

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

ERIC HOUSEKNECHT,  
Plaintiff

vs.

DAVID YOUNG, DONALD MAYES,  
JODY MILLER AND DUSTIN REEDER,  
Defendants

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:  
: CIVIL ACTION NO.  
: 4:20-CV-1233-MWB  
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**CITY OF WILLIAMSPORT'S MEMORANDUM OF LAW IN OPPOSITION OF THE  
MOTION FOR COURT DETERMINATION THAT THE SETTLEMENT AGREEMENT  
EXECUTED BETWEEN THE PLAINTIFF AND DEFENDANTS IS CONFIDENTIAL**

City of Williamsport (City), its solicitor, Norman M. Lubin, Esquire, represents as follows:

1. The above-named Defendants are current or former employees of the City.
2. They were named as Defendants for alleged violations of the Plaintiff's First Amendment rights. The Plaintiff was also a City employee during the relevant time period.
3. The City referred the matter to its insurance carrier who retained counsel for the Defendants.
4. The insurance carrier resolved the case via a settlement agreement without the City's knowledge or consent.
5. The settlement agreement contains a confidentiality provision.
6. John Beauge submitted a request under the Pennsylvania Right to Know Law, 65 P.S. Section 67.101 et seq (RTKL), seeking a copy of the settlement agreement.

7. Pursuant to Section 506(d)(1), 65 P.S. Section 67.506 (d)(3), the City notified the insurance carrier of the RTKL request and sought a copy. This section provides as follows:

“(d) Agency possession –

(1) 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, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.”

8. Here, the City has a contractual relation with the insurance carrier who is performing a governmental function on behalf of the City by defending the City in the litigation.
9. The insurance carrier, through its attorney and the Defendants’ attorneys in this case denied providing a copy to the RTKL request as set forth in Defendants’ Motion.
10. In light of the denial, Beauge filed an Appeal to the PA Office of Open Records.
11. The denial of Defendants’ attorney is incorrect as a matter of law. While the City was not named as a defendant, and did not participate in its own behalf in the litigation, the City was entitled to a copy of the settlement agreement pursuant to the RTKL once the request was received.
12. While the Defendants’ public policy arguments about the need for confidentiality to encourage settlements of lawsuits is laudible, the Pennsylvania Courts have taken the opposite view. The PA Supreme Court in Tribune Review Publishing Co. vs. Westmoreland County Housing Authority, 833 A2d 112 (Pa. 2003) has stated that a public entity may not enter into enforceable promise of confidentiality regarding public records. Furthermore, the Commonwealth Court in Newspaper Holdings, Inc. vs. New Castle Area School District, 911 A2d 644 (Pa. Cwlth. Ct. 2006) noted that a

trial court may not seal a settlement agreement simply because it contains a confidentiality provision as such provisions are unenforceable.

13. Defendants are seeking an Order of Confidentiality pursuant to Section 708 (b)(17)(vi)(a) which provides that an executed settlement agreement is determined to be confidential by a Court.
14. Defendants have not offered any reason for a determination of confidentiality other than encouraging settlements.
15. The PA Office of Open Records in the Matter of James Crossen vs. Pine Grove Township and Roots Farm, Inc. No. AP2020-1270, reviewed the law with regard to an agency withholding a settlement agreement due to its containing a confidentiality provision. A copy of the decision is attached hereto as Exhibit "A".

### **CONCLUSION**

On the basis of the foregoing, the Motion of the Defendants for a Determination of Confidentiality should be denied.

Respectfully submitted,

**CASALE, BONNER,  
HILLMAN & SOUTHARD, P.C.**

By: /s/ Norman Lubin  
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**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information.

**CERTIFICATE OF SERVICE**

I, Norman M. Lubin, Esquire, Solicitor for the City of Williamsport, hereby certifies that he served the foregoing, on this 1st day of August, 2023, on the following via ECF notification:

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**CASALE, BONNER,  
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By: */s/ Norman Lubin*  
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On August 21, 2020, Roots Farm requested to participate in the appeal and submitted legal argument in support of withholding the settlement agreement, as well as the affidavit, made under penalty of perjury, of Mingju Xu, Manager of Roots Farm. On August 25, 2020, the OOR granted Roots Farm's request to participate and accepted its submissions into the record of appeal.

Also on August 21, 2020, the Township submitted correspondence reiterating its reasons for denying access to the settlement agreement and expressing a willingness to submit the settlement agreement to the OOR for an *in camera* review. Later that date, Roots Farm explained that it did not have an objection to the OOR conducting an *in camera* review.

On September 14, 2020, in response to a request for clarification from the OOR, the Requester confirmed that the appeal is limited to the executed settlement agreement between the Township and Roots Farm.

#### LEGAL ANALYSIS

“The 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 L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 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. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that

disposing of the underlying litigation: 1) that the settlement agreement is not a public record under the RTKL and 2) that it is related to the Township's noncriminal investigation.

First, the Township and Roots Farm argue that the settlement agreement is not a public record under the RTKL by virtue of a confidentiality provision. Section 102 of the RTKL defines "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.

65 P.S. § 67.102. Records in the possession of a local agency such as the Township are presumed to be "public records" unless: 1) the records are subject to one of the RTKL's exemptions found in Section 708; 2) the records are protected by a privilege; or 3) the records are "exempt from disclosure under any other Federal or State law or regulation or judicial order or decree." 65 P.S. § 67.305(a). These are the three bases for withholding records in the possession of an agency under the RTKL.

The RTKL does not permit an agency to withhold a record simply because it has promised confidentiality. *See id.* It is well-settled that "[a] public entity may not enter into enforceable promises of confidentiality regarding public records." *Tribune-Review Publ'g Co. v. Westmoreland County Hous. Auth.*, 833 A.2d 112, 120 (Pa. 2003). An agency "may not contract away the public's right of access to public records because the purpose of access is to keep open the doors of government, to prohibit secrets, to scrutinize the actions of public officials and to make public officials accountable in their use of public funds.... A confidentiality clause contained in a settlement agreement that runs afoul of the RTKL violates public policy and is unenforceable." *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 649 n.11 (Pa. Commw.

The requested settlement agreement is a “record” of the Township under the RTKL. As acknowledged by Roots Farm’s Manager:

5. [The Township], through its building inspectors, conducted an investigation and review into the Premises and, in particular, the Production Facility to ensure that it met the building and safety code requirements under the Uniform Construction Code (“UCC”), as adopted in Pennsylvania.
6. The Township’s investigation included, but was not limited to, site visits to the Premises on more than one occasion.
7. Working with the Township and its building code inspectors, Roots Farm has made all modifications and/or renovations to the Premises which are required by the UCC.
8. As a result of the modifications and/or renovations made to the Roots Farm’s Premises, the Township, through its building inspectors, has determined that the Premises is in compliance with all requirements of the UCC and has issued a Certificate of Occupancy for the Premises, including the Production Facility.
9. The settlement agreement entered into between the Township and Roots Farms *represents and memorializes the resolution of the issue of Roots Farm’s compliance with the UCC.*

(emphasis added). The Requester also submitted various exhibits outlining the litigation between the Township and Roots Farm, including docket sheets. The settlement agreement clearly documents the resolution of the Township’s UCC investigation and subsequent litigation and was created, received, and retained in connection with those activities of the Township. Therefore, it is unquestionably a “record” of the Township under the RTKL<sup>4</sup> and presumed to be a public record under Section 305 of the RTKL.

Neither the Township nor Roots Farm claims that the settlement agreement is privileged, exempt under a Federal or State statute or regulation, or sealed or otherwise protected by a judicial order or decree. The only other basis raised by the Township for withholding the record is that it

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<sup>4</sup> It is unclear how a settlement agreement between an agency and third party would ever *not* be a “record” of that agency.



## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Township is required to provide a copy of the executed settlement agreement within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Schuylkill County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>6</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 22, 2020**

/s/ Kyle Applegate

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APPEALS OFFICER  
KYLE APPLGATE, ESQ.

Sent to: James Crossen, Esq. (via email only);  
Jordan Yeagley, Esq. (via email only);  
Gino DiNicola, Esq. (via email only)

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<sup>6</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).