



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**WANDA AIKENS,
Requester**

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:

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v.

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Docket No.: AP 2018-0296

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**CLYMER VOLUNTEER FIRE
COMPANY,
Respondent**

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INTRODUCTION

Wanda Aikens (“Requester”) submitted a request (“Request”) to the Clymer Volunteer Fire Company (“Fire Company”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to the removal of member from the Fire Company. The Fire Company denied the Request, stating that it is not a local agency subject to the RTKL. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **dismissed**, and the Fire Company is not required to take any further action.

FACTUAL BACKGROUND

On January 19, 2018, the Request was filed,¹ seeking “...records of the removal of Gary Aikens as a member in your company and the reasons for those decisions...” On January 25, 2018,

¹ Although the Request was sent on January 12, 2018, the appeal contains the certificate of service with a tracking number evidencing that the Request was received by the Fire Company on January 19, 2018.

the Fire Company invoked a thirty day extension to respond to the Request. *See* 65 P.S. § 67.902. On February 12, 2018, the Fire Company responded stating that it is not a local agency under the RTKL.

On February 20, 2018, the Requester appealed to the OOR, arguing that the Fire Company is subject to the RTKL and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Fire Company to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

Upon the request of the OOR, the Requester agreed to stay the instant appeal pending a decision by the Commonwealth Court in *Bohman and WNEP-TV v. Clinton Twp. Vol. Fire Co.*, No. 1238 C.D. 2017, which involves the issue of whether a volunteer fire company is a local agency under the RTKL. On May 8, 2019, the Commonwealth Court issued its decision in *Bohman*, vacating the trial court's order and remanding the matter "for development of the factual record." *Bohman and WNEP-TV v. Clinton Twp. Vol. Fire Co.*, No. 1238 C.D. 2017, 2019 Pa. Commw. Unpub. LEXIS 267, *1 (Pa. Commw. Ct. 2019); *see also Pysher v. Clinton Twp. Vol. Fire Co.*, No. 1237 C.D. 2017, 2019 Pa. Commw. LEXIS 422 (Pa. Commw. Ct. 2019).

In accordance with the holdings in *Bohman* and *Pysher*, on May 13, 2019, the OOR sought additional evidence from the Fire Company to determine the degree of governmental control Clymer Borough ("Borough") exercises over the Fire Company, the nature of the Fire Company's functions, and the degree of financial control by the Borough over the Fire Company. On May 31, 2019, the Fire Company provided a response to the OOR's request for additional evidence. On June 21, 2019, the Fire Company submitted an attestation, made under the penalty of perjury, from Mike Keith of the Fire Company, attesting to the facts set forth in the May 31, 2019 submission.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(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)).

As a preliminary matter, the OOR must determine whether the Fire Company is a local agency for purposes of applying the RTKL. The issue of whether the Fire Company is a local agency is a jurisdictional question, as the OOR only retains authority to review decisions of Commonwealth and local agencies. 65 P.S. § 67.503(a).

The RTKL 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 (emphasis added). When determining whether a volunteer fire company constitutes a local agency under the RTKL, the OOR has previously considered case law finding firefighting to be a governmental activity:

“Similar governmental entity” is not defined in either the RTKL or the Statutory Construction Act, 1 Pa. C.S. § 1991, so the terms are construed in accordance with their plain meaning. *Commonwealth v. McCoy*, 962 A.2d 1160 (Pa. 2009). The key term here is “governmental,” which case law abundantly defines according to function. Non-profit entities like the Fire Co. may qualify as local agencies if they are sufficiently governmental in nature. Volunteer fire companies have consistently been held to be governmental entities, and been deemed local agencies

under other statutes that do not specifically include them in their definition, e.g., Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8501-8564 (“PSTCA”). *See Zern v. Muldoon*, 516 A.2d 799 (Pa. Commw. 1986); *Wilson v. Dravosburg Volunteer Fire Dept.*, 516 A.2d 100 (Pa. Commw. 1986). Case law also holds that a volunteer Fire Company is an entity created to perform a governmental function. *See id.*; *Guinn v. Albertis Fire Co.*, 614 A.2d 218 (Pa. 1992); *Weaver v. Union City Vol. Fire Dept.*, 518 A.2d 7 (Pa. Commw. 1986); *Flood v. Silkies, Meckes & Klecknersville Fire Co.*, 933 A.2d 1072 (Pa. Commw. 2007) (non-profit volunteer Fire Company founded by volunteers and separate from municipality constitutes a local agency) ... Notably, fire-fighting must be performed as a nonprofit enterprise, and thus is not proprietary. [Footnote omitted]

In both *Zern* and *Wilson*, the Commonwealth Court reasoned that volunteer fire companies were sufficiently governmental in nature to qualify as “local agencies” entitled to immunity under the PSTCA. Specifically, in *Zern*, Judge Crumlish found that the unique “history, structure, organization and public duty of volunteer fire companies distinguish them from any other organization in existence in this Commonwealth today.” 516 A.2d at 804. Volunteer fire companies, including the Fire Co., exist to perform a governmental function on behalf of local governmental units. *Wilson, supra*; *Harmony Volunteer Fire Co. & Relief Ass’n v. PHRC*, 459 A.2d 439 (Pa. Commw. 1983) (holding fire-fighting is governmental in nature).

Although the Supreme Court has held that “an entity’s status as an agency or instrumentality varies, depending on the issue for which the determination is being made,” *Penn State v. Derry Twp. Sch. Dist.*, 731 A.2d 1272, 1274 (Pa. 1999), here the context is ensuring public access to records documenting a governmental function that has been deemed necessary. Given the legislative intent to ensure transparency in all aspects of government, the OOR finds that “similar governmental entity” was intended to include volunteer fire companies like the Fire Co.

Schenk v. Unionville Fire Company and Center Twp., OOR Dkt. AP 2012-0567, 2012 PA O.O.R.D. LEXIS 704 (citations omitted).

In addition to being considered government agencies under the PSTCA, volunteer fire companies have also been determined to be government agencies under the Judicial Code. *See Wilson*, 516 A.2d at 101-02 (citing 42 Pa.C.S. § 102); *Guinn*, 614 A.2d at 219-220 n.2 (same); *see also Rue v. Wash. Twp. Volunteer Fire Co.*, No. 1461 C.D. 2009, 2010 Pa. Commw. Unpub. LEXIS 405 at (Pa. Commw. Ct. 2010) (same).

Recently, in *Pysher*, 2019 Pa. Commw. LEXIS 422, and *Bohman*, 2019 Pa. Commw. Unpub. LEXIS 267, the Commonwealth Court provided guidance as to the types of information needed to determine whether a volunteer fire company is a local agency subject to the RTKL. In *Pysher*, the requester submitted a RTKL request to the Clinton Township Volunteer Fire Company (“Company”), seeking copies of various bank statements and loan agreements. The Company denied the request, stating that it was not a local agency and, therefore, was not subject to the RTKL. On appeal, the OOR disagreed, concluding that the Company was a local agency for purposes of applying the RTKL. *Pysher v. Clinton Twp. Vol. Fire Co.*, OOR Dkt. AP 2017-0403, 2017 PA O.O.R.D. LEXIS 418.

The OOR’s decision was affirmed by the Clinton County Court of Common Pleas in *Pysher v. Clinton Twp. Vol. Fire Co.*, CV-17-647 (Lycoming Com. Pl. Aug. 9, 2017). In affirming the OOR, the trial court applied the same test set forth by the Pennsylvania Supreme Court in a footnote in the case of *Guinn*, 614 A.2d at 219 n.2, involving the issue of whether a fire company was entitled to immunity from tort liability, namely, “a volunteer fire company created pursuant to relevant law and legally recognized as the official fire company for a political subdivision is a local agency.” (Trial Court Opinion, pg. 8) (citations omitted). The trial court noted that the Company operated pursuant to the Second Class Township Code, 53 P.S. §§ 65101-68701, which “demonstrates both that the ... Company was created pursuant to relevant law, and that it is recognized as the official fire company.” *Id.* Additionally, the trial court found that the Company received funding from Clinton Township. Thus, the trial court concluded that “by taking on a government function and operating with funds appropriated by the township, the ... Company subjects itself to the disclosure of documents ... pursuant to the RTKL.” *Id.*

On appeal, the Commonwealth Court examined the trial court's application of *Guinn*.

Specifically, the Commonwealth Court stated:

Although the courts have stated that an entity's treatment as a local agency under one statute is not determinative of its treatment under another statute, ... the trial court [in this matter] relied upon *Guinn*, a case involving immunity, to determine [the] Company was a local agency under the RTKL. Notably, in *Guinn*, the immunity of the fire company had already been *conceded* and was not in issue. The issue before the Supreme Court was whether that immunity extended outside of the scope of firefighting duties. The Supreme Court held it did and, in a footnote, stated that "a volunteer fire company created pursuant to relevant law and legally recognized as the official fire company for a political subdivision is a local agency." ... Based upon this statement, the trial court concluded [the] Company was also a local agency under the RTKL. Because the Supreme Court has counseled that "an entity's status as an agency ... varies, depending on the issue for which the determination is being made" ... we do not interpret [the Supreme Court's] statement in a footnote in a case in which immunity was conceded as controlling whether volunteer fire companies are also local agencies under the RTKL.

Pysher, 2019 Pa. Commw. LEXIS 422, *13-14 (citations omitted).

The Commonwealth Court then discussed its holding in *Appeal of Hadley*, 83 A.3d 1101 (Pa. Commw. Ct. 2014), where the Court "evaluated whether a regional alliance of businesses, industry, and tourism, which was a private nonprofit, was a 'similar government entity' to be considered a 'local agency' under the RTKL." *Id.* at *15. 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. *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." *Pysher*, 2019 Pa. Commw. LEXIS 422, *16.

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.” 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.* (citations omitted).

The Court concluded its analysis by stating that “there is no factual record to evaluate the degree of governmental control, the nature of [the] Company’s functions, and the financial control by the [t]ownship over the Company.” *Id.* at *18 (citations omitted). Thus, the Court remanded the matter, stating that on remand:

the parties shall be prepared to produce evidence relevant to the degree of governmental control the [t]ownship exercises over [the] ... Company, including, but not limited to [the] ... Company’s “organizational structure, purposes, powers, duties and fiscal affairs”; the function [the] ... Company performs and whether it is “a substantial facet of government activity”; and the degree of public funding provided to [the] ... Company in relation to private funds.

Id. at *20 (citations omitted).

Turning to the instant matter, the OOR posed a series of questions to the Fire Company to further develop the record regarding whether the Fire Company is a local agency under the RTKL. With respect to the degree of governmental control, Mr. Keith states that the Fire Company was organized by a group of private citizens in 1905 and that its officers are elected by its members annually. Mr. Keith likewise explains that the municipalities do not exercise any control over the Fire Company, nor its day-to-day operations. He further states that the Borough does not indemnify the Fire Company and/or its members and does not provide any benefits to the members, beyond payment of the workers compensation premiums. Mr. Keith further states that if the Fire Company dissolved, the members would decide where the assets are to go.

With respect to the second factor, namely the nature of the Fire Company's functions, Mr. Keith affirms that it does not have a contract with the Borough to provide services and it does not provide services to any other municipality.

In terms of financing, the Fire Company states that the Borough does not exercise financial control over the Fire Company. Specifically, Mr. Keith explains that the Fire Company received \$31,984 in 2016, \$20,780 in 2017, \$25,327 in 2018 and \$1,154 in 2019. He states that 85% of its income is derived from fundraising and 15% from municipal funds. Mr. Keith does not list any expenses paid by the municipality and only refers to the funding received from the municipality to pay for expenses.

It is undisputed that the provision of fire services is a governmental function and that the Fire Company provides fire services to the Borough and other municipalities. However, the record shows that the Borough exercises very little, if any, governmental control over the Fire Company. Specifically, all officers of the Fire Company are chosen by its members, and all decisions concerning the Fire Company and its operations are made by its members, not the Borough. Moreover, the Fire Company has established that a significant majority of its funding comes by way fundraising activities – not from the Borough it serves. As such, the Borough does not exercise financial control over the Fire Company and is not a “similar government entity” and cannot be considered a “local agency” under the RTKL.”

CONCLUSION

For the foregoing reasons, the appeal is **dismissed**, and the Fire Company 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 Indiana 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.² This Final Determination shall be placed on the OOR's website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 24, 2019

/s/ Jill S. Wolfe

JILL S. WOLFE, ESQ.
APPEALS OFFICER

Sent to: Wanda Aikens (via email only);
Mike Keith

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).