

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

|   |   |                          |
|---|---|--------------------------|
| Philadelphia Industrial Development Corporation | : |                          |
|   | : |                          |
|   | : | No. 528 C.D. 2010        |
| v.  | : | Argued: February 8, 2011 |
| Jihad Ali,                                      | : |                          |
|   | : |                          |
| Appellant                                       | : |                          |

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON<sup>1</sup>**

**FILED:** April 18, 2011

Jihad Ali (Appellant) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), dated March 2, 2010. The trial court reversed a final determination of the Office of Open Records (OOR), dated June 17, 2009, holding that Philadelphia Industrial Development Corporation (PIDC) is not subject to the open records requirements of the Right-To-Know Law (RTKL)<sup>2</sup> for the purposes of Appellant’s request. The primary issue in this case is whether PIDC qualifies as “local agency” under Section 102 of the RTKL, 65 P.S. § 67.102. For the reasons that follow, we affirm the trial court’s decision.

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<sup>1</sup> Judge Butler recused himself from consideration of this matter. While the panel of judges that heard the case voted 2 to 1 to affirm, pursuant to our opinion circulation rules all remaining commissioned judges voted on the opinion and a tie vote resulted. Therefore, this opinion is filed pursuant to Section 256(b) of the Internal Operating Procedures of the Commonwealth Court. 210 Pa. Code § 67.29(b).

<sup>2</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-.3104.

PIDC is a private, not-for-profit Pennsylvania corporation formed jointly in 1957 by the Greater Philadelphia Chamber of Commerce (Chamber of Commerce) and the City of Philadelphia (City) for the purpose of promoting economic development throughout the City. PIDC's board of directors is comprised of 30 members: eight members are nominated by the President of the Chamber of Commerce; fifteen members are persons prominent in the financial, commercial, industrial and professional community of the City, nominated jointly by the Director of Commerce of the City and the President of the Chamber of Commerce; and seven are City officials *ex officio*. (Supplemental Reproduced Record (Supp. R.R.) at 73b-75b.) In the event that PIDC terminates operations or dissolves, the City will receive all of PIDC's assets. (Supp. R.R. at 97b.)

Although not created by ordinance, PIDC was designated as the City's official industrial development agency pursuant to an ordinance adopted by the Philadelphia City Council on August 21, 1958, under the Industrial Development Assistance Law.<sup>3</sup> (R.R. at 105b.) Following the City's designation, PIDC began issuing tax-exempt obligations under Section 103 of the Internal Revenue Code of 1954 (Code).<sup>4</sup> On January 30, 1967, however, the IRS ruled that obligations issued by PIDC would no longer be considered tax-exempt under Section 103 of the Code because PIDC was not acting "on behalf of" the City. (Supp. R.R. at 107b-110b.) This ruling was ostensibly a motivating factor behind the General Assembly's

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<sup>3</sup> Act of May 31, 1956, P.L. (1955) 1911, *as amended, formerly* 75 P.S. §§ 351-358, repealed by the Act of November 17, 1998, P.L. 788.

<sup>4</sup> 26 U.S.C. § 103. Section 103 of the Code provides that gross income does not include interest on the obligations of a State, a Territory, or a possession the United States, or any political subdivision of any of the foregoing, or the District of Columbia.

passage of the Economic Development Financing Law (EDFL), Act of August 23, 1967, P.L. 251, *as amended*, 73 P.S. §§ 371-386.<sup>5</sup>

Pursuant to Section 4 of the EDFL, 73 P.S. § 374, the City adopted an ordinance creating the Philadelphia Authority for Industrial Development (PAID) on October 25, 1967.<sup>6</sup> Unlike PIDC, PAID has the power to issue tax-exempt obligations under Section 103 of the Code. As required by Section 9 of the EDFL, 73 P.S. § 379, PAID is governed by a five-member board of directors appointed by the Mayor of the City. PAID, however, has no employees of its own.

Concurrent with its formation, PAID entered into a contractual relationship with PIDC. Under the agreement between PAID and PIDC, PAID designates PIDC “as its management agent and administrator of . . . routine administrative and operating affairs.” (Supp. R.R. at 22b.) Although PIDC fills virtually all of PAID’s staffing needs, PAID exercises no authority or control over PIDC’s employees: “PAID does not hire or fire PIDC’s employees; does not establish salaries; nor does PAID exercise any control over job titles, responsibilities, or performance of PIDC employees.” (Appellant’s Brief at 26.)

On January 15, 2009, Appellant utilized a standard Right-to-Know request form to seek certain records from PIDC and certain records from PAID.<sup>7</sup> Appellant requested four categories of documents:

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<sup>5</sup> The EDFL “authorizes the formation of industrial and commercial development authorities by any county, city, incorporated town, borough, or township, pursuant to the adoption of an ordinance or resolution by the local governing body. Such an authority is empowered to borrow and issue bonds.” 23 Summ. Pa. Jur. 2d Municipal and Local Law § 21:197.

<sup>6</sup> It is undisputed that PAID is subject to the open records requirements of the RTKL.

<sup>7</sup> It is unclear whether Appellant directed his Right-to-Know request to PIDC or PAID. Although Appellant’s request was emailed to Pauld@pidc-pa.org, a PIDC email address, PAID’s

1. Contract and all attachments between PIDC and PAID appointing [PIDC] as Management Agent for PAID (periods 2008-2009);
2. List of PIDC personnel (titles and salaries);

Ordinance enacting PIDC; and

3. Ordinance enacting PAID.

(Supp. R.R. at 112b.)

On January 15, 2009, a representative of PIDC granted in part and denied in part Appellant's Right-to-Know request. The PIDC representative granted Appellant's request for a copy of the contract between PAID and PIDC and a copy of the ordinance enacting PAID. The PIDC representative, however, denied Appellant's request for a copy of the ordinance enacting PIDC, because there is no ordinance enacting PIDC. Rather, PIDC was created as a private, not-for-profit corporation. The PIDC representative also denied Appellant's request for a list of PIDC personnel, reasoning that "PIDC is not an agency subject to the [RTKL]." (Supp. R.R. at 114b.)

On February 5, 2009, Appellant appealed PIDC's partial denial of his request to OOR pursuant to Section 1101(a) of the RTKL, 65 P.S. § 67.1101(a).<sup>8</sup> By final determination issued June 17, 2009, OOR granted Appellant's appeal and directed PIDC to provide Appellant with the requested records. OOR determined that PIDC falls within the scope of the RTKL because PIDC qualifies as a "similar governmental entity" under Section 102 of the RTKL's definition of "local

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website (<http://www.paid-pa.org> (last visited Feb. 15, 2011)) designates the same email address as the proper destination for Right-to-Know requests sent via email.

<sup>8</sup> The initial basis for Appellant's appeal to OOR was that PIDC is an "agency" subject to the RTKL because the City designated PIDC as its official industrial development agency by ordinance dated August 21, 1958. (Supp. R.R. at 116b-17b.) By subsequent letter dated March 11, 2009, Appellant added that PIDC's stated purpose is to "promote the industrial and economic development of the City of Philadelphia," and that upon dissolution, all of PIDC's assets will go to the City. (Supp. R.R. at 133b.)

agency,” noting that PIDC and PAID are “so closely intertwined and interdependent.” (Appellant’s Brief at 20.)

On July 17, 2009, PIDC timely appealed OOR’s final determination to the trial court pursuant to Section 1302 of the RTKL, 65 P.S. § 67.1302. PIDC argued, *inter alia*, that OOR erred in finding that PIDC constitutes a “local agency” under the RTKL. By order dated March 2, 2010, the trial court reversed OOR’s final determination, holding that “PIDC is not an agency subject to the open records requirements of the [RTKL].” (Appellant’s Brief at 24.) The trial court reasoned:

While PIDC fills virtually all of PAID’s staffing needs, it also receives revenue from services provided to a mix of other public and private sources. . . .

. . . The OOR mistakenly found that the PIDC is a similar governmental entity [under the RTKL’s definition of “local agency”] because it performs a governmental purpose. Based on the facts above, the PIDC is not a governmental entity at all. While the PIDC may perform all of PAID’s duties, this Court finds that PIDC does not solely perform PAID’s duties. The OOR erred when it intermingled PAID and the PIDC.

(Appellant’s Brief at 26.) This appeal followed.

On appeal,<sup>9</sup> Appellant argues, *inter alia*, that PIDC is subject to the open records requirements of the RTKL because PIDC qualifies as a “similar governmental entity” under Section 102 of the RTKL’s definition of “local agency.” Specifically, Appellant argues:

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<sup>9</sup> This Court’s review in a statutory appeal is limited to determining whether findings of fact are supported by competent evidence or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision.” *Piasecki v. Dep’t of Transp., Bureau of Driver Licensing*, 6 A.3d 1067, 1070 n.7 (Pa. Cmwlth. 2010). “The scope of review for a question of law under the [RTKL] is plenary.” *Stein v. Plymouth Twp.*, 994 A.2d 1179, 1181 n.4 (Pa. Cmwlth. 2010).

For those private entities who are the life support system of a public entity, then those private entities should be subject to the requirements of the [RTKL]. If the entire private company is not subject to the requirements of the [RTKL], then at the very least, those parts of the private company which have any relation to the operation and function of the public entity should be subject to the requirements of the [RTKL].

....

[W]hen a private company is so closely entwined with the operation of a public entity that the public entity can not exist without the control by the private company, then the private company should be considered a “similar governmental entity” and all of those portions of the private company which deal directly with the operation and control of the public entity should be entitled to disclosure under the [RTKL].

(Appellant’s Brief at 5, 10.) In other words, Appellant contends that PIDC is a “similar government entity” because PAID has contracted PIDC to substantially perform PAID’s duties. We disagree.

When interpreting a statute, this Court is guided by the Statutory Construction Act of 1972, 1 Pa. C.S. §§ 1501-1991, which provides that “the object of all interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). “The clearest indication of legislative intent is generally the plain language of a statute.” *Walker v. Eleby*, 577 Pa. 104, 123, 842 A.2d 389, 400 (2004). Accordingly, “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b). Only “[w]hen the words of the statute are not explicit” may this Court resort to statutory construction. 1 Pa. C.S. § 1921(c). Moreover, “[e]very statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa. C.S. § 1921(a). It is presumed “[t]hat the General Assembly intends the entire statute to

be effective and certain.” 1 Pa. C.S. § 1922(2). Thus, no provision of a statute shall be “reduced to mere surplusage.” *Walker*, 577 Pa. at 123, 842 A.2d at 400. Finally, it is presumed “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa. C.S. § 1922(1).

Section 102 of the RTKL defines “agency” as “[a] Commonwealth agency, a *local agency*, a judicial agency or a legislative agency.” (Emphasis added.) In turn, “local agency” is defined as any of the following:

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

*Id.* (emphasis added). The term “similar governmental entity” is not defined under the RTKL.<sup>10</sup>

Under the doctrine of statutory construction known as *ejusdem generis*, “where general words follow the enumeration of particular classes of persons or things, the general words will be construed of the same general nature or class as those enumerated.” *Indep. Oil & Gas Ass’n of Pa. v. Bd. of Assessment Appeals of Fayette Cnty.*, 572 Pa. 240, 246, 814 A.2d 180, 184 (2002) (quoting *McClellan v. Health Maint. Org. of Pa.*, 546 Pa. 463, 473, 686 A.2d 801, 806 (1987)). This concept has been codified in Section 1903(b) of the Statutory Construction Act, 1 Pa. C.S. § 1903(b), which provides: “General words shall be construed to take their meanings and be restricted by preceding particular words.” Accordingly, the term “similar governmental entity” must be construed in light of

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<sup>10</sup> Appellant does not contend that PIDC falls under any of the other types of entities specifically listed under Section 102 of the RTKL’s definition of “local agency.”

the particular terms preceding it, which include: “any local, intergovernmental, regional or municipal agency, authority, council, board, [or] commission.” Section 102 of the RTKL.

Generally, local, intergovernmental, regional or municipal agencies, authorities, councils, boards, or commissions are governmental entities established by a political subdivision pursuant to statutory authorization.<sup>11</sup> As PIDC aptly observed:

The elements common to each of these governmental entities include: (1) Each is created by a political subdivision pursuant to specific statutory power granted to the political subdivision; (2) Each is considered to be either a division of a political subdivision or political subdivision in its own right; (3) The members are appointed exclusively by the governing body of the creating political subdivision; (4) The political subdivision delegates, rather than contracts, the power to perform a governmental function to the governmental entity; and (5) The governing body of the creating political subdivision has the authority to disband the agency, authority, council, board or commission.

(PIDC’s Brief at 16-17.)

Applying the doctrine of *ejusdem generis*, it is clear that PIDC is not a “similar governmental entity” because PIDC is disparate from all of the specific types of governmental entities expressly listed in Section 102 of the RTKL’s definition of “local agency.” PIDC was not created by a political subdivision

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<sup>11</sup> See *e.g.*, 53 Pa. C.S. §§ 2301-2316; Intergovernmental Cooperation Authority Act for Cities of the Second Class, Act of February 12, 2004, P.L. 73, 53 P.S. §§ 28101-28707; Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class, Act of June 5, 1991, P.L. 9, 53 P.S. §§ 12720.101-12720.709; Municipality Authorities Act, 53 Pa. C.S. §§ 5601-5623; The Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §§ 65101-68701; The Borough Code, Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. §§ 45101-48501.

pursuant to a specific statutory power; PIDC is not a division of a political subdivision or a political subdivision itself; PIDC's members are not appointed exclusively by the governing body of a political subdivision; PIDC does not require a delegation of authority from a political subdivision to promote economic development; and PIDC cannot be disbanded by a political subdivision. More to the point, PIDC is not a governmental entity at all. Accordingly, PIDC is not a "local agency" subject to the open records requirements of the RTKL.

That PIDC is not a "local agency" under Section 102 of the RTKL is further bolstered by the fact that the General Assembly expressly provided for the situation where an agency has contracted with a party to perform a governmental function in Section 506(d) of the RTKL, 65 P.S. § 67.506(d). Section 506(d) provides, in pertinent part:

(d) Agency possession.—

- (1) A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.
- (2) Nothing in this act shall be construed to require access to any other record of the party in possession of the public record.
- (3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency.

Under this section, therefore, documents in the possession of a party contracted by an agency to perform a governmental function on behalf of the agency are subject to the RTKL to the extent that they directly relate to the governmental function that the party was contracted by the agency to perform. If we were to conclude that

PIDC is a “local agency” because it has been contracted by PAID to perform PAID’s duties, Section 506(d) of the RTKL would be rendered meaningless.<sup>12</sup> As we stated above, no provision of a statute shall be “reduced to mere surplusage.” *Walker*, 577 Pa. at 123, 842 A.2d at 400. While we are cognizant of the fact that PIDC has been contracted to perform virtually all of PAID’s duties, the *extent* to which a private party has been contracted by an agency is not determinative of whether the private party can or should be considered a “local agency” under the law.

Accordingly, the decision of the trial court is affirmed.<sup>13, 14</sup>

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P. KEVIN BROBSON, Judge

Judge Butler did not participate in the decision in this case.

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<sup>12</sup> Appellant does not argue that Section 506(d) of the RTKL is applicable to his request.

<sup>13</sup> Appellant also argues that the trial court erred in relying on statements made by PIDC’s attorney which were not supported by evidence of record in holding that PIDC is not a “local agency” under the RTKL. Specifically, Appellant contends that the trial court improperly accepted statements made by PIDC’s counsel, regarding PIDC’s activities outside of providing services for PAID, without any supporting documentary evidence. Even if we assume, *arguendo*, that the trial court acted with impropriety, the trial court’s reliance on PIDC’s counsel’s statements constitutes harmless error because PIDC’s activities outside of performing services for PAID are not relevant to our determination that PIDC is not a “local agency” under Section 102 of the RTKL.

<sup>14</sup> PIDC argues, in the alternative, that OOR’s final determination is ineffective and void because it was not issued within the statutorily mandated time period. PIDC also argues that OOR denied PIDC due process by relying on evidence that was not part of the record. Having determined that PIDC is not a “local agency” under Section 102 of the RTKL, we need not address PIDC’s alternative arguments.



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 : No. 528 C.D. 2010  
 v. : Argued: February 8, 2011  
 Jihad Ali, :  
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 Appellant :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

DISSENTING OPINION  
BY JUDGE McCULLOUGH

FILED: April 18, 2011

I respectfully dissent because I believe that, under the facts of this case, the Philadelphia Industrial Development Corporation (PIDC) qualifies as a “similar governmental entity” and, thus, fits within the definition of a “local agency” pursuant to section 102 of the Right-to-Know Law (RTKL), Act of February 14, 2008, P.L. 6, as amended, 65 P.S. §67.102.

As stated by the Majority, section 102 of the RTKL defines a “local agency” as any of the following:

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

(Emphasis added.) The term “similar governmental entity” is not defined under the RTKL.

The Majority correctly notes that the City of Philadelphia (City) created the Philadelphia Authority for Industrial Development (PAID) by ordinance, whereas PIDC originated as a joint venture in 1957 between the Greater Philadelphia Chamber of Commerce and the City for the purpose of promoting economic development throughout the City. However, while PIDC was not created by ordinance, the Majority further notes that PIDC was in fact designated as the City’s official industrial development agency pursuant to an ordinance adopted by Philadelphia City Council in 1958. Similar to other local agencies, PIDC issued tax-exempt obligations, until an adverse IRS ruling in January 1967. Thus, PIDC’s very existence was substantiated by City ordinance and its actions resembled those of other local agencies.

The ordinance creating PAID was adopted by the City in October 1967. Although PAID was governed by a five-member board of directors appointed by the City’s Mayor, PAID had no employees of its own. Instead, PAID immediately entered into a contractual relationship with PIDC designating PIDC as “its management agent and administrator of such of its routine administrative and operating affairs which may be lawfully delegated.”<sup>1</sup> (S.R.R. at 22b.) In other words, PIDC performs all lawfully-delegated managerial duties on behalf of PAID. PAID itself appears to exist solely as a proper conduit for the issuance of tax-exempt obligations and was only created subsequent to the adverse IRS ruling

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<sup>1</sup> The record reveals that, pursuant to the aforementioned contractual relationship, PAID pays certain fees to PIDC for its services. (S.R.R. at 22b.) However, PIDC also generates revenue from other sources, including royalties relating to a computerized loan reporting system developed by PIDC and licensed to other industrial development corporations, rent from an office building owned by PIDC, and rent from a sublease of office space to a third party. Id.

prohibiting PIDC from issuing the same. Furthermore, in the event that PIDC terminates operations or dissolves, the City will receive all of PIDC's assets. (S.R.R. at 97b.) Even applying the doctrine of statutory construction known as *ejusdem generis*, this factual scenario weighs heavily in favor of the conclusion that PIDC is a "similar governmental entity" and, hence, a "local agency," under the RTKL.

The Majority aptly notes section 506(d) of the RTKL, which provides for access to public records in the possession of a party with whom an agency contracts to perform a governmental function on behalf of that agency. Recently, we have seen the application of that section to a foundation that performed a governmental function, namely fundraising, pursuant to a contractual relationship with a state university. East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496 (Pa. Cmwlth. 2010), appeal denied, \_\_\_ Pa. \_\_\_, \_\_\_ A.3d \_\_\_ (Nos. 439 and 440 MAL 2010, filed March 16, 2011). In this case, however, PIDC's association with PAID extends well beyond a mere contractual relationship and PIDC appears to perform more than a single governmental function. Indeed, PAID would not function at all without PIDC.

For these reasons, I would reverse the order of the trial court.

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PATRICIA A. McCULLOUGH, Judge



providing it from PIDC as a courtesy. Mr. Ali timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted** and PIDC is directed to provide access to the records requested.

### **FACTUAL BACKGROUND**

On January 15, 2009, Mr. Ali filed a Right-to-Know request with PIDC for:

1. The contract and all attachments between PIDC and PAID appointing PIDC as Management Agent for PAID (periods 2008-2009);
2. The list of PIDC personnel (titles and salaries);
3. The ordinance enacting PIDC; and
4. The ordinance enacting PAID

In a response dated January 16, 2009, Ms. Brown provided Mr. Ali with copies of the management contract between PAID and PIDC and the ordinance enacting PAID. She indicated that PIDC is a not-for profit Pennsylvania Corporation and that, therefore, there is no enacting statute. Ms. Brown also indicated that because PIDC is a private company and not a government agency subject to the RTKL, she would not provide a list of PIDC personnel and salary information. However, in a separate appeal before the OOR, Ms. Brown stated that in lieu of staffing itself, PAID has a management agreement with PIDC, a “non-profit corporation organization that serves as the City’s Economic Development Agency” to provide services. She confirms that PIDC maintains and controls PAID’s records.

Mr. Ali filed a timely appeal of the denial to the OOR on February 5, 2009. Mr. Ali subsequently granted the OOR additional time to issue a Final Determination. The

parties subsequently provided additional documentation to support their positions in this appeal.

In a letter supporting its denial, PIDC states that it is a not-for-profit Pennsylvania corporation founded in 1957 by the City of Philadelphia (the “City”) and the Greater Philadelphia Chamber of Commerce (the “Chamber of Commerce”) for the purpose of promoting economic development throughout the City. PIDC states that it was created to function as an independent organization that would cooperate with the City, its agencies and the private business community to address the challenges of industrial renewal in the City. PIDC’s clients include businesses, developers, nonprofits, the City and PAID.

PIDC’s charter provides that upon dissolution, its assets will be distributed between the City and the Chamber of Commerce.

PIDC’s 30-member board of directors consists of seven City officials, eight members appointed by the Chamber of Commerce, and 15 individuals from the private sector who are nominated by the President of the Chamber of Commerce and the City’s Director of Commerce.

PIDC has been in existence for over 50 years. It has changed and evolved from its beginnings as a not-for-profit corporation to follow the many legal, regulatory and tax-driven changes that inevitably occurred over such a long period of time and that necessarily impacted and shaped its mission and strategies.

In 1958, PIDC was designated by the City as the City’s “official industrial development agency” under the Pennsylvania Industrial Development Assistance Law (the “PIDAL”). However, this law was later repealed. See P.L. 788, No. 100 § 14 (Nov. 17, 1998). Be that as it may, the PIDC spent 40 years as the statutorily-designed

industrial development agency for the City. Further, as reflected in Ms. Brown's correspondence, PIDC still maintains that it is the "City's Economic Development Agency."

Also, PIDC issued tax-exempt bonds for much of its early existence. However, in 1967, the Internal Revenue Service ("IRS") ruled that PIDC was no longer permitted to issue such bonds. The IRS found that PIDC has no incidence of sovereignty, is not controlled by the City, and its classification as an official agency only had significance under PIDAL. This ruling led later that year to the creation of PAID under the Economic Development Financing Law (the "EDFL"). See 73 P.S. § 371.

According to the Contract between PAID and PIDC, PAID was organized for the purpose of acquiring, building, constructing, improving, maintaining, operating, owning, financing, and leasing industrial, commercial, or specialized development projects undertaken.

PAID is a local agency. PIDC does not contest that PAID is an agency subject to the RTKL.

Concurrent with its formation, PAID entered into a contract with PIDC. This contract states that "PIDC shall continue to carry the responsibility for the promotion of industrial development projects in the City" and that "PAID shall complement and cooperate with PIDC in its work." Further, the parties agreed to "cooperate in such a manner that such cooperation is...in the public interest." More specifically, under the Contract, PAID delegates to PIDC many functions and responsibilities, including conducting all negotiation and legal formalization of any project undertaken by PAID. PAID expressly designates PIDC "as its management agent and administrator of such of

its routine administrative and operating affairs which may be lawfully delegated” and authorizes PIDC as its agent to perform any and all acts necessary in connection with such continuing and administrative operating affairs of PAID.

It is important to note that PAID has no employees of its own and delegates all functionality to PIDC through the management contract. Further in a separate appeal before the OOR, Ms. Brown stated that PAID has a management agreement with PIDC, a “non-profit corporation organization that serves as the City’s Economic Development Agency” to provide services. She also confirmed that PIDC maintains and controls PAID’s records.

Most significantly, the Contract expressly provides that PIDC’s actions on behalf of and for PAID are subject to the authority of the City Solicitor. Specifically, the Contract states: “No action may be taken by PIDC on behalf of PAID which shall be contrary to the advice of the City Solicitor and all such actions shall be subject to the authority of the City Solicitor who may review, intervene in, or supersede any such action of a legal nature.”

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). PIDC denied as a threshold matter Mr. Ali’s request for records claiming that it is not an agency and therefore not subject to the RTKL.

Under the RTKL an agency is defined as “[a] Commonwealth agency, a local agency, a judicial agency or a legislative agency.” See 65 P.S. § 67.102. The RTKL provides more detail and defined local agency as:

Any of the following:

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

Private entities, including nonprofit corporations, may be subject to the RTKL in two ways:

- the private entity is in possession of public records or furnishes a governmental function by contract to an agency (See §506(d) of the RTKL)<sup>1</sup> or
- the private entity may qualify under the broader definition of “agency” as either a Commonwealth agency or a local agency depending on its governmental function and its relationship to government through political or fiscal control.

The purpose of the RTKL is transparency in government and access to governmental public records to inform the public of how its government works and spends public dollars. The reach of the new RTKL is expansive and designed to reach all branches of government and governmental entities. For this reason, entities that are created to perform governmental functions may qualify as agencies to ensure access to public records. 65 P.S. § 67.102.

However, the term “similar governmental entity” is not defined under either the RTKL or the Statutory Construction Act, 1 Pa. C.S. §1991. Thus, these terms must be

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<sup>1</sup> The OOR notes here that PIDC did not raise the secondary defense that it is merely a third-party private contractor to PAID and that Mr. Ali’s Right-to-Know the request must be properly made to PAID and left unstated its position on whether the records sought – PIDC personnel and salary information – would be public (a governmental record) under that scenario. The OOR believes that the analysis it would have employed to evaluate this defense would have led it to the same result as it found in evaluating the defense actually raised – that PIDC and PAID are so intertwined and interdependent that PIDC falls within the definition of a “similar governmental entity” and is therefore subject to the RTKL on its own and not merely through its contractual relationship to PAID.

construed in accordance with their plain meaning. Commonwealth v. McCoy, 962 A.2d 1160 (Pa. 2009).<sup>2</sup>

We note here that finding that otherwise “private” entities are public in nature for certain purposes is not without precedent in Pennsylvania. See Dynamic Stud. Svcs., Inc., v. State Sys. of Higher Educ., 697 A.2d 239 (Pa. 1997).

The key term is “governmental,” which case law defines according to function. Because the RTKL definition of the term “local agencies” includes the phrase “any similar governmental entity” along with municipalities and authorities, non-profit entities may qualify if they are sufficiently governmental in nature. See Dynamic Stud. Svcs., Inc., v. State Sys. of Higher Educ., 697 A.2d 239 (Pa. 1997).

In discerning the meaning of “similar governmental entity,” the plain meaning of the otherwise undefined term should be consulted. See Commonwealth v. McCoy, 962 A.2d 1160 (Pa. 2009). The common and approved usage of “entity” is a nondescript term for “something that exists as a particular and discrete unit,” American Heritage Dictionary, n. 3. “Governmental” means of or pertaining to government and believed to have a public, as opposed to private, purpose and for the public benefit. The determination of what constitutes a similar government entity is fact-specific and must be made on a case-by-case basis.

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<sup>2</sup> In its response, PIDC claims that the legislative history of the RTKL weighs against it falling within the definition of a local agency. PIDC argues that since the General Assembly reacted to previous case law and specifically named educational entities and certain state-related institutions within the new RTKL, it did not intend for other quasi-public entities to be considered agencies under the RTKL. By not including entities like the PIDC specifically within the legislation, PIDC asserted, the General Assembly intended to exclude them from the RTKL. Further, it argues, the General Assembly was capable of drafting language that could have specifically brought not-for-profit corporations under the law. The OOR is not persuaded by this line of reasoning. The plain language of the statute demonstrates that the General Assembly left this question open for a case-by-case determination. The General Assembly also included 30 exceptions (several of which are “belt and suspender” exceptions) to the definition of public record and could easily have excluded not-for-profits if it had so intended. It elected not to do so.

Pennsylvania courts have found that an entity's status as public or private may vary, depending on the issue for which the determination is being made." Penn State v. Derry Township Sch. Dist., 731 A.2d 1272, 1274 (Pa. 1999).

In the instant case, the OOR finds that PIDC is a "similar government entity" and therefore, falls within the definition of "local agency" under the RTKL. This determination is supported by a number of factors. Most significant among these factors is that PAID, the actual public agency, has no employees and has delegated its entire range of functions and responsibilities to PIDC. Without PIDC and its employees, PAID is nothing but a paper agency that cannot fulfill its statutorily-authorized duties.

Further, the City has control over PIDC, through the contractual role of its solicitor and its right of final approval over any and all decisions and actions on behalf of PAID. PIDC is not independent from control by PAID or the City. While the majority of the members serving on the PIDC Board of Directors are not public officials, the City wields a fair amount of control over who serves on that Board, such that control of the organization is not private or independent of the City. City officials make up over twenty percent of the board and hold power over who is nominated to fill the fifteen nonpublic positions. In addition, and critically, the City Solicitor holds authority over any actions taken by PIDC on behalf of PAID. (See Contract ¶6). While PIDC was intended to function independently, the City holds the ability to seriously impede and even stop any actions of PIDC. The City's control over PIDC weighs against its status as an independent entity. While the contract places financial responsibility of paying employees and providing them benefits, this does not alone tip the scales in favor of PIDC's claim it is not governmental in its function.

Not insignificantly, PAID, as a government agency organized under EDFL, has the authority to issue tax-exempt bonds. However, all of the records, documentation and activities connected to this inherently public function are shielded from public scrutiny by contractually delegating them to a corporate entity. Finally, it is also noteworthy that the City of Philadelphia will receive half of the assets should PIDC terminate operations or dissolve.

The principal at stake here is that the public's right to know attaches not only to the activities conducted and documents generated by actual government agencies, but also to those governmental activities that are delegated to the private sector. When government delegates more than simple administrative, technical or other tasks to the private sector, when it delegates the essence of its public nature – its very purpose to exist – the public's right to monitor these activities must be preserved. Hiding behind a contractual delegation or a corporate entity's private status can and should not be tolerated.

PAID is a government agency in name only as it has no staff and no ability to execute its public mission. PIDC is not simply a third party contractor, providing a discrete or occasional service to PAID. On the contrary, PIDC animates PAID's very purpose and fulfills every aspect of its mission. These two are so closely intertwined and so interdependent (PAID was created because PIDC lost the ability to issue tax-exempt bonds) that to characterize one as private and one as public is impossible. It is also worth noting that while PIDC concedes a public purpose and claims to be a City agency, it has stated no or little private purpose that would demonstrate any independence from the governmental nature of its functions.

Common sense must prevail in cases such as this one. The OOR is cognizant of the significance of this Final Determination and is mindful of the disruption that may be perceived as a result. But in the end, the OOR has an obligation under the RTKL to see beyond form to the actual substance of the records sought and the activities documented therein. To do otherwise violates the spirit *and* the letter of the RTKL and would signal that there are ways to circumvent the public's legitimate right of access to public records.

### **CONCLUSION**

For the foregoing reasons, Mr. Ali's appeal is **granted**. PIDC is an agency subject to the RTKL and therefore is directed to provide Mr. Ali with the requested records. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Court of Common Pleas in Philadelphia County. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website,

<http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED** June 17, 2009



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NATHANAEL J. BYERLY, Esq.  
Appeals Officer