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1020 CD 2016

**COMMONWEALTH COURT OF PENNSYLVANIA**

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No. 1020 CD 2016  
(Relating to 1021 CD 2016)

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THE MUNICIPALITY OF MT. LEBANON,  
Appellee,

v.

ELAINE GILLEN,  
Appellant,

v.

PENNSYLVANIA OFFICE OF OPEN RECORDS,  
Interested Party.

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**REPRODUCED RECORD**

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Appeal from the Decision Under 65 P.S. §67.1302(a) dated May 23, 2016 of the  
Court of Common Pleas for Allegheny County (O'Brien, J.) at No. SA 16-000963  
and SA 16-000236

---

Ronald D. Barber  
Pa. ID No. 52734  
Gretchen E. Moore  
Pa. ID No. 202103  
Edward A. Knafelc  
Pa. ID No. 316920

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*Counsel for Appellant  
Elaine Gillen*

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**PROOF OF SERVICE**

**Allegheny County - Department of Court Records**  
**Civil/Family Division Docket Report**

\*\*\*CONSOLIDATED AT SA-15-000963\*\*\*

SA-16-000236

Run Date: 08/26/2016  
Run Time: 02:00:52 PM

Court Type: Arbitration  
Case Type: Office of Open Records Appeal  
Judge: O'Brien W. Terrence  
Current Status: Letter

Related Cases: SA-15-000963,  
Jury Requested: No  
Amount In Dispute: \$ .00

**Parties**

**- Litigants -**

ID	LName	FName	MI	Type	Address	Phone	Attorney
@1315470	Municipality of Mount Lebanon	--	--	Plaintiff	710 Washington Road Pittsburgh PA 15228	--	Weis Philip J.,
@1963611	Pennsylvania Office of Open Records	--	--	Interested Party	Commonwealth Keystone Building 400 North Street, 4th floor Harrisburg PA 17120-0225	--	--
@123419	Gillen	Elaine	--	Defendant	735 Valle Vista Avenue Pittsburgh PA 15234	--	--

**- Attorney -**

ID	LName	FName	MI	Type	Address	Phone
44846	Weis	Philip	J.	Plaintiff's Attorney	Buchanan Ingersoll P.C. 301 Grant Street, 20th floor One Oxford Centre Pittsburgh PA 15219	--
52734	Barber	Ronald	D.	Attorney	Four Gateway Center Suite 220 444 Liberty Avenue Pittsburgh PA 15222	(412)2815423

**- Non Litigants -**

ID	LName	FName	MI	Type	Address	Phone
COMMONWEA	Commonwealth Court of Pennsylvania	--	--	Court	No Default Address Available	--
ACDCR	Allegheny County Department of Court Records	--	--	Department of Court Records	414 Grant Street Pittsburgh PA 15219	--
JOBRIEN	O'Brien	W.	Terrence	Judge	705 City County Building Pittsburgh PA 15219	(412)3505898

**Docket Entries**

Filing Date	Docket Type	Docket Text	Filing Party
03/22/2016	Petition Initiating Case		Municipality of Mount Lebanon

04/05/2016	Copy of Order of Court	Dated on 04/05/16. Order that Motion to Consolidate is GRANTED. The action filed at Docket SA-15-000963 is hereby consolidated w/ the action at Docket sa-16-000236. Hearing has been scheduled for 04/11/16 at 10:00 AM. O'Brien, J. Copies sent on 04/06/16 (ORIGINAL ORDER ON SA-15-000963)	O'Brien W. Terrence
04/11/2016	Writ of Certiorari	Issued and sent on 04/11/2016.	Allegheny County Department of Court Records
05/23/2016	Decision	Under 65 PS. 67.1302 (a). Dated 05/23/16 O'Brien J. Copies sent 05/23/2016.	O'Brien W. Terrence
06/13/2016	Motion for Reconsideration		Gillen Elaine
06/17/2016	Reply	To respondents's motion for reconsideration	Municipality of Mount Lebanon
06/22/2016	Notice of Appeal to Higher Court	To Commonwealth Court from the decision entered on 5/23/16. Proof of service filed. Request for transcript filed.	Gillen Elaine
06/27/2016	Amended	Notice of appeal	Gillen Elaine
07/01/2016	Appeal Number	From Commonwealth Court. #1021 CD 2016.	Commonwealth Court of Pennsylvania
07/11/2016	Order of Court	Dated 07/11/2016 Department of Court Records shall transmit the record to the Commonwealth Court in due course without the filing of an opinion because the reasons for the entry of the decisions appealed from "already appear of record, i.e. in the decisions, themselves and in the Trial Court's Statement Under Pa. R.A.P. 1925(a). O'Brien J.	O'Brien W. Terrence
07/12/2016	Letter	Sent to all parties regarding all docket entries sent to Commonwealth Court.	Allegheny County Department of Court Records

**Allegheny County - Department of Court Records  
Civil/Family Division Docket Report**

SA-15-000963

Municipality of Mt. Lebanon vs Gillen

Run Date: 08/26/2016  
Run Time: 02:02:13 PM

**Court Type:** Arbitration  
**Case Type:** Office of Open Records Appeal  
**Judge:** O'Brien W. Terrence  
**Current Status:** Order of Court

**Related Cases:** SA-16-000236,  
**Jury Requested:** No  
**Amount In Dispute:** \$ .00

**Parties**

**- Litigants -**

ID	LName	FName	MI	Type	Address	Phone	Attorney
@1315470	Municipality of Mount Lebanon	—	—	Plaintiff	710 Washington Road Pittsburgh PA 15228	—	Weis Philip J.,
@991464	Municipality of Mt. Lebanon	—	—	Plaintiff	710 Washington Road Pittsburgh PA 15228	—	Garfinkel Daniel, Weis Philip J.,
@1691452	Pennsylvania Office of Open Records	—	—	Interested Party	No Default Address Available	—	—
@1963611	Pennsylvania Office of Open Records	—	—	Interested Party	Commonwealth Keystone Building 400 North Street, 4th floor Harrisburg PA 17120-0225	—	—
@123419	Gillen	Elaine	—	Defendant	735 Vallevista Avenue Pittsburgh PA 15234	—	—
@2190860	Gillen	Elaine	—	Defendant	735 Vallevista Avenue Pittsburgh PA 15234	—	Barber Ronald D.,

**- Attorney -**

ID	LName	FName	MI	Type	Address	Phone
44846	Weis	Philip	J.	Plaintiff's Attorney	Buchanan Ingersoll P.C. 301 Grant Street, 20th floor One Oxford Centre Pittsburgh PA 15219	—
52734	Barber	Ronald	D.	Defendant's Attorney	Four Gateway Center Suite 220 444 Liberty Avenue Pittsburgh PA 15222	(412)2815423
92037	Garfinkel	Daniel	—	Attorney	Buchanan Ingersoll One Oxford Centre 301 Grant Street, 20th Floor Pittsburgh PA 15237	—
316820	Knafelc	Edward	A.	Attorney	444 Liberty Avenue Suite 2200 Pittsburgh PA 15222	(412)2815423
202103	Moore	Gretchen	E	Attorney	444 Liberty Avenue Pittsburgh PA 15222	(412)2815423

**- Non Litigants -**

ID	LName	FName	MI	Type	Address	Phone
COMMONWEA	Commonwealth Court of Pennsylvania	—	—	Court	No Default Address Available	—
@914524	Zwick	Denise	Murphy	Court Reporter	Court Reporter Pittsburgh PA 15219	—
ACDCR	Allegheny County Department of Court Records	—	—	Department of Court Records	414 Grant Street Pittsburgh PA 15219	—
JOBRIEN	O'Brien	W.	Terrence	Judge	705 City County Building Pittsburgh PA 15219	(412)3505898

JOBRIEN	O'Brien	W.	Terrence	Judge	705 City County Building Pittsburgh PA 15219	(412)3505898
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### Docket Entries

Filing Date	Docket Type	Docket Text	Filing Party
12/18/2015	Petition Initiating Case		Municipality of Mt. Lebanon
12/22/2015	Praecipe for Appearance	Ronald D.Barber,Gretchen E.Moore & Edward A.Knafelc,Esquires.	Gillen Elaine
12/29/2015	Writ of Certiorari	Issued and sent on 12/29/15. Notices Mailed 12/29/15	Allegheny County Department of Court Records
12/30/2015	Answer and New Matter		Gillen Elaine
01/15/2016	Certified Record		Pennsylvania Office of Open Records
02/23/2016	Order of Court	Dated 02/23/16, hearing scheduled on the Petition for Judicial Review is continued to 04/11/16 at 10:00 before the undersigned. O'Brien J. Copies mailed 2/23/16.	O'Brien W. Terrence
03/22/2016	Petition Initiating Case		Municipality of Mount Lebanon
04/05/2016	Motion & Order	Dated on 04/05/16. Order that Motion to Consolidate is GRANTED. The action filed at Docket SA-15-000963 is hereby consolidated w/ the action at Docket sa-16-000236. Hearing has been scheduled for 04/11/16 at 10:00 AM. O'Brien, J. Copies sent on 04/06/16	Gillen Elaine
04/05/2016	Copy of Order of Court	Dated on 04/05/16. Order that Motion to Consolidate is GRANTED. The action filed at Docket SA-15-000963 is hereby consolidated w/ the action at Docket sa-16-000236. Hearing has been scheduled for 04/11/16 at 10:00 AM. O'Brien, J. Copies sent on 04/06/16 (ORIGINAL ORDER ON SA-15-000963)	O'Brien W. Terrence

004a

04/08/2016	Praeipce for Appearance	of Daniel C. Garfinkel, Esquire	Municipality of Mt. Lebanon
04/26/2016	Notice of Proof	Of proceeding hearing on Petitions under the Right to know Law on April 11,2016 by the Honorable Judge W.T. O'Brien	Zwick Denise Murphy
04/26/2016	Transcript of Proceedings		Zwick Denise Murphy
04/29/2016	Certification	Of record filed on the behalf of the defendant	Gillen Elaine
05/23/2016	Decision	Under 65 PS. 67.1302 (a). Dated 05/23/16 O'Brien J. Copies sent 05/23/2016.	O'Brien W. Terrence
06/22/2016	Notice of Appeal to Higher Court	To Commonwealth Court from the decision entered on 5/23/16. Proof of service filed. Request for transcript filed.	Gillen Elaine
06/27/2016	Amended	Notice of appeal	Gillen Elaine
06/30/2016	Appeal Number	From Commonwealth Court. #1020 CD 2016.	Commonwealth Court of Pennsylvania
07/11/2016	Order of Court	Dated 07/11/2016 Department of Court Records shall transmit the record to the Commonwealth Court in due course without the filing of an opinion because the reasons for the entry of the decisions appealed from "already appear of record, i.e. in the decisions, themselves and in the Trial Court's Statement Under Pa. R.A.P. 1925(a). O'Brien J.	O'Brien W. Terrence
07/11/2016	Order of Court	Dated: 07/11/2016 My decisions were docketed on May 23, 2016. Paragraphs 19 and 20 of her Motion for Reconsideration read as follows; Argument contained in paragraph 19 has already been addressed in section IV of my Decision at SA-15-963. See order for specifics. O'Brien, J.	O'Brien W. Terrence
07/12/2016	Letter	Sent to all parties regarding all docket entries sent to Commonwealth Court.	Allegheny County Department of Court Records

## PUBLIC RECORDS REQUEST FORM

Please provide the following information so we may locate your requested record

<b>Record Requested (be specific):</b> All communication to and/or from municipal staff and, all communication to and/or from the commission concerning Anthony DeNicola's archery program from June 18, 2015 to the present.
<b>Date and Time of Request:</b> <div style="text-align: right;">July 30, 2015 6:28 PM</div>
<b>Person Requesting:</b> <div style="text-align: right;">Elaine Gillen</div>
<b>Address:</b> <div style="text-align: right;">735 Valle Vista Avenue Pittsburgh, PA 15234</div>
<b>Phone Number:</b> <div style="text-align: right;">412.561.6505</div>
<b>Signature:</b> <i>Elaine Gillen</i>
<b>Comments, if any:</b> Please email my Right To Know request to EGillen476@aol.com.

### PUBLIC SAFETY RECORDS ONLY

<b>Date/Time of Incident:</b>	
<b>Incident Number:</b>	
<b>Location of Incident:</b>	
<b>Type of Incident:</b>	
<b>Person(s) Involved in Incident:</b>	

You will be notified within (5) business days of the status of your record request.

<b>Fees per report:</b>	<b>Accident: \$15</b>	<b>Computer-aided Dispatch: \$10</b>
<b>Record Release:</b>	<b>Denied:</b>	
<b>Approved:</b>		
<b>Mt. Lebanon Official Signature:</b>		
<b>Date:</b>		

\*Originally adopted with Resolution R-04-03; amended by Resolution R-29-05; amended by Resolution R-10-08

Mail to: Mt. Lebanon Municip;

Pittsburgh, PA 15228-2018



**MT. LEBANON**  
PENNSYLVANIA

September 3, 2015

Elaine Gillen  
735 Vallevista Avenue  
Pittsburgh, PA 15234

MUNICIPAL BUILDING  
210 WASHINGTON ROAD  
PITTSBURGH, PA 15228  
PHONE: (412) 641-4100  
www.mtlebanonpa.org

- Re: Right to Know Request

Dear Ms. Gillen:

Thank you for your request for information pursuant to the Pennsylvania Right-To-Know law (the "Act").

By your request dated July 30, 2015, you requested the following records:

*All communication to and/or from municipal staff and, all communication to and/or from the commission concerning Anthony DeNicola's archery program from June 18, 2015 to the present.*

I have determined that your request should be granted in part and denied in part for reasons as set forth herein. To the extent the request is granted, the documents are enclosed.

There are 131 pages. The copying charge is \$32.75. The documents are now available from my office and will be immediately provided upon receipt of the copying charge.

Several emails were not produced that dealt with persons volunteering to donate their time or property to the program either as an archer or property owner. These were not produced under two exceptions:

(1) The Act at Section 708(b)(1) provides as follows:

(i) A record the disclosure of which:

\*\*\*

(ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

(2) The Act at Section 708(b)(13) provides as follows:

(13) Records 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

PAV. GENERAL OFFICES 1000 1000 1000



PAV. GENERAL OFFICES 1000 1000 1000

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.

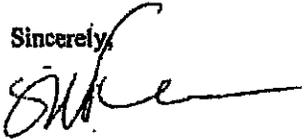
In addition, emails were not produced based on the attorney client privilege. The term "Public Record" as defined in the Act at Section 102 does not include material that is protected by a privilege. See *Schenck v. Township of Centre*, 893 A.2d 849 (Pa. Commw. 2006).

Finally, under Section 708(6) of the Act, certain personal identification information (such as home addresses, home phone numbers and personal email addresses) is contained in the documents you seek. We redacted these.

You have a right to appeal the denial of information in writing to the Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4<sup>th</sup> Floor, Harrisburg, PA 17120.

If you choose to file an appeal, you must do so within 15 business days of the mailing date of the agency's response, as outlined in Section 1101 of the Act. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address the reasons the Agency denies your request. Visit the Office of Open Records website at <http://openrecords.state.pa.us> for further information on filing an appeal. If you have further questions, please call me. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,



Stephen M. Feiler  
Municipal Manager

cc: P. Weis, K. McGill



pennsylvania  
OFFICE OF OPEN RECORDS

RIGHT TO KNOW LAW APPEAL  
DENIAL OR PARTIAL DENIAL

RECEIVED

SEP 18 2015

Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225  
Fax: (717) 425-5343 E-mail: [openrecords@pa.gov](mailto:openrecords@pa.gov)

OFFICE OF OPEN RECORDS

Today's date: September 16, 2015

Requester's name: Elaine T Gillen  
Address/City/State/Zip: 735 Valle Vista Avenue/Pittsburgh/PA/15234  
Request submitted by:  Fax  Mail  E-mail  In-Person (Please check one)  
Date of Right to Know request: July 30, 2015 Date of Agency Response: 08.05.15, 09.03.15  
Telephone and fax number: 4125616505 /--- E-mail: EGillen476@aol.com  
Name and address of Agency: Municipality of Mt. Lebanon, PA 710 Washington Rd. Pittsburgh, PA 15228  
E-mail Address of Agency: sfeller@mtlebanon.org Fax of Agency: 412.343.3753  
Name and title of person who denied my request: Stephen M. Feller, Municipal Manager

I submitted a request for records to the agency named above. The agency either denied or partially denied my request. I am appealing that denial to the Office of Open Records (OOR), and I am providing the following information:

I was denied access to the following records (attach additional pages if necessary): see attached

The agency's denial of my request is flawed and the requested records are public records because (check all that apply) **(REQUIRED)**:

- the records document the receipt or use of agency funds.
- the records are in the possession, custody or control of the agency and are not protected by any exemptions under Section 708 of the Right-to-Know Law, are not protected by privilege, and are not exempted under any Federal or State law or regulation.
- Other See attached

(attach additional pages if necessary)

- I have attached a copy of my request for records. **(REQUIRED)**
- I have attached a copy of all responses from the agency regarding my request. **(REQUIRED)**
- I have attached any letters or notices extending the agency's time to respond to my request.
- I hereby agree to permit the OOR an additional thirty (30) days to issue a final order in this appeal.
- I am interested in resolving this appeal through mediation with the agency.

Respectfully Submitted, Elaine T. Gillen (must be signed)

You should provide the agency:

its you submit to the OOR.

**Reason for appeal:**

The Municipality of Mt. Lebanon (agency) has no reasonable basis for citing The Act at Section 708(b)(1) as a reason for failing to produce documents containing the requested information. Further, withholding the documents that contain the information sought would be reasonably likely to result in a substantial and demonstrable risk of physical harm to the personal security and/or personal safety of the public-at-large, including the municipality's approximately 33,000 residents, the most vulnerable of which are children.

I was denied access to the following records: the locations of the private properties participating in the archery hunt. We are a walking community. From the School District website: <http://www.mtisd.org/parents/safewalkingroutes.asp>

**Safe Walking Routes**

The Municipality of Mt. Lebanon, along with the Mt. Lebanon Police Department and Juvenile Protection has formulated the following walking routes. These routes are recommended safe walking routes according to pedestrian and vehicle laws of the Commonwealth of PA. The walking routes are all encompassing not simply for routes to each elementary school. They were designed to be used 24 hours a day, 7 days a week. These routes will show the safest area to walk on the street as well as the safest place to cross every street and crossing guard locations. The routes will take you to a signalized intersection with a stop sign or traffic signal making it easier to cross.

For students in elementary school, locate your school map and find your address. You may then follow the blue arrows to the school. The reverse would be done for walking home. For students in middle and high school, locate the elementary school map where you live and follow that towards your school and onto the next elementary school map where the middle or high school is located.

Because the maps are all-encompassing for safety, all walking routes will follow a street or sidewalk. Pathways and cut through stairs have been eliminated as safe walking routes.

Foster Elementary School Walking Route

Hoover Elementary School Walking Route

Howe Elementary School Walking Route

Jefferson Elementary School Walking Route

Lincoln Elementary School Walking Route

Markham Elementary School Walking Route

Washington Elementary School Walking Route

Elaine T. Gillen  
735 Vallevista Avenue  
Pittsburgh, PA 15234  
412.561

Elaine T Gillen v Mt. Lebanon appeal 091615.pages



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>ELAINE GILLEN,</b>	:	
<b>Requester</b>	:	
	:	<b>Docket No.: AP 2015-1938</b>
<b>v.</b>	:	
	:	
<b>MUNICIPALITY OF MT. LEBANON,</b>	:	
<b>Respondent</b>	:	

**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 hunting 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 July 30, 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 June 18, 2015 to the present." On August 5, 2015, the

Municipality invoked a thirty-day to respond to the Request. *See* 65 P.S. § 67.902. On September 4, 2015, the Municipality partially granted the Request, providing 131 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 those 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 September 18, 2015, 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 September 30, 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 Stephen Feller, Manager and Open Records Officer for the Municipality, and Chief Aaron Lauth, Chief of Police for Mt. Lebanon. In its submission, the Municipality provides a discussion of the deer management techniques in the Municipality that was attempted last year, which was "trap and euthanize." The Pennsylvania Game Commission permitted a program wherein deer were lured into corrals resulting in the deer being entrapped and shot. This year, the Municipality awarded a contract to White Buffalo to institute an archery program to manage the deer population. The contractor would screen, train and manage archers for the hunt which is occurring on public and private properties. The contractor contacted the

property owners and neighbors for permissions required under the Pennsylvania Game Commission's hunting and safety rules.

On October 1, 2015, the Requester submitted her position statement, stating that during public meetings, certain individuals indicated their support for the hunting program and the minutes reflect the names and addresses of these individuals.

#### 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)).

The Municipality states that certain e-mails were not produced that would identify the persons volunteering time as an archer or permitting the 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. Dep't of Corrections*, 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).

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. 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 Municipality made five of its public lands available and private property owners could also provide access to their land. The Municipality has chosen to keep the location of the private property confidential because of what it believes is a reasonable likelihood that property owners and those associated with the program may encounter problems such as those encountered in previous years.

Although the Municipality has provided evidence of incidents in past years which involved tampering with traps and scaring deer, none of the evidence demonstrates that there were any threats to individuals involved in the deer management programs, either past or present.

As Section 708(b)(1) requires more than conjecture, 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). Here, the Municipality provides the Merriam-Webster definition of "donate", which states, in pertinent part: "to make a gift of; especially: to contribute to a public or charitable cause." The Municipality argues that the participants in the program are donating the use of their land. However, the landowners are not gifting their property to the program, they are simply allowing temporary access to their property and it will at all times remain the property of those individuals, not the program. 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. § 67.1301(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. This Final Determination shall be placed on the  
OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 24, 2015**



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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent to: Elaine Gillen (via e-mail only);  
Philip Weis, Esq. (via e-mail only);  
Stephen Feller (via e-mail only)

## PUBLIC RECORDS REQUEST FORM

Please provide the following information so we may locate your requested record

Record Requested (be specific): All communication 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.	
Date and Time of Request:	November 25, 2015 7:20 AM
Person Requesting:	Elaine Gillen
Address:	735 Vallevista Avenue Pittsburgh, PA 15234
Phone Number:	412.561.6505
Signature:	<i>Elaine Gillen</i>
Comments, if any: Please email my Right To Know Request to EGillen476@aol.com	

### PUBLIC SAFETY RECORDS ONLY

Date/Time of Incident:
Incident Number:
Location of Incident:
Type of Incident:
Person(s) Involved in Incident:

You will be notified within (5) business days of the status of your record request.

Fees per report: Incident: \$15*	Accident: \$15	Computer-aided Dispatch: \$10
Record Release: Approved:	Denied:	
Mt. Lebanon Official Signature:		
Date:		

\*Originally adopted with Resolution R-04-03; amended by Resolution R-29-05; amended by Resolution R-10-08

Mail to: Mt. Lebanon Municipal Manager, 710 Washington Road, Pittsburgh, PA 15228-2018

RECEIVED

JAN 06 2016



pennsylvania  
OFFICE OF OPEN RECORDS

OFFICE OF OPEN RECORDS

RIGHT-TO-KNOW LAW ("RTKL")  
APPEAL OF DENIAL, PARTIAL DENIAL, OR DEEMED DENIAL

Office of Open Records ("OOR")  
Email: [openrecords@pa.gov](mailto:openrecords@pa.gov)  
Fax: (717) 425-5343

Commonwealth Keystone Building  
400 North St., 4th Floor  
Harrisburg, PA 17120-0225

Today's Date: 01/06/16

Requester Name(s): Elaine Gillen

Address/City/State/Zip: 785 Vallevista Avenue

Email: EGillen476@aol.com

Phone/Fax: 412.561.6506

Request Submitted to Agency Via:  Email  Mail  Fax  In-Person (*check only one*)

Date of Request: 11/25/15 Date of Response: 12/02/15, 01/04/16  Check if no response

Name of Agency: Municipality of Mt. Lebanon

Address/City/State/Zip: 710 Washington Rd/Pittsburgh/PA/15228

Email: bcross@mtlebanon.org

Phone/Fax: 412.343.3625

412.343.3753

Name & Title of Person Who Denied Request (*if any*): Bonnie Cross, Assistant to the Manager

I was denied access to the following records (**REQUIRED**, *Use additional pages if necessary*):  
see attached.

I requested the listed records from the Agency named above. By signing below, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

I am also appealing for the following reasons (*Optional. Use additional pages if necessary*): Per the ruling of the Office of Open Records Final Determination for Docket No.: AP 2015-1938

- I have attached a copy of my request for records. (**REQUIRED**)
- I have attached a copy of all responses from the Agency regarding my request. (**REQUIRED**)
- I have attached any letters or notices extending the Agency's time to respond to my request.
- I hereby agree to permit the OOR an additional 30 days to issue a final order.
- I am interested in resolving this issue through OOR mediation. *This stays the initial OOR deadline for the issuance of a final determination. If mediation is unsuccessful, the OOR has 30 days from the conclusion of the mediation process to issue a final determination.*

Respectfully submitted, Elaine Gillen (**SIGNATURE REQUIRED**)

You should provide the Agency with a copy of this form and any documents you submit to the OOR.

OOR Appeal Form - Revised January 4, 2016

January 6, 2016

I was denied access to the following records:

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.

The Municipality also denied access to those e-mails stating that the e-mails would identify those individuals making a donation to an agency.

Elaine Gillen  
735 Vallevista Avenue  
Pittsburgh, PA 15234  
412.561.6505



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

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

**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**



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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,

CIVIL DIVISION

No. SA-15- 963

Petitioner,

v.

ELAINE GILLEN

Respondent.

**PETITION FOR JUDICIAL REVIEW OF  
A FINAL DETERMINATION OF THE  
PENNSYLVANIA OFFICE OF OPEN  
RECORDS**

and

PENNSYLVANIA OFFICE OF  
OPEN RECORDS,

Filed on behalf of:  
Municipality of Mt. Lebanon,  
Petitioner

Interested Party.

Counsel of Record for This Party:

Philip J. Weis, Esquire  
Pa. I.D. No. 44846

Brendan P. Lucas  
Pa. I.D. No. 314300

BUCHANAN INGERSOLL & ROONEY PC  
Firm No. 038  
20th Floor, One Oxford Centre  
301 Grant Street  
Pittsburgh, PA 15219

(412) 562-3937

OPSSPAUL01  
12-18-2015 03:04:04  
SA-15-000963

FILED  
2015 DEC 18 PM 3:03

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MUNICIPALITY OF MT. LEBANON,

CIVIL DIVISION

Petitioner,

v.

No. SA-15-

ELAINE GILLEN

Respondent.

and

PENNSYLVANIA OFFICE OF  
OPEN RECORDS

Interested Party.

**NOTICE TO PLEAD**

TO: Elaine Gillen  
735 Vallevista Avenue  
Pittsburgh, PA 15234

You are required to plead to the within Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records within twenty (20) days from the date of service thereof or a default judgment may be entered against you.

Respectfully submitted,



Philip J. Weis, Esquire  
Brendan Lucas, Esquire

BUCHANAN INGERSOLL & ROONEY PC  
20th Floor, One Oxford Centre  
301 Grant Street  
Pittsburgh, PA 15219  
(412) 562-3937

Dated: December 18, 2015

MUNICIPALITY OF MT. LEBANON,	)	CIVIL DIVISION
	)	
Petitioner,	)	
	)	
v.	)	No. SA-15-
	)	
ELAINE GILLEN	)	
	)	
Respondent.	)	
	)	
and	)	
	)	
PENNSYLVANIA OFFICE OF	)	
OPEN RECORDS	)	
	)	
Interested Party.	)	

**PETITION FOR JUDICIAL REVIEW OF A FINAL DETERMINATION OF THE  
PENNSYLVANIA OFFICE OF OPEN RECORDS**

AND NOW, comes the Petitioner, Municipality of Mt. Lebanon, by and through its attorneys, Buchanan, Ingersoll & Rooney, PC, and files the within Petition For Judicial Review of a Final Determination of the Pennsylvania Office of Open Records, and in support thereof states the following:

**I. Parties**

1. Petitioner, Municipality of Mt. Lebanon ("Municipality"), is a "local agency" under the Pennsylvania Right to Know Law ("RTKL"), 65 P.S. § 67.101 *et seq.*, and has a business address of 710 Washington Road, Pittsburgh, PA 15228.
2. Upon information and belief, Respondent, Elaine Gillen, has an address of 735 Vallevista Avenue, Pittsburgh, PA 15234.

3. The Pennsylvania Office of Open Records ("OOR") is a Commonwealth agency within the Department of Community and Economic Development, organized and existing under the RTKL, 65 P.S. § 67.1310, with a business address of Commonwealth Keystone Building, 400 North St., 4<sup>th</sup> Floor, Harrisburg, PA 17120.

## II. Jurisdiction and Venue

4. This Petition is filed pursuant to Section 1302 of the RTKL, 65 P.S. § 67.1302, as a result of a Final Determination issued by the OOR on November 24, 2015, at OOR Docket No. AP 2015-1938. A true and correct copy of the Final Determination is attached hereto as Exhibit "A."

5. Section 1302 of the RTKL states:

### Section 1302. Local agencies.

(a) **General rule.** — Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b) or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision.

(b) **Stay.** — A petition for review under this section shall stay the release of documents until a decision under subsection (a) is issued.

6. The Municipality is located in Allegheny County and, therefore, this Court has jurisdiction over this Petition pursuant to Section 1302(a) of the RTKL.

## III. Factual and Procedural Background

7. The documents and emails that are the subject of the instant Petition relate to deer management within the Municipality. In July 2015, the Municipality awarded a contract to White Buffalo, Inc. ("White Buffalo") for an archery program to cull the deer population.

White Buffalo was hired to screen, train and manage archers to conduct an organized bow hunt. The hunt is ongoing and occurring on public and private properties. Interested private property owners contacted White Buffalo directly, offering to donate their properties for participation in the project. Officials from White Buffalo then contacted each applicant and the applicant's neighbors for any additional permissions needed to comply with Pennsylvania Game Commission hunting and safety regulations. Each property was rated based on White Buffalo's discretion, with more weight given to areas of heavy vegetation or woods.

8. Respondent filed a RTKL request with the Municipality via email on July 30, 2015 ("Request"). The Request sought production of "[a]ll communication to and/or from municipal staff and, all communication to and/or from the commission concerning Anthony DeNicola's archery program from June 18, 2015 to the present." A true and correct copy the Request is attached hereto as Exhibit "B."

9. On August 5, 2015, the Municipality replied to Respondent via letter and invoked a thirty (30) day extension period, which is permitted by Section 902 of the RTKL. See 65 P.S. § 67.902. A true and correct copy of said letter is attached hereto as Exhibit "C."

10. In an email letter dated September 3, 2014, the Municipality partially granted and partially denied the Request, providing a total of 131 e-mails to the Respondent. A true and correct copy of said email letter is attached hereto as Exhibit "D."

11. Regarding the denied portion of the Request, the Municipality's response stated, in pertinent part:

Several emails were not produced that dealt with persons volunteering to donate their time or property to the program either as an archer or property owner. These were not produced under two exceptions:

(1) The Act at Section 708(b)(1) provides as follows:

(1) A record the disclosure of which:

\* \* \*

(ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

(2) The Act at Section 708(b)(13) provides as follows:

(13) Records 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.

12. On September 18, 2015, Respondent timely appealed the Municipality's denial of the request to the OOR, challenging the denial and stating grounds for disclosure. However, respondent did not address why any of the specific exemptions to disclosure cited by the Municipality should not apply. A true and correct copy of said appeal is attached hereto as Exhibit "E."

13. On November 24, 2015, the OOR issued a Final Determination in favor of Respondent and ordered that the Municipality provide the Respondent with all of the requested emails. *See Exhibit "A."*

#### IV. Grounds for Review

14. The Pennsylvania Supreme Court has established the following standard of review for appeals from decisions the OOR: "...the courts are the ultimate finders of fact and they are to conduct full *de novo* reviews of appeals made from decisions by the RTKL appeals officers, allowing for the adoption of the appeals officer's factual finds and legal conclusions where appropriate." *Bowling v. Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013). Further, a

reviewing court shall have a plenary scope of review when reviewing decisions made by OOR appeals officers. *Id.*

16. This Court should reverse the Final Determination of the OOR and find that the emails that identified the property owners who volunteered their time or property for the deer management program were properly withheld because:

a. The Respondent's appeal changed the description of the requested documents. Upon appeal, the Respondent stated that "I was denied access to the following records: the locations of the private properties participating in the archery hunt." See Exhibit "E." However, these are not the records that Respondent requested in the Request. In the Request, the Respondent requested "[a]ll communication to and/or from municipal staff and, all communication to and/or from the commission concerning Anthony DeNicola's archery program from June 18, 2015 to the present." The OOR has repeatedly held that a requester may not modify, explain, or expand upon a request on appeal. See *Krize and WNEP News v. Lycoming County*, Docket No.: AP 2014-0258; *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010). The OOR therefore erred by allowing the Respondent to modify her request upon appeal.

b. In her appeal to the OOR, the Respondent did not address why the specific exemptions to the RTKL cited by the Municipality should not have resulted in the denial of her Request. The OOR should dismiss an appeal where the appellant fails to address the grounds stated by an agency for denying a request. See 65 P.S. § 67.1101 ("The appeal shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request."); *Padgett v. Pennsylvania State Police*, 73 A.3d 644 (Pa. Commw. Ct. 2013) (holding

that, when a requester fails to state the records sought under the RTKL are public, or fails to address an agency's grounds for denial, the OOR properly dismisses the appeal.); *Saunders v. Pennsylvania Dep't of Corr.*, 48 A.3d 540, 542-43 (Pa. Commw. Ct. 2012) (holding that an appellant is "required by Section 1101 to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access.").

Respondent summarily addressed the Municipality's denial under Section 708(b)(1)(ii), merely stating that the Municipality has "no reasonable basis for citing The Act at Section 708(b)(1) as a reason for failing to the documents..." Respondent provided no further explanation as to why Section 708(b)(1) was not applicable. Moreover, the respondent failed to address at all the Municipality's denial under Section 708(b)(13). Therefore, the OOR committed an error of law by requiring disclosure where the Respondent did not address the exemptions cited by the Municipality.

c. Even if Respondent had properly addressed the exemptions cited by the Municipality, the requested emails constitute a record of disclosure that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual," which is exempt from disclosure pursuant to Section 708(b)(1)(ii) of the RTKL. 65 P.S. § 67.708(b)(1)(ii). The Municipality provided evidence to the OOR, in the form of an affidavit from Mt. Lebanon Police Chief Aaron Lauth ("Police Chief"), which stated, among other things, that the disclosure of the emails would pose a "substantial and demonstrable risk" of harassment, invasion of privacy, and personal security to the individuals whose identities would be disclosed in the emails. The affidavit was based upon a long and contentious history surrounding the deer issue in Mt. Lebanon. A true and correct copy of said affidavit is attached hereto as Exhibit "F." Given a historical pattern of problems with deer management in Mt.

Lebanon, the Affidavit of the Chief of Police that such problems were going to continue should have been accepted.

Subsequent events of the risk posed by the potential disclosure of the emails have demonstrated the accuracy of the Police Chief's conclusions. Following the decision of the OOR, on November 27, 2015, Respondent emailed the Police Chief and stated: "I am sending this email to you because I am getting harassed. There are a lot of hateful people commenting in the newspapers..." See Exhibit "G." The email was taken seriously by the Police Chief, and increased patrols were implemented. Additionally, a woman was recently convicted of trespassing and interfering with a legal hunt on private property in connection with the archery program within the Municipality. See Exhibit "H." These incidents are precisely the type of "substantial and demonstrable risk of physical harm to or the personal security of an individual" that the Municipality seeks to avoid in withholding the requested emails.<sup>1</sup> Therefore, the OOR erred by determining that disclosure of the emails does not pose a reasonable likelihood of substantial and demonstrable risk to the individuals whose identities would be disclosed.

d. Even if Respondent had properly addressed the exemptions cited by the Municipality, the emails constitute "[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." Such records that

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<sup>1</sup> Although these incidents occurred after the Final Determination was issued by the OOR, they are directly relevant to the resolution of this Petition. They demonstrate that the likelihood of risk of physical harm and to personal security is "more than mere conjecture." See Final Determination at 5. Therefore, the Municipality requests that the record be opened and expanded to include Exhibit "G" and Exhibit "H."

identify an individual who makes a donation to an agency are exempt from disclosure pursuant to Section 708(b)(13) of the RTKL. 65 P.S. § 67.708(b)(13).

The Municipality claimed exemption from disclosure under this section because disclosure would identify individuals who (1) offered to donate their property for use during the archery program and (2) offered to donate their time and expertise as volunteer hunters in the archery program. In determining that this exemption was not applicable, the OOR failed to properly conclude that the individuals volunteered to donate the use of their property, and that it is possible to donate something less than fee title. In addition, the decision of the OOR did not address the time volunteered by hunters to the archery program. Both situations fit squarely within Section 708(b)(1)(13) and the OOR erred when it determined that this exemption does not apply.

WHEREFORE, the Municipality respectfully requests that this Honorable Court issue a decision with findings of fact and conclusions of law that reverses the Pennsylvania Office of Open Records' Final Determination issued at OOR Docket No. AP 2015-1938. The Municipality further requests that this Honorable Court expand the record to include Exhibit "G" and Exhibit "H," which include evidence pertinent to the fair resolution of this Petition, but which was not available until after the Final Determination was issued.

Respectfully submitted,

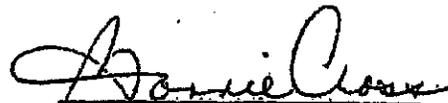
  
Philip J. Wels, Esquire  
Brendan Lucas, Esquire

BUCHANAN INGERSOLL & ROONEY PC  
20th Floor, One Oxford Centre  
301 Grant Street  
Pittsburgh, PA 15219  
(412) 562-3937

Dated: December 18, 2015

**VERIFICATION**

I, Bonnie Cross, verify that the facts set forth in the foregoing Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records are true and correct to the best of my knowledge, information and belief. I understand that this statement is made subject to the penalties of 18 Pa.C.S.A §4904 relating to unsworn falsification to authorities, which provides that if I knowingly make false averments, I may be subject to criminal penalties.



Bonnie Cross  
Bonnie Cross  
Open Records Officer  
Municipality of Mt. Lebanon

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-16- 000 236

**PETITION FOR JUDICIAL REVIEW OF  
A FINAL DETERMINATION OF THE  
PENNSYLVANIA OFFICE OF OPEN  
RECORDS**

Filed on behalf of:  
Municipality of Mt. Lebanon,  
Petitioner

Counsel of Record for This Party:

Philip J. Weis, Esquire  
Pa. I.D. No. 44846

Daniel C. Garfinkel, Esquire  
Pa. I.D. No. 92037

Brendan P. Lucas, Esquire  
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BUCHANAN INGERSOLL & ROONEY PC  
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Pittsburgh, PA 15219

(412) 562-3937

DEPT. OF COURT RECORDS  
CIVIL/FAMILY DIVISION  
ALLEGHENY COUNTY PA

2016 MAR 22 PM 4:04

FILED





existing under the RTKL, 65 PS. § 67.1310, with a business address of Commonwealth Keystone Building, 400 North St., 4<sup>th</sup> Floor, Harrisburg, PA 17120.

## **II. Jurisdiction and Venue**

4. This Petition is filed pursuant to Section 1302 of the RTKL, 65 P.S. § 67.1302, as a result of a Final Determination issued by the OOR on February 23, 2016, at OOR Docket No. AP 2016-0023. A true and correct copy of the Final Determination is attached hereto as Exhibit "A."

5. Section 1302 of the RTKL states:

### **Section 1302. Local agencies.**

(a) **General rule.** — Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b) or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision.

(b) **Stay.** — A petition for review under this section shall stay the release of documents until a decision under subsection (a) is issued.

6. The Municipality is located in Allegheny County and, therefore, this Court has jurisdiction over this Petition pursuant to Section 1302(a) of the RTKL.

## **III. Factual and Procedural Background**

7. The documents and emails that are the subject of the instant Petition relate to deer management within the Municipality. In July 2015, the Municipality awarded a contract to White Buffalo, Inc. ("White Buffalo") for an archery program to cull the deer population. White Buffalo was hired to screen, train and manage archers to conduct an organized bow hunt. The hunt is now concluded and occurred on public and private properties. Interested private

property owners contacted White Buffalo directly, offering to donate their properties for participation in the project and to volunteer their time as archers in the hunt. Officials from White Buffalo then contacted each applicant and the applicant's neighbors for any additional permissions needed to comply with Pennsylvania Game Commission hunting and safety regulations. Each property was rated based on White Buffalo's discretion, with more weight given to areas of heavy vegetation or woods.

8. Respondent filed a RTKL request with the Municipality via email on November 25, 2015 ("Request"). The Request sought production of "[a]ll communication 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." A true and correct copy the Request is attached hereto as Exhibit "B."

9. On December 2, 2015, the Municipality replied to Respondent via letter and invoked a thirty (30) day extension period, which is permitted by Section 902 of the RTKL. *See* 65 P.S. § 67.902. A true and correct copy of said letter is attached hereto as Exhibit "C."

10. In a letter dated January 4, 2016, the Municipality partially granted and partially denied the Request, providing a total of 63 pages of emails to the Respondent. A true and correct copy of said letter and produced documents is attached hereto as Exhibit "D."

11. Regarding the denied portion of the Request, the Municipality's response stated, in pertinent part:

Several records were not produced that dealt with persons volunteering to donate their time or property to the program either as an archer or property owner. These were not produced under two exceptions:

(1) The Act at Section 708(b)(1) provides as follows:

(1) A record the disclosure of which:

\* \* \*

- (ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

(2) The Act at Section 708(b)(13) provides as follows:

(13) Records 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.

12. On January 6, 2016, Respondent timely appealed the Municipality's denial of the request to the OOR, challenging the denial and stating grounds for disclosure. A true and correct copy of said appeal is attached hereto as Exhibit "E."

13. On February 23, 2016, the OOR issued a Final Determination in favor of Respondent and ordered that the Municipality provide the Respondent with all of the requested emails. See Exhibit "A."

14. The Request that is the subject of the instant appeal is identical to the records requested in *Gillen v. Municipality of Mt. Lebanon*, OOR Dkt. AP 2015-1938, 2015 PA O.O.R.D. LEXIS 1963 ("*Gillen I*"), which was appealed to this Court and is currently pending at Docket No. SA-15-000963, except that the current Request is for documents from a later period in time. A true and correct copy of the Final Determination in *Gillen I* is attached hereto as Exhibit "F."

#### IV. Grounds for Review

15. The Pennsylvania Supreme Court has established the following standard of review for appeals from decisions the OOR: "...the courts are the ultimate finders of fact and

they are to conduct full *de novo* reviews of appeals made from decisions by the RTKL appeals officers, allowing for the adoption of the appeals officer's factual finds and legal conclusions where appropriate." *Bowling v. Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013). Further, a reviewing court shall have a plenary scope of review when reviewing decisions made by OOR appeals officers. *Id.*

16. This Court should reverse the Final Determination of the OOR and find that the emails that identified the property owners who volunteered their time and/or property for the deer management program were properly withheld because:

a. The requested emails constitute records of disclosure that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual," which is exempt from disclosure pursuant to Section 708(b)(1)(ii) of the RTKL. 65 P.S. § 67.708(b)(1)(ii).

b. The Municipality provided evidence to the OOR, in the form of an affidavit from Mt. Lebanon Police Chief Aaron Lauth ("Police Chief"), which stated, among other things, that the disclosure of the emails would pose a "substantial and demonstrable risk" of harassment, invasion of privacy, and personal security to the individuals whose identities would be disclosed in the emails. The affidavit was based upon a long and contentious history surrounding the deer issue in Mt. Lebanon. A true and correct copy of said affidavit is attached hereto as Exhibit "G." Given the historical pattern of problems with deer management in Mt. Lebanon, the Affidavit of the Chief of Police that such problems were going to continue should have been accepted.

c. Moreover, actual events have demonstrated the accuracy of the Police Chief's conclusions. Following the decision of the OOR in *Gillen I*, on November 27, 2015,

Respondent emailed the Police Chief and stated: "I am sending this email to you because I am getting harassed. There are a lot of hateful people commenting in the newspapers..." See Exhibit "G." The Respondent requested increased police patrols around her home. The email was taken seriously by the Police Chief, and increased patrols were implemented.

d. Additionally, On October 5, 2015 a woman was cited by Mt. Lebanon Police for defiant trespass and by the Pennsylvania Game Commission for "interfering with lawful taking of wildlife" 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. See Exhibit "G." The charges were appealed to the Court of Common Pleas, where the defendant was found guilty of defiant trespass charge and not guilty of the hunting related charge. See Exhibit "H."

e. These incidents are precisely the type of "substantial and demonstrable risk of physical harm to or the personal security of an individual" that the statute permits the Municipality to consider. The OOR erred by determining that disclosure of the emails does not pose a reasonable likelihood of substantial and demonstrable risk of harm to or the personal security of the individuals whose identities would be disclosed.

f. The OOR limited its analysis to personal harm; it did not address the personal security of individuals. "[T]he RTKL includes, in the disjunctive, both the risk of 'physical harm' and the risk to 'personal security.'" *Delaware Cty. v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1154 (Pa. Commw. Ct. 2012) (emphasis added). The OOR has held that the personal security exception is designed to protect from harm, danger, fear or anxiety. See *Shine v. Dept. of State*, OOR Dkt. Nos. 2009-0083, 2009-0105. When a person is

told to leave private property and refuses to do so to the point where a criminal conviction for defiant trespass occurs, the personal security of the property owner is necessarily implicated.

f. The emails constitute “[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.” Such records that identify an individual who makes a donation to an agency are exempt from disclosure pursuant to Section 708(b)(13) of the RTKL. 65 P.S. § 67.708(b)(13).

g. The Municipality claimed exemption from disclosure under this section because disclosure would identify individuals who (1) offered to donate their property for use during the archery program and (2) offered to donate their time and expertise as volunteer hunters in the archery program. In determining that this exemption was not applicable, the OOR failed to properly conclude that the individuals volunteered to donate the use of their property, and that it is possible to donate something less than fee title. In addition, as in *Gillen I*, the decision of the OOR did not address the time volunteered by hunters to the archery program. Both situations fit squarely within Section 708(b)(13) and the OOR erred when it determined that this exemption does not apply.

h. The OOR has interpreted the donation exemption to only apply to “natural persons” as defined by 1 Pa.C.S. § 1991, and not corporations, partnerships, associations and other entities. See *Roxbury News v. City of Harrisburg*, OOR Dkt. AP 2012-1748, 2012 PA O.O.R.D. LEXIS 1457. The OOR has also interpreted this donation exception to not apply to financial records under 65 P.S. § 67.708(c) (“The exceptions set forth in subsection (b) shall not

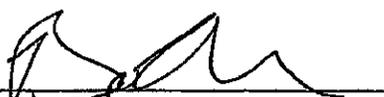
apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16), or (17)".

i. Assuming that these positions are correct, the donations in this case (non-financial donations of time, and use of property) are donations that are required to be recognized so that the statute has a purpose.

j. The OOR position, that the donation exception does not apply as the landowners are not gifting their property to the program, but instead 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, is unduly restrictive and contrary to the plain meaning of the statute. There is nothing in the statute that limits the exception to one type of donation only, i.e. donations of a fee interest.

WHEREFORE, the Municipality respectfully requests that this Honorable Court issue a decision with findings of fact and conclusions of law that reverses the Pennsylvania Office of Open Records' Final Determination issued at OOR Docket No. AP 2016-0023.

Respectfully submitted,



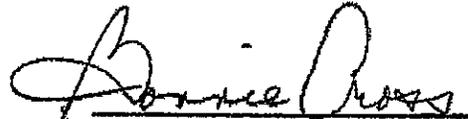
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Brendan Lucas, Esquire

BUCHANAN INGERSOLL & ROONEY PC  
20th Floor, One Oxford Centre  
301 Grant Street  
Pittsburgh, PA 15219  
(412) 562-3937

Dated: March 22, 2016

**VERIFICATION**

I, Bonnie Cross, verify that the facts set forth in the foregoing Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records are true and correct to the best of my knowledge, information and belief. I understand that this statement is made subject to the penalties of 18 Pa.C.S.A §4904 relating to unsworn falsification to authorities, which provides that if I knowingly make false averments, I may be subject to criminal penalties.

A handwritten signature in cursive script that reads "Bonnie Cross". The signature is written in black ink and is positioned above a horizontal line.

**Bonnie Cross**  
**Open Records Officer**  
**Municipality of Mt. Lebanon**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records was served by first class U.S. Mail, postage prepaid, on this 22<sup>th</sup> day of March 2016 on the following:

Ronald D. Barber, Esq.  
Gretchen Moore, Esq.  
Edward Knafelc, Esq.  
Strassburger, McKenna, Gutnick & Gefsky  
Four Gateway Center, Suite 2200  
444 Liberty Ave  
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*Counsel for Elaine Gillen*

Elaine Gillen  
735 Vallevista Avenue  
Pittsburgh, PA 15234

Jill S. Wolfe, Esq.  
Appeals Officer  
Pennsylvania Office of Open Records  
Commonwealth Keystone Building  
400 North St., 4<sup>th</sup> Floor  
Harrisburg, PA 17120



Brendan P. Lucas

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(412) 562-3937

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:

O'Brien, 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 15 - 000963

FILED BY:  
JUDGE W. TERRENCE O'BRIEN

Copies sent to:

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DEPT OF COURT RECORDS  
CIVIL FAMILY DIVISION  
ALLEGHENY COUNTY PA

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FILED

DECISION UNDER 65 P.S. § 67.1302(a)

O'BRIEN, J.

**I Procedural and factual history**

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 (OOR). A hearing was held before me on April 11, 2016, on this case and SA 16 - 236.<sup>1</sup> I reverse the OOR for reasons that follow.

I adopt the following procedural history, factual background and legal analysis from the Final Determination of the OOR dated November 29, 2015, regarding this case.

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 hunting 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 [OOR]. ...

**FACTUAL BACKGROUND**

On July 30, 2015, the Request was filed seeking "[a]ll communications to and/or from municipal staff and, all communications to and/or from the commission concerning Anthony DeNicola's archery program from June 18, 2015 to the present." ... On September 4, 2015, the Municipality partially

<sup>1</sup> A separate Decision is being rendered at SA 16 - 236.

granted the Request, providing 131 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 [or those volunteering their archery skills], arguing that public access of those records would result in a substantial and demonstrable risk to the personal security of the property owners [and the volunteering archers]. See 65 P.S. § 67.708(b)(1). The Municipality also denied access to those 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 September 18, 2015, the Requester appealed to the OOR. ...

On September 30, 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 Stephen Feller, Manager and Open Records Officer for the Municipality, and Chief Aaron Lauth, Chief of Police for Mt. Lebanon. In its submission, the Municipality provides a discussion of the deer management techniques in the Municipality that was attempted last year, which was "trap and euthanize." The Pennsylvania Game Commission permitted a program wherein deer were lured into corrals resulting in the deer being entrapped and shot. This year, the Municipality awarded a contract to White Buffalo to institute an archery program to manage the deer population. The contractor would screen, train and manage archers for the hunt which is occurring on public and private properties. The contractor contacted the property owners and neighbors for permissions required under the Pennsylvania Game Commission's hunting and safety rules.

On October 1, 2015, the Requester submitted a position statement, stating that during public meetings, certain individuals indicated their support for the hunting program and the minutes reflect the names and addresses of these individuals.

#### 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. 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..

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. 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."

The Municipality states that certain e-mails were not produced that would identify the persons volunteering time as an archer or permitting the 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. ... [See] *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).

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. 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 Municipality made five of its public lands available and private property owners could also provide access to their land. The Municipality has chosen to keep the location of the private property

confidential because of what it believes is a reasonable likelihood that property owners and those associated with the program may encounter problems such as those in previous years.

Pages 1-5; some citations and quotation marks omitted.

## II Sufficiency of the Requester's Appeal to OOR

Mt. Lebanon first invokes 65 P.S. § 67.1101(a)(1), which requires that an appeal to the OOR

shall state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for delaying or denying the request.

In support of its argument that I should dismiss the Requester's appeal based on her failure to comply with this section of the RTKL, Mt. Lebanon cites *Saunders v. Dep't of Corr.*, 48 A.3d 540 (Pa. Cmwith. 2012); and *Padgett v. Pa. State Police*, 73 A.3d 644 (Pa. Cmwith. 2013). These cases stand for the proposition that "when a requester fails to ... address an agency's grounds for denial, the OOR properly dismisses the appeal." *Padgett*, 73 A.3d at 647. See also *Dep't of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Cmwith. 2011), which holds a requester's appeal to the OOR "must address any grounds stated by the agency ... for denying the request." There the Commonwealth Court held the OOR "should not have proceeded, as it did, to decide Requester's appeal in its deficient form." *Id.*

I must agree with Mt. Lebanon that *Padgett* and *Saunders* are controlling. The Requester's appeal to the OOR in the case at bar did not address the grounds stated by Mt. Lebanon for partially denying her request. By checking off the middle box of the first page of her appeal form, the Requester was simply using boilerplate language. This language neither "state[d] the grounds upon which requester [was asserting] that the

record is a public record" nor "address[ed] the grounds stated by the agency for ... denying the request." 65 P.S. § 67.1101(a)(1). Regarding the Personal Security exemption, the Requester, in the sheets attached to the form provided by the OOR, rather than addressing why the exemption was not applicable, argued, in effect, that withholding the names of those volunteering their archery skills or the use of their property would endanger pedestrians in Mt. Lebanon. **The appeal did not even attempt to address, by reference to the applicable RTKL section or otherwise, Mt. Lebanon's reliance on the Donation exemption.** Although the Requester argues dismissal of the appeal is not appropriate because the deficiency did not hinder the OOR's review, none of the above-cited three cases requires such hindrance as a prerequisite for dismissal. Assuming, *arguendo*, the requester properly preserved her appeal to the OOR, I will discuss the two exemptions upon which Mt. Lebanon relies for denying access to the records in question. <sup>2</sup>

### III Personal Security exemption

Mt. Lebanon argues as follows regarding this exemption:

Now, the second exemption implicated in this case is the risk of physical harm or personal security. Specifically requested documents in this case, in both cases constitute a record of disclosure that, quote, would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual and they are therefore exempt from disclosure under Section 708(b)(1)(2) of the Right to Know Law.

The Commonwealth Court has recognized that the Right to Know Law includes in the disjunctive both the risk of physical harm and the risk of personal security, so they are separate considerations.

The Office of Open Records has determined in another case that the personal security exception is designed to protect from harm,

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<sup>2</sup> 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 8-10 of the hearing transcript.

danger, fear or anxiety.

The Affidavit of Police Chief Louth (*sic*) was submitted in each case. It is somewhat a different affidavit in each case, but they are very similar. They are Exhibits F and G to the respective petitions. He testified in the Affidavit that the disclosure of the e-mails at issue would cause a substantial and demonstrable risk of harassment, an invasion of privacy and personal security to the identities of the individuals disclosed in the e-mails.

There is a long and contentious history surrounding the hunting of deer in Mt. Lebanon.

THE COURT: These hunts are over now: right?

MR. GARFINKEL: That's correct, they are over for the season.

THE COURT: Are you saying if I order disclosure of the volunteers, whether it is their efforts or their land, that these people are going to be harassed or attacked or what?

MR. GARFINKEL: I think that's a possibility. I think if - -

THE COURT: If it is a possibility, is that enough?

MR. GARFINKEL: I think it's more than a possibility. We had specific instances of what has happened when people figure out where hunts, authorized hunts are taking place.

THE COURT: Is that during the time when hunts are in progress?

MR. GARFINKEL: That is during the time when hunts are in progress.

THE COURT: What does the passage of time do to your argument on the personal security exemption?

MR. GARFINKEL: I don't think it changes anything. As a practical matter, the hunt may happen again in the fall. If it does, these same people, their property would conceivably [be] used if they have offered it in the past and it was used in the past, so this problem would go forward into the next season.

Irrespective of that, I think these people could face harassment. My colleague over here, Mr. Barber, has presented the Court with signs,

and your Honor may have seen these signs where some individuals are pro-hunt and some are opposed to the hunt. I do think that there is a risk of harassment.

[The Requester] has apparently faced that own [sic] harassment. She asked for increased patrols at her house, so she is a perfect example of what could happen when this type of information becomes public. There is a reasonable risk here.

What has happened in the past also demonstrates the risk. Before the archery hunt there was the - - it was a trap situation where the deer were trapped and basically put in cages and euthanized. Individuals interfered with that program through - - they sprayed bait in the traps with urine, they wedged sticks to prevent doors from closing, used car horns to frighten deer. Again, this is all evidence of what Chief Lauth testified to in his Affidavit and is in fact become the case.

I think this risk of personal security is very real. You have hunters on the one hand going into the woods alone on private property, and I think there is a risk of them being harassed. And, in fact, we do have a trespass conviction with respect to such an event. That's attached as Exhibit H to the second petition.

So, in other words, Chief Louth's (sic) predictions were correct. First there was the past interference with the program with the hunters alone in the woods who one (sic) has in fact incurred trespassers, and somebody who was convicted of a trespass citation, although they were found not guilty of a hunting related charge.

THE COURT: Found not guilty of what?

MR. GARFINKEL: A hunting related charge. There were two charges, one for trespassing and one relating to interference of the home.

And [the Requester] expressed her own concerns. She asked for increased patrols. She sent an e-mail: I am getting harassed. There are a lot of hateful people commenting in newspapers. Again, that's exactly what can happen here.

While [the Requester] may have taken her position public, the people who submitted to the Municipality that they would offer their services for the property may not have had that same wish.

So Mt. Lebanon has established its burden by a preponderance of the evidence that, A, these e-mails show the individuals who donated property and their services. That clearly fails within the Right to Know

exemption. And the second exemption is personal security, because if the individuals are identified, there is a serious risk to their personal security.

Thank you.

Hearing transcript, pp. 28-33. I disagree with Mt. Lebanon on this issue.

In *Carey v. Pennsylvania Dep't of Corr.*, 61 A.3d 367, 372 (Pa. Cmwith. 2013), the requester, a Pennsylvania state penitentiary inmate, sought records "which may indicate the identities of those who authorized the transfers" of him and other inmates to a Michigan prison. The Department of Corrections based its refusal to disclose the records on the Personal Security exemption. The Commonwealth Court held as follows:

The Personal Security exception protects any record, the disclosure of which "would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual." Section 708(b)(1)(ii) of the RTKL, 65 P.S. § 67.708(b)(1)(ii). ...

To establish this exception, an agency must show: (1) a "reasonable likelihood" of (2) "substantial and demonstrable risk" to an individual's security if the information sought is not protected. *Purcell*. We defined substantial and demonstrable as actual or real and apparent. *Id.* "More than mere conjecture is needed." *Id.* at 820 (citing *Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Cmwith. 2010)).

Personal security issues are of particular concern in a prison setting. *Dep't of Corr. v. Gardner*, (Pa. Cmwith., No. 631 C.D. 2011, filed April 27, 2012) (unreported) (quoting *Commonwealth v. Dugger*, 506 Pa. 537, 542, 486 A.2d 382, 384 (1985) that "[a] prison setting involves unique concerns and security risks" and upholding Personal Security exception as to training materials of identified DOC employee). Given the heightened risk associated with prisons, representations regarding perceived threats to individual DOC personnel posed by inmates are persuasive

Requester seeks the identities of "the individuals or agencies who authorized" the transfers. With regard to this part of the Request, DOC met its burden of proof. In its affidavit, DOC specifically

addressed records that reflect the names of staff who approved or authorized the transfers. DOC explains that many inmates, including Requester, did not want to be transferred. DOC further explained inmates may retaliate against DOC officials who nominated inmates for or authorized transfers. Disclosure of the identities of DOC officials, similar to disclosure of first names of corrections officers, poses a substantial and demonstrable risk to personal security under these circumstances. *Stein v. Office of Open Records*, (Pa.Cmwith., No. 1236 C.D. 2009, filed May 19, 2010) (unreported) (corrections officers' first names protected for personal security reasons).

*Id.* at 373-74.

Mt. Lebanon has failed to meet its burden of establishing the Personal Security exemption. The potential danger inherent in telling state penitentiary inmates who authorized an undesired transfer is obvious. The incidents relied upon by Mt. Lebanon, on the other hand, are akin to acts of protest or civil disobedience. While Chief Lauth's concerns show commendable vigilance in the atmosphere of a hotly debated and divisive community issue, they constitute speculation. He points to no specific threat against any person involved in the deer culling program, including the commissioners who authorized it, whose identities are well known and whose home addresses are easily ascertained. Mt. Lebanon has failed to establish a "substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1)(ii).

#### IV Donation exemption

The RTKL exempts from disclosure records

that would disclose the identity of an individual who lawfully makes a donation to an 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). I agree that this exemption protects the records at issue. The

statute does not define "donation." To donate is "to make a gift of, especially: to contribute to a public or charitable cause." <http://www.merriam-webster.com/dictionary>. One of the dictionary examples of the use of the word is "He donates some of his free time to volunteer work." *Id.* Those who volunteered their archery skills or the use of their property made a contribution because Mt. Lebanon received something of value. What the volunteers offered had value because they contributed to a program the people's representatives in Mt. Lebanon deemed beneficial to its residents and those who use its roads. The OOR offered no analysis to support its conclusion that only conveyance of title to the properties involved would meet the definition of "donation" under section 708(b)(13). In enacting the RTKL, the legislature could have exempted records only pertaining to gifts of a certain type or size, but did not. The legislature apparently believed it was more important to encourage even small donations to an agency than to allow the public to know the identity of the donors. Even construing the Donation exemption narrowly, as I must, I nevertheless conclude that the records withheld are covered thereby.

BY THE COURT

J. Brian  
5/23/16

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:  
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DEPT. OF COURT RECORDS  
CIVIL FAMILY DIVISION  
ALLEGHENY COUNTY PA

16 MAY 23 AM 11:52

FILED

O'BRIEN, J.

## DECISION UNDER 65 P.S. § 67.1302(a)

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.<sup>1</sup>

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.<sup>2</sup> Mt. Lebanon may redact the sender's e-mail address, telephone numbers, fax number and information related to her place of employment.<sup>3</sup>

BY THE COURT

O'Brien J.  
5/23/16

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> The Requester does not object to the redaction of this information.

**PROOF OF SERVICE**

I hereby certify that I am this day serving two (2) true and correct copies of the foregoing **REPRODUCED RECORD** upon the persons and in the manner indicated below, this 6<sup>th</sup> day of September, 2016.

Service by U.S. Mail, first class, postage pre-paid, as follows:

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