

Property Tax Collection System.” The report was published by LBFC in June 2011.² Although the questionnaire form was included in an appendix to the report, the specific answers of municipal real estate tax collectors were not. LBFC denied the request on April 10, 2015, for the reason that the records sought fell within the exemption for “[w]ork papers underlying an audit” in a noncriminal investigation, citing section 708(b)(17)(v) of the RTKL. Requester was then notified of the right to appeal the decision to LRB.

On May 1, 2015, LRB received an email message from Requester placing LRB on notice of Requester’s appeal and indicating that a hard copy of the appeal letter would follow by mail. The original appeal letter dated May 1, 2015, was received by LRB on May 4, 2015.

LRB sent a letter to Requester and LBFC on May 5, 2015, informing them of a May 15, 2015, deadline to submit additional information and legal argument in support of their positions. LRB also requested that LBFC submit a copy of the June 2011 report and all email messages between the parties. The information sought from LBFC was timely received by LRB on May 15, 2015. In addition, LBFC submitted affidavits of its executive director and counsel, the later of whom serves as LBFC’s open records officer. Lastly, LBFC submitted a seven-page letter detailing its legal argument on appeal.

After the deadline stated in LRB’s letter to the parties, Requester sent an email message to LRB in which Requester sought additional time to submit a response to LBFC’s seven-page letter. On May 18, 2015, LRB denied the request for an extension of time to do so. No hearing was conducted by LRB.

² The report was prepared in compliance with Senate Resolution No. 250, Printer’s No. 1693 (Regular Session 2009-2010) (Senate Resolution 250), adopted May 25, 2010. LBFC was directed by the resolution to, *inter alia*, “conduct a comprehensive study of the current real property tax collection systems in this Commonwealth,” post a report of its findings on the Internet and submit the report to various officials within State government.

LEGAL ANALYSIS

“[T]he objective of the Right-to-Know Law... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees LLC v. Wintermantel*, 615 Pa. 640, 662, 45 A.3d 1029, 1042 (2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions....” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commonwealth 2010), *aff’d*, 621 Pa. 133, 75 A.3d 453 (2013).

LRB is required by section 503(c)(1) of the RTKL to hear appeals from all legislative agencies. *See* 65 P.S. § 67.503(c)(1). In performing that duty, LRB must appoint an appeals officer. The appeals officer has the legal duty to “[r]eview all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). The appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Department of General Services*, 20 A.3d 613, 617 (Pa. Commonwealth 2011). LRB has the necessary, requisite information and evidence before it to properly adjudicate the matter.

LBFC is a legislative agency subject to the RTKL and, as such, is required to disclose its legislative records. 65 P.S. § 67.303(a). A legislative record in the possession of a legislative agency is presumed to be available in accordance with the RTKL unless an exemption applies. 65 P.S. § 67.305(b). Upon receipt of a request under the RTKL, a legislative agency is required to assess whether a record is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. The legislative agency bears the burden of proving by a preponderance of the evidence the applicability of any cited exemption. *See* 65 P.S. § 67.708(a)(2).

The preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435, 439 (Pa. Commonwealth 2011) (quoting *Department of Transportation v. Agricultural Lands Condemnation Approval Board*, 5 A.3d 821, 827 (Pa. Commonwealth 2010)).

Before considering whether an exemption applies, there is the more fundamental question as to whether the record falls within the statutory definition of a “legislative record.” Under the RTKL, legislative agencies are required to provide statutorily defined legislative records only. *See* 65 P.S. § 67.303(a). If the record or document sought does not satisfy the definition of a legislative record, there is no need to discuss exemptions; in such a case, the record or document is not subject to the RTKL.

Section 102 of the RTKL provides the following pertinent definition:

"Legislative record." Any of the following relating to a legislative agency or a standing committee, subcommittee or conference committee of a legislative agency:

- (1) A financial record.
- (2) A bill or resolution that has been introduced and amendments offered thereto in committee or in legislative session, including resolutions to adopt or amend the rules of a chamber.
- (3) Fiscal notes.
- (4) A cosponsorship memorandum.
- (5) The journal of a chamber.
- (6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.
- (7) The transcript of a public hearing when available.
- (8) Executive nomination calendars.
- (9) The rules of a chamber.
- (10) A record of all recorded votes taken in a legislative session.
- (11) Any administrative staff manuals or written policies.
- (12) An audit report prepared pursuant to the act of June 30, 1970 (P.L.442, No.151) entitled, “An act implementing the

provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission.”

(13) Final or annual reports required by law to be submitted to the General Assembly.

(14) Legislative Budget and Finance Committee reports.

(15) Daily legislative session calendars and marked calendars.

(16) A record communicating to an agency the official appointment of a legislative appointee.

(17) A record communicating to the appointing authority the resignation of a legislative appointee.

(18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.

(19) The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

65 P.S. § 67.102. There are various forms of records of legislative agencies that fall within the definition of “legislative record.” However, unless a record satisfies one of the enumerated forms, it is not required to be produced by a legislative agency under the RTKL.

In this case, Requester seeks answers of individual municipal real estate tax collectors to several questions included in a questionnaire prepared and distributed by LBFC. The questionnaire was identified in Appendix B of the LBFC report published in June 2011 and titled “Pennsylvania’s Current Real Property Tax Collection System.”

The report clearly falls within the definition of a legislative record for purposes of the RTKL since LBFC reports are specifically identified in paragraph (14) of the definition. However, Requester is not interested in obtaining the report itself, but seeks some of the data collected by LBFC from a questionnaire included in Appendix B of the report.³ The statutory definition is

³ Senate Resolution 250 explicitly requires the report to be published on LBFC’s Internet website. This makes the report publicly accessible regardless of the RTKL.

limited to the report only; underlying data to the report is not expressly included in the definition. Therefore, none of the data obtained from the questionnaire is a legislative record under the RTKL. For this reason alone, LBFC had the legal justification to deny the request.

In its denial letter to Requester, LBFC mentions paragraph (19) of the definition of “legislative record,” which provision relates to “results of public opinion surveys ... or similar efforts designed to measure public opinion funded by a legislative agency.” LRB disagrees that the information sought by Requester are results from an effort to solicit public opinion. The questionnaire was sent to a select group of local public officials, namely municipal real estate tax collectors. LBFC was not seeking to assess the opinion of the public, but rather to gather information from a select group of persons as local officials. They were not polled in their personal capacity as members of the general public. Accordingly, paragraph (19) of the definition of “legislative record” contained in section 102 of the RTKL does not apply in this case.

LRB concludes that the information sought by Requester does not fall within the definition of a “legislative record.” It is acknowledged that LBFC’s initial denial did not specify this reason. However, the failure of LBFC to do so is not dispositive. LBFC is not precluded from raising new grounds for denial on appeal. *See Levy v. Senate of Pennsylvania*, 619 Pa. 586, 65 A.3d. 361 (2013), *appeal denied*, 103 A.3d 727 (Table) (Pa. 2014).

Even if the information sought by Requester were a legislative record, it would still not be subject to access under the RTKL. In its denial letter to Requester, LBFC asserts that the requested information falls under an exemption in section 708(b)(17). Paragraph (17) of section 708(b) lists various types of records relating to noncriminal investigations by an agency. Paragraph (17) includes, among other things, “[w]ork papers underlying an audit.” *See* 65 P.S. § 67.708(b)(17)(v).

LBFC relies on this specific provision under paragraph (17) to deny Requester access to the questionnaire information.

The term “audit” is not defined in the RTKL. As such, it is appropriate to construe it according to common and approved usage. 1 Pa.C.S.A. § 1903. An audit is defined as a “formal examination of an individual’s or organization’s accounting records, financial situation, or compliance with some other set of standards.” *Black’s Law Dictionary* 150 (9th ed. 2009).

LRB is not persuaded that the results of the voluntary questionnaire submitted to local public officials in order to prepare LBFC’s report to the General Assembly are work papers from an audit. While the work of LBFC in collecting information might be analytical and methodical as a means to form conclusions about the activities of municipal real estate tax collectors, that effort does not equate to an audit. The activity by LBFC in this case simply did not involve an inspection of accounting records of a person or entity being audited. Hence, the records sought were not part of an audit and the exemption in section 708(b)(17)(v) does not apply. *Cf. Department of Public Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commonwealth 2014).

Although the audit exemption does not apply in this case, there is another provision under section 708(b)(17) that does. One of the other types of records relating to noncriminal investigations includes “investigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(ii). The Pennsylvania Commonwealth Court has defined “investigation” for purposes of section 708(b)(17). The term means “a systematic or searching inquiry, a detailed examination, or an official probe.” *Department of Health v. Office of Open Records*, 4 A.3d 803, 811 (Pa. Commonwealth 2010). *Department of Health* involved inspections and surveys by an agency.

In this case, LBFC was directed by Senate Resolution 250 “to conduct a comprehensive study of the current real property tax collection systems in this Commonwealth to determine the impact of the consolidation of those real property tax collection systems...” Senate Resolution 250, p. 1. The study involved various analyses and LBFC make inquiries throughout Pennsylvania for data about real property, taxes and the practices of tax collectors. Among those inquiries were the questions asked of tax collectors as contained in the questionnaire. The results of the tax collector inquiries contributed to the findings that LBFC was required by Senate Resolution 250 to report on its Internet website and to the General Assembly.

In LRB’s view, this activity by LBFC is a noncriminal investigation within the meaning of section 708(b)(17)(ii) of the RTKL. The answers of the tax collectors to the questionnaire are certainly correspondence and materials relating to the investigation. Therefore, LRB concludes that LBFC has met its burden of proving that section 708(b)(17)(ii) applies to the records sought by Requester. The records fall within a specific exemption under section 708 and Requester does not have a right of access to them under the RTKL.

CONCLUSION

For the foregoing reasons, Requester's appeal is denied and LBFC is not required by the RTKL to take any further action. This Final Determination is binding on all parties. Within 30 days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court of Pennsylvania. 65 P.S. § 67.1301(a). If a party appeals, it must serve notice of the appeal to all other parties and LRB. Pursuant to section 1303(a) of the RTKL, LRB has the right to respond.

FINAL DETERMINATION ISSUED AND MAILED: May 22, 2015

Duane M. Searle, Esq.
Appeals Officer

