



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JOHN BROWN,
Complainant**

v.

**FRYSTOWN COMMUNITY FIRE CO.
Respondent**

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Docket No. AP 2009-0199

INTRODUCTION

John Brown submitted a request to Community Fire Co. Frystown (“Fire Co.”) seeking meeting minutes over a several year period pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The Fire Co. denied access alleging that it is not subject to the RTKL. Mr. Brown filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, Mr. Brown’s appeal is **granted in part** and **denied in part** as to the Fire Co., and the Fire Co. is required to take action as directed.

FACTUAL BACKGROUND

On February 9, 2009, Mr. Brown, a Fire Co. member, submitted a right-to-know request to the Fire Co. on OOR’s Standard Right-to-Know Request Form seeking “minutes of all meetings of the [Fire Co.] from April 3, 1996 through the present.” (“Request”).¹ His Request was accompanied by a letter from his counsel, William H. Sturm, Jr., Esquire, advising the Fire Co. that it is subject to the RTKL and must respond in accordance with it.

¹ Initially, Mr. Brown requested to review the minutes and membership list of active volunteers in January 2009. He did not indicate he was submitting it as a right-to-know request. In response, the Fire Co. advised that its Insurance Company Broker advised that the minutes were confidential unless he were an executive board member.

The Fire Co. timely responded within the five business days on February 14, 2009, to invoke the thirty day extension pursuant to Section 902 of the RTKL for both staffing limitations, because it is all volunteer, and to pursue a legal review to assess whether the RTKL applies to it. Within the thirty-day extension, on March 13, 2009, the Fire Co. advised that it reviewed its Bylaws and minutes of its meetings with the Bethel Township legal counsel, and determined that its elections were held correctly. The letter, signed by the officers of the Fire Co., Jason Harris, (President), Rose Labox, (Secretary), Corey Houser (Fire Chief), and Lee Groff (Treasurer), stated that as “an independent incorporated non-profit 501(c)(3) organization, that we do not need to comply with” the RTKL and will not allow Mr. Brown to review the minutes of the Fire Co. (“Denial”).

Mr. Brown timely appealed to the OOR, which was received on March 19, 2009. In his appeal, Mr. Brown’s counsel advised that fire companies are subject to the RTKL as local agencies, and that minutes of local agencies (“Appeal”). Attached to the Appeal were the correspondence between Mr. Brown and the Fire Co. since January 2009. In response to the Appeal, by letter dated March 25th, Lee Groff, the Treasurer of the Fire Co. submitted its Bylaws, its Articles of Incorporation, and a couple pages from a 1997 complaint filed against the Fire Co. in Berks County in support of its contention that it is not subject to the RTKL as a local agency.

By letter on April 9, 2009, the OOR advised the Fire Co. of its Final Determination in *Pierce v. Morris Township and Morris Township Fire Co.*, in which it determined that a volunteer fire company established as a non-profit 501(c)(3) corporation, qualified as a local agency. The OOR also requested sworn statements regarding the alleged private nature of the Fire Co.. Lee Groff called the OOR on April 13th and received clarification as to what was being requested. On April 14th, in response to the OOR’s request for supplementation regarding the

governance and local governmental affiliations of the Fire Co., Mr. Groff submitted sworn statements of a Fire Co. officer and the Chief regarding pertinent facts. The Fire Co. submitted a notarized and sworn attestation of Rose Labox, the Secretary of the Fire Co., made pursuant to 42 Pa. C.S. §6103, “Lack of Record,” that there are no records of the Fire Co. minutes for the years 1997, 1998, and 1999 (“Attestation”). The Fire Co. also submitted an affidavit of Chief Corey Houser, about the composition and governance of the Fire Co. (“Chief Affidavit”).

Chief Houser swears that the fire crews are comprised of entirely volunteers who do not receive compensation of any kind. Chief Affidavit ¶1. He attests that the only benefit received by Bethel Township, in which the Fire Co. is located, is limited workers’ compensation insurance during emergency calls, which is required by state law. In addition to the Township-paid workers’ compensation insurance, the Fire Co. purchases its own insurance. The Chief attests that the Fire Co. has never been cited as a public agency of any type and had to defend the lawsuit with its own insurance. Chief Affidavit ¶8. (A copy of the cover page of the filed Complaint was submitted.) He also advises that the Fire Co. is an EMS licensed provider of services with the Commonwealth pursuant to the Emergency Services Act, and as a certified quick response service, its Patient trip reports are protected as confidential. Chief Affidavit, ¶6. He explains that none of the Township Supervisors serves upon its governing board, and that the majority of funding is due to its fundraising efforts as a charitable organization. The Chief advises that the Fire Co. meetings are open to the public. *Id.* ¶10. However, he explained that the general public is not permitted to participate in elections or governance. The Chief did not state that the election of officers is held privately, nor that any meetings are confidential in nature. No other materials were submitted for consideration in this Final Determination.

LEGAL ANALYSIS

The Fire Co. denies that RTKL applies to it as a local agency under the RTKL. The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). Volunteer fire companies that perform the governmental function of fire-fighting and/or emergency services required by the local governmental units they serve, qualify as local agencies under the RTKL. *See* 65 P.S. §67.102; *Pierce v. Morris Township and Morris Township Fire Co.*, OOR Dkt. No. 2009-0116. Records of a local agency are presumed to be “public” unless: (1) the record is exempt under Section 708(b); (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation, judicial order or decree. 65 P.S. §67.305. The Fire Co. asserted no exceptions to support its Denial.

1. The Fire Co. did not respond in accordance with the RTKL.

The Fire Co.’s Denial is deficient under Section 903 of the RTKL, 65 P.S. §67.903, in several respects. The Denial was deficient in that it did not include instructions for appeal, nor include the substance of the Request or set forth legal support for its Denial. However, the Fire Co.’s non-compliance is excusable in this case in that the Fire Co. did not believe it was subject to the RTKL, and thus did not respond in accordance with the law. However, the OOR notes that the responses by the Fire Co., in terms of timing and citing the appropriate reasons for needing additional time under Section 902, 65 P.S. §67.902, were compliant.

2. The Volunteer Fire Co. qualifies as a local agency subject to the RTKL.

The Bylaws of the Fire Co. state that “the Company shall operate as a volunteer fire company with a primary goal of preventing and extinguishing of fires and protection of property and life.” Bylaws, Art. 3- Purpose. The definition of ‘Local agency’ includes “any of the following:...(2) any local, intergovernmental, regional or municipal agency, authority, council,

board commission or *similar governmental entity*.” 65. P.S. §67.102. “Similar governmental entity” is not defined in either the RTKL or the Statutory Construction Act, 1 Pa. C.S. §1991, so the terms are construed in accordance with their plain meaning. *Commonwealth v. McCoy*, 962 A.2d 1160 (Pa. 2009). The key term here is “governmental,” which case law abundantly defines according to function.

Non-profit entities like the Fire Co. may qualify as local agencies if they are sufficiently governmental in nature. Volunteer fire companies have consistently been held to be governmental entities, and been deemed local agencies under other statutes that do not specifically include them in their definition, *e.g.*, Political Subdivision Tort Claims Act, 42 Pa.C.S. §§8501-8564 (“PSTCA”). *See Zern v. Muldoon*, 516 A.2d 799 (Pa. Commw. 1986); *Wilson v. Dravosburg Volunteer Fire Dept.*, 516 A.2d 100 (Pa. Commw. 1986). Case law also holds that a volunteer fire company is an entity created to perform a governmental function. *See id.*; *Guinn v. Albertis Fire Co.*, 614 A.2d 218 (Pa. 1992); *Weaver v. Union City Vol. Fire Dept.*, 518 A.2d 7 (Pa. Commw. 1986); *Flood v. Silkies, Meckes & Klecknersville Fire Co.*, 933 A.2d 1072 (Pa. Commw. 2007)(non-profit volunteer fire company founded by volunteers and separate from municipality constitutes a local agency). Although the Fire Co. submitted part of a complaint to show it had been sued as a private entity, the OOR notes that is not the same as a judicial or adjudicative body finding that the Fire Co. did not qualify as public in nature by virtue of performing its governmental function, and thus does not illustrate non-public nature here. Notably, fire-fighting must be performed as a non-profit enterprise, and thus is not proprietary.²

² While non-profit corporations have not been defined as agencies based upon receipt of public funds, *see Mooney v. Temple Univ. Bd. of Trustees*, 292 A.2d 395 (Pa. 1972); *Roy v. PSU*, 568 A.2d 751 (Pa. Commw. 1990), a private entity may be subject to open records law based on whether it provides a governmental function. *See Dynamic Stud. Svcs., Inc., v. State Sys. of Higher Educ.*, 697 A.2d 239 (Pa. 1997). Fire-fighting is a governmental function.

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

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

Because fire-fighting is a governmental function, and volunteer fire companies have been treated as local agencies in many legal contexts, as in *Pierce, supra*, OOR Dkt. No. 2009-0116, the OOR concludes that the Fire Co. is a local agency subject to the RTKL in all its aspects. The Fire Co. has not shown that it does not perform a governmental function on behalf of a local governmental unit, *i.e.*, Bethel Township. Nor has the Fire Co. shown a distinction between itself and Morris Township Fire Co., which was likewise incorporated as a private non-profit corporation, pursuant to the Non-profit Code, and Section 501(c)(3) of the Internal Revenue Code. Since the Fire Co. is a local agency, the OOR reviews the Request in substance to assess whether Mr. Brown is entitled to the minutes requested given their presumed public nature.

3. The Fire Co. failed to overcome the legal presumption that its records are public.

The RTKL provides that records in possession of a local agency are *presumed* to be public unless an agency shows that an exemption applies to protect the record. 65 P.S. §67.305. The agency bears the burden of overcoming the legal presumption and to the extent an exception is asserted, must show its application by a preponderance of the evidence. 65 P.S. §67.708(a). In this Appeal, the Fire Co. failed to raise any of the exceptions under Section 708(b) to protect the minutes Mr. Brown seeks from view. The OOR notes, that when they exist, minutes of a public meeting of a local agency are public records that are required to be disclosed, unless another exception applies to protect them. The OOR notes that final approved minutes of meetings of a local agency are generally public on their face. Moreover, the Fire Co. Chief attests that the meetings that the Fire Co. holds are open to the public. Since the meetings are open to public attendance, there is no reason to preclude public access to the minutes of those public meetings. Thus, the OOR concludes the requested minutes are public records that must be disclosed.

There is no question that the Fire Co. meets once a month to conduct Fire Co. business, and that minutes of those meetings are kept. Although the OOR concludes that the minutes from April 3, 1996 through the present qualify as public records to which no exception was shown to apply, the OOR notes that the Fire co. cannot be directed to produce that which does not exist within the Fire Co.'s custody or control. In this case, the Fire Co. supplied the Attestation showing that the minutes for 1997, 1998, and 1999 are not in the possession or control of the Fire Co., and cannot be recovered. The Chief's Affidavit echoes the non-possession and irretrievable nature of the minutes for that three-year span. As Mr. Brown and his counsel submitted nothing to contradict the Attestation or Chief Affidavit, the OOR concludes that the Fire Co. established that it does not have minutes for that period to provide. Consequently, only

those minutes from April 1996 through December 1996, and January 2000 through the present are available for Mr. Brown's duplication.

CONCLUSION

For the foregoing reasons, Mr. Brown' appeal is **granted in part** and **denied in part**. The OOR concludes that the Fire Co. qualifies as a local agency subject to the RTKL and its requirements to provide access to public records. The Fire Co. failed to properly assert any exceptions to protect the minutes from disclosure. Thus, Mr. Brown's Appeal is granted as to the minutes, other than those which are beyond the custody or control of the Fire Co., and the Fire Co. is directed to provide those minutes that remain available within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Berks 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. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED: April 20, 2009



**APPEALS OFFICER
LUCINDA GLINN, ESQ.**