

# Commonwealth Court Establishes Test to Determine Whether Volunteer Fire Companies are Subject to the RTKL

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An entity must be a Commonwealth agency, a local agency, a judicial agency or a legislative agency to be subject to the RTKL. 65 P.S. § 67.302. In *Pysher v. Clinton Township Vol. Fire Co.*, 1237 C.D. 2017, 2019 WL 2017782, at \*3 (Pa. Cmmw. May 8, 2019), the parties disputed whether a volunteer fire company is a local agency under the RTKL. The RTKL defines “Local agency” as:

- Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school.
- Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.

65 P.S. § 67.102.

In determining whether the VFC was a “similar governmental entity” subject to the RTKL, the court relied on its earlier decision in *In re Right to Know Law Request Served on Venango County’s Tourism Promotion Agency and Lead Economic Development Agency*, 83 A.3d 1101 (Pa. Cmwth. 2014) (*Venango County*), where the court evaluated whether a regional alliance of businesses, industry, and tourism, which was a private nonprofit, was a “similar governmental entity” to be considered a “local agency” under the RTKL. In that case, the court set forth three factors to be considered when assessing an organization’s status as a “similar governmental entity,” including: 1) the degree of governmental control; 2) the nature of the organization’s functions; and 3) financial control. *Id.* at 1108. The court continued:

Concerning the first factor, degree of governmental control, we held a court should review factors, such as “organizational structure, purposes, powers, duties and fiscal affairs.” *Id.* Moreover, we noted that cooperation with the government is insufficient to establish control. *Id.* As for government function, we held that “[t]he 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. Finally, with regard to financial control, we noted that the less government financing, the less likely it was that there was government control. *Id.*

In *Pysher*, the court concluded that it did not have sufficient evidence to evaluate these factors and remanded the case. However, it indicated that the following factors were important to the analysis:

- Whether the VFC contracts with the Municipality and other municipalities to provide fire services;
- Whether the VFC was created or incorporated by a Municipality or by a group of interested citizens;
- Whether the Municipality participates in the VFC’s day-to-day operations;
- Whether Municipality appoints, selects, or approves VFC’s members or officers;
- Whether Municipality indemnifies VFC or its members;
- Whether members of VFC receive municipal benefits;
- Whether if VFC was to dissolve, its assets would not go to the Municipality;
- Whether the VFC maintains its operations through fundraising, rentals, and donations;
- Whether Municipality exercises financial or governmental control over VFC; and
- Whether Municipality funds the VFC or pays certain expenses of the VFC.

The OOR has issued at least two decisions subsequent to the *Pysher* case. In *Mezzacappa v. Tatamy Volunteer Fire Department*, AP 2019-0814 (July 24, 2019), the OOR ruled that the VFD was subject to a RTKL request because it did not provide sufficient evidence that the above-factors weighed in its favor. The OOR noted that the second factor (government function) clearly weighs in favor of finding that the VFD is subject to the RTKL because: “There is no dispute that the provision of firefighting services is a governmental function.”

In *Yakin v Monroeville Fire Company*, AP 2018-0299 (July 3, 2019), however, the VFC addressed the factors discussed in *Pysher* and the OOR ruled in its favor. As to the second factor, the OOR held that it is undisputed that the provision of fire services is a governmental function and that the VFC provides fire services to the Municipality and other communities. However, with respect to the first factor, government control, the OOR held that the Municipality exercises very little, if any, governmental control over the VFC. Specifically, all members of the VFC are chosen by the existing members of the VFC, all officers of the VFC are chosen by its members, and all decisions concerning the VFC and its operations are made by its members, not the Municipality. Moreover, with respect to the third factor, financial control, the OOR held that the Municipality did not exercise financial control over the VFC because, while the Municipality provides some funding and resources to the VFC, the majority of the VFC’s funding comes from the other sources of income.

The *Pysher* decision provides valuable insight into how the OOR will evaluate whether a volunteer fire company or other nonprofit is a local agency. However, every entity is different and, Open Records Officers should always consult with their solicitor prior to making such a determination.

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