavit and Herb Affidavit supplied that there is no contract between the Township and the Fire Co., each Denial is addressed separately.

¹ To allow supplementation of the record, Mr. Pierce granted an extension for the Final Determination to April 3rd.

1. The Township did not respond in accordance with the RTKL.

Morris Township's Denial is deficient under Section 903 of the RTKL, 65 P.S. §67.903, in several respects. First, the Denial failed to include a description of the record requested. Second, the Denial did not state "the specific reason for the denial, including a citation of supporting legal authority." 65 P.S. §67.903(2). Third, the Denial did not indicate it was reviewed by the Open Records Officer for the Township, and did not include the printed name, business telephone number and signature of the Open Records Officer on whose authority the Denial was issued. Lastly, the Denial did not include the procedure to appeal the Denial to the OOR. The Township thus did not comply with the basic requirements of the RTKL.

Although the Township did not comply with the RTKL in its Denial, the Township submitted the notarized Affidavit which constitutes sufficient evidence as to the Township's lack of possession and/or control over the Fire Co.'s records. [See *Heatley Affidavit*.] The Township Secretary attested that the Township does not possess, nor have control over the Bylaws, the Tripp Sheets, most of the Financial records, or Emails or the Minutes sought in the Request. Despite some funding to the Fire Co. from the Township, and payment of worker's compensation benefits, control over records in the Request is not shown. Pursuant to the Second Class Township Code the Township shall require "an annual itemized listing of all expenditures of [Township] funds before [it] may consider budgeting additional funding to the organization." 53 P.S. §66553(c). As the Township will have a list of all Fire Co. expenditures from Township funds, at least annually, upon receipt, the Township can send a copy of the list to Mr. Pierce.

The Township also has no contract with the Fire Co. for the provision of fire-fighting services. Thus, the Township is not obligated to procure the public records from the Fire Co., to the extent they are related to that governmental function pursuant to Section 506(d)(1), 65 P.S.

§67.506(d)(1).² [*Heatley Affidavit* ¶2.] Mr. Pierce’s argument that the Township *could* have a contract with the Fire Co. as a means of providing fire-fighting services to its citizens in fulfillment of its statutory obligations to ensure emergency services are supplied, does not persuade the OOR to find the Township has control over the Fire Co. and its records. The fact is, without a contract, Section 506(d)(1) does not apply.

The OOR finds that the Township has shown that the Fire Co. is a separate entity that has its separate incorporation from the Township and so is not part of the Township itself nor controlled by contract. Mr. Pierce admits that the Township is not the only local government unit that Morris Fire Co. serves. His submission of letters of other municipalities showing their financial contributions to the Fire Co. underscores its separateness from Morris Township.

Because the Township cannot be compelled to produce something which it does not have and over which it lacks control, the OOR finds that the Township did not possess the records sought in the Request to disclose them. However, the Township is cautioned to respond to RTK requests in accordance with Sections 901 through 905, 65 P.S. §§901-905, in the future.

2. The volunteer Fire Co. qualifies as a local agency subject to the RTKL.

Solicitor Hebe repeatedly argues that “The Act defines an agency as...‘created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function.’” [*See March 26 Hebe Letter.*] The quote reveals a fundamental misconception; while this definition of “Agency” was correct under the old Right-to-Know Law, 65 P.S. §66.1, (“Old Law”), it has been repealed and replaced by the current RTKL. The Legislature defined “agency” more broadly under the current RTKL to encompass all branches of state and local government. Both ‘Commonwealth agency’ and

² Under Section 506(d)(1), a public record in the possession of an entity with which an agency contracted to perform a governmental function is deemed a public record of the agency, provided it relates to performance of that function.

‘Local agency’ are more broadly defined to include a number of entities not previously included. Unlike the Old Law, an “Agency” is not limited to named governmental units or branches, nor providers of *essential*³ governmental services, but includes “any similar *governmental entity*.” 65 P.S. §67.102 (emphasis supplied).

The definition of ‘Local agency’ includes “any of the following:...(2) any local, intergovernmental, regional or municipal agency, authority, council, board commission or *similar governmental entity*.” 65. P.S. §67.102. “Similar governmental entity” is not defined in either the RTKL or the Statutory Construction Act, 1 Pa. C.S. §1991, so the terms are construed in accordance with their plain meaning. *Commonwealth v. McCoy*, 962 A.2d 1160 (Pa. 2009). The key term here is “governmental,” which case law abundantly defines according to function.

Non-profit entities like the Fire Co. may qualify as local agencies if they are sufficiently governmental in nature. Volunteer fire companies have consistently been held to be governmental entities, and been deemed local agencies under other statutes that do not specifically include them in their definition, *e.g.*, Political Subdivision Tort Claims Act, 42 Pa.C.S. §§8501-8564 (“PSTCA”). *See Zern v. Muldoon*, 516 A.2d 799 (Pa. Commw. 1986); *Wilson v. Dravosburg Volunteer Fire Dept.*, 516 A.2d 100 (Pa. Commw. 1986). Case law also holds that a volunteer fire company is an entity created to perform a governmental function. *See id.*; *Guinn v. Albertis Fire Co.*, 614 A.2d 218 (Pa. 1992); *Weaver v. Union City Vol. Fire Dept.*, 518 A.2d 7 (Pa. Commw. 1986); *Flood v. Silkies, Meckes & Klecknersville Fire Co.*, 933 A.2d 1072 (Pa. Commw. 2007)(non-profit volunteer fire company founded by volunteers and separate

³ Fire-fighting functions have been deemed to be necessary to government. *See, e.g.*, Borough Code, 53 P.S. §46202; First Class Township Code, 53 P.S. §56579; Second Class Township Code, 53 P.S. §66553; *Zern, infra*.

from municipality constitutes a local agency). Notably, fire-fighting may only be performed as a non-profit enterprise, and thus is not proprietary.⁴

In both *Zern* and *Wilson*, the Commonwealth Court reasoned that volunteer fire companies were sufficiently governmental in nature to qualify as “local agencies” entitled to immunity under the PSTCA. Specifically, in *Zern* Judge Crumlish found that the unique “history, structure, organization and public duty of volunteer fire companies distinguish them from any other organization in existence in this Commonwealth today.” 516 A.2d at 804. Volunteer fire companies, including the Fire Co., exist to perform a governmental function on behalf of local governmental units. *Wilson, supra; Harmony Volunteer Fire Co. & Relief Ass’n v. PHRC*, 459 A.2d 439 (Pa. Commw. 1983)(holding fire-fighting is governmental in nature).

Although the Supreme Court has held that “an entity's status as an agency or instrumentality varies, depending on the issue for which the determination is being made,” *Penn State v. Derry Tp. Sch. Dist.*, 731 A.2d 1272, 1274 (Pa. 1999), here the context is ensuring public access to records documenting a governmental function that has been deemed necessary. Given the legislative intent to ensure transparency in all aspects of government, the OOR finds that “similar governmental entity” was intended to include volunteer fire companies like the Fire Co.

Because fire-fighting has been defined as a governmental function, and volunteer fire companies have been treated as local agencies in many legal contexts, the OOR concludes that volunteer fire companies are local agencies and subject to the RTKL in all its aspects. Since the Fire Co. is a local agency, the OOR reviews the Request in substance to assess whether Mr. Pierce is entitled to the records requested due to their presumed public nature.

⁴ While non-profit corporations have not been defined as agencies based upon receipt of public funds, *see Mooney v. Temple Univ. Bd. of Trustees*, 292 A.2d 395 (Pa. 1972); *Roy v. PSU*, 568 A.2d 751 (Pa. Commw. 1990), a private entity may be subject to open records law based on whether it provides a governmental function. *See Dynamic Stud. Svcs., Inc., v. State Sys. of Higher Educ.*, 697 A.2d 239 (Pa. 1997). Fire-fighting is a governmental function.

3. The Fire Co. failed to overcome the legal presumption that its records are public.

The RTKL provides that records in possession of a local agency are *presumed* to be public unless an agency shows that an exemption applies to protect the record. 65 P.S. §67.305. The agency bears the burden of overcoming the legal presumption and to the extent an exception is asserted, must show its application by a preponderance of the evidence. 65 P.S. §67.708(a). In this Appeal, the Fire Co. failed to raise any of the exceptions under Section 708(b) to protect the five types of records sought here: Bylaws, Tripp Sheets, Financial Records, Emails and Minutes.

With regard to the Bylaws, the Fire Co. asserts no basis for withholding them. The OOR notes that bylaws are governing documents of a non-profit equivalent to contracts. Non-profit organizations soliciting charitable contributions in Pennsylvania are required to file their Bylaws of record with the Bureau of Charitable Organizations. Because the Fire Co. asserted no exception protecting their disclosure, and none exists based upon the type of document at issue, the OOR finds that the Bylaws are public records that must be disclosed under the RTKL.

With regard to Tripp Sheets, the Fire Co. Solicitor asserted that they contain personal information relating to the victim of an emergency service call. Mr. Hebe explains that they include victim information which may include personal health information and other information in which a subject of a rescue operation would have a reasonable expectation of privacy. The federal Health Insurance Portability and Accountability Act (“HIPAA”) offers a clear statutory exemption for personally identifiable health information. HIPAA provides that personal health information and identifiers relative to treatment are private under its Privacy Rule, 45 C.F.R. Parts 160, 164. Penalties may attach for knowing disclosure of personal health information and identifiers under HIPAA. Thus it qualifies as a statute that prohibits release of information and is proper grounds for withholding information encompassed within its privacy shield.

Accordingly, to the extent that the Tripp Sheets contain any personal health information or identifiers related to emergency medical/rescue, that information is properly withheld as it does not qualify as a public record under 65 P.S. §67.102. Despite the application of HIPAA to certain information contained within Tripp Sheets, the entire record is not protected under the HIPAA Privacy Rule. Pursuant to Section 706 of the RTKL, an agency is to produce the public record, with those non-public parts of the record at issue redacted. 65 P.S. §67.706. Therefore, the OOR concludes that the Fire Co. shall, in accordance with Section 706, produce redacted copies of the Tripp Sheets with only the personal health information and identifiers redacted.

The Fire Co. also raised a “privacy right” under the Pennsylvania Constitution to protect contents of the Tripp Sheets. However, the Fire Co. failed to cite the any legal authority to show the application of that exemption as required under Section 903(2), 65 P.S. §67.903(2). Thus, the Fire Co. cannot meet its burden of proof to show an asserted constitutional privacy right here.

With regard to Financial Records, they are presumed to be public. Mr. Pierce specifically seeks records of disbursements and expenditures of the Fire Co. and the vendors/servicers to which they are paid. The records requested qualify as “financial records” as that term is defined in the RTKL. 65 P.S. §67.102. He does not seek donor information which is exempt from disclosure under Section 708(b)(13), 65 P.S. §67.708(b)(13). He does not seek audit work papers protected under Section 708(b)(17)(v), 65 P.S. §67.708(b)(17)(v). Because Mr. Pierce specifically excluded from his Request any “returns,” from the description in the Request, none of the information requested is apparently non-public in nature. However, the OOR notes that the Fire Co. may redact any personal identification information listed in Section 708(b)(6), 65 P.S. §67.708(b)(6), to the extent it applies.

With regard to his request for Emails, the request is not sufficiently specific because it does not set forth a subject matter for the communications, nor identify a specific and relatively limited number of people. His Request only specifies a timeframe and agencies, and without more does not qualify as a sufficiently specific request in accordance with Section 703, 65 P.S. §67.703. Accordingly, the Fire Co. is not required to respond to this part of his Request as it is currently insufficiently specific to compel a response.

With regard to Minutes, again, since the Fire Co. asserted no exceptions to protect them, they are presumed to be public. The OOR notes that final approved minutes of meetings of a local agency are generally public on their face. Thus, the OOR concludes they must be disclosed.

CONCLUSION

For the foregoing reasons, Mr. Pierce's appeal is **granted in part** and **denied in part**. The OOR concludes that the Township failed to comply with Section 903 of the RTKL in its Denial, 65 P.S. §67.903. However, as the Township established that it lacked possession or control over the Fire Co. records, Mr. Pierce's Appeal is denied as to the Township.

The OOR also concludes that the Fire Co. qualifies as a local agency subject to the RTKL and its requirements to provide access to public records. The Fire Co. failed to properly assert any exceptions to the five types of documents requested, other than Tripp Sheets, and thus did not overcome the legal presumption. With regard to the Tripp Sheets, the OOR finds the Fire Co. showed that certain parts are protected by HIPAA and so may be redacted to remove any personal health information or identifiers. The OOR notes that Mr. Pierce's Request for Emails was not sufficiently specific. Thus, Mr. Pierce's Appeal is denied as to Emails, and is granted as to Bylaws, Financial Records, Minutes, and Tripp Sheets, redacted to remove personal health and identifier information. The Fire Co. is directed to provide the records within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Tioga County Court of Common Pleas. 65 P.S. §67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED: April 3, 2009



**APPEALS OFFICER
LUCINDA GLINN, ESQ.**