

6. All meeting minutes regarding changing or transitioning prescription plans from July 1, 2021, to September 2, 2022.

7. All communication to vendors regarding changing or transitioning prescription plans from July 1, 2021, to September 2, 2022.

8. All communication from members regarding changing or transitioning prescription plans from July 1, 2021, to September 2, 2022.

9. All records regarding the tiers of prescriptions covered by the [Consortium].

On September 15, 2022, the Consortium denied the Request, arguing that it did not qualify as an agency under the RTKL, and therefore was not subject to the RTKL. 65 P.S. § 67.102.

On September 29, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the Consortium’s denial and arguing that either the Consortium is an agency subject to the RTKL, or that it is a contractor of the Butler Area School District (“District”) and the records should be produced pursuant to Section 506(d) of the RTKL.¹ The OOR invited both parties to supplement the record and directed the Consortium to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 4, 2022, the Requester submitted the sworn affidavit of Michael Dobransky, who attests that the District was self-insured prior to joining the Consortium, has a contract with the Consortium, that the Consortium is an unincorporated 501(c)(9) association consisting of 72 member public or private educational institutions, that the Consortium receives funding by invoicing those members, and that it is controlled by a Board of Trustees appointed by member districts and employee unions. The Requester also submitted a copy of the contract between the

¹ The Requester alleges that an identical Request was submitted to the District, which asked for the records from the Consortium and was denied. The Consortium alleges that the Requester is solicitor for the District, who is demanding the records to waste the Consortium’s time and money as a punishment for denying a request by the District to pay for a wellness event. Because the appeal did not name the District as a respondent agency and does not include a copy of the RTKL request or subsequent denial sent to or by the District, the OOR has no jurisdiction in this matter to determine whether the District can be required to produce those records.

District and the Consortium, as well as court filings describing the Consortium and an agreement between school entities constituting the Consortium.

The same day, the Consortium submitted a position statement, acknowledging that it is a Voluntary Employee Benefits Association comprised of 91 public and private school employers in western Pennsylvania. The Consortium noted that it has no employees, but operates off of third-party vendors, and argues that it is not an agency under the meaning of the RTKL because it does not meet the statutory definitions for a Commonwealth or local agency, and is not a “similar governmental entity” because there is no government control of its board, it was not established by enabling legislation or ordinance, it performs no governmental function to the benefit of the public, and the receipt of public funds alone does not qualify the Consortium as an agency under the RTKL. The Consortium also provided evidence that it had notified third parties of the appeal, and the verification of Michael Garofalo, Vice President of Aon Risk Services Central, Inc., a consultant for the Consortium, who attests as to the activities of the Consortium and the history of the appeal.

LEGAL ANALYSIS

The Requester asserts that the Consortium is local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Consortium would be required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). 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 sole issue on appeal is whether the Consortium is an agency subject to the RTKL, or a private entity that is not obligated to respond to RTKL requests. The RTKL provides for access to public records, which are records in the possession of a Commonwealth agency or a local agency. 65 P.S. § 67.305(a). The Consortium is a non-profit Voluntary Employee Beneficiary Association under 501(c)(9) of the Internal Revenue Code, which was created by a group of public and non-public schools in western Pennsylvania for the purpose of handling health insurance claims for their employees. IRC §501(c)(9) (providing for the tax-exempt status of such associations).

It is uncontested among the parties that the Consortium is not a Commonwealth agency, because it is not an “office, department, authority, board, multistate agency or commission of the executive branch, an independent agency [or] a State-affiliated entity” or “organization established by the Constitution of Pennsylvania, a statute or an executive order [...]” 65 P.S. § 67.102. Likewise, the parties agree that the Consortium is not “[a]ny political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school.” *Id.* However, the Requester argues that the Consortium qualifies as a “local agency” due to its status as a “local, intergovernmental, regional or municipal agency, authority, council, board, commission or *similar governmental entity.*” *Id.* (emphasis added).

In *Pysher v. Clinton Twp. Volunteer Fire Co.*, 209 A.3d 1116 (Pa. Commw. Ct. 2019), the Commonwealth Court discussed its decision in *Appeal of Hadley*, 83 A.3d 1101 (Pa. Commw. Ct. 2014), wherein the Court “evaluated whether a regional alliance of businesses, industry, and tourism, which was a private nonprofit, was a ‘similar governmental entity’ to be considered a

‘local agency’ under the RTKL.” *Pysher*, 209 A.3d at 1123. In *Hadley*, the Commonwealth Court set forth several factors to be considered when assessing whether an organization is considered a “similar government entity[,]” including the degree of governmental control, the nature of the organization's functions, and financial control. *Id.*; *see also Hadley*, 83 A.2d at 1108. The Court explained that with respect to the first factor, a court should review the “organizational structure, purposes, powers, duties and fiscal affairs” of the organization. *Id.* The Court also noted that “cooperation with the government is insufficient to establish control.” *Id.* Regarding the second factor, the Court held that “[t]he function an entity performs weighs heavily in a local agency assessment. The function must be governmental, but it need not be ... essential. To qualify as governmental, the function must be a substantial facet of a government activity.” *Id.* Finally, with respect to financial control, the Court noted that “the less government financing, the less likely it was that there was governmental control.” *Id.*

First, the Consortium is funded primarily by invoices to school districts and similarly situated educational entities. The Consortium attests that it receives substantial funds from both public and non-public sources; however, it does not offer any rebuttal to the Requester’s argument that the bulk of such funding comes through public agencies and sources. Garofalo Attestation ¶20² (“[The Consortium’s funding comes from a variety of sources including hospital incentive income, prescription drug rebates, income from drug coupon reimbursements, income from financial guarantees, Medicare Part D subsidies, retention funds, and premiums paid by the Employers.”) For this analysis, it is sufficient to find that the Consortium receives substantial

² Under the RTKL, an affidavit or statement made under 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. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Consortium has acted in bad faith, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’t Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (*citing Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

government financing; though, as noted above, that factor is not controlling. *See Id. at 1123* (“There are a number of organizations subject to government regulation, particularly those that receive public funds, such as grants. To hold a privately incorporated nonprofit that is somehow regulated by the government to be an agency subject to the RTKL without regard to the extent of control exercised by the government or other factors could have far-reaching and unintended effects.”)

Next, the Consortium is comprised of a board of directors, half of whom are selected in various ways from the employers who are members; the other half are selected from unions or other school employee associations. Garofalo Attestation ¶9. This presents an unusual situation wherein the membership of the Consortium is comprised largely of employees or officials of multiple public agencies, but no single agency involved can exercise significant control over the organization.

In *Philadelphia Industrial Development Corporation v. Ali*, the Commonwealth Court examined the Philadelphia Industrial Development Corporation (“PIDC”), a joint venture between the City of Philadelphia and the Philadelphia Chamber of Commerce to promote economic growth and industry. 2011 Pa. Commw. Unpub. LEXIS 317 (Pa. Commw. Ct. 2011). There, the PIDC had a 30-member board, of which the City nominated just over half in part, but with only seven *ex officio* members. *Id.* The Commonwealth Court concluded, in that case, that the PIDC was not subject to governmental control because the board was not appointed exclusively by the City, it was not created pursuant to ordinance, was not created by or constituted as a political subdivision, required no delegation of authority, and could not be disbanded by the government. *Id.*

In this case, the Consortium’s officers are not exclusively appointed by any agency, or even a group of agencies collectively, and it was not created by an exercise of governmental authority

or constituted as a political subdivision. Garofalo Attestation ¶6. The Consortium’s contract does contain a provision for termination, but this requires a 2/3rds majority vote among Consortium members rather than some form of legislation, and all assets or losses are apportioned among participating entities according to allocation. Requester’s Exhibit A, p21.³ As such, it appears that no individual agency exercises substantial authority over the Consortium, and even on a collective level the public agency members control half or less than half of the Consortium’s board membership, which the Commonwealth Court considered insufficient to show “governmental control” in *Ali*.

Finally, the parties disagree over whether the nature of the Consortium’s business reflects an “essential governmental function.” *But see Pysher*, 209 A.3d at 1123 (noting that the function need not be “essential”, but merely “a substantial facet of government activity”). It is apparent from the submitted evidence, especially the Consortium’s originating agreement, that the purpose of the Consortium is to collect payments from the member schools and coordinate them among contractors for the provision of health services and benefits to the employees of each member school. Requester’s Exhibit A, p13-15. The Consortium argues that this is not a governmental function at all- merely the function of an employer, private or public. *See, e.g., SWB Yankees v. Wintermantel*, 45 A.3d 1029 (Pa. 2012) (finding that “governmental function” under Section 506(d) of the RTKL referred to some “non-ancillary” function contracted out by a governmental unit.) The Requester argues that this provision of healthcare is a mandatory duty among these member schools and is therefore a substantial governmental function.

It is true that the Consortium has taken on a variety of roles and purposes that were previously performed by governmental entities, but this does not mean that those activities are

³ Requester’s Exhibit A is the 2003 Agreement constituting the Consortium, which Mr. Garofalo’s attestation confirms is the organic document governing the Consortium. Garofalo Attestation ¶6.

“governmental” in nature. The provision of health insurance to employees is a requirement common to both public and private employers, and one that can be accomplished in a variety of ways, including through wholly nongovernmental agencies. Contrary to past cases where agencies such as volunteer fire departments have been analyzed, the Consortium is not responsible for administration of any traditional governmental responsibilities, and the OOR cannot find that the exchange of money for health insurance services is a “substantial facet of government activity” when it is largely done by and through private providers. *Pysher*, 209 A.3d at 1123. Therefore, the Consortium receives substantial public funding but is not subject to majority control by one or multiple *government* agencies and does not carry out a substantial facet of government activity, and the *Pysher* factors favor a finding that the Consortium is not a local agency for the purposes of the RTKL. Because the Consortium is not an agency under the RTKL, the appeal must be dismissed.

However, as noted above, the OOR has no jurisdiction in this case to determine whether records related to any specific school entity, in the Consortium’s possession, could be obtained through filing a RTKL with that school entity. 65 P.S. § 67.506(d) (“A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and that directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.”) The OOR does not purport to hold, in this Final Determination, that any of the *Pysher* analysis is determinative of the factors required to reach third party contractor records under Section 506 of the RTKL.

CONCLUSION

For the foregoing reasons, the appeal is **dismissed**, and the Consortium is not required to take any further action at this time. 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. 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 30, 2022

/s/ Jordan C. Davis

SENIOR APPEALS OFFICER
JORDAN DAVIS

Sent via email to: Michael Dobransky, Esq. (via email only);
Robert Junker, Esq. (via email only)

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