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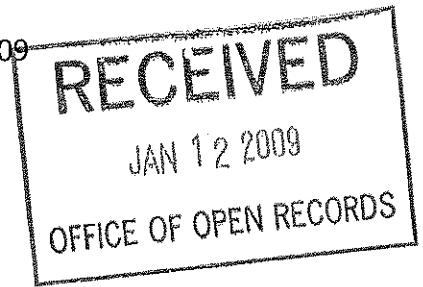
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January 8, 2009



**VIA EMAIL AND
REGULAR MAIL**

Ms. Terry Mutchler
Executive Director of the Office of Open Records
400 North Street
Harrisburg, PA 17120

**RE: REQUEST FOR AN ADVISORY OPINION
RECORDINGS OF MEETINGS**

Dear Executive Director Mutchler:

This office serves as Solicitor for the Borough of Franklin Park in Allegheny County. Borough Council has asked me to request an Advisory Opinion from your office concerning the recording of meetings. Consistent with the guidelines provided on the website for the Office of Open Records, please consider this request.

Facts

The Borough Secretary uses a handheld microcassette recorder at agenda work sessions and regular meetings in order to assist her with compiling the official minutes. She also uses a laptop computer and types her notes into a template for the minutes as the meeting progresses. In the week or two following the regular meeting, the Secretary completes the draft minutes using her notes and the tape of the meeting. After the draft minutes are prepared and sent to Council as part of their agenda work session packet, the microcassette tapes are erased or over-written. The Borough does not maintain a collection of meeting tapes.

The Borough received Right to Know requests in the past seeking the meeting tapes and Secretary's notes. The Borough's response was to deny the request based upon the holding of Tapco, Inc. v. Township of Neville, 695 A.2d 460 (Pa. Commw. Ct. 1997). No exceptions were filed, and no further requests were received. There is also no litigation pending regarding any of the issues that are raised in this request for an opinion.

Questions of Law

The concise questions of law upon which the Borough seeks your advice are as follows:

- 1) Whether a microcassette recording of a public meeting is considered a "record" under 65 P.S. § 67.102.

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Executive Director Mutchler
January 8, 2009
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2) Whether a microcassette recording of a public meeting used for the sole purpose of creating the minutes is considered a "public record" or if it falls under any of the exceptions listed in 65 P.S. § 67.708(b), and more specifically, the exception for draft minutes in 65 P.S. § 67.708(b)(21).

3) Whether the Secretary's notes taken during a public meeting for the purposes of creating the minutes are considered "public records" or if they fall under any of the exceptions listed in listed in 65 P.S. § 67.708(b), and more specifically, the exception for draft minutes in 65 P.S. § 67.708(b)(21) or the exception for notes and working papers in 65 P.S. § 67.708(b)(12).

4) In the event that the tapes are considered public records, whether the Borough has to change its current practice of not storing or otherwise maintaining copies of meeting tapes in light of the direction provided by 65 P.S. § 65.507, entitled "Retention of records."

This request for an opinion is relevant to the application and/or implementation of the new Right to Know Law because of the uncertainty caused by the change to the definition of "public records" and the new exception relating to draft meeting minutes. The rationale of Tapco appears to be no longer relevant, but the holding may have been codified in the new exception related to draft meeting minutes. If the recordings are considered "public records" that are open to access, the Borough needs to know whether it is proper to continue to maintain the recordings only for the short amount of time needed to create the written minutes or if it needs to undertake a new practice of storing the tapes and making them available for the long term.

My contact information is listed on the first page of this letter, and the OOR may communicate with me about this request. If you should have any questions, please do not hesitate to contact me.

Very truly yours,



Robert Max Junker

Cc: Ambrose Rocca, Borough Manager



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

February 17, 2009

Robert Max Junker
THE LAW OFFICES OF IRA WEISS
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RE: Advisory Opinion 2009-003 – Audio Recordings of Meetings

Dear Mr. Junker,

Thank you for writing to the Office of Open Records (“OOR”) with your December 10, 2008 request for an Advisory Opinion pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”).

On behalf of the Borough of Franklin Park, you sought an Advisory Opinion of the Office of Open Records to determine 1) whether audio recordings of a public meeting are considered a record, 2) whether audio recordings used solely to create minutes of a meeting are public record; and 3) whether a Board Secretary’s notes, used for the purpose of creating minutes of a meeting, are considered a record under the new law.

Your request for an Advisory Opinion is granted. Please be advised that for the reasons set forth below, audio recordings and a Board Secretary’s notes are considered public record and, therefore, subject to the RTK.

Are Microcassettes Recordings of a Public Meeting Considered a “Record?”

Please be advised that the Pennsylvania Sunshine Act, 65 P.S. §§701, *et seq.* does not require that a local agency record public meetings. However, if an agency chooses to make audio, video or digital recordings of a public meeting, those records are public records subject to the Right-to-Know law as follows.

Under section 102 of the RTKL, entitled *Definitions*, the law defines the term “record” as:

“Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound

recording, information stored or maintained electronically and a data-processed or image-processed document” (*emphasis added*).

The term “record,” according to the definition, specifically identifies a “tape.” Further, the recording of a public meeting documents an activity of the agency and is created in connection with that activity. Therefore, by definition under the Act, a tape recording of a public meeting is a record subject to the RTK law.

Applicability of the Law to Microcassette Recordings Used Solely to Create Minutes

You asked whether a microcassette recording of a public meeting, used for the sole purpose of creating the minutes, is considered a “public record” or if it falls under any of the exceptions listed in 65 P.S. §67.708(b), and more specifically, the exception for draft minutes in 65 P.S. §67.708(b)(21).”

A “public record” is defined by the RTKL as: “A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.” With respect to any exceptions to disclosure, we limit our answer to the inquiry regarding an exemption for draft minutes in 65 P.S. §67.708(b)(21) and will not address whether or not a microcassette falls under any other exception as the RTKL is clear that agencies bear the burden of proving the applicability of exemptions (§67.708(A)(1)) and it is not the role of this Office to identify potential areas of exemption.

In Tapco, Inc. v. Twp of Neville, 695 A.2d 460 (Pa. Cmwlth. 1997), the case cited in your letter, the Court specifically held that a tape recording of a public meeting is not a “minute” as it does not represent the official record of a township’s actions. Because the definition of “public record” was more limited under the previous RTKL and the tape did not qualify as a “minute, order or decision” it was not subject to disclosure. The current definition, as set forth in the answer above, is more expansive and specifically includes tapes. The case law is clear that a tape is not a minute, nor do we view it as a draft minute.

Applicability of the Law to a Board Secretary’s Notes Taken During a Public Meeting

Your sought guidance on “whether the Secretary’s notes taken during a public meeting for the purpose of creating the minutes are considered “public records” or if they fall under any of the exceptions listed in 65 P.S. §67.708(b), and more specifically, the exception for draft minutes in 65 P.S. §67.708(b)(21) or the exception for notes and working papers in 65 P.S. §67.708(b), and more specifically, the exception for draft minutes in 65 P.S. §67.708(b)(21).”

As set forth in the previous answer, the OOR will consider only the specific exemptions cited and provide guidance. As described in your letter, the Secretary “types her

notes into a template for the minutes as the meeting progresses” and completes the minutes using that document and the tape recording. Because the notes are typed using a template for minutes which is later revised and finalized for official approval, we consider the notes, as you described them, to be draft minutes pursuant to §67.708(b)(21). It is important to note that the exemption for draft minutes is only preserved until the next meeting of the agency. If official minutes are not adopted at that time, draft minutes become public records and must be disclosed upon receipt of a RTKL request.

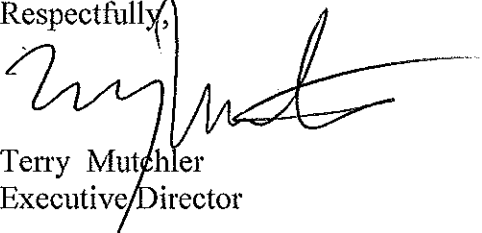
You further cite section 708(b)(12) as a possible exception to these notes. That section, entitled *Exemptions for Public Records*, states: “Notes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose,” §67.708(b)(12).

Please be advised that the draft minutes do not fall within this exemption. As these notes are typed during a public meeting into a template for board minutes, they are not solely for personal use as the notes form the basis for the final minutes and, as set forth above, constitute draft minutes. They are done in the scope of the Secretary’s work for professional and not personal use and have an official purpose of documenting the official actions of the agency.

Lastly, you asked whether “in the event that the tapes are considered public records, whether the Borough has to change its current practice of not storing or otherwise maintaining copies of meeting tapes in light of the direction provided by 65 P.S. §67.507, entitled “*Retention of records.*””

This issue is governed by legal requirements for record retention and not the RTKL, which is intended to increase access to records of government but does not address their retention except to provide immunity from the penalties under the act as follows: “No agency, public official or public employee shall be liable for civil or criminal damages or penalties under this act **for complying with any written public record retention and disposition schedule**” (*emphasis added*). This suggests, conversely, that destruction of a record without adherence to a retention and disposition schedule could result in the imposition of penalties as set forth in §67.1305. Our guidance, therefore, is that preservation of tapes is necessary if they are required to be saved in accordance with record retention requirements applicable to boroughs or if they are not addressed in a record retention and disposition schedule (§67.1306). In any event, if there is a request for a record prior to destruction, it must be preserved and provided even if it is on a disposition schedule.

Respectfully,



Terry Mutchler
Executive Director