

4. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and Hellertown Library from January 1, 2020, through the present date pertaining to the use of the Hellertown Library by Lower Saucon Township residents.
5. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and OCL from January 1, 2020, through the present date pertaining to any dispute between Hellertown Borough and Lower Saucon Township regarding the Hellertown Library.
6. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Library and OCL from January 1, 2020, through the present date pertaining to any dispute between Hellertown Borough and Lower Saucon Township regarding the Hellertown Library.
7. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and Hellertown Library from January 1, 2020, through the present date pertaining to any dispute between Hellertown Borough and Lower Saucon Township regarding the Hellertown Library.
8. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Library and OCL from January 1, 2020, through the present date pertaining to the management of the Hellertown Library.
9. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and OCL from January 1, 2020, through the present date pertaining to the management of the Hellertown Library.
10. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and Hellertown Library from January 1, 2020, through the present date pertaining to the management of the Hellertown Library.
11. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Library and OCL from January 1, 2020, through the present date pertaining to the funding of the Hellertown Library.
12. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and OCL from

- January 1, 2020, through the present date pertaining to the funding of the Hellertown Library.
13. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and Hellertown Library from January 1, 2020, through the present date pertaining to the funding of the Hellertown Library.
 14. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Library and OCL from January 1, 2020, through the present date pertaining to the Hellertown Library’s service area.
 15. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and OCL from January 1, 2020, through the present date pertaining to the Hellertown Library’s service area.
 16. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Borough and Hellertown Library from January 1, 2020, through the present date pertaining to the Hellertown Library’s service area.
 17. All internal communications pertaining to any dispute between Hellertown Borough and Lower Saucon Township from January 1, 2020, through the present date.
 18. All internal communications pertaining to the funding of Hellertown Library from January 1, 2020, through the present date.
 19. All internal communications pertaining to the service area of the Hellertown Library from January 1, 2020, through the present date.
 20. All memorandum, reports, files, etc. pertaining to the use of the Hellertown Library by Lower Saucon Township residents from January 1, 2020, through the present date.
 21. All memorandum, reports, files, etc. pertaining to the funding of the Hellertown Library from January 1, 2020, through the present date.
 22. All memorandum, reports, files, etc. pertaining to the service area of the Hellertown Library from January 1, 2020, through the present date.

The Library did not respond within five business days of receiving the Request, and the Request was therefore, deemed denied. *See* 65 P.S. § 67.901.

On November 7, 2022, the Requester appealed to the Office of Open Records (“OOR”), stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Library to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 16, 2022, the Requester submitted a position statement, reiterating its argument that the Library is an agency under the RTKL, as well as copies of meeting minutes, correspondence from the Pennsylvania Department of Education, and Library Services Agreements between the Library and Hellertown Borough (the “2022 Agreement”) and the Library, Hellertown Borough and Lower Saucon Township (the “2016 Agreement”). In support of her position, the Requester submitted the statement, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities, of B. Lincoln Treadwell, Jr., Esq., the Solicitor for Lower Saucon Township.

On the same day, the Library submitted a position statement, the contents of which were verified, subject to the penalties of 18 Pa.C.S. § 4904, by Jason Bates, Esq., legal counsel for the Library. The Library also submitted a statement, made subject to the penalties of 18 Pa.C.S. § 4904, from Ken Solt, the President of the Library’s Board of Directors, as well as a copy of the

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”). Furthermore, on November 10, 2022, the OOR dismissed the instant appeal, concluding that the Library was not an agency under the RTKL. On November 23, 2022, the Requester filed a Petition for Reconsideration, asking the OOR to reopen the record to permit the submission of evidence proving the Library is, in fact, an agency. By Order dated November 30, 2022, to ensure the parties had a meaningful opportunity to present arguments, the OOR vacated the original final determination and established case deadlines.

2022 Agreement and various organizational documents concerning the Library's Board of Directors, including by-laws and a list of Board Directors.

LEGAL ANALYSIS

Records in the possession of local agencies 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. Local agencies are 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 before the OOR is whether the Library falls within the definition of a local agency under the RTKL, which defines “local agency” as:

- (1) Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school.
- (2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.

65 P.S. § 67.102. As the Library notes in its position statement, the OOR has, on numerous occasions, found public libraries to fall outside the definition of an agency under the RTKL. *See, e.g., Mahon v. Plymouth Public Library*, OOR Dkt. AP 2015-1045, 2015 PA O.O.R.D. LEXIS 1094; *Hanover Twp. Board of Supervisors v. Bethlehem Area Public Library*, OOR Dkt. AP 2012-2053, 2012 PA O.O.R.D. LEXIS 1477; *Wolf v. Lancaster Public Library*, OOR Dkt. AP 2010-0414, 2010 PA O.O.R.D. LEXIS 381.

In *Pysher v. Clinton Twp. Volunteer Fire Co.*, the Commonwealth Court provided guidance as to the types of information needed to determine whether an agency—in that case, a volunteer fire department—constitutes a local agency subject to the RTKL. 209 A.3d 1116 (Pa. Commw. Ct. 2019); *see also Bohman v. Clinton Twp. Volunteer Fire Co.*, 212 A.3d 145 (Pa. Commw. Ct. 2019). The Court set forth several factors to be considered when assessing whether an organization is considered a “similar governmental entity,” including the degree of governmental control, the nature of the organization’s functions, and financial control. *Pysher*, 209 A.3d at 1123 (citing *Appeal of Hadley*, 83 A.3d 1101, 1108 (Pa. Commw. Ct. 2014)). The Court explained that, with respect to the first factor, the factfinder must review the “organizational structure, purposes, powers, duties and fiscal affairs” of the organization, noting 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”; rather, “the function must be a substantial facet of a government activity.” *Id.* (quoting *Hadley*, 83 A.3d at 1109). 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.*

As a preliminary matter, there appears to be no dispute that the nature of the function at issue in this appeal—the provision of library services—constitutes “a substantial facet of government activity,” particularly where the Library meets the definition of a public library under the Pennsylvania Library Code of 2012 (“Library Code”), 24 P.S. §§ 9301 *et seq.*, and, as noted in the Solt statement, was organized as a “non-profit public library under the Laws of the Commonwealth of Pennsylvania and the Pennsylvania Library Code” and makes “library services available to all residents of the Borough of Hellertown....” *See also* 22 Pa. Code § 141.21

(providing that local libraries “shall be an integral part of general local government”). Instead, the Library focuses on whether the Borough exercises financial and governmental control over the Library.

Regarding financial control, the Solt statement² affirms as follows:

All of the assets of the [Library] are solely owned by the Library itself and are not controlled by Borough Council.

The Board of Directors creates a budget which is provided to the ... Borough Manager to share with Borough Council. Neither Borough Council nor the Borough Manager have ever provided for or have been ask[ed] for input.

Solt Statement, ¶¶ 10-11. Furthermore, in its position statement, the Library argues that, even though the Borough provides financial support to the Library, “the mere acceptance of governmental funding alone does not convert the Library into a ‘local agency’ for purposes of the RTKL.” To do so, the Library contends, “will create a significant administrative burden, including time, costs and/or attorney’s fees, to libraries that already are struggling with financial burdens” and would “likely result in the dissolution of many nongovernmental nonprofits that provide our communities with critical services.”

While we agree that the receipt of government funding does not automatically transform a non-profit public library into a local agency under the RTKL, *see Pysher*, 209 A.3d at 1123 (“...the less government financing, the less likely it was that there was government control”); *see also Mooney v. Bd. of Trs. of Temple Univ.*, 292 A.2d 395, 399 (Pa. 1972), the 2022 Agreement, which became effective on February 1, 2022, establishes that “[t]he Borough shall pay to the Library a yearly sum to cover the operating costs of the Library” and, “[i]n 2022, ... a one-time supplemental emergency appropriation of \$75,000 ... to be utilized for Library operating expenses at the

² Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *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).

discretion of the Library Board of Directors.” 2022 Agreement, ¶¶ 4A-B. The 2022 Agreement further reads that this yearly operating amount is “subject to the presentation of a library budget to the Borough Council, and an *approval* of the operating costs for each subsequent year *by that Council.*” 2022 Agreement, ¶ 4A (emphasis added). Finally, the Library is obligated to meet with the Borough Manager in preparing the budget “to discuss funding and operational costs,” and the Borough has the right to inspect the Library’s financial books and records and, once every two years, may “conduct its own independent audit of review of the Library’s financial books and records.” 2022 Agreement, ¶¶ 6-7.

With respect to governmental control, the 2022 Agreement provides that the Borough has the power to appoint a majority of the Library’s Board of Directors and that “Library Board shall have the power to plan for, implement, and manage all library services, programs and activities in accordance with its By-Laws, rules and regulations.” 2022 Agreement ¶¶5A-B. Notably, however, the Library’s amended By-Laws may only be adopted by the Library Board “with the approval of Hellertown Borough” and “no amendments may be made to the powers granted to the Borough in the By-Laws to appoint Board members as provided in the By-Laws without the prior approval of the Borough.” 2022 Agreement, ¶5B. The amended By-Laws, which were adopted on March 22, 2022, provide that five of the seven Board members must be appointed by the Hellertown Borough Council³ and at least one of the Borough’s appointments must serve on the Hellertown Borough Council.⁴ Hellertown Library Association By-Laws, Article IV, Section A, Subsections 1 and 2.

³ The Public Library Code provides that “[t]he municipal officers of the municipality in which the local library is established shall appoint any members of the board and fill any vacancies on the board....” 24 Pa.C.S. § 9318(b)(1).

⁴ In his statement, Mr. Solt explains that there are presently two members of the Hellertown Borough Council serving on the Library Board of Directors. *Solt Statement*, ¶7.

The Library argues that the Borough does not have control over the day-to-day services of the Library and that “there is nothing in the Agreement to suggest that the Borough ... would exercise direct control over the operations of the Library through the Board of Directors.” While this may be true, the fact remains that the 2022 Agreement and the amended Library By-Laws permit the Borough to exercise financial and governmental control over the Library. The Borough, which is contractually obligated to cover the annual operating costs of the Library, must be consulted on⁵ and presented with the Library’s annual budget and must approve the Library’s yearly operating expenses. The Borough is also granted the authority to appoint a majority of the Library’s Board of Directors, to include at least one of its own Council members, and approve the amendment of the Library’s By-Laws as it pertains to the appointment of more than two-thirds of the Library’s Board of Directors. *Cf. Appeal of Hadley, supra* (concluding that a business, industry and tourism alliance was not a “similar governmental entity” where there was no governmental control over the alliance’s operations, including its organizational structure, purposes, powers, duties and fiscal affairs and the government’s financing of the alliance was “proportionally small”); *Phila. Indus. Dev. Corp. v. Ali*, 2011 Pa. Commw. Unpub. LEXIS 317 (Pa. Commw. Ct. 2011) (holding that the PIDC was not a “similar governmental entity” where, among other things, it was not created by a political subdivision pursuant to a specific statutory power, its members were not appointed exclusively by the governing body of a political subdivision, it did not require the delegation of authority from a political subdivision to perform its function).⁶ Accordingly, the Library meets the definition of a “similar governmental entity” and is, therefore, a local agency under the RTKL.

⁵ The Library’s Director is obligated to meet with the Borough Manager “to discuss funding and operational costs” on an annual basis.

⁶ An unreported opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414.

Furthermore, because the Library has neither raised nor supported with evidence any additional grounds for withholding the requested records, it has failed to meet its burden of proof under the RTKL. *See* 65 P.S. § 67.305; 65 P.S. § 67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Library is required to provide all responsive records 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 Northampton 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.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 6 January 2023

/s/ Joshua T. Young

JOSHUA T. YOUNG
DEPUTY CHIEF COUNSEL

Sent via email to: Susan Longnaker;
Tricia Springer, Esq.;
Jason Bates, Esq.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).