



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

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:

SIMON CAMPBELL,  
Requester

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v.

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Docket No.: AP 2016-1114

REPUBLICAN STATE COMMITTEE OF  
PENNSYLVANIA,  
Respondent

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### INTRODUCTION

Simon Campbell (“Requester”) submitted a request (“Request”) to the Republican State Committee of Pennsylvania (“Committee”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other records, rules forwarded by the Committee to the Secretary of the Commonwealth. The Committee responded, stating that it is not an agency subject to the RTKL. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **dismissed**, and the Committee is not required to take any further action.

### FACTUAL BACKGROUND

On June 17, 2016, the Request was filed, seeking rules forwarded to the Secretary of the Commonwealth and records related to the selection of delegates and nominees. On June 21, 2016, the Committee responded by stating that it is not an agency subject to the RTKL.

On June 27, 2016, the Requester appealed to the OOR, arguing that the Committee is an independent agency subject to the RTKL. *See* 65 P.S. § 67.102 (defining “independent agency”). The OOR invited both parties to supplement the record and directed the Committee to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On June 29, 2016, the Requester submitted an additional statement in support of his position, arguing that, since the Committee is required to perform a variety of functions pursuant to the Election Code, 25 P.S. §§ 2601 *et seq.*, the Committee should also be subject to the RTKL.

As the Committee did not submit any materials to the OOR prior to the date the record was scheduled to close in this matter, the OOR reopened the record to allow the parties to further supplement the record and to address whether the Committee is an agency in light of *Bentman v. Seventh Ward Democratic Executive Committee*, 218 A.2d 261 (Pa. 1966), and *In re Ganzman*, 574 A.2d 732 (Pa. Commw. Ct. 1990). On July 13, 2016 and July 14, 2016, the Requester made additional submissions. On July 17, 2016, the Committee submitted an unsworn position statement, arguing that it is not an agency under *Eu v. The San Francisco Democratic Committee*, 489 U.S. 214 (1989), and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The Committee also argues that, “to the extent that *Bentman* in any way can be construed to confer governmental entity status on a political party, such holding has clearly been reversed by the U.S. Supreme Court’s decision in both” *Eu* and *Tashjian*. On July 17, 2016, the Requester submitted a response to the Committee’s submission, arguing that the cases cited by the Committee are limited to freedom of association issues under the First Amendment of the U.S. Constitution.

## 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 question before the OOR is whether the Committee is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of agencies 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).

The Requester argues that the Committee qualifies as a Commonwealth agency because it is “independent agency” that serves as a “commission ... of the Commonwealth.” *See generally* 65 P.S. § 67.102 (including “an independent agency” within the definition of “Commonwealth agency”). The RTKL defines “[i]ndependent agency” as “[a]ny board, commission or other agency or officer of the Commonwealth, that is not subject to the policy supervision and control of the Governor.” *Id.* The term “commission” is not defined in either the RTKL or the Pennsylvania Rules of Statutory Construction; however, Black’s Law Dictionary defines “commission” as, in relevant part, “[a] body of persons acting under lawful authority to perform certain public services.” BLACK’S LAW DICTIONARY 326 (10th ed. 2014).

As explained by the U.S. Court of Appeals for the Third Circuit:

An organization qualified as a “political party” [in Pennsylvania] if, during the most recent general election, one of its candidates polled at least two percent “of the largest entire vote case” in each of at least ten counties and “polled a total vote in the State equal to at least two per centum of the largest entire vote case in the State for any elected candidate.”

*The Constitution Party of Pa. et al. v. Cortes*, No. 15-3046, 2016 U.S. App. LEXIS 10029, \*4 (3d Cir. June 2, 2016) (quoting 25 P.S. § 2831(a)). The Election Code mandates that each “political party ... be directed by a State committee;” that the committee “shall meet for organization not later than the sixth Wednesday following their election;” and that, while the committee shall of each political party may make rules governing the party, “[n]o such rules shall be effective until a certified copy ... has been field in the office of the secretary of the commonwealth.” 25 P.S. § 2834. The Election Code also governs the filling of vacancies in committees, 25 P.S. § 2835; the election of National committeemen, 25 P.S. § 2836; the selection of delegates and alternative delegates to National conventions, 25 P.S. § 2838.1; the election of members to National and State committees and party offices, 25 P.S. § 2840; the

resolution of tied votes for party offices, 25 P.S. § 2841; and the Secretary of the Commonwealth's determination of "which organizations are political parties within the State," 25 P.S. § 2861. Additionally, 4 Pa. Code § 177.1 requires political committees to file various reports.

In light of the obligations imposed on committees by the Election Code and related regulations, the Pennsylvania Supreme Court, in *Bentman v. Seventh Ward Democratic Executive Committee*, held that:

[i]nasmuch as the legislature has seen fit to impose on political party organization certain duties which bear a *direct* and *substantial* relationship to the selection of public officials by the electoral process the *complete* privacy in the nature of party organization recognized by our courts in the past no longer exists. The assumption of such obligations by party organizations has marked the entry by such party organizations into an area of public activity which renders their activities in such area amenable to judicial supervision. When the activity of a party organization in such area is challenged as constitutionally offensive and it is claimed that, in the performance of its statutorily imposed duties amounting to state action, the party organization violates the concept of due process, then the judiciary not only *may* but must intervene.

218 A.2d 261, 269 (Pa. 1966) (emphasis in original). Decades later, the Commonwealth Court, in *In re Ganzman*, distinguished *Bentman*, noting that "[a]lthough the Supreme Court in *Bentman* ... discarded the view that political parties are purely private organizations totally immune from judicial intervention, **the court did not go so far as to declare that political parties are public or civil organizations.**" 574 A.2d 732, 734 (Pa. Commw. Ct. 1990) (emphasis added).<sup>1</sup>

Based on the Pennsylvania Supreme Court's decision and a review of the Election Code, the Committee, at times, performs some functions that could be considered governmental functions. See *Max v. Republican Comm. of Lancaster County*, 587 F.3d 198, 203 (3d Cir. 2009)

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<sup>1</sup> The cases cited by the Committee, *Eu* and *Tashjian*, both dealt with successful challenges to election laws that infringed upon rights guaranteed under the First Amendment to the U.S. Constitution. These cases did not overturn *Bentman* or otherwise address whether the Committee should be considered an independent agency under the RTKL.

(noting that “there may well be situations where the actions of a political party in a primary election are deemed to be state action”); *Valenti v. Pa. Democratic State Comm.*, 844 F.Supp. 1015, 1017-18 (E.D.Pa. 1994) (“The Supreme Court has concluded that state action is present in ... cases because the state had delegated the running of the primary to political parties”). However, as noted by the Third Circuit Court of Appeals, “the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices or the filling of these offices state action.” *Lynch v. Torquato*, 343 F.2d 370, 370 (3d Cir. 1965). Thus, while in certain circumstances a political party committee may be a state actor, the question remains whether the Committee is an independent agency or Commonwealth agency subject to the RTKL.

### **1. The Committee is not an independent agency under the RTKL**

As a “commission” is “[a] body of persons acting under lawful authority to perform certain public services,” BLACK’S LAW DICTIONARY 326 (10th ed. 2014), the Committee constitutes a “commission” for purposes of 65 P.S. § 67.102 as a result of duties imposed upon it by the Election Code.<sup>2</sup> See generally *Bentman*, 218 A.2d at 269. However, the question is whether the Committee is “of the Commonwealth.” See 65 P.S. § 67.102. Within the definition of “Commonwealth agency,” the RTKL lists certain types of governmental agencies that perform *exclusively* governmental functions, including the Governor’s Office, the Office of Attorney General, the Department of the Auditor General and the Treasury Department. Other than these specific agencies, the definition includes “[a]ny office, department, authority, board, multistate agency or commission of the executive branch; ... a state-affiliated entity;”<sup>3</sup> and “an

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<sup>2</sup> Because of this holding, the OOR need not also address whether the Committee qualifies as an “agency ... of the Commonwealth.”

<sup>3</sup> In his July 13, 2016 and July 14, 2016 submissions, the Requester states that he is not arguing that the Committee is a state-affiliated entity.

organization established by the Constitution of Pennsylvania, a statute or an executive order which performs or is intended to perform an essential governmental function.” *Id.*

Additionally, the definition of “independent agency” illustrates that boards, commissions or other agency must be “of the Commonwealth,” implying that independent agencies must also exclusively perform public functions. *See generally Scott v. Del. Valley Reg'l Planning Comm'n*, 56 A.3d 40, 46-47 (relying upon the “list of descriptive examples which the term ‘Commonwealth Agency’ includes” in holding that an entity is not an “independent agency” for purposes of the RTKL). Interpreting the phrase “of the Commonwealth” in light of the examples listed under the definitions of Commonwealth agency and state-affiliated agency, only entities that exclusively perform governmental functions may be considered independent agencies under the RTKL. *See generally Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2010) (“[W]e cannot fathom how the General Assembly could have intended to open up the records of a private entity based solely on some marginal connection between that private entity and a government agency or public official”). Because the Committee does not exclusively perform public functions like the agencies listed within 65 P.S. § 67.102, the Committee cannot be considered an independent agency for purposes of the RTKL.

## **2. The Committee is not a Commonwealth agency under the RTKL**

The Requester also argues that the Committee qualifies as a Commonwealth agency because it is “[a]n organization established by ... a statute ... which performs or is intended to perform an essential governmental function.” *See* 65 P.S. § 67.102 (defining “Commonwealth agency”). The Requester argues that, because 25 P.S. § 2834 requires that political parties be directed by a committee, the Committee was “established by” the Election Code for purposes of 65 P.S. § 67.102. Regardless of whether the Election Code “established” the Committee, the

Committee must also perform an essential governmental function in order to qualify as a Commonwealth agency. *See Scott*, 56 A.3d at 47 n.9. Under the former RTKL, the Supreme Court explained that:

In determining whether an agency is performing an essential governmental function, ... the performing entity must be either [1] statutorily identified as providing an essential service or [2] provide a service which is constitutionally mandated or indisputably necessary to continued existence of the Commonwealth.

*Zager v. Chester Cmty. Charter Sch.*, 934 A.2d 1227, 1231 (Pa. 2007); *compare id.* (holding that charter schools are subject to the RTKL because they provide “the essential, constitutionally mandated service of education”) *with Cmty. College of Phila. v. Brown*, 674 A.2d 670 (Pa. 1996) (holding that community colleges are not agencies under the RTKL because their enabling statutes do not identify them as providing “essential services” and post-secondary education is not constitutionally mandated).

The Requester relies upon *Bentman* for the proposition that the Committee performs an essential governmental function. Although *Bentman* states that political committees may perform some public functions, nothing in that opinion states that the Committee (or political committees, generally) perform “essential” governmental functions. *See generally Bentman*, 218 A.2d at 269; *In re Ganzman*, 574 A.2d at 734. As there are no provisions within the Election Code that identify political committees as providing an essential service, the Committee cannot be considered as performing an essential governmental service under the first prong set forth in *Zager*.

While elections are mandated under various sections of the Pennsylvania Constitution, the Pennsylvania Constitution does not mandate that political committees or the General Assembly provide for the nomination of candidates for various positions. *Compare* PA. CONST. art. III, § 14 (“**The General Assembly shall provide** for the maintenance and support of a

thorough and efficient system of public education”) (emphasis added) *with* PA. CONST. art. I, § 5 (“Elections shall be free and equal ...”), *and* PA. CONST. art. II, § 2 (“Members of the General Assembly shall be chosen ...”), *and* PA. CONST. art. IV, § 2-4.1 (discussing the election of the Governor, Lieutenant Governor and Attorney General), *and* PA. CONST. art. V, § 13 (discussing the election of members of the Judiciary). As a result, while the Committee is mandated to exist by statute, its existence is not constitutionally mandated. Additionally, while the Committee performs important services, neither the Election Code nor case law establishes that “the survival of the Commonwealth would be in jeopardy” without the functions performed by the Committee. *See Brown*, 674 A.2d at 671. Accordingly, the Committee is not a “Commonwealth agency” as defined by the RTKL, and, consequently, the Committee is not subject to the RTKL.

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **dismissed**, and the Committee is not required to take any further action. 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 Commonwealth Court. 65 P.S. § 67.1301(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. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: July 22, 2016**

/s/ J. Chadwick Schnee, Esq.

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