

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philadelphia Industrial Development Corporation	:	
	:	
	:	No. 528 C.D. 2010
v.	:	Argued: February 8, 2011
Jihad Ali,	:	
	:	
Appellant	:	

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON¹**

FILED: April 18, 2011

Jihad Ali (Appellant) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), dated March 2, 2010. The trial court reversed a final determination of the Office of Open Records (OOR), dated June 17, 2009, holding that Philadelphia Industrial Development Corporation (PIDC) is not subject to the open records requirements of the Right-To-Know Law (RTKL)² for the purposes of Appellant’s request. The primary issue in this case is whether PIDC qualifies as “local agency” under Section 102 of the RTKL, 65 P.S. § 67.102. For the reasons that follow, we affirm the trial court’s decision.

¹ Judge Butler recused himself from consideration of this matter. While the panel of judges that heard the case voted 2 to 1 to affirm, pursuant to our opinion circulation rules all remaining commissioned judges voted on the opinion and a tie vote resulted. Therefore, this opinion is filed pursuant to Section 256(b) of the Internal Operating Procedures of the Commonwealth Court. 210 Pa. Code § 67.29(b).

² Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-.3104.

PIDC is a private, not-for-profit Pennsylvania corporation formed jointly in 1957 by the Greater Philadelphia Chamber of Commerce (Chamber of Commerce) and the City of Philadelphia (City) for the purpose of promoting economic development throughout the City. PIDC's board of directors is comprised of 30 members: eight members are nominated by the President of the Chamber of Commerce; fifteen members are persons prominent in the financial, commercial, industrial and professional community of the City, nominated jointly by the Director of Commerce of the City and the President of the Chamber of Commerce; and seven are City officials *ex officio*. (Supplemental Reproduced Record (Supp. R.R.) at 73b-75b.) In the event that PIDC terminates operations or dissolves, the City will receive all of PIDC's assets. (Supp. R.R. at 97b.)

Although not created by ordinance, PIDC was designated as the City's official industrial development agency pursuant to an ordinance adopted by the Philadelphia City Council on August 21, 1958, under the Industrial Development Assistance Law.³ (R.R. at 105b.) Following the City's designation, PIDC began issuing tax-exempt obligations under Section 103 of the Internal Revenue Code of 1954 (Code).⁴ On January 30, 1967, however, the IRS ruled that obligations issued by PIDC would no longer be considered tax-exempt under Section 103 of the Code because PIDC was not acting "on behalf of" the City. (Supp. R.R. at 107b-110b.) This ruling was ostensibly a motivating factor behind the General Assembly's

³ Act of May 31, 1956, P.L. (1955) 1911, *as amended, formerly* 75 P.S. §§ 351-358, repealed by the Act of November 17, 1998, P.L. 788.

⁴ 26 U.S.C. § 103. Section 103 of the Code provides that gross income does not include interest on the obligations of a State, a Territory, or a possession the United States, or any political subdivision of any of the foregoing, or the District of Columbia.

passage of the Economic Development Financing Law (EDFL), Act of August 23, 1967, P.L. 251, *as amended*, 73 P.S. §§ 371-386.⁵

Pursuant to Section 4 of the EDFL, 73 P.S. § 374, the City adopted an ordinance creating the Philadelphia Authority for Industrial Development (PAID) on October 25, 1967.⁶ Unlike PIDC, PAID has the power to issue tax-exempt obligations under Section 103 of the Code. As required by Section 9 of the EDFL, 73 P.S. § 379, PAID is governed by a five-member board of directors appointed by the Mayor of the City. PAID, however, has no employees of its own.

Concurrent with its formation, PAID entered into a contractual relationship with PIDC. Under the agreement between PAID and PIDC, PAID designates PIDC “as its management agent and administrator of . . . routine administrative and operating affairs.” (Supp. R.R. at 22b.) Although PIDC fills virtually all of PAID’s staffing needs, PAID exercises no authority or control over PIDC’s employees: “PAID does not hire or fire PIDC’s employees; does not establish salaries; nor does PAID exercise any control over job titles, responsibilities, or performance of PIDC employees.” (Appellant’s Brief at 26.)

On January 15, 2009, Appellant utilized a standard Right-to-Know request form to seek certain records from PIDC and certain records from PAID.⁷ Appellant requested four categories of documents:

⁵ The EDFL “authorizes the formation of industrial and commercial development authorities by any county, city, incorporated town, borough, or township, pursuant to the adoption of an ordinance or resolution by the local governing body. Such an authority is empowered to borrow and issue bonds.” 23 Summ. Pa. Jur. 2d Municipal and Local Law § 21:197.

⁶ It is undisputed that PAID is subject to the open records requirements of the RTKL.

⁷ It is unclear whether Appellant directed his Right-to-Know request to PIDC or PAID. Although Appellant’s request was emailed to Pauld@pidc-pa.org, a PIDC email address, PAID’s

1. Contract and all attachments between PIDC and PAID appointing [PIDC] as Management Agent for PAID (periods 2008-2009);
2. List of PIDC personnel (titles and salaries);

Ordinance enacting PIDC; and

3. Ordinance enacting PAID.

(Supp. R.R. at 112b.)

On January 15, 2009, a representative of PIDC granted in part and denied in part Appellant's Right-to-Know request. The PIDC representative granted Appellant's request for a copy of the contract between PAID and PIDC and a copy of the ordinance enacting PAID. The PIDC representative, however, denied Appellant's request for a copy of the ordinance enacting PIDC, because there is no ordinance enacting PIDC. Rather, PIDC was created as a private, not-for-profit corporation. The PIDC representative also denied Appellant's request for a list of PIDC personnel, reasoning that "PIDC is not an agency subject to the [RTKL]." (Supp. R.R. at 114b.)

On February 5, 2009, Appellant appealed PIDC's partial denial of his request to OOR pursuant to Section 1101(a) of the RTKL, 65 P.S. § 67.1101(a).⁸ By final determination issued June 17, 2009, OOR granted Appellant's appeal and directed PIDC to provide Appellant with the requested records. OOR determined that PIDC falls within the scope of the RTKL because PIDC qualifies as a "similar governmental entity" under Section 102 of the RTKL's definition of "local

website (<http://www.paid-pa.org> (last visited Feb. 15, 2011)) designates the same email address as the proper destination for Right-to-Know requests sent via email.

⁸ The initial basis for Appellant's appeal to OOR was that PIDC is an "agency" subject to the RTKL because the City designated PIDC as its official industrial development agency by ordinance dated August 21, 1958. (Supp. R.R. at 116b-17b.) By subsequent letter dated March 11, 2009, Appellant added that PIDC's stated purpose is to "promote the industrial and economic development of the City of Philadelphia," and that upon dissolution, all of PIDC's assets will go to the City. (Supp. R.R. at 133b.)

agency,” noting that PIDC and PAID are “so closely intertwined and interdependent.” (Appellant’s Brief at 20.)

On July 17, 2009, PIDC timely appealed OOR’s final determination to the trial court pursuant to Section 1302 of the RTKL, 65 P.S. § 67.1302. PIDC argued, *inter alia*, that OOR erred in finding that PIDC constitutes a “local agency” under the RTKL. By order dated March 2, 2010, the trial court reversed OOR’s final determination, holding that “PIDC is not an agency subject to the open records requirements of the [RTKL].” (Appellant’s Brief at 24.) The trial court reasoned:

While PIDC fills virtually all of PAID’s staffing needs, it also receives revenue from services provided to a mix of other public and private sources. . . .

. . . The OOR mistakenly found that the PIDC is a similar governmental entity [under the RTKL’s definition of “local agency”] because it performs a governmental purpose. Based on the facts above, the PIDC is not a governmental entity at all. While the PIDC may perform all of PAID’s duties, this Court finds that PIDC does not solely perform PAID’s duties. The OOR erred when it intermingled PAID and the PIDC.

(Appellant’s Brief at 26.) This appeal followed.

On appeal,⁹ Appellant argues, *inter alia*, that PIDC is subject to the open records requirements of the RTKL because PIDC qualifies as a “similar governmental entity” under Section 102 of the RTKL’s definition of “local agency.” Specifically, Appellant argues:

⁹ This Court’s review in a statutory appeal is limited to determining whether findings of fact are supported by competent evidence or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision.” *Piasecki v. Dep’t of Transp., Bureau of Driver Licensing*, 6 A.3d 1067, 1070 n.7 (Pa. Cmwlth. 2010). “The scope of review for a question of law under the [RTKL] is plenary.” *Stein v. Plymouth Twp.*, 994 A.2d 1179, 1181 n.4 (Pa. Cmwlth. 2010).

For those private entities who are the life support system of a public entity, then those private entities should be subject to the requirements of the [RTKL]. If the entire private company is not subject to the requirements of the [RTKL], then at the very least, those parts of the private company which have any relation to the operation and function of the public entity should be subject to the requirements of the [RTKL].

....

[W]hen a private company is so closely entwined with the operation of a public entity that the public entity can not exist without the control by the private company, then the private company should be considered a “similar governmental entity” and all of those portions of the private company which deal directly with the operation and control of the public entity should be entitled to disclosure under the [RTKL].

(Appellant’s Brief at 5, 10.) In other words, Appellant contends that PIDC is a “similar government entity” because PAID has contracted PIDC to substantially perform PAID’s duties. We disagree.

When interpreting a statute, this Court is guided by the Statutory Construction Act of 1972, 1 Pa. C.S. §§ 1501-1991, which provides that “the object of all interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). “The clearest indication of legislative intent is generally the plain language of a statute.” *Walker v. Eleby*, 577 Pa. 104, 123, 842 A.2d 389, 400 (2004). Accordingly, “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b). Only “[w]hen the words of the statute are not explicit” may this Court resort to statutory construction. 1 Pa. C.S. § 1921(c). Moreover, “[e]very statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa. C.S. § 1921(a). It is presumed “[t]hat the General Assembly intends the entire statute to

be effective and certain.” 1 Pa. C.S. § 1922(2). Thus, no provision of a statute shall be “reduced to mere surplusage.” *Walker*, 577 Pa. at 123, 842 A.2d at 400. Finally, it is presumed “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa. C.S. § 1922(1).

Section 102 of the RTKL defines “agency” as “[a] Commonwealth agency, a local agency, a judicial agency or a legislative agency.” (Emphasis added.) In turn, “local agency” is defined as any of the following:

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

Id. (emphasis added). The term “similar governmental entity” is not defined under the RTKL.¹⁰

Under the doctrine of statutory construction known as *ejusdem generis*, “where general words follow the enumeration of particular classes of persons or things, the general words will be construed of the same general nature or class as those enumerated.” *Indep. Oil & Gas Ass’n of Pa. v. Bd. of Assessment Appeals of Fayette Cnty.*, 572 Pa. 240, 246, 814 A.2d 180, 184 (2002) (quoting *McClellan v. Health Maint. Org. of Pa.*, 546 Pa. 463, 473, 686 A.2d 801, 806 (1987)). This concept has been codified in Section 1903(b) of the Statutory Construction Act, 1 Pa. C.S. § 1903(b), which provides: “General words shall be construed to take their meanings and be restricted by preceding particular words.” Accordingly, the term “similar governmental entity” must be construed in light of

¹⁰ Appellant does not contend that PIDC falls under any of the other types of entities specifically listed under Section 102 of the RTKL’s definition of “local agency.”

the particular terms preceding it, which include: “any local, intergovernmental, regional or municipal agency, authority, council, board, [or] commission.” Section 102 of the RTKL.

Generally, local, intergovernmental, regional or municipal agencies, authorities, councils, boards, or commissions are governmental entities established by a political subdivision pursuant to statutory authorization.¹¹ As PIDC aptly observed:

The elements common to each of these governmental entities include: (1) Each is created by a political subdivision pursuant to specific statutory power granted to the political subdivision; (2) Each is considered to be either a division of a political subdivision or political subdivision in its own right; (3) The members are appointed exclusively by the governing body of the creating political subdivision; (4) The political subdivision delegates, rather than contracts, the power to perform a governmental function to the governmental entity; and (5) The governing body of the creating political subdivision has the authority to disband the agency, authority, council, board or commission.

(PIDC’s Brief at 16-17.)

Applying the doctrine of *ejusdem generis*, it is clear that PIDC is not a “similar governmental entity” because PIDC is disparate from all of the specific types of governmental entities expressly listed in Section 102 of the RTKL’s definition of “local agency.” PIDC was not created by a political subdivision

¹¹ See *e.g.*, 53 Pa. C.S. §§ 2301-2316; Intergovernmental Cooperation Authority Act for Cities of the Second Class, Act of February 12, 2004, P.L. 73, 53 P.S. §§ 28101-28707; Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class, Act of June 5, 1991, P.L. 9, 53 P.S. §§ 12720.101-12720.709; Municipality Authorities Act, 53 Pa. C.S. §§ 5601-5623; The Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §§ 65101-68701; The Borough Code, Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. §§ 45101-48501.

pursuant to a specific statutory power; PIDC is not a division of a political subdivision or a political subdivision itself; PIDC's members are not appointed exclusively by the governing body of a political subdivision; PIDC does not require a delegation of authority from a political subdivision to promote economic development; and PIDC cannot be disbanded by a political subdivision. More to the point, PIDC is not a governmental entity at all. Accordingly, PIDC is not a "local agency" subject to the open records requirements of the RTKL.

That PIDC is not a "local agency" under Section 102 of the RTKL is further bolstered by the fact that the General Assembly expressly provided for the situation where an agency has contracted with a party to perform a governmental function in Section 506(d) of the RTKL, 65 P.S. § 67.506(d). Section 506(d) provides, in pertinent part:

(d) Agency possession.—

(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.

(2) Nothing in this act shall be construed to require access to any other record of the party in possession of the public record.

(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.

Under this section, therefore, documents in the possession of a party contracted by an agency to perform a governmental function on behalf of the agency are subject to the RTKL to the extent that they directly relate to the governmental function that the party was contracted by the agency to perform. If we were to conclude that

PIDC is a “local agency” because it has been contracted by PAID to perform PAID’s duties, Section 506(d) of the RTKL would be rendered meaningless.¹² As we stated above, no provision of a statute shall be “reduced to mere surplusage.” *Walker*, 577 Pa. at 123, 842 A.2d at 400. While we are cognizant of the fact that PIDC has been contracted to perform virtually all of PAID’s duties, the *extent* to which a private party has been contracted by an agency is not determinative of whether the private party can or should be considered a “local agency” under the law.

Accordingly, the decision of the trial court is affirmed.^{13, 14}

P. KEVIN BROBSON, Judge

Judge Butler did not participate in the decision in this case.

¹² Appellant does not argue that Section 506(d) of the RTKL is applicable to his request.

¹³ Appellant also argues that the trial court erred in relying on statements made by PIDC’s attorney which were not supported by evidence of record in holding that PIDC is not a “local agency” under the RTKL. Specifically, Appellant contends that the trial court improperly accepted statements made by PIDC’s counsel, regarding PIDC’s activities outside of providing services for PAID, without any supporting documentary evidence. Even if we assume, *arguendo*, that the trial court acted with impropriety, the trial court’s reliance on PIDC’s counsel’s statements constitutes harmless error because PIDC’s activities outside of performing services for PAID are not relevant to our determination that PIDC is not a “local agency” under Section 102 of the RTKL.

¹⁴ PIDC argues, in the alternative, that OOR’s final determination is ineffective and void because it was not issued within the statutorily mandated time period. PIDC also argues that OOR denied PIDC due process by relying on evidence that was not part of the record. Having determined that PIDC is not a “local agency” under Section 102 of the RTKL, we need not address PIDC’s alternative arguments.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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 : No. 528 C.D. 2010
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 v. :
 Jihad Ali, :
 :
 Appellant :

ORDER

AND NOW, this 18th day of April, 2011, the order of the Court of Common Pleas of Philadelphia County (trial court), dated March 2, 2010, is hereby AFFIRMED.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McCULLOUGH

FILED: April 18, 2011

I respectfully dissent because I believe that, under the facts of this case, the Philadelphia Industrial Development Corporation (PIDC) qualifies as a “similar governmental entity” and, thus, fits within the definition of a “local agency” pursuant to section 102 of the Right-to-Know Law (RTKL), Act of February 14, 2008, P.L. 6, as amended, 65 P.S. §67.102.

As stated by the Majority, section 102 of the RTKL defines a “local agency” as any of the following:

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

(Emphasis added.) The term “similar governmental entity” is not defined under the RTKL.

The Majority correctly notes that the City of Philadelphia (City) created the Philadelphia Authority for Industrial Development (PAID) by ordinance, whereas PIDC originated as a joint venture in 1957 between the Greater Philadelphia Chamber of Commerce and the City for the purpose of promoting economic development throughout the City. However, while PIDC was not created by ordinance, the Majority further notes that PIDC was in fact designated as the City’s official industrial development agency pursuant to an ordinance adopted by Philadelphia City Council in 1958. Similar to other local agencies, PIDC issued tax-exempt obligations, until an adverse IRS ruling in January 1967. Thus, PIDC’s very existence was substantiated by City ordinance and its actions resembled those of other local agencies.

The ordinance creating PAID was adopted by the City in October 1967. Although PAID was governed by a five-member board of directors appointed by the City’s Mayor, PAID had no employees of its own. Instead, PAID immediately entered into a contractual relationship with PIDC designating PIDC as “its management agent and administrator of such of its routine administrative and operating affairs which may be lawfully delegated.”¹ (S.R.R. at 22b.) In other words, PIDC performs all lawfully-delegated managerial duties on behalf of PAID. PAID itself appears to exist solely as a proper conduit for the issuance of tax-exempt obligations and was only created subsequent to the adverse IRS ruling

¹ The record reveals that, pursuant to the aforementioned contractual relationship, PAID pays certain fees to PIDC for its services. (S.R.R. at 22b.) However, PIDC also generates revenue from other sources, including royalties relating to a computerized loan reporting system developed by PIDC and licensed to other industrial development corporations, rent from an office building owned by PIDC, and rent from a sublease of office space to a third party. Id.

prohibiting PIDC from issuing the same. Furthermore, in the event that PIDC terminates operations or dissolves, the City will receive all of PIDC's assets. (S.R.R. at 97b.) Even applying the doctrine of statutory construction known as *ejusdem generis*, this factual scenario weighs heavily in favor of the conclusion that PIDC is a "similar governmental entity" and, hence, a "local agency," under the RTKL.

The Majority aptly notes section 506(d) of the RTKL, which provides for access to public records in the possession of a party with whom an agency contracts to perform a governmental function on behalf of that agency. Recently, we have seen the application of that section to a foundation that performed a governmental function, namely fundraising, pursuant to a contractual relationship with a state university. East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496 (Pa. Cmwlth. 2010), appeal denied, ___ Pa. ___, ___ A.3d ___ (Nos. 439 and 440 MAL 2010, filed March 16, 2011). In this case, however, PIDC's association with PAID extends well beyond a mere contractual relationship and PIDC appears to perform more than a single governmental function. Indeed, PAID would not function at all without PIDC.

For these reasons, I would reverse the order of the trial court.

PATRICIA A. McCULLOUGH, Judge