

HIGH SWARTZ LLP  
BY: GILBERT P. HIGH, JR., ESQUIRE  
Attorney I.D. #09419  
40 East Airy Street  
Norristown, PA 19404  
(610) 275-0700



Attorney for Appellant,  
Township of Lower Merion

**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PA  
CIVIL ACTION – LAW**

**MICHAEL S. D'AGOSTINO, ESQUIRE** : **NO. 11-17735**  
215 Bullens Lane :  
Woodlyn, PA 19094-9983 :  
**Respondent** :  
v. :  
**TOWNSHIP OF LOWER MERION** : **RIGHT-TO-KNOW ACT APPEAL**  
75 E. Lancaster Avenue :  
Ardmore, PA 19003 :  
**Petitioner** :

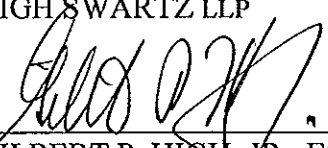
**CERTIFICATE OF SERVICE**

I, Gilbert P. High, Jr., Esquire, hereby certify that I served true and correct copies of the Township of Lower Merion's Petition for Review of Final Determination of the Office of Open Records by First Class Mail on the parties listed below. A copy of the transmittal letter is attached hereto as Exhibit "A".

Michael S. D'Agostino, Esquire  
Pileggi & Pileggi  
215 Bullens Lane  
Woodlyn, PA 19094-9983

✓ Terry Mutchler, Executive Director  
Pennsylvania Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

Date: 6/29/11

HIGH SWARTZ LLP  
By:   
GILBERT P. HIGH, JR., ESQUIRE  
Attorney for Petitioner





2011-17735-0001  
7/12/2011 10:11:23 AM  
Affidavit/Certificate of Service of  
Receipt # Z1262557 Fee \$0.00  
Mark Levy - Montgomery County Prothonotary

# HIGH SWARTZ

Attorneys At Law LLP

40 EAST AIRY STREET, P. O. BOX 671, NORRISTOWN, PENNSYLVANIA 19404  
(610) 275-0700, FAX (610) 275-5290, main@highswartz.com, www.highswartz.com

ESTABLISHED 1914

Gilbert P. High, Jr.  
Paul Baker Bartle  
Thomas D. Rees  
Mary Cushing Doherty  
Joel D. Rosen  
Eric B. Smith  
Richard C. Sokoral  
James B. Shrimp  
Melissa M. Boyd  
William F. Kerr, Jr.  
F. Arnold Heller  
Alan W. Flenner  
Stephanie E. Murphy  
Mark R. Fischer, Jr.  
Joo Y. Park  
Keri A. Schantz

OF COUNSEL  
Marlyn F. Smith  
J. Kenneth Cronney  
John P. Gregg  
Kenneth R. Myers  
Dina Schlossberg

June 29, 2011

Michael S. D'Agostino, Esquire  
Pileggi & Pileggi  
215 Bullens Lane  
Woodlyn, PA 19094-9983

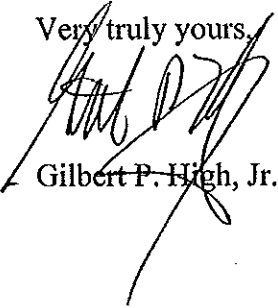
Terry Mutchler, Executive Director  
Pennsylvania Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

**Re: Michael S. D'Agostino v. Township of Lower Merion  
Final Determination Docket No. AP 2011-0606  
Montgomery County CCP No. 2011-17735**

Dear Mr. D'Agostino and Ms. Mutchler:

I enclose a copy of the Petition for Review of Final Determination of the Office of Open Records filed this date by the Township of Lower Merion.

Very truly yours,

  
Gilbert P. High, Jr.

GPHJr/jpe  
Enclosure

cc: Brenda Viola, Open Records Officer

EXHIBIT 'A'

Gilbert P. High, Jr.  
DIRECT EMAIL  
ghigh@highswartz.com



On April 25, 2011, the Township denied the Request, arguing that the Application was not a public record because “[i]nformation pertaining to business privilege and mercantile licenses taxes is confidential and therefore exempt under § 17 of the Local Taxpayers Bill of Rights Act.” The Township further noted that it had no licenses or permits for Megasun Tanning.

On May 2, 2011, the Requester appealed to the OOR, alleging that the Township “simply states that the requested record is confidential and provides no further proof of the applicability of the cited exemption.” The Requester also attached to his appeal a copy of a blank Business Registration/Mercantile License Application, arguing that “the information [requested on the Application] is in no way ‘confidential tax’ information.” The OOR invited both parties to supplement the record. On May 16, 2011, the Township provided a memorandum, as well as the affidavit of William F. Kerr, Jr., Solicitor for the Township (the “Affidavit”). The Affidavit states, in relevant part:

1. I reviewed requests under the Right-to-Know Law filed with Brenda Viola, Open Records Officer of the Township, by Michael S. D’Agostino, Esquire, dated April 20, 2011....
2. In response to these requests, the Township’s Office of Public Information provided a written response, dated April 25, 2011, which I also reviewed. The Township’s Response indicated that: (1) the Township had no licenses or permits related to Megasun Tanning, and (2) information pertaining to business privilege and mercantile license taxes is confidential and exempt from the Right-to-Know law.
3. It has been the Township’s policy not to release information relating to the administration and implementation of its local taxes, pursuant to the Local Taxpayer’s Bill of Rights Act.

### **LEGAL ANALYSIS**

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). 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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Township is a local agency subject to the RTKL and is thus required to disclose public records. *See* 65 P.S. § 67.302(a). Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305(a). 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 clearly 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). Preponderance of the evidence has been defined as “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

The RTKL excludes records subject to a privilege from its definition of “public records.” *See* 65 P.S. § 67.102. The RTKL defines “privilege” as “[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other

privilege recognized by a court interpreting the laws of this Commonwealth.” *Id.* The Local Taxpayers Bill of Rights Act states:

Any information gained by a local taxing authority as a result of any audit, return, report, investigation, hearing or verification shall be confidential tax information. It shall be unlawful, except for official purposes or as provided by law, for any local taxing authority to:

- (1) Divulge or make known in any manner any confidential information gained in any return, investigation, hearing or verification to any person.
- (2) Permit confidential tax information or any book containing any abstract or particulars thereof to be seen or examined by any person.
- (3) Print, publish or make known in any manner any confidential tax information.

53 Pa. C.S. § 8437. The Township argues that the Application “is clearly a report or verification, or the equivalent of a report or verification, because once completed by the tax payer or business it contains basic information provided by the taxpayer that is related to the entity and its business operation.” Thus, it argues that the Application is confidential and not subject to disclosure under the RTKL.

The OOR has previously held that the Local Taxpayers Bill of Rights Act prevents the disclosure of the names and addresses of taxpayers. *See Campbell v. Lower Makefield Township*, OOR Dkt. AP 2010-0762, 2010 PA O.O.R.D. LEXIS 818. In that case, the OOR relied heavily on *Juniata Valley School District v. Wargo*, 797 A.2d 428 (Pa. Commw. Ct. 2002), a Commonwealth Court decision decided under the now-repealed Right-to-Know Act. In *Wargo*, the Court held that the Local Taxpayers Bill of Rights Act “specifically protects the confidentiality of information on earned income tax returns.” *Id.* at 431. Therefore, the Court

held that names and addresses fall “within the category of confidential information obtained from tax declarations and returns.” *Id.*

Both *Campbell* and *Wargo* deal with information obtained from tax returns. In the instant case, however, the Application is notably not akin to a tax return. The copy of the Application provided by the Requester asks for information such as business name, mailing address, address of corporate office, a description of the business activity, whether the business has other locations and whether the business contracts for security, janitorial, housekeeping and/or food services.<sup>1</sup> The Application does not ask for any financial information. Further, the Application states that “[a]pproved applications will receive a new business tax package within 45 days.” Therefore, the Application, on its face, states that it is separate from the collection of taxes. Accordingly, as the Application is not akin to a tax return, it is not protected under the Local Taxpayers Bill of Rights Act. *See Campbell v. Pocono Mountain School District*, OOR Dkt. AP 2009-0390, 2009 PA O.O.R.D. LEXIS 648 (holding that the Local Taxpayers Bill of Rights Act does not preclude the release of W-2 forms because they are not “equivalent to ‘return information,’ and the information requested is not learned or gathered by the School District based upon a tax return submitted to it”).

However, the Township argues that “once [the Application] is completed by the Township it will also include the business’ tax account number and tax code, along with the business’ license number assigned by [the Township] in processing the application.” Under the Local Taxpayers Bill of Rights Act, this information is not protected. The Act protects only “information *gained* by a local taxing authority,” not information supplied by a local taxing authority. *See* 53 Pa. C.S. § 8437. Therefore, even though the information supplied by the

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<sup>1</sup> The Township’s memorandum refers to these subjects as “basic information.”

Township pertains to the collection of taxes, it is not protected under the Local Taxpayers Bill of Rights Act.

The Township has not argued that any other exemption applies. Therefore, the Application must be disclosed as a public record. *See* 65 P.S. § 67.305(a).

### **CONCLUSION**

For the foregoing reasons, Requester's appeal is **granted** and the Township is required to provide all responsive records to the Requester within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Montgomery 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: June 1, 2011**



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APPEALS OFFICER  
KYLE APPLGATE, ESQ.

Sent to: Michael S. D'Agostino, Esq.; William F. Kerr, Jr., Esq.