

PARTIES

2. Appellant Daniel Sheehan (“Requester”) is an adult individual employed as a reporter at The Morning Call, with a business address of PO Box 1260, Allentown, PA 18105.
3. Appellant The Morning Call, founded in 1883, is the leading media company in the Lehigh Valley and the third largest newspaper in Pennsylvania. Headquartered in Allentown, Pennsylvania, it is part of the Tribune Publishing Company portfolio. Its business address is PO Box 1260, Allentown, PA 18105.
4. Appellee is the South Whitehall Township, a governmental unit with a business address of 4444 Walbert Avenue, Allentown, PA 18104.
5. The following persons entered an appearance in the proceedings below:
 - a. Randy Cope
Agency Open Records Officer
South Whitehall Township
4444 Walbert Avenue
Allentown, PA 18104
info@southwhitehall.com
 - b. Joshua Young, Esq.
Appeals Officer, Deputy Chief Counsel
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
joshyoung@pa.gov

FACTUAL AND PROCEDURAL HISTORY

6. On April 11, 2022 Requester Peter Hall, a reporter for the Morning Call, submitted a letter requesting records from the Township pursuant to the Pennsylvania Right to Know Act, 65 P.S. §§ 67.101 et seq. (the “Instant Request”).
7. The request was emailed to Randy Cope, Interim Township Manager of the South Whitehall Township via email at: info@southwhitehall.com.

8. The request sought, among other records, “Any settlement and release ending litigation in Theresa M Serano’s federal civil rights lawsuit, *Serano v. Golden*, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania.”
9. On May 18, 2022 the Interim Township Manager denied the Instant Request, arguing that the requested settlement agreement is not in the Township’s possession, custody, or control because the Township was dismissed as a named party to the suit on the same day, but prior to, the settlement.
10. Mr. Hall, the original requester, has changed jobs and will be working at a different news organization. Therefore, on June 2, 2022 he authorized another Morning Call reporter, Daniel Sheehan, to substitute for him in this matter.
11. On June 2, 2022, Requester appealed the Township’s denial of the Instant Request to the OOR. A true and correct copy of Requester’s appeal is attached hereto as Exhibit B and incorporated by reference herein.
12. On July 5, 2022, the Office of Open Records issued a determination denying Requester’s June 2, 2022 appeal. A true and correct copy of the OOR determination is attached hereto as Exhibit A. The determination stated that “based on the evidence provided, the Township has met its burden of proof that it does not possess the records sought in the Request.” Ex. A. at 3.
13. Critically, in denying the Instant Request, the OOR failed to address the fact that Golden was sued in his official capacity under 42 U.S.C. §1983, and that the Township was dismissed as a party to the lawsuit on the same day the case settled.

STANDARD AND SCOPE OF REVIEW

14. In adjudicating this matter, this Court may function as a fact finder and exercise plenary review and apply a de novo standard of review. *Bowling v. Office of Open Records*, 75 A.3d 453, 473 (Pa. 2013).
15. This Court may supplement the record to ensure “the broadest scope of review.” *Bowling*, 75 A.3d at 477.
16. The OOR erred in determining that the Township met its burden of proving the requested settlement agreement is not in its possession, custody, or control under *Tribune-Review Publishing Co. v. Westmoreland County Housing Auth.*, 833 A.2d 112 (Pa. 2003).
17. The Township’s attestation fails to address the fact that officer Golden was sued in his official capacity under 42 U.S.C. §1983, which provides civil causes of action for deprivation of rights by a person acting under color of state law.
18. The Township cannot evade its obligation to provide access to records of an agreement settling claims stemming from the actions of an agent of the Township, acting in his official duty, merely by achieving the dismissal of the government agency by name on the eve of settlement.
19. Settlement agreements involving an agency are public records and are accessible regardless of whether the agency has actual physical possession of the agreement. *See e.g., Trib.-Rev. Pub. Co. v. Westmoreland Cty. Hous. Auth.*, 574 Pa. 661, 672 (2003).

Because Officer Golden was sued in his official capacity, and at all times relevant to the lawsuit was acting in an official capacity as an employee of the Township, the Settlement Agreement is subject to the RTKL regardless of whether the Township remained a named defendant in the case.

20. Appellants reserve the right to supplement the record before the Court by briefing the question more fully in a later phase of this litigation, and, should the Court wish, by appearing before the Court at a hearing on this matter.

RELIEF SOUGHT

WHEREFORE, Daniel Sheehan and The Morning Call respectfully request that the Court reverse the final determination of the Office of Open Records; enter a finding that the Township cannot circumvent the RTKL by claiming they have no access to a settlement agreement concerning an employee acting in his official capacity; and order the release of the documents requested; as well as award Petitioner its reasonable costs and attorney's fees and grant any other relief the Court deems appropriate, including penalties pursuant to 65 P.S. § 67.1305(a).

Respectfully submitted,

/s/Paula Knudsen Burke

Attorney for Daniel Sheehan and
The Morning Call

Date: July 28, 2022

VERIFICATION

I, Daniel Sheehan, hereby state that the facts set forth above in the Notice of Appeal are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

_____ *Daniel Sheehan* _____
(signature)

Date: _____ **727/2022** _____

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by:

Signature: /s/*Paula Knudsen Burke*

Name: Paula Knudsen Burke

PA Attorney ID: 87607

CERTIFICATE OF SERVICE

I, Paula Knudsen Burke, hereby certify that a true and correct copy of the foregoing Notice of Appeal was served upon the parties below by Certified Mail (Return Receipt Requested):

Jennifer R. Alderfer, Esq.
Assistant Solicitor
South Whitehall Township
4444 Walbert Avenue
Allentown, PA 18104
jalderfer@zatorlaw.com

And by email to:

Joshua Young, Esq.
Appeals Officer, Deputy Chief Counsel
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
joshyoung@pa.gov

/s/Paula Knudsen Burke

Attorney for Daniel Sheehan and
The Morning Call

Date: July 28, 2022

APPENDIX A



FINAL DETERMINATION

IN THE MATTER OF	:
	:
PETER HALL AND THE MORNING	:
CALL,	:
Requester	:
	: Docket No: AP 2022-1320
v.	:
	:
SOUTH WHITEHALL TOWNSHIP,	:
Respondent	:

On April 11, 2022, Peter Hall and The Morning Call (collectively, the “Requester”) submitted a request (“Request”) to South Whitehall Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other items, “[a] settlement and release ending litigation” in a specific federal court case. On May 18, 2022, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Township partially denied the Request, arguing that the Township does not possess a copy of the requested settlement agreement.

On June 2, 2022, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to

¹ The Township also partially denied the Request to the extent it sought “[i]nformation regarding discipline, demotion or discharge” contained in the personnel file of Officer Golden, which did not reflect the final action of the Township relating to demotion or discharge. Because the Requester does not reference or otherwise dispute the Township’s partial denial on his appeal form, any challenge of the same is waived.

supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal.² 65 P.S. § 67.1101(c).

On June 14, 2022, the Township submitted a position statement, reiterating that it does not possess a copy of the requested settlement agreement, as well as an attestation, made under the penalty of perjury, from Randy Cope, the Township's Interim Manager and Open Records Officer, who attests that a search was conducted and that no responsive records exist in the Township's possession, custody or control. Mr. Cope further attests that he contacted Marshall Dennehey, the law firm appointed by the Township's insurance carrier to defend the Township in the relevant litigation, which advised Mr. Cope that, by Order dated September 21, 2021, the Township was dismissed from the litigation. *Cope Attestation*, ¶¶3(a)(i-ii). Mr. Cope also affirms that the Township "is not and has not been involved in any settlement or release agreement due to the fact that it was dismissed with prejudice as a party to the litigation." *Cope Attestation*, ¶3(a)(iii). Thereafter, Mr. Cope attests, by Order dated October 6, 2021, the Court barred the remaining parties of the litigation, and their legal counsel, from disclosing the terms of the settlement; however, "[t]he [Township] has no knowledge of or access to any settlement or release between the remaining parties." *Cope Attestation*, ¶¶3(a)(iv-v).³

On appeal, the Requester, citing the Pennsylvania Supreme Court's decision in *Trib.-Rev. Pub. Co. v. Westmoreland Cnty. Hous. Auth.*, 833 A.2d 112 (Pa. 2003), contends that the Township has "a legal right to custody or control of" the settlement agreement and, as such, the Requester suggests the Township constructively possesses the settlement agreement and cannot "contract

² Although the Township noted, in its final response, that the records sought in the Request "may affect a legal or security interest of a third party ...[,] contain proprietary or trade secret information ... [,] or are held by a contractor of vendor[,]," see 65 P.S. § 67.1101(c)(1), no third parties contacted the OOR to participate in this appeal.

³ Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. See *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

away the public’s right to access” to the agreement by means of a confidentiality clause. While we agree that the OOR has consistently held that confidentiality clauses contained in settlement agreements involving Commonwealth and local agencies are unenforceable, *see, e.g., Crossen v. Pine Grove Twp. and Roots Farm, Inc.*, OOR Dkt. AP 2020-1270, 2020 PA O.O.R.D. LEXIS 2614; *Zyla and The News-Item v. Coal Twp.*, OOR Dkt. AP 2020-0053, 2020 PA O.O.R.D. LEXIS 2021, the Township, in this case, has submitted evidence explaining that it was dismissed from the litigation prior to the settlement and, as a result, was not a participant in or party to the settlement. *Cf. Trib.-Rev. Pub. Co.*, 833 A.2d at 118-19 (concluding that the preparation of a writing, such as a settlement agreement, by an *attorney for an agency or by an attorney-in fact for the agency’s insurer* is within the possession, custody or control of the agency). Furthermore, there is no evidence in the record to suggest Marshall Dennehey, the law firm retained by the Township’s insurer to represent the Township, or any other attorney prepared the requested settlement agreement on behalf of the Township.⁴ In the absence of any evidence that the Township has acted in bad faith or that the requested records exist in the possession, custody or control of the Township, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Therefore, based on the evidence provided, the Township has met its burden of proof that it does not possess the records sought in the Request. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

⁴ To the extent the Requester implies the Township should possess a copy of the settlement agreement because Officer Golden was sued in both his personal and official capacity as a Township police officer, Mr. Cope attests that the Township discharged Officer Golden as of February 6, 2019, and the complaint initiating the federal lawsuit was filed on January 7, 2021. *Cope Attestation*, ¶3(a)(vii). Mr. Cope also explained that the only payments made by the Township were to Marshall Dennehey for legal fees incurred in the Township’s defense. *Cope Attestation*, ¶3(a)(vi).

For the foregoing reasons, the appeal is **denied**, and the Township is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Lehigh 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 according to Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁵ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 5 July 2022

/s/ Joshua T. Young

JOSHUA T. YOUNG
DEPUTY CHIEF COUNSEL

Sent to: Paula Knudsen Burke, Esq. (via email only);
Jennifer Alderfer, Esq. (via email only);
Randy Cope, AORO (via email only)

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

APPENDIX B

COUNSEL FOR REQUESTER:

Paula Knudsen Burke (PA Attorney ID 87607)
Reporters Committee for Freedom of the Press
PO Box 1328, Lancaster, PA 17608
Phone: 717-370-6884
Email: pknudsen@rcfp.org

June 2, 2022

OFFICE OF OPEN RECORDS
RIGHT TO KNOW LAW APPEAL

REQUESTER:

Daniel Patrick Sheehan
Journalist, The Morning Call
P.O. Box 1260
Allentown, PA 18105
Phone: 610-820-6598
Email: daniel.sheehan@mcall.com

AGENCY:

South Whitehall Township
4444 Walbert Avenue
Allentown, PA 18104
Phone: 610-398-0401
Email: info@southwhitehall.com

RECORDS AT ISSUE IN THIS APPEAL:

On appeal, the only records at issue are Requester's first request: access to "any settlement and release ending litigation in Theresa M Serano's federal civil rights lawsuit, *Serano v. Golden*, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania."

RECORDS SUBMITTED TO AGENCY VIA: EMAIL

DATE OF REQUEST: April 11, 2022

DATE OF INTERIM RESPONSE: April 18, 2022

DATE OF FINAL RESPONSE: May 18, 2022

AGENCY OPEN RECORDS OFFICER: Randy Cope, Interim Township Manager

AGENCY RESPONSE: Request denied

BACKGROUND

1. On April 11, 2022 Requester Peter Hall, a reporter for the Morning Call, submitted a letter requesting records from the Township pursuant to the Pennsylvania Right to Know Act, 65 P.S. §§ 67.101 et seq.
2. The request was emailed to Randy Cope, Interim Township Manager of the South Whitehall Township via email at: info@southwhitehall.com.

3. The request sought, among other records, “Any settlement and release ending litigation in Theresa M Serano’s federal civil rights lawsuit, *Serano v. Golden*, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania.”
4. This request is similar to Requester Hall’s earlier RTKL request submitted on September 29, 2021. The OOR issued a Final Determination denying access to the records in that appeal on December 28, 2021, docketed at AP 2021-2267.
5. On May 18, 2022 the Interim Township Manager denied the present request.
6. The Denial stated “Based on a thorough examination of records in the possession, custody and control of South Whitehall Township, the records you requested do not exist in the possession, custody and control of South Whitehall Township. . . . For all of the reasons cited in the Township's original denial [of the September 2021 RTKL request] as well as the OOR's Final Determination and denial of your Petition for Reconsideration, your request is again DENIED.”
7. Mr. Hall, the original requester, has changed jobs and will be working at a different news organization. Therefore, on June 2, 2022 he authorized another Morning Call reporter, Daniel Sheehan, to substitute for him in this matter. Mr. Sheehan, is now the Requester and appeals the May 18, 2022 denial to the OOR.

REQUESTER’S STATEMENT IN SUPPORT OF RELEASE OF DOCUMENTS AS A PUBLIC RECORD & RESPONSE TO AGENCY’S GROUNDS FOR DENYING REQUEST

Requester first sought access to the *Serano v. Golden* settlement agreement (the “the Settlement Agreement”) in an earlier RTKL request submitted on September 29, 2021 (OOR Dkt. No. AP 2021-2267). The South Whitehall Township (the “Township”) denied Requester’s current bid for records for the same reasons as the earlier request, writing “the records do not exist in the possession, custody, and control of the South Whitehall Township.” In support of their decision to deny access to the Settlement Agreement, the Township offered “the reasons cited in the Township’s original denial as well as the OOR’s Final Determination and denial of [the] Petition for Reconsideration.” In this appeal, the question remains whether the Township can circumvent the RTKL by claiming they have no access to a settlement agreement concerning an employee acting in his official capacity.

Requester seeks settlement documents from a lawsuit filed Jan. 7, 2021, in which the Township, an unknown number of unidentified individuals and former police officer Kyle Golden were sued for violations of civil rights and other injuries stemming from Golden’s alleged assault of the plaintiff Theresa Serrano. Golden was sued in his official and individual capacities. On September 21, 2021 the parties agreed to both (i) dismiss the Township as a defendant and (ii) settle the case pursuant to Rule 41.1(b).

In its response to the original RTKL request, the Township submitted the attestation of Open Records Officer Randy Cope stating that he had searched for the requested records and found no responsive record in the possession of the Township or third-party contractors. Additionally, Cope’s attestation states that he contacted the appointed counsel for the Township who

confirmed that the Township, “is not and has not been involved in any settlement or release agreement due to the fact that it was dismissed with prejudice as a party to the litigation” on the same day the case settled.

Crucially, Cope’s attestation fails to address the fact that Golden was sued in his official capacity under 42 U.S.C. §1983, which provides civil causes of action for deprivation of rights by a person acting under color of state law. A core tenet of §1983 jurisprudence is that an official-capacity suit against an individual is really a suit against that official’s government entity. *See e.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (“Official-capacity suits, in contrast, ‘generally represent only another way of pleading an action against an entity of which an officer is an agent.’”). The Township cannot evade its obligation to provide access to records of an agreement settling claims stemming from the actions of an agent of the Township, acting in his official duty, merely by achieving the dismissal of the government agency by name.

Settlement agreements involving an agency are public records and are accessible regardless of whether the agency has actual physical possession of the agreement. *See e.g., Trib.-Rev. Pub. Co. v. Westmoreland Cty. Hous. Auth.*, 574 Pa. 661, 672 (2003). As the OOR recognized in its December 2021 Final Determination, “[t]hat the litigation settlement involves ‘personal’ as well as ‘official’ conduct, or contains a confidentiality clause, does not vitiate the public nature of the document.” *Id.*, at 670. Because Officer Golden was sued in his official capacity, and at all times relevant to the lawsuit was acting in an official capacity as an employee of the Township, the Settlement Agreement is subject to the RTKL regardless of whether the Township remained a named defendant in the case.

“[C]ourts of the Commonwealth reject a narrow ‘physical possession’ test, focusing instead on whether the subpoenaed party has a legal right to custody or control of the documents in question.” *Id.* at 672. Like the Housing Authority in *Trib.-Rev. Pub. Co.*, the Township argues that it has no possession of the Settlement Agreement because it was dismissed as a party just before the case settled (in fact, on the same day the case was settled). But *Trib.-Rev. Pub. Co.* makes clear that “lack of possession of an existing writing by the public entity at the time of a request pursuant to the Act is not, by itself, determinative of the question of whether the writing is a ‘public record’ subject to disclosure. A writing is within the ambit of the Act if it is subject to the control of the agency.” *Id.* at 671. Here, the Settlement Agreement is within the control of the Township—where an individual is sued in his official capacity, such that a statutory requirement “is proof that the defendant acted under color of state law. It is axiomatic that there must be state action to prevail because the statute does not reach entirely private conduct.” *Id.* Thus, while the Township “may not have actual possession of the settlement agreement, it has control over its production” because Kyle Golden was sued in his official capacity. *Id.*

The Right to Know Law expressly requires access to the records requested in this case because the public has a right to know when the actions of law enforcement officers result in the settlement of a case against an officer acting in his official capacity, even when the agency is dismissed by name at the eleventh hour. It is vitally important to the press and the public to be able to access records that shine a light on law enforcement operations and misconduct, as well as records that illustrate the public funding expended to settle such claims. Importantly, there is no way to know whether public funds have been expended to settle these claims on Golden’s

behalf (through insurance or indemnity) without access to the Settlement Agreement. Because Golden was sued in his official capacity, the public has a strong interest in knowing whether and how much of the settlement payout the Township or the Township's insurer covered.¹

Public access also provides a safeguard and means of accountability. If the Township's argument stands, agencies would be able to negotiate secret settlements for a government agent named in his or her official capacity. This would be against public policy as an impediment to public oversight of government officials. The township official in this case was operating in his official capacity, on behalf of the public, and his conduct resulted in federal litigation and a settlement. The fact that the Township was dismissed as defendant is irrelevant to the public's right to hold public employees accountable for their official conduct. But for Mr. Golden's work for the township, he would not have been involved in the case or the settlement. His official duties, and the apparent dereliction thereof, give the public a statutory right of access and impose an affirmative duty on the township to facilitate access to the settlement that arose as a result of its employee's conduct. It is also important to note that settlements often include non-monetary conditions that legally bind the litigants, including public officials acting in their official capacity. The public has a right to know whether the settlement in this case legally binds a public servant in the performance of his official duties, in addition to any public funding aspects of the settlement. The OOR did not address these arguments in its December 2 Final Determination, and the Township has not addressed this argument in any of its responses. Requester respectfully asks the OOR address the foregoing arguments.

ATTACHMENTS

YES ☐ I have attached a copy of my request for records.

YES ☐ I have attached a copy of all responses from the Agency regarding my request.

YES ☐ I have attached any letters or notices extending the Agency's time to respond to my request.

NO ☐ I hereby agree to permit the OOR an additional 30 days to issue a final determination.

NO ☐ I am interested in resolving this issue through OOR mediation. *(This stays the initial OOR deadline for the issuance of a final determination by 7 business days. If mediation is unsuccessful, the OOR has 30 days from the conclusion of the mediation process to issue a final determination.)*

¹ In the alternative, Requester asks that the OOR conduct an in-camera review of the Settlement Agreement to determine whether the Township's insurer (or the use of any public funding) was involved.



Annie Kapnick <akapnick@rcfp.org>

Public records request

Hall, Peter <peter.hall@mcall.com>
To: info@southwhitehall.com
Cc: PDRTK@swtpd.org
Bcc: akapnick@rcfp.org

Mon, Apr 11, 2022 at 12:47 PM

Please find attached a request for public records pursuant to the Pennsylvania Right to Know Law. If you have any trouble with the attached document, you may contact me at 484-903-3406.

Best regards,
Peter Hall

Peter Hall | Senior Journalist | The Morning Call
P.O. Box 1260 | Allentown, PA | 18105
office: 610-820-6581 | cell: 484-903-3406 | fax: 610-820-6693
email: peter.hall@mcall.com | twitter: @phall215



RTK - South Whitehall - Golden v. Serrano settlement 3-25-22.pdf
151K

Randy Cope, Right-to-Know Officer
South Whitehall Township
4444 Walbert Avenue
Allentown, PA 18104
Office (610) 398-0401
FAX (610) 841-4009
Via email: info@southwhitehall.com

Cc: Chief Glen Dorney

April 11, 2021

To the Right-to-Know officer:

This letter is a request pursuant to the Pennsylvania Right to Know Act, 65 P.S. §§ 67.101 et seq. for the following public records:

- Any settlement and release ending litigation in Theresa M Serano's federal civil rights lawsuit, *Serano v. Golden*, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania.
- All attorney and professional fees relating to the township's defense of itself and Officer Kyle Golden in Theresa M Serano's federal civil rights lawsuit, *Serano v. Golden*, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania.
- Payment records to Theresa M Serano, Officer Kyle Golden, and their agents, relating to the *Serano v. Golden* litigation, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania."
- Checkbook register for South Whitehall Township for any payments dated January 7, 2019, to present day.
- Requester seeks records of the agency's final action regarding the demotion or discharge of Officer Kyle Golden.

Pennsylvania courts have made clear that settlement agreements (such as those requested in response to this RTKL request) are subject to access. The court has held that where, as here, a "settlement agreement fixes the personal or property rights of the parties or calls for the payment of money involving the disbursement of public funds, it is subject to disclosure under the RTKL." *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 648 (Pa. Commw. Ct. 2006) (internal citations omitted) (emphasis added). Moreover, "courts of the Commonwealth reject a narrow "physical possession" test, focusing instead on whether the subpoenaed party has a legal right to custody or control of the documents in question." *Trib.-Rev. Pub. Co. v. Westmoreland Cty. Hous. Auth.*, 574 Pa. 661, 672 (2003). Where an individual is sued in his official capacity, such that a statutory requirement "is proof that the defendant acted under color of state law. It is axiomatic that there must be state action to prevail because the statute does not reach entirely private conduct." *Id.* at 671.

It is also well settled that the RTKL does not permit an agency to withhold a record simply because it has promised confidentiality. In *Tribune–Review Publishing*, the court held that “[a] public entity may not enter into enforceable promises of confidentiality regarding public records.” *Tribune-Review Publ’g Co. v. Westmoreland County Hous. Auth.*, 833 A.2d 112, 120 (Pa. 2003). Moreover, an agency “may not contract away the public’s right of access to public records because the purpose of access is to keep open the doors of government, to prohibit secrets, to scrutinize the actions of public officials and to make public officials accountable in their use of public funds. . . . A confidentiality clause contained in a settlement agreement that runs afoul of the RTKL violates public policy and is unenforceable.” *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 649 n.11 (Pa. Commw. Ct. 2006) (citing *Tribune-Review Publ’g Co.*).

Requester notes that the Right to Know Law in Section 708(b)(7)(viii) states that information regarding discipline, demotion or discharge contained in a personnel file shall be exempt from disclosure. However, the section clarifies that requesters can access information about limited information regarding an employee’s termination or demotion. “This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.”

I would prefer to receive these records electronically via email at peter.hall@mcall.com. If you would like to discuss this request or have any questions, please call me at 484-903-3406.

Best regards,
/s/
Peter Hall
Staff writer

----- Forwarded message -----

From: **Tracy J. Fehnel** <fehnel@southwhitehall.com>
Date: Mon, Apr 18, 2022 at 4:50 PM
Subject: Please find attached response to your RTK 2022-16
To: Hall, Peter <peter.hall@mcall.com>
Cc: Randy Cope <coper@southwhitehall.com>

Good Afternoon Mr. Hall:

Please find attached response to your RTK Request from Randy Cope,
Interim Township Manager/ORO.

Sincerely,

A handwritten signature in black ink, appearing to read "Tracy".

Tracy J.B. Fehnel

Insurance Administrator & Executive Assistant to

Randy T. Cope, Interim Twp Manager &

Director of Township Operations/ORO

[4444 Walbert Avenue](#)

[Allentown, PA 18104](#)

610-398-0401, x202

SOUTH WHITEHALL TOWNSHIP

4444 Walbert Avenue, Allentown, PA 18104-1699
www.southwhitehall.com • 610-398-0401

Right-To-Know Law Extension Notice

April 18, 2022

Mr. Peter Hall
c/o THE MORNING CALL
peter.hall@mcall.com

Re: Right-to-Know 2022-16

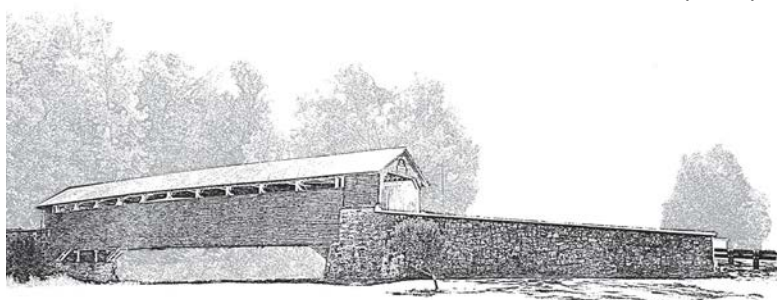
Dear Mr. Hall:

Thank you for writing to South Whitehall Township to request records pursuant to Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.* On April 11, 2022, you requested the following:

- *Any settlement and release ending litigation in Theresa M Serano's federal civil rights lawsuit, Serano v. Golden, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania.*
- *All attorney and professional fees relating to the township's defense of itself and Officer Kyle Golden in Theresa M Serano's federal civil rights lawsuit, Serano v. Golden, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania.*
- *Payment records to Theresa M Serano, Officer Kyle Golden, and their agents, relating to the Serano v. Golden litigation, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania.*
- *Checkbook register for South Whitehall Township for any payments dated January 7, 2019, to present day.*
- *Requester seeks records of the agency's final action regarding the demotion or discharge of Officer Kyle Golden.*

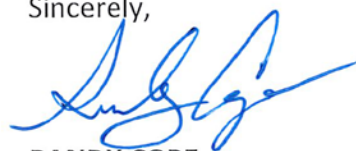
Pursuant to Section 902(a) of the RTKL, an additional 30 days are required to respond because (check all that apply):

- The request requires redaction in accordance with Section 706 of the RTKL.
- ☐ The request requires the retrieval of a record stored in a remote location.
 - ☐ A timely response cannot be accomplished due to bona fide staffing limitations.
 - ☐ A legal review is needed to determine whether the record is subject to access.
 - ☐ The requester has not complied with the Agency's policies regarding access to records.
 - ☐ The requester refuses to pay applicable fees authorized by the RTKL.
- The extent or nature of the request precludes a response within the required time period.



South Whitehall Township expects to respond to your request on or before Wednesday, May 18, 2022. Should you have any questions or concerns with regard to this extension, please feel free to contact our office.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Randy Cope', with a stylized, flowing script.

RANDY COPE

ORO/Interim Township Manager

----- Forwarded message -----

From: **Tracy J. Fehnel** <fehnel@southwhitehall.com>

Date: Wed, May 18, 2022 at 4:11 PM

Subject: Please find attached Response to your RTK Request 2022-16

To: Hall, Peter <peter.hall@mcall.com>

Cc: Randy Cope <coper@southwhitehall.com>

Good Afternoon Mr. Hall:

Please find attached Response to your RTK Request 2022-16 from Randy Cope, Interim Township Manager. Should you have any questions with regard to this response, please do not hesitate to contact our office.

Sincerely,



Tracy J.B. Fehnel

Insurance Administrator & Executive Assistant to

Randy T. Cope, Interim Twp Manager &

Director of Township Operations/ORO

[4444 Walbert Avenue](#)

[Allentown, PA 18104](#)

610-398-0401, x202



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2022.05.18 - RTK 2022-16 Response to Mr. Peter Hall, The Morning Call w-attachments.pdf
5891K

SOUTH WHITEHALL TOWNSHIP

4444 Walbert Avenue, Allentown, PA 18104-1699
www.southwhitehall.com • 610-398-0401

Right-To-Know Response

May 18, 2022

Mr. Peter Hall
THE MORNING CALL
101 North Sixth Street
PO Box 1260
Allentown, PA 18105

Re: Right-To-Know Response 2022-16

Dear Mr. Hall:

Thank you for writing to South Whitehall Township to request records pursuant to Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*

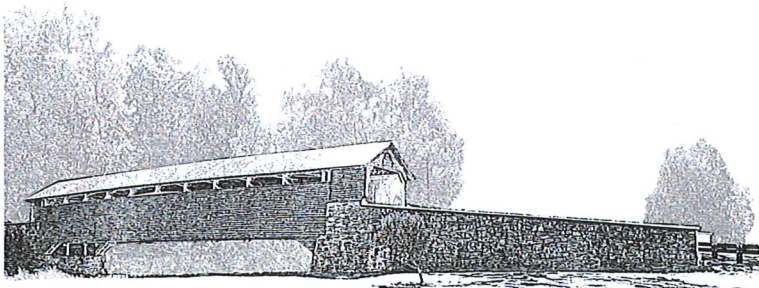
On April 11, 2022, you requested the following:

- Any settlement and release ending litigation in Theresa M Serano's federal civil rights lawsuit, Serano v. Golden, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania.
- All attorney and professional fees relating to the township's defense of itself and Officer Kyle Golden in Theresa M Serano's federal civil rights lawsuit, Serano v. Golden, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania."
- Checkbook register for South Whitehall Township for any payments dated January 7, 2019, to present day.
- Requester seeks records of the agency's final action regarding the demotion or discharge of Officer Kyle Golden.

By letter dated April 18, 2022, the Township provided you with notice of an extension of time pursuant to RTKL Section 902.

Your request is granted in part and denied in part as follows:

- Requested record: "Any settlement and release ending litigation in Theresa M Serano's federal civil rights lawsuit, Serano v. Golden, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania."



- Township response: The request is DENIED. Based on a thorough examination of records in the possession, custody and control of South Whitehall Township, the records you requested do not exist in the possession, custody and control of South Whitehall Township. Your request is duplicative of an earlier RTKL Request submitted by you on September 29, 2021. That request was denied for the same reasons. You subsequently appealed that denial and the OOR denied your appeal in a Final Determination dated December 2, 2021. You also filed a Petition for Reconsideration, which the OOR denied on December 28, 2021. For all of the reasons cited in the Township's original denial as well as the OOR's Final Determination and denial of your Petition for Reconsideration, your request is again DENIED.
- Requested record: "All attorney and professional fees relating to the township's defense of itself and Officer Kyle Golden in Theresa M Serano's federal civil rights lawsuit, Serano v. Golden, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania."
- Township response: The request is GRANTED and all responsive records are attached hereto.
- Requested record: "Checkbook register for South Whitehall Township for any payments dated January 7, 2019, to present day."
- Township response: The request is GRANTED and all responsive records relating to the subject litigation are attached hereto.
- Requested record: "Requester seeks records of the agency's final action regarding the demotion or discharge of Officer Kyle Golden."
- Township response: The request is GRANTED IN PART AND DENIED IN PART. As requestor acknowledges in his RTKL Request, Section 708(b)(7)(viii) of the RTKL exempts from access "Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge." As a result, the request is denied to the extent that it seeks Officer Golden's personnel file. The request is granted insofar as the Township Board of Commissioners meeting minutes from February 6, 2019 reflecting the final action of the agency are attached hereto.

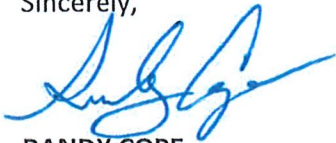
Some of the records/information you have requested may affect a legal or security interest of a third party; contain confidential proprietary or trade secret information; or are held by a contractor or vendor. See 65 P.S. § 67.1101(c)(1). If you choose to file an appeal, third parties with a direct interest in these records will be notified and have the opportunity to participate in that appeal.

You have a right to appeal this denial in writing to: Office of Open Records, 333 Market St., 16th Floor, Harrisburg, PA 17101-2234. Appeals can also be filed online at the Office of Open Records website, <https://www.openrecords.pa.gov>.

If you choose to file an appeal you must do so within 15 business days of the mailing date of the agency's response. See 65 P.S. § 67.1101. Please note that a copy of your original RTKL request, the agency's extension notice, and this denial letter should be included when filing an appeal. More information about how to file an appeal under the RTKL is available at the Office of Open Records website, <https://www.openrecords.pa.gov>.

If you have additional questions, please contact Randy Cope. This correspondence will serve to close this record with our office as permitted by law.

Sincerely,



RANDY COPE

ORO/Interim Township Manager