

## ORR Holds that Records Documenting the Locations of Gunshot Sensors in the Possession of a Third Party are Public Records

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Last week, we discussed a case where the OOR found that certain records in the possession of a third party were beyond the scope of Section 506(d)(1) of the RTKL. This week, we'll discuss a case where the OOR concluded otherwise and found that an agency was required to get certain records from a third party contractor.

In *Sandler v. City of Pittsburgh*, AP 2019-0215 (April 25, 2019), the Requester sought records in the possession of ShotSpotter Inc., a third party contractor that provides a software system that detects gunshots in the City. Specifically, the Requester wanted records setting forth the locations and names of property owners where ShotSpotter devices were installed. The City established that it did not actually possess any responsive records and that such information was solely in the possession of ShotSpotter, Inc.

As discussed last week, public records in the possession of third parties are accessible through Section 506(d) of the RTKL if: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to the performance of that function. In addition, an agency must have a contract with the third party from whom records are sought under Section 506(d).

The City acknowledged that it had a contract with ShotSpotter, Inc. Accordingly, the OOR had to determine if ShotSpotter, Inc. performed a governmental function and if the information sought directly relates to that function.

As to the first element, a third party performs a governmental function on behalf of an agency where it performs a function generally performed by that agency and is not ancillary to the agency's functions. This must include the delegation of some substantial facet of the agency's role and responsibilities, as opposed to entry into routine service agreements with independent contractors. The OOR concluded that because the ShotSpotter software is used to aid criminal investigations, an essential government function, the first element was met.

To satisfy the "directly relates" element, the records must relate to the performance of the governmental function. See *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336 (Pa. Commw. 2013) (while social services performed by contractor fulfill government function, contractor employee information does not directly relate to performing the services under the contract); *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613 (Pa. Commw. Ct. 2011) (holding subcontracts for interpretation services with contractors who are not selected are not directly related as there is no contract performance); *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. 2010) (the purchase cost of commissary items does not directly relate to the re-sale to inmates); *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 940 (Pa. Commw. 2014) (the cost of provider services does not directly relate to the performance of the government function). The OOR concluded that the ShotSpotter locations are directly related to the governmental function, but that the names of the property owners where the sensors are located are not.

Therefore, the OOR concluded that while the records were not in the City's possession, the City was obligated to retrieve the locations of the sensors under Section 506(d), if they were not exempt under the RTKL or otherwise protected from public disclosure.

As the last two posts have demonstrated, the determination as to whether records in the possession of a third party are public records is fact sensitive and determinations must be made on a case by case basis. Accordingly, Open Records Officers should work with their solicitors before making a decision to acquire records from a third party.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.