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Todd Pysher
v.
Clinton Township Volunteer Fire
Company, Appellant

No. 766 C.D. 2022

Commonwealth Court of Pennsylvania

May 24, 2023

OPINION NOT REPORTED

Submitted: April 3, 2023

BEFORE: HONORABLE RENÉE COHN
JUBELIRER, President Judge, HONORABLE
CHRISTINE FIZZANO CANNON, Judge,
HONORABLE STACY WALLACE, Judge

MEMORANDUM OPINION

RENÉE COHN JUBELIRER, President
Judge

Clinton Township Volunteer Fire Company (Fire Company) appeals from a June 20, 2022 Order of the Court of Common Pleas of Lycoming County (trial court), which concluded Fire Company is a "local agency" under the Right-to-Know Law (RTKL).^[1] The trial court reached this conclusion after this Court previously remanded the matter for development of the evidentiary record. *Pysher v. Clinton Twp. Volunteer Fire Co.*, 209 A.3d 1116 (Pa. Cmwlth. 2019) (*Pysher I*). Upon review, we affirm on the basis of the thorough and well-reasoned opinion of the Honorable Eric R. Linhardt.

This matter stems from a 2017 RTKL request directed to Fire Company by Todd Pysher (Requester). As set forth in *Pysher I*,^[2] Requester sought:

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1. Copy(ies) of any and all written loan agreement(s) during the last

ten (10) years between Clinton Township Volunteer Fire Company No. 1 (CTVFC) and any member(s) who received loans from CTVFC, including collateral provisions of loan(s), term(s) of loan(s), and rate of interest for loan(s).

2. Copy(ies) of any and all CTVFC meeting minutes during the last ten (10) years where loan(s) from CTVFC to any member(s) who received loans were discussed and/or approved.

3. Copy(ies) of any and all bank statement(s) during the last ten (10) years showing payment(s) of any and all loan proceeds from CTVFC to any member(s) who received loans.

4. Copy(ies) of any and all bank statement(s) during the last ten (10) years showing any and all loan payment(s) from member(s) who received loans to CTVFC.

5. Copy of Form 990 and all Schedules attached to Form 990 that were filed with the Internal Revenue Service by CTVFC for calendar year 2015.

6. An itemization of amounts billed to and received from the State Correctional Institut[ion] at Muncy and the Federal Penitentiary at Allenwood for ambulance services (basic life support) for each calendar year beginning in 1999 and ending in 2016.

7. Page(s) of loan document(s) between CTVFC and Muncy Bank and Trust Company showing date of loan origination, loan amount, rate of interest, and term of loan.

8. Copies of bills for electric service for each month of calendar year 2016.

Pysher I, 209 A.3d at 1118 (citation to Reproduced Record omitted). Fire Company responded to the Request asserting it was not a local agency subject to the RTKL and thus would not otherwise respond to the Request. *Id.* Requester appealed to the Office of Open Records (OOR), which, based upon the parties' position statements,

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concluded Fire Company was a local agency. *Id.* Fire Company filed a petition for review with the trial court, which affirmed, concluding Fire Company was a "similar governmental entity" and, thus, a "local agency" under the RTKL. *Id.*

On appeal to this Court, Fire Company presented an issue similar to that which it raises herein pertaining to whether it was a local agency subject to the RTKL. Concluding the term "similar governmental entity," as included in the statutory definition of "local agency," is itself undefined, we examined how courts have treated volunteer fire companies under other statutes, including the Pennsylvania Human Relations Act,^[3] Pennsylvania Labor Relations Act,^[4] and the act commonly referred to as the Political Subdivision Tort Claims Act.^[5] *Pysher I*, 209 A.3d at 1121-22. We likewise considered how other nonprofit corporations have been treated under the RTKL. *Id.* at 1123. Therefrom, we derived three factors that should be considered in determining whether an organization is a "similar governmental entity" and, thus, a "local agency" under the RTKL: (1) degree of governmental control; (2) nature of the organization's functions; and (3) financial control. *Id.* at 1124. Because the record was devoid of any facts to evaluate these factors, we vacated the trial court's order and remanded the matter for the parties

to produce evidence relevant to the degree of governmental control [Clinton] Township exercises over

Fire Company, including, but not limited to Fire Company's "organizational structure, purposes, powers, duties, and fiscal affairs"; the function Fire Company performs and whether it is "a substantial facet of a government activity"; and the degree of public funding provided to Fire Company in relation to private funds.

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Id. at 1125 (quoting *In re Right to Know Law Request Served on Venango Cnty.'s Tourism Promotion Agency & Lead Econ. Dev. Agency*, 83 A.3d 1101, 1108-09 (Pa. Cmwlth. 2014)).

Upon remand, the trial court further remanded to OOR, which ultimately issued a Final Determination concluding Fire Company is not a "local agency" under the RTKL. (Trial Court Opinion (Op.) at 7.) Requester subsequently filed a petition for judicial review with the trial court, which exercised de novo review and held an evidentiary hearing. (*Id.* at 7-8.) At the hearing, Requester testified, as did Fire Chief Todd Winder and Treasurer Ronald Winder. (*Id.* at 8-15.) The parties also presented documentary evidence including two RTKL requests directed to Clinton Township and Brady Township, to which Fire Company provides emergency services, and the municipalities' responses thereto, which detailed funding provided to Fire Company, (Exs. P1 & P2); Fire Company's Answers to Requester's Discovery Requests, which included numerous tax, financial, and corporate documents, (Ex. P3); and Fire Company's IRS Form 990, (Ex. P4).

Based upon the evidence presented, the trial court held Fire Company is a local agency under the RTKL. In so holding, the trial court considered the three factors set forth in *Pysher I*. The trial court noted that Requester and Fire Company both could "legitimately point to multiple facts in the record in support of their position." (Trial Court Op. at 19.) The trial court found the first factor - the nature of Fire Company's functions - was a "strong factor in

favor of finding that [Fire Company] is a local agency." (*Id.* at 20.) The trial court explained that the provision of fire and emergency services, which is Fire Company's primary purpose, is an essential government function. (*Id.* at 20-21.) The trial court rejected Fire Company's argument trying to distinguish between choosing emergency service

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providers, which Fire Company maintained is the Township's role, and actually performing those functions, which is Fire Company's role. (*Id.* at 20.)

Concerning the second factor - the degree of governmental control - the trial court found "[t]his factor is far less determinate than the nature of [Fire Company]'s functions." (*Id.* at 22.) While the trial court found "active control" by the municipalities was "quite limited," weighing in favor of Fire Company, it found the municipalities "exercise passive or political control and oversight over" Fire Company. (*Id.* at 22-23 (emphasis in original).) Although they did "not appear to often wield this oversight offensively," the trial court found Clinton and Brady Townships easily could and, depending on what steps they decided to take, "destroy [Fire Company]'s viability." (*Id.* at 23-24.)

As to the third and final factor - financial control - the trial court found more than 50% of Fire Company's funding is from public sources. (*Id.* at 25.) The trial court found that the municipalities do not dictate how Fire Company spends its money on a daily basis but do exert financial control in "many ancillary ways." (*Id.*) The trial court found it important that without the financial support of Clinton and Brady Townships, Fire Company admitted it "would cease to exist." (*Id.* at 25.) In the trial court's view, this distinguished Fire Company from the tourism agency in *Venango County*. The trial court also found it notable that Clinton Township had the authority, and exercised that authority, to audit Fire Company, something it could not do with

other third parties with which it contracted. (*Id.* at 26.)

Finally, the trial court dispelled concerns of unintended consequences of holding a private non-profit entity that contracts with the government to be a local agency subject to the RTKL. (*Id.* at 27-29.) The trial court explained each inquiry will be fact dependent and require an application of the three factors. (*Id.* at 28.)

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Moreover, the trial court questioned to what extent other contractors will be performing governmental functions, which are largely statutorily mandated, such as here. (*Id.* at 28-29.) Lastly, the trial court explained that its decision would be unlikely to impact other government contractors that neither "perform a quintessentially government function" nor would "cease to exist if the government terminated the contract." (*Id.* at 29.) Fire Company filed a timely Notice of Appeal.

Before this Court,^[6] Fire Company argues the trial court erred in concluding it was a local agency under the RTKL. Fire Company compares itself to other government contractors, which provide garbage disposal, office supplies, or legal services. As it did before the trial court, it argued townships are responsible for determining the means and extent of fire and emergency services, but "[o]nce that policy decision is made by the township, it then engages . . . [F]ire [C]ompany to provide the services which it, as the township's elected representatives, has determined are appropriate." (Fire Company's Brief (Br.) at 10.) Fire Company argues the trial court wrongly gave greater weight to the first factor, the nature of Fire Company's functions, than the second factor, control. Fire Company also argues that because the municipalities are subject to the RTKL and possess at least some of the information Requester seeks, it is unnecessary to determine whether Fire Company is a local agency subject to the RTKL.

Requester responds that the trial court properly applied the factors we set forth in *Pysher I* and correctly determined, based on those factors, that Fire Company is a local agency. Requester claims it is undisputed that Fire Company provides a

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governmental function that municipalities are required to provide to its citizens. Requester acknowledges the municipalities do not exert control over all aspects of Fire Company's operations but maintains "[c]ontrol is not simply dictating the day-to-day operations or organization of" Fire Company. (Requester's Br. at 15.) Requester asserts that if Clinton and Brady Townships were not involved, Fire Company "would not have the level of protection . . ., [] the ability to perform its necessary functions . . ., or receive the necessary funds to perform its necessary functions for the municipality. . . ." (*Id.*) As to the last factor, Requester argues the municipalities provide an "overwhelming" level of financial control over Fire Company, without which Fire Company could not survive. (*Id.* at 15-16.) In response to Fire Company's second argument, Requester asserts Fire Company did not raise it before the trial court and, thus, it is waived. Even if it is not waived, Requester argues Fire Company "offers no legal holding that validates this argument." (*Id.* at 19.)

Upon review of the record, the parties' arguments, and the law, we conclude the trial court ably resolved Fire Company's first issue in the thorough and well-reasoned opinion of the Honorable Eric R. Linhardt. As it does not appear Fire Company raised the second issue before the trial court, we conclude it was not preserved for our review. *See* Pennsylvania Rule of Appellate Procedure 302(a), Pa.R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.") Notwithstanding that the issue was not preserved, Fire Company cites no legal authority, nor could we find any, providing that a local agency subject to the RTKL need not respond to a lawful request

simply because the requested records are available from another source.

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Accordingly, following our careful review, we affirm on the basis of the trial court's thorough and well-reasoned opinion in *Todd Pysher v. Clinton Township Volunteer Fire Company* (C.P. Lycoming, No. CV-20-01076, filed June 20, 2022) (appended hereto).

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ORDER

NOW, May 24, 2023, the Order of the Court of Common Pleas of Lycoming County, dated June 20, 2022, is AFFIRMED.

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OPINION AND ORDER

AND NOW, this 20th day of June 2022, following a hearing on the Petition for Judicial Review filed November 4, 2020 by Petitioner Todd R. Pysher, the Court issues the following ORDER and OPINION.

BACKGROUND

A. Right-to-Know Law Request

Petitioner Todd R. Pysher filed a request under Pennsylvania's Right-to-Know Law^[1] ("RTKL") on February 16, 2017 seeking eight categories of records concerning the finances and business dealings of the Clinton Township Volunteer Fire Company No. 1 ("Respondent"). Around that time,^[2] Respondent sent Petitioner a letter through counsel indicating that it "is not subject to the [RTKL]," because the RTKL "applies to the Commonwealth and 'local agencies'. The definition of local agency does not include a volunteer fire company."^[3]

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On March 31, 2017, the Office of Open Records ["OOR"] "issued a final determination with regards to... [Petitioner's] request for records, concluding that [Respondent] is a local agency subject to the RTKL" and that Respondent "did not meet its burden of proving that the requested records were exempt from disclosure."^[4] Respondent timely appealed this determination to this Court, and this matter was assigned to the Honorable Richard A. Gray.^[5]

B. August 9, 2017 Court of Common Pleas Ruling

Judge Gray issued an Opinion and Order on August 9, 2017, concluding that Respondent is a "local agency" subject to the RTKL. Judge Gray noted that the Commonwealth Court of Pennsylvania determined that a volunteer fire company was a local agency for the purposes of the Political Subdivision Tort Claims Act^[6] and the 1980 Immunity Act.^[7] Judge Gray did not take any additional evidence prior to issuing the Opinion and Order, and premised his ruling entirely on statutory interpretation.^[8]

Respondent timely appealed the August 9, 2017 Opinion and Order to the Commonwealth Court.

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C. Commonwealth Court Vacating and Remanding for Further Proceedings

On May 8, 2019, the Commonwealth Court issued an Opinion "vacating] the trial court's Order and remand[ing] for development of the factual record."^[9] The Court first noted that the "OOR did not hold a hearing [on Petitioner's RTKL request] and neither party requested one," and that the OOR acknowledged a split among Pennsylvania's courts of common pleas as to whether a fire company was a local agency.^[10] The Court then explained how the trial court reached its decision, analyzing Respondent's status according to a test laid out by the Supreme Court of Pennsylvania "in a case involving the issue of

whether a volunteer fire company was entitled to immunity from tort liability...."^[11]

The Commonwealth Court recognized the parties' agreement that Respondent "is not a Commonwealth, judicial, or legislative agency," and that the only question is whether it is a "local agency" subject to the RTKL.^[12] The RTKL defines a "local agency" as:

"(1) Any political subdivision, intermediate unit, charter school, cyber school, cyber charter school or public trade or vocational school.

(2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity."^[13]

The dispositive question is whether Respondent is a "similar governmental entity."

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Noting that the phrase "similar governmental entity" is undefined, the Commonwealth Court reviewed a number of cases in which "[t]he courts... previously examined the treatment of volunteer fire companies," noting that they have largely found volunteer fire companies to be "governmental in nature" and "entitled to immunity as local or government agencies."^[14] The Court explained that these cases are of only limited utility here in light of the Supreme Court of Pennsylvania's admonition that "an entity's status as an agency or instrumentality varies, depending on the issue for which the determination is being made."^[15] For instance, the Court highlighted, the Delaware Valley Regional Planning Commission is "a Commonwealth agency under the Judicial Code," but was not "an 'agency' under the former Right-to-Know Act... because it did not perform an essential governmental function."^[16] Thus, in light of the fact that the same entity can be a governmental agency for some purposes but not others, it was error for the trial court to "rel[y] upon *Guinn*, a

case involving immunity, to determine [Respondent] was a local agency under the RTKL."^[17] The Court elaborated that although Respondent:

"is a nonprofit corporation [which] may operate pursuant to the Township Code... requiring] a township to provide fire and emergency medical services to its residents and permitting] a township to make rules and regulations governing a fire company's operations... [those facts] alone do[] not transform a nonprofit, volunteer fire company into an extension of the government."^[18]

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Such a ruling, the Court explained, "could have far-reaching and unintended effects" applying to any organization that receives any public funding whatsoever.^[19]

The Court next "considered] how other nonprofit corporations have been treated under the RTKL," first highlighting the "analogous case" concerning the Venango County Tourism Promotion Agency and Lead Economic Development Agency.^[20] In that case, the Court:

"set forth a number of factors to be considered when assessing an organization's status as a 'similar governmental entity,' including the degree of governmental control, the nature of the organization's functions, and financial control. Concerning the first factor, degree of governmental control, we held a court should review factors, such as 'organizational structure, purposes, powers, duties and fiscal affairs.' Moreover, we noted that cooperation with the government is insufficient to establish control. As for government function, we held

that 'the function an entity performs weighs heavily in a local agency assessment. The function must be governmental, but it need not be... essential. To qualify as governmental, the function must be a substantial facet of a government activity.' Finally, with regard to financial control, we noted that the less government financing, the less likely it was that there was government control. Applying these factors, we determined the regional alliance was not a local agency under the RTKL."^[21]

The Court also reviewed its unpublished opinion in *AH*:

"In that case, we were faced with the issue of whether an industrial development corporation was a local agency under the RTKL. Like this case, PIDC turned on the interpretation of 'similar governmental entity.' Applying the rules of statutory construction, including the doctrine *ejusdem generis*, we explained that '[generally, local, intergovernmental, regional or municipal agencies, authorities, councils,

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boards, or commissions are government entities established by a political subdivision pursuant to statutory authorization.' The industrial authority, we noted, was 'not a division of... [or] a political subdivision itself; [its] members [were] not appointed exclusively by the governing body of a political subdivision; [it did] not require a delegation of authority from a political subdivision to promote economic development; and [it]

cannot be disbanded by a political subdivision.' This Court's conclusion that the industrial authority was not a 'local agency' was bolstered, we said, by Section 506(d) of the RTKL, which expressly 'provided for the situation where an agency' contracts 'with a party to perform a governmental function.' We explained that if the industrial authority was held to be a local agency based upon its contract to provide services, this section 'of the RTKL would be rendered meaningless.' Furthermore, we noted that 'the extent to which a private party has been contracted by an agency is not determinative of whether the private party can or should be considered a local agency under the law.'"^[22]

Ultimately, the Commonwealth Court directed that in order to determine whether Respondent is a "local agency," this Court would need to make a "factual record to evaluate the degree of governmental control, the nature of [Respondent's] functions, and the financial control by the Township over [Respondent]."^[23] The Court noted that the parties had made a number of *assertions* in their briefs addressing "exactly the type of facts that are needed to determine" the ultimate issue, but the Court could not consider them given that they were not supported by any evidence of record. The Court directed that:

"[o]n remand, the parties shall be prepared to produce evidence relevant to the degree of governmental control the Township exercises over [Respondent], including, but not limited to [Respondent's] 'organizational structure, purposes, powers, duties and fiscal affairs'; the function [Respondent] performs and whether it is 'a substantial facet of a government activity'; and the degree

of public funding provided to [Respondent] in relation to private funds."

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Neither party appealed from the Commonwealth Court's Order, and the case was remanded to this Court.

D. Subsequent OOR Determination and Instant Appeal

Following the Commonwealth Court's remand, this Court remanded to the OOR for further proceedings. On October 5, 2020, the OOR issued a final determination concluding that Respondent is *not* a "local agency" subject to the RTKL. The OOR noted that prior to its 2017 determination Petitioner "submitted evidence outlining the governmental financial support provided to" Respondent, and on remand the OOR "requested [Respondent] to submit evidence regarding various issues relating to [its] creation, organization, staffing, functions, finances and operations," in response to which Respondent "submitted the affidavit of Todd Winder, Chief of the Fire Company...." The OOR concluded that Respondent "unquestionably performs a governmental function in providing fire-fighting services and receives municipal taxes to cover a portion of [its] operating expenses," but "the Townships exercise no managerial or operational control over" Respondent. The OOR found this complete lack of operation control dispositive.

On November 4, 2020, Petitioner filed the instant Appeal and Petition for Judicial Review of the October 5, 2020 OOR final determination. Petitioner generally contested the OOR's conclusion, and more specifically alleged that "the evidence submitted by Respondent" consisting solely of "an unsigned Affidavit... does not develop[] the relationship between Clinton Township and Respondent" in a manner sufficient to address the factors required by the Commonwealth Court. Petitioner

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asked this Court to find that Respondent is a "local agency" or, in the alternative, to order an evidentiary hearing to properly develop the record.

The Court heard argument concerning the Petition on December 18, 2020, and subsequently issued an Order on March 2, 2021, holding that it was necessary to schedule a full evidentiary hearing to develop a factual record in accordance with the Commonwealth Court's directive on remand. The Court initially scheduled this evidentiary hearing for May 7, 2021; after a number of continuances, the Court held the evidentiary hearing on November 18, 2021.

EVIDENTIARY HEARING AND BRIEFS

A. Testimony and Evidence

Petitioner testified first, explaining the nature of his request and the documents he was seeking. He introduced Exhibit P1, which was his RTKL request to Clinton Township which sought "financial payments to [Respondent] by board of supervisors for calendar years 2015-2020," along with the responses to the request. The first page of the response to this RTKL request was titled "Insurance and Bonding Paid for by Clinton Township for The Clinton Township VFC," and showed that from 2015 to 2019 Clinton Township paid Respondent varying amounts of insurance and bonding funds between \$15,144 and \$28,410 annually. The second page was titled "2015 through 2019 Financial History of Real Estate Fire Tax, Interim Tax, Delinquent Tax, Act 13, Fire Relief Fund and Donations to the Clinton Township VFC." The document established that over that time period, Clinton Township paid Respondent varying amounts between \$122,796.38 and \$146,598.98 annually, with more than

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half of each amount listed as "taxes" and the remaining total split roughly evenly between "Act 13" and "Fire Relief."^[24] The document included a note indicating that these sums do not include the

insurance and bonding listed on the first page. The third page itemized the payments for 2020, which totaled \$173,026.67 between taxes, Act 13, insurance and bonding, and a line for "Fire Equipment 10yr Agreement - \$25,000 per year for 10 yrs towards the New Fire Truck, started agreement in 2020."

Petitioner also introduced Exhibit P2, a similar request to Brady Township, which also has a relationship with Respondent. Exhibit P2 included a single-page response titled "Financial Support for Clinton Twp Volunteer Fire Company," which showed that for the years 2015 through 2020, Brady Township paid Respondent an annual donation of \$30,000, approximately \$4,000 in annual taxes and bonding, and one-time payments of \$5,000 in 2019 for "Equipment - lift chair" and \$15,000 in 2020 for "Fire truck."

On cross-examination, Petitioner testified that he was not currently a member of the Respondent fire company, but had been for a "couple years" in the late 1980s.

Todd Winder ("Todd")^[25] testified next. He explained that he has been the chief at the Respondent fire company since he was elected to that position in 1999, and has worked with Respondent since 1984. He discussed the sources of funding listed

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in Exhibits P1 and P2 as well as other funds Respondent utilizes,^[26] explaining that Respondent's budget is approximately \$400,000 to \$500,000 annually. He testified that of this budget, the prison and ambulance contracts provide the largest portion, Respondent's fundraising generates over 30% of the budget, and the two townships provide approximately \$100,000 annually.

Todd testified that the purpose of Respondent is to provide emergency services generally; although it is called a "fire department," it is an "all-hazards company" that will serve as first responders to any 911 call

regardless of severity.^[27] Todd explained that in addition to providing full first-responder services to Clinton and Brady Townships (Respondent's "primary response area"), they provide EMS and secondary support to Washington Township, and conduct limited additional services in Union and Northumberland County. Todd stated that Respondent has never been "certified" by the municipalities, but is annually appointed, and each year Respondent provides a list of its fire police officers to Clinton and Brady Townships, who then ratify Respondent's services. Todd testified that if Clinton and Brady Townships ceased using Respondent's services, Respondent could not continue as a viable entity. He explained that it was entirely within the Townships' discretion to terminate their contract with Respondent, and that presumably if they did so the Washington

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Township fire company, or Muncy fire company, would take over, which would lead to great delays in some response times.

Todd explained that Respondent provides services on a twenty-four hour basis, and that many other companies do not. He clarified that each township has discretion to choose its fire and EMS provided, so a township could in theory choose a provider very far away (though of course this would not be effective or useful given the emergent nature of the issues fire departments deal with); thus, it is Clinton and Brady Townships that are choosing Respondent, and not the other way around.

Todd testified that Respondent purchases its own equipment with its treasury funds, and that the \$30,000 annual donation from Brady Township goes to Respondent's mortgage. He explained that almost all other sums are commingled in Respondent's general fund, though occasionally they will receive donations earmarked for specific purposes. Todd noted that Clinton Township recently pledged \$25,000 annually for 10 years for the purchase of a new truck, which cost approximately \$600,000. Todd

explained that had Clinton Township not made the pledge, Respondent still would have purchased the truck but would have needed to take out a larger loan to do so. Todd testified that if for some reason Clinton and Brady Townships decided to no longer utilize Respondent's services, it is unlikely that many people would volunteer for Respondent, and the company would have to disband and attempt to liquidate its assets. This process would have to be conducted in accordance with state law.

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On cross-examination, Todd further explained the categories of funds Respondent receives. Petitioner introduced Exhibit P3, Respondents' Answers to Petitioner's Discovery Requests, consisting of a number of tax, financial, and corporate documents. Todd testified that Act 13 funds come from taxes on the operation of gas wells in Pennsylvania and the County; the amounts Respondent receives are not necessarily from activity within Clinton Township, but are a portion of the Act 13 funds the Township itself receives. A portion of the taxes Respondent receives comes from taxes on fire insurance, and this amount similarly passes through Clinton Township. Todd testified that Respondent accounts to Clinton Township for its annual spending, with its treasurer submitting a yearly report, and that if it did not Clinton Township could withhold certain payments under state law. He explained that Respondent does not account to Brady Township in this manner, because the vast majority of the amount Brady Township provides is the \$30,000 donation which goes directly to Respondent's mortgage. Todd noted that the spending of fire relief money is audited by the Attorney General's office.

Todd testified that Clinton and Brady Townships are not involved in the day-to-day operations of Respondent, and that they will approve Respondent's list of fire police annually as a matter of course but are not otherwise involved in any way in personnel decisions, such as approving new members. Todd explained that

the Townships provide new members workers' compensation but no other benefits.

Todd testified that Clinton Township recently audited Respondent as a result of public pressure, as some Township supervisors alleged proof of misappropriation.

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As a result, Clinton Township contracted with a private auditor at a cost of approximately \$11,000; the auditor was given complete access to Respondent's financial records in 2018 or 2019 (covering the previous fiscal year) and issued a report concluding that all money was properly accounted for. Todd explained that Clinton and Brady Townships have no involvement with Respondent's finances, and clarified that Respondent explicitly offered Clinton Township more direct control over Respondent's finances but the Township was not interested.

On re-direct, Todd explained that "insurance and bonding" partly covers some payments that Clinton Township makes towards Respondent's insurance, but he was not certain what the "bonding" payments were specifically. He noted that costs are high right now, though Respondent recently did some of its own negotiating. Todd was surprised that the numbers listed in Exhibit P1 were as high as they were. He clarified that there is no requirement that Act 13 funds go to local fire departments, but that Clinton Township made a political choice to provide Respondent with a portion of its Act 13 funds. Todd testified that Respondent may be in possession of the Attorney General's office audits of portions of its finances, but does not possess the private audit conducted by Clinton Township in 2018 or 2019.

Ronald Winder ("Ronald"), Respondent's treasurer, testified next. He explained that he has no formal accounting training but learned some things on the job. He testified that he works with Respondent's accountant, providing her with Respondent's financial materials, and signs off on the work she does, including her annual report

and Respondent's Form 990. Petitioner introduced Exhibit P4,

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Respondent's Form 990 from 2019. Ronald explained that Line 8 on Exhibit P4, reflecting approximately \$250,000 in "contributions and grants," included a large government grant for Respondent's scuba unit as well as additional smaller grants from the state; he stated that this amount does not include money from fire taxes, but that a professional accountant would be better able to explain exactly what goes into this figure. Ronald was not sure what the \$116,311 listed in Line 9 as "program service revenue" meant. He explained that the total revenue, listed in Line 12 as "388,482," was provided by Respondent's accountant, who explains the bottom line to him, points out concerns, and checks for government compliance.

When asked to compare some of the figures in Exhibit P1 to the lines on Exhibit P4, Ronald explained that he did not know exactly how the sums were broken out or otherwise correspond between the two documents; for instance, he did not know if the roughly \$146,500 from Clinton Township to Respondent reflected in Exhibit P1 was correct, or where the receipt of that money was reflected in P4. Ronald testified that Respondent has five bank accounts, with different sources of money going into different accounts. In particular, the tax revenue Respondent receives goes into Respondent's checking account at Muncy Bank, and the money for the new truck has a separate account. The money from Brady Township goes into Respondent's general account. Ronald explained that Clinton Township gets a copy of Respondent's monthly statements from both of its accounts at Muncy Bank.

Ronald testified that he was not sure what would happen to funds if Respondent dissolved, but that he believed it would have to be distributed in

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accordance with state law. He explained that the money Respondent receives from its ambulance accounts and general fundraising, its only non-governmental sources, would not be sufficient to allow Respondent to exist.

Following the conclusion of Ronald's testimony, Petitioner rested. Respondent rested without calling any additional witnesses.

B. Petitioner's Brief

In his brief, Petitioner argues that Respondent "is a 'local agency' subject to the RTKL because it is funded by public money, performs a governmental duty, and must submit annual financial reports to the township." Petitioner first highlights that "a volunteer fire company's 'primary function, the provision of fire and emergency services, is governmental in nature,'" and thus "[t]here is no doubt that [Respondent] is providing a governmental function that is the responsibility of the municipalities it serves to provide."^[28]

Petitioner next notes that although Clinton and Brady Townships "do not directly regulate or make rules for [Respondent]," they are authorized to do so.^[29] Petitioner notes that in a second class township "a volunteer fire company is not permitted to organize or operate unless it is approved by resolution by the board of supervisors," and that "a volunteer fire company is not eligible for certain benefits," such as workers' compensation insurance, "unless the local municipality it serves

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certifies that it is the recognized volunteer fire company for the municipality." Additionally, Petitioner highlights, the municipalities approve Respondent's list of fire police, who "are an integral part of the fire protections that [Respondent] must provide to the townships," inasmuch as they "perform traffic control and keep crowds under control at or in the vicinity of any fire on which their companies are in attendance and... exercise other police powers

necessary to facilitate and prevent interference with the work of firemen in extinguishing fires."

Petitioner argues that the Township Code's limitations on "how funds received from the township can be used by a volunteer fire company," and its requirement that a fire company submit an annual report accounting for its use of such funds, further establish that "the townships exercise a significant level of control over" Respondent.

With regard to the specific financing received by Respondent, Petitioner characterizes "[t]he level of financial control that the municipalities hold" over Respondent as "overwhelming," due to the fact that it receives such a large majority of its income from the municipalities that it would cease to exist if these revenue sources were taken away. For instance, Petitioner notes that in 2019, Respondent's total revenue was \$388,482, consisting of \$252,828 in "government grants, contributions, and gifts," \$116,311 in "ambulance and other services," and \$19,300 in "fundraising."^[30] Petitioner avers that Exhibits P1 and P2 establish that a total of \$195,213.63 of the \$252,828 in government grants, contributions, and gifts came from either Clinton or Brady Township. Petitioner highlights that the figures for 2019

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are typical of the entire period from 2015 through 2020, meaning that Respondent consistently "receives over 65% of its income from the participating municipalities."

C. Respondent's Brief

In its brief, Respondent first highlights that Clinton Township, and other municipalities, "do[] not participate in [day-to-day] operations of [Respondent]," and characterizes the contract for fire services as "similar to any other contract that the Township would enter for garbage removal, office supplies or legal services." Respondent notes that the Township does not appoint, select, or approve its members, and they receive no

municipal benefits other than workers' compensation insurance. Respondent notes, as Petitioner acknowledges in its brief, that "if [Respondent] were to dissolve, [its] assets would not go to the Township."

Respondent cites *Ralcond* as providing an overview of the history of volunteer fire companies in Pennsylvania, explaining that they serve an essentially charitable purpose and that the grant of governmental immunity is appropriate to further that purpose.^[31] In the context of governmental services presented here, however, Respondent essentially describes a two-step process: first, the second class township supervisors "determine the extent of fire and emergency medical services to be provided... [thus] carrying] out the public policy or governmental functions"; and second, "[o]nce that policy decision is made by the township, it then engages the volunteer fire company to provide the services which it, as the township's elected representatives, has determined are appropriate." Thus, "[i]t is not the fire company

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that makes any determination as to the means or the extent of providing fire and emergency medical services within the township. The policy or governmental or governing decision is made by the elected representatives...." Respondent points out that Todd and Ronald Winder testified that Respondent "does report to the Township how [its] public funds are expended," so Petitioner's RTKL request is essentially "seeking to ascertain the use of the private funds that the fire company raises and expends."

Ultimately, Respondent emphasizes that the Commonwealth Court explicitly rejected the contention that the resolution of the instant issue is analogous to whether fire companies are entitled to immunity, and suggests that finding Respondent to be a "local agency" for RTKL purposes would subject "the local trash hauler," "the SPCA," and "the vendor that provides supplies to the Township Office... [to] print Ordinances" to the RTKL as well.

ANALYSIS

The parties agree that Respondent "is a Pennsylvania non-profit corporation" that was not created by and is not presently a formal part of any governmental agency. The dispositive question is whether Respondent is a "similar governmental entity" to "[a]ny local, intergovernmental, regional or municipal agency, authority, council, board, [or] commission...." The Commonwealth Court has directed this Court to answer this question by considering "the degree of governmental control, the nature of [Respondent's] functions, and financial control"; to do so, the Court must address "[Respondent's] organizational structure, purposes, powers, duties and fiscal

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Inasmuch as Respondent's primary work, the provision of fire and emergency services, is clearly governmental in nature, the Court's analysis starts far closer to a finding that Respondent satisfies the statutory definition of "local agency" than in *Venango County*. In that case, the functions performed by the organization in question were "economic development and community stewardship," which "do not fulfill a core purpose of government agency."^[35]

The Court recognizes that Respondent has multiple purposes and performs a multitude of functions, only some of which are governmental in nature. The evidence established that Respondent has multiple private contracts and conducts private fundraising, all of which account for a significant portion of its budget. Many of Respondent's activities are of the sort typically performed by a private contractor, or even a social club, than those typically performed by a governmental agency. Article II of Respondent's Constitution contains Respondent's Mission Statement:

"The mission of this organization shall be to maintain and operate a Volunteer Fire Company for the prevention, extinguishing, and

fighting of fires, emergency medical services including treatment and transport of the ill, injured, or infirmed, rescue services of persons or animals in dangerous or life threatening situations, the preservation of life and property in Clinton Township, Lycoming County, Pennsylvania, and the communities adjacent thereto; to provide and sponsor social activities for members of the organization, to sponsor and promote community and other activities of a public nature; to maintain a Relief Association for the protection of members of the organization who are injured in the line of duty; and other benefits that the By-Laws may provide."

Ultimately, however, Respondent is the primary provider of fire and emergency services to Clinton and Brady Townships, and a secondary provider of these services

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to other municipalities. This quintessentially governmental activity is not Respondent's only function, but is among of its primary functions, and thus a significant portion of Respondent's activities constitute "a substantial facet of a government activity."

B. Degree of Governmental Control

The Commonwealth Court directed this Court to evaluate "the degree of governmental control the Township exercises over [Respondent], including, but not limited to [Respondent's] organization structure, purposes, powers, duties and fiscal affairs." This factor is far less determinate than the nature of Respondent's functions. The testimony did not finely establish Respondent's organizational structure, though it is an organization with a Chief and Treasurer and a number of volunteers. Respondent's Constitution and By-Laws, included in Exhibit 3,

establish criteria for membership, and create a number of officer positions: President, Vice-President, Secretary, Treasurer, Chief, Fire & Rescue Captain, Safety Captain, EMS Captain, two Fire & Rescue Lieutenants, and an EMS Lieutenant. The testimony did establish that the Treasurer essentially works to provide Respondent's accountant access to Respondent's financial information, and then verifies and signs off on the accountant's work to the extent possible without formal training.

In terms of Respondent's structure as it relates to the Townships, it is clear that the Townships' *active* control of Respondent is quite limited. Todd testified that Clinton Township's approval of Respondent's fire police lists is essentially a rubber stamp, and that otherwise Respondent is free to conduct its affairs - such as hiring,

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firing, and the purchase of equipment - in whatever manner it deems best. Todd noted that although Respondent responds to every 911 call in Clinton and Brady Townships regardless of the nature of the call, it is not required by law to do so and could choose at any time to exercise additional discretion.

The Townships' lack of active control over Respondent's activities is the strongest factor in Respondent's favor. The Court is not willing to go so far as Respondent, who argues that the primary government function is the Townships' determination of their fire and emergency needs, and therefore Respondent's fulfillment of those needs within the contract is a secondary function that they can perform with complete autonomy; the request for services and the provision of those services cannot be so neatly disentangled. Even so, all of the testimony and evidence clearly establishes that Respondent does have essentially complete autonomy to conduct its own day-to-day affairs.

It is clear, however, that the Townships do exercise passive or political control and oversight

over Respondent, and that Respondent could potentially suffer consequences for inappropriate activity. Todd testified that by statute, Respondent is required to account to the Townships for its expenditure of certain funds, and the Township has made a political choice to contribute 25% of its Act 13 funds to Respondent.^[36] Additionally, Clinton Township provides Respondent's members with workers' compensation insurance. Although the Townships do not appear to often wield this oversight offensively, it certainly seems they could do so, as the testimony

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established that a choice by the Townships to certify and rely upon a different emergency services provided would destroy Respondent's viability. Clinton Township did exercise political pressure over Respondent's affairs when it conducted the audit in 2018 or 2019. Neither party presented testimony or evidence regarding what the Township would or could have done had the audit revealed evidence of impropriety, and the Court will not speculate as to what might have happened in such a scenario.

Additionally, to the extent Petitioner contends that the Townships' ratification of the proposed fire police is merely ceremonial and thus meaningless to an analysis of control, the Court disagrees with this contention. That the Townships have generally not contested the proposed fire police does not mean they could not do so in the future, and this procedure does demonstrate a level of control over Respondent's affairs, though of smaller magnitude than would follow from *ex ante* input into the selection of fire police officers.

Ultimately, the record regarding the degree of control the Townships exert over Respondent is mixed; although this factor does cut in favor of Respondent, it is not as favorable to Respondent as the first factor was to Petitioner.

C. Financial Control

The Commonwealth Court highlighted Respondent's "financial control" and "the degree of public funding provided... in relation to private funds" as necessary considerations.

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The testimony and evidence established that a large portion of Respondent's funds come from the Townships, although Respondent's witnesses established that only some of these funds are given freely by the Townships, whereas others are mandatory funds that originate at higher levels of government and "pass through" the townships. This fact may account for the discrepancy between Todd's testimony, which was that the Townships contributed approximately \$100,000 of Respondent's \$400,000 to \$500,000 annual budget, and Petitioners' Exhibits 1, 2 and 4, which show that the Townships provide far closer to \$200,000 annually and that approximately \$250,000 of Respondent's \$388,482 revenue for 2019 was comprised of "contributions and grants," which includes funds from all levels of government. Ultimately, a substantial portion of Respondent's funding is public, and the testimony and evidence suggests public funding may ultimately account for 50% or more of Respondent's funding.

At the heart of the issue of financial control is the question of who dictates how Respondent can spend its money. It is undisputed that the Townships do not direct Respondent's spending on a day-to-day basis, and thus do not directly control the flow of funds into and out of Respondent's accounts. The Townships do exercise financial control over Respondent, however, in many ancillary ways.

Perhaps most importantly, Respondent admits that without the Townships' funding Respondent would cease to exist. That the Townships have the right to withdraw this funding (either by not providing discretionary funding or by choosing a different organization to provide emergency services) gives the Townships a

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measure of control over Respondent. The fact that the Townships continue to designate Respondent as their primary emergency services provider is not per se a factor in Petitioner's favor; in *Venango County*, the fact that "the Venango County Commissioners designated the [tourism agency] to serve as [the County's] 'tourism promotion agency'" pursuant to statute did not "confer 'local agency' status on it."^[37] Here, however, this continued designation is what keeps Respondent solvent; whereas in *Venango County* "the government financing [was] 'proportionally small,'" here it is the primary component of Respondents' budget.

As to financial oversight, the testimony established that the law requires Respondent to provide certain financial documents to the Townships, and as noted above, political pressures led Clinton Township to audit Respondent. The fact that the Township had the authority, whether de facto or de jure, to conduct this audit is telling; certainly, a municipality cannot audit, for instance, its office supply vendor in such a manner. Additionally, although Respondent testified that it may use most of the money provided by the Townships as it sees fit, some of the funds provided are earmarked for certain projects.

Although the fact that the Townships do not actively direct Respondent's expenditure of funds is a significant factor in Respondent's favor, the size and proportion of government funding, and the substantial entanglement of that funding with Respondent's affairs, means that the factor of financial control suggests Respondent is a local agency under the RTKL.

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D. *Slippery Slope*

One final contention merits discussion. The Commonwealth Court took care in its Opinion in this case to warn of the "far-reaching and unintended effects" that could arise from a

holding that a "privately incorporated nonprofit that is somehow regulated by the government" is an agency for the purposes of the RTKL regardless of "the extent of control exercised by the government or other factors...."^[38] Notably, the RTKL contains a provision that allows a requester to obtain "[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," as long as the public record "directly relates to the governmental function and is not [otherwise] exempt" under the RTKL.^[39] As the Commonwealth Court noted in *AH*, the inclusion of this provision is strong evidence that a government agency contracting with a party to perform a government function does not, without more, render that party a "local agency" subject to the right to know law; if the existence of such a contract were sufficient to do so, § 67.506(d)(1) would be superfluous.^[40]

Respondent echoes this concern:

"[Respondent's] contract with the Township to provide fire protection is identical to any other contract that a party has with a Township. It goes without saying that the Township is not going to enter into any contract that does not involve some type of governmental function. The position advocated by Pysher opens up Pandora's Box. If the Township's financial contribution to [Respondent] makes [Respondent] subject to

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the Right to Know Act, wouldn't the local trash hauler be subject to the Right to Know Act? Or the SPCA that provides an essential governmental function by controlling stray pets within the Township? Or the vendor that provides supplies to the Township Office so that the Township Office

can print Ordinances, which is obviously a governmental function?"

For multiple reasons, the Court does not believe its decision will open up the floodgates the Commonwealth Court has warned of, and Respondent fears. First, the Court's analysis - compelled by the Commonwealth Court - is multifactorial and highly fact-specific. No one similarity, or set of similarities, between Respondent and any other organization contracting with a government entity will be dispositive of whether that entity is a local agency under the RTKL; rather, to answer that question it is necessary to analyze "the degree of governmental control, the nature of [that organization's] functions, and financial control" arising out of the specific relationship between the organization and governmental unit in question.

Second, it is not the case that every action a municipality may hire another party to perform is necessarily a "governmental function." As noted in *Venango*, "economic development and community stewardship... do not fulfill a core purpose of a government agency." The extent to which trash disposal, animal control, and printing of legislation constitute governmental activities is complex and would require a legal and historical analysis that is beyond the scope of the question before this Court. This Court is skeptical, however, that copying documents which happen to be ordinances passed by a municipality is a governmental function of the same quality as the provision of fire and emergency services. Additionally, the testimony and evidence here established that many of the characteristics of the relationship

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between the Townships and Respondent are not bargained-for terms of the contract between them but are statutory requirements. Although not dispositive, this provides a further governmental character to the relationship that is not present in

the relationship between a municipality and its local print shop.

Finally, the Court's determination in this case rests in large part on the fact that the Townships provide a comparatively large portion of Respondent's funding; after adding in the funding provided by other levels of government, it is possible that in a given year Respondent's funding will be more public than private. The degree of this funding renders Respondent viable for only as long as the Townships provide this funding. This fact should assuage the concerns of any organization that fears that entering into a government contract, regardless of its characteristics, will inadvertently subject it to public regulation and oversight. The Court expects that its decision here will have very little applicability to any government contractor that 1) does not perform a quintessentially governmental function or 2) would not cease to exist if the government terminated the contract.^[41]

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ORDER

For the foregoing reasons, the Court concludes that the Clinton Township Volunteer Fire Company is a "local agency" for the purposes of the Right-to-Know Law. Respondent shall reply to Petitioner's request in accordance with the Right-to-Know Law.

IT IS SO ORDERED this 20th day of June 2022.

Eric R. Linhardt, Judge

Christopher H. Kenyon, Esq.

Joseph F. Orso, III, Esq.

Gary Weber, Esq. (Lycoming Reporter)

Notes:

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

[2] The procedural history and factual background of this matter are fully set forth in both *Pysher I* and the trial court's opinion accompanying its Order. Therefore, it is unnecessary to fully restate that information here.

[3] Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §§ 951-963.

[4] Act of June 1, 1937, P.L. 1168, *as amended*, 43 P.S. §§ 211.1-211.13.

[5] 42 Pa.C.S. §§ 8541-8542.

[6] Our review is "limited to determining whether findings of fact are supported by [substantial] evidence or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision." *Kaplin v. Lower Merion Township*, 19 A.3d 1209, 1213 n.6 (Pa. Cmwlth. 2011).

[1] 65 P.S. § 67.101 through § 67.3104.

[2] This letter is dated February 13, 2017, which is three days before Petitioner filed his RTKL request. It is unclear from the record whether one of these documents is misdated or whether Respondent's letter was sent pre-emptively or in response to communications that preceded Petitioner's RTKL request.

[3] Respondent acknowledged in the letter that one of the records Petitioner sought, IRS Form 990, "is a public document [that] may be obtained by [Respondent] on the internet," and that Respondent would be willing to provide Petitioner with a copy at a cost of \$0.25 per page.

[4] August 9, 2017 *Opinion and Order of Hon. Richard A. Gray; Pysher v. Clinton Township Volunteer Fire Company*, 209 A.3d 1116,1118 (Pa. Cmwlth. 2019).

[5] Judge Gray has since retired from the bench, and this matter has been reassigned to the undersigned.

[6] *Zern v. Muldoon*, 516 A.2d 799 (Pa. Cmwlth. 1986).

[7] *Wilson v. Dravosburg Volunteer Fire Dept*, 516 A.2d 100 (Pa. Cmwlth. 1986).

[8] In the August 9, 2017 Opinion, the Court also addressed two collateral issues, finding that Respondent was not estopped from asserting that it was not a local agency and that Petitioner was not entitled to attorney's fees. Neither of these issues are presently before the Court.

[9] *Pysher v. Clinton Township Volunteer Fire Company*, 209 A.3d 1116, 1117 (Pa. Cmwlth. 2019).

[10] *Id.* at 1118.

[11] *Id.* (citing *Guinn v. Alburdis Fire Co.*, 614 A.2d 218, 219 n.2 (Pa. 1992)).

[12] *Id.* at 1120-21.

[13] 65 P.S. §67.102.

[14] *Id.* at 1121.

[15] *Id.* (citing *Pa. State Univ. v. Deny Twp. Sch. Dist*, 731 A.2d 1272 (Pa. 1999) (holding "Penn State University was not an agency of the Commonwealth immune to real estate taxes, although it had been determined an agency of the Commonwealth for other purposes" (emphasis added))).

[16] *Id.* at 1122.

[17] *Id.*

[18] *Id.* at 1122-23.

[19] *Id.* at 1123.

[20] *Id.* (citing *In re Right to Know Law Request Served on Venango County's Tourism Promotion Agency and Lead Economic Development Agency*, 83 A.3d 1101 (Pa. Cmwlth. 2014)).

[21] *Id.* (internal citations omitted; emphasis in original).

[22] *Id.* at 1123-24 (internal citations omitted; emphasis in original).

[23] *Id.*

[24] 2018 had an additional category, "Lucas (CPR)."

[25] Both Todd Winder and Ronald Winder testified at the hearing; this Opinion will refer to them by their first names to avoid confusion.

[26] In particular, Todd cited a contract with SCI Muncy, certain EMS services contracts, fundraising, and donations from the public as providing additional money.

[27] Todd testified that Respondent has the legal right to refuse to respond to certain calls, but they do not exercise that right and respond to every call.

[28] Petitioner cites *Harmony Volunteer Fire Co. & Relief Ass'n v. PHRC*, 459 A.2d 439 (Pa. Cmwlth. 1983).

[29] 53 P.S. § 66803(b), cited by Petitioner, provides that "[t]he board of supervisors [of a second class township] may by ordinance make rules and regulations for the government of fire companies which are located within the township and their officers."

[30] The remaining \$43 is listed on the 2019 Form 990 as "investment income."

[31] *Ralcond Corporation v. Muldoon*, 516 A.2d 800 (Pa. Cmwlth. 1986).

[35] *Venango County*, 83 A.2d at 1109.

[36] The degree of financial control is discussed *infra*.

[37] *Venango County*, 83 A.2d at 1109.

[38] *Pysher*, 209 A.3d at 1123.

[39] 65P.S. § 67.506(d)(1).

[40] *Pysher*, 209 A.3d at 1124 (citing *AH*, 2011 WL 10843527).

[41] As stated above, even if these two conditions are met, they are not dispositive, and the determination of whether an organization is a "local agency" for purposes of the RTKL will necessitate a multifactorial, fact-intensive inquiry into the particular circumstances of the relationship between the organization and the government.
