

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

GREGG TOWNSHIP,
Petitioner

v.

MICHELLE GROVE,
Respondent

No. 2018-3097

Attorney for Petitioner:
Attorney for Respondent:

David S. Gaines, Jr., Esq.
Pro Se

Opinion and Order

Ruest, J.

Presently before the Court is Gregg Township's (Petitioner) Petition for Review and Notice of Appeal of the Office of Open Record's (OOR) determination Petitioner must provide further responsive documents to a Right-to-Know Law (RTKL) request made by Michelle Grove (Respondent). Respondent filed a RTKL request on June 11, 2018 seeking all emails to or from Doug Bierly with the keyword "Prothonotary," during the specified timeframe. Doug Bierly is a supervisor in the Township. Petitioner filed a response on June 26, 2018 refusing Respondent's request on the grounds the only responsive documentation is privileged. Respondent filed an appeal to the OOR on June 26, 2018 and Petitioner filed a response on June 27, 2018. The OOR granted Respondent's request on July 25, 2018 and ordered Petitioner to turn over all responsive materials. Petitioner filed this appeal on August 1, 2018. A hearing was held on December 20, 2018. The Court ordered briefs from both parties. Petitioner filed his brief on January 22, 2019; Respondent did not file a brief. For the following reasons, this Court overrules the decision of the OOR.

Findings of Fact

1. Petitioner is a Township and is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302.

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2. Respondent is a resident of Gregg Township who frequently makes Right to Know requests, and runs a website providing comprehensive public records relating to the township, including payroll records, employee emails, and tax lists indicating which residents have and have not paid taxes.
3. Respondent filed a RTKL request on June 11, 2018 seeking all emails to and from Doug Bierly with the keyword "prothonotary" from October 26, 2016 to December 31, 2017.
4. Petitioner's RTKL Officer, Jennifer Snyder, worked with Mr. Bierly to find all responsive emails which were then printed and provided to Petitioner's solicitor.
5. Petitioner withheld responsive emails pursuant to the attorney-client privilege.
6. Ms. Snyder testified that the withheld emails involved communications between Petitioner's solicitor regarding then-pending legal matters.
7. Petitioner provided the two emails in question to the Court for *in-camera* review.

Conclusions of Law

1. This Court has jurisdiction to hear an appeal from the OOR when the government entity involved is a local agency, including a local government. 65 P.S. §67.1302.
2. This Court is the fact-finder and entitled to make a *de novo* review of the record.
Bowling v. Office of Open Records, 621 Pa. 133, 75 A.3d 453, 469-70 (2013).
3. This Court has a broad scope of review. ***Id.*** at 476
4. Records should be readily disclosed unless it can be established that the records are exempt under 65 P.S. §67.708. ***Department of Labor and Industry v. Heltzel***, 90 A.3d 823, 833-34 (Pa.Comm. Ct. 2014).
5. The RTKL exempts records from the definition of "public record" subject to a privilege. 65 P.S. §67.102.

6. A privilege is defined as “[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.” *Id.*
7. In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. ***Nationwide Mut. Ins. Co. v. Fleming***, 2007 Pa.Super. 145, 924 A.2d 1259.
8. “[A]n agency may satisfy its burden of proof that it does not possess a requested record” by submitting “an unsworn attestation by the person who searched for the record...” ***Hodges v. Pa. Dept. of Health***, 29 A.3d 1190, 1102 (Pa. Commw.Ct. 2011), (citing ***Moore v. Office of Open Records***, 992 A.2d 997, 908-909 (Pa. Commw.Ct. 2010).

Discussion

This Court has jurisdiction to hear an appeal from the OOR when the government entity involved is a local agency, including a local government. 65 P.S. §67.1302. As such, the Court is empowered to make a *de novo* review of the record and is the fact-finder. ***Bowling v. Office of Open Records***, 621 Pa. 133, 75 A.3d 453, 469-70 (2013). The Court is also empowered with a broad scope of review, and is not limited to the record presented from the OOR on appeal. *Id.* at 474-76. The Court reviewed the record presented from the OOR, and held a hearing at which time Petitioner provided further testimony. Petitioner also provided the emails in question to the Court for *in-camera* review.

Respondent sought from Petitioner "October 26, 2016 through December 31, 2017 All emails to/from Doug Bierly with the keyword: "Prothonotary". Petitioner's RTKL officer searched for and found responsive emails, but denied Respondent's request on June 26, 2018 claiming the responsive emails were exempt under the attorney-client privilege. Records should be readily disclosed unless it can be established that the records are exempt under 65 P.S. §67.708. **Department of Labor and Industry v. Heltzel**, 90 A.3d 823, 833-34 (Pa.Comm. Ct. 2014).

The RTKL exempts records from the definition of "public record" subject to a privilege. 65 P.S. §67.102. A privilege is defined as "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." *Id.* In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. **Nationwide Mut. Ins. Co. v. Fleming**, 2007 Pa.Super. 145, 924 A.2d 1259.

The emails in question satisfy the four prongs of the **Nationwide Mut. Ins. Co.** test: 1) the Township and its supervisors are clients; 2) the communication was from their attorneys; 3) the communication related to a legal matter; 4) the privilege has been claimed and not waived by the client. As the emails are public records subject to the attorney-client privilege, they are exempt.

Respondent also argued Doug Bierly must attest that these emails are all of the responsive emails. "[A]n agency may satisfy its burden of proof that it does not possess a


requested record” by submitting “an unsworn attestation by the person who searched for the record...” ***Hodges v. Pa. Dept. of Health***, 29 A.3d 1190,1102 (Pa.Commw.Ct. 2011), citing ***Moore v. Office of Open Records***, 992 A.2d 997,908-909 (Pa.Commw.Ct. 2010). As RTKL Officer Snyder searched along with Doug Bierly for the requested emails and testified regarding these records, no further evidence from Mr. Bierly is required.

The following order is hereby entered:

ORDER

AND NOW, this 29th day of January, 2019, the Petition for Review and Notice of Appeal pursuant to the Pennsylvania Right-to-Know Law is **GRANTED**. The Final Determination by the Office of Open Records is overturned, and Petitioner does not need to provide any further documentation to Respondent.

BY THE COURT:



Pamela A. Ruest, President Judge