

IN THE MATTER OF	:	IN THE COURT OF COMMON PLEAS
SCOTT PIERCE,	:	
	:	OF TIOGA COUNTY, PENNSYLVANIA
Respondent	:	
	:	NO. 426 CV 2009
vs.	:	
	:	RIGHT-TO-KNOW-LAW (RTKL)
MORRIS TOWNSHIP FIRE CO.,	:	
	:	
Petitioner	:	

BRIEF OF AMICUS CURIAE

Amici: Rep. Matthew Baker, Rep. Samuel Smith, Republican Leader, Rep. Sandy Major, Republican Caucus Chairman, Rep. Jerry Stern Republican Caucus Secretary, Rep. Stan Saylor, Republican Policy Committee Chairman, Rep. Merle Phillips, Republican Caucus Administrator, Rep. Mario Civera, Republican Appropriations Chairman, Rep. Karen Boback, Rep. Michele Brooks, Rep. Marty Causer, Rep. Paul Clymer, Rep. Bryan Cutler, Rep. Craig Dally, Rep. Gary Day, Rep. Gordon Denlinger, Rep. Garth Everett, Rep. Russ Fairchild, Rep. Frank Farry, Rep. Mike Fleck, Rep. Matt Gabler, Rep. Keith Gillespie, Rep. Kate Harper, Rep. Sue Helm, Rep. Dick Hess, Rep. Dave Hickernell, Rep. Mark Keller, Rep. Tom Killion, Rep. Tim Krieger, Rep. Jim Marshall, Rep. Bob Mensch, Rep. Nick Micozzie, Rep. David Millard, Rep. Dan Moul, Rep. Donna Oberlander, Rep. Bernie O’Neil, Rep. John Payne, Rep. Mike Peifer, Rep. Tina Pickett, Rep. Marguerite Quinn, Rep. Kathy Rapp, Rep. Mario Scavello, Rep. Curt Sonney, Rep. RoseMarie Swanger, Rep. Will Tallman, Rep. Katie True, Rep. Randy Vulakovitch, Rep. Kathy Watson.

STATEMENT OF INTEREST

The Amici are elected Members of the Pennsylvania General Assembly serving in the House of Representatives.¹ The Constitution of the Commonwealth of Pennsylvania vests the Members of the General Assembly with “legislative power” to enact laws. Pa. Constitution, Art. 2, § 1. A law enacted by the General Assembly is intended to achieve defined legislative goals. However, the interpretation and application of a law by an administrative agency is on occasion contrary to the intent of the General Assembly. Therefore, after enactment of a law the Members of the General Assembly have an interest in the interpretation and application of the law so the law achieves the intended legislative goals.

Amici contend that the Office of Open Records (hereinafter “OOR”) has incorrectly interpreted and applied Act 3 of 2008, the Right-to-Know Law (hereinafter “RTKL”). The OOR incorrectly ruled that volunteer fire companies are local agencies and, therefore, are subject to the RTKL in all its aspects. The Amici assert that the RTKL was not intended to apply to volunteer fire companies.² Therefore, the Amici have an interest in the question pending before this Honorable Court.

¹ The legislative district served by each Amicus is described on Exhibit A attached hereto. The Petitioner, Morris Township Fire Co., is located in legislative district No. 68, represented by the Honorable Matthew Baker.

² Act 3 of 2008 passed the House of Representatives by a vote of 199 to 0 with 4 Members absent. Each Amicus voted in the affirmative except Rep. Gary Day, Rep. Frank Farry, Rep. Matt Gabler, Rep. Tim Krieger, Rep. Donna Oberlander, and Rep. Will Tallman, who were not Members of the House of Representatives in 2008. A copy of the Pennsylvania House of Representatives Roll Call vote for Act 3 of 2008 is attached and marked Exhibit B.

ORDER IN QUESTION

The Final Determination issued by the Pennsylvania Office of Open Records on April 3, 2009 In the Matter of Scott Pierce v. Morris Township and Morris Township Fire Co., Docket No. AP 2009-0116.³

STATEMENT OF QUESTION PRESENTED

WHETHER A VOLUNTEER FIRE COMPANY IS A “LOCAL AGENCY” AS DEFINED IN THE RIGHT-TO-KNOW LAW AND, THEREFORE, SUBJECT TO THE RIGHT-TO-KNOW LAW.⁴

SUGGESTED ANSWER

A VOLUNTEER FIRE COMPANY IS NOT A “LOCAL AGENCY” AS DEFINED IN THE RIGHT-TO-KNOW LAW AND, THEREFORE, IS NOT SUBJECT TO THE RIGHT-TO-KNOW LAW.

ARGUMENT

Local agencies are subject to the Right-to-Know law. 65 P.S § 67.101 et.seq. However, a volunteer fire company is not a “local agency” as that term is defined in the Right-to-Know Law. The RTKL defines “local agency” as follows:

“Local agency.” Any of the following:

(1) Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school.

³ A copy of the Final Determination is attached to the Morris Township Fire Company’s Petition for Review.

⁴ Paragraphs 17(a) (b) and (c) of the Petition for Review submitted by the Morris Township Fire Co., presented three questions for consideration. The Amici support the Morris Township Fire Co., in regard to the question presented in paragraph 17 (a) but do not take a position with regard to the questions presented in paragraphs 17(b) and 17(c).

(2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or *similar governmental entity*.

65 P.S. § 67.102 (emphasis added).

The OOR erroneously concluded that a volunteer fire company is a “similar governmental entity.” Final Determination, p.8. According to the OOR:

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*.

Final Determination, p.8 (emphasis added). Thus, according to the OOR if a volunteer organization performs a governmental function and has been defined as a local agency in another unrelated statutory scheme it is a “similar governmental entity” for the purposes of the RTKL. In reaching its conclusion, however, the OOR failed to apply basic principles of statutory construction.

When interpreting a statute, “the object is to ascertain and effectuate the intention of the General Assembly.” Narberth Borough v. Lower Merion Township, 590 Pa. 630, ___, 915 A.2d 626, 634 (2007) citing 1 Pa.C.S. § 1903 (a), 1921 (a). “The primary and favored indicator of the legislature’s intention is the plain language of the statute under scrutiny.” Id. To ascertain the legislature’s intent the court must give effect to the meaning of each distinct word as chosen by the Legislature. Freundt v. Commonwealth of Pennsylvania Dept. of Transportation, 584 Pa. 283, 883 A.2d 503 (2005).

In the present case, the OOR did not ascertain the legislative intent because it did not “give effect to the meaning of each distinct word as chosen” by the General Assembly. The OOR chose to ignore the words “similar” and “entity” and the complete

phrase “similar governmental entity”. In so doing, the OOR focused only on the word “governmental”. Final Determination, p.7. Reasoning that fire fighting is a “governmental function”, the OOR simply leapt to the conclusion that a volunteer fire company must be a “similar governmental entity” because it performs a governmental function. Final Determination, p.8.

If, however, the principles of statutory construction are applied a different conclusion is mandated. Not only must this Court give effect to each word in the phrase “similar governmental entity”, the principle of “ejusdem generis” must be applied. The principle of ejusdem generis is defined as follows:

Ejusdem generis: Of the same kind, class or nature.

In the construction of laws, wills, and other instruments, the “ejusdem generis rule” is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

Black’s Law Dictionary, Fourth Edition; *See also*, Derk v. Zerbe Twp., 322 Pa. 350, 185 A. 647 (1936) citing and applying the principle of ejusdem generis. Thus, the phrase “similar governmental entity”, must be construed not to the widest extent but narrowly limited to entities of the same general kind or class as those specifically mentioned.

The entities specifically mentioned are “any local, intergovernmental, regional or municipal agency, authority, council, board, [or] commission.” Therefore, the initial question is what did the General Assembly intend to include within this specific list?

An intergovernmental agency, authority, council, board or commission is a governmental entity established by a political subdivision pursuant to statutory authority.

See, for example, 53 Pa.C.S.A. § 2301 et seq (Intergovernmental Cooperation Act); 53 P.S. § 28101 et.seq. (Intergovernmental Cooperation Authority Act for Cities of the Second Class); 53 P.S. § 12720.101 et.seq. (Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class).

A local or regional or municipal authority is a governmental entity established by political subdivisions pursuant to statutory authority. *See*, Municipality Authorities Act, 53 Pa.C.S.A. § 5601 et seq.

A local council, board or commission is a governmental entity established by a political subdivision pursuant to statutory authority. *See, for example*, 53 P.S. § 65101 et seq. (authorizing Second Class Townships to establish Vacancy Board; Shade Tree Commission; Recreation Board etc); 53 P.S. § 45101 et seq (authorizing Boroughs to establish Vacancy Board; Shade Tree Commission; Recreation Board; Park Commission; Civil Service Commission). The statutes of the Commonwealth of Pennsylvania empower counties, cities, boroughs, townships, towns, and school districts to create authorities, boards, councils, and commissions and to delegate authority to those governmental agencies to fulfill governmental functions.

The elements common to each “local, intergovernmental, regional or municipal agency, authority, council, board, [or] commission” include: 1. Each is created by a political subdivision pursuant to specific statutory power granted to the political subdivision; 2. Each is considered to be either a division of the political subdivision or a political subdivision in its own right; 3. The members are appointed by the governing body of the creating political subdivision; 4. The political subdivision delegates to the governmental entity the power to perform a governmental function; and 5. The governing

body of the creating political subdivision(s) has the authority to disband the agency, authority, council, board or commission.

Applying the statutory construction rule *ejusdem generis*, it is obvious that a not-for-profit volunteer fire company is not of the same general kind or class as the entities specifically listed in the definition. A not-for-profit volunteer fire company is not created by the political subdivision pursuant to specific statutory power, it is not a division of a political subdivision or a political subdivision in its own right, its members are not appointed by the governing body of the political subdivision, the fire company may engage in fire fighting without any delegation of authority from the political subdivision and the governing body cannot disband the volunteer fire company.

It is obvious that a volunteer fire company is not of the same general kind or class as those specifically listed. A volunteer fire company is not even similar to any of the listed governmental entities. Therefore, a volunteer fire company is not a local agency for purposes of the RTKL because it is not a “similar governmental entity”.

If the General Assembly had intended to subject every entity that performed a governmental function to the RTKL the statutory language would have been markedly different. The General Assembly could have simply stated that the definition of “local agency” includes “any local, intergovernmental, regional or municipal agency, authority, board, commission *and entity that performs a governmental function.*” The General Assembly did not do so, however, because it was not the General Assembly’s intent to cast such a broad net. If the General Assembly had intended to subject volunteer fire companies to the RTKL it could have specifically included volunteer fire companies in

the list of governmental entities. The General Assembly did not do so, however, because it was not the intent of the General Assembly to include volunteer fire companies.

The essence of the OOR's ruling is that if an entity performs any governmental function it is a "similar governmental entity and subject to the RTKL in all aspects." Final Determination, p.8. The OOR attempted to lend credibility to its ruling by citing the Commonwealth Court's decision in Wilson v. Dravosburg Volunteer Fire Department, 516 A.2d 100 (Pa.Cmwlt. 1986) which held that volunteer fire companies are considered to be local agencies for purposes of the Political Subdivision Tort Claims Act (hereinafter referred to PSTCA) and thereby granted immunity from lawsuits. However, in Wilson the Commonwealth Court declared "[w]e stress at this time that our conclusion that volunteer fire companies are local agencies is limited to our analysis of the 1980 Immunity Act." Id at 102. Thus, the very language of the opinion relied upon by the OOR does not support its position.

What the General Assembly intended to address in the PSTCA is irrelevant to what the General Assembly intended to address in the RTKL. The RTKL with its distinct definitions and purposes cannot be interpreted by applying the interpretation of an unrelated law which has different definitions and purposes. The Pennsylvania Supreme Court in Penn State v. Derry Twp. School District, 557 Pa. 91, 96, 731 A2d 1272, 1274 (1999) held that "an entity's status as an agency or instrumentality varies, depending on the issue for which the determination is being made." Since the General Assembly did not use the same definition of "local agency" in the RTKL which it previously used in the PSTCA it compels the conclusion that the General Assembly did not intend to include the same entities within the purview of the RTKL.

Stripped of its reliance on an unrelated statute, the underlying principle of the OOR's ruling is that if an independent entity performs any governmental function it is transformed into a "similar governmental entity" and subject to the RTKL in all aspects. Not only is the ruling contrary to the clear language of the RTKL but the application of this rule would lead to an absurd and unreasonable result. In ascertaining the intent of the General Assembly it is presumed that the General Assembly does not intend a result that is absurd or unreasonable. 1 Pa.C.S.A. § 1922.

Many governmental functions are performed by volunteer entities and by for profit entities as well. The governmental functions of a Second Class Township are listed both specifically and generally in numerous statutes including, but not limited to, the Second Class Township Code, the Pennsylvania Municipalities Planning Code and the Solid Waste Management Act to name a few.⁵ In general, a Second Class Township has the power to adopt ordinances, rules and regulations necessary for the "peace, good government, health and welfare of the Township and its citizens, trade, commerce and manufacturers." 53 P.S. § 66506. To fulfill its governmental functions a Township may adopt ordinances, the enforcement of which is often delegated to independent third parties. A Township may contract with independent third parties to construct and maintain roads and operate sewer facilities. A Township may appropriate funds to non-profit animal shelters, hospitals, libraries, tourist promotion agencies, nonprofit art corporations and neighborhood crime watch programs to perform some of a Township's governmental functions. It would be an absurd interpretation of the RTKL to conclude

⁵ The governmental functions of all other political subdivisions are set forth either in general or with specificity in the statutes of the Commonwealth of Pennsylvania and the arguments set forth herein apply to those political subdivisions as well. For purposes of the Amicus brief, however, only the Second Class Township Code is specifically referred to because the Morris Township Fire Co. is situated in a Second Class Township.

that the General Assembly intended that all these entities and their members and employees be subject to the burdens imposed by the RTKL.

Moreover, the OOR's ruling could arguably subject every institution of purely public charity to the RTKL. In order to be deemed an institution of purely public charity, an institution must "possess all of the following characteristics:

- (a) Advances a charitable purpose;
- (b) Donates or renders gratuitously a substantial portion of its services;
- (c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity;
- (d) *Relieves the government of some of its burden*, and
- (e) Operates entirely free from private profit motive."

In re: Appeal of American Institute for Chartered Property and Casualty Underwriters, 928 A.2d 433, 435-436 (Pa.Cmwlt. 2007), citing Hospital Utilization Project v. Commonwealth, 507 Pa. 1, 487 A.2d 1306 (1985) (emphasis added); See also, 10 P.S. § 375.

The Institutions of Purely Public Charity Act, 10 P.S. § 371 et seq., provides several alternatives for an institution to demonstrate that its efforts perform a governmental function, or "relieve the government of some of its burden." 10 P.S. § 375(f). An institution can prove that it, among other options:

- "Provides a service to the public that the government would otherwise be obliged to fund or to provide directly or indirectly or to assure that a similar institution exists to provide the service." 10 P.S. § 375 (f)(1).

- “Provides services in furtherance of its charitable purpose which are either the responsibility of the government by law or which historically have been assumed or offered or funded by the government.” 10 P.S. § 375(f)(2).

Thus, the OOR’s ruling that an entity that performs a governmental function is subject to the RTKL could subject every institution of purely public charity to the RTKL. Clearly, the General Assembly did not intend such an unreasonably broad application of the RTKL.

Moreover, it would be an unreasonable result if the Commonwealth’s already over-burdened volunteer fire companies would be further burdened with complying with the RTKL. The Amici are keenly aware of the critical condition of the Commonwealth’s volunteer fire companies. In 1975 there were 210,000 active volunteer firefighters in Pennsylvania. By 2000, there were 70,000 active firefighters. Jill Ercolino, *Hot and Bothered* (newsletter PA. Township News) 9 (Feb. 2001). The volunteer fire service is the main stay of fire fighting. In 2001 there were 2,462 fire companies in Pennsylvania of which 96% or 2366 were volunteer companies. Pennsylvania Fire and Emergency Services Institute, *Funding for Pennsylvania Emergency Services...Beyond 2001* (2001). Each year Volunteer firefighters contribute time and money approaching \$6 billion to Pennsylvania communities. Pennsylvania Fire and Emergency Services Institute, *Funding for Pennsylvania Emergency Services...Beyond 2001* (2001).

The Amici are aware that the reduction in the number of firefighters is due to many factors including increased state and federal requirements, increased time demand for fundraising activities, increased call volume and demands at work and home. Robert S. D’Intino, Ph.D., Pennsylvania State University Schuylkill, *Volunteer Firefighter*

Recruitment and Retention in Rural Pennsylvania, Report (A report for The Center for Rural Pennsylvania) 6,7,11,12 (May 2006). As the number of firefighters declines the burden grows on those who remain.⁶

Therefore, it would be absurd and unreasonable to conclude that the General Assembly intended to impose additional demands on the members of volunteer fire companies by requiring compliance with the RTKL. Compliance with the RTKL is costly and time consuming. Political subdivisions absorb the costs through the taxpayer or ratepayer base but a volunteer company, for the most part, must increase fundraising. Political subdivisions and other governmental entities appoint a paid employee to the position of Open Records Officer, but a volunteer company must secure a volunteer from an ever dwindling pool of volunteers. Political subdivisions and other governmental entities usually have established office hours but volunteer fire companies often do not.

Moreover, applying the RTKL to volunteer fire companies would invade the privacy of the volunteers. If volunteer fire companies were subject to the RTKL there is a presumption that *all records* of volunteer fire companies are public records. 65 P.S. § 67.305. Volunteer fire companies would be required to disclose the names and addresses of volunteers, certain personnel records of volunteers, internal memos and emails between volunteers, records regarding demotion or discharge, minutes of meetings, and records of internal elections. Subjecting volunteers to this invasion of privacy will further reduce the number of volunteers. The General Assembly did not intend such an absurd and unreasonable result.

⁶ The Amici are submitting two letters in support of their position. The first letter is authored by the Co-Chairmen of the bi-partisan Pennsylvania Fire and Emergency Services Legislative Caucus. Exhibit C. The second letter is authored by Rep. Frank Farry who also serves his community as a volunteer fire chief. Exhibit D.

CONCLUSION

The Amici respectfully submit that the OOR erred when it ruled that volunteer fire companies are “local agencies” and subject to the RTKL in all respects. Applying principles of statutory construction to ascertain the legislative intent, it is beyond question that the General Assembly did not intend the phrase “similar governmental entity” to include volunteer fire companies.

Respectfully submitted,



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Dated: July 1, 2009

CERTIFICATE OF SERVICE

The undersigned certifies that on the 1st day of July 2009, a copy of the Brief of Amicus Curiae was served on the following by first class mail postage prepaid.

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