

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

LANCASTER TOWNSHIP, : CIVIL DIVISION — STATUTORY
Petitioner, : APPEAL
v. :
ALEX WEIDENHOF AND THE : Case No. 21-40053
CRANBERRY EAGLE :
Respondents, :

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OFFICE OF OPEN RECORDS

**BRIEF IN SUPPORT OF RESPONDENT ALEX WEIDENHOF'S ANSWER TO
PETITION FOR REVIEW OF AN OFFICE OF OPEN RECORDS FINAL
DETERMINATION, NEW MATTER AND COUNTERCLAIM**

INTRODUCTION

More than a century ago, then-Boston lawyer Louis Brandeis wrote that “[s]unlight is said to be the best of disinfectants.” Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 92 (1914). That statement was made in response to the inner workings of the finance industry, but it is applicable, too, to the inner workings of governments. In fact, it was echoed more than a decade ago to emphasize the importance of the federal government's Freedom of Information Act. *See* Memorandum for the Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

What is before this court is, quite simply, a local governmental agency attempting to put a layer of opacity between it and its constituency, rather than allowing in sunlight. Lancaster Township (the “Township”) seeks to obfuscate the public's understanding of how it works, and in fact has taken every step along the way to prevent the intrusion of sunlight upon its mechanics.

SUMMARY OF ARGUMENT

In the six months between the Township's denial of the Right-to-Know Law Request at issue in this case and its filing of this Petition for Review, the Township has had an opportunity

at every turn to produce evidence in support of the exemptions it claims preclude it from releasing the responsive records. But instead of producing evidence when it denied the Request, instead of offering evidence on appeal before the Office of Open Records ("OOR"), instead even of requesting the OOR conduct its own *in camera* review as permitted under the Right-to-Know Law ("RTKL"), the Township here is asking this Court to do something extraordinary. Rather than act as finder of fact, the Township has asked this Court to find facts for it.

The Township in its Petition for Review urges this Court to exercise a *de novo* standard of review with a broad or plenary scope. Pet. ¶¶ 6-7. It would stand to reason, then, that the Township would present additional evidence when asking to supplement. Indeed, the Township has presented no evidence in the preceding six months indicating that any responsive records are applicable under either the Section 708(b)(7) employee record exemption or the Section 708(b)(17) noncriminal investigative record exemption. Still, the Township urges the Court to conduct an *in camera* review of the responsive records.

As further explained below, the Township's Petition should be dismissed with prejudice. Lancaster Township has not met any burden the Right-to-Know Law places upon it; it has not presented one page, one sentence, or one word of evidence for the exemptions it cites; and now it wants the Court to cure the significant defects of the arguments and evidence it has presented during the past six months.

What is more, the Township commenced this action in plain violation of state open-government laws. Rather than authorizing its solicitor to file the instant Petition in an open meeting, as is required by the Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701-716, the Township merely announced it held a closed-door executive session and, three weeks later, filed its Petition. The Township's failure to abide by the Commonwealth of Pennsylvania's open-

meetings law in order to challenge an order to release documents under the state's open-records would be humorous if it were not so concerning.

STATEMENT OF QUESTIONS PRESENTED

1. **Should Lancaster Township's Petition for Review be dismissed with prejudice because the Township lacks the capacity to sue by failing to properly commence this action under the Pennsylvania Sunshine Act?**

Suggested Answer: *Yes.*

2. **Did the Office of Open Records correctly determine that Lancaster Township has failed to meet its evidentiary burden under the Right-to-Know Law to withhold public records?**

Suggested Answer: *Yes.*

3. **Has Lancaster Township failed at every turn to present any evidence in support of its withholding public records under the Right-to-Know Law?**

Suggested Answer: *Yes.*

4. **Should this Court hold that precedent requires Lancaster Township present evidence in support of its claims, find it has failed to do so, and uphold the Office of Open Records' correctly decided Final Determination?**

Suggested Answer: *Yes.*

I. ARGUMENT

A. THE TOWNSHIP LACKS CAPACITY TO SUE BY COMMENCING THIS ACTION IN VIOLATION OF THE SUNSHINE ACT, AND ITS PETITION SHOULD BE DISMISSED.

Not only has the Township failed to make any evidentiary showing that would support its withholding of public records, as further discussed below, it has also appealed the OOR's Final Determination unlawfully. For the following reasons, this Court should declare the Township's Petition to have been unlawfully filed, and this Court should dismiss with prejudice the Township's Petition for lack of jurisdiction.

Paragraphs 34 through 48, and 56 through 71 of the Answer, New Matter and Counterclaim are incorporated by reference as if fully set forth herein.

Clearly, the Township has failed to abide by both of the Commonwealth's flagship open-governance laws. Moreover, it has illegally challenged an order issued under one open-governance law by approving the filing of that challenge without following the other.

In Pennsylvania, it is "the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies." 65 Pa.C.S. § 702(a). All citizens have the right "to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon. *Id.* § 702(b).

Lancaster Township plainly considers action by the township's solicitor to be something that requires approval by its Board of Supervisors. *See* Lancaster Township, Butler County, Pennsylvania, Municipal Code § 187-7 ("Upon a specific finding by the Police Department of the fact that a public nuisance exists at a particular location, the Solicitor, *with the approval of the Board of Supervisors*, is authorized to take whatever action is appropriate") (emphasis added). Further, this Petition is clearly something—even ignoring the Rules of Professional Conduct—approved by the Board of Supervisors, as evidenced by its Chairman signing the verification page of the Petition.

The Township's Board approved the filing of this petition, but it did so in plain and significant violation of the Sunshine Act. Therefore, this Court should enjoin the Township from litigating its Petition until it determines the extent to which the Township violated the Sunshine Act. After such review, this Court should declare the Township unlawfully filed this Petition and, as the Township lacks capacity to sue, and any lawful action authorizing the filing of a

subsequent petition would be after the statutory 30-day appeal deadline, giving this Court no jurisdiction over the matter, dismiss with prejudice the Petition.

B: THE TOWNSHIP HAS FAILED TO PRESENT ANY EVIDENCE IN SUPPORT OF ITS WITHHOLDING PUBLIC RECORDS.

Records of any agency in the Commonwealth, including those of the Township, are presumed to be public, unless the record is exempt under Section 708 of the RTKL, the record is protected by privilege, or the record is exempt under any “Federal or State law or regulation or judicial order or decree.” 65 P.S. § 67.305(a). Here, the Township presents an argument that it should not be forced to provide records, claiming they are exempt under Section 708 of the RTKL; it does not cite any privilege, nor does it claim it is prohibited from disclosing the records under any law or judicial order. There is no argument, then, that the records are presumed to be public, and there is no statutory duty for the Township to *not* disclose the records.

Instead, the RTKL, under which the Township claims the requested records are exempt from disclosure, provides that “[t]he burden of proving that a record of a . . . local agency is exempt from public access shall be on the . . . local agency receiving a request by a preponderance of the evidence.” *Id.* § 67.708(a)(1). The evidence presented by the Township to support its cited exemptions, however, falls well short of that standard.

The Township’s evidentiary presentation during the past six months amounts to a mere recitation of the cited exemptions when the Township first denied the Request, Pet. Ex. C; unsworn statements by its solicitor that the exemptions apply, Pet. Ex. E; and a sworn declaration by its secretary-treasurer that “all records within the Agency’s possession, custody or control that are responsive to the request and available for public access” were provided. *Id.* Certainly, affidavits and other documents may be used to establish exemptions. *Sherry v. Radnor Twp.*

School Dist., 20 A.3d 515 (Pa. Cmwlth. 2011). But an affidavit that is “conclusory or merely parrot[s] the exemption” does not suffice as evidence. *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Cmwlth. 2016). Further, while the township’s solicitor’s arguments are part of the record, they are “distinguishable from the *evidentiary* record.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Cmwlth. 2015). The Township’s circular, tautological argument here—that the exemptions apply *because* they claim the exemptions apply—is woefully insufficient.

Lancaster fails on two fronts to establish any records are exempt as “employee records.” First, it is unclear what specific exemption the Township relies on here to withhold public records. The “employee records” category of exemptions is not a broad catchall for all records pertaining to employees of the Township, but rather establishes nine exemptions agencies may apply. *See* 65 P.S. § 67.708(b)(7) (“*The following records relating to an agency employee*”) (emphasis added). While the Township has cited specific exemptions, it has not remained consistent in its citations of such. For instance, in its original denial of the Request, the Township applied the: (1) Section 708(b)(7)(ii) performance rating or review exemption; (2) Subsection (vi) written criticism exemption; (3) Subsection (vii) grievance material exemption; and (4) Subsection (viii) discipline-, demotion- or discharge-related information exemption. Pet. Ex. C. The Township contracted the invoked exemptions on appeal before the OOR, arguing that only the Section 708(v)(7)(vi) and (viii) exemptions applied. Ex. E.

If the Township cannot consistently cite the same exemptions it contends preclude it from disclosing records, it almost certainly cannot provide evidence supporting its claims. Indeed, the Township has not done so.

Second, and as referenced above, the Township has not presented evidence in support of its vague citations of the Section 708(b)(7) exemptions. It plainly admits its evidentiary deficiencies in its Petition: “The Township also supplied an attestation under oath by its open records officer that she had reviewed all documents responsive to the request and available for public access and had provided them to the requester.” Pet. ¶ 19. There, the Township states it filed a document that consists merely of conclusory statements. But “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

Next, the Township’s claims that some requested documents are exempt as records of noncriminal investigations somehow has less evidentiary support than its employee records claim.

In order for that exemption to be applied, the Township must supply evidence that the “records sought relate to a noncriminal investigation.” *Black v. Pa. State Police*, No. 676 C.D. 2016 at *10 n. 16 (Pa. Cmwlth. Nov. 23, 2016). And while the RTKL does not define a “noncriminal investigation,” Pennsylvania courts have consistently held such an investigation consists of “a systematic or searching inquiry, a detailed examination, or an official probe.” *Dept. of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Cmwlth. 2010). Moreover, that investigation must have been conducted as “part of the agency’s official duties.” *Id.* at 814. “Official duties” is construed narrowly. “This exception was applied to preclude disclosure of materials related to noncriminal investigations conducted by an agency *acting within its legislatively-granted fact-finding and investigative powers*. That is, its ‘official duties.’” *Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920, 925 (Pa. Cmwlth. 2012) (emphasis added).

As with the other exemptions claimed by the Township, Lancaster has failed to meet its evidentiary burden with the noncriminal investigation claim. Its support in this case amounts to substantially less than its evidentiary burden to establish the applicability of exemptions: Sworn statements that are merely conclusory and an unsworn position statement by the Township's attorney. The Township's argument ignores more than a decade of RTKL precedent, is more tautological than a circle, and amounts, essentially, to seeking arguments that meet its desire to not release the records, rather than having any statutory duty or right to withhold the requested documents. In sum, the Township is grasping for straws.

C. THE TOWNSHIP IMPROPERLY SEEKS *IN CAMERA* REVIEW IN LIEU OF MEETING ITS EVIDENTIARY BURDEN.

The Township is correct in its assertion that this Court's standard of review may be *de novo* and its scope of review may be plenary. Pet. ¶ 6. However, this court is by no means obligated to do so, particularly when the Township seeks to supplement the record and have this Court conduct an *in camera* review in lieu of presenting any evidence before the OOR.

That is precisely what the Commonwealth Court worried about five years ago. *See Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 62 (Pa.Cmwlt. 2016) ("We express concern about the potential for an agency to bypass OOR as the fact-finder in the first instance and seek a more receptive audience in a Chapter 13 court."). Moreover, state courts have consistently held that, in the absence of any sufficient evidence the OOR issued a deficient Final Determination, it is reasonable for a court to defer to the appeals officer; this deference preference has prevailed even after the state Supreme Court held that reviewing courts may exercise a *de novo* standard of review with plenary scope. *See, e.g., Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013) (Saylor, J., concurring) ("[T]o the extent that OOR

determinations reflect a consistent and reasonable approach in fleshing out the boundaries of the statutory exemptions from disclosure in the myriad factual scenarios arising on a daily basis before the agency, I would favor the affordance of some deference to these administrative-level developments”); *Levy v. Senate of Pa.*, 94 A.3d 436, 442 (Pa. Cmwlth. 2014) (“In the ordinary course of RTKL proceedings, this will occur at the appeals officer stage, and a reviewing court will defer to the findings of the appeals officer”).

To be certain, there are instances in which this Court should conduct an *in camera* review; for example, when issues of privilege are raised, such review may be necessary to protect a client from the unlawful disclosure of privileged information. *See Commonwealth v. Ctr. Twp.*, 95 A.3d 354, 370 (Pa. Cmwlth. 2014) (“The propriety of in camera review is well-accepted and it is oftentimes necessary for a fact-finder to utilize this tool in order to determine whether a claimed privilege is applicable”).

What the Township seeks in this instance, however, does not meet that necessity. It does not raise the issue of privilege; the Township instead seeks *in camera* review because it has been unable to establish by a preponderance of the evidence that it may withhold the public records sought in the Request. In fact, the Township has had the opportunity for more than half a year to provide this evidence. It has not.

The OOR invited both parties to supplement the record on appeal. What the Township submitted did not include sufficient evidence for it to withhold records under the RTKL. “It is not incumbent upon OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts.” *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Cmwlth. 2017). In fact, the Township “had a full opportunity to

establish the exemptions before OOR. That the evidence . . . submitted was found wanting by the OOR does not mean the procedure was flawed.” *Id.*

Lancaster Township does not seek a review of the OOR’s Final Determination. Instead, what it seeks is the proverbial second bite at the apple, the ability to make amends for its failure to make any semblance of an adequate legal argument before the OOR. But it does not do so by requesting the ability to supplement the record with sufficient evidence. That would be one thing, although still not permitted under prevailing law. Rather, the Township wants this Court not to be the fact-finder but instead wants this Court to fix the Township’s insufficient evidentiary presentation for the Township by conducting an *in camera* review.

State courts have consistently held that “[a]n agency is not entitled to ignore its burden to show an exemption from disclosure before OOR and rely on supplementation of the record in this Court to avoid the consequences of that conduct.” *Pa. State Police v. Muller*, 124 A.3d 761, 766 (Pa. Cmwith. 2015). That is precisely what the Township seeks by filing its Petition. This Court should look to *Muller* for guidance due to the similarities between that and this case. In *Muller*, the Pennsylvania State Police denied a requester’s RTKL request with “bare, conclusory statements,” which are, as noted above, insufficient under the RTKL. PSP then failed to adequately supplement the record before OOR. *Id.* The Commonwealth Court held that, “absent a showing of necessity particular to the circumstances presented, we are wary of permitting supplementation lest we incentivize an obfuscatory practice in proceedings below that is contrary to the clear intent of the RTKL.” *Id.*

But it was not just in *Muller* that state courts have held agencies must make at least some evidentiary showing to warrant an *in camera* review. It has been held that so much as an application to supplement the record with additional declarations constitutes a “second bite of the

apple.” *Pennsylvania Turnpike Com’n v. Murphy*, 25 A.3d 1294, 1298 (Pa. Cmwlth. 2011).

Moreover, when the record developed before the OOR is inadequate to prove an exemption, as is the case here, that still does not mean an *in camera* review is proper. “Lack of evidence, when the parties and participants had a full opportunity to submit evidence to the fact-finder, is not a valid reason for supplementing the record.” *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 129 (Pa. Cmwlth. 2019).

It was the Township’s, not the OOR’s, error in this case that led to the Final Determination ordering the disclosure of documents. For that reason, this Court should deny the Township’s request for *in camera* review and affirm the OOR’s Final Determination.

CONCLUSION

For the above reasons, the Township’s Petition is significantly deficient. Not only does the Township fail to present any evidence that the requested records are exempt from public disclosure, the relief it requests—that this Court take action to make up for the Township’s deficient argument and evidentiary presentation before the OOR, rather than act as finder of fact—is something state courts have repeatedly held is untenable. The Township, quite simply, ignored its duty and now asks this Court to do its work for it.

On top of that, the Township’s Petition was unlawfully filed, with the Board of Supervisors approving the filing of the Petition in a closed-door executive session in violation of the Sunshine Act.

For the foregoing reasons, the Township’s Petition should be dismissed with prejudice or, in the alternative, this Court should affirm the holdings of the Office of Open Records and order the Township to provide all responsive records within ten (10) days.

Respectfully submitted,



Alex Weidenhof

This 26th day of March, 2021

VERIFICATION

I, Alex Weidenhof, verify that the facts and statements contained in the foregoing pleading are true and correct to the best of my personal knowledge, information, and belief. I understand this verification is subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, and I may be subject to criminal penalties if I make knowingly false averments.

Date: March 26th, 2021


Alex Weidenhof

CERTIFICATE OF SERVICE

I, Alex Weidenhof, hereby certify that on March 26th, 2021, I caused to be served the foregoing document, Brief in Support of Respondent Alex Weidenhof's Answer to Petition for Review of an Office of Open Records Final Determination, New Matter, and Counterclaim, by email and First Class Mail, postage prepaid, to the following:

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CERTIFICATE OF COMPLIANCE

I certify 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.



Alex Weidenhof