

land application. LBFC is directed to conduct the review by House Resolution 60 of 2015.¹ The request specifically asked for all information gathered, including reports, minutes, study results, research and testimonials acquired by the committee, along with names of the committee members, their attendance records, all times and dates of committee meetings and member's participation in any seminars, tours, visitations and presentations. Additionally, the request asked for the names of all companies, organizations and/or other entities that have been or are participating in the study, including the nature of their involvement. Finally, Requester sought any communications the committee had received from townships, lobbyists, corporations and other interested parties and organizations.

LBFC responded to Requester on August 16, 2016, stating that the request was being reviewed and that an extension of time was required for legal review to determine whether the requested information was a record subject to access and because the extent or nature of the request precluded a response within the required time period. *See* RTKL section 902(a)(4) and (7). 65 P.S. § 67.902(a)(4) and (7). LBFC denied the request on August 16, 2016, for the reason that none of the information requested was a "legislative record" under section 102 of the RTKL. 65 P.S. §67.102. Therefore, LBFC was not required to make any of the requested information public. The decision further stated that there had been no committee meetings regarding the study project and once a report was completed, that final report would be made available to the public. The decision noted that the information and documents being gathered by LBFC in conducting the study project are also specifically exempt from the RTKL under section 708(b)(17), which exempts from disclosure any "record of an agency relating to a noncriminal investigation, including: . . . investigative materials, notes, correspondence and reports" and "work papers underlying an audit."

¹ House Resolution No. 60, Printer's No. 2680 (Regular Session 2015-2016) (House Resolution 60), adopted June 23, 2016.

65 P.S. § 67.708(b)(7). Requester was informed in the letter that an appeal of the denial could be filed with the Legislative Reference Bureau (LRB) within fifteen (15) days.

In response to the denial, Requester filed an appeal with the Office of Open Records (OOR) on September 6, 2016, rather than with LRB. On September 13, 2016, OOR issued a final determination, transferring the appeal to the Appeals Officer of the LRB. On October 3, 2016, LRB sent Requester notification that even though the appeal was improperly filed, LRB would review the appeal if Requester agreed to extend the time period for the review, to which Requester agreed. LRB sent the parties a letter, dated October 7, 2016, requesting LBFC to submit the original request for information under the RTKL and any other correspondence between LBFC and Requester and instructed that all information and legal argument, if any, be submitted by October 14, 2016. Requester submitted the original letter sent to OOR appealing LBFC's denial. LBFC timely submitted a five-page letter detailing its legal arguments on appeal. LRB sent an email message to LBFC on October 17, 2016, again requesting the original RTKL request from Requester and any other correspondence with Requester, which was promptly submitted for the record.

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). A hearing was not conducted, but LRB has the necessary, requisite information and evidence 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 documents 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 all documentation and committee minutes from 6/23/2016 – 7/29/2016 relating to a LBFC review of the Commonwealth’s program for the beneficial use of sewage sludge by land application, as required by House Resolution 60 of 2015, including all information gathered, such as reports, minutes, study results, research and testimonials acquired by the committee. The request inquires for the names of the committee members, their attendance records, all times and dates of committee meetings and members participation in any seminars, tours, visitations and presentations. Additionally, Requester asks for the names of all companies, organizations and/or other entities that have participated in the study, including the nature of their involvement, and Requester seeks any communications the committee has received from townships, lobbyists, corporations and other interested parties and organizations.

The information sought by Requester does not fall within the definition of a “legislative record” under section 102 of the RTKL. Section 102 provides an exhaustive list of what is defined as a legislative record and the types of documents that are subject to disclosure. Reports of the Legislative Budget and Finance Committee are specifically enumerated as a legislative record in paragraph (14). At the time of the request, however, the report did not exist. Once the report

required by House Resolution 60 is completed, it will be available for public access as a legislative record.

The request also seeks records and information that are part of LBFC's project under House Resolution 60. However, section 102 does not provide that any information or documents compiled in the process of conducting a study for a report or other types of information such as meeting minutes, research, study results, activities of committee members or communications with other interested parties or organizations, are considered a legislative record.² LBFC provided in its legal argument that the study project is ongoing and there are documents, information, correspondence and other work papers and investigatory materials that have been compiled as a part of the study. Philip R. Durgin, Executive Director of LBFC, has submitted a sworn affidavit that there have been no meetings of the LBFC regarding the project and that there are no records in the possession of LBFC that are considered a "legislative record" under section 102 of the RTKL. Therefore, LRB concludes that the information sought by Requester, to the extent it exists, does not fall within the definition of a "legislative record."

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 exemptions in section 708(b)(17)(ii) and (v). Paragraph (17) of section 708(b) lists various types of records relating to noncriminal investigations by an agency. Paragraph (17) includes, among other things, "[i]nvestigative materials, notes, correspondence and reports" and "[w]ork papers underlying an audit." *See* 65 P.S. § 67.708(b)(17).

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. LBFC argues that the Merriam-

² LRB takes administrative notice that members of LBFC can be found online at the following link: <http://lbfc.legis.state.pa.us/Committee-Members.cfm>.

Webster online dictionary shows that common usage of the term “audit” generally has two facets, the relevant being “a methodical examination and review.” See, <http://www.merriam-webster.com/dictionary/audit>. However, under the hierarchy of legal authority used in statutory interpretation, a legal dictionary receives priority over a standard dictionary when defining a statutory term. See *Matthews v. Konieczny*, 515 Pa. 106, 115-16, 527 A.2d 508, 513 (1987)(plurality opinion). Accordingly, *Black’s Law Dictionary* defines audit 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 rejects LBFC’s contention that the work performed and information compiled by LBFC to prepare the report for the General Assembly are work papers from an audit. Although, as LBFC argues, its enabling legislation permits the performance of activities that could equate to an audit, the work proscribed in House Resolution 60 is narrower in scope and does not fit within the *Black’s Law Dictionary* definition of the term. While the work of LBFC in collecting information might be analytical and methodical as a means to form conclusions about the activities relating to the Commonwealth’s program for the beneficial use of sewage sludge by land application, that effort does not equate to an audit. The activity by LBFC in this case simply does not involve an inspection of accounting records of a person or entity being audited. Hence, the records sought are 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 “[i]nvestigative 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 is directed by House Resolution 60 to “undertake a comprehensive review of the beneficial use of biosolids by land application and prepare a report of its findings...”

House Resolution 60, p. 2. The resolution provides that the committee address the following:

- (1) The methods currently used for biosolids use and disposal in this Commonwealth.
- (2) The costs involved with current methods of biosolids use and disposal.
- (3) The methods used to administer and enforce the program established under 25 Pa. Code Ch. 271 Subch. J by the Department of Environmental Protection.
- (4) All appropriate alternatives to current use and disposal methods employed in this Commonwealth and in other states, particularly in regard to their economic feasibility and effects on the environment and on public health in comparison to current use and disposal methods.
- (5) Any alternative beneficial use, including but not limited to, electric power generation and abandoned mine reclamation, and any obstacles that may hinder the expansion of any alternative beneficial use of biosolids[.]

House Resolution 60, p. 2.

This activity by LBFC is a noncriminal investigation within the meaning of section 708(b)(17)(ii) of the RTKL. 65 P.S. § 67.708(b)(17)(ii). The information gathered to address these questions is clearly investigatory in nature. 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. 65 P.S. § 67.1303(a).

FINAL DETERMINATION ISSUED AND MAILED: October 21, 2016

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Appeals Officer