

# BAILIWICK NEWS

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**How, when, where and which local unelected, taxpayer-funded totalitarian managerial elites narrow the range of policy options elected officials and citizens are allowed to consider, to ensure pre-ordained outcomes that screw riffraff to benefit elites.**

By Katherine Watt

## CRITICAL ANALYSIS

I tried to get a copy of the draft zoning rewrite document prepared by Clarion Consultants and submitted to Borough staff late last year, after more than two years of complete public blackout from the drafting process.

I found that -- along with all other State College taxpayers, I paid the consultant to produce the draft zoning ordinance, a project allocated up to \$200,000 by vote of Borough Council on Jan. 9, 2017.

Then I paid the manager to deny public access to the draft zoning ordinance. Then I paid the solicitor, Terry Williams, to support Fountaine's secrecy.

Then I paid the state Office of Open Records official to uphold Fountaine and Williams' s secrecy.

It's the best local example yet of the unassailable fact that we do not live in any semblance of democratic or constitutional republican government, at any level.

We demonstrably live under managerial totalitarianism (see Wolin, Sheldon, *Democracy Inc.: Managed Democracy and the Specter of Inverted Totalitarianism*, 2008) conducted in secret, at the unfettered discretion of unelected, unaccountable bureaucrats and corporate lobbyists, enabled by state-level laws and administrators, all funded by the people, who are systematically blocked from actual knowledge and functional participation.

I don't give a fuck anymore. Breach of trust-last straw incident, and so forth.

But I have been thinking about what specific, visible bat signals Borough Council could send up to rekindle hope, to let wannabe active citizen participants that the coast is clear and we're valued as something other than blind, deaf and mute tax donkeys present and future, through annual assessments and massive borrowings.

The best signal would be a Council vote to fire Tom Fountaine as Borough Manager, and Terry Williams as Borough Solicitor, and not replace them, instead taking on direct public supervision of all public works for themselves as public servants held directly accountable to voters every four years.

I won't be holding my breath waiting for that cold day in hell.

## *Right to Know Farce*

Jan. 8, 2020 State College Planning Commission Meeting - Planning Director Ed LeClear informed Planning Commission and public that he had received a lengthy (over 600-page) draft zoning rewrite document from Clarion Consultants; that he had a phone call with the consultants scheduled for Jan. 23; that he hoped to present a draft to the Zoning Rewrite Advisory Committee in late spring; that the current Borough Council is the council that will vote on the zoning code overhaul during its term; and that "significant orientation" will be required for council members and others to understand, evaluate and make zoning ordinance rewrite decisions.

Jan. 9, 2020 - Right to Know request from Watt to Borough Right-to-Know Officer Tom Fountaine, requesting: "Electronic copy of Clarion consultants' 600-page draft zoning rewrite document, mentioned by Planning Director Ed LeClear at the Jan. 8, 2020 meeting of the State College Planning Commission. PDF by email is preferred format."

Jan. 15, 2020 - Fountaine letter of denial to Watt

The document you have requested is in draft form and as such, per Section 708(b)(10)(i)(A) of the Pennsylvania Right to Know Law, is not considered a public document. Therefore, your request is being denied.

For your convenience, below is the section from the Pennsylvania Right to Know Law referenced above:

"The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations."

Jan. 21, 2020 - Watt appeal to Pennsylvania Office of Open Records (PA-OOR), attaching *James v. Upper St. Clair School District*, Docket No. AP 2019-1189, which holds: "...conclusory statements are insufficient to prove the existence of an exemption...the evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exceptions." [internal citations omitted.]

Jan. 21, 2020 PA-OOR notice to parties of appeal received, with instructions for next steps: evidence, legal argument and general information due on or before Jan. 30, 2020.

Jan. 28, 2020 - Watt filing to PA-OOR

1. The Borough of State College has been working on a comprehensive update to the municipal zoning ordinance for several years. The last time the ordinance was comprehensively updated was in or about 1958.

2. The Borough maintains a public website regarding the rewrite project, at <http://zonestatecollege.org>; and has stated an interest in transparency and public participation in the rewrite process.

3. The Borough hired a consulting firm, "Clarion Associates," at taxpayer expense "not to exceed \$200,000," (See State College Borough Council Minutes, Jan. 9, 2017 at p. 3, attached) to guide the project through the analysis, drafting, review and adoption process.

4. The Borough formed a "Zoning Rewrite Advisory Committee," which met on September 26, 2017.

5. Three "pre-decisional" documents were posted on the Borough website in 2017, including:

a) September 2017 "Zoning Ordinance Assessment,"

[http://zonestatecollege.org/assets/assessment\\_public-review-draft.pdf](http://zonestatecollege.org/assets/assessment_public-review-draft.pdf)

b) Oct. 25, 2017 "Zoning Assessment Notes", [http://zonestatecollege.org/assets/2017\\_12\\_06\\_zoningassessmentfeedback\\_jlw.pdf](http://zonestatecollege.org/assets/2017_12_06_zoningassessmentfeedback_jlw.pdf) (collected comments received from Planning Commission, Borough Council, ZRAC and Fraternity focus groups held on Sept. 26, 2017); and

c) Dec. 11, 2017 "Zoning Revision Update" [http://zonestatecollege.org/assets/2017-eoy-zoning-update\\_2017\\_12\\_11.pdf](http://zonestatecollege.org/assets/2017-eoy-zoning-update_2017_12_11.pdf) (outlined progress to date and planned next steps.)

6. No additional records, ZRAC meetings, or public meetings were posted or held on the zoning rewrite process in 2018 or 2019, apparently due in part to staffing shortages in the Planning Department.

7. On Jan. 8, 2020, Planning Director Ed LeClear informed the Planning Commission, at a public meeting, that the consulting team had submitted a draft zoning rewrite document containing more than 600 pages, and that LeClear was reading through the document.

8. On Jan. 9, 2020, I submitted a Right to Know Request seeking an electronic copy of the lengthy document to which LeClear referred.

9. On Jan. 15, 2020, Borough RTK Officer Tom Fountaine denied the request, citing -- without elaboration -- the 708(b)(10)(i)(A) exception provision of the Right to Know Law.

10. The OOR has already decided, in similar cases, that an agency simply citing an exception is insufficient to carry the agency's burden of proof to justify withholding a record from the public. See OOR-AP-2019-1189, *James v.*

*Upper St. Clair School District*, at pp. 12-13, citing *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commonwealth Court 2016) and several other Commonwealth Court cases interpreting the Right to Know Law.

11. The Borough's denial of my request is arbitrary, given the public posting of prior "pre-decisional" and draft records.

12. The Borough's denial is counter to the public interest in timely, complete access to zoning rewrite records to provide the public with enough time to work through large documents and prepare for informed public engagement throughout the rewrite process.

13. Therefore, I request that the OOR order the Borough of State College to provide me with the complete, unredacted draft zoning rewrite document as it was submitted by the taxpayer-funded consultants to Planning Director Ed LeClear.

Jan. 28, 2020 - Borough Solicitor Terry Williams' filing to PA-OOR

Factual background

Requestor seeks an "Electronic copy of Clarion consultants' 600-page draft zoning rewrite document".

The request was denied by letter of State College's Manager and designated Right-to-Know Officer for State College.

The document is under review by Borough staff and following correction and possible revision will be presented to Borough Council at a public meeting for Council's consideration and eventual public input.

At the time it is delivered to the elected officials, it will be placed on the Borough's website and will be available to the general public as a whole.

As a courtesy, once the further revised Consultant's Report becomes public, a copy will be provided to the Requester.

Discussion

The Open Records provision of the Right-to-Know Law contains two exceptions which are applicable to the situation.

A. Under the provisions of Exception 9, 65 P.S. Section 67.708(b)(9), draft of a Bill, Ordinance or Amendment thereto prepared by or for an agency excludes ordinance drafts which are under active work to arrive at a final proposal to be provided to public officials and for public hearing.

B. Furthermore, 65 P.S. Section 67.708(10)(i) clearly provides that ... "legislation proposals, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations" are an exception and are not subject to disclosure.

The consultant, having been retained to provide State College with a proposal for a rewrite of its Zoning Ordinance, is clearly within both exceptions.

It is significant to note that discussions regarding a rewrite of State College's Zoning Ordinance have been ongoing for a number of years and that untold hours of staff time have been utilized to try to arrive at a meaningful proposal for legislative action to be submitted to the elected officials for their review including a requirement as set forth in the Municipality's [sic] Planning Code for public hearings. The Consultant's proposal is nothing more than an opinion to be provided to staff for consideration in rewriting the Zoning Ordinance. That consideration by staff is ongoing and under active review.

Respondent sites [sic] the Open Records Office Opinion in the James v. Upper St. Clair School District case. In that matter, the decision was based upon (1) some records do not exist, (2) the request is sufficiently specific, (3) the District has not demonstrated that names and addresses are protected from disclosure, (4) the District has not demonstrated that the records are protected by the Attorney-Client Privilege, (5) that an email response was not predecisional or deliberative material.

In other words, the case does not deal with draft legislation under active consideration and rework by the Municipality.

When a final proposal is prepared and submitted to the elected officials for their and public review, the document in its final form then becomes a public record.

Conclusion.

For the reasons set forth above, the Respondent, State College, respectfully requests that the appeal filed by the Requester, be denied.

#### Jan. 28, 2020 - Attestation of Thomas J. Fountaine, II

I, Thomas J. Fountaine, II, make the following attestation under the penalty of perjury:

1. I am the Right to Know Officer for Respondent, State College.

2. I received a Standard Right-to-Know Form from Requester and filed a written response denying the request from which the current Appeal has been taken.

3. As Manager of State College, I am fully aware that for a number of years various proposals have been reviewed and reworked to entirely replace State College's Zoning Ordinance.

4. To that end, a consultant with Clarion Associates, LLC was retained to provide advice to the Municipality including a proposed draft rewrite of the Ordinance for review and editing.

5. That submission, as a Consultant, is currently under active review and editing by the staff of the Municipality.

6. Upon completion, the proposal will be submitted to the elected officials and at that time placed on the Borough's website for review by the general public.

7. At that time, a courtesy copy will be provided to the Requester.

8. I hereby certify that the facts contained in the foregoing Attestation are true and correct to the best of my knowledge, information, and belief, and that I make Attestation subject to the penalty of perjury under 18 Pa.C.S. Section 4904 relating to unsworn falsification.

#### Feb. 10 - PA-OOR representative Joy Ramsingh's request to Terry Williams for more info.

I have some questions regarding the Borough's position statement.

First, exactly which responsive records have been identified by the Borough? From the exemption raised, I can infer that a drafted ordinance is one of the records that the Borough has identified as responsive, but the Borough's position statement also references a consultant's report (described as "an opinion provided to staff"), and/or a proposal.

However, in other portions of the brief it seems like the term "proposal" is used interchangeably with the term "drafted legislation."

Please clarify whether these statements reference documents that are different from the drafted legislation (e.g. "the Borough has a proposal, which consists of drafted legislation and a report," or, "the Borough has a report, a proposal, and a draft," etc.).

I seek this clarification because, in order for the OOR to be able to make a determination about which exemption applies and why, we need to have a very clear picture of which records are responsive, as well as the nature of those records.

If you are referencing more than just drafted legislation/ordinances, I need supplemental evidence as to the exemption relating to internal, predecisional deliberative records. Particularly, I need an affirmative statement, made under penalty of perjury, that the Borough has maintained this record internally (including its representatives). See *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commonwealth Court 2011).

The Borough may submit this additional evidence by or before February 12, 2020, at noon.

#### Feb. 14 - Borough Solicitor Terry Williams response to PA-OOR, Ramsingh

"In response to your request of February 10, 2020, there is no additional evidence.

By way of explanation, the Requestor's request was for "Electronic copy of Clarion consultants' 600-page draft zoning rewrite document, mentioned by Planning Director Ed LeClear at the Jan. 8, 2020 meeting of the State College Planning Commission. PDF by email is preferred format."

We do not believe that this is what Ed LeClear was referring to at the January 8, 2020 meeting.

Regardless, what Clarion consultants is working with the Borough is a draft zoning rewrite document. It is both

a proposal and a draft legislation which continues to be worked on by members of the Borough staff.

This material is part of the extensive pre-decisional deliberation which staff is utilizing to formulate a proposed zoning ordinance rewrite which ultimately will be delivered to the elected officials, planning commission and at that time be placed on the Borough's information website and, as previously noted, a copy will be forwarded to the Requestor."

## Feb. 28 - PA-OOR Final Decision denying appeal.

### INTRODUCTION

Katherine Watt ("Requester") submitted a request ("Request") to State College Borough ("Borough") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of a draft zoning ordinance.

The Borough denied the Request, arguing that the responsive record reflects the internal, predecisional deliberations of the Borough.

The Requester appealed to the Office of Open Records ("OOR").

For the reasons set forth in this Final Determination, the appeal is denied, and the Borough is not required to take any further action.

### FACTUAL BACKGROUND

On January 9, 2020, the Request was filed, seeking an "[e]lectronic copy of Clarion consultants' 600 page-page draft zoning rewrite document, mentioned by Planning Director Ed LeClear at the Jan. 8, 2020 meeting of the State College Planning Commission. PDF by email is preferred format."

On January 15, 2020, the Borough denied the Request, arguing that the responsive record reflects the internal, predecisional deliberations of the Borough. 65 P.S. § 67.708(b)(10)(i)(A).

On January 21, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 28, 2020, the Borough submitted a position statement reiterating its grounds for denial and also arguing that the responsive record is also exempt as "[t]he draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency." 65 P.S. § 67.708(b)(9). In support of its position, the Borough submitted the affidavit of Thomas Fountaine, its Open Records Officer.

On February 10, 2020, the OOR sought clarification from the Borough as to the nature of the identified responsive records.

Specifically, the OOR asked the Borough to clarify whether the responsive record consisted purely of drafted

legislation, or whether there were attachments, such as a proposal letter to draft the legislation.

On February 14, 2020, the Borough responded, noting that the responsive record was both "a proposal and a draft legislation."

### 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. Commonwealth Court 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" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commonwealth Court 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Borough is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302.

Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901.

An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1).

Preponderance of the evidence has been defined as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its

nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commonwealth Court 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commonwealth Court 2010)).

The Borough argues that the responsive record is exempt under Section 708(b)(9) of the RTKL because it “is in draft form and encompasses a legislative proposal as a rewrite of the Borough’s Zoning Ordinance.”

Section 708(b)(9) exempts from disclosure “[t]he draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.” 65 P.S. § 67.708(b)(9).

This exemption covers only drafts that fall into the categories identified by the statute. *See, e.g., Public Interest Legal Foundation v. City of Phila. Office of City Commissioners*, OOR Dkt. AP 2018-0256, 2018 PA O.O.R.D. LEXIS 562 (drafts of transcripts do not meet the categories identified by the exemption).

Likewise, the exemption cannot be claimed for a draft ordinance which is in conventional use, even if it has not been formally approved by the agency. *See Phila. Public Sch. Notebook v. Sch. Dist. of Phila.*, 49 A.3d 445, 451-52 (Pa. Commonwealth Court 2012); *Melniczak v. Pa. Dep’t of Rev.*, OOR Dkt. AP 2013- 0244, 2013 PA O.O.R.D. LEXIS 188.

Mr. Fountaine attests, in part:

"As Manager of State College, I am fully aware that for a number of years various proposals have been reviewed and reworked to entirely replace State College’s Zoning Ordinance.

To that end, a consultant with Clarion Associates, LLC was retained to provide advice to the Municipality including a proposed draft rewrite of the Ordinance for review and editing.

That submission, as a Consultant, is currently under active review and editing by the staff of the Municipality."

Under the RTKL, an affidavit made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commonwealth Court 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commonwealth Court 2010).

In the absence of any competent evidence that the Borough acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commonwealth Court 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commonwealth Court 2013)).

Here, the face of the Request seeks a form of drafted legislation, and the Borough has established by its sworn statement that the responsive record is drafted legislation which is not currently in use. 65 P.S. § 67.708(a)(1). [FOOTNOTE 1 - The Borough also argues that the drafted legislation reflects the internal, predecisional, deliberative processes of the Borough. *See* 65 P.S. § 67.708(b)(10)(i)(A).

Because we find that the Borough has met its burden of proof as to the draft legislation exemption, we need not address the remaining arguments set forth by the Borough.]

The Requester argues that several similar documents have been placed on the Borough’s website for review, and that this denial of access is arbitrary.

The RTKL is not a confidentiality statute — an agency has discretion to grant access to records which would otherwise fall under a RTKL exemption. *See* 65 P.S. § 67.506(c).

Accordingly, the fact that the Borough previously exercised its discretion to provide certain material does not diminish the Borough’s ability to argue an exemption for similar material, under the RTKL.

## CONCLUSION

For the foregoing reasons, the appeal is denied, and the Borough is not required to take any further action. This

Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Centre 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 *See* RTKL. 65 P.S. § 67.1303. 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. Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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