



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

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| IN THE MATTER OF | : | |
| | : | |
| SIGNATURE SOLUTIONS INC. | : | |
| Complainant | : | |
| | : | |
| v. | : | Docket No. AP 2009-0521 |
| | : | |
| MIDDLETOWN TOWNSHIP, | : | |
| Respondent | : | |

INTRODUCTION

Signature Solutions Inc., (“Signature”), submitted a request seeking printouts of current tax year information and payment status to Middleton Township (the “Township”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The Township denied possession of the records. 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 Township is directed to supply responsive records.

FACTUAL BACKGROUND

On June 11, 2009, Signature, through Don Braunstein, submitted a right-to-know request to the Township, seeking “copies/printouts for current year real estate tax billing and payment status, please include payment dates and homestead rebate amounts where applicable for the listed properties” [three listed properties with parcel numbers] (the “Request”). Signature explains in the e-mail submitting the standard Right-to-Know request form that he does “not seek[] certifications, just a copy of the financial records.”

On the same day, Rita L. Wilson, the Open Records Officer (“ORO”), responded that the information is “only available from the Tax Office.” See e-mail of R. Wilson at 3:11 PM, June 11th. Signature then responded that while the information may be physically located at the Tax Office, the Request must be directed to the agency, and cited to Section 506(d)(1) of the RTKL in support of his position.

On June 16th, the Township Manager, Raymond Stepnoski, timely responded to the Request stating that the Township is not required to obtain the information from the Tax Office under the cited provision because the Tax Office does not provide any “governmental function pursuant to contract” as Section 506(d)(1) specifies (the “Denial”). The Township further states that no responsive records are at the Township to provide Signature.

Signature filed an appeal with the OOR on June 19th, within the fifteen business days of the deemed denial. Signature states that its Request was clearly filed under the RTKL, and that the records are needed to show the accounting of tax revenues by the Township for assessed properties within the Township, as well as the payment status (the “Appeal”). Signature contends that this information represents a “financial record” as defined in the RTKL because it evidences the receipt or non-receipt of public funds for the support of a public body, a function which the Township has entrusted to a third party. Signature notes that the lack of physical possession is not a proper defense as they are records of tax collection of the Township. Signature further notes that the OOR has held that the proper entity from which such information should be requested is the Township. Further, Signature notes that the information requested must be maintained in an organized fashion to provide the Tax Collector the means to properly bill and collect the charges. As part of its explanation of its Request to the Township, Signature clearly advised the Township that it does not want certifications.

In response to the OOR's invitation to each party to submit additional material in support of their respective positions, the Township submitted a response to the appeal through its counsel dated June 30th. The Township explains that it does not directly collect any taxes, and relies on third parties to perform that function through the Tax Collector, and collects other taxes under the Local Tax Enabling Act, 53 P.S. §6924.101 *et seq.*, ("LTEA"). Because it delegates that function to third parties, the Township argues that the Township does not receive and does not retain any records showing "the current year real estate tax billing and payment status...payment dates and homestead rebate amounts." The Township advises that the only information provided to it regard the collection of taxes is the amount of tax revenues deposited to the Township's accounts. The Township also advised that there is no contract with the Tax Collector within Section 506(d), and that such an obligation to collect taxes arises from the mandate set forth in the Local Tax Collection Law, 72 P.S. §§5511.1 *et seq.*, ("LTCL").

Legal custody of tax collection records under the LTCL is within the Tax Collector, which, the Township argues, means that the taxing district does not need to become involved in obtaining tax records. The Township asserts that requiring it to obtain the requested records from its Tax Collector amounts to requiring the Township to "create" a municipal record where none existed in violation of Section 705. The Township contends that requiring an agency to obtain these records from a third party is improper because it requires the agency to underwrite the cost of making the records available to commercial businesses, which "amounts to turning that policy [of open access] on its head."

The OOR requested the Township to support its grounds for refusing to provide the records to Signature based upon the prior Final Determinations issued by the OOR and to specifically address the degree of control the Township exercises over the Tax Collector pursuant to 72 P.S. §5511.25 in the LTCL. In response, the Township submitted a

“Supplemental Explanation of Grounds for Denial of Request” (“Explanation of Grounds”) through its counsel and attached two affidavits. The Explanation of Grounds advises that the information requested would need to be gathered from multiple sources to create a record which is not required under Section 705. The Township further argues that the Request is unnecessary because Signature already has in its possession the requested records in the form of a “certification” which was prepared by the Tax Collector. To permit Signature to access the information without paying the certification fee is at the price of increasing the cost to local government in staff time and resources. The Township also argues that the LTCL shows the legislative intent that tax collection records would not be subject to public access through the RTKL, and asserts that Section 4.(c) of the LTCL, sets apart such records as protected. The Township contends that the LTCL is a law that protects collection records from disclosure, so they are not public records under Section 305 of the RTKL.

The affidavits appended to the Explanation of Grounds are both sworn and notarized statements submitted to show that the Township has no responsive records. The Affidavit of Thomas Kearns, the Township Tax Collector, (“Tax Collector Affidavit”), states that the Tax Collector would be required to create a record in order to furnish the requested information. He attests that he submits monthly statements to the Township regarding real estate taxes and that such statements contain only an aggregate total of all taxes collected rather than any detail. An example of the monthly statements is appended to the Tax Collector Affidavit (“Monthly Statement”). The Tax Collector also attest that Signature requested, paid for and received certifications for the three properties that were a part of the Request, and that the certification information was identical to the information sought in the Request.

The Monthly Statement shows a total of 2008 Township Tax Money, of \$1,333.62 and 2009 Township Tax Money, of \$392,137.56. At the end, on page 1 of 1 it states: “Tom Kearns,

Middletown Tax Collector (22)". The second exhibit to the Tax Collector Affidavit shows the wire transfer of the funds to the Township at TD Bank.

The Township Manager attests pursuant to 42 Pa. C.S. §6103 that the information requested is not available in any records within the Township's custody, nor within a single document or "printout." The Township Manager Affidavit states that pursuant to the LTCL, the Township receives monthly statements regarding the real estate taxes collected that contain only an aggregate total of all taxes collected and deposited on behalf of the Township rather than the detail or sources of the collected taxes, such that the monthly statements do not contain the information requested.

As the Township's supplement did not address the Final Determinations that the OOR has issued, as requested by the OOR, and did not specifically address the degree of control exercised by the Township under Section 25 of the LTCL, 72 P.S. §5511.25, the OOR repeated its request and again sought supplementation of the record on that point. The OOR also asked the Township to cite legal authority, as is required by Section 903(2), to support for its argument that Section 4.(c) protects tax collection records from disclosure, including any legislative intent to support its implication that the LTCL does not permit tax collection records to be obtained via the RTKL.

The Township submitted a Second Explanation, ("Supplemental Explanation") in which the Township refused to address the Final Determinations issued by the OOR, which held such records to be public records within the control of the agency taxing district. The Township advised that, under statutory construction, the LTCL "plainly state[s] that the Tax Collector is not required to respond to requests for records submitted ...[under] the RTKL." [*See Supplemental Explanation*, p. 2.] The Township contended that the issue of control over the records is irrelevant because there exists no record of the Township, or of the Tax Collector to

provide. The Township relies upon its argument that the information sought by Signature requires “creation of a record” which is not permitted under Section 705, and contends that its affidavits are sufficient to support its argument. The Township also asserts that its Denial is consistent with the decision by the Delaware County Court of Common Pleas in *Aston Township v. Signature Solutions*, No. 4852 of 2009, involving a similar request with allegedly similar facts.

Signature requested an extension of the due date for Final Determination so it would have an opportunity to file a substantive response to the Township’s multiple submissions during the appeal. As a result, and in accordance with Section 1101(b), the due date for the Final Determination was extended to August 3rd. Signature submitted a “Memorandum in Support of its Right to Know Request” prepared by its counsel (“Memorandum”) on July 24th. Signature also submitted an Affidavit of Richard Honaman, the Director of the Pennsylvania Division and Technical Projects TSD for Signature, sworn and notarized on July 23rd (“Signature Affidavit”).

In his affidavit, Mr. Honaman advises that he is familiar with the local tax collection process and the record used by Middletown Township in Bucks County in the processing and reporting of taxes and liens collected by the Tax Collector. Signature Affidavit, ¶2. He further attests that the records of the Township Tax Collector are and have been computerized for some time, and that the records requested are available from the Tax Collector by being printed from one or more print screens from the records, which does not qualify as “creation” of a record. Signature Affidavit, ¶4. Appended to the Signature Affidavit are the computer generated forms that contain the identical information sought by Signature in its Appeal. The two Exhibits are titled “Tax Certification” in bold and contain the information sought by Signature with regard to two of the parcels requested. In addition to stating the amount paid, and date for type of taxes, it is dated, signed by the Tax Collector and states: “This is to verify that to the best of my

knowledge as the Tax Collector... that real estate taxes due and paid are listed below,” to certify the accuracy of the data supplied.

The Memorandum argues that the records at issue are clearly public records, and cites cases in support. The Memorandum notes that the LTCL states that when any duplicate of taxes assessed is issued and delivered by any taxing district to the tax collector, the tax collector must then issue tax notices or bills. The “duplicate” is a listing of the property valuations within a certain taxing district for a certain year that is derived from the county assessment rolls and once it is certified as accurate by the taxing district. 72 P.S. §5511.2 (emphasis supplied). There is no dispute that the Township is the taxing district, and that the function of taxation cannot be delegated. Signature also submits that the LTCL also permits a taxing district to require a Tax Collector to provide additional information supplementing that set forth in the [report] form approved by the Department of Community and Economic Development.” 72 P.S. §5511.25 (emphasis supplied). Signature explains that the tax collection of Tax Collector is performed based upon information obtained by the taxing district and is to be reconciled with such data in the monthly statement, such that the taxing district exercises full control over the Tax Collector. The Memorandum also cites the Commonwealth Court’s recent decision in *Lukes et al v. DPW*, 2009 Pa. Commw. LEXIS 452 (June 3, 2009) and its interpretation of an agency’s obligation to obtain records that qualify as agency records from third parties despite lack of physical custody.

The Memorandum also refutes the Township’s argument that no responsive records “exist” and the Request seeks creation of a record which is not permitted under Section 705. Signature argues that because the Tax Collector can print the public information being housed on its database, as shown by the Tax Certifications appended to its affidavit, the records clearly exist and do not need to be created. The data on the certification is requested, absent the signature and verification as to accuracy of the data that a Tax Collector creates for certification.

Although the record did not close for both parties until the next Monday, no other material was submitted. Signature then extended the Final Determination due date to August 6th.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for local agencies. 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 are presumed to be “public” unless the record is: (1) exempt under Section 708; (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law, regulation or judicial order or decree. 65 P.S. §67.305. The Township did not cite any exemptions, and the public nature of the type of information requested is not contested.¹ The Township supports its Denial based upon its position that the records requested are not records “of” the Township since they are in the legal custody of its Tax Collector, and contends that the records as requested do not “exist” and need to be created in violation of Section 705 of the RTKL. Each argument is addressed in turn.

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. 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 consistently has held that the records of a tax collector to perform collection functions on behalf of a taxing district are records “of” the taxing district, such that the taxing district remains responsible for its records, despite their legal custody residing in a third party.

¹ As Signature argued, the records requested qualify as “financial records” defined in the RTKL. as “any account, voucher or contract dealing with (i) the receipt or disbursement of funds by an agency.” Tax collection records as described qualify as a “voucher” for the tax payments owed or paid to the taxing district, on taxes assessed or due.

In interpreting the LTCL based upon its statutory language and appellate case law construing same, the OOR has determined that the records of the tax collection activities performed for the taxing districts, like the Township, qualify as records “of” the Township as they document the business of tax collection. Signature notes that the records to which it seeks access have been repeatedly deemed public records, citing *Westmoreland County Board of Assessment Appeals v. Montgomery*, 321 A.2d 660 (1974) and *Dooley v. Luzerne County Board of Assessment Appeals*, 649 A.2d 728 (1994) in support. The Township contends that the LTCL provides that tax collection records are not meant to be accessible through the RTKL in Section 4.(c). The OOR does not find the Township’s statutory construction persuasive.

The provision states: [t]his section shall not be construed to do any of the following:

(1) Make a tax collector an "agency" or authorize requests of the tax collector for records pursuant to the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(2) Alter or amend any law concerning the confidentiality of tax collection records.

72 P.S. § 5511.4c. The Township does not cite any laws that provide the information sought by Signature is “confidential,” and indeed, for a fee, the records are provided upon request directly from the Tax Collector. Pursuant to Section 3103 of the RTKL, any reference to the prior Right-to-Know Law, may be deemed a reference to the current RTKL, which means that a tax collector cannot be deemed an “agency” under the RTKL and that right-to-know requests should not be directed to the tax collector. In its Final Determinations addressing that issue, the OOR has held that requests for tax collection records must be addressed to the taxing district, as the proper “agency” whose records are governed by the RTKL. The OOR holds that this provision does not prohibit the release of the information nor alter its public nature, nor preclude a taxing district from providing the public information in response to a proper right-to-know request. Therefore, this provision does not govern the provision of public records and cannot be used as a defense.

The OOR has consistently held, as Signature submits, that tax collection records of a taxing district qualify as public records of the taxing district agency because the information contained is within the “control” of the agency. Although repeatedly requested to submit any arguments to oppose this position, or support the lack of control, the Township refused to address the import of Section 25 of the LTCL, 72 P.S. §5511.25. The Township did not address or refute the OOR’s Final Determinations holding that the Township has control over the records to the extent provided under Section 25, which permits the Township to obtain the payment status at any time.

Appellate case law interpreting the LTCL contradicts the position the Township set forth. *See Current Status Inc. v. Hykel*, 778 A.2d 781 (Pa. Commw. 2001). The Commonwealth Court noted that accessibility of records from the tax collector was not material to the public access to the public nature of the records because “a taxing authority, in contrast to a Tax Collector, is subject to the disclosure provisions of the Act.” 778 A.2d at 784. In interpreting the LTCL, 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.” The Township has not responded to the degree of legal control provided under the LTCL, and therefore, the OOR upholds its decisions finding that the control

Further, as the Commonwealth Court recently held when interpreting the obligation of an agency to obtain records from a third party upon receiving a right-to-know request under the prior RTKL, the responsibility for records of an agency depends not upon physical custody, but upon the control the agency may exercise over the records at issue. *See Lukes, supra*. As the Township has not refuted the considerable degree of control that the LTCL contemplates the taxing district has over the records of tax collection and payment of the agency’s taxes, the OOR

concludes that the records of the Tax Collector discussed in Section 25, to include the payment status, date and amount for certain taxes, are records of the Township that it must provide.

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 P.S. §5511.2.

The OOR finds that the public has a right under the RTKL to access the tax information that reveals how the Township 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. The OOR finds that the Township has an obligation to obtain its records from the Tax Collector under Section 506(d)(3) which provides that “a request for a record in possession of a party other than the agency shall be submitted to the open records officer of the agency.” 65 P.S. §67.506(d)(3).

2. The Request does not require the “Creation of a Record” under Section 705.

The Township contends that the issue of control is irrelevant because the two affidavits it supplied attest to the fact that the records requested are identical to a “Tax Certification” and require compilation and creation of a separate record in order to supply the public data sought. From review of the Tax Collector Affidavit and the Township Manager Affidavit, the OOR

concludes that the Township did not show that fulfillment of the Request requires creation of a non-existing record, or formatting of a record in a manner in which it is not maintained.

Section 705 has been consistently construed by the OOR to mean that an agency is not required to create a record that does not already exist in order to satisfy a right-to-know request. Section 705 also does not require an agency to compile, organize or format the requested information in any manner in which it is not already maintained. Here, Signature does not request compilation, organization or formatting in a specific manner, which the OOR recognizes would not be permitted under Section 705. Signature has clearly requested a record, the public nature of which is not disputed, in whatever format it exists to show the data sought. The Township does not dispute the existence of the information, and the existence of the data sought is shown by the submission of the Tax Certifications. Therefore, the issue to be determined can be distilled to whether the printing of the data from a database, which may require printing from multiple screens, qualifies as “creation” or compilation of a record contemplated by Section 705.

The Township relies upon the Court of Common Pleas opinion rendered in Delaware County in *Aston Township v. Signature* for its position that the printout from multiple screens qualifies as “creation” of a record. As the Court’s review was in its appellate jurisdiction, it accepted the facts as found by the OOR. The OOR The Tax Collector Affidavit states that the record requested “is not available in one single document or “printout” but must be assembled by me from a review of multiple documents and/or sources.” There is no submission of any facts to show that the records need to be created from multiple screens in order to be placed in one record, nor that the records in the manner in which they are maintained, do not contain the information requested, or cannot be duplicated in the form in which they exist. First, in this case, there has been no evidence submitted “that the records requested do not exist in a form that can be a “printout” of a screen” as found in *Aston*, and relied upon by the Court of Common Pleas.

Second, Section 705 must be construed on its terms in accordance with case law and the OOR's interpretations in Final Determinations. The OOR concludes, based upon the evidence presented, that the Township has not demonstrated that the public records requested by Signature do not exist in a format that may be duplicated, such as with a "print screen" function. Therefore, the OOR holds that the Township, and by extension the Tax Collector, is not being requested to "create" a record or compile its records in a format not already maintained. The printout of a number of screens from a database is no more the "creation of a record" than the copying of a series of pages of a record on a copying machine. Accordingly, the Township is required to produce the records requested, that have been deemed records "of" the Township, in the format in which they currently exist, to show the amounts paid as of the date the record is printed.

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. If interim tax bills are issued, the Township did not overcome the presumption of openness with respect to them, and thus is required to produce them. Likewise, the Township must provide a record reflecting "other lienable items," if they are shown on the duplicate.

On a separate but relevant point, the OOR notes that the certification of the payment of taxes is an important function provided by the Tax Collector. The verification that the Tax Collector makes as to the accuracy of the data that he is able to print from a number of screens within the data he houses for the taxing district is a separate function called "Certification" enabling a person purchasing that service to submit that the amounts on the certification are accurate as of a certain date. Signature is not required to purchase that extra service of certification in order to obtain the public data that is placed upon the "Tax Certification" record. The OOR recognizes that the format of the Tax Certification, with the verification language, is

created by the Tax Collector for a specific purpose, upon request, qualifies as a “Creation of a record” that is not required by the agency, and for which a separate fee may be charged.

However, the fact that Tax Certifications contain information that is public record does not enable the Tax Collector to hold the public records hostage for the certification fee by refusing to produce them in any other permissible and pre-existing format. The lack of a certification for the public records obtained by Signature means that the accuracy of the data is not guaranteed; the tax collector is not required to earlier update his or her records in order to provide the taxing district with the payment information comprised within Section 25 of the LTCL. The Tax Collector need only print out the screens that apply to the property parcel designated as it exists in its database as of the date requested. It need not be reconciled or updated in any way in order to show the most up-to-date payment status unless the information already exists in that format.

The OOR also 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 Township did not establish that it lacked control over the Tax Collector and the records that are within his physical custody. The OOR further concludes that the Tax Collector did not submit sufficient evidence to show that he actually creates a separate record that requires more than

printing the screen from a number of sources. Therefore, the Township is required to provide 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 Township 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 Bucks 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 AND MAILED: August 6, 2009



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Richard Honaman of Signature; Barbara Merlie, Esq. Counsel for Middletown Township