

David Bedillion
522 E Spruce St
Perkasie, PA 18944

Date: February 4, 2023

Bedillion v. Bucks County Free Library; OOR Dkt. AP 2022-2853
Requester Petition for Reconsideration

Introduction:

I, the Requester in the above-referenced matter, am respectfully requesting reconsideration and modification of the Final Determination issued and mailed on January 23, 2023.

This Petition is filed pursuant to *1 Pa. Code § 35.241* as an application for reconsideration and modification of the Final Determination in the above-referenced matter. The Final Determination is attached for reference.

Specifically, I believe that the Office of Open Records (OOR) Appeals Officer made several inadvertent errors in their legal analysis and application of the relevant case law (*Pysher v. Clinton Twp. Volunteer Fire Co.*, 209 A3.d 1116 (Pa. Commw. Ct. 2019) and *Appeal of Hadley*, 83 A.3d 1101, 1108 (Pa. Commw. Ct. 2014) with respect to the Bucks County Free Library ("BCFL"). By ignoring the governmental nature of the BCFL, the proportion of government funding received by the BCFL, the governmental control of the BCFL as evidenced by the County Commissioner's appointment of the BCFL's entire Board of Directors, and other applicable facts presented in evidence (some of which the OOR Appeals Officer seems to not take into account), the OOR Appeals Officer inadvertently erred in their Final Determination that the BCFL does not meet the definition of a "similar governmental agency." Additionally, the legal analysis used in the instant appeal is inconsistent from that used in other OOR appeals involving public libraries, such as *Susan Longnaker v. Hellertown Area Library Association; OOR Dkt. AP 2022-2541*, where, using the same case laws (*Pysher* and *Hadley*), the OOR ruled that the Library does, in fact, meet the definition of a "similar governmental agency" and is therefore a local agency under the Right to Know Law (RTKL), or *Walsh v. Carnegie Library; OOR Dkt. AP 2009-1150*, where the OOR also evaluated whether the Library's Board is "appointed by a government entity or official" in determining if the Library met the definition of a "similar governmental agency."

Reconsideration and modification of the Final Determination is both permissible and appropriate pursuant to *1 Pa. Code § 35.241(b)* because the inadvertent errors in the legal analysis and ruling are in direct opposition to the referenced case law and also contradict final determinations made by the OOR in previous appeals involving public libraries.

As set forth more fully below, I am respectfully requesting that the OOR reconsider the Final Determination and that the Appeals Officer provide a new Final Determination ruling that the BCFL meets the definition of a "similar governmental agency" and, therefore, is legally required to respond to my lawfully submitted Open Records Request pursuant to RTKL.

Discussion:

1. I submitted an Open Records Request on November 23, 2022 to BCFL pursuant to RTKL, 65 P.S. 65 P.S. §§ 67.101 et seq., seeking email communications "to/from any Bucks County Free Library... Board Members."

2. I did not receive the Library's response with five business days and contacted the Library. On December 15, 2022, John J. Doran II, the Chief Financial Officer and AORO of the BCFL denied the request, stating that the OOR *"has repeatedly and consistently held that public libraries are not an 'agency' within the meaning of that statute and are therefore exempt from that law."*
3. In the instant appeal, the sole issue presented before the OOR was whether the BCFL falls within the definition of a local agency under the RTKL. Because the RTKL definition of the term "local agencies" includes the phrase "any similar governmental entity" along with municipalities and authorities, non-profit entities, such as the BCFL, may qualify if they are sufficiently governmental in nature. It is important to note here that, contrary to the statements made by the BCFL, the OOR has recently found, in *Longnaker v. Hellertown Area Library Association OOR Dkt. AP 2022-2541* (also included as an attachment), that a Library meets the definition of a "similar governmental entity" and is, therefore, a local agency under the RTKL. This Final Determination relied on the same case law (*Pysher* and *Hadley*) utilized by the Appeals Officer in the instant appeal.
4. In the case law utilized by the OOR Appeals Officer in the instant appeal (*Pysher* and *Hadley*), 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 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 governmental entity[.]" including:

- (1) the degree of governmental control,**
- (2) the nature of the organization's functions, and**
- (3) financial control.**

Id.; see also *Hadley*, 83 A.2d at 1109. 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, 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.* 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.*

5. In the Final Determination of the instant appeal, the OOR Appeals officer relied on *Vyonder v. Bucks Co. Free Library*, OOR Dkt. AP 2022-2757, wherein the OOR determined, based on the same evidence provided by the Library in the instant appeal, that the Library is not an agency subject to the RTKL. In that matter, and in the instant appeal, the OOR undertook an analysis pursuant to *Pysher* and *Hadley*, using the same three factors mentioned above to determine whether the BCFL meets the definition of a "similar governmental entity." However, the OOR made several inadvertent errors in the legal analysis pursuant to *Pysher* and *Hadley*, and the Final Determination in the instant appeal contradicts the Final Determination made in *Longnaker* and legal analysis used in other OOR appeals such as *Longnaker* and *Walsh*.
6. Regarding the second factor (the nature of the organization's functions), the OOR Appeals Officers in both *Vyonder*, and in the instant appeal, inadvertently made **no determination** as to whether

the BCFL is, in fact, “governmental” in nature. In comparison, the OOR Appeals Officer in *Longnaker* stated *“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.’”* In the instant appeal, the OOR Appeals Officer should have made a similar finding since the BCFL did not dispute this fact, but should have also acknowledged that, in my position statement, I specifically make this argument. Because the OOR Appeals Officer did not make any determination on the extent to which the BCFL is a “substantial facet of government activity”, which is one of the three factors outlined in the case law (*Pysher* and *Hadley*) utilized in the Final Determination, the OOR Appeals Officer inadvertently did not provide a full legal assessment of whether the BCFL meets the definition of a “similar governmental entity.”

7. Regarding the first factor (degree of government control), the OOR Appeals Officer in *Vyonder* and in the instant appeal did not take into account the degree of government control through several factors considered in *Pysher* and *Hadley* such as Board representation and where the assets go if the BCFL were to dissolve. In the case of the BCFL, the entire 7-person Board, which controls and governs the BCFL system, is appointed by the Bucks County Commissioners. Since the Board governs the day-to-day operations of the BCFL, and the County controls the entire Board, the County inherently exercises government control over the BCFL. In *Hadley*, the Court specifically examined “board representation” with respect to the degree of government control and noting in this case that *“private sector representatives have a clear majority at 21 members.”* Similarly, in *Longnaker*, the OOR noted that *“the Borough has the power to appoint a majority of the Library’s Board of Directors”* and that the Board has *“the power to plan for, implement, and management all library services, programs and activities...”* Additionally, in *Walsh v. Carnegie*, OOR Dkt. AP 2009-1150, the OOR in assessing degree of government control, noted that *“the Library’s Board is not appointed by a government entity...”* The OOR Also considered government control of the Board in *Donahue v. Hazleton Area Public Library*, OOR Dkt. AP 2010-0414, noting *“the Library’s Board is not controlled by any municipality or local government.”* Regarding assets, the BCFL presented evidence that *“Upon dissolution of the library system, all assets will be distributed to the County.”* In *Pysher*, the Court specifically examined where the assets would go upon dissolution of the Fire Company, noting *“if the Fire Company were to dissolve, its assets would not go to the Township[.]”* In *Donahue*, the OOR also found that *“there is no evidence of any governmental control over the Library’s assets...”* In the instant appeal, the OOR Appeals Officer, by not taking into account the complete appointment of the BCFL Board by the County, the County control of assets upon dissolution of the BCFL as well as most of its buildings, and other factors presented in evidence, did not provide a full legal assessment of the degree of government control and therefore whether the BCFL meets the definition of a “similar governmental entity.”
8. Regarding the third factor (financial control), the OOR Appeals Officer in *Vyonder*, and in the instant appeal, solely relied on the fact that, *“the Library receives funding from various sources”*, including the government, and that *“this fact alone is not enough to transform a private nonprofit organization into a local agency under the RTKL.”* While the mere receipt of government funding doesn’t transform a public library into a local agency, the Court is clear in *Hadley* that it, when assessing financial control, it is the proportion of government funding that determines the likelihood of governmental control. In *Hadley*, the Court noted, *“the government financing of the Alliance is ‘proportionally small’.* The trial court reasoned that receipt of such a small amount of government funds is not tantamount to governmental control.” One can infer

that the opposite would be true, and the OOR Appeals Officer appears to have made an inadvertent error in the instant appeal by not taking into account the proportion of government funding that the BCFL receives, which is almost the entirety of the funding that the Library receives. Simply put, but for the government funding, the BCFL could not function as a library. The evidence presented in appeal demonstrated that this was also by design when setting up the BCFL (they state they don't do major fundraising programs and rely mainly on government funding), and that the BCFL maintains its operations through government funding and use of government-owned facilities. In contrast, the Court in *Pysher* noted that the "*Fire company maintains its operations through fundraising, rentals and donations.*" By ignoring the question of proportion and ability to operate without government funding and facilities, the OOR Appeals Officer inadvertently erred by not conducted a full legal assessment of whether the government has financial control over the BCFL and therefore whether the BCFL meets the definition of a "similar governmental entity."

In conclusion, I respectfully request reconsideration of the January 23, 2023 Final Determination and request that the OOR rule that the BCFL meets the definition of a "similar government entity," subject to RTKL and grant my original and legally submitted Open Records Request in its entirety.

Respectfully Submitted,

David Bedillion



FINAL DETERMINATION

IN THE MATTER OF

**DAVID BEDILLION,
Requester**

v.

**BUCKS COUNTY FREE LIBRARY,
Respondent**

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Docket No.: AP 2022-2853

FACTUAL BACKGROUND

On November 23, 2022, David Bedillion (“Requester”) mailed a request (“Request”) to the Bucks County Free Library (“Library”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Any/all email communication records (including associated attachments, URL links and electronic database links) to and/or from any/all Bucks County Free Library...Board Members (including personal email addresses if used for Library business), from August 1st, 2022 to present that contain any of the following keywords:

“Drag”, “Drag Queen”, “Perkasie”, “Complaint”, “Conner”, “Knorr”, “Bedillion”

As the Requester did not receive the Library’s response within five business days of the Request, the Request was deemed denied. *See* 65 P.S. § 67.901. On December 15, 2022, the Requester contacted the Library seeking its response and John Doran, III, Chief Financial Officer for the Library, responded indicating that the Library thought it was the same as a prior request.

Upon learning it was different, he notified the Requester that the Library would not be responding to the Request because the Library is not an agency under the RTKL.

On December 27, 2022, the Requester appealed to the Office of Open Records (“OOR”).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 January 6, 2023, the Library submitted a position statement arguing that it is not an agency subject to the RTKL. In support of its position, the Library submitted the verification of John Doran, III, Chief Financial Officer for the Library.² The Library also submitted supporting documents, including: an Internal Revenue Service document indicating that the Library is a 501(c)(3) organization; financial statements for 2021, the Library’s 2021 Operating and Capital Budget; the Bucks County Comprehensive Financial Report; and the Bucks County 2023 Preliminary Budget.

On January 6, 2023, the Requester submitted a position statement arguing that the Library is an agency subject to the RTKL, having acted in the past as an agency under the RTKL, and noting two prior final determinations involving the Library.

On January 12, 2023, the Requester submitted additional argument in support of his appeal. This submission was received after the record closed; however, to develop the record, the submission was considered. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

¹ The Requester granted the OOR a 60-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).”).

² Under the RTKL, a sworn affidavit or 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).

LEGAL ANALYSIS

The RTKL defines a “local agency” as any of the following:

- (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.

In *Vyonder v. Bucks Co. Free Library*, OOR Dkt. AP 2022-2757, 2023 PA O.O.R.D. LEXIS 33, the OOR determined, based on the same evidence provided by the Library in this case, that the Library is not an agency subject to the RTKL. In that matter, the OOR undertook an analysis pursuant to *Pysher v. Clinton Twp. Volunteer Fire Co.*, 209 A.3d 1116 (Pa. Commw. Ct. 2019) and *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.*

Here, the Library is a nonprofit corporation and not a “political subdivision, intermediate unit, charter school, or public trade or vocational school[,]...local, intergovernmental, regional or municipal agency, authority, council, board, [or] commission...”³ *Id.* Therefore, the question becomes whether the Library is a “similar governmental entity.”

In the instant matter, the Doran verification affirms that the Library system consists of seven branches throughout Bucks County (“County”) and that the primary purpose of the Library is “to provide to the general public access to books, information, and other materials and other resources for educational, recreational and other informational needs” and that it is governed by a seven-member Board of Directors that operates independently from the County and any other government entity. *See* Doran Verification, ¶¶ 9-10. Members of the Board of Directors are appointed by the County Commissioners pursuant to the Public Library Code, 24 Pa.C.S. § 9318(b)(1), but the Board members do not consist of any County officials.⁴ *Id.* at ¶ 14. Additionally, the Doran verification provides that the Library’s administration consists of a Chief Executive Officer who is hired by Library’s Board of Directors, as well as a Chief Operations Officer, a Chief Financial Officer, a Public Services Director, a Collections Management Director, an Access Service Manager and a District Consultant, all of whom are hired by the Chief Executive Officer. *Id.* at ¶ 11. No County Commissioner or County official is involved in the day-to-day administration, governance or activities of the Library. *Id.* at ¶ 16.

³ The Library submitted a Department of Treasury, Internal Revenue Service document dated December 26, 1991, which indicates that the Library is a 501(c)(3). Additionally, the Doran Affidavit provides that the “[Library] system is a tax-exempt 501(c)(3) non-profit organization under the Internal Revenue Code.” *See* Doran Affidavit, ¶ 8.

⁴ 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).

The Doran verification further provides that the Library maintains its own website and domain that is separate from the County and that it maintains its own Informational Technology Department, servers and equipment that are all separate from the County. *Id.* at ¶ 12. The Library does not participate in the County’s pension or health benefit plans and provides its own benefit plans to library employees, and does not observe the same holidays County government. *Id.* at ¶¶ 22, 24.

Regarding financing, the Doran verification affirms that “[the Library] prepares its own yearly budgets and is responsible for its own yearly audit which it forwards to the County. The County, in turn, accepts [the Library’s] audit for incorporation into its financial statements concerning the use of taxpayers’ monies.”⁵ *Id.* at ¶ 18. Further, “operations of [the Library] are primarily funded by the County through tax dollars, followed by state aid provided by the Commonwealth of Pennsylvania, as well as by charitable donations, grants, endowments and fines and fees.” *Id.* at ¶ 15. While six of the seven Library branches are in County buildings and are provided rent-free, the Library “solely maintains and upkeeps the buildings and grounds without involvement or assistance by the County or its service employees, unless there is an emergency[.]” Library employees provide cleaning and landscaping services to the Library buildings and grounds, and the Library engages in its own contracts with outside companies. *Id.* at ¶ 21. Additionally, the Library submitted a copy of the County’s 2023 Preliminary Budget, which lists the Library under the “miscellaneous” category rather than under its list of County Departments.

The Requester argues that the fact that the Library previously considered itself an agency under the RTKL and has participated in appeals before the OOR supports a finding that the Library is a local agency subject to the RTKL. While the Requester is correct that the Library has, in the

⁵ On appeal, the Library submitted a copy of the County’s Annual Financial Report for 2021, which identifies the Library as a “component unit,” which the Report defines as “legally separate entities.”

past, considered itself an agency subject to the RTKL and has been a party in previous appeals before the OOR, the Library did not previously raise the issue of jurisdiction and the OOR did not make a finding that the Library is in fact an agency. *See Dearmond v. Bucks Cnty. Free Library*, OOR Dkt. AP 2022-0954, 2022 PA O.O.R.D. LEXIS 1470; *Marcovitz v. Bucks Cnty. Free Library*, OOR Dkt. AP 2013-1041, 2013 PA O.O.R.D. 575. Further, the fact that the Library previously responded to RTKL requests and did not raise the issue of jurisdiction in previous appeals before the OOR does not prevent the Library from now presenting evidence that it is not a local agency, nor does it preclude a finding by the OOR that the Library is not a local agency pursuant to the RTKL. *See Scott v. Del. Valley Reg'l Planning Comm'n*, 56 A.3d 40, 44 n.4 (Pa. Commw. Ct. 2012); *Boyer v. Wyoming Free Library*, OOR Dkt. AP 2018-1276, 2018 PA O.O.R.D. LEXIS 1143.

The Requester further argues that the County maintains control over the day-to-day operations of the Library and its assets, and that the Library receives the majority of its funding from the County. He argues that the Library has only provided the OOR with partial documentation in support of its argument and has misrepresented itself to avoid compliance with the RTKL. In support of this, he points to various statements within the Library's 2021 Financial Audit and provides a copy of the Library's IRS 1023 Form from 1991.⁶

Here, upon consideration of all the evidence submitted, the Library has established that, while its Board members are appointed by the County Commissioners, as required by the Public Library Code, the Library itself is not under government control as the day-to-day activities, governance and administration of the Library is done by the Board members, without County oversight. Further, the Library receives funding from various sources, and while it receives

⁶ This form is an Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code.

government funding, this fact alone is not enough to transform a private nonprofit corporation into a local agency under the RTKL. *See Hadley, supra*. Therefore, as there is no evidence before the OOR of any governmental control that would make the Library a “similar governmental entity,” the Library is not a local agency, and thus, not subject to the RTKL and the OOR lacks jurisdiction over this appeal. *See MacNeil v. Sharon Hill Boro. Library*, OOR Dkt. AP 2021-1015, 2021 PA O.O.R.D. LEXIS 1472 (a public library is not a local agency under the RTKL); *Boyer, supra*.

CONCLUSION

For the foregoing reasons, the appeal is **dismissed for lack of jurisdiction**, and the Library is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks 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: January 23, 2023

/s/ Erin Burlew

ERIN BURLEW, ESQ.
SENIOR APPEALS OFFICER

Sent via portal only to: David Bedillion; John Doran, Karen A. Diaz, Esq.

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



FINAL DETERMINATION

IN THE MATTER OF	:
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SUSAN LONGNAKER,	:
Requester	:
	:
v.	: Docket No: AP 2022-2541
	:
HELLERTOWN AREA LIBRARY	:
ASSOCIATION,	:
Respondent	:

FACTUAL BACKGROUND

On October 17, 2022, Susan Longnaker (“Requester”) submitted a request (“Request”) to the Hellertown Area Library Association (“Library”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. All communications – including but not limited to emails, letters, text messages, voicemails and memos – from January 1, 2020, through the present date regarding Lower Saucon Township residents’ use of the Hellertown Library.
2. All communications – including but not limited to emails, letters, text messages, voicemails and memorandums – between Hellertown Library and the Office of Commonwealth Libraries (“OCL”) from January 1, 2020, through the present date pertaining to the use of the Hellertown Library by Lower Saucon Township residents.
3. 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 use of the Hellertown Library by Lower Saucon Township residents.

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).