

FINAL DETERMINATION

IN THE MATTER OF :

RICHARD MYCHAK,
Complainant

v. : Docket No. AP 2009-0570

MT. CARMEL TOWNSHIP,

Respondent :

INTRODUCTION

Richard Mychak (the "Citizen") submitted a request to Mount Carmel Township ("Township") seeking a certified copy of the internal audit report for 2008 pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, ("RTKL"). The Township provided the 2008 Annual Audit and Financial Report in response. The Citizen states that the Financial Report was not the record requested, and timely appealed to the Office of Open Records ("OOR").

For the reasons set forth in this Final Determination, the Citizen's appeal is **granted**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

On June 23, 2009, the Citizen submitted a right-to-know request to the Township in person on the standard form seeking "copy of Mount Carmel Township Internal audit for year of 2008 prepared by Robert B. Fanella, Debora A. Gownley and Jean Hancock ["Auditors"]" (the "Request"). He requested certified copies. Township Supervisor, William Eby, who serves as the Open Records Officer (ORO), supplied the Township's 2008 Annual Audit and Financial Report in response as signed by the three Township Auditors. No denial letter was issued.

The Citizen timely filed an appeal with the OOR, which was received on July 2, 2009. In support, he advises the internal audit is paid for by taxpayers (the "Appeal"). To clarify how the record supplied differed from the record requested, the OOR asked the Township to describe the "internal audit" record at issue and the reason for not providing it upon request. The Township responded that the record supplied *is* the audit, and that the "internal audit" information sought by the Citizen is exempt from disclosure under Section 708(b)(17) as "work papers underlying an audit." The Township provided no further explanation of its non-disclosure.

The Citizen supplemented the record to explain that the record requested was provided to him for 2007 upon request last year, and noted that the internal audit information provided last year is entitled the "Auditor Report" and details the expenditures by the Township. The Auditor Report from the prior year consists of four pages of detailed explanation of spending and a Financial Report is a separate record which consists of a single page showing the basic totals and balances for the year in General, Liquid Fuels and Other Funds accounts, and is signed by the three Auditors. The "Auditor Report" for 2007 appears to have been presented to the Township Supervisors, and includes questions regarding certain amounts and suggestions for the future.

The OOR requested additional information from the Township regarding the ground for not supplying the Auditor Report that details the single-page Financial Audit already provided, and which was supplied last year upon request. [See Letters of OOR dated July 28th and July 31st.] The OOR twice requested the Township to explain its conclusion that the Auditor Report qualified as work papers of an audit, and to support its asserted exception. In response, the Township advised that there were no minutes taken of the meeting with the Auditors this year "because it was a work session not attended by a quorum of the Township Supervisors." [See August 4th Letter of William Eby to the OOR.] The Township did not advise that the requested records did not exist and did not explain how the Auditor Report constituted "work papers."

The Citizen granted an extension of the Final Determination due date to permit the record to remain open and clarification regarding the records at issue to be submitted to the OOR. Ultimately, the Citizen agreed to extend the Final Determination due date to August 12th, with the record to close at 12 PM noon on August 10th. On August 7th, the Citizen submitted material to refute the Township's position that no minutes had been taken of the Auditor Report to the Supervisors as the meeting was a work session, and attached to his letter copies of the Auditor Report for 2008 signed by the three Auditors (the "2008 Auditor Report"). The 2008 Auditor Report states that the report was submitted to the Township and outlined what the Auditors deemed unnecessary spending by Township employees and officials. The 2008 Auditor Report was signed by the three Auditors and offers their recommendations for the Township.

No other submissions were received prior to the close of the record. The Township submitted a response to the Citizen's submission and admitted that the attachment, the 2008 Auditor Report, "is in fact the internal audit report." The only matter to be addressed in this Appeal is whether the 2008 Auditor Report, which indisputably constitutes the "internal audit" record in question, qualifies as "work papers underlying an audit" under Section 708(b)(17)(v).

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The Township is a local agency subject to the RTKL that is required to disclose public records. *See* 65 P.S. §67.302. Records of a local agency like the Township are presumed to be "public" unless the record is: (1) exempt under Section 708(b); (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. The Township contends that the "internal audit" qualifies for protection under Section 708(b)(17)(v) as "work papers underlying an audit." Based upon the record submitted, which includes a copy of the internal audit itself, the OOR disagrees.

Section 708(b)(17) protects from disclosure "a record of an agency relating to a noncriminal investigation, including: (v) work papers underlying an audit." 65 P.S. §67.708(b)(17)(v). Under Section 708(a), the Township bears the burden of proving the asserted exception applies by the preponderance of the evidence, meaning the "greater weight of the evidence." *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). The Township did not submit any material in support of its claimed exception, and cannot establish it by mere assertion. However, in this Appeal, the OOR is in the unique position of having the opportunity to review a copy of the record at issue from the prior year, as well as a copy of the record requested, as copies had been submitted by the Citizen.

An Auditor Report that is prepared by the elected auditors, and is signed and submitted by those auditors to an agency for its formal consideration does not qualify as a "work paper underlying an audit." A "work paper" would be less formal, more equivalent to a draft, and would not be an official signed submission to an agency.

"Work papers" is not a defined term in the RTKL. However, in the context of an audit or and as used in laws regulating the accountant profession, "working papers" are personal to an accountant or employee accountant. *See, e.g.*, 63 P.S. §9.11 (regarding ownership of working papers); *Brett Senior & Assoc. v. Fitzgerald*, 2007 U.S. Dist. LEXIS 50833 (E.D. Pa. 2007). Because they are deemed personal in the accountant profession, similar to attorney work papers, certain statutes provide they are private. *Id.*; 40 P.S. §4103. The reason for such confidentiality is that they are not intended to be relied upon by the third party to whom the formal advice or recommendations are imparted. As the "internal audit" at issue in this Appeal was signed by the three elected auditors and presented to the Township Supervisors at a meeting, regardless of the fact that no quorum was present, they are not "work papers underlying an audit." As Section 708(b)(17)(v) does not apply, the Township had no legal ground for withholding the record here.

CONCLUSION

For the foregoing reasons, the Citizen's Appeal is granted. The OOR finds that the

Township did not support its legal ground for withholding the internal audit, and that the record

sought did not qualify as work papers underlying an audit. Therefore, the OOR holds that the

Township is required to supply a certified copy of the record 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 Northumberland 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. This Final Determination shall be posted at http://openrecords.state.pa.us.

FINAL DETERMINATION ISSUED AND MAILED: August 12, 2009

LUCINDA GLINN, ESQ.

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APPEALS OFFICER

Sent to: Richard Mychak; William Eby, Mt. Carmel Township

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