

FACTUAL BACKGROUND

On January 22, 2009, Mr. Meyerson filed a right to know request with the Borough. Specifically, he sought a copy of the audio cassette recording of the January 13, 2009 Borough council meeting. Melissa Shaffer (“Ms. Shaffer”), Open Records Officer, for the Borough, responded within the required five (5) business days on January 28, 2009. Ms. Shaffer denied the request. In support of the denial, she referenced Tapco v. Twp. Of Neville, 695 A.2d 460 (1997), stating that the audio tape was used for the purpose of taking meeting minutes and that the Borough did not consider the tapes an official public record. Ms. Shaffer properly advised Mr. Meyerson of his right to appeal. Mr. Meyerson filed a timely appeal to the OOR on February 5, 2009.

In support of his appeal, Mr. Meyerson argues that the tapes are public because they are a recording of direct feeds from the council and speaker microphones at a public meeting.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). The Borough is a local agency subject to the RTKL. See 65 P.S. § 67.302. The RTKL defines a “public record” as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.”

65 P.S. §67.102.

The Pennsylvania Sunshine Act, 65 P.S. §§701, *et seq.* does not require that a local agency record public meetings. However, if an agency elects to make audio, video or

digital recordings of a public meeting, those records are public records subject to the Right-to-Know Law.

Section 102 of the RTKL, defines the term “record” as:

“Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, **tape**, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document” (*emphasis added*).

The RTKL specifically identifies a “tape” as a record. Further, the audio recording of a public meeting documents an activity of the agency and is created in connection with that activity. Therefore, by definition under the RTKL, a tape recording of a public meeting is a record subject to the RTKL.

We note that Ms. Shaffer points to Tapco, Inc. v. Twp of Neville, 695 A.2d 460 (Pa. Cmwlth. 1997), where the Court specifically held that a tape recording of a public meeting is not a “minute” as it does not represent the official record of a township’s actions. However, Tapco involves the previous RTKL. Because the definition of “public record” was more limited under the previous RTKL and the tape did not qualify as a “minute, order or decision” it was not subject to disclosure. The current definition, as set forth above, is more expansive and specifically includes tapes. The case law is clear that a tape is not a minute, nor do we view it as a draft minute.

With respect to any exceptions to disclosure, we will not address whether or not an audio cassette falls under any other exception as the RTKL is clear that agencies bear the burden of proving the applicability of exceptions and it is not the role of the OOR to identify potential areas of exemption. Specifically, § 708 in pertinent part states:

(a) Burden of proof. —

(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

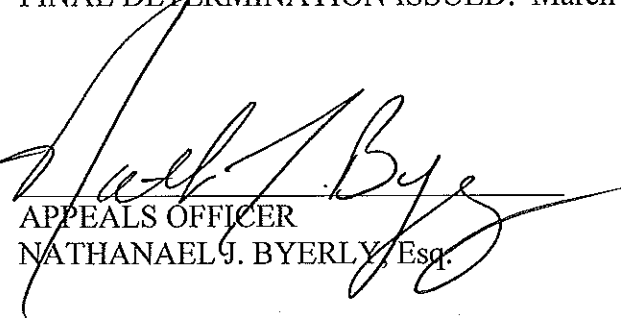
65. P.S. § 67.708.

Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8th ed. West 2004). See also Commonwealth v. Williams, 615 A.2d 716 (PA. 1992). Merely citing an exception available to a local agency within the law does not meet its burden. The Borough has not met its burden of proof as required by law.

CONCLUSION

For the foregoing reasons, this appeal is **granted**, and the Borough is directed to release the record requested. The parties are advised that this is a Final Determination and is binding on the parties. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Court of Common Pleas. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1302.

FINAL DETERMINATION ISSUED: March 5, 2009


APPEALS OFFICER
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