

# OFFICE OF THE PROTHONOTARY York County

Allison Blew  
Prothonotary  
Billie Jo Bones  
Chief Deputy  
Gregory E. Gettle, Esq.  
Solicitor



York County Judicial Center  
45 N. George Street  
York, PA 17401  
Office: (717) 771-9611  
Passports: (717) 771-4760

## FAX TRANSMITTAL

DATE: AUG 20 2021

FROM: PROTHONOTARY'S OFFICE LOCATION: YORK CO JUDICIAL CENTER

<u>TO: WALTER A TILLEY, ESQ</u>	<u>LOCATION: 063</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**Notice of Entry of Order, Decree or Judgment in accordance with PA R. C. P. 236**

CASE NUMBER 2021-SU-000898

NUMBER OF PAGES INCLUDING COVER SHEET: 23 pages

**ANY PROBLEMS WITH TRANSMITTAL PLEASE CALL (717) 771-9611 AND ASK FOR LESLI**

Confidentiality Notice: This facsimile, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender at the phone number listed above and destroy all copies of the original message.

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA  
CIVIL DIVISION: LAW

NORTH YORK BOROUGH,	:	No. 2021-SU-000898
Petitioner	:	
	:	
vs.	:	
	:	
TINA LOCURTO and	:	
THE YORK DISPATCH,	:	
Respondents	:	Right to Know Law

RECEIVED  
 YORK COUNTY PROTHONOTARY  
 2021 AUG 20 AM 9:50  
 JUDICIAL CENTER YORK PA

APPEARANCES:

For Petitioner: Walter Tilley, III, Esq.  
For Respondents: Paula Knudsen Burke, Esq.

ORDER

AND NOW, this 19<sup>th</sup> day of August, 2021, upon consideration of the *Notice of Appeal and Petition for Review*, filed by the Petitioner, North York Borough, and the briefs filed by the parties in support or in opposition thereto, which call upon us to decide whether the forensic audit of North York Borough Liberty Fire Co. No. 1 is a discoverable financial record under the Right-to-Know Law, falls under one of the Right-to-Know Law's narrow exceptions, or should otherwise be referred to the District Attorney for further processing, it is hereby

ORDERED that the petition is DENIED.

It is further ORDERED and DIRECTED that the North York Borough shall, immediately and without delay, take all steps necessary to release the forensic accounting investigation report to Respondents.

The Court's rationale is as follows:

I. BACKGROUND.

On January 20, 2021, Ms. Locurto, on behalf of the York Dispatch (collectively, Requester), submitted a Right-to-Know Law<sup>1</sup> (RTKL) request (the Request) to North York Borough (the Borough). Therein, Requester sought a copy of the forensic accounting investigation report of North York Borough Liberty Fire Co No. 1 (Liberty Fire). On January 21 2021, the Borough denied the Request stating that the audit is exempt as it relates to a non-criminal investigation.

Requester then appealed the County's denial to the Office of Open Records (OOR) on January 28, 2021, challenging the decision to withhold the documents and stating grounds for disclosure. According to the OOR, in addition to inviting the parties to supplement the record, it directed the County to notify any third parties of their right to participate in the appeal pursuant to 65 P.S. § 67.1101(c). *Tina Locurto and the York Dispatch v. North York Borough*, No. AP 2021-0193. On February 17, 2021, the Borough submitted a position statement, explaining the report records a potential misappropriation of funds, including witness interviews, and that the review uncovered potential criminal activity and had been provided to the York District Attorney's Office (DA's Office) for further review. The Borough further submitted an affidavit, made under penalty of perjury,

---

<sup>1</sup> 65 P.S. §§ 67.101 et seq.

of Richard Shank, the Borough's council president and Walter Tilley, III, Esq., Borough Solicitor. Requester did not submit any additional information during the appeal.

By Final Determination dated April 8, 2021, the OOR granted the appeal on the grounds that the forensic audit is neither exempt as a criminal investigation nor was it exempt as a record of a non-criminal investigation, and advised both parties of their right of appeal. The OOR disposed of the Borough's claim that the audit is protected by the criminal investigation exemption based on the fact that even though the Borough would be considered a local law enforcement agency for the purposes of Section 708(b)(16) of the RTKL, the audit was conducted for the purposes of proper governance of public funds and therefore is not protected by the criminal investigation exemption. *See* 65 Pa. Stat. Ann. § 67.708(b)(16); *Silver v. City of Pittsburgh*, AP 2013-1395; *Hockheimer v. City of Harrisburg*, AP 2015-1852. The OOR additionally denied the Borough's claim that the audit is protected under the non-criminal investigation exemption by asserting that while the papers underlying an audit may be protected, the actual results of the audit are not. *See* 65 Pa. Stat. Ann. § 67.708(b)(17); *Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa.Cmwlth. 2014).

The Borough then took this pending appeal on April 30, 2021, with the intention to present the matter to the Court at the May 11, 2021 session of motions court. On May 11, 2021, the parties appeared before the Court and the Court reported it was also considering the merits of a companion case, *Dylan Segelbaum and the York Daily Record v. North York*

*Borough*, 2020-SU-002061 and would release both orders on an expedited basis. The matter is now ripe for disposition.

## II. ARGUMENTS.

The Borough maintains that the forensic audit report sought by the Requester is a record related to a criminal investigation because it was created with the purpose of determining if misappropriation of funds occurred. In support of this contention, the Borough provided a supplemental Affidavit, made under penalty of perjury, of Walter A. Tilley, III, Esq. which details the purpose of the forensic audit, communication with the York County District Attorney, the Fire Chief turning himself in on October 9, 2020, and the assertion that the District Attorney is in possession of the report and intends to use it as evidence in a criminal case. The Borough further argues that the OOR lacks jurisdiction to hear the appeal and it should have been before the District Attorney as the attestation of Mr. Shank asserted that the District Attorney may use the report as evidence and the affidavit of Mr. Tilley confirms this. Lastly, the Borough asserts that the OOR erred when it determined the record did not relate to a non-criminal investigation because but-for the investigation of possible misappropriation of Borough funds, the record would not exist and the forensic audit is significantly different than a routine audit, more akin to the "official probe" required for assertion of the non-criminal investigation exemption. *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa.Cmwlt. 2010).

Alternatively, the Requester continues to assert that the forensic audit in question is a financial record as defined by the RTKL law and that if the record in question bears a

sufficient connection to a financial account, voucher, or contract and deals with the receipt or disbursement of funds by an agency, most exemptions to the RTKL are inapplicable. 65 Pa. Stat. Ann. § 67.102; *City of Harrisburg v. Prince*, 219 A.3d 602, 617 (Pa. 2019); 65 Pa. Stat. Ann. § 67.708(c). The Requester emphasizes that the OOR's decision regarding the criminal investigation exemption was correct. Just because a record becomes evidence in a criminal investigation does not transform an available public record into one shielded by the RTKL. *Silver v. City of Pittsburgh*, AP 2013-1395. The Requester further argues that the non-criminal investigation exemption is not applicable based on the contention that while a Borough council does have the authority to appoint an independent auditor to examine the borough's accounts for a fiscal year, they do not have the legislatively granted fact-finding or investigative powers to conduct a one-time special audit of a volunteer fire department. *Mollick v. Methacton Sch. District*, AP 2019-0514; *Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa.Cmwlth. 2014).

### III. LEGAL ANALYSIS.

At its heart, the RTKL is remedial legislation designed to facilitate transparency of government information and to promote accountability. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161, 1170 (Pa.Cmwlth. 2018) (Uniontown II) (citing *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa.Cmwlth. 2010), *aff'd*, 75 A.3d 453 (Pa. 2013)). Foundationally, the RTKL requires state and local agencies to provide access to public records upon request. Section 302 of the Right-to-Know Law, 65 P.S. §67.302 ("A local agency shall provide public records in accordance with this act.").

The original Right to Know Act (RTKA) was enacted in 1957 and allowed public access to a very limited category of public records including “any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials equipment or other property.” *65 Pa. Stat. and Cons. Stat. Ann. § 66.1*. Further, under the original RTKA, the burden of proving that a record was public was on the person seeking the record. In 2002, the RTKA was amended and provided more access to agency documents including access to documents in every form, allowing access to electronic documents, as well as providing an appeals process which was not previously present in the 1957 RTKA.

On February 14, 2008, the Governor signed Act No. 3 of 2008 into law which completely overhauled the RTKA and established the Right to Know Law (RTKL) that now governs information requests. Act 3 allowed unprecedented access to all documents in government including the financial records of the judiciary and public records of the legislature.

Section 102 of the Right-to-Know Law contains the following definitions, which inform our analysis:

“FINANCIAL RECORD.” Any of the following:

- (1) Any account, voucher or contract dealing with:
  - (i) the receipt or disbursement of funds by an agency; or
  - (ii) an agency’s acquisition, use or disposal of services, supplies, materials, equipment or property.
- (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
- (3) *A financial audit report. The term does not include work papers underlying an audit.*

“LOCAL AGENCY.” Any of the following:

(1) Any political subdivision, intermediate unit, charter 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.

“OFFICE OF OPEN RECORDS.” The Office of Open Records established in section 1310 [65 P.S. §67.708].

“PUBLIC RECORD” as a record, *including a financial record*, of a Commonwealth or local agency that:

(1) is not exempt under section 708 [65 P.S. §67.708];

(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.

“REQUESTER.” A person that is a legal resident of the United States and requests a record pursuant to this act. The term includes an agency.

“RESPONSE.” Access to a record or an agency’s written notice to a requester granting, denying or partially granting and partially denying access to a record.

65 P.S. §67.102. Emphasis added.

Chapter 9 of the RTKL sets forth an agency’s duties when responding to a request for records. Upon receiving the request, the officer “must make a good faith effort to determine whether: (1) the record is a public record; and, (2) the record is in the possession, custody, or control of the agency.” *Uniontown II* at 1171. The officer also has a duty to “to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.” *Id.* at 1171-72. If the agency does not possess the records in question, but a contractor does, the agency must “take reasonable steps to secure the records from the contractor and then make a determination if those



records are exempt from disclosure.” *Id.* at 1172 (brackets omitted). After gathering all the relevant records, the agency must then “review the records and assess their public nature under Sections 901 and 903 of the RTKL.” *Id.* As the Commonwealth Court observed, “[i]t is axiomatic that an agency cannot discern whether a record is public or exempt without first obtaining and reviewing the record.” *Id.*

Section 901 of the RTKL provides, in relevant part:

§ 67.901. General rule

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.

65 P.S. § 67.901.

Section 903 of the RTKL provides, in relevant part:

§ 67.903. Denial

If an agency’s response is a denial of a written request for access, whether in whole or in part, the denial shall be in writing and shall include:

- (1) A description of the record requested.
- (2) The specific reasons for the denial, including a citation of supporting legal authority.

65 P.S. § 67.903.

§ 67.502. Open-records officer

(a) Establishment. -

(1) An agency shall designate an official or employee to act as the open-records officer.

\* \* \* \*

(b) Functions. -

(1) The open-records officer shall receive requests submitted to the agency under this act, direct requests to other appropriate persons within the agency or to appropriate persons in another agency, track the agency's progress in responding to requests and issue interim and final responses under this act.

65 P.S. § 67.502.

Upon request, a Local Agency shall provide public records in accordance with the RTKL. It may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law. 65 P.S. § 67.302.

The burden of proving that a "record" is exempt from public access is placed on the "local agency receiving a request by a preponderance of the evidence." Section 708(a)(1) of the Right-to-Know Law, 65 P.S. §67.708(a)(1). By this standard of proof, "the existence of a contested fact must be more probable than its nonexistence." *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435, 439 (Pa.Cmwlth. 2011) (quoting *Department of Transportation v. Agricultural Lands Condemnation Approval Board*, 5 A.3d 821, 827 (Pa.Cmwlth. 2010)). This standard is "tantamount to a 'more likely than not' inquiry." *Popowsky v. Pa. Public Util. Com'n*, 937 A.2d 1040, 1055 n.18 (Pa. 2007). In addition, "[c]onsistent with the RTKL's goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed." *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa.Cmwlth. 2015); *Easton Area Sch. Dist. v. Miller*, 191 A.3d 75, 79 (Pa.Cmwlth. 2018).

#### IV. DISCUSSION.

The Court is presented with two important queries in this matter, first, the character of the forensic audit. We must determine whether the audit qualifies as an exempted criminal investigation, an exempted non-criminal investigation, or a financial record fully discoverable under the RTKL. Secondly, if applicable, we must determine whether the OOR properly invoked jurisdiction over this matter or if the matter should be referred to the District Attorney for further processing and release if the District Attorney deems it appropriate.

#### **The Forensic Audit is a Financial Record.**

We conclude that the instant Forensic audit is a Financial Record discoverable under the RTKL. It is unquestionable that the Forensic audit is a financial record as it is a "financial audit report" as defined by the RTKL. *65 P.S. §67.102*. While the Borough argues that the audit is investigatory in nature and was only undertaken for the Borough's investigation into the possible misappropriation of funds, the underlying background of the audit cannot be denied. The audit was undertaken to examine the finances of a fire department that receives appropriations from the Borough. While a forensic audit is more exacting and involves more than a simple annual review of financial records, a forensic audit is, at its heart, an audit. As the OOR correctly identified, the affidavit of Richard Shank is particularly instructive in this matter. Therein, Mr. Shank reported, "The investigation was conducted in order to determine if Borough funds were being misused by the Fire Company or its members in consideration of whether the Borough would be able to continue appropriating funds to the

Fire Company, and whether or not additional controls were needed to ensure that there was no misappropriation.”

As with all matters of statutory construction, the plain language of the law must govern. *Commonwealth v. Small*, 238 A.3d 1267, 1284 (Pa. 2020) (citing *1 Pa.C.S. § 1921(b)*) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”). Our objective when interpreting a statute is to ascertain the intent of the General Assembly. *1 Pa.C.S. § 1921(a)*. Statutory language that is clear and free from all ambiguity is presumed to be the best indicator of legislative intent. *Danganan v. Guardian Prot. Servs.*, 645 Pa. 181, 179 A.3d 9, 16 (Pa. 2018). The term “audit” is defined as: “A formal or official examination and verification of accounts, vouchers and other records; an account as adjusted by auditors.” *Ballentine’s Law Dictionary* (3rd Ed.).

With this background in mind, it is clear the General Assembly intended all financial audits to be included in the definition of “financial records” as defined by the RTKL, any other interpretation would throw a veil of secrecy over any financial investigation solely because its primary intent was to tackle misuse of governmental funds rather than ensuring effective use of state funds or simple negligent accounting. This would be an absurd result considering the stated intent of the RTKL which is to facilitate transparency of government information and to promote accountability. *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1170 (Pa.Cmwlth. 2018) (Uniontown II) (citing *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa.Cmwlth. 2010), *aff’d*, 75 A.3d 453 (Pa. 2013)).

Therefore, we conclude that the forensic audit in question falls under the broad category of “financial audit” as defined by Section 67.102 of the RTKL.

**The Forensic Audit Does Not Qualify as a Record of a Criminal Investigation**

We must next grapple with the question of whether or not the forensic audit falls under any of the exemptions asserted by the Borough, being a record of a criminal investigation and/or a record of a non-criminal investigation. Having determined that the forensic audit is a financial record, Section 67.708(c) of the RTKL applies. Section 67.708(c) provides that the exceptions stated in Section 67.708(b) do not apply to financial records but further states that both of the asserted exceptions the Borough purports allows the Borough to redact portions of the record that are protected from release as criminal and non-criminal investigations. *65 P.S. §67.708(c)*. The Borough asserts that it did not release any information based upon its determination that the entire document is covered by the exception and it, therefore, opted to deny the request as opposed to responding to the request with a fully redacted document.

First, we conclude that the forensic audit is not a record of a criminal investigation. The Borough enlisted an independent auditor to conduct an analysis of the financial situation of a local volunteer fire house. While the Borough may have had the intent of undertaking the forensic audit to uncover possible misappropriation, and did in fact find evidence thereof, this does not transform the boroughs’ oversight and management of its public funds into a criminal investigation. As the party seeking to deny access, the Borough has the burden of proof and it has not proven that they undertook the forensic audit for the *specific*

purpose of uncovering misappropriation. Under the RTKL an attestation may serve as sufficient evidentiary support. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa.Cmwlth. 2011). In absence that the Borough has acted in bad faith, “the averments in [the verification] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. Prot.*, 103 A.3d 374, 382-83. To support their argument, the Borough supplied the attestations of Walter A. Tilley, III, Esq. and Richard Shank. There is no evidence of bad faith by the Borough so we must accept the attestations as true.

Nevertheless, since the burden of proof is on the Borough and the attestation of Walter A. Tilley, III, Esq. does not provide enough additional evidence to show that the Borough conducted a criminal investigation, we concur with the OOR’s Final Decision. The OOR cited to one of its previous decisions, *Silver v. City of Pittsburgh*, in which the OOR did not exempt overtime forms and correspondence regarding their completion as exempt under Section 708(b) (16) of the RTKL because they were financial records and only tangentially related to a criminal investigation as the FBI later used them as evidence in their investigation. *Silver v. Pittsburgh*, AP 2013-1395. We agree with the Borough that comparing the instant forensic audit to the records in *Silver* is not a perfect comparison, but given our previous conclusion that the forensic audit is a financial record, the reasoning in *Silver* is quite applicable. Namely, the OOR determined that:

“The fact that a record becomes evidence in a criminal investigation, especially a nominal public record dealing with the expenditure of public funds, does not transform that request into one exempt from disclosure... In situations such as this, the OOR will not deprive itself of jurisdiction over appeals where the records at issue

are plainly public records, *i.e.* dealing with the expenditure of public funds, and therefore, incapable of being criminal investigative records.”

*Id.* Here, the record that the Requester seeks is a forensic audit of a local fire house which was conducted to ensure proper governance of public funds. Once the audit was completed, it was apparent that fraud had occurred and the case was referred to the District Attorney for further processing. As a local agency, the Borough cannot refuse to release a financial record subject to a RTKL request but may release a redacted version that omits any details that are protected as evidence of a criminal or non-criminal investigation. However, the forensic audit in question only discovered impropriety through the process of ensuring that the public funds appropriated to Liberty Fire were being used properly. Once this audit was forwarded to the DA’s Office, they independently chose to begin a criminal investigation into Liberty Fire.

In *Grove*, the Pennsylvania Supreme Court defined a “criminal investigation” as an “official inquiry into a possible crime.” *Pa. State Police v. Grove*, 640 Pa. 1, 27, 161 A.3d 877, 893 (2017). The Supreme Court further held that Motor Vehicle Recordings (MVRs) are not automatically exempt from disclosure under the RTKL simply because they do not always relate to or result in criminal investigations. *Id.* This case is particularly instructive in the instant matter because forensic audits similarly are conducted to ferret out potential fraud or misuse of funds but do not always relate to or result in a criminal investigation. However, in this case, the “investigation” was not undertaken on behalf of a law enforcement agency nor was it undertaken under any statutorily granted authority. As such, it cannot be

determined to be a "criminal investigation" and therefore is not protected from release by the criminal investigative record exception. As such, the "investigation" conducted by the Borough was not a criminal investigation as defined by Section 708(b) (16) of the RTKL. Given this determination, we further hold that this matter need not be referred to the District Attorney and that the OOR did not err in retaining jurisdiction.

**The Forensic Audit Does Not Qualify as a Record of a Noncriminal Investigation**

Second, we conclude that the forensic audit is not a record of a non-criminal investigation. The Borough argues that the forensic audit should be exempt from release because it is a record of a non-criminal investigation and therefore is exempt based on Section 708(b)(17) of the RTKL. To support this contention, the Borough argues: (1) that the OOR incorrectly determined that the forensic audit was "the most recent forensic audit" and failed to understand that a forensic audit was not a regularly occurring audit but rather was done to investigate Liberty Fire and that, but-for the Borough's investigation, the audit would otherwise not exist; (2) the investigative report being called an audit does not automatically make it discoverable under the RTKL because the audit is much more comprehensive and allowing such reports to be discoverable would lead to an absurd result where all "audits" are discoverable under the RTKL, and (3) due to the exacting and investigatory nature of a forensic audit, it is an "official probe" which is exactly the type of investigation Section 708(b)(17) is meant to protect.

The Requester asserts that the OOR was correct in their determination and further asserts that the Borough did not have statutory authority to conduct the "investigation" and,



therefore, the fruits of this investigation cannot be protected by the non-criminal investigation exception. Neither party contends that the work papers underlying the audit report are discoverable as those are explicitly not discoverable under the RTKL. 65 P.S. §67.708(b)(17)(v).

The Commonwealth Court discussed the non-criminal exemption in detail in *Dep't of Health v. Office of Open Records* stating that:

We initially conclude that the use of the word “noncriminal” in Section 708(b)(17) is intended to signal that the exemption is applicable to investigations other than those which are criminal in nature. This conclusion is supported by the fact that Section 708(b)(16) of the RTKL also exempts records “relating to or resulting in a criminal investigation.” 65 P.S. § 67.708(b)(16). Thus, our inquiry here is focused on determining the meaning of the term “investigation.” Black’s Law Dictionary does not define the term “investigation”; however, it defines the term “investigate” as follows: “1. To inquire into (a matter) systematically to make (a suspect) the subject of a criminal inquiry . . . . 2. To make an official inquiry . . . .” *Black’s Law Dictionary* 902 (9th ed. 2009). Webster’s Third New International Dictionary defines the term “investigation” as follows: “1: the action or process of investigating: detailed examination . . . 2. a searching inquiry: . . . an official probe . . . .” *Webster’s Third New International Dictionary* 1189 (2002). Therefore, we conclude that as used in Section 708(b)(17), the term “investigation” means a systematic or searching inquiry, a detailed examination, or an official probe.

*Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa.Cmwlt. 2010). The Commonwealth Court further defined what an “official probe” is in *Dep't of Public Welfare v. Chawaga*. The Court determined that an official probe only applies to non-criminal investigations conducted by an agency acting within its legislatively granted fact-finding and investigative powers. *Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa.Cmwlt. 2014).

Addressing the Borough's arguments in turn, we first hold that the OOR improperly characterized the forensic audit as being a recurring event that the Borough conducts to ensure the ongoing proper governance of public funds. However, we do not believe that this improper characterization is fatal to the OOR's decision as the audit conducted was not comprehensive enough to be considered an investigation. The facts as presented to the Court suggest that the Borough was informed that the funds they appropriate for Liberty Fire, in accordance with their responsibilities as a local agency, may have been misused and that when such impropriety is suspected, a forensic audit needs to be conducted. Based upon this advice, the Borough retained RKL to conduct an audit of Liberty Fire and determine what, if any, misuse had occurred or was occurring. Following the audit, the auditor revealed there was evidence of wrongdoing and the report was forwarded to the District Attorney for further processing. The forensic audit in this case is not a systematic or searching inquiry nor is it a detailed examination as discussed in *Department of Health*, instead the audit report is a one-time general investigation of Liberty Fire's finances for a six-year span with accompanying interviews of involved parties which sought to ensure proper governance of publically appropriate funds and determine what safeguards, if any, needed to be put in place to continue funding Liberty Fire. *Chawaga*, 91 A.3d 257, 259 (Pa.Cmwlth. 2014). The investigation which took place in *Department of Health* was characterized as comprehensive, repeated, onsite investigations of nursing homes. *Id.* Additionally, allowing the release of the results of the forensic audit would be in line with public policy as it would "discourag[e] financial abuses by businesses under governmental contracts. The Generally

Accepted Government Auditing Standards (GAGAS) promulgated by the United States Comptroller General evidence this public policy consideration.” *Id.* Therefore, even though the forensic audit was not a regularly occurring audit, it is not comprehensive enough to be considered an “investigation” as defined by the Commonwealth Court and allowing the release of the forensic audit would further the public policy goals of the RTKL.

Second, we find that allowing a forensic audit such as the document in this case to be released under the RTKL would not lead to an absurd result unintended by the legislature where all “audits” would be of public record. We first note that as the Borough itself stated, there are audits that are explicitly excluded from the RTKL under Section 708(b)(22). 65 P.S. §67.708(b)(22) (Explicitly excluding audits relative to leasing, acquiring, or disposing of real property, the purchase of public supplies or equipment included in real estate transactions, or construction projects.) Additionally, when a forensic audit is conducted for the purposes of a criminal investigation or a non-criminal investigation, then the local agency would only be required to release a redacted version of the document which omits any investigatory findings. Our finding in this matter is limited to the release of the forensic audit conducted by the Borough which was conducted one-time and outside the scope of their statutory authority. Much like the MVRs in *Grove*, the OOR and reviewing Courts would have to examine the release of forensic audits on a case-by-case basis, by determining the comprehensiveness of the audit and the statutory authority that the investigation was conducted under.

Lastly, we find that the forensic audit was not an “official probe” as asserted by the Borough. In response to this assertion, the Requester raises the argument that the forensic audit was not undertaken under the Borough’s statutorily granted powers. We agree. The Borough asserts that the core duty that the forensic audit was meant to serve is providing for the safety of its residents through financially supporting fire services. *8 Pa.C.S. 1202(35); (56)*. First we examined the plain text of these statutes which allegedly grant the Borough the power to engage in a one-time forensic audit of a volunteer firehouse. Section 35 states in relevant part:

“To purchase or contribute to the purchase of fire engines and fire apparatus, boats, rescue and lifesaving equipment and supplies for the use of the borough for fire, rescue and lifesaving services, including community ambulance service, and to appropriate money for fire companies and rescue units located within the borough, including for the construction, repair and maintenance of buildings for fire companies and rescue units, and to acquire land for those purposes...”

*8 Pa.C.S. 1202(35)*. The only power granted to the borough in this portion of the statute is the power to appropriate funds to the emergency services in the borough for the purchase of equipment, supplies, and the ongoing construction and maintenance of facilities for these emergency services. There is no mention of any authority to engage in auditing of these emergency firehouses, either explicitly or implicitly.

Therefore, we must moving to the second cited statute, which is closer to providing the powers the borough seeks to assert but we hold that this authority falls short of the “official probe” standard and is more akin to the ancillary power discussed in *Chawaga*. Section 56 provides that:

"To ensure that fire and emergency medical services are provided within the borough by the means and to the extent determined by the borough, *including the appropriate financial and administrative assistance for these services...* The borough shall require any emergency services organization receiving borough funds to provide to the borough an annual itemized listing of all expenditures of these funds before the borough may consider budgeting additional funding to the organization."

*8 Pa.C.S. 1202(56) (Emphasis added).* This portion of the statute provides a bit more guidance as to the explicit powers of the Borough to appropriate funds and their level of oversight permitted by the general assembly. We pause at the phrase "Including the appropriate financial and administrative assistance for these services." Research has not revealed much to the explicit intent of this phrase so we must engage in statutory construction to reveal the intent of the general assembly. We are primarily interested in the phrase "administrative assistance" as based upon the context of the statute, financial assistance likely refers to the powers enumerated in section 35. Similarly given the context of administrative assistance, we can conclude that the legislature intended for boroughs to have some degree of management akin to the ordinary dictionary definition of administrative. The word "Administer" is defined as the performance of executive duties *Merriam-Webster's Dictionary Tenth Edition*. However given the addition of the term "assistance" it is likely that the general assembly sought the borough to merely aid in the management of their emergency services when the need arises.


To aid in our interpretation, we note that the only specific reference to the power of a borough to audit an emergency service provider comes directly from the statute that the Borough cites in support of their argument. In the event that an emergency services

organization requires additional funds, the Borough must require that organization to provide "an itemized listing of all expenditures of these funds." 8 Pa.C.S. 1202(56). We can assume that if the General Assembly intended to give specific auditing powers to Borough's they would be explicitly listed in the given statute, any power the borough has to audit is only explicitly granted when a request for additional funds has been submitted. *See Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 ("DPW's performance audit was not part of the DPW's legislatively granted or investigative powers; rather, the audit was ancillary to DPW's public assistance services." *See Also, Governor's Office of Administration v. Purcell*, 35 A.3d 811, 816 (Pa. Cmwlth. 2011) ("[S]pecific inclusion of some items of the same class is presumed to exclude all other items of the same class.")).

By way of further support, we look to the attestations of Mr. Shank and Attorney Tilley. We note specifically that while the attestations and cited statute do refer to the financial ability of the borough to provide appropriate funds, and require emergency services to provide itemized listing of expenditures before the borough may consider budgeting additional funding, there is no mention of providing for the safety of their residents nor is there reference to the borough's ability to investigate emergency services providers by way of a forensic audit or other means. Therefore, we have no choice to conclude that the forensic audit undertaken by the Borough went outside their explicit statutory grant of authority to provide administrative assistance to emergency service providers. The Borough was only permitted to engage this audit as an ancillary function of their overarching responsibility to provide for the safety of their residents. As such, the borough cannot hide

the results of this audit by claiming they are an "official probe" thus, the non-criminal investigation exception does not apply. The Borough must provide the Respondents with the results of the forensic audit as none of the discrete exceptions to the RTKL apply.

**BY THE COURT:**



**CLYDE W. VEDDER, JUDGE**