



agreements (“Agreements”) under the terms of the Management Agreement, and attached correspondence to and from SWB to show its refusal.

The Requester timely appealed, arguing that SWB, the management company, negotiated the requested Agreements, and serves as a government vendor performing a government function on behalf of the agency (“Appeal”). The Requester argues that the Authority benefits from the Agreement and revenue from it pays off a multi-million dollar bond taken out by Lackawanna County on behalf of the county taxpayers. The Agreements can be reached through the contract with SWB which performs a function that would otherwise be performed by the governmental agency. Further, the Requester argues, the Agreement qualifies as a “financial record” under the RTKL as “any contract dealing with ...the receipt ...of funds by an agency; or ... an agency’s use or disposal of...property.”

SWB requested to participate in the proceeding as an entity with a direct interest under Section 1101(c). The OOR granted the request, and the Requester extended the due date for the Final Determination to April 16<sup>th</sup> to accommodate additional submissions for the record.

Frank Tunis, the Authority’s Solicitor and Open Records Officer (ORO) submitted an affidavit under penalty of perjury attesting to its lack of custody or control over the Agreement, and its control by SWB, a private entity (“Affidavit”). The Authority attests that it has been unsuccessful in obtaining the requested records because SWB is not within its control. The letters to SWB in which the Authority requested the Agreement and SWB’s refusal are attached to the Affidavit. The Authority advised that had it possessed the records, it would release them.

SWB submitted an argument regarding its relationship to the Authority. SWB advised that it executed a naming rights agreement (*i.e.*, the Agreement) with PNC Bank in 2007 and entered a new agreement with PNC in February 2010. SWB advised that the Agreement is not in the Authority’s possession, and such agreements “belong” to SWB. SWB advised that the

functions it performs pursuant to the Management Agreement are not “governmental” functions and therefore are not reachable under Section 506(d)(1). SWB argues that the function of “naming rights” does not qualify as a governmental function under the test articulated by Judge Terrence Nealon in *SWB v. Wintermantel*, 2009 WL 3052903 (Lack. Com. Pls. 2009) when SWB appealed the decision rendered by the OOR in *SWB v. Wintermantel*, OOR Dkt. AP 2009-0184.

SWB notes that *Wintermantel* is currently on appeal to the Commonwealth Court.

The OOR had reviewed the Management Agreement in its consideration of OOR Dkt. AP 2009-0184. According to the Management Agreement between the Authority and SWB, SWB is engaged to “manage all baseball operations and other events that are held at the stadium.” SWB is an agent of the Authority permitted plenary authority to engage in contracts relating to its management of the baseball/stadium operations.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The Authority is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. A record in possession of a local agency is presumed to be public unless it is exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §67.305. However, the Authority denies possession, custody or control over the Agreements, and contends that SWB refuses to provide the Agreements sought.

The Requester contends the records can be reached under Section 506(d)(1) which states:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. §67.506(d)(1). SWB argues that its records are not subject to disclosure pursuant to the above because it does not perform a governmental function. The OOR has already determined that the function of managing the stadium for the Authority constitutes a “governmental function” in *Wintermantel, supra*, AP 2009-0184, affirmed by the Lackawanna County Court of Common Pleas in *SWB, supra* (appealed to Commonwealth Court on October 8, 2009).

The parties do not dispute that the Management Agreement governs the relationship between SWB and the Authority. Although the Authority does not challenge the governmental function finding of the OOR here, SWB, having a direct interest, contends its function is non-governmental.

The OOR notes that the decided cases that have considered the relationship between SWB and the Authority hold that the functions SWB provides pursuant to the Management Agreement **are** governmental in nature. As The Honorable Terrence Nealon found, the functions of managing the stadium for the Authority, which is responsible for the stadium and serves as the sole means of revenue for the Authority, qualify as “governmental functions.” The OOR follows its decision in *Wintermantel*, and specifically incorporates the reasoning and holding as refined and upheld by Judge Nealon in *SWB, supra* here.

The type of records at issue in this Appeal is the naming rights Agreement. Provided that the naming rights “directly relate” to the governmental function being provided by SWB by contract, then the Agreement is accessible via Section 506(d). Both *Wintermantel* cases explained, a key governmental statutory function of the Authority is to manage the stadium, and it has delegated that function to SWB as part of all baseball operations. The actions of SWB, including its entrance into contracts, binds the Authority. The Agreement thus “directly relates” to the defined governmental function and is accessible under Section 506(d).

The Agreement described in this case involves the receipt or distribution of funds and involves the Authority’s acquisition, use or disposal of services or property. Thus, the Agreement

qualifies as a “financial record” under the definition of the RTKL and is public aside from parts that may be protected under limited exceptions. *See* 65 P.S. §67.708(c).

Due to the governmental function and the relationship of naming rights to the operation of the stadium, the Agreement is deemed to be within the control of the Authority, and the Authority has a legal obligation under Section 506(d) to obtain it. The fact that the Authority substantiated that it has requested the records and been refused (*see* Affidavit) does not constitute a viable defense to its legal duty, and does not establish lack of constructive control. With regard to the naming rights Agreement at issue, no exemptions to its disclosure have been made, and therefore the Agreement qualifies as a public record that must be disclosed.

### CONCLUSION

For the foregoing reasons, the appeal is **granted** and the Authority is obligated to obtain the Agreement and is directed to disclose the Agreement to the Requester 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 Lackawanna 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: April 14, 2010**



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**LUCINDA GLINN, ESQ.  
APPEALS OFFICER**

Sent to: Charles Schillinger for *Times-Tribune*; Frank Tunis, Esq. for Authority  
Adam Brown, Esq. for SWB Yankees LLC