



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>SIGNATURE SOLUTIONS INC.</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. AP 2009-0289</b>
	:	
<b>MONTGOMERY TOWNSHIP,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Signature Solutions Inc., (“Signature”), submitted a request seeking printouts of current tax year information and charges for liens to Montgomery Township (“Agency”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The Agency did not substantively respond in accordance with the RTKL, and the request was deemed denied. Signature timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, Signature’s appeal is **granted**, and the Agency is directed to supply responsive records as directed.

**FACTUAL BACKGROUND**

On February 19, 2009, Signature submitted a right-to-know request to the Agency, seeking “printouts of the current tax year information (including interim tax bills –where applicable), as well as any other charges for lienable items against the real estate that your tax entity collects” with regard to a single property (“Request”). The Request was accompanied by a check for \$0.25 for the single property record.

On March 2<sup>nd</sup>, Pam Gural-Bear, the Agency Open Records Officer (“ORO”), responded timely within five business days of its receipt on February 23<sup>rd</sup>, to state that an extension of time is needed for legal review such that a response would be provided by April 10, 2009. The thirty-day extension permitted by Section 902 elapsed on April 1<sup>st</sup>, the same day the Agency states it submitted a request for Advisory Opinion in which it asked the OOR to advise “what records kept by a tax collector are accessible public records under the new [RTKL]?”. Signature did not challenge the Agency’s extended extension, but it must be noted that any extension beyond the thirty days must be agreed to in writing, so the Request may be deemed denied as of April 1<sup>st</sup>.

On April 6<sup>th</sup>, the ORO advised Signature that during its extension, instead of formulating its substantive response, the Agency submitted a request for Advisory Opinion (“AO”) to the OOR. The Agency requested Signature’s agreement to an additional extension in order to await the OOR’s decision on the AO request and provision of the opinion addressing the issue. As was its right under the law, Signature refused to grant an extension. It must be noted that an agency must respond to a right-to-know request as outlined in the RTKL. The OOR does not issue Advisory Opinions on matters that are the subject of a pending right-to-know request or appeal.

Signature filed an appeal with the OOR on April 14<sup>th</sup>, within the fifteen business days of the deemed denial. Signature states that it previously sought printouts of real estate tax information in January, and received letters from the Agency advising that the information request should be submitted directly to the Tax Collector instead of the Agency. In support of the appeal, Signature asserts that tax records are public and the Agency cannot require payment of a certification fee to review public tax information. Signature did not request certification and so, it contends, has no reason to pay that fee. Signature also argues that the Agency controls the Tax Collector by paying her salary as per Ordinance §43-1, and that the Agency should have the authority to fulfill the Request (the “Appeal”).

In response, the Agency Solicitor advised that he had submitted a request for Advisory Opinion, and expected an opinion by April 29<sup>th</sup>. The Agency requested that the “final determination in Signature’s recent appeal be held in abeyance pending disposition of your advisory opinion,” and incorporated the request for AO to respond to the Appeal. The Agency supplies no grounds for its denial, and instead notes that “What Signature is seeking to do under the RTK Law is to obtain the information for free, compile it and then certify it for profit.”<sup>1</sup>

The OOR advised the Agency that the AO process and appeals process are separate, and that the AO process cannot delay any appeal, and should not pertain to a pending request in the first instance. Substantively, the OOR sought supplementation from the Agency to support its denial of access with citation to legal authority, which could include other Signature appeals for which Final Determinations are issued, such as *Aston Township*, AP 2009-0072 cited by Signature. The Agency failed to supply the requested supplementation by the scheduled date. As permitted under Section 1101(b) of the RTKL, Signature agreed to a day’s extension for issuance of the Final Determination to May 15, 2009, to permit the supplement to be reviewed.

The Agency submitted its argument on May 12<sup>th</sup>. The Agency notes that the Request was never denied on its merits. The Agency argues that only certified statements of accounts issued and taxes received and forwarded by the Tax Collector pursuant to the Local Tax Collection Law, 72 Pa. C.S. §§5511.1-5511.42 (“LTCL”), are accessible under the RTKL. In support, the Agency cites *Current Status Inc. v. Hykel*, 778 A.2d 781 (Pa. Commw. 2001) and advises that the OOR’s position with regard to the *Hykel* decision and LTCL is unsupportable.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for local agencies. 65 P.S. §67.503(a). Montgomery Township is a local agency subject to the RTKL and required to disclose public

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<sup>1</sup>The OOR notes that the intended use of a record is immaterial to disposition of a request. See 65 P.S. §67.302(b).

records. 65 P.S. §67.302. Records of a local agency are presumed to be “public” unless: (1) the record is exempt under Section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law, regulation or judicial order or decree. 65 P.S. §67.305. The Agency did not cite any exemptions. Instead, the Agency supports its Denial based upon its position that the records requested are not “records of” the Agency and need not be produced, in part, due to its reliance upon *dicta* in *Hykel*. The Agency’s position is inconsistent with prior Final Determinations that interpret the RTKL and LTCL.

**1. The RTKL Requires Agency to Produce Tax Duplicate Information, as such Records Are within Its *Control* Even if Not within Agency’s Possession.**

The OOR has responsibility for interpreting the RTKL and its provisions, which it does through the appeals process with the issuance of Final Determinations such as this one, as well as through Advisory Opinions that it has the discretion to issue. 65 P.S. §67.1310. The OOR is required to “provide information relating to the implementation and enforcement of the Act” and provide training on the RTKL. *Id.* As such, the OOR has interpretive authority and its construction of the RTKL shall be accepted unless or until overturned by a court. The OOR finds that *Hykel* is inapplicable in that it did not determine the public status of records in possession of a Tax Collector under the prior Right-to-Know Law, 65 P.S. §§66.1 *et seq.* (“Old Law”), and only held that the Tax Collector is not an agency subject to that law.

*Hykel* also interprets the LTCL, which remains unchanged, setting forth the duties of a Tax Collector, including the issuance of tax bills, the receipt of taxes, and the paying over of taxes to the municipality. The Commonwealth Court reasoned that the powers attendant to tax collection are reserved to the taxing authority, and cited 72 Pa. C.S. §5511.25 before concluding “the records that the Tax Collector maintains are also to be found with the taxing authority.” 778 A.2d at 784. The Commonwealth Court also stated “we note that a taxing authority, in contrast to a Tax Collector, is subject to the disclosure provisions of the Act.” *Id.*

The rationale underlying this decision and this Final Determination today is simple— the public has a right under the RTKL to access the tax information that reveals how the Agency decides to assess and collect taxes, assess discounts, penalties, and grant exoneration for uncollected taxes from review of the Agency’s tax collection related records as these are inherently public functions. Critically, that the Tax Collector has physical possession of these records does not alter their public status— not under the Old Law, the RTKL or the LTCL. Those portions of *Hykel* that advise there is no obligation under the Old Law, for “certain information [to] be made *immediately* available” (emphasis in original), do not however, assist the OOR or agencies in interpreting the new RTKL which, expressly requires agencies to procure otherwise public records that happen to be in the possession of third parties in order to produce them pursuant to a right-to-know request. 65 P.S. §67.506(d).

The Agency has not defended this Appeal based upon the Request presented to it. Distinguishing *Hykel*, and without any supporting legal authority, the Agency argues that the only records Agency is required to provide to Signature in response to the Request are the certified statements that the Tax Collector submits monthly to the Agency pursuant to the LTCL. The Agency also contends, again without support, that other records in possession of its Tax Collector are not public records. The Agency ignores the OOR’s prior determinations that have held that tax duplicates are public records of the taxing authority, *i.e.*, Agency, and that such records constitute records within the control of Agency because they must be presented to the Agency by the Tax Collector upon demand. *See* 72 Pa. C.S. §5511.25.

The OOR holds that the tax duplicate, defined by 72 Pa. C.S. §5511.2, is within the control of the taxing authority. Section 5511.25 confers authority upon the taxing authority to demand tax duplicate information at any time, and obligates a Tax Collector, to be in compliance with the LTCL, to provide it. Pursuant to the definitions of the LTCL, a tax “duplicate” is:

a listing of the valuations of persons and property within a taxing district taxable for the applicable year and may include a computerized billing register of annual taxes. It shall be prepared or derived from the county assessment roll and, after being certified as accurate by the taxing district, shall be used by the tax collector to notify the persons whose names appear thereon of the valuations and identification of the properties or persons taxed, the rates of taxes and the amount of tax due.

72 Pa. C.S. §5511.2.

Even under the Old Law, the Pennsylvania Supreme Court identified the touchstone in determining whether a record is open to the public as whether it was within the *control of the agency*. *Tribune Review Publ'g v. Westmoreland County Housing Auth.*, 574 Pa. 661, 672, 833 A.2d 112, 118 (2003) (holding access to records within an agency's control is critical to an effective open records law to prevent an agency from moving records outside the public's reach).

The OOR finds this rationale more compelling under the RTKL and follows the Supreme Court's reasoning in *Westmoreland County Housing*, which holds that possession must be construed broadly to mean *control* as well as custody. Section 506(d) entitled "Agency Possession" evidences the clear legislative intent to require an agency to obtain its records being held by third parties. Section 506(d)(1) provides that records of any third party that provides a governmental function pursuant to contract are accessible, and places the burden upon an agency to obtain them from third parties. Likewise, under the RTKL, if a third party possesses a contract, which may not be incident to a governmental function, to which an agency is a party, the fact the agency did not maintain a copy in its possession does not transform that contract from a public into a non-public record and the agency remains responsible for providing access, and must procure that contract from a third party and provide access to it as a public record.

Section 506(d)(3) provides that a request for a public record in possession of a party other than the agency shall be submitted to the ORO of the agency. Accordingly, Signature correctly presented its Request to the Agency in order to access public records in possession of the Tax Collector as the OOR ruled in *Honaman v. Lower Merion Township*, OOR Dkt. AP 2009-0053.

The Agency here had the obligation to determine whether the requested records, *i.e.*, current tax year information and charges for other lienable items, are subject to access as a public record. The OOR previously held the records requested are public, and are to be obtained by the third party in possession in accordance with Section 506(d). Here again, the OOR makes that holding.

## **2. Tax Duplicate Information Is Public and Available without Certification.**

None of the cases presented to the OOR have asserted that the records at issue must be shielded from disclosure under another law, privilege or one of the thirty exceptions under Section 708(b). Agency similarly fails to assert any exemptions to protect the records requested, and they are thus presumptively open. Like Agency, the agencies before have focused upon the *source* of the records at issue, and claimed that payment of a certification fee is required for access from the source, or that the record requested requires “creation” by the Tax Collector, for which a fee must be paid. The OOR Final Determinations construing the RTKL with the LTCL consistently hold that the records requested by Signature, properly from Agency here, are public.

To summarize the OOR Final Determinations that analyze the provision of records in possession of a Tax Collector, and for the benefit of other similarly situated entities, the OOR has issued the following rulings:

- a. *Lower Merion Township* held:<sup>2</sup> Tax Collector is not an agency, but requests for records in their possession, which document agency taxes, should be made to the taxing authority.
- b. *Signature v. Penn Township*, OOR Dkt. AP 2009-0020<sup>3</sup> held: The LTCL did not conflict with the RTKL to supercede the presumed public nature of a taxing authority’s records. The taxing authority had the right to request tax duplicate information from the Tax Collector at any time, without waiting for the monthly statement certification.
- c. *Signature v. Aston Township*, AP 2009-0072 held: Certification fee cannot be charged for mere assembly of records from multiple sources, as that does not constitute “creation of a record” under Section 705. Unless certification is *requested*, it cannot be charged.

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<sup>2</sup> *Lower Merion* has been appealed to the Court of Common Pleas, where the appeal is pending.

<sup>3</sup> In *Penn Township*, the OOR expressly did *not* decide that the tax certification fee was appropriate to be charged. Rather the OOR recognized that the reported willful refusal of Penn’s Tax Collector to comply with the LTCL and supply the taxing authority its own records without payment of a fee were issues beyond the OOR’s jurisdiction.

Moreover, Section 1307(c) states that “an agency may impose reasonable fees for official certification of copies if the certification is *at the behest of the requester* and for the purpose of legally verifying the public record.” (emphasis added). If a requester does not specifically request certified records, the Agency cannot compel a requester to pay the certification fee. Nor can a taxing authority “pass on” certification fees charged by Tax Collectors pursuant to ordinance; agencies are constrained by the RTKL to the Fee Schedule published by the OOR.

Following this reasoning, the OOR holds that the records sought by Signature are public records to which no exemption has been shown to apply. Further, the OOR holds the records sought are properly deemed records “of the Agency” which document the transaction of its business and activity, *i.e.*, the essential activity of tax collection, and that those records in the custody of the Tax Collector, are within the Agency’s control (72 Pa.C.S. §5511.25). The Agency also has control over the Tax Collector by virtue of paying her salary under Ordinance §43-1.

In the instant case, the record is not clear that interim tax bills are issued. If they are not issued, the Agency is not required to create a record as the OOR determined in *Aston Township*. If interim tax bills are issued, the Agency did not overcome the presumption of openness with respect to them, and thus is required to produce them. Likewise, the Agency must provide a record reflecting “other lienable items”, if they are shown on the duplicate.

On a separate but important note, the OOR recognizes the frustration expressed by Tax Collectors statewide that any requester, including a for-profit company, can request public records and use those records for its own commercial gain after an agency expends time and resources to gather them. The Legislature considered and addressed this concern; the law clearly provides that a requester “need not include any explanation of [its] reason for requesting or intended use of the records unless otherwise required by law” in Section 703, and clearly prohibits an agency from denying access to a public record based on the intended use in Section 302(b).

## CONCLUSION

For the foregoing reasons, Signature's Appeal is **granted**. The OOR concludes that the Agency failed to comply with the RTKL and did not meet its obligations under Chapter 9 which required a response to Signature within the prescribed timeframe, and which required the Agency to assess whether the records at issue were protected from disclosure or were required to be disclosed as public records. In addition to the monthly certified statement of accounts issued and taxes received, which the Agency supplied during the pendency of this Appeal, the Agency is required to furnish a copy of the screens showing the information reflected on a tax duplicate, including copies of any interim tax bills if applicable, as well as the printed screens showing other lienable items charged by the Agency, to Signature, 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 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. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED: May 15, 2009**



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**APPEALS OFFICER  
LUCINDA GLINN, ESQ.**