[J-111-2011] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SWB YANKEES LLC,	:	No. 44 MAP 2011
Appellant	:	Appeal from the Opinion and Order of the Commonwealth Court at No. 2037 CD 2009, dated July 22, 2010, affirming the Order of the Lackawanna County Court of Common Pleas at No. 09-CV-3691, dated September 9, 2009
v.	:	
GRETCHEN WINTERMANTEL AND THE SCRANTON TIMES TRIBUNE,	:	999 A.2d 672 (Pa. Cmwlth. 2010)
Appellees	:	ARGUED: November 29, 2011

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: May 29, 2012**

I concur in the decision, and join much of the reasoning, of the Majority Opinion.[1] The Majority affirms the decision of the Commonwealth Court, and holds that Section 506(d)(1) of the Right-to-Know Law requires disclosure to The Scranton Times Tribune and reporter Gretchen Wintermantel ("appellees") of all the names of private parties and the written bids these private parties submitted to appellant SWB Yankees LLC ("appellant") for the concessionaire contract at PNC Field in Scranton, where the SWB

[1] I join the Opinion to the extent that the Majority rejects appellant's governmental/proprietary distinction and adopts a "non-ancillary" function test in resolving the parties' dispute over the term "governmental function." I believe, however, that the issue of whether the General Assembly intended to recast the information of a private entity and agency contractor as a public record of the agency for the purposes of the Right-to-Know Law is a close one, which should be left open for consideration in an appropriate case. See Majority Slip Op. at 27.

Yankees, a Triple-A affiliate of the New York Yankees, play their home games. I join this disposition given the narrowness of the issue framed for review.

I write separately to address the foundational notion, not specifically challenged by appellant, that the type of information requested here amounts to a "public record" within the purview of Section 506(d)(1) and the Right-to-Know Law. The information at issue is in the possession of a private entity and documents the transactions or activities of that private entity in conducting business with other private parties. Although appellant addresses this point only obliquely and fails to develop a specific claim premised upon it, the concern is the primary focus of the *amicus curiae* brief filed by the Pennsylvania School Boards Association. I address the foundational issue because recognition of the limitation in the appeal, in my view, helps to explain what otherwise might appear to be a problematic result, and may be of some benefit in the resolution of further disputes under the Right-to-Know Law.[2]

Appellant, as the Majority relates, is a private entity and contractor for a local agency, the Multipurpose Stadium Authority of Lackawanna County (the "Authority"). The Lackawanna County Board of Commissioners created the Authority in 1985 to own and operate an amusement enterprise, specifically operations related to the sport of

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[2] The issue I address, of whether the information appellees requested here was a "public record" for the purposes of Section 506(d)(1) is distinct from the issue that appellant raises, of whether the information requested is a "record," as that term is defined in Section 102 of the Right-to-Know Law. "Public record" and "record" are separately defined and generally employed as terms of art by the Right-to-Know Law. Appellant framed the question for review as follows: "Did the Commonwealth Court err by holding that the information requested in this matter constitutes a 'record' within the meaning of the [Right-to-Know Law]?" SWB Yankees LLC v. Wintermantel, 18 A.3d 1145 (Pa. 2011). Appellant argues that the information appellees requested was not a "record" because the bids for the concessions contracts did not document a transaction or activity of the agency, and were not created, received, or retained pursuant to law or in connection with a transaction, business, or activity of the agency. See 65 P.S. § 67.102.

baseball, at PNC Field. In 2007, the Authority and appellant entered into a management contract by which they agreed that appellant would assume the Authority's management responsibilities at PNC Field. In 2009, appellant terminated the pre-existing food service contract, and sought bids for a replacement provider. Appellant accepted the bid proposal of Legends Hospitality LLC, and rejected two other bids.

Appellees filed a Right-to-Know Law request with the Authority, seeking disclosure of the names and written bids of all concessionaire candidates, on the premise that the information requested was a public record. See 65 P.S. § 67.506(d)(3) ("A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency."). Appellant SWB Yankees did not receive notice and was not a party to the initial request. The Authority's open records officer denied the request on the ground that appellant was not performing a "governmental function" on behalf of the Authority and, therefore, any public records or private information in appellant's possession were not subject to disclosure. Appellees challenged the determination by filing an appeal with the Office of Open Records (the "OOR"). Again, appellant did not receive notice and was not a party to the appeal. The OOR agreed with appellees that appellant performed a governmental function, and ordered disclosure of the information appellees had requested.

Subsequently, appellant, after receiving notice to release the documents, intervened in the action, and filed an appeal from the OOR decision to the Lackawanna County Court of Common Pleas. Appellant raised several issues, including whether it was actually performing a governmental function as defined. Additionally, appellant argued that the information requested was not a "record," as that term is defined in the

Right-to-Know Law, Section 102.[3] The trial court conducted *de novo* review of the matter and ordered disclosure. The Commonwealth Court affirmed. This Court accepted review of two issues: (1) whether appellant's operation of a professional baseball team and related concessions constitutes a "governmental function" and (2) whether the information requested by appellees constitutes a "record," within the meaning of the Right-to-Know Law. See SWB Yankees LLC v. Wintermantel, 18 A.3d 1145 (Pa. 2011). Both questions require interpretation of the Pennsylvania Right-to-Know Law, in general, and of Section 506(d)(1), in particular.

The Majority construes Section 506(d)(1) of the Right-to-Know Law as a provision which recasts the information and internal records of a private entity/government contractor into public records of the governmental agency with which it has contracted. Majority Slip Op. at 27. The Majority states that the governing definition of a "public record" is settled in this respect, and is not the subject of dispute in the present appeal. Majority Slip Op. at 18 n.13 (citing Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc., 13 A.3d 1025 (Pa. Cmwlth. 2011)). Accordingly, the Majority focuses its analysis on the controversy respecting the parties' various understandings of the term "governmental function," and generally discounts appellant's secondary argument that the documents requested by appellees are not "records" subject to Section 506(d)(1) in the first instance. Id.

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[3] It does not appear that appellant forwarded the same argument to the trial court as it does here on the issue of whether the information requested by appellees was a "record." To the trial court, appellant argued that appellees' request "was a factual inquiry seeking intangible information only" and, therefore, not a "document or other media" request that could constitute a record. See Appellant's Brief at 61-66; Trial Court Op., 9/9/2009, at 17-19 (quoting appellant's trial court brief). Appellees, however, do not assert waiver on this ground.

I agree that appellant does not pursue a specific challenge to what comprises a "public record" under the Right-to-Know Law. Nevertheless, I believe some discussion of this foundational notion is appropriate, given the likely broad impact that the Court's decision will have on government contractors and government agencies responding to record requests and the increased administrative burden that will arise as a result.

The Right-to-Know Law provides generally for the disclosure of non-exempt and non-privileged public records upon request to the appropriate governmental body, specifically any local, Commonwealth, legislative, or judicial agency. See, e.g., 65 P.S. § 67.302(a) ("Requirement. -- A local agency shall provide public records in accordance with this act."); accord 65 P.S. §§ 67.301, 67.303-67.304. In addition to addressing the procedure by which a public record request may be made, the provisions of the Right-to-Know Law demarcate the scope of disclosure, primarily by identifying what is a public record and, among public records, which records are subject to disclosure. See, e.g., 65 P.S. §§ 67.102, 67.305, 67.306, 67.506, 67.708.

A "public record" is broadly defined as a "record, including a financial record, of a Commonwealth or local agency." 65 P.S. § 67.102. A "record," for the purposes of the Right-to-Know Law, is "[i]nformation, 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." Id. An agency includes a local agency defined as "[a]ny political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school" or "[a]ny local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity." Id. Notably, an "agency" does not include a contractor, an agent of a local agency, or any other private entity.

Any record "in the possession" of a local agency, like the Authority, is presumed to be a "public record," and available for disclosure. 65 P.S. § 67.305(a). There is no similar presumption applicable to alleged public records that are not (or, as in this matter, never were) in the possession of the agency. The General Assembly addressed disclosure of public records not in the possession of an agency specifically, as follows:

> (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.

65 P.S. § 67.506(d) ("Agency possession"). Access to the private contractor's other information is outside the scope of the Right-to-Know Law: "[n]othing" in the Right-to-Know Law "shall be construed to require access to any other record of the party in possession of the public record." 65 P.S. § 67.506(d)(2).

Similar to requests for a public record in the actual possession of the agency, a request for a "public record in possession of a party other than the agency" must be submitted to the open records officer of the relevant agency. See 65 P.S. § 67.506(d)(3); accord 65 P.S. §§ 67.502(b) ("Open-records officer"), 67.701-708 ("Procedure"). Unfortunately, the statute does not contemplate the role of a private entity. If the agency's open records officer asserts that a public record is exempt from disclosure by the Right-to-Know Law, whether the record is in the possession of the agency or of a third party, the burden of proving that the record is exempt is on the local or Commonwealth agency receiving the request. 65 P.S. § 67.708(a)(1).

In private entity cases such as this, there is a colorable argument to be made that the type of information requested should not be subject to disclosure. As a preliminary matter, I note that part of the difficulty in cases involving records exclusively in the

control of private entities stems from circumstances related to the sort of procedure followed here. Appellant did not participate in the initial phases of the disclosure process; the Authority's open records officer decided the request in the first instance without notice to or advocacy from appellant, whose records and information were actually at issue. The open records officer denied the request, citing as the sole basis for refusal the fact that appellant was not performing a "governmental function" on behalf of the Authority. The OOR disagreed with the officer's assessment on the governmental function issue raised by the agency and reversed. Appellant, arguably the more appropriate party in interest given the stakes and the nature of the dispute, intervened only after the OOR ordered release of the records and thereafter appealed the decision to the Lackawanna County Court of Common Pleas.

It is unclear whether appellant considered itself limited upon intervention and on appeal by the specific issues raised by the Authority, or whether appellant granted due deference to the reasoning offered by the agency's open records officer. In any event, the open records officer's reasoning framed the dispute between appellant and appellees in subsequent phases of judicial review. Adding to this procedural difficulty, the present iteration of the Right-to-Know Law is relatively recent, constitutes a considerable departure from the previous version of the statute, and now includes the addition of the principle articulated in Section 506(d)(1). The court that interpreted Section 506(d)(1) most recently had expressly given the term "public record" little meaning, essentially reading it out of the provision. See A Second Chance, Inc., 13 A.3d at 1036-39; accord Majority Slip Op. at 18 n.13. As a result, appellant's primary argument here poses a very narrow issue -- that appellant does not perform a governmental function -- pursuant to a distinction no court of this Commonwealth has yet to accept as valid in the context of the Right-to-Know Law. Against this background,

the Majority offers a persuasive analysis of the parties' dispute regarding the phrase "governmental function."

In an appropriate case, I believe this Court should closely consider whether and/or to what extent information of a private party contracting with an agency is in fact a "public record" under the Right-to-Know Law. It is clear that the General Assembly intended Section 506(d)(1) to provide access to certain information of an agency, which happens to be in the possession of a contractor; but, it is less clear whether the General Assembly intended to recast information peculiar to the contractor as a public record of the agency. See 65 P.S. § 67.506(d) ("Agency possession"). Section 506(d)(1) defines a public record subject to disclosure, see 65 P.S. § 67.302(a), to include a "public record," which is not in the possession of the local agency but in the possession of a contractor performing a governmental function on behalf of the agency, and which directly relates to that governmental function. See 65 P.S. §67.506(d)(1). For the first reference to a "public record" in Section 506(d)(1) to have any meaning, the term must be defined by reference to the general definition in Section 102 of the Right-to-Know Law, *supra*, and not in a circular fashion by reference to the second iteration of the term "public record" in Section 506(d)(1). See also 1 Pa.C.S. § 1922(1) (General Assembly does not intend result that is absurd). Moreover, the first reference to a "public record" in Section 506(d)(1) can neither be read out of the provision nor downplayed. See 1 Pa.C.S. § 1922(2) (General Assembly intends entire statute to be effective). The first reference to a "public record" in Section 506(d)(1) is a key normative phrase in the provision's scheme, which indicates an intention to limit disclosure to that information of the agency which is in the contractor's possession; access to the contractor's information is then subject to Section 506(d)(2). In this respect, Sections 506(d)(1) and

506(d)(2) are clear that information in the possession of a contractor, other than a public record, is not subject to disclosure. See 65 P.S. § 67.506(d)(1)-(2).

The term "governmental function" is a secondary normative phrase, which further narrows information subject to disclosure of any public record in any third party's possession to those public records in the possession of a contractor that performs a governmental function on behalf of the agency whose own records are being requested. Moreover, any public record disclosed must relate "directly" to the contractor's performance of that governmental function. See 65 P.S. § 67.506(d)(1).

To the extent that Section 506(d)(1) is ambiguous, the tools of statutory construction confirm this interpretation of the provision. The title of Section 506(d) -- "Agency possession" -- for example, strongly suggests that the purpose of the provision is to address possession of a public record, rather than to recast private information of a private entity as a public record. This interpretation of Section 506(d) is harmonious with the general statutory scheme: thus, Sections 301(a) and 302(a) provide access to non-exempt and non-privileged local and Commonwealth agency records, in the first instance, and Sections 305(a) and 506(d)(1) address agency possession of those records. In Section 305(a), the General Assembly offers the presumption that records of a local or Commonwealth agency in the possession of those agencies shall be disclosed and, in Section 506(d)(1), further addresses the limited disclosure of public records in the possession of certain types of contractors. As a corollary to these provisions, any other information is not subject to disclosure under the Right-to-Know Law. Section 708 further narrows the types of information that may be obtained pursuant to the Right-to-Know Law by listing thirty exemptions pursuant to which an agency may deny access to a public record. See 65 P.S. § 67.708(b). The assertion that a public record is exempt from disclosure must be substantiated by the agency,

which carries the burden to prove the applicability of the exemption, whether the public record is in its own possession or in the possession of a contractor. See 65 P.S. § 67.708(a)(1). Thus, even among public records, a great number are exempt from disclosure under the Right-to-Know Law.

The statute offers no indication that, while access to certain public records is restricted, information of private entities/contractors is nonetheless subject to disclosure by simple association with a governmental agency -- and with limited ability by the third party to participate in the disclosure process. Indeed, Section 506(d)(2) suggests the contrary, and expressly prohibits access to the private information of governmental or agency contractors, even if that contractor is also in possession of some public record. See 65 P.S. § 67.506(d)(2). Presumably, if the intention was to make records and information of private contractors subject to broad disclosure, the General Assembly would have placed the burden to prove entitlement to an exemption on the contractor, the actual party in interest and in possession of the relevant supporting documentation. Other procedural provisions of the Right-to-Know Law also suggest that the statute targets broad disclosure of information that actually documents activities or transactions of local or Commonwealth agencies, rather than private party information deemed a public record of such an agency by operation of law. These provisions outline the duties of the agency to disclose information, and impose sanctions on the agency for failure to comply. See, e.g., 65 P.S. §§ 67.701-707 ("Procedure"), 901-905 ("Agency Response"), 1305 ("Civil penalty"). Notably, duties, including civil sanctions, are not aimed at enforcing the Right-to-Know Law against third party contractors.

While the driving policy behind disclosure of public records, as defined in Section 102, is to ensure transparency in the operation of government, the calculus behind mandating disclosure of information from private contractors obviously is more nuanced.

Private entities have more prominent privacy and proprietary interests, have more reticence to assume the costs of any information disclosure mechanism, and have a diluted interest in vindicating the public's right to know. These competing interests are evident in the lines that the General Assembly has drawn between public records and private entity information, as well as between public records in the possession of an agency and public records in the possession of other entities. Regardless of whether broad disclosure of a contractor's private information may be salutary, I am skeptical of the notion that the General Assembly drafted the Right-to-Know Law with the intent to recast information of a private entity as a public record.

In summary, while I concur in the Majority's decision to affirm, under the constraints faced here, I do not join the Opinion insofar as it can be read to foreclose consideration of what constitutes a "public record" in relation to information of a private entity, as that term is used in Section 506(d)(1) of the Right-to-Know Law.