

Supreme Court of Pennsylvania

Court of Common Pleas Civil Cover Sheet

York

County

For Prothonotary Use Only:

Docket No:

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

RECEIVED

OCT 20 2020

OFFICE OF OPEN RECORDS

Commencement of Action:

- ☐ Complaint ☐ Writ of Summons ☒ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:

North York Borough

Lead Defendant's Name:

Dylan Segelbaum

Are money damages requested? ☐ Yes ☒ No

Dollar Amount Requested: ☐ within arbitration limits
(check one) ☐ outside arbitration limits

Is this a Class Action Suit? ☐ Yes ☒ No

Is this an MDJ Appeal? ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney: Walter A. Tilley, III, Esquire

☐ Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

Nature of the Case: Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

TORT (do not include Mass Tort)

- ☐ Intentional
☐ Malicious Prosecution
☐ Motor Vehicle
☐ Nuisance
☐ Premises Liability
☐ Product Liability (does not include mass tort)
☐ Slander/Libel/ Defamation
☐ Other:

CONTRACT (do not include Judgments)

- ☐ Buyer Plaintiff
☐ Debt Collection: Credit Card
☐ Debt Collection: Other

☐ Employment Dispute: Discrimination
☐ Employment Dispute: Other

☐ Other:

CIVIL APPEALS

- Administrative Agencies
☐ Board of Assessment
☐ Board of Elections
☐ Dept. of Transportation
☐ Statutory Appeal: Other

☐ Zoning Board
☒ Other:
Office of Open Records

MASS TORT

- ☐ Asbestos
☐ Tobacco
☐ Toxic Tort - DES
☐ Toxic Tort - Implant
☐ Toxic Waste
☐ Other:

REAL PROPERTY

- ☐ Ejectment
☐ Eminent Domain/Condemnation
☐ Ground Rent
☐ Landlord/Tenant Dispute
☐ Mortgage Foreclosure: Residential
☐ Mortgage Foreclosure: Commercial
☐ Partition
☐ Quiet Title
☐ Other:

MISCELLANEOUS

- ☐ Common Law/Statutory Arbitration
☐ Declaratory Judgment
☐ Mandamus
☐ Non-Domestic Relations
☐ Restraining Order
☐ Quo Warranto
☐ Replevin
☐ Other:

PROFESSIONAL LIABILITY

- ☐ Dental
☐ Legal
☐ Medical
☐ Other Professional:

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

NORTH YORK BOROUGH

Petitioner,

v.

DYLAN SEGELBAUM and
THE YORK DAILY RECORD,

Respondent.

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Docket No:

NOTICE OF APPEAL AND

PETITION FOR REVIEW

AND NOW, comes North York Borough, Petitioner, and files this Notice of Appeal and Petition for Review pursuant to Pa. R.A.P. 1513 and 65 P.S. § 67.1302, by and through its undersigned counsel, of which the following is a statement:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to the Right to Know Law, 65 P.S. § 67.1302.

PARTIES

2. The Petitioner/Appellant is North York Borough ("Borough"), a municipality organized pursuant to the Pennsylvania Borough Code, 8 Pa.C.S. § 101 et seq., with offices at 350 East Sixth Avenue, York, PA 17404.

3. The Respondent/Appellee is Dylan Segelbaum and The York Daily Record, which has a mailing address of 1891 Loucks Road, York, Pennsylvania, 17408.

4. The Office of Open Records of the Commonwealth of Pennsylvania ("OOR") is the governmental agency. The OOR is not a party to the appeal, but will receive notice of the appeal and has a right to respond. *See, Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013); *See also*, the Final Decision of the OOR in this matter attached hereto as "Exhibit A", pg 8.

DETERMINATION TO BE REVIEWED

5. The determination to be reviewed is the Final Determination entered by the OOR on September 16, 2020 in OOR Docket Number AP 2020-1336. A copy of the Final Determination is attached hereto as "Exhibit A." Copies of all materials provided to the OOR, including but not limited to the initial response from the Borough's Right to Know Officer, Brittany Reed, the affidavit of Richard Shank, Borough Council President, and the Position Statement filed with OOR on behalf of the Borough, are attached as "Exhibit B". The Borough's supplemental affidavit of Walter A. Tilley, Esquire, Borough Solicitor, is provided pursuant to *Bowling v. Office of Open Records*, 75 A.3d 453, 476 (Pa. 2013) and are attached as "Exhibit C."

STANDARD AND SCOPE OF REVIEW

6. The standard of review is *de novo* and the scope of review is plenary. *Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013).

CONCISE STATEMENT OF FACTS

7. The Open Records Officer (agency official) for North York Borough is:

Brittany Reed
North York Borough Secretary
350 East Sixth Avenue, York, PA 17404
(717) 845-3976

8. The record responsive to the RTKL request is a forensic accounting investigation report of North York Borough Liberty Fire. Co. No. 1.

9. The request is dated July 30, 2020.

10. The response denying the request is dated August 6, 2020.

11. The Respondent asserts the record is public because it is a financial record.

12. The Borough asserts that the record is exempt from disclosure as a record relating both to a criminal investigation pursuant to Section 708(b)16 and a non-criminal investigation pursuant to Section 708(b)17. *See*, 65 P.S. § 67.708 (b)16-17.

CONCISE STATEMENT OF THE REASONS FOR APPEAL

13. The OOR erred when it determined that the record at issue, a forensic audit report, was not a record related to a criminal investigation because the audit was not primarily created for

proper governance of public funds but rather was created with the purpose of determining if public funds had been misappropriated, which is a crime.

- a. After-acquired evidence shows that the record is related to a criminal investigation undertaken by the York County District Attorney's Office. *See Exhibit C attached*, supplemental Affidavit of Walter A. Tilley, III, Esquire.
- b. As the affidavit of Richard Shank, which was submitted to OOR, demonstrated, the record was turned over to the District Attorney after the Borough completed its own non-criminal investigation. *See Exhibit B attached*, supplemental Affidavit of Richard Shank.
- c. The record itself was investigatory in nature, and but-for the Borough's investigation into possible misappropriation of funds (a crime), the record would not have existed.
- d. It was not a routinely created audit report, but rather was a report of a forensic accountant specifically hired by the Borough to investigate misappropriation so that the findings could be provided to the District Attorney. *See Exhibit C attached*, supplemental Affidavit of Walter A. Tilley, III, Esquire.
- e. It contains information from witness interviews, relates information from documents reviewed by the forensic accountant, and contains the forensic accountant's conclusions. As such, is not merely tangentially related to an investigation of misappropriation, but the record is *the record* of the investigation itself.

- f. Further, even though the Borough was not the agency conducting the investigation, the record is still a record relating to a criminal investigation as set forth in the RTKL because it is a record used by the District Attorney, which is an agency with law enforcement functions. *Levy v. Senate of Pennsylvania*, 94 A.3d 436, 449 (Pa.Cmwlt. 2014) (extending analysis of criminal investigation exemption to a record unrelated to the agency's law enforcement functions).
 - g. As such, the OOR erred in determining that the record did not relate to a criminal investigation.
14. Because the Borough asserted that the record relates to a criminal investigation, the OOR does not have jurisdiction to hear the appeal by the requester, but rather, the appeal should have been transferred to the District Attorney. See 65 P.S. § 67.503(d)(2).
- a. Under the RTKL, an attestation 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).
 - b. In the absence of any evidence that the Borough has acted in bad faith, "the averments in [the verification] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).
 - c. Here, the Affidavit supplied by Richard Shank attested that the record was transferred to the District Attorney, which is now supplemented with the Affidavit attached hereto as Exhibit C from Walter A. Tilley, III, Esquire.

- d. Richard Shank attested that the record was presumably being used as part of the District Attorney's criminal investigation. *See Exhibit B, attached.*
 - e. After-acquired evidence demonstrates that the record was used as part of the District Attorney's criminal investigation. *See Exhibit C attached*, the supplemental Affidavit of Walter A. Tilley, III, Esquire.
 - f. As such, the OOR lacked jurisdiction to hear the appeal, and it should have been transferred to the District Attorney for review and disposition. See 65 P.S. § 67.503(d)(2).
15. The OOR erred when it determined that the record did not relate to a non-criminal investigation because but-for the Borough's investigation into the possible misappropriation of Borough funds, the record would not have existed.
- a. The OOR cites to *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010) to support its position that the record is an audit that is not exempt pursuant to Section 708(b)17 of the RTKL.
 - b. However, the OOR erred when it stated that the forensic audit report is the "most recent forensic audit into a fire department." This implies that the Borough routinely conducts forensic audits of the fire department, when this is not the case. In fact, this is the first forensic audit ever conducted by the Borough. Forensic audits, by their nature of taking statements, and looking at every transaction rather than limiting the examination to material transactions, is very time consuming and

expensive. The very purpose of a forensic audit is investigatory in nature, looking for wrongdoing, and not looking for inefficiencies like a performance audit.

- c. But-for the Borough's investigation, the audit would not have existed. This is unlike the facts in *Pa Dep't of Welfare*, where the agency conducted performance audits regularly of its contractors as a part of ensuring proper governance of public funds. As such, the court found that the audit conducted in that case was not an "official probe" as required to assert the non-criminal investigation exemption.
- d. Here, the report generated by the forensic accountant is called an "audit" as that is the term used when an accountant reviews the books of an entity. However, as stated in the Borough's submission to the OOR, the audit is really a result of the Borough's official probe into possible misappropriation of funds by the fire department.
- e. Simply having the name "audit" does not mean that every audit is a public record as is asserted by the OOR. This would lead to an absurd result, and was not intended by the legislature as evidence by the RTKL itself. For example, audits in the possession of an agency that are related to the purchase of real estate or construction projects are exempt pursuant to Section 708(b)22 of the RTKL. Forensic audits are more detailed, time consuming and expensive than standard audits of performance or expenses.
- f. Because the report generated by the forensic accountant would not have existed but-for the non-criminal investigation conducted by the Borough as detailed in the

affidavit supplied by Richard Shank and the position statement provided to the OOR by the Borough, the record properly falls within the exemption at Section 708(b)17 of the RTKL.

RELIEF SOUGHT

16. The Borough respectfully requests that this Court reverse the decision of the Office of Open Records and:

- a. Find that the OOR erred when it retained jurisdiction over the appeal and remand the proceedings to the District Attorney; and
- b. Find that the OOR erred when it determined the record did not relate to a non-criminal investigation and reverse the decision of the OOR, denying the appeal.

CERTIFICATION AS TO THE TRANSCRIPT

17. The Borough hereby certifies that there was no transcript in the proceedings before the Office of Open Records.

Respectfully submitted,

Date: October 14, 2020

By: /s/ Walter A. Tilley, III
Walter A. Tilley, III, Esquire
I.D. #37452
wtilley@stockandleader.com
Sarah L. Doyle, Esquire
I.D. #321149
Stock and Leader
Susquehanna Commerce Center East
221 W. Philadelphia Street, Suite 600
York, PA 17401
Telephone: (717) 846-9800
Attorney for Petitioners

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

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

NORTH YORK BOROUGH
Petitioner,

v.

DYLAN SEGELBAUM and
THE YORK DAILY RECORD,
Respondent.

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Docket No:

CERTIFICATE OF SERVICE

AND NOW, this 15th day of October, 2020, I, Walter A. Tilley, III, Esquire of the law firm of Stock and Leader, attorneys for the Petitioner, hereby certify that I served the within Petitioner's Notice of Appeal and Petition for Review this day by depositing the same in the United States mail, postage prepaid, in York, Pennsylvania, addressed to:

Jordan C. Davis, Esquire
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Dylan Segelbaum
The York Daily Record/Sunday News
1891 Loucks Road
York, PA 17408

STOCK AND LEADER

By: /s/ Walter A. Tilley, III

Walter A. Tilley, III, Esquire
I.D. No. 37452
Susquehanna Commerce Center East
221 West Philadelphia Street, Suite 600
York, PA 17401
Tel.: (717) 846-9800
Attorney for Petitioner

EXHIBIT A

**(Final Determination Entered by the
Pennsylvania Office of Open Records
dated September 16, 2020)**

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

NORTH YORK BOROUGH,
Respondent

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: **Docket No: AP 2020-1336**
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On July 30, 2020, the Request was filed, seeking “[a] copy of the most recent forensic audit of the North York Borough Liberty Vol. Fire Co. No. 1.” On August 6, 2020, the Borough denied the Request, stating that the audit is exempt as related to a noncriminal investigation. 65 P.S. § 67.708(b)(17).

On August 10, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 26, 2020, the Borough submitted a position statement, explaining that the responsive record is a report recording the investigation into potential misappropriation of funds provided to the fire company, including witness interviews, pursuant to a specific legislative enactment, and that the review had uncovered potential criminal activity and been provided to the York County District Attorney's Office ("DA's Office") for further review. The Borough argued that the record is exempt both as a record of a criminal and noncriminal investigation, 65 P.S. §§ 67.708(b)(16); (17), and submitted the sworn affidavit of Richard Shank, the Borough's council president, who attests as to the accuracy of the position statement.

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 all 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, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Borough is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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)).

1. The Borough has not established that it conducted a criminal investigation

On appeal, the Borough also argues that the responsive audit report is exempt under Section 708(b)(16) of the RTKL. 65 P.S. § 67.708(b)(16). In support of this argument, the Borough submitted the verification of Borough Council President Shank, who attests that:

The entirety of the record responsive to [the Request] is a report of findings in an investigation into potential misappropriation of Borough funds. The responsive record details the steps that were taken in the investigation by the forensic accounting firm contracted by the Borough to conduct the investigation into potential misappropriation, such as the records that were reviewed and the witnesses that were interviewed. The record review was completed and witness interviews were taken as part of an official probe into the conduct of certain members of the Fire Company. It also contains the accounting firm's conclusions.

[...] The investigation was conducted in order to determine if Borough funds were being misused by the Fire Company or its members in consideration of whether the Borough would be able to continue appropriating funds to the Fire Company, and whether or not additional controls were needed to ensure that there was no misappropriation.

As a result of the investigation, the record was then transferred to the [DA's Office], which, to the best of my understanding, is reviewing the matter and may conduct its own investigation. The investigation did not result in the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization or a settlement agreement.

Under the RTKL, an attestation 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). In the absence of any evidence that the Borough has acted in bad faith, "the averments in [the verification] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Municipal governments, such as the Borough, are generally local law enforcement agencies for the purposes of Section 708(b)(16) of the RTKL.¹ 65 P.S. § 67.102; *see also Huegel v. Penn del Borough*, OOR Dkt. AP 2019-2312, 2019 PA O.O.R.D. LEXIS 2069; *Bolton v. York County District Attorney's Office*, OOR Dkt. AP 2017-1324, 2017 PA O.O.R.D. LEXIS 1167. The OOR does not have jurisdiction to hear appeals related to criminal investigative records held by local law enforcement agencies. *See* 65 P.S. § 67.503(d)(2). Instead, where the agency either submits evidence demonstrating that a criminal investigation occurred or, based on the appeal documents or the language of the request itself, there is no dispute between the parties regarding the existence of a criminal investigation, such appeals are to be heard by an appeals officer designated by the DA's Office. *See id.*; *Wisor v. City of DuBois*, OOR Dkt. AP 2019-1351, 2019 PA O.O.R.D. LEXIS 1209 (holding that the OOR lacked jurisdiction over the portion of a request seeking "any and all" records relating to criminal charges, arrests and law enforcement intervention); *see also Steinheiser v. Falls Twp.*, OOR Dkt. AP 2015-0323, 2015 PA O.O.R.D. LEXIS 378 (holding that where the plain language of a RTKL request sought a police report and there was evidence of a criminal investigation, the criminal investigative exemption applied).

Here, however, the Borough's evidence does not show that it conducted a criminal investigation. According to the Borough Council President's attestation, the Borough initiated a forensic audit "to determine if Borough funds were being misused by the Fire Company or its members in consideration of whether the Borough would be able to continue appropriating funds to the Fire Company, and whether or not additional controls were needed to ensure that there was

¹ According to the Borough's website, "North York Borough contracts with the Northern York County Regional Police Department ... to provide police protection to the Borough. North York Borough disbanded its Police Department in 1973." *See* <https://www.northyorkborough.com/emergency.html>, last accessed Sept. 10, 2020. For the reasons below, the OOR does not need to determine whether this contract changes the Borough's status as a local law enforcement agency.

no misappropriation.” Although the Borough attests that the information was then provided to the DA’s Office, the Borough’s purpose in creating the record was the proper governance of public funds.

In *Silver v. City of Pittsburgh*, the OOR held that:

The withheld records are related to a criminal investigation only in the sense that they have been obtained by the FBI as evidence during their investigation. The fact that a record becomes evidence in a criminal investigation – especially a nominally public record dealing with the expenditure of public funds – does not transform that record into one exempt from disclosure pursuant to Section 708(b)(16). The investigation at issue is not being conducted by the City, and as such, the records at issue were not created or compiled by the City in relation to a criminal investigation.²

OOR Dkt. AP 2013-1395, 2013 PA O.O.R.D. LEXIS 886. The criminal investigative exemption exempts records of the criminal investigations undertaken by the Borough, but it does not exempt documents of the Borough just because they may be the subject of criminal investigations by other agencies. See *Hockheimer v. City of Harrisburg*, OOR Dkt. AP 2015-1852, 2015 PA O.O.R.D. LEXIS 1654. Therefore, because the Borough has not demonstrated that the audit was undertaken for the purposes of a criminal investigation, Section 708(b)(16) does not apply, and the OOR retains jurisdiction over this appeal.³

2. The Borough may not withhold the audit report under Section (b)(17) of the RTKL

The Request seeks the audit report generated by the Borough’s most recent forensic audit into a fire department, which the Borough denied under Section 708(b)(17) of the RTKL. 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL provides that records “relating to a noncriminal

² As with the records in *Silver*, the responsive audit report is a “financial record” under the RTKL, and therefore subject to more stringent requirements for redaction. 65 P.S. § 67.102 (A “Financial Record” includes “(3) A financial audit report. The term does not include work papers underlying an audit.”).

³ Furthermore, to the extent that Section 708(b)(16) did apply, the Borough would still be required to produce the audit, but with the investigative material redacted. See *Levy v. Senate of Pa.*, 94 A.3d 436, 448 (Pa. Commw. Ct. 2014).

investigation” are exempt from disclosure, including “investigative materials, notes, correspondence and reports,” 65 P.S. § 67.708(b)(17)(ii), and records that “if disclosed would... reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license....” 65 P.S. § 67.708(b)(17)(vi). For this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010).

However, in *Pa. Dep’t of Pub. Welfare v. Chawaga*, the Commonwealth Court held that “importantly, the RTKL specifically exempts the work papers underlying an audit without exempting the actual audit. [...] By including the work papers within the exemption, but not the resulting audit, we can presume that the General Assembly did not intend to exempt the actual [] audit report under principles of statutory construction.” 91 A.3d 257, 259 (Pa. Commw. Ct. 2014) (internal citations omitted); *see also Governor’s Office of Admin. v. Purcell*, 35 A.3d 811, 816 (Pa. Commw. Ct. 2011) (“[S]pecific inclusion of some items of the same class is presumed to exclude all other items of the same class.”) As a result, while the papers underlying a financial audit may be exempt from disclosure under Section 708(b)(17), the actual results of the audit are not. *Mollick v. Methacton Sch. Dist.*, OOR Dkt. AP 2019-0514, 2019 PA O.O.R.D. LEXIS 423. Therefore, the Borough cannot withhold the audit report und Section 708(b)(17) of the RTKL.⁴

⁴ Although the RTKL does not define “audit report”, the parties do not dispute that the responsive record—a report prepared by a forensic accounting firm detailing their investigations into how money was spent—constitutes the result of an audit.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Borough is required to provide 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 York 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. 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 party.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 16, 2020

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS, ESQ.

Sent to: Dylan Segelbaum (via email);
Brittany Reed (via email);
Sarah Doyle, Esq (via email)

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

EXHIBIT B

(2020 1336 Appeal Packet)

NOTICE RELATED TO THE CORONAVIRUS (COVID-19) EMERGENCY

Pennsylvania is currently under a declared state of emergency related to the coronavirus (COVID-19). Some agencies and requesters may face challenges in regard to their ability to meaningfully participate in Right-to-Know Law (RTKL) appeals. Accordingly, and to ensure due process, the Office of Open Records (OOR) is taking the following temporary steps.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **September 9, 2020**.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **August 19, 2020**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Every staff member of the OOR is working remotely, and we are only able to receive postal mail on a limited basis at this time. Accordingly, we urge agencies and requesters to use email for all communication with the OOR at this time.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters during this time to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.



August 10, 2020

Via Email Only:

Mr. Dylan Segelbaum
The York Daily Record/Sunday News
1891 Loucks Road
York, PA 17408
dsegelbaum@ydr.com

Via Email Only:

Brittany Reed
Agency Open Records Officer
North York Borough
350 East Sixth Avenue
York, PA 17404
general@northyork.us

RE: OFFICIAL NOTICE OF APPEAL - DOCKET #AP 2020-1336

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. on August 10, 2020. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **subject to the enclosed information regarding the coronavirus (COVID-19).**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

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

Erik Arneson
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") has received the enclosed appeal, which was filed under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the enclosed information regarding the coronavirus (COVID-19). If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR

Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR – other than *in camera* records – will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. § 67.1101(c)).

The Commonwealth Court has held that "the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt." (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact **must** be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court – saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Jordan Davis, Esq.

CONTACT INFORMATION:

Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

FACSIMILE:

(717) 425-5343

EMAIL:

jorddavis@pa.gov

**Preferred method of contact and
submission of information:**

EMAIL

Please direct submissions and correspondence related to this appeal to the above Appeals Officer.
Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot speak to parties individually without the participation of the other party.

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff are also available to provide general information about the appeals process by calling (717) 346-9903.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

From: no-reply@openrecords.pa.gov
To: dsegelbaum@ydr.com
Subject: PA Office of Open Records - Appeal Confirmation
Date: Monday, August 10, 2020 11:51:56 AM
Attachments: oor_logo_email.png



pennsylvania
OFFICE OF OPEN RECORDS

You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Dylan Segelbaum
Company:	The York Daily Record/Sunday News
Address 1:	1891 Loucks Road
Address 2:	
City:	York
State:	Pennsylvania
Zip:	17408
Phone:	717-916-3981
Email:	dsegelbaum@ydr.com
Agency (typed):	North York
Agency Address 1:	East Sixth Ave.
Agency Address 2:	
Agency City:	York
Agency State:	Pennsylvania
Agency Zip:	17404
Agency Phone:	717-845-3976
Agency Email:	general@northyork.us
Records at Issue in this Appeal:	See attached.

Request Submitted to Agency Via:	e-mail
Request Date:	07/30/2020
Response Date:	08/06/2020
Deemed Denied:	No
Agency Open Records Officer:	Brittany Reed, Right-to-Know coordinator
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	Yes
Agree to permit the OOR an additional 30 days to issue a final order:	No
Interested in resolving this issue through OOR mediation:	No
Attachments:	<ul style="list-style-type: none">• Segelbaum_RTKL_07302020.doc• RTK forensic audit fire company request Dylan Segelbaum 7.30.2020.docx• Scan_2020-08-07-100417076.pdf• Segelbaum_NorthYorkAppeal.docx

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

The goal 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). That’s in addition to promoting access to information 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).

Financial audits are presumptively public records until the Right-to-Know Law.

Section 708 (c) states, “(c) Financial records.--The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17).”

Section 102 provides a definition of “financial records,” which includes “financial audits.”

- (1) Any account, voucher or contract dealing with:
 - (i) the receipt or disbursement of funds by an agency; or
 - (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.
- (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
- (3) A financial audit report. The term does not include work papers underlying an audit.

North York asserts the financial audit report should not be released because it’s related to a noncriminal investigation, but the borough has not met its burden of proof.

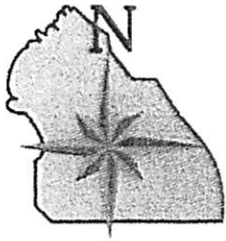
Section 708(a) of the Right-to-Know Law states, “The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.”

The borough stating that the financial audit cannot be released because of a noncriminal investigation is a conclusory statement and is insufficient to satisfy the burden of proof. See *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”).

Assuming *arguendo* that there is a noncriminal investigation, the Right-to-Know Law, under Section 706, provides a mechanism in which information that is not subject to public access can be redacted and the remainder provided to the requester. The section states the following:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency’s response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9.

Wherefore, requester asks the Office of Open Records to order North York to provide a copy of the most recent financial audit report into North York Borough Liberty Vol. Fire Co. No. 1.



NORTH YORK BOROUGH

350 E. SIXTH AVE, YORK PA 17404 * (717) 845-3976 * FAX (717)852-9394
WEBSITE WWW.NORTHYORKBOROUGH.COM * EMAIL GENERAL@NORTHYORK.US

August 6th, 2020

Dylan Segelbaum
1891 Loucks Road
York, PA 17408

VIA EMAIL: dsegelbaum@ydr.com

Re: Right to Know Law Request received July 30, 2020

Dear Mr. Segelbaum:

Thank you for writing to North York Borough with your request for information pursuant to the Pennsylvania Right to Know Law ("RTKL").

On July 30, 2020, North York Borough received from you a request as follows:

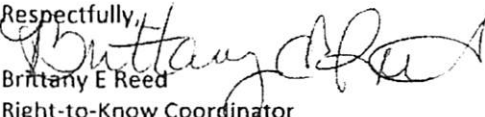
"A copy of the most recent forensic audit of the North York Borough Liberty Vol. Fire Co. No. 1."

This request is denied because the responsive record relates to a non-criminal investigation and is therefore exempt pursuant to Section 708(b)(17) of the RTKL.

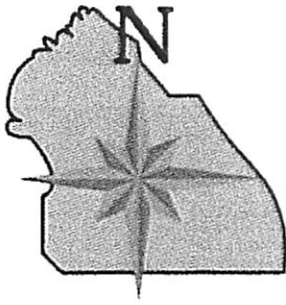
You have a right to appeal the denial of records in writing to Executive Director, Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17126-0333. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response. See Section 1101 of the RTKL. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The RTKL also requires that you state the reasons why the record is a public record and address each of the reasons the Borough denied your request. Visit the Office of Open Records website at <http://openrecords.state.pa.us> for further information on filing an appeal.

The Borough hereby expressly reserves its right to assert any and all exceptions as set forth in Section 708(b)(1-30) of the RTKL and further, its right to dispute whether any future requests seek a "record" or "public record" in accordance with the RTKL should you choose to amend your request at a later date or through the appellate process.

If you have further questions, please call me. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Respectfully,

Brittany E Reed
Right-to-Know Coordinator
North York Borough

cc: RTK file



NORTH YORK BOROUGH

350 E. SIXTH AVE, YORK PA 17404 * (717) 845-3976 * FAX (717)852-9394
WEBSITE WWW.NORTHYORKBOROUGH.COM * EMAIL GENERAL@NORTHYORK.US

Right-To-Know Law Extension Notice

July 30, 2020

Dylan Segelbaum
1891 Loucks Rd
York, PA 17408
Email: dsegelbaum@ydr.com

Dear Brian Bush,

Thank you for writing to North York Borough with your request for records pursuant to Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.* On July 30th, 2020, you requested a copy of the most recent forensic audit of the North York Borough Liberty Vol Fire Co. No. 1.

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

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

North York Borough expects to respond to your request on or before September 1st, 2020.

Respectfully,

Brittany E. Reed

North York Borough Admin. Asst / Right-To-Know Coordinator



pennsylvania
OFFICE OF OPEN RECORDS

STANDARD RIGHT-TO-KNOW REQUEST FORM

DATE REQUESTED: July 30, 2020

REQUEST SUBMITTED BY: ☐ E-MAIL ☐ U.S. MAIL ☐ FAX ☐ IN-PERSON

REQUEST SUBMITTED TO (Agency name & address): North York, East Sixth Avenue, York, PA 17404.

NAME OF REQUESTER: Dylan Segelbaum

STREET ADDRESS: 1891 Loucks Road

CITY/STATE/COUNTY/ZIP(Required): York, PA 17408

TELEPHONE (Optional): (717) 916-3981 (cell) **EMAIL (optional):** dsegelbaum@ydr.com.

RECORDS REQUESTED: **Provide as much specific detail as possible so the agency can identify the information. Please use additional sheets if necessary*

- A copy of the most recent forensic audit of the North York Borough Liberty Vol. Fire Co. No. 1.

DO YOU WANT COPIES? ☐ YES ☐ NO

DO YOU WANT TO INSPECT THE RECORDS? ☐ YES ☐ NO

DO YOU WANT CERTIFIED COPIES OF RECORDS? ☐ YES ☐ NO

DO YOU WANT TO BE NOTIFIED IN ADVANCE IF THE COST EXCEEDS \$25? ☐ YES ☐ NO

**** PLEASE NOTE: RETAIN A COPY OF THIS REQUEST FOR YOUR FILES ****
**** IT IS A REQUIRED DOCUMENT IF YOU WOULD NEED TO FILE AN APPEAL ****

FOR AGENCY USE ONLY

OPEN-RECORDS OFFICER:

☐ I have provided notice to appropriate third parties and given them an opportunity to object to this request

DATE RECEIVED BY THE AGENCY:

AGENCY FIVE (5) BUSINESS DAY RESPONSE DUE:

***Public bodies may fill anonymous verbal or written requests. If the requestor wishes to pursue the relief and remedies provided for in this Act, the request must be in writing. (Section 702.) Written requests need not include an explanation why information is sought or the intended use of the information unless otherwise required by law. (Section 703.)*

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF YORK : OOR Docket # AP 2020-1336

I, Richard Shank, being duly sworn according to law, deposes and says that I am the President of Borough Council for the Borough of North York. In my capacity as the President, I am familiar with the records of North York Borough, particularly as it relates to the record responsive to the request in this matter.

The Open Records Officer of North York Borough notified me of Mr. Segelbaum's request for documents pertaining to a forensic audit of the North York Borough Liberty Vol. Fire Co. No. 1 ("Fire Company"), which is a volunteer fire company serving North York Borough residents. North York Borough annually appropriates significant funds to the Fire Company in order for the Fire Company to maintain equipment, its building, and for the firefighters to participate in training. Without Borough funds, the Fire Company would likely not be able to function.

The entirety of the record responsive to Mr. Segelbaum's request is a report of findings in an investigation into potential misappropriation of Borough funds. The responsive record details the steps that were taken in the investigation by the forensic accounting firm contracted by the Borough to conduct the investigation into potential misappropriation, such as the records that were reviewed and the witnesses that were interviewed. The record review was completed and witness interviews were taken as part of an official probe into the conduct of certain members of the Fire Company. It also contains the accounting firm's conclusions.

The investigation into the members' conduct was conducted pursuant to the Borough Code, 8 Pa. C.S. §1202(35) and (56), which permits a Borough to appropriate funds to fire companies within the Borough, permits the Borough to ensure that the fire and emergency medical services

have the appropriate financial and administrative assistance for the services, and which requires that the fire/emergency medical services provide the Borough an annual itemized listing of all expenditures of the Borough's funds before the Borough considers budgeting additional funding to the organization. The investigation was conducted in order to determine if Borough funds were being misused by the Fire Company or its members in consideration of whether the Borough would be able to continue appropriating funds to the Fire Company, and whether or not additional controls were needed to ensure that there was no misappropriation.

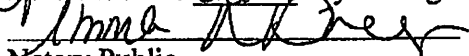
As a result of the investigation, the record was then transferred to the York County District Attorney's Office, which, to the best of my understanding, is reviewing the matter and may conduct its own investigation. The investigation did not result in the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization or a settlement agreement.



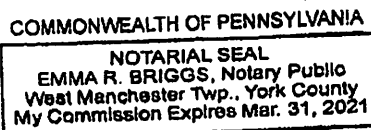
Richard Shank

President of Borough Council, North York Borough

Sworn and Subscribed to
Before me this 21st day of August, 2020.


Notary Public

My Commission Expires: 03/31/2021



Stock and Leader

ATTORNEYS AT LAW

BUSINESS

GOVERNMENT

PERSONAL

When Decisions Matter

August 26, 2020

Sarah L. Doyle, Esquire
Direct Dial: (717) 849-4103
sdoyle@stockandleader.com

VIA EMAIL (jorddavis@pa.gov)

Jordan Davis, Esquire
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Docket #AP 2020-1336

Dear Appeals Officer Davis:

Stock and Leader is Solicitor for North York Borough ("Borough"). Please accept this letter in support of the position of the Borough in this matter. On August 26, 2020, the Borough received an email from you inquiring as to whether the Borough would be responding to the appeal filed by Mr. Dylan Segelbaum ("Requester") on August 10, 2020. It was discovered that the original notification had been sorted to the Open Records Officer's junk folder. Upon review, the official notice of this appeal, including an invitation to submit additional information and legal argument, was sent on August 10, 2020. We thank you and the Requester for your courtesies in allowing us to submit this statement.

The Requester submitted a Right to Know Law Request ("the Request") on July 30, 2020 seeking "A copy of the most recent forensic audit of the North York Borough Liberty Fire. Co. No. 1" (the "Record"). On August 6, 2020, the Borough timely denied the Request. This appeal followed.

Standard of Review

Records in possession of a local agency are presumed public *unless* there is an exception under the Right to Know Law ("RTKL") or other law or protected by a privilege, judicial order or decree. 65 P.S. § 67.305 (*emphasis added*). The Borough bears the burden of proving the

August 26, 2020
Page 2 of 4

application of the exception beyond a preponderance of the evidence. *Levy v. Senate of Pennsylvania*, 94 A.3d 436 at 449 (Pa. Cmwlth. Ct. 2014). In this matter, the Borough denied the Request pursuant to Section 708(b)(17) of the Right to Know Law (RTKL), which is an exception for records relating to a non-criminal investigation. Additionally, the Borough asserts that the Record is exempt as it relates to a criminal investigation pursuant to Section 708(b)(16) of the RTKL.

Noncriminal Investigation Exception

While Section 708(b)(17) of the RTKL clearly exempts from public disclosure “record[s] of an agency relating to a noncriminal investigation,” the RTKL does not define “noncriminal” or “investigation.” It is well settled that, “[w]hen a statute fails to define a term, the term’s ordinary usage applies.” *Educ. Mgmt. Servs. v. Dep’t of Educ.*, 931 A.2d 820, 825–26 (Pa.Cmwlth.2007). “Moreover, ‘[d]ictionaries provide substantial evidence of a term’s ordinary usage.’” *Id.* Applying this principle in *Sherry v. Radnor Tp. Sch. Dist.*, the court concludes “that the use of the word ‘noncriminal’ in Section 708(b)(17) is intended to signal that the exemption is applicable to investigations other than those which are criminal in nature.” *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 522 (Pa.Cmwlth. 2011).

The court in *Sherry* also cites to Black’s Law Dictionary and Webster’s Dictionary when defining “investigate” and states, “Black’s Law Dictionary does not define the term ‘investigation’; however, it defines the term ‘investigate’ as follows: ‘1. To inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry.... 2. To make an official inquiry....’ Black’s Law Dictionary 902 (9th ed.2009). Webster’s Third New International Dictionary defines the term ‘investigation’ as follows: ‘1: the action or process of investigating; detailed examination ... 2. a searching inquiry: ... an official probe....’ Webster’s Third New International Dictionary 1189 (2002). Therefore, we conclude that, as used in Section 708(b)(17), the term ‘investigation’ means a systematic or searching inquiry, a detailed examination, or an official probe.” *Sherry*, 20 A.3d 515, 522–23.

Here, the Request, which seeks a forensic accounting investigation report, relates directly to a noncriminal investigation undertaken by the Borough to investigate a financial matter. The only reason for its existence is that the Borough investigated potential misappropriations of funds that the Borough had provided to the North York Borough Liberty Fire. Co. No. 1. The Borough conducted a “searching inquiry” into the matter by contracting a forensic accounting firm to perform the investigation. Records were reviewed, witnesses were interviewed, and the accounting firm set forth its methods and conclusions in its report, which is the Record in question. *See*, Affidavit of Richard Shank.

In addition, the investigation relates to a specifically authorized power and obligation of Boroughs in Pennsylvania. The Record in this case is like the requested record in *Ralph Duquette v. Palmyra Area Sch. Dist.*, where the OOR found that the requested record was pertaining to an investigation that related to a core duty of the School District, namely, investigations of harassment or discrimination pursuant to federal law and 43 P.S. §§ 951 et seq. Therefore, the record was

August 26, 2020
Page 3 of 4

exempt from disclosure because it related to a noncriminal investigation conducted pursuant to one of the School District's core duties. *Duquette v. Palmyra Area Sch. Dist.* OOR Docket No. AP 2017-0372.

Here, one of the Borough's core duties pursuant to the Borough Code is the safety of its residents. A power that the Borough has to ensure that it can adequately provide fire safety for its residents is to contribute to the purchase of fire engines and other apparatus, and to appropriate funds to fire companies for the construction, repair, and maintenance of buildings, among other things. 8 Pa. C.S. § 1202(35). Pursuant to the Borough Code, the Borough must also ensure that fire and emergency medical services are provided within the Borough "by the means and to the extent determined by the borough, including the appropriate financial and administrative assistance for these services." 8 Pa. C.S. § 1202(56). Additionally, "[t]he borough shall require any emergency services organization receiving borough funds to provide to the borough an annual itemized listing of all expenditures of these funds before the borough may consider budgeting additional funding to the organization." The legislature, when enacting this provision, anticipated that instances may arise in which the Borough may want to question the appropriateness of the use of the municipality's contributed funds. In order to ascertain whether or not the funds are being used appropriately, a noncriminal investigation necessarily must be performed. A forensic accounting investigation was performed in this instance at the direction of the Borough Council. *See*, Affidavit of Richard Shank.

The Borough conducted an official investigation into a potential misappropriation of Borough funds that required 1) inquiries into the financial activities of the Fire Company, 2) an examination of evidence, including financial records and other documents, and 3) an official probe into Fire Company members' actions via witness interviews, together meeting the standards set forth in *Sherry*. As such, the Record is exempt pursuant to Section 708(17) of the RTKL.

Criminal Investigation Exception

Additionally, the Record is exempt from disclosure because it resulted in a criminal investigation. 65 P.S. § 67.708(16). This exemption may be asserted by agencies that are not legislatively empowered to enforce the law. *Levy v. Senate of Pennsylvania*, 94 A.3d 436, 449 (Pa.Cmwlth. 2014) (extending analysis of criminal investigation exemption to a record unrelated to the agency's law enforcement functions.) Unlike in *Levy*, however, where the records were not related to any criminal investigations, here, the Record relates to a criminal investigation. During a noncriminal investigation into potential misappropriation of Borough funds, it was discovered that criminal activities may have occurred. As such, the Record was provided to the York County District Attorney's Office, which is presumed to have opened a criminal investigation based upon the Record. It would be unconscionable to now require the Borough to disclose records of an ongoing criminal investigation, as that would directly interfere with an on-going criminal investigation. As such, the Record is exempt pursuant to Section 708(16) of the RTKL.

The Borough respectfully requests that you deny the instant appeal. Please do not hesitate to contact me should you have any questions.

August 26, 2020
Page 4 of 4

Very truly yours,

STOCK AND LEADER


Sarah L. Doyle, Esquire

SLD
Attachments

EXHIBIT C

**(Supplemental Affidavit of Walter, A.
Tilley, III, Esquire)**

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA : Case No:
: OOR Docket # AP 2020-1336
COUNTY OF YORK :

I, Walter A. Tilley, III, Esquire, being duly sworn according to law, deposes and says that I am the Solicitor for North York Borough. In my capacity as Solicitor for the Borough, I routinely advise the Borough regarding legal matters, such as the investigation that the Borough undertook that resulted in the creation of the record at issue in this appeal.

I became aware of concerns regarding possible misappropriation of funds by the North York Borough Liberty Vol. Fire co. No. 1 (Fire Company) by Borough Council during an executive session. I suggested that if financial impropriety was suspected, the Borough Council should engage the services of a forensic auditor, and I provided the Council with RKL as an accounting firm with that capability. I also advised the Council that, if there was criminal activity, in order for the District Attorney to prosecute the matter, the Borough would need to provide evidence of wrongdoing that would allow the District Attorney's office to take on the investigation and pursue criminal charges if appropriate. The accounting firm, RKL, conducted the forensic audit and produced a report that is the record at issue in this appeal.



As part of the investigation, members of Borough Council met with the accountant to discuss the report at the accountant's office. The accountant explained that he found that there was evidence of wrongdoing. Then Borough Council decided that they wanted to forward to the report to the District Attorney. Pursuant to the direction from the Borough Council, I corresponded with the District Attorney, David Sunday, who advised that I should send the report to his office, which I did. The assigned investigator then asked for contact information of Borough Council members

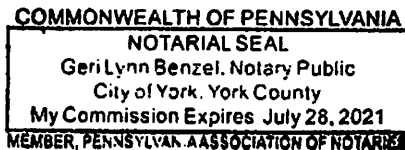
and Fire Company members. I learned that the investigator conducted interviews of these individuals.

After the Final Determination was issued by the Office of Open Records in this matter, charges were filed against the fire chief on September 30, 2020. On October 9, 2020, the fire chief turned himself in to the court in response to the charges. It is my understanding that the forensic audit report from RKL is in the possession of the District Attorney and that he intends to use the report and its findings as evidence in the criminal case.


Walter A. Tilley, III, Esquire

Sworn and Subscribed to
Before me this 13th day of October 2020.


Notary Public
My Commission Expires: 



IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

NORTH YORK BOROUGH
Petitioner,

v.

DYLAN SEGELBAUM and
THE YORK DAILY RECORD,
Respondent.

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Docket No:

NOTICE OF PRESENTMENT OF MATTER AT CIVIL MOTIONS COURT

TO THE PROTHONOTARY:

The following matter is for presentment at Civil Motions Court:

Notice of Appeal and Petition for Review of Office of Open Records Final Determination
pursuant to York R.C.P. 5090 and YCJA 509.1

Date to be presented:

October 22, 2020

Pleading/matter to be presented:

Notice of Appeal and Petition for Review of Office of Open Records Final
Determination

Date(s) conferred, or attempt to confer with all other interested parties:

N/A

Date(s) moving party sought concurrence of each other party:

N/A

Date other parties and Court Administration notified of intended presentment:

October 15, 2020

Respectfully submitted,

STOCK AND LEADER

Date: October 14, 2020

By: /s/ Walter A. Tilley, III

Walter A. Tilley, III, Esquire

I.D. #37452

wtilley@stockandleader.com

Sarah L. Doyle, Esquire

I.D. #321149

Stock and Leader

Susquehanna Commerce Center East

221 W. Philadelphia Street, Suite 600

York, PA 17401

Telephone: (717) 846-9800

Attorney for Petitioners

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

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

NORTH YORK BOROUGH
Petitioner,

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DYLAN SEGELBAUM and
THE YORK DAILY RECORD,
Respondent.

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Docket No:

CERTIFICATE OF SERVICE

AND NOW, this 15th day of October, 2020, I, Walter A. Tilley, III, Esquire of the law firm of Stock and Leader, attorneys for the Petitioner, hereby certify that I served the within Petitioner's Notice of Presentment this day by depositing the same in the United States mail, postage prepaid, in York, Pennsylvania, addressed to:

Jordan C. Davis, Esquire
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Dylan Segelbaum
The York Daily Record/Sunday News
1891 Loucks Road
York, PA 17408

STOCK AND LEADER

By: /s/ Walter A. Tilley, III

Walter A. Tilley, III, Esquire

I.D. No. 37452

Susquehanna Commerce Center East

221 West Philadelphia Street, Suite 600

York, PA 17401

Tel.: (717) 846-9800

Attorney for Petitioner

Stock and Leader

ATTORNEYS AT LAW

BUSINESS

GOVERNMENT

PERSONAL

When Decisions Matter

October 15, 2020

Walter A. Tilley, III, Esquire
Direct Dial: (717) 849-4127
wtalley@stockandleader.com

Dylan Segelbaum
The York Daily Record/Sunday News
1891 Loucks Road
York, PA 17408

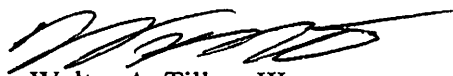
Re: North York Borough v. Dylan Segelbaum, et al.
Notice of Appeal

Dear Mr. Segelbaum:

Enclosed please find date-stamped copies of Petitioners Notice of Appeal and Petition for Review, and Petitioner's Notice of Presentment of Matter at Civil Motion Court, which were electronically filed today in the above-referenced matter.

Very truly yours,

STOCK AND LEADER



Walter A. Tilley, III

WAT\slz

Enclosures

cc: ✓ Jordan C. Davis, Esquire (with enclosures)

PARTIES

2. The Petitioner/Appellant is North York Borough ("Borough"), a municipality organized pursuant to the Pennsylvania Borough Code, 8 Pa.C.S. § 101 et seq., with offices at 350 East Sixth Avenue, York, PA 17404.

3. The Respondent/Appellee is Dylan Segelbaum and The York Daily Record, which has a mailing address of 1891 Loucks Road, York, Pennsylvania, 17408.

4. The Office of Open Records of the Commonwealth of Pennsylvania ("OOR") is the governmental agency. The OOR is not a party to the appeal, but will receive notice of the appeal and has a right to respond. *See, Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013); *See also*, the Final Decision of the OOR in this matter attached hereto as "Exhibit A", pg 8.

DETERMINATION TO BE REVIEWED

5. The determination to be reviewed is the Final Determination entered by the OOR on September 16, 2020 in OOR Docket Number AP 2020-1336. A copy of the Final Determination is attached hereto as "Exhibit A." Copies of all materials provided to the OOR, including but not limited to the initial response from the Borough's Right to Know Officer, Brittany Reed, the affidavit of Richard Shank, Borough Council President, and the Position Statement filed with OOR on behalf of the Borough, are attached as "Exhibit B". The Borough's supplemental affidavit of Walter A. Tilley, Esquire, Borough Solicitor, is provided pursuant to *Bowling v. Office of Open Records*, 75 A.3d 453, 476 (Pa. 2013) and are attached as "Exhibit C."

STANDARD AND SCOPE OF REVIEW

6. The standard of review is *de novo* and the scope of review is plenary. *Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013).

CONCISE STATEMENT OF FACTS

7. The Open Records Officer (agency official) for North York Borough is:

Brittany Reed
North York Borough Secretary
350 East Sixth Avenue, York, PA 17404
(717) 845-3976

8. The record responsive to the RTKL request is a forensic accounting investigation report of North York Borough Liberty Fire. Co. No. 1.

9. The request is dated July 30, 2020.

10. The response denying the request is dated August 6, 2020.

11. The Respondent asserts the record is public because it is a financial record.

12. The Borough asserts that the record is exempt from disclosure as a record relating both to a criminal investigation pursuant to Section 708(b)16 and a non-criminal investigation pursuant to Section 708(b)17. *See*, 65 P.S. § 67.708 (b)16-17.

CONCISE STATEMENT OF THE REASONS FOR APPEAL

13. The OOR erred when it determined that the record at issue, a forensic audit report, was not a record related to a criminal investigation because the audit was not primarily created for

proper governance of public funds but rather was created with the purpose of determining if public funds had been misappropriated, which is a crime.

- a. After-acquired evidence shows that the record is related to a criminal investigation undertaken by the York County District Attorney's Office. *See Exhibit C attached*, supplemental Affidavit of Walter A. Tilley, III, Esquire.
- b. As the affidavit of Richard Shank, which was submitted to OOR, demonstrated, the record was turned over to the District Attorney after the Borough completed its own non-criminal investigation. *See Exhibit B attached*, supplemental Affidavit of Richard Shank.
- c. The record itself was investigatory in nature, and but-for the Borough's investigation into possible misappropriation of funds (a crime), the record would not have existed.
- d. It was not a routinely created audit report, but rather was a report of a forensic accountant specifically hired by the Borough to investigate misappropriation so that the findings could be provided to the District Attorney. *See Exhibit C attached*, supplemental Affidavit of Walter A. Tilley, III, Esquire.
- e. It contains information from witness interviews, relates information from documents reviewed by the forensic accountant, and contains the forensic accountant's conclusions. As such, is not merely tangentially related to an investigation of misappropriation, but the record is *the record* of the investigation itself.