IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis M. Davin, in his capacity as Secretary for the Department of Community and Economic Development, Petitioner	:	
v.	:	No. 569 M.D. 2011
City of Harrisburg, Respondent	:	

Re: Application and Cross-Application for Declaratory Relief Regarding the Status of Impact Harrisburg under the Sunshine Act

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER,
Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: August 4, 2017**

Before the Court are the cross-applications for relief filed by Impact Harrisburg and PA Media Group, WITF, Inc., and Hearst Properties Inc., d/b/a WGAL-TV (Media Parties), seeking a declaratory judgment regarding whether Impact Harrisburg, a non-profit corporation formed pursuant to the Harrisburg Strong Plan, constitutes an "agency" for purposes of the Sunshine Act (Act), 65 Pa. C.S. §§ 701-716, requiring that it comply

with the Act's open meeting requirements.[1] For the reasons set forth below, the Court grants Impact Harrisburg's application for declaratory relief and denies the cross-application filed by Media Parties.

Pursuant to Chapters 6 and 7 of the Municipalities Financial Recovery Act (MFRA), Act of July 10, 1987, P.L. 246, *as amended*, 53 P.S. §§ 11701.101 – 11701.712,[2] the Governor declared the City of Harrisburg to be in a state of "fiscal emergency," *see* Section 602 of the MFRA, 53 P.S. § 11701.602, and a Court-confirmed Receiver was appointed on December 2, 2011, to direct and assist the City on a path to fiscal recovery. In accordance with statutory mandate, the Receiver developed a recovery plan for the City. *See* Section 703 of the MFRA, 53 P.S. § 11701.703. This Court confirmed the Receiver's proposed recovery plan following a hearing. The original recovery plan included multiple measures to achieve financial stability, including asset monetization, lender concessions and debt restructuring, operational initiatives, budgetary adjustments, and renegotiation of collective bargaining agreements. The Receiver's plan underwent subsequent amendments and modifications, and eventually became known as the "Harrisburg Strong Plan." In September 2013, the Court confirmed plan modifications, which included the Receiver's proposal to monetize the

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[1] The parties have filed a joint stipulation of facts and briefs in support of their respective applications for relief. Accordingly, the Court will construe the applications as applications for summary relief. An application for summary relief may be granted if a "party's right to judgment is clear and no material issues of fact are in dispute." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 153 A.3d 424, 428 (Pa. Cmwlth. 2017) (internal quotations and citation omitted).

[2] Chapters 6 and 7 were added by the Act of October 20, 2011, P.L. 318, *as amended*, and govern distressed municipalities declared by the Governor to be in a state of "fiscal emergency." Chapters 6 and 7 include Sections 601-712, 53 P.S. §§ 11701.601-11701.712.

City's and the Harrisburg Parking Authority's parking facilities (referred to as the Parking Transaction). The proposal contemplated using a portion of the Parking Transaction proceeds to fund several non-profit corporations for economic development and infrastructure improvements in the City. *See* Harrisburg Strong Plan and Exhibits thereto (filed August 26, 2013); Order dated September 23, 2013 (confirming Harrisburg Strong Plan); Stipulation of Facts, ¶¶ 6-8. In confirming the Harrisburg Strong Plan (Plan), the Court noted that the Parking Transaction was a "critical component" to the Plan and if completed by early December 2013, would provide essential funding to the City that would allow it to, among other things, "balance its budget in 2013, achieve balanced budgets in years 2014-2016, meet its restructured debt service obligations, and be benefited by fundings for City infrastructure improvements, economic development within the City and the initiation of a healthcare trust fund." Order at 3, ¶ 11 (dated September 23, 2013). Accordingly, the Court approved the Parking Transaction and the associated distribution of proceeds.

Due to the success of the Plan and the City's emergence from its state of fiscal emergency, the Secretary of the Department of Community and Economic Development (DCED) filed an application seeking termination of the receivership. The Court terminated the receivership in February 2014, and directed that a DCED-appointed Coordinator continue the implementation of the Plan. Thereafter, Frederick A. Reddig, the appointed Coordinator, filed an Application seeking approval of a "Governance Proposal and Action Plan pursuant to the Harrisburg Strong Plan (Application)," which provided for the incorporation of Impact

Harrisburg under the Pennsylvania Nonprofit Corporation Law, 15 Pa. C.S. §§ 5101 – 6162, for the purposes of allocating and awarding funding for economic development and infrastructure improvement in the City.[3] The proposal further provided that in accordance with the Plan, sixteen million dollars from the Parking Transaction proceeds would be provided to Impact Harrisburg for funding. The Application indicated that no further funding from City assets was expected other than any recoveries that might stem from a successful pursuit of forensic claims related to the prior financing of the City's trash incinerator. In the event Impact Harrisburg is terminated or dissolved, any remaining funds are to be paid over to an existing nonprofit corporation with a similar mission, or to the City, contingent upon the funds being used only for the express purposes of economic development and infrastructure improvements. *See* Application, filed October 3, 2014, ¶ 25.

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[3] According to the proposed articles of incorporation attached to the Application, the stated purposes of Impact Harrisburg include, *inter alia*: making grants and low interest loans, or subsidizing grants or guaranty loans, for the purposes of clearing, rebuilding and rehabilitating blighted and deteriorated structures, streets, and sidewalks, and other aesthetic improvements; making grants and low interest loans, or subsidizing grants or guaranty loans, to eliminate and prevent blight and deterioration in the City's infrastructure and to promote the general well-being and livelihood of City residents; making grants and low interest loans, or subsidizing grants or guaranty loans, to local entrepreneurs and businesses to assist in the creation of jobs and increased tax revenues; encouraging participation in infrastructure improvement and economic development; reducing the burdens of government through development of business and improvement of the infrastructure; and receiving funds by gift, bequest, grant or otherwise, and administering funds for the stated purposes, "including but not limited to distributing such funds to other organizations that qualify as exempt organizations under section 501(c)(3) of the [Internal Revenue] Code in further[ance] of the Charitable Purposes of such other exempt organizations. Application, Appendix II, at ¶ 3(f).

Marita Kelley will replace Mr. Reddig as the Coordinator effective July 31, 2017. *See* Notification of Appointment of Coordinator for the City of Harrisburg, filed June 29, 2015.

The Court granted the Application, authorizing and directing the incorporation of Impact Harrisburg for the purposes stated.

According to the parties' stipulations of fact, Impact Harrisburg was subsequently incorporated on March 17, 2015. Stipulation of Facts (SOF), ¶ 16. Thereafter, the Coordinator appointed the initial nine-member Board of Directors (Board). *Id.*, ¶ 18. "[Twelve million three-hundred thousand dollars (12.3 million)] of funds realized from [transactions involving City assets] (including the Parking Transaction) was distributed to Impact Harrisburg to expend for the restricted purposes of infrastructure needs within the City of Harrisburg and economic development activities in the City." *Id.*, ¶ 17. Notably, "Impact Harrisburg is not restricted from securing additional funding from other sources or raising funds in its discretion for other uses, consistent with its non-profit corporate status." *Id.*, ¶ 41. Impact Harrisburg's Board began meeting in March 2015, and has continued to meet on a regular basis. Since that time, it has adopted guidelines for awarding grants, advertised for grant applicants, and begun to consider grant applications for infrastructure improvement projects. During its meetings, the Board occasionally goes into "executive session" to discuss "legal matters." *Id.*, ¶ 27.[4]

[4] The Act defines an "executive session" as a "meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting." Section 703 of the Act, 65 Pa. C.S. § 703. The Act sets forth the reasons an agency may hold an executive session, including, *inter alia*, to discuss employment matters, to hold strategy and negotiation sessions relating to labor relations and collective bargaining matters, to discuss litigation matters or complaints expected to be filed, and to review and discuss agency business protected by confidentiality and privilege laws. *See* Section 708, 65 Pa. C.S. § 708.

Apparently, when first incorporated, the Board did not provide formal public notice of its meetings as is required of an agency subject to the Act, nor did it open its meetings to the public. *See generally* Sections 704 and 709 of the Act, 65 Pa. C.S. §§ 704, 709 (pertaining to meetings required to be open to the public and public notice of agency meetings, respectively). However, after counsel for Media Parties contacted Board Chairman, Neil Grover, Esquire, outlining his position that Impact Harrisburg was an "agency" for purposes of the Act and, therefore, required to comply with its provisions, the Board, beginning in March 2016, opened its meetings to the public and media.[5] Notwithstanding its permission of public attendance, the Board has not provided advanced statutory notice of its meetings. SOF, ¶ 25. Shortly before it opened its meetings to the general public, Impact Harrisburg filed the present application seeking a declaratory judgment regarding its status as an "agency" subject to the Act. In its application, Impact Harrisburg contends that it is not an agency for purposes of the Act and its attendant requirements. Media Parties have responded, and filed an application on their own behalf as well, contending the opposite, that Impact Harrisburg is an "agency" under the Act.

"The purpose of the Declaratory Judgments Act[, 42 Pa. C.S. §§ 7531 – 7541,] is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . . ." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 153 A.3d 424, 428 (Pa. Cmwlth. 2017) (internal quotations and citation omitted). An action brought under the

[5] According to the Stipulation of Facts: "In January 2016, local media articles appeared questioning whether Impact Harrisburg should be conducting open meetings in accordance with the Sunshine Act." SOF, ¶ 37.

Declaratory Judgments Act, "must allege an interest by the party seeking relief which is direct, substantial and present, and must demonstrate the existence of an actual controversy related to the invasion or threatened invasion of one's legal rights." *Id.* (internal quotations and citation omitted). Declaratory relief regarding whether an entity has violated the open meeting requirements of the Commonwealth's Sunshine laws, including the current Act, has been afforded by our appellate courts. *See Trib Total Media, Inc. v. Highlands Sch. Distr.*, 3 A.3d 695 (Pa. Cmwlth. 2010). *See also Consumers Educ. & Prot. Ass'n, Int'l, Inc. v. Nolan*, 346 A.2d 871 (Pa. Cmwlth. 1975) (*en banc*), *aff'd*, 368 A.2d 675 (Pa. 1977).

Based upon the conflicting views regarding whether Impact Harrisburg is subject to the Act, and its reluctance to fully comply with the Act's requirements, the Court concludes the parties have presented a direct and substantial controversy that poses a threat to one party's legal rights. Specifically, Impact Harrisburg's legal right to freely conduct its meetings as it chooses has been threatened, or Media's Parties legal right to attend Board meetings held in full compliance with the Act has been restricted.[6]

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[6] Clearly, if Impact Harrisburg is an agency and has failed to comply with the Act, Media parties have been deprived of their right to notice of and the right to attend all agency meetings. The stated purpose and public policy of the Act indicate the importance of our governmental entities operating in an open manner, accessible to the public. Section 702 of the Act provides as follows:

> **(a) Findings.** – The General Assembly finds that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society.

Accordingly, the Court concludes that declaratory relief is appropriate.

Because the Act's requirements and parameters apply only to "agencies," the instant conflict turns on whether Impact Harrisburg is an agency for purposes of the Act. The Act defines an "agency" as follows:

> The body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of all the following: the General Assembly, the executive branch of the government of this Commonwealth, including the Governor's Cabinet when meeting on official policymaking business, any board, council, authority or commission of the Commonwealth or of any political subdivision of the Commonwealth or any State, municipal, township or school authority, school board, school governing body, commission, the boards of trustees of all State-aided colleges and universities, the councils of trustees of all State-owned colleges and universities, the boards of trustees of all State-related universities and all community colleges or similar organizations created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function and through the joint action of its members exercises governmental authority and takes official action. The term shall include the governing board of any nonprofit corporation which by a mutually binding legal written agreement with a community

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> **(b) Declarations.** - The General Assembly hereby declares it to be the public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this chapter.

65 Pa. C.S. § 702. *See also Smith v. Twp. of Richmond*, 82 A.3d 407, 416 (Pa. 2013) (observing that the Act is "designed to enhance the proper functioning of the democratic process by curtailing secrecy in public affairs.").

> college, or State-aided, State-owned or State-related institution of higher education is granted legally enforceable supervisory and advisory powers regarding the degree programs of the institution of higher education. The term does not include a caucus or a meeting of an ethics committee created under rules of the Senate or House of Representatives.

Section 703, 65 Pa. C.S. § 703. Before parsing the definition of "agency," it is worth noting the rules of statutory construction. Pursuant to the Statutory Construction Act of 1972, 1 Pa. C.S. §§ 1501 – 1991, the goal of statutory construction is to ascertain and effect the intent of the General Assembly. 1 Pa. C.S. § 1921(a). The best indication of legislative intent is the express language of the statute. *Dep't of Envtl. Prot. v. Cumberland Coal Res., L.P.*, 102 A.3d 962, 975 (Pa. 2014). When the statutory language is clear and free from doubt, "the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b). *Accord Dep't of Envtl. Prot. v. Cumberland Coal Res.*, 102 A.3d at 975. "When considering statutory language, 'words and phrases shall be construed according to rules of grammar and according to their common and approved usage.'" *Dep't of Envtl. Prot. v. Cumberland Coal Res.*, 102 A.3d at 975 [quoting 1 Pa. C.S. § 1903(a)]. "[O]nly when the words of a statute are ambiguous should a reviewing court seek to ascertain the intent of the General Assembly through consideration of the various factors found in [1 Pa. C.S. §] 1921(c)." *Id.* at 975.

Beginning with Impact Harrisburg's initial contentions, Impact argues that the Act's definition of "agency" is clear and unambiguous, and cannot be construed to include private, nonprofit corporations. As Impact Harrisburg notes, it (as well as other nonprofit corporations) does not

constitute any of the entities specifically identified in the definition, such as the General Assembly, nor does it fall within one of the enumerated categories of entities, such as "any board, council, authority or commission of the Commonwealth" or of any "State, municipal, township or school authority, [or] school board." Impact Harrisburg further notes that it cannot constitute a "committee" of any of the entities included in the definition because its Board members were appointed by the Coordinator, not pursuant to statute, and it does not have any explicit authority to act on behalf of or to bind the Commonwealth, the City of Harrisburg, or any of their respective officials. In support, Impact Harrisburg cites to *Lee Publications, Inc. v. Dickinson School of Law of the Pennsylvania State University Association*, 848 A.2d 178 (Pa. Cmwlth. 2004).

Impact Harrisburg also contends that it cannot be considered a "similar organization" because it was not created by statute; it is not governed by statute, only by its Articles of Incorporation; and it does not perform any essential governmental functions or exercise governmental authority.

To begin, there is no dispute that Impact Harrisburg does not constitute any of the named entities in the definition, nor does it fall within the categories of entities constituting an agency under the Act. After consideration, the Court also agrees with Impact Harrisburg that it is not a "committee" of the Commonwealth or the City of Harrisburg. *Lee Publications* is helpful in this regard. There, in resolving whether a nonprofit corporation, which was created by the Board of Trustees of the former Dickinson School of Law (Dickinson) to enforce certain covenants

with Pennsylvania State University (PSU) following the merger of Dickinson and PSU, was a "committee" of PSU and, therefore, subject to the Act, this Court stated as follows:

> The dictionary defines "committee" "as a body of persons delegated to consider, investigate, take action on, or report on some matter." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 231(10th ed. 2001). The term "delegate" used in the definition means "to entrust to another"; "to appoint as one's representative"; or, "to assign responsibility or authority." *Id.* at 304. Thus, the qualities of a "committee" derived from these definitions indicate that it would be "of PSU", and entrusted by PSU as its representative, to consider, investigate, take action on, or report. Pervasive in the meaning of committee, then, is the ability of PSU to select the committee members and the obligation of the committee members to act **on behalf of PSU** and to act **in the best interests of PSU**. We find no indications in the record that the Board of Governors [of the nonprofit corporation] acts on behalf of or in the best interests of PSU.

848 A.2d at 186 (emphasis in original). Based upon the above reasoning, the Court concluded that the nonprofit corporation was not a committee of an agency subject to the Act.

Similarly, here, notwithstanding the Coordinator's role in pursuing the formation of Impact Harrisburg via an application in this Court, and his subsequent appointment of the original Board members, the Coordinator, acting on behalf of DCED, did not delegate, entrust or assign any authority to Impact Harrisburg; neither the articles of incorporation, nor the parties stipulations of fact demonstrate that Impact Harrisburg has authority to act on behalf the City or to bind its legal interests. Indeed, the

City has submitted applications to Impact Harrisburg seeking funds for different projects and its applications have been denied on occasion.[7] *Compare The Patriot-News Co. v. Empowerment Team of the Harrisburg Sch. Distr. Members*, 763 A.2d 539 (Pa. Cmwlth. 2000) (concluding that empowerment team, which is appointed pursuant to the Public School Code and possesses authority to bind the school board and school district, is a committee of the school district and, therefore, an agency subject to the Sunshine Act). Thus, Impact Harrisburg does not constitute a committee of any of the relevant enumerated entities included in the Act's definition of agency.

Next, turning to Media Parties' main contention, the Court must determine whether Impact Harrisburg is subject to the Act as a "similar organization[] created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function and through the joint action of its members exercises governmental authority and takes official action." *See* Section 703. Looking at the statutory provisions of Chapters Six and Seven of the MFRA, particularly those that vest the Court-confirmed Receiver with the statutory mandate to develop a recovery plan and to direct its implementation once judicially confirmed, Media Parties argue:

> Impact Harrisburg is a "similar organization" which has been created pursuant to the authority initially vested in the Receiver and then subsequently in the Coordinator and approved

[7] While this fact is not included in the parties' stipulations of facts, the Coordinator has repeatedly noted this fact in his status reports filed with this Court and the City has never taken issue with the assertion.

by the Court under the provisions of Act 47 and thus was created "pursuant to statute."

. . . .

. . . The [Receiver's] recovery plan must provide for the continued provision of "vital and necessary services." 53 P.S. § 11701.703(b)(1)(i).

The recovery plan must include factors which are relevant to alleviating the financially distressed status of the municipality including but not limited to: (i) a capital budget which addresses infrastructure deficiencies, (ii) recommendations for greater use of Commonwealth economic and community development programs, and (iii) recommendations for enhanced cooperation and changes in land use planning and zoning, including regional approaches that would promote economic development and improve residential, commercial and industrial use availability within and around the municipality. 53 P.S. § 11701.241(9), (10), and (10.1).

. . . The Court's confirmation of the plan imposes on the elected and appointed officials of the distressed municipality a mandatory duty to undertake the acts set forth in the recovery plan and suspends any lawful authority they have to interfere with the powers granted to the receiver or the goals of the plan. 53 P.S. § 11701.704(a).

. . . The coordinator must implement the plan and may exercise the same powers and duties as the receiver. 53 P.S. § 11701.710.1(b) & (b)(2).

In the instant matter, the Plan provided for the creation of an entity known as "Impact Harrisburg" which was to work "to create a structure for the administration of the 12.3 million dollars that was set aside as part of the parking monetization to address infrastructure needs of the City and to incentivize economic development

> opportunities to aid the City in strengthening its tax base and addressing critical infrastructure needs thus enhancing the quality of life for City residents." Plan, modified through 11/25/15, p. 71.
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> Act 47 required the Receiver to include these provisions related to infrastructure improvements and economic development in the Plan. . . .

Brief of Media Parties in Support of their Cross-Application at 11-14 (emphasis in original). Media Parties further argue that because the General Assembly has included infrastructure improvements and economic development as factors that the receiver and/or a successor coordinator must address in a recovery plan, such activities are related to the fiscal integrity of a municipality. According to Media Parties: "It follows that Impact Harrisburg's provisions for infrastructure improvements and economic development pursuant to the Plan are essential governmental functions because the Receiver has deemed such factors critical to restore and maintain the fiscal stability of the City." *Id.* at 19. Media Parties cite *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012), dealing with the Right-to-Know Law (RTKL),[8] to support their position. While the Court finds *Wintermantel* instructive, it is distinguishable.[9] Moreover, application

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[8] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104. In general, the RTKL provides that the non-exempt and non-privileged records of Commonwealth and local agencies are accessible to the public. The purpose of the RTKL is "to promote access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." *Silver v. Borough of Wilkinsburg*, 58 A.3d 125, 128 (Pa. Cmwlth. 2012) (internal quotations and citation omitted).

[9] At issue in *Wintermantel* was the provision of the RTKL providing:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the

of its analysis leads to the conclusion that Impact Harrisburg is not a "similar organization."

In *Wintermantel*, our Supreme Court addressed whether documents in the possession of a private joint venture management company, which managed a municipal authority's baseball stadium, were accessible under the Right-to-Know Law (RTKL). There, the Board of Commissioners of Lackawanna County formed a stadium authority (Authority) under the Municipality Authorities Act (MAA),[10] which in turn

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> 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.

Section 506(d)(1), 65 P.S. § 67.506(d)(1).

Because the RTKL and the Act have similar purposes and relate to the same class of things, they are in *pari materia*, and "shall be construed together, if possible, as one statute." *Silver*, 58 A.3d at 128 (internal quotation and citation omitted). Nonetheless, they are not the same, and the consequences of determining that certain activities constitute a governmental function are markedly different. If a private contractor is found to be performing a governmental function, its records relating *to that activity* are subject to disclosure under Section 506(d)(1). This does not make *all* records of the entity public, let alone subject that entity's governing body to the Sunshine Act. To illustrate, if a municipality which has historically engaged in trash removal decides to outsource that function to a private company such as Waste Management, the company might be found to be performing a governmental function and its records relating to that activity subject to disclosure. This is a far cry, however, from reaching the plainly untenable conclusion that Waste Management's board of directors' meetings would thus be subject to the Sunshine Act.

[10] The current version of the MAA appears at 53 Pa. C.S. §§ 5601-5623. Pursuant to the MAA, an authority may be incorporated for the purpose of financing, acquiring, maintaining and operating parks, recreation grounds and facilities. 53 Pa. C.S. § 5607(a)(4). Moreover, the authorized purposes of authorities created under the MAA are deemed to be "for the benefit of the people . . . for the increase of their commerce and prosperity and for the improvement of their health and living conditions." *Id.*, § 5620. The activities taken by an authority to effectuate its statutory purpose are statutorily declared to be "essential government functions." *Id.*

constructed a stadium and acquired a minor league baseball team, the Scranton/Wilkes-Barre Red Barons. The Authority subsequently entered into a management agreement with SWB Yankees LLC, a private entity, through which SWB Yankees became the exclusive manager of all baseball operations and other activities at the stadium. Pursuant to the parties' agreement, SWB Yankees was made an agent of the Authority, with "'plenary' powers over a primary function of a government agency," and it was empowered to act on behalf of the Authority and to bind its legal interests. *Wintermantel*, 45 A.3d at 1042 (quoting in part from the management agreement). After SWB Yankees entered into a food service contract with a concessionaire, Gretchen Wintermantel, a reporter, submitted a request to the Authority under the RTKL, seeking access to all bids that were submitted for that contract. The Authority's solicitor denied the request on the grounds that it did not possess the information and inasmuch as SWB Yankees, the stadium manager, was not performing a governmental function, its records were not accessible to the public under Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1) (see footnote 9).

On appeal, in construing the term "governmental function," our Supreme Court stepped away from the two prior approaches of governmental vs. proprietary function, and "the government-always-acts-as-the–government." Pointing to the Commonwealth's operation of liquor stores and the lottery, the Court noted that today, the government has undertaken various commercial enterprises that previously would be viewed as nongovernmental functions. Importantly, however, the operation of such activities has been statutorily-assigned to state agencies as a core activity.

Accordingly, the Court observed: "[T]his understanding—*i.e.*, that some activities which conventionally may be couched as proprietary in nature are being undertaken as governmental functions—is consistent with a common definition of the term as 'a government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public.' BLACK'S LAW DICTIONARY 716 (8th ed. 2004)." *Wintermantel*, 45 A.3d 1041.

Because the Authority had delegated to a private entity its statutorily-authorized activities and responsibilities, which have been legislatively declared to be "essential governmental functions," the Court concluded that the private entity's records pertaining to its performance of those duties were "public" for purposes of the RTKL:

> [T]he Stadium Authority, having been formed to administer an amusement enterprise, generated substantial public indebtedness in such venture. [SWB Yankees] has accepted delegation of the responsibility to operate the ball park for the public benefit as the Authority's agent. . . . [W]e [ ] have no difficulty holding that, where a government agency's primary activities are defined by statute as "essential government functions," and such entity delegates one of those main functions to a private entity via the conferral of agency status, Section 506(d)(1) pertains on its terms to non-exempted records directly relating to the function.

Id. at 1043-44 (footnote omitted). Put simply, the Authority, itself a governmental agency under the RTKL, was legislatively created for the purpose of conducting the baseball enterprise. This made the baseball enterprise a governmental function and the essential or core function of that agency. Because the Authority contracted out the management and control

of the day-to-day operations of that enterprise to a private contractor, that contractor was engaged in a governmental function and subject to the disclosure requirements of Section 506(d)(1). None of these circumstances occurred here, but even if we were to conclude that the activities of Impact Harrisburg amount to a governmental function within the meaning of Section 506(d)(1),[11] that would not make it an agency for purposes of either the RTKL or the Sunshine Act.

In *Ristau v. Casey*, 647 A.2d 642 (Pa. Cmwlth. 1994), this Court held that a trial court nominating commission, created pursuant to executive order, was not an agency subject to the Act. In doing so, we noted that the commission was not created by or pursuant to statute, it was not governed by statute, and it was created solely for the purpose of making a recommendation to the Governor, a task that did not constitute an essential governmental function. *Id.* at 647. Finally, we noted that the commission did not exercise any governmental authority; exclusive authority to nominate a candidate rested solely with the Governor. *Id.* *See also Mazur v. Washington Cnty. Redev. Auth.*, 900 A.2d 1024 (Pa. Cmwlth. 2006) (concluding that tax increment financing committee, composed of representatives from different taxing districts, was not an agency subject to the Act).

In re Right to Know Law Request Served on Venango County's Tourism Promotion Agency, 83 A.3d 1101 (Pa. Cmwlth. 2014), is also

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[11] We further note that in order to be a "similar organization" pursuant to Section 703 of the Act, the entity must perform an "*essential* government function," whereas Section 506(d)(1) of the RTKL requires only that the contractor perform a "governmental function."

instructive. There, this Court concluded that a private, nonprofit corporation (Alliance) comprising five organizations and formed to promote economic development, recreation and tourism in Venango and Crawford counties, was not an agency subject to the RTKL. Notably, the Alliance's governing board was primarily composed of members of the private sector and it received funding from its member organizations as well as from federal and state grants. The Venango County Commissioners had designated the Alliance as its "tourism promotion agency."[12] In addition, the Alliance constituted an "industrial development agency" under Section 3(g) of the Pennsylvania Industrial Development Authority Act (PIDA), Act of May 17, 1956, P.L. (1955) 1609, *as amended*, 73 P.S. § 303(g).[13]

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[12] Former Section 1770.6 of the County Code, defined a "recognized tourist promotion agency" as the "nonprofit corporation, organization, association or agency which is engaged in planning and promoting programs designed to stimulate and increase the volume of tourist, visitor and vacation business within counties served by the agency as that term is defined in the . . . 'Tourist Promotion Law.'" Act of August 9, 1955, P.L. 323, *as amended*, added by the Act of December 22, 2000, P.L. 1019, 16 P.S. § 1770.6. Section 1770.6 was repealed by the Act of April 20, 2016, P.L. 134; the subject matter of the repealed section now appears in Section 1770.10 of the County Code, added by the Act of April 20, 2016, P.L. 134, 16 P.S. § 1770.10. Former Section 1770.6 and its replacement, Section 1770.10, pertain to the authorization and imposition of a hotel tax.

[13] The General Assembly set forth the express purpose of the PIDA as follows:

> [I]t is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the health, safety, morals, right to gainful employment, business opportunities and general welfare of the inhabitants thereof by the creation of a body corporate and politic to be known as "The Pennsylvania Industrial Development Authority" which shall exist and operate for the public purpose of alleviating unemployment with its resulting spread of indigency and economic stagnation by the promotion and development of industrial and manufacturing enterprises and research and development facilities in those areas of the Commonwealth in which conditions of critical

In first concluding that the Alliance was not an agency for purposes of the RTKL, the Court noted that (1) no evidence was offered to establish that it was a government entity, (2) unlike the Pennsylvania Industrial Development Authority, it was not created pursuant to statute, and (3) as statutorily defined, its functions were not characterized as essentially governmental in nature. 83 A.3d at 1106. The Court also concluded that the Alliance was not a "similar governmental entity." In reaching that conclusion, the Court considered the degree of authority the government exercised over the Alliance and its employees, whether the Alliance performed a substantial facet of a governmental activity, whether the Alliance possessed statutory authority to accomplish its goals and the degree of financial control exercised by the government through its financial assistance. The Court opined:

> The Alliance is a private nonprofit 501(c)(3) corporation . . . . [that] is governed by a 25-member Board comprised of Venango County residents, including industrialists, businessmen, bankers, and a few representatives of government

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> unemployment currently or may from time to time exist. Such purposes are hereby declared to be pubic purposes for which public money may be spent.

Section 2(l) of the PIDA, 73 P.S. § 302(l). The PIDA defines an "industrial development agency" as

> A nonprofit corporation or a foundation or association organized and existing under the laws of this Commonwealth, regardless of the particular name, to whose members or shareholders no profit shall enure and which shall have as a purpose the promotion, encouragement, construction, development and expansion of new or existing industrial development projects in a critical economic area.

Section 3(g), 73 P.S. § 303(g).

> agencies. Private sector representatives have a clear majority at 21 members.
>
> . . . .
>
> [E]vidence of federal, state and local government cooperation with an entity is not sufficient to establish control by a government agency. We agree with the trial court that the relevant consideration is control by government, not cooperation with government. The trial court found there was no evidence of control by the government because most of the Alliance's Board members are representatives from the private sector.

Id. at 1108 (citations and footnotes omitted). The Court further held that the "function an entity performs weighs heavily in a local agency assessment. The function must be governmental but it need not be essential. To qualify as governmental, the function must be a substantial facet of a government activity." *Id.* at 1109 (citing *Wintermantel*). Noting that the Alliance primarily engages in economic development and community stewardship, we affirmed the trial court's conclusion that such activities do not fulfill a core governmental purpose. *Id.* at 1109. Finally, although the Alliance had not received significant financial assistance from the Commonwealth, we agreed with the trial court that receipt of governmental funds does not transform an entity into a state agency. *Id. See also Mooney v. Bd. of Trs. of Temple Univ.*, 292 A.2d 395 (Pa. 1972).

Considering the factors discussed above compels the conclusion that Impact Harrisburg does not satisfy the criteria necessary to be deemed a "similar organization" under Section 703 of the Act. First, while the MFRA

affords both the Chapter Two coordinator[14] and the Chapter Seven receiver[15] much discretion and latitude to develop a recovery plan designed to alleviate either a municipality's financial distress or fiscal emergency, the provision of such broad authority cannot be equated with a statutory mandate to create a nonprofit corporation to serve these purposes. To conclude otherwise construes the language "created by or pursuant to a statute" too broadly and is contrary to the authority discussed above, which requires a more specific statutory authorization. *See Venango County*; *Ristau.*

Moreover, Impact Harrisburg simply is not performing functions that have been statutorily identified as essential. In addressing this factor, Media Parties focus primarily on Chapter Two of the MFRA, which sets forth the permissible parameters of the coordinator's plan. Section 241 of the MFRA provides that the plan formulated by the coordinator "*shall include any* of the following factors *which are relevant* to alleviating the financially distressed status of the municipality" including a "capital budget which addresses infrastructure deficiencies," "[r]ecommendations for greater use of Commonwealth economic and community development programs," and "[r]ecommendations for enhanced cooperation and changes in land use planning and zoning, including regional approaches that would promote economic development and improve residential, commercial and industrial use availability within and around the municipality." Section 241(9), (10) and (10.1), 53 P.S. § 11701.241(9), (10), and (10.1) (emphasis added).

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[14] Chapter Two of the MFRA pertains to municipal financial distress and the appointment of a coordinator.

[15] Chapter Seven of the MFRA applies in the context of a declared municipal fiscal emergency and provides for the appointment of a receiver.

First, such factors are not required in a recovery plan formulated by the receiver under Chapter Seven. *See* Section 703(b)(1), 53 P.S. § 11701.703(b)(1).[16] In addition, the factors are not even identified as permissible components of a recovery plan. *See* Section 703(b)(2), 53 P.S. § 11701.703(b)(2). Thus, there is no merit to the assertions that such activities are mandated or necessary to a financial recovery.[17] It is well settled that in order to be deemed a similar organization under Section 703, the authorizing statute must "declare in substance" that the entity is performing an essential governmental function. *Mazur*; *Ristau*. Here, the MFRA does not declare explicitly that economic development and infrastructure improvement are essential government functions. Moreover, even if the term "declared in substance" encompasses an implied declaration, no such implication can be drawn from the MFRA; a municipality's economic development and infrastructure needs are not included in the criteria listed for determining whether a municipality is in financial distress, *see* Section 201, 53 P.S. § 11701.201, they are not included in the category of "vital and necessary [municipal] services," *see* Section 701, 53 P.S. § 11701.701, and they are not required to be included in the receiver's recovery plan. *See* Section 703(b)(1).

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[16] Unlike Chapter 2, which gives the coordinator flexibility regarding the plan components, Chapter Seven requires a more focused, narrowly-tailored plan. In addition, the components of a Chapter Seven recovery plan are mandatory, to wit: "The recovery plan *shall provide for all* of the following . . . ." Section 703(b)(1) (emphasis added).

[17] Even if Chapter Two of the MFRA were applicable, the Court does not equate providing grants for projects constituting economic development or infrastructure improvement with the requirement that the coordinator's plan include a capital budget that address infrastructure needs, recommendations for greater use of Commonwealth programs, and recommendations for cooperation and changes in regional land use planning and zoning to promote economic development.

Finally, it is beyond dispute that Impact Harrisburg neither exercises governmental authority nor takes official action, essential requirements of a "similar organization" under the Act's definition of an "agency." Moreover, the City does not exercise control over Impact Harrisburg's activities. That the mission of a private entity is to serve the public interest in cooperation with government authorities does not make that entity a public agency.

For the foregoing reasons, the Court must conclude that Impact Harrisburg is not an agency subject to the Sunshine Act. While this conclusion is compelled by both statutory language and appellate case law, the Court notes that the issue was difficult, particularly in light of the unique circumstances underlying the incorporation of Impact Harrisburg and the source of its primary funding. As has been well reported, the City of Harrisburg was in dire financial straits, struggling with crippling debt and an inability to meet its everyday financial obligations and public service responsibilities. The City's financial recovery required an enormous amount of hard work and cooperation, as well as sacrifice and concessions by all sides, parties, and interests, both public and private. As a part of the overall plan, Impact Harrisburg was incorporated to increase the prospect of long term municipal vitality, and limited City resources were provided to help it fulfill its purposes. Strong policy considerations support the ability of the public to follow the application of these funds. Therefore, the Court encourages Impact Harrisburg to act with the transparency appropriate to its public mission, at a minimum to provide the public with some form of notice regarding its meeting dates and to hold its meetings and deliberations open

to the public to the greatest extent possible, thereby encouraging public confidence in its operations.

Bonnie B. Leadbetter

BONNIE BRIGANCE LEADBETTER,
Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis M. Davin, in his capacity as Secretary for the Department of Community and Economic Development, Petitioner	:	
v.	:	No. 569 M.D. 2011
City of Harrisburg, Respondent	:	

ORDER

AND NOW, this 4th day of August, 2017, having concluded that Impact Harrisburg is not an agency for purposes of the Sunshine Act, 65 Pa. C.S. §§ 701-716, the application for declaratory relief filed by Impact Harrisburg is granted and the cross-application for declaratory relief filed by PA Media Group, WITF, Inc., and Hearst Properties, Inc., d/b/a WGAL-TV is denied.

Bonnie B. Leadbetter

BONNIE BRIGANCE LEADBETTER,
Senior Judge

Certified from the Record

AUG - 4 2017

and Order Exit