

HEY STEINBRENNER, GIMME THOSE RECORDS! AN  
EXAMINATION OF THE SUPREME COURT OF  
PENNSYLVANIA'S DECISION IN *SWB YANKEES, LLC V.*  
*WINTERMANTEL*

I. INTRODUCTION

With municipal agencies struggling to manage projects that are less than profitable, many agencies are bound to consider ways to relieve the financial burden of running unsuccessful business ventures. The private entities that contract with the government to perform these functions should know the consequences of doing business with the government. If privacy is of concern to your business, or your client's business, please read on. The decision in *SWB Yankees, LLC v. Wintermantel*<sup>1</sup> will enable citizens to request the records of private contractors and the business that they conduct with other private entities.<sup>2</sup>

In *Wintermantel*, the Supreme Court of Pennsylvania held that when the government contracts with a private entity to perform some "non-ancillary"<sup>3</sup> "governmental function,"<sup>4</sup> the records of the private entity that "directly relate[]"<sup>5</sup> to that function are subject to disclosure under Pennsylvania's Right-to-Know Law (RTKL).<sup>6</sup> The broad construction of "governmental function,"<sup>7</sup> and the addition of "*non-ancillary*"<sup>8</sup> to case law, is an attempt to provide guidance for private entities doing business with the Commonwealth.

This survey will detail how the Supreme Court of Pennsylvania has interpreted the RTKL and the effect that it will have on private entities that perform *governmental functions* on

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<sup>1</sup> *SWB Yankees, LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012).

<sup>2</sup> *Id.* at 1042.

<sup>3</sup> *Id.* at 1042, 1047.

<sup>4</sup> 65 PA. STAT. ANN. § 67.506(d)(1) (West 2010).

<sup>5</sup> *Id.*

<sup>6</sup> *Wintermantel*, 45 A.3d at 1044.

<sup>7</sup> tit. 65, § 67.506(d)(1).

<sup>8</sup> *Wintermantel*, 45 A.3d at 1042 (emphasis added).

behalf of the Commonwealth. Part II of this survey will provide the reader with the law necessary to understand the effect of the court's decision in *Wintermantel*. Part III will then lay out the issues before the court, detail the parties' arguments, and, most importantly, explain the court's analysis of those issues. Part IV will explain the effect of the court's decision and provide some guidance as to where the law stands and what changes are foreseeable. In conclusion, Part V will summarize the court's holding and wrap up the analysis with a brief statement on the state of the law, and what it means for the businesses and citizens of the Commonwealth.

## II. BACKGROUND

### *A. Statutes*

RTKL<sup>9</sup> is designed to hold "public officials accountable for their actions"<sup>10</sup> and empower citizens by providing them with access to "official government information."<sup>11</sup> The RTKL provides that "a public record . . . shall be accessible for inspection and duplication in accordance with this act."<sup>12</sup> A "record" is defined as "[i]nformation . . . 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."<sup>13</sup> With regard to information that is not in the possession of an agency, the RTKL provides:

- (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,

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<sup>9</sup> tit. 65, §§ 67.101-3104.

<sup>10</sup> *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010).

<sup>11</sup> *Id.*

<sup>12</sup> tit. 65, § 67.701(a).

<sup>13</sup> *Id.* § 67.102.

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.<sup>14</sup>

### *B. Case Law*

In *Allegheny County Department of Administrative Services v. A Second Chance, Inc.*,<sup>15</sup> the Commonwealth Court of Pennsylvania considered whether employee records in the possession of a third-party contractor were "public records" for purposes of the RTKL.<sup>16</sup> Reporter James Parsons requested employee information "about certain ASCI employees who provide services pursuant to a contract between ASCI and the County."<sup>17</sup> Parsons claimed that ASCI was a "contractor that perform[ed] an essential government function for the County."<sup>18</sup>

The court interpreted section 506(d)(1) of the RTKL to mean that "a record in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency shall be deemed a 'public record,' and . . . shall be accessible under the RTKL, so long as the record . . . directly relates to the governmental function."<sup>19</sup> The court reasoned that when an agency contracts with a private company to perform a function that it would otherwise have to perform itself, the records that directly relate to that function, in the possession of the third-party contractor, are public records under section 506(d)(1) of the RTKL.<sup>20</sup> Thus, section 506(d)(1) "ensure[s] that some level of public access to information about governmental functions is

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<sup>14</sup> *Id.* § 67.506(d)(1)-(2).

<sup>15</sup> *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025 (Pa. Commw. Ct. 2011).

<sup>16</sup> *Id.* at 1029.

<sup>17</sup> *Id.* at 1027, 1034.

<sup>18</sup> *Id.* at 1028.

<sup>19</sup> *Id.* at 1039.

<sup>20</sup> *Id.*

preserved where an agency chooses to contract out the performance of that function to a third-party."<sup>21</sup>

In *East Stroudsburg University Foundation v. Office of Open Records*,<sup>22</sup> the Commonwealth Court of Pennsylvania considered whether a university foundation in the possession of donor records performed a "governmental function[]" on behalf of the University."<sup>23</sup> Dan Berrett, on behalf of *The Pocono Record*, requested donor information from the East Stroudsburg University Foundation.<sup>24</sup> Berrett argued that the requested information was in the possession of a party with whom the University "contracted to perform governmental functions on behalf of the University."<sup>25</sup> In addition, Berrett argued the Foundation performed a governmental function because it was established to advance the educational purposes of the University by providing "students with education at the lowest possible costs."<sup>26</sup> Finally, Berrett argued that the "Foundation functioned as a 'state-affiliated entity' because it was staffed by public employees."<sup>27</sup>

The University initially denied the request, stating that although the University is a Commonwealth agency, the Foundation's relationship with the University was akin to an independent contractor, "not joint ventures or principal and agent."<sup>28</sup> "Therefore, no legal relationship existed" between the Foundation and the University, "and the Foundation was not 'tasked with performing essential governmental functions.'"<sup>29</sup> In addition, both the Foundation and the University argued that "the functions performed by the Foundation are not governmental

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<sup>21</sup> *Allegheny Cnty.*, 13 A.3d at 1039.

<sup>22</sup> *East Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. Ct. 2010).

<sup>23</sup> *Id.* at 500.

<sup>24</sup> *Id.* at 498.

<sup>25</sup> *Id.* at 500.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (according to *The Pocono Record*, "the Vice President for University Advancement held a dual position as Executive Director of the Foundation and the entire staff of the Foundation doubled as staff of the University's advancement department").

<sup>28</sup> *East Stroudsburg Univ. Found.*, 995 A.2d at 500.

<sup>29</sup> *Id.*

functions but rather proprietary business functions that the University is not required to perform by law."<sup>30</sup>

The Commonwealth Court of Pennsylvania issued a broad holding, stating that "[b]ecause the General Assembly only used the term 'governmental function' in 65 P.S. § 67.506(d)(1), . . . all contracts that governmental entities enter into with private contractors necessarily carry out a 'governmental function' – because the government always acts as the government."<sup>31</sup> Therefore, since the "Foundation . . . carries out fundraising on behalf of the University," the court held that "any records 'directly' related" to that function were subject to disclosure.<sup>32</sup> The court reasoned that the term "governmental function" was used to limit access to "those records in a contractor's possession that relate to that [governmental] function."<sup>33</sup> Therefore, only records that "'directly' relate to carrying out the governmental function" can be accessed through the RTKL.<sup>34</sup> For example, the "material used in preparation for the bid for the governmental contract would not be subject to access because those records do not directly relate to carrying out the governmental function."<sup>35</sup>

### *C. The Municipality Authorities Act*

Pennsylvania's Municipality Authorities Act<sup>36</sup> provides that municipal authorities are created for the "benefit of the people of this Commonwealth, for the increase of their commerce and prosperity and for the improvement of their health and living conditions."<sup>37</sup> Authorities created under the Act "perform[] essential governmental functions."<sup>38</sup>

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<sup>30</sup> *Id.* at 502.

<sup>31</sup> *Id.* at 504.

<sup>32</sup> *Id.* at 505.

<sup>33</sup> *Id.* at 504.

<sup>34</sup> *East Stroudsburg Univ. Found.*, 995 A.2d at 504.

<sup>35</sup> *Id.*

<sup>36</sup> 53 PA. CONS. STAT. §§ 5601-5623 (2009).

<sup>37</sup> *Id.* § 5620.

<sup>38</sup> *Id.*

III. ANALYSIS: *SWB YANKEES, LLC v. WINTERMANTEL*A. *Issues*

In *Wintermantel*, the Supreme Court of Pennsylvania decided two issues that should be of great importance to private entities doing business with the Commonwealth.<sup>39</sup> First, does the "operation of a professional baseball team and concessions at a multi-purpose stadium constitute[] a 'governmental function' within the meaning of the Pennsylvania Right to Know Law?"<sup>40</sup> Second, does the information requested constitute a " 'record' within the meaning of the Pennsylvania Right to Know Law?"<sup>41</sup>

B. *Statement of Facts*

The Multi-Purpose Stadium Authority of Lackawanna County (the Authority) was created in 1985 through the Municipality Authorities Act.<sup>42</sup> The Authority was created with the sole purpose of operating a multi-purpose stadium in Lackawanna County.<sup>43</sup> It was the Authority's responsibility to "generate revenue" and "retire debt incurred."<sup>44</sup> Thereafter, the Authority acquired the Scranton/Wilkes-Barre Red Barons, a minor league baseball team affiliated with the Philadelphia Phillies.<sup>45</sup> With the help of capital raised through bonds and public financing, "the Authority constructed the Lackawanna County Stadium, now known as PNC Field . . . to serve as the home field for the franchise."<sup>46</sup> From 1989 to 2006, the Authority managed the day-to-day operations of the baseball team, as well as all other projects at the stadium.<sup>47</sup>

In 2006, "the Phillies ended their affiliation with the Red Barons . . . and the Red Barons became the Scranton/Wilkes-Barre Yankees."<sup>48</sup> The Authority then entered into a "management

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<sup>39</sup> *SWB Yankees, LLC v. Wintermantel*, 18 A.3d 1145, 1145 (Pa. 2011).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *SWB Yankees, LLC v. Wintermantel*, 45 A.3d 1029, 1030 (Pa. 2012).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Wintermantel*, 45 A.3d at 1030-31.

agreement with Mandalay Baseball Properties, LLC, a private entity, which vested Mandalay with the overall management and control of the day-to-day operations of the baseball club and the Stadium."<sup>49</sup> The New York Yankees then formed a joint venture management company with Mandalay known as the SWB Yankees, LLC (the Yankees).<sup>50</sup> The Stadium Authority and the Yankees then entered into a "replacement management agreement" whereby the Yankees "became the sole and exclusive manager of all baseball operations and other entertainment activities and events conducted at the Stadium."<sup>51</sup>

The Yankees were "made 'an agent of the Stadium Authority for the purpose of baseball operations and certain other activities.'"<sup>52</sup> The agreement provided that the "'actions of [the Yankees] taken in accordance with such authority shall bind the Authority and the Team.'"<sup>53</sup> In return, the Yankees were required to make a yearly payment to the Authority.<sup>54</sup> The agreement further provided that the Yankees were "given plenary authority over, among other things, concession sales, while accepting the obligation to make reasonable and prudent expenditures relating to baseball operations."<sup>55</sup> Thereafter, the Yankees contracted with Legends Hospitality, LLC for a food service contract, including concessions at the Stadium, after receiving competing proposals.<sup>56</sup>

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<sup>49</sup> *Id.* at 1031.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (quoting Management Agreement of April 4, 2007, § 1.2(a)).

<sup>53</sup> *Id.* (quoting Management Agreement of April 4, 2007, § 1.2(a)).

<sup>54</sup> *Wintermantel*, 45 A.3d at 1031. The Yankees were "required to make a yearly payment to the Stadium Authority in an amount equal to one-third of the Collected Net Income attributable to such Fiscal Year (the 'Annual Payment'); *provided, however*, that the amount of each Annual Payment shall not be less than \$125,000." *Id.* (citing Management Agreement of April 4, 2007, § 2.9) (emphasis in original).

<sup>55</sup> *Id.* (citing Management Agreement of April 4, 2007, § 1.2(a)).

<sup>56</sup> *Id.*

*C. Procedural History*

## i. The Office of Open Records

Pursuant to the RTKL, Gretchen Wintermantel, on behalf of *The Scranton Times Tribune*, "submitted a request to the Stadium Authority seeking 'access to and copies of all names and the bids submitted to [the Yankees] for a concessionaire contract at the Stadium.'"<sup>57</sup> The Stadium Authority's solicitor denied the request, stating that the Yankees were "not performing a governmental function on behalf of the Stadium Authority," and therefore "the information was not considered a public record of the Authority for purposes of the [RTKL]."<sup>58</sup>

Wintermantel appealed the solicitor's determination to the Office of Open Records (OOR) and argued that "any action by [the Yankees] as the Stadium Authority's agent is public business."<sup>59</sup> The Authority argued that the Yankees' management of a baseball park was "non-governmental, and thus, disclosure of its records under Section 506(d)(1) was not implicated."<sup>60</sup>

The OOR granted the appeal and ordered the Authority to disclose the requested information.<sup>61</sup> The appeals officer reasoned that although the Authority's purpose, running a baseball stadium, might be considered non-governmental, "the Authority is [still] a local governmental agency."<sup>62</sup> Since the Authority contracted away its duties, the appeals officer stated that the test is "whether or not an agency has contracted out functions that *it* would otherwise have to perform."<sup>63</sup> The appeals officer reasoned that due to the agency relationship between the Yankees and the Authority, the management agreement essentially transferred all functions of the Authority to the Yankees.<sup>64</sup> Therefore, according to the appeals officer, this is "precisely the kind of arrangement the RTKL targets in Section 506(d)(1)," and "the records of [the Yankees] are

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1032.

<sup>59</sup> *Id.*

<sup>60</sup> *Wintermantel*, 45 A.3d at 1032.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1033 (emphasis in original).

<sup>64</sup> *Id.*



exactly the type required to be disclosed."<sup>65</sup> To hold any other way "would permit a local agency, expressly subject to the RTKL, to contract away all of its functions to a private company and shield all of its operations from the public."<sup>66</sup>

## ii. Court of Common Pleas

The Yankees appealed the OOR decision to the Lackawanna County Court of Common Pleas.<sup>67</sup> Judge Nealon rejected the Yankees' argument that the bids were not "records" for purposes of the RTKL.<sup>68</sup> According to Judge Nealon, "the request was centered on written concessionaire bids, which readily qualified as 'records' per the broad definition provided in the Law."<sup>69</sup>

The court looked to other jurisdictions that have dealt with the "governmental function" issue and explained that "a number of them employ a 'totality of factors' test to determine whether a private entity acting on behalf of a public agency is subject to the state's open records law."<sup>70</sup> Applying those factors to the facts of the case, Judge Nealon held that the Yankees perform a governmental function on the Stadium Authority's behalf for purposes of the RTKL.<sup>71</sup>

The court reasoned that the purpose of the new RTKL "is to provide broader and easier public access to records relating to the

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<sup>65</sup> *Id.*

<sup>66</sup> *Wintermantel*, 45 A.3d at 1033.

<sup>67</sup> *Id.*; see *SWB Yankees, LLC v. Wintermantel*, No. 09 CV 3691, 2009 WL 3052903, at \*1-2 (Pa. C.P. Lackawanna Cnty. Sept. 9, 2009).

<sup>68</sup> *Wintermantel*, 45 A.3d at 1033.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1036. The common pleas court:

reasoned that 'governmental function' should encompass activities: (1) that the agency is empowered to conduct; (2) that the agency previously performed prior to contractually delegating that function to the government contractor; (3) that are conducted on agency owned property; (4) in which the agency has a continuing financial interest; and (5) that affect the quality or cost of goods or services offered to the public on the agency owned property.

*Id.*; see, e.g., *News & Sun Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992).

<sup>71</sup> *Wintermantel*, 45 A.3d at 1036.

activities of government agencies and their contractors."<sup>72</sup> Therefore, by delegating core functions to a private entity, "municipal authorities could undermine the salutary purposes of the open-records law."<sup>73</sup> Finally, the court highlighted the fact that the Stadium Authority owed Lackawanna County \$13,000,000 for past indebtedness and that the concessionaire contract would impact the "annual payment to the Stadium Authority under the Management Agreement."<sup>74</sup>

### iii. The Commonwealth Court of Pennsylvania

The Yankees appealed the common pleas court's decision, arguing that the lower court (1) "ignored the straightforward meaning of the term governmental function;" (2) "proffered an interpretation of the phrase that contravened the legislative intent underlying the new Law;" and (3) "erroneously rejected the governmental-proprietary test."<sup>75</sup>

The Commonwealth Court of Pennsylvania affirmed the lower court's decision and adopted much of the reasoning employed by Judge Nealon.<sup>76</sup> The court drew substantial support from the fact that, under the Municipality Authorities Act, municipal "authorities perform 'essential governmental functions,' "<sup>77</sup> and the Authority was "clearly created for the benefit of the people of the Commonwealth."<sup>78</sup> Therefore, the fact that the Authority contracted out its operation of the baseball stadium "is of no consequence as Section 506(d)(1) of the RTKL clearly puts a third party in the same position as an agency for the purposes of the RTKL."<sup>79</sup>

The Commonwealth Court held that the Yankees perform a governmental function because they "create[] revenue for the Commonwealth [,] . . . operate[] a public place for the benefit of

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<sup>72</sup> *Id.* at 1034.

<sup>73</sup> *Id.* at 1035.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1036.

<sup>76</sup> *Id.* at 1037; *see also* SWB Yankees, LLC v. Wintermantel, 999 A.2d 672, 673 (Pa. Commw. Ct. 2010).

<sup>77</sup> *Wintermantel*, 45 A.3d at 1037; *see also* *Wintermantel*, 999 A.2d at 675.

<sup>78</sup> *Wintermantel*, 45 A.3d at 1037 (quoting *Wintermantel*, 999 A.2d at 675).

<sup>79</sup> *Id.* (quoting *Wintermantel*, 999 A.2d at 675).

the Commonwealth, [and] the bids requested . . . clearly affect the amount of revenue generated by the Authority."<sup>80</sup> Therefore, "the bids [requested from the Yankees] directly relate to the Authority's governmental function, and thus are public records under the RTKL."<sup>81</sup>

*D. The Supreme Court of Pennsylvania*

i. First Issue: "Governmental Function"

The Yankees appealed the Commonwealth Court of Pennsylvania's decision to the Supreme Court of Pennsylvania, arguing that "exhibiting baseball games and selling concessions" is not a governmental function.<sup>82</sup> First, the Yankees argued "that the extension of 'governmental function' to any and all revenue-raising activities strips the term of any role or function within the statutory scheme."<sup>83</sup> Although the Yankees acknowledged that the purpose of the new RTKL is to "substantially enlarge public access to government records," they argued that there is "no similar purpose with regard to third-party records" because the RTKL is not meant to expose "information held by private third party contractors."<sup>84</sup> In addition, the Yankees argued that "a greater nexus to acts of governance must be required, 'which at a minimum, requires the exercise of authoritative direction or control over a political or sovereign unit.' "<sup>85</sup> Lastly, as a policy matter, the Yankees argued that if the court were to adopt the meaning of governmental function employed by the Commonwealth Court, "it would chill business relations between government agencies and private parties."<sup>86</sup>

Wintermantel countered these arguments by crediting the lower court's analysis and "emphasizing the legislative policy of providing broader access to citizens concerning information about

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<sup>80</sup> *Id.* (quoting *Wintermantel*, 999 A.2d at 675).

<sup>81</sup> *Wintermantel*, 999 A.2d at 676.

<sup>82</sup> *Wintermantel*, 45 A.3d at 1037.

<sup>83</sup> *Id.* at 1038.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1038-39.

the affairs of government."<sup>87</sup> In addition, Wintermantel urged the court to adopt the " 'totality of factors' approach" employed by Judge Nealon because it is "the most appropriate framework for ascertaining if a private contractor is performing a governmental function."<sup>88</sup>

Initially, the court responded to the Yankees' arguments by conceding that the term "governmental function," as used in the statute, is "materially ambiguous."<sup>89</sup> In attempting to find a definition for the term, the court noted that "governmental function" is defined as " 'a government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public.' "<sup>90</sup>

Next, the court highlighted the fact that "the Authority's existence and tax exempt status are justified on the ground that it performs an 'essential governmental function.' "<sup>91</sup> Moreover, the Management Agreement between the Yankees and the Authority affords the Yankee " 'plenary' powers over a primary function of a government agency," and essentially makes the Yankees an " 'agent' of the Authority."<sup>92</sup> Due to the "income-sharing feature of the Management Agreement" and the fact that "certain of Appellant's actions 'shall bind' the agency . . . the interests of the Stadium Authority and Appellant ha[d] become closely intertwined."<sup>93</sup>

The court agreed with Wintermantel that the "objective of the Right to Know Law . . . is to empower citizens by affording them access to information concerning the activities of their government," and, therefore, "a reasonably broad construction of

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<sup>87</sup> *Id.* at 1040.

<sup>88</sup> *Wintermantel*, 45 A.3d at 1040.

<sup>89</sup> *Id.* at 1041 ("[A]n ambiguity exists when there are at least two reasonable interpretations of the text under review."); *see also* *Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 483 (Pa. 2009).

<sup>90</sup> *Id.* at 1041 (quoting BLACK'S LAW DICTIONARY 716 (8th ed. 2004)).

<sup>91</sup> *Wintermantel*, 45 A.3d at 1041 (citing 53 PA. CONS. STAT. § 5620 (2009)).

<sup>92</sup> *Id.* at 1042.

<sup>93</sup> *Id.*

'governmental function' best comports with [that] objective."<sup>94</sup> The court stated that although liquor and gambling may not be thought of as " 'governmental functions,' they plainly are so in the sense that they are core activities assigned to and undertaken by government agencies."<sup>95</sup> "[T]he government's entry into areas which might more comfortably be associated with the private sector" does not suggest a "diminished cause for openness."<sup>96</sup>

The court held that "it is the delegation of some non-ancillary undertaking of government, and not a convention-based assessment of the governmental-versus-proprietary character of the activity, that should control."<sup>97</sup> Although "there is ambiguity in [the] use of the term 'non-ancillary,' " the court found that "the non-ancillary threshold" is the "most amenable to further development over time in the decisional law."<sup>98</sup> The court noted that President Judge Leadbetter correctly observed in her *East Stroudsburg* concurrence "that Section 506 requires that the agency 'has contracted to perform a governmental function.'"<sup>99</sup> The court "read this to connote an act of delegation of some substantial facet of the agency's role and responsibilities, as opposed to entry into routine service agreements with independent contractors."<sup>100</sup>

Turning to the present case, the court reasoned that "[t]he present circumstances . . . do not involve an independent contractor conducting some ancillary activity, nor do they lay in the boundaries."<sup>101</sup> The Stadium Authority was "formed to administer an amusement enterprise [and] generated substantial public indebtedness in [that] venture."<sup>102</sup> Therefore, the court held, "where a government agency's primary activities are defined by

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1041.

<sup>96</sup> *Id.* at 1042.

<sup>97</sup> *Wintermantel*, 45 A.3d at 1042.

<sup>98</sup> *Id.* at 1042-43.

<sup>99</sup> *Id.* at 1043 (quoting *East Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496, 508 (Pa. Commw. Ct. 2010) (Leadbetter, P.J., concurring)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

statute as 'essential governmental functions,' and such entity delegates one of those main functions to a private entity via the conferral of agency status, Section 506(d)(1) pertains on its terms to non-exempted records directly relating to the function."<sup>103</sup>

ii. Second Issue: "Record"

As to the second issue on appeal, the Yankees argued that "the requested information does not fall within the definition of a record [because] the information sought does not 'document a transaction or activity of an agency,' and was not 'created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.'"<sup>104</sup> In addition, the Yankees argued that "the request pertained to bids that were created by prospective subcontractors and submitted to [the Yankees]."<sup>105</sup> Therefore, the bids were not records of an agency.<sup>106</sup>

Wintermantel countered these arguments by stating that "the requested information is a 'record,' since the Management Agreement between the Stadium Authority and Appellant documents a transaction or activity of the Authority, and the bids or proposals are 'integral' to that contract."<sup>107</sup>

The court held that the "written concessionaire bids are 'records' for the purposes of Section 506(d)(1)" because the Yankees accepted "the status of an agent" and performed a "primary public duty of the Stadium Authority."<sup>108</sup> The court explained that section 506(d)(1) "recasts certain third-party records bearing the requisite connection to government as public records 'of the [government] agency.'"<sup>109</sup> According to the court, "it would undermine the clear aim of Section 506(d)(1) . . . to require that the materials be 'of such agency' in the first instance."<sup>110</sup>

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<sup>103</sup> *Wintermantel*, 45 A.3d at 1044.

<sup>104</sup> *Id.* at 1039 (emphasis in original) (quoting 65 PA. STAT. ANN. § 67.102 (West 2010)).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1040.

<sup>108</sup> *Id.* at 1044.

<sup>109</sup> *Wintermantel*, 45 A.3d at 1044 (quoting tit. 65, § 67.506(d)(1)).

<sup>110</sup> *Id.* (quoting tit. 65, § 67.102 (defining "record")).

## iii. Concurrence

Chief Justice Castille filed a concurring opinion in order to address the majority's finding that the information requested "amounts to a 'public record' within the purview of Section 506(d)(1) and the [RTKL]." <sup>111</sup> According to Chief Justice Castille, "[i]n private entity cases such as this, there is a colorable argument to be made that the type of information requested should not be subject to disclosure." <sup>112</sup>

Chief Justice Castille observed that since Wintermantel's request was initially denied by the Authority's open records officer, and the Yankees "intervened only after the OOR ordered release of the records," the open records officer's reasoning framed much of the dispute between the parties. <sup>113</sup> Because the Yankees only intervened after the OOR ordered the release, their primary argument focused on the fact that they do not perform a governmental function. <sup>114</sup> As a result, the Yankees argued an issue "pursuant to a distinction no court of this Commonwealth has yet to accept as valid in the context of the [RTKL]." <sup>115</sup>

Chief Justice Castille noted that "[t]he court that interpreted Section 506(d)(1) most recently had expressly given the term 'public record' little meaning, essentially reading it out of the provision." <sup>116</sup> Since "public record" is used in section 506(d)(1) in order to limit disclosure to information of the agency that is in the contractor's possession, "access to the contractor's information is then subject to Section 506(d)(2)." <sup>117</sup> Section 506(d)(2) then states that "[n]othing in this act shall be construed to require access to any other record of the party in possession of the public record." <sup>118</sup> Reading both provisions together indicates that the "information in

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<sup>111</sup> *Id.* at 1045 (Castille, C.J., concurring).

<sup>112</sup> *Id.* at 1047.

<sup>113</sup> *Id.* at 1048.

<sup>114</sup> *Id.*

<sup>115</sup> *Wintermantel*, 45 A.3d at 1048 (Castille, C.J., concurring).

<sup>116</sup> *Id.*; see *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1036-39 (Pa. Commw. Ct. 2011).

<sup>117</sup> *Id.* at 1049.

<sup>118</sup> 65 PA. STAT. ANN. § 67.506(d)(2) (West 2010).

the possession of a contractor, other than a public record, is not subject to disclosure."<sup>119</sup>

According to Chief Justice Castille, the "public record" issue is one that the court should closely consider in order to determine whether and "to what extent information of a private party contracting with an agency is in fact a 'public record' under the [RTKL]."<sup>120</sup> In closing, Chief Justice Castille notes that the opinion should not "be read to foreclose consideration of what constitutes a 'public record' in relation to information of a private entity, as the term is used in Section 506(d)(1) of the [RTKL]."<sup>121</sup>

#### IV. EVALUATION

The decision in *Wintermantel* will affect private entities with no connection to a Commonwealth agency. This is so because the majority holds that bids submitted by one private company to another are subject to disclosure. Since the Yankees contracted with a government agency to perform what is defined by statute as an *essential governmental function*, anything related to that function is a *public record* and must be disclosed.

With municipal agencies struggling to manage projects that are less than profitable, many agencies are bound to consider ways to relieve the financial burden of running unsuccessful business ventures. If those agencies decide to contract away the management responsibilities of those ventures to a private entity, it is the private entity that risks opening their records to RTKL exposure. The private entities that contract to perform these *governmental functions*, and the businesses that enter into contracts with them, will now be operating under an open records policy.

What the majority holds is that when a private party steps into the shoes of an agency and essentially performs the duties of that agency, the private party is performing a *governmental function* for purposes of the RTKL, and the records that directly relate to that governmental function are subject to disclosure. The question that continues to linger is why? Should sections 506(d)(1)-(2) not be

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<sup>119</sup> *Wintermantel*, 45 A.3d at 1049 (Castille, C.J., concurring).

<sup>120</sup> *Id.* at 1048.

<sup>121</sup> *Id.* at 1050.



read to mean that the private party's records of its transactions with the government are accessible and not the records of transactions between the two private entities? This would seem to further the RTKL's policy of holding elected officials and government agencies accountable for their actions, while at the same time allowing private entities to keep their information private. It seems obvious that the contract between a government agency and a private party should be subject to RTKL exposure, but why should the record of a transaction between two private parties be subject to disclosure?

Perhaps the court's decision can be read narrowly to mean that when the government contracts with a private party and makes that private party an agent of the Commonwealth through the contract, the records of the private party will be subject to RTKL exposure. This would seem to narrow the application of section 506(d)(1), and a private party may be able to shield its records from exposure by not accepting the agency relationship with the Commonwealth.

As noted by Chief Justice Castille's concurrence, the decision in *Wintermantel* may have left open the issue of what constitutes a 'public record' in the possession of a private entity for purposes of the RTKL. In the future, this may prove to be the issue that shields a private entity's records from disclosure since section 506(d)(2) dictates that the private contractor's other information is outside the scope of the RTKL.

## V. CONCLUSION

The decision in *Wintermantel* will enable citizens to request the records of private contractors and the business that they conduct with other private entities. When a government agency's activities are defined as *essential governmental functions*, and that agency delegates one of its *non-ancillary* activities to a private entity, section 506(d)(1) of the RTKL allows private citizens to successfully request documents *directly related* to that activity. The broad construction of *governmental function* and the fact that two private entities can create a *public record* will have lasting effects on the business that is conducted in this Commonwealth.

*Thomas McQuillan*\*

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\* J.D. Candidate, Widener University School of Law (Harrisburg), May 2013. This survey is dedicated to my Dad, Jack McQuillan, and my Grandmother, Marie McQuillan. Thank you for filling my life with love, teaching me the importance of faith, and showing me how to be calm and confident in the face of adversity. I owe all that I accomplish in life to the sacrifices you made and the support you have given me. I truly stand on the shoulders of giants.