IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

REQUEST RECEIVED
OFFICE OF OPEN RECORDS

JUN 15 2016

RESPONSE DUE:
TRACKING NO:

THE MUNICIPALITY OF MT. LEBANON, Petitioner, v. ELAINE GILLEN, Respondent, And PENNSYLVANIA OFFICE OF OPEN RECORDS, Interested Party.	CIVIL DIVISION No. SA 16-000236 **RESPONDENT'S MOTION FOR RECONSIDERATION** Filed on Behalf of: Respondent ELAIN GILLEN Counsel of Record for This Party: Ronald D. Barber Pa. I.D. No. 52734 rbarber@smgglaw.com Gretchen E. Moore Pa. I.D. No. 202103 gmoore@smgglaw.com Edward A. Knafelc Pa. I.D. No. 316820 tknafelc@smgglaw.com STRASSBURGER McKENNA GUTNICK & GEFSKY Four Gateway Center, Suite 2200 444 Liberty Avenue Pittsburgh, PA 15222 Telephone: (412) 281-5423 Facsimile: (412) 281-8264

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

THE MUNICIPALITY OF MT. LEBANON,	:	CIVIL DIVISION
Petitioner,	:	No. SA 16-000236
v.	:	
ELAINE GILLEN,	:	
Respondent,	:	
And	:	
PENNSYLVANIA OFFICE OF OPEN RECORDS,	:	
Interested Party.	:	

RESPONDENT'S MOTION FOR RECONSIDERATION

AND NOW comes Elaine Gillen (Respondent herein) by and through her undersigned counsel presents this Motion for Reconsideration. The instant motion respectfully requests that this Court reconsider its Decision dated May 23, 2016 (the "Decision"), which determined that the records requested pursuant to the Right-to-Know Law (RTKL) by Respondent were exempted from disclosure under 65 P.S. § 67.708(b)(13).

1. The homeowners in this case – who received the taxpayer funded service of culling destructive animals from their property were not "donors." Even if one considers that they "gave" a license to enter their property, they received consideration in return. In fact, the homeowners are beneficiaries of the taxpayer funded service. Transactions involving consideration are by no means exempt from the RTKL.

BACKGROUND

2. The subject of Respondent's RTKL requests for documents relate to deer population management within the Municipality of Mt. Lebanon (Municipality herein).

3. In July 2015, the Municipality awarded a contract to White Buffalo, Inc. to conduct an organized bow hunt on public and private properties within the Municipality in order to curb the community's deer population.

4. Respondent made two separate requests for documents under the RTKL.

5. Respondent's requests were both partially granted and partially denied by the Municipality.

6. Respondent appealed both the Municipality's partial denials to the Pennsylvania Office of Open Records (OOR).

7. The OOR granted both Respondent's appeals and directed the Municipality to make available all documents requested by Respondent.

8. The Municipality then appealed both OOR decisions to this Honorable Court and the cases were consolidated to better serve the interest of the parties, as well as further the interests of judicial economy.

9. On May 23, 2016 this Court entered its Decision which held that the great majority of records requested pursuant to the RTKL were exempted from disclosure under the 65 P.S. § 67.708(b)(13) relating to Donations.

RELIEF REQUESTED

10. "It is well settled that a court upon notice to the parties may modify or rescind any order within 30 days after its entry . . . if no appeal from such an order has

been taken or allowed." *PNC Bank, N.A. v. Unknown Heirs*, 929 A.2d 219, 226 (Pa. Super. 2007), quoting 42 Pa.C.S.A. § 5505.

11. Respondent respectfully requests that this Honorable Court reconsider its May 23, 2016 Decision as Respondent believes the Court erred by not construing the Donation exemption narrowly.

12. As a result of this error, the Court incorrectly determined that the production of the requested records would disclose the identity of an individual who lawfully makes a donation to an agency.

ARGUMENT

13. The objection of the RTKL is to empower citizens by affording access to information concerning activities of their government. *Commonwealth of Pennsylvania, Office of Open Records v. Center Township*, 95 A.3d 354 (Pa. Commw. Ct. 2014).

14. Records in possession of a local agency are presumed public unless exempt under the RTKL are presumed public unless exempt under the RTKL or other law or protected by privilege, judicial order or decree. 65 P.S. § 67.305.

15. The RTKL must be construed to maximize access to public records that are in an agency's possession and exceptions to disclosure of public records must be narrowly construed. *Pennsylvania State Educ. Ass'n ex rel. Wilson v. Commonwealth of Pennsylvania, Dept. of Community and Economic Development*, 110 A.3d 1076 (Pa. Commw. Ct. 2015).

16. Furthermore, "[t]he burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth

agency or local agency receiving a request by preponderance of the evidence." 65 P.S. § 67.708(a).

17. The term "preponderance of the evidence" has been defined as "such proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011).

18. In order to invoke the exception under Section 708(b)(13) of the Right to Know Law the Municipality must show that the disclosure of the requested information would "disclose the identity of an individual who lawfully makes a donation to an agency." 65 P.S. § 67.708(b)(13).

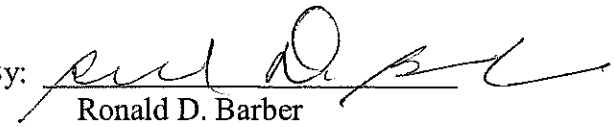
19. This exception is not applicable to these facts. The Landowners in question here are not gifting their property to the program. The landowners are merely allowing temporary access to their property and at all times the property will remain the property of those landowners.

20. Furthermore, the Landowners are receiving compensation for their allowance of temporary access to their property. Landowners receive the benefit of curbing the amount of animal feces deposited in their yard, curbing the amount of vegetation that the animals consume from their yard and may receive the meat from the animals that are killed on their property.

WHEREFORE, Respondent respectfully requests that this Honorable Court grant reconsideration of the May 23, 2016 Decision and order that the May 23, 2016 Decision is vacated.

Respectfully submitted,

STRASSBURGER MCKENNA GUTNICK
& GEFSKY

By: 

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Counsel for Respondent, Elaine Gillen

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

THE MUNICIPALITY OF MT. LEBANON,	:	CIVIL DIVISION
Petitioner,	:	No. SA 16-000236
v.	:	
ELAINE GILLEN,	:	
Respondent,	:	
And	:	
PENNSYLVANIA OFFICE OF OPEN RECORDS,	:	
Interested Party.	:	

ORDER OF COURT

AND NOW, this _____ day of June, 2016, upon consideration of Respondent's Motion for Reconsideration of the Decision dated May 23, 2016, it is hereby ORDERED, ADJUDGED, and DECREED that reconsideration is granted and argument on reconsideration shall take place on _____.

_____, J.

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THE MUNICIPALITY OF MT. LEBANON,	:	CIVIL DIVISION
Petitioner,	:	No. SA 16-000236
v.	:	
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And	:	
PENNSYLVANIA OFFICE OF OPEN RECORDS,	:	
Interested Party.	:	

ORDER OF COURT

AND NOW, this _____ day of June, 2016, upon reconsideration, the final determination of the Pennsylvania Office of Open Records is affirmed in all respects.

_____, J.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **RESPONDENT'S MOTION FOR RECONSIDERATION** was served by Email and First Class Mail, U.S. Mail, postage prepaid, this 13th day of June, 2016, on the following:

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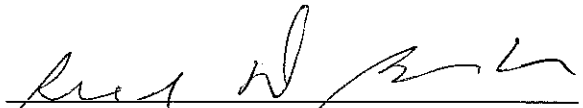

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June 13, 2016

The Honorable W. Terrence O'Brien
Court of Common Pleas of Allegheny County
705 City-County Building
414 Grant Street
Pittsburgh, PA 15219

Re: In The Matter Of: Elaine Gillen v. Municipality of Mt. Lebanon
SA 16-00236

Dear Judge O'Brien:

Enclosed please find Respondent's Motion for Reconsideration of the Decision dated May 23, 2016 in case number SA 16-00236.

As you know Pa. R.A.P. 903 provides that notice of appeal must be filed within thirty (30) days after the entry of the order from which the appeal is taken. In this case that deadline is June 22, 2016. The filing of this motion does not in of itself toll that deadline. Pursuant to Pa. R.A.P 1701(b)(3) in order to toll the appeal deadline an order expressly granting reconsideration must be entered within the appeal period. This is not to say that this Court needs to hear and determine the motion within thirty (30) days from the appealable order; it must only enter an order stating it has agree to consider it.

For that reason we ask that you strongly consider signing the first order included with this motion which grants reconsideration prior to the June 22, 2016 deadline so that we may preserve our appeal rights in this matter. Thank you in advance for your review and consideration of the enclosed motion.

Sincerely yours,

Ronald D. Barber

RDB/km
Enclosure
cc: Brendan P. Lucas, Esquire (w/encl.)
Jill S. Wolfe, Appeals Officer (w/encl.)