

COMMONWEALTH COURT OF PENNSYLVANIA
DOCKETING STATEMENT
NOTICE OF APPEAL

RECEIVED

JUL 11 2016

Counsel for Appellant(s) must complete this form and file it with the Chief Clerk of the Commonwealth Court within 10 days of the date of the Notice of Docketing.

Failure to timely file a docketing statement, with required attachments and certificate of service, may result in dismissal of the appeal.

Attach additional sheets if needed.

Case Caption: THE MUNICIPALITY OF MT. LEBANON ET AL. V. GILLEN
Commonwealth Court Docket No.: 1020 CD 2016

Required Attachments:

(1) Attach a copy of all previous opinions, if any, and all pertinent orders in this case (including, for example, the order and adjudication of the Zoning Hearing Board, or similar decision).

(2) Attach a **Statement of Issues** of no more than *two pages* in length, containing a summary sufficient to explain the case, (*See* Order of September 15, 1999, 29 Pa. Bull. 5064, 210 Pa. Code §69.501) and indicating the relief requested. **NOTE: Information in the Statement of Issues is used to screen cases for the Court's Mediation Program and does not bind appellant. Any issue omitted will not constitute a waiver of the issue on appeal.**

(3) Attach a **certificate of service** indicating service of the docketing statement, statement of issues, and all attachments on all other parties.

A. Timeliness of Appeal

- (1) Date of judgment, order, or decree appealed: MAY 23, 2016
(2) Date notice of appeal filed: JUNE 22, 2016

B. Appealability of Order

- (1) Is the order appealed a final order? Yes No
(2) Is this matter disposed of as to all parties in the trial court? Yes No

If no, what is the status of this case as to the remaining parties?

N/A

- (3) If the order is not a final order, pursuant to what Rule of Appellate Procedure is this order appealed, e.g., Pa. R.A.P. 311, 313, 341(c)? N/A

Please explain: N/A

C. Are there any related cases, including cross-appeals, pending in this Court or any other federal or state court? Yes No

If yes, please list the court, caption and docket number(s): 1021 CD 2016
THE MUNICIPALITY OF MT. LEBANON ET AL. V. GILLEN

D. Was there a trial or hearing before the trial court? Yes No If yes, have you made arrangements to have the testimony transcribed? Yes No

E. Have you paid the required deposit for the transcript? Yes No

If no, why not? N/A

F. Are there any real parties in interest not appearing in the trial court caption? Yes No
If yes, please list their names and the names and addresses of their counsel, if any: N/A

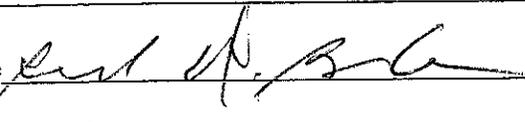
G. Have there been any previous efforts to settle this matter? Yes No

If yes, please explain: N/A

H. Are you aware of any conflict of interest that may exist with respect to any party, lawyer, or issue in this case that may suggest the need for recusal by any judge of this court?
 Yes No

If yes, please explain: N/A

Signature



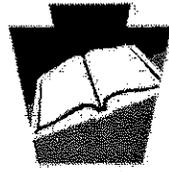
Date July 8, 2016

Name (Printed) Ronald D. Barber

Address 444 LIBERTY AVENUE, SUITE 2200, PITTSBURGH, PA 15222

Telephone No. (412) 281-5423 Fax No. (412) 281-8264

Counsel for (Name of Party) ELAINE GILLEN



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ELAINE GILLEN,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-0023
	:	
MUNICIPALITY OF MT. LEBANON,	:	
Respondent	:	

INTRODUCTION

Elaine Gillen (“Requester”) submitted a request (“Request”) to the Municipality of Mt. Lebanon (“Municipality”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking e-mails pertaining to a deer management program. The Municipality partially denied the Request, withholding from public disclosure certain e-mails that would threaten personal security and reveal the identities of donors. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Municipality is required to take further action as directed.

FACTUAL BACKGROUND

On November 25, 2015, the Request was filed seeking “[a]ll communications to and/or from municipal staff and, all communication to and/or from the commission concerning Anthony DeNicola’s archery program from July 31, 2015 through November 25, 2015.” On December 2,

2015, the Municipality invoked a thirty-day to respond to the Request. *See* 65 P.S. § 67.902. On January 4, 2016, the Municipality partially granted the Request, providing e-mails to the Requester. The Municipality denied access to certain e-mails that would identify the private properties being used for the archery hunt, arguing that public access of those records would result in a substantial and demonstrable risk to the personal security of the property owners. *See* 65 P.S. § 67.708(b)(1). The Municipality also denied access to these e-mails stating that the e-mails would identify those individuals making a donation to an agency. *See* 65 P.S. § 67.708(b)(13).

On January 6, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Municipality to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On January 15, 2015, the Municipality submitted a position statement, reiterating the same reasons for withholding the records from public disclosure. The Municipality also submitted the sworn affidavits of Bonnie Cross, Assistant to the Manager and Open Records Officer for the Municipality, and Chief Aaron Lauth, Chief of Police for Mt. Lebanon. In its submission, the Municipality indicates that the instant appeal seeks the same records, except for a different date range, as a previous appeal to the OOR. *See Gillen v. Municipality of Mt. Lebanon*, OOR Dkt. AP 2015-1938, 2015 PA O.O.R.D. LEXIS 1963 ("*Gillen I*"). As the background facts were discussed in *Gillen I*, they will not be discussed herein.

On January 22, 2016, the Requester submitted a position statement, stating that there is no evidence on the likelihood of harm.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Municipality is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The 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 a preponderance of the evidence.” 65 P.S. § 67.708(a). 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) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Municipality has not established that the disclosure of the records would be reasonably likely to result in a risk of personal harm

The Municipality states that certain e-mails were not produced that would identify the persons volunteering use of their property to conduct the archery program. The Municipality argues that the release of these e-mails would threaten personal security of these individuals. Section 708(b)(1)(ii) of the RTKL protects “a record, the disclosure of which ... would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii).

Under the RTKL, “reasonable likelihood” of “substantial and demonstrable risk” is necessary to trigger the personal security exception. The term, “substantial and demonstrable risk” is not defined in the RTKL. By construing these terms in accordance with their plain meaning, 1 Pa.C.S. § 1903(a), the risk of harm must be material, real and ample. The risk of harm must also be demonstrable, which is defined as being obvious or apparent. *See Swartzwelder v. Butler County*, OOR Dkt. AP 2009-0632, 2009 PA O.O.R.D. LEXIS 129. Mere belief that the release of a record would cause substantial and demonstrable risk of harm is

insufficient. *Zachariah v. Pa. Dep't of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

Ms. Cross explains that the Municipality is allowing the hunting on five of its public lands, as well as privately owned lands that have been volunteered for use in the archery program. She attests that the e-mails withheld in this appeal would reveal the properties that were offered for use and were either chosen or not chosen to participate in the program. The Municipality has chosen to keep the location of the private properties confidential because of the “publicity associated with hunting and deer management and the [divisive] nature of the issue.”

Chief Lauth explains that deer management in the Municipality has been “hotly debated and very contentious.” He provided the OOR with the Commission’s public website to view the community’s comments at Commission meetings arguing against a lethal deer management program. He also attests that, prior to some of the meetings, protests were held and, at some meetings, “police presence was deemed advisable.” Chief Lauth further explains that past deer management programs have also been controversial and resulted in numerous incidents, such as tampering with the bait, wedging sticks in corral doors to prevent deer from being caught and loud noises to scare deer away. With respect to this deer management program, Chief Lauth attests that the Municipality hired a third party to locate and test qualified hunters, determine the hunting locations and determine compliance with Game Commission rules. The Chief attests that:

The archery program commenced in September, 2015. On October 5, 2015 a woman was cited for trespass by Mt. Lebanon Police and for interfering with a legal hunt by the PA Game Commission for an incident occurring on a private property used in the archery program. She was convicted of both charges on December 5, 2015 in front of the District Magistrate.

Following the OOR ruling in [*Gillen I*], the [Requester] in this matter contacted me by email...request[ing] patrols on her street in response to the reaction she received because her appeal was granted by the OOR.

Chief Lauth opines that individuals identified as volunteering the use of their property for the hunt would encounter harassment, invasion of privacy and personal security issues.

The Municipality has provided evidence of incidents in past years which involved tampering with traps and scaring deer. The Municipality also references the recent conviction of an individual for trespassing on privately owned land involved with the hunting program but provides no details beyond remarking that such an incident occurred. As such, the Municipality fails to show any link between the trespass conviction and any alleged risk of personal harm.

The Municipality also claims that access should be denied because the Requester asked police to patrol her street based on the reaction to her previous request and successful appeal. A negative reaction toward a citizen exercising their rights under the RTKL cannot be used as a gate to block future requests for records. This is especially true where, like here, the type of record requested has already been found to be public. Finally, the Requester's submission on appeal does not discuss her e-mail to the police or express any concern for her own personal safety; rather, she iterates that the Municipality has not proven a substantial risk of harm in this matter. As Section 708(b)(1) requires more than conjecture and conclusory statements, the Municipality has failed to demonstrate that the e-mails are not subject to public disclosure under Section 708(b)(1) of the RTKL.

2. Section 708(b)(13) of the RTKL does not apply

The Municipality denied access to e-mails identifying landowners that are allowing the access to their land for the deer management program as records that would reveal the identity of

an individual making a donation to the agency. Section 708(b)(13) of the RTKL, which exempts from disclosure:

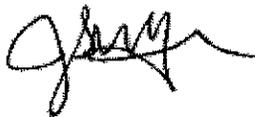
[r]ecords that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

65 P.S. § 67.708(b)(13). As the OOR held in *Gillen I*, the landowners are not gifting their property to the program; instead, they are simply allowing temporary access to their property and such property will, at all times, remain the property of those individuals rather than the program. Accordingly, Section 708(b)(13) does not apply in this matter, as nothing is being donated.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Municipality is required to provide all e-mails within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Allegheny 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 as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 23, 2016



APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Elaine Gillen (via e-mail only);
Philip Weis, Esq. (via e-mail only);
Ronald Barber, Esq. (via e-mail only);
Bonnie Cross (via e-mail only).

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA

THE MUNICIPALITY OF MT.
LEBANON,

Petitioner,

v.

ELAINE GILLEN,

Respondent,

And

PENNSYLVANIA OFFICE OF OPEN
RECORDS,

Interested Party.

: CIVIL DIVISION

: No. SA 15-000963

: No. SA 16-000236 //

: **MOTION TO CONSOLIDATE**

: Filed on Behalf of: Respondent
: ELAINE GILLEN

: Counsel of Record for this Party:

: Ronald D. Barber
: Pa. I.D. No. 52734
: rbarber@smgglaw.com
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: STRASSBURGER McKENNA GUTNICK
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DEPT. OF JUDICIAL RECORDS
CIVIL DIVISION
ALLEGHENY COUNTY

2016 APR -5 PM 2:10

FILED

DEPT. OF JUDICIAL RECORDS
CIVIL DIVISION
ALLEGHENY COUNTY

2016 APR -5 PM 2:10

FILED

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA

THE MUNICIPALITY OF MT.
LEBANON,

Petitioner,

v.

ELAINE GILLEN,

Respondent,

And

PENNSYLVANIA OFFICE OF OPEN
RECORDS,

Interested Party.

: CIVIL DIVISION

: No. SA 15-000963

: No. SA 16-000236

ORDER

On this 5th day of April, 2016, upon consideration of the

foregoing Motion to Consolidate, it is hereby ORDERED that the Motion is GRANTED.

The action filed at Docket No. SA-15-000963 is hereby consolidated with the action at

Docket No. SA-16-000236. *Hearing has been scheduled
for April 11, 2016, at 10:00.*

By the Court:

J. Brian, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

THE MUNICIPALITY OF MT. LEBANON,

Petitioner,

v.

ELAINE GILLEN,

Respondent,

and

PENNSYLVANIA OFFICE OF OPEN RECORDS,

Interested Party.

DECISION UNDER 65
P.S. § 67.1302(a)

SA 16 - 000236

FILED BY:
JUDGE W. TERRENCE O'BRIEN

Copies sent to:

Ronald D. Barber, Esq.
4 Gateway Center Suite 2200
444 Liberty Avenue
Pittsburgh PA 15222

Daniel C. Garfinkel, Esq.
One Oxford Centre 20th Floor
301 Grant Street
Pittsburgh PA 15219

DEPT OF COURT RECORDS
CIVIL FAMILY DIVISION
ALLEGHENY COUNTY PA

16 MAY 23 AM 11:52

FILED

DECISION UNDER 65 P.S. § 67.1302(a)

O'BRIEN, J.

Before the Court is the Municipality of Mt. Lebanon's Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records. A hearing was held before me on April 11, 2016, on this case and SA 15 – 963. The cases, which were consolidated for hearing in this Court, involve requests under the Right-to-Know Law. The records sought in each case deal with the same subject matter, but cover different time periods.¹

I adopt section III of my Decision at SA 15 – 963 regarding Mt. Lebanon's assertion of the Personal Security exemption. Regarding the Donation exemption, I adopt section IV of said Decision, except that this exemption does not protect the e-mail sent to the Mt. Lebanon Commission on October 12, 2015, at 2:41 p.m.. The sender of this e-mail offers neither her time nor the use of her land, but simply expresses support for the deer culling program.² Mt. Lebanon may redact the sender's e-mail address, telephone numbers, fax number and information related to her place of employment.³

BY THE COURT

O'Brien, J.
5/23/16

¹ Prior to the hearing on April 11, 2016, I conducted an *in camera* review of the records. A brief description of the records is found at pages 11-14 of the hearing transcript.

² This e-mail is discussed on pages 11-12 of the hearing transcript. Mt. Lebanon concedes this is an accurate characterization of the e-mail. See hearing transcript, page 11.

³ The Requester does not object to the redaction of this information.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE MUNICIPALITY OF MT. LEBANON, :
 :
 Appellee, :
 :
 v. : Commonwealth Court No. 1020 CD 2016
 :
 ELAINE GILLEN, :
 :
 Appellant, :
 :
 v. :
 :
 PENNSYLVANIA OFFICE OF OPEN :
 RECORDS, :
 :
 Interested Party. :

STATEMENT OF ISSUES

Appellant, Elaine Gillen, requests that the Commonwealth Court review the Decision/Order of the Court of Common Pleas of Allegheny County dated May 23, 2016 which held that the great majority of records requested by Appellant under the Pennsylvania Right-to-Know Law were exempted from disclosure under 65 P.S. §67.708(b)(13) relating to donations.

Appellant contends that the Court, by its Decision/Order, erred in:

- Failing to narrowly construe the exemption relating to donations at 65 P.S. §67.708(b)(13).
- Failing to place the burden of proving that the records requested were exempt from public access on the Municipality of Mt. Lebanon.
- Determining that a landowner permitting the Municipality of Mt. Lebanon to have temporary access to their property constitutes a donation under 65 P.S. §67.708(b)(13).

WHEREFORE, Appellant prays that the Court review and Reverse the Decision/Order
the Court of Common Pleas of Allegheny County dated May 23, 2016.

Respectfully submitted,

STRASSBURGER McKENNA GUTNICK
& GEFSKY

By: /s/Ronald D. Barber

Ronald D. Barber
Pa. ID No. 52734
Gretchen E. Moore
Pa. ID No. 202103
Edward A. Knafelc
Pa. ID No. 316820

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Counsel for Appellant
Elaine Gillen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **DOCKETING STATEMENT, STATEMENT OF ISSUES, AND ALL OTHER ATTACHMENTS** were served by Electronic Filing and First Class Mail, U.S. Mail, postage prepaid, this 8th day of July, 2015, on the following:

Brendan P. Lucas, Esquire
Buchanan Ingersoll & Rooney, PC
One Oxford Centre
301 Grant Street, 20th Floor
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brendan.lucas@bipc.com
*(Counsel for Appellee
The Municipality of Mt. Lebanon)*

Jill S. Wolfe, Appeals Officer
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*(Counsel for Interested Party
Pennsylvania Office of Open Records)*

**STRASSBURGER McKENNA GUTNICK
& GEFSKY**

/s/Ronald D. Barber

Ronald D. Barber
Gretchen E. Moore
Edward A. Knafelc



**Strassburger McKenna
Gutnick & Gefsky**

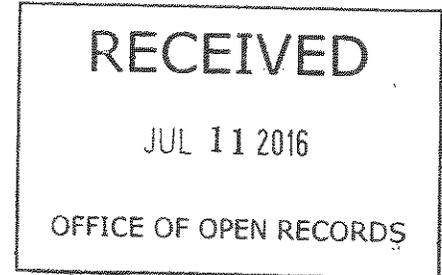
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July 8, 2016

Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
P.O. Box 61985
Harrisburg, PA 17106-9185



**Re: The Municipality of Mt. Lebanon v. Gillen, et al.
No. 1020 CD 2016**

Dear Sir/Madam:

Please find enclosed the and original and one (1) copy of the Docketing Statement that was electronically filed today in the above-referenced matter.

Should you have any questions or comments, please do not hesitate to contact our office.

Very truly yours,

Kim Maiorano
Legal Assistant to
Ronald D. Barber, Esq.

/km
Enclosures

cc: Brendan P. Lucas, Esquire
✓ Jill Smith Wolfe, Esquire



**Strassburger McKenna
Gutnick & Gefsky**

ATTORNEYS AT LAW | SINCE 1919

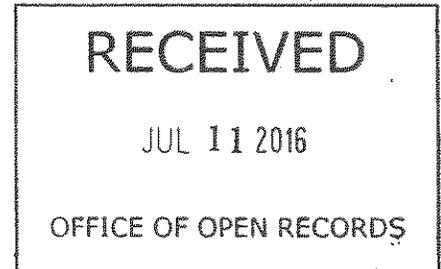
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July 8, 2016

VIA U.S. First Class Mail

Brendan P. Lucas, Esquire
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301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410



**Re: The Municipality of Mt. Lebanon v. Elaine Gillen, et al.
No. 1020 CD 2016
And
The Municipality of Mt. Lebanon v. Elaine Gillen, et al.
No. 1021 CD 2016**

Dear Mr. Lucas:

Please find enclosed the Docketing Statements that were filed today with the Commonwealth Court of Pennsylvania in the above-referenced matters.

Should you have any questions or comments, please do not hesitate to contact me.

Very truly yours,

Kim Maiorano
Legal Assistant to
Ronald D. Barber, Esq.

/km

Enclosures

cc: ✓ Jill S. Wolfe, Appeals Officer, Office of Open Records (w/encl.)
Ronald D. Barber, Esquire (w/out encl.)
Edward A Knafelc, Esquire (w/out encl.)
Gretchen E. Moore, Esquire (w/out encl.)
Elaine Gillen (w/encl.)