



FINAL DETERMINATION

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| IN THE MATTER OF | : | |
| | : | |
| MICHELLE GROVE, | : | |
| Requester | : | |
| | : | |
| v. | : | Docket No.: AP 2018-1290 |
| | : | |
| GREGG TOWNSHIP, | : | |
| Respondent | : | |

INTRODUCTION

Michelle Grove (“Requester”) submitted a request (“Request”) to Gregg Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking certain emails sent to and received by a specific Township employee. The Township partially denied the Request, asserting that portions of the records are confidential under the attorney-client privilege. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

On June 11, 2018, the Request was filed, seeking, for the time period of January 1, 2018 through June 1, 2018, “[a]ll emails to/from Keri Miller with the following search terms: ‘deleted emails,’ ‘attestation,’ ‘perjury,’ [and] ‘What’s the best phone number to reach you at?’” On June

26, 2018, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the Township partially denied the Request, claiming that portions of the responsive records are privileged.

On July 18, 2018, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On July 27, 2018, the Township submitted a position statement, claiming that portions of the responsive records are protected by the attorney-client privilege. In support of its position, the Township submitted the attestation of Jennifer Snyder (“Ms. Snyder”), the Township’s Open Records Officer. On August 21, 2018, the Requester submitted multiple position statements, asking, in part, that the OOR make “a bad faith ruling.”

In response to a request for additional evidence from the OOR, on August 22, 2018, the Township submitted an Exemption Log for the withheld and redacted records, identifying the responsive records and the corresponding grounds for withholding or redacting each record. On the same day, the Requester submitted additional evidence, asserting that the withheld and redacted records are subject to public access.

On September 11, 2018, the Requester made multiple submissions, including a YouTube video link, in support of her claim that the Township acted in bad faith.¹ In response to a request for clarification from the OOR, on September 14, 2018, the Township submitted the sworn

¹ The Requester’s submissions were received after the record closed; however, to develop the record, the submissions were considered. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

statement of Ms. Snyder, addressing why a particular email was withheld from disclosure under the attorney-client privilege. On September 15, 2018, the Requester submitted multiple responses to the Township's September 14, 2018 submission, asserting that the withheld records are subject to public access.

On September 18, 2018, following the Requester's agreement to an indefinite extension of time to issue the Final Determination in this matter, *see* 65 P.S. § 67.1101(b)(1), the OOR directed the Township to submit copies of all withheld and redacted records for *in camera* review. On October 2, 2018, the Township submitted the records, along with an Inspection Index, and the OOR performed an *in camera* review of the records.

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. Commw. Ct. 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; however, 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. Commw. Ct.

2011). Here, the parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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). Similarly, the burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011); *Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved”); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). 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. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. Portions of the responsive records are protected by the attorney-client privilege

The Township argues that the withheld and redacted records are privileged and not subject to public disclosure. The RTKL defines “privilege” 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.” 65 P.S. § 67.102. 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. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). The attorney-client privilege protects communications to and from a client. *See Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011); *see, e.g., Romig v. Macungie Borough*, OOR Dkt. AP 2010-0674, 2010 PA O.O.R.D. LEXIS 573; *Staley v. Pittsburgh Water & Sewer Auth.*, OOR Dkt. AP 2010-0544, 2010 PA O.O.R.D. LEXIS 466; *Fikry v. Retirement Bd. of Allegheny Twp.*, OOR Dkt. AP 2009-1149, 2010 PA O.O.R.D. LEXIS 19. The Commonwealth Court has confirmed that, after an agency establishes the privilege was properly invoked under the first three prongs outlined above, the party challenging invocation of the privilege must prove waiver under the fourth prong. *Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

In support of its argument, the Township relies on the attestation of Ms. Snyder, who attests, in relevant part, as follows:

5. Between June 18, 2018, and June 26, 2018, I worked with Supervisor Keri Miller to obtain all of the emails that were responsive to [the R]equest.
6. In particular, I reached out to Ms. Miller, provided Ms. Miller with a copy of the ... [R]equest, and then assisted Ms. Miller with separating out the emails that were responsive....
8. When Ms. Miller provided the aforementioned emails to me, it was immediately and readily apparent that many of the emails contained communications about ongoing legal matters between Ms. Miller and the Township's solicitor, David Gaines.
9. For example, many of the emails that included "attestation" involved communications between Ms. Miller, who is the Chair of our board of supervisors and the alternate Right to Know Officer for the Township, and Mr. Gaines regarding how to respond to the multitude of [the Requester's] prior ... requests for information.
10. In light of this fact, I provided the emails to Mr. Gaines, who reviewed the emails, ultimately removing and redacting all information that involved communications (1) between Ms. Miller, in her capacity as the Chair of the board of supervisors in the Township, or me, in my capacity as the Right to Know Officer of the Township, and Mr. Gaines, the Township's solicitor, (2) which involved how to respond to or otherwise address legal matters, most often [the Requester's] prior ... requests....
12. A limited number of remaining emails involve general communications between Mr. Gaines and the full board of supervisors regarding the same matters.
13. The Township has not waived any privilege or involved any non-officers in the redacted emails....

Additionally, the Township provided an Exemption Log, listing the withheld and redacted emails.

The Township also submitted the attestation of Keri Miller, who attests that the Exemption Log "is an accurate depiction of the materials that were withheld by the Township in response to [the Request]...."²

Under the RTKL, an attestation is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore*

² While the attestation is labeled as the attestation of Ms. Snyder, it was completed and signed by Ms. Miller.

v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Township acted in bad faith, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence presented, as well as the OOR’s *in camera* review of the responsive records, the Township has demonstrated that the attorney-client privilege was properly invoked for portions of the records submitted for *in camera* review. Specifically, the following portions of email chains identified in the Inspection Index³ are privileged:

1. Pages 11 and 12, all attachments, the email from Attorney Gaines to the Township Secretary, dated April 4, 2018 at 10:31 a.m., and the email from the Township Secretary to Attorney Gaines, dated April 4, 2018 at 11:06 a.m.;
2. Page 17, all attachments, the email from Attorney Gaines to the Township Secretary, dated April 4, 2018 at 10:31 a.m., and the email from the Township Secretary to Attorney Gaines, dated April 4, 2018 at 11:06 a.m.;
3. Page 21, the email from the Township Secretary to Attorney Gaines, Douglas Bierly and Keri Miller, dated March 5, 2018 at 2:08 p.m.;
4. Page 34, the email from Attorney Gaines to the Township Secretary and Keri Miller, dated May 18, 2018 at 10:01 a.m., the email from Keri Miller to Attorney Gaines, dated May 18, 2018 at 11:22 a.m., and the email from Attorney Gaines to Keri Miller, dated May 18, 2018 at 11:31 a.m.;
5. Page 35, all attachments only;
6. Page 36, all attachments and the email from Attorney Gaines to Keri Miller, dated May 18, 2018 at 1:27 p.m.;
7. Page 38, the email from the Township Secretary to Attorney Gaines and Keri Miller, dated May 21, 2018 at 9:50 a.m., and the email from Attorney Gaines to the Township Secretary, dated May 21, 2018 at 9:59 a.m.;

³ Section V(E)(13) of the OOR Procedural Guidelines provides, among other things, that “[r]eferences to specific records submitted for *in camera* inspection ... will be by the assigned reference numbers ... as set forth in the *in camera* inspection index.” As such, the OOR’s written analysis is constrained to generic descriptions of the withheld records.

8. Page 39, the attachment only;
9. Page 61, the email from the Township Secretary to Attorney Gaines and Keri Miller, dated May 18, 2018 at 7:11 a.m.;
10. Page 62, the email from Attorney Gaines to the Township Secretary, dated May 18, 2018 at 9:57 a.m., and the email from the Township Secretary to Attorney Gaines, dated May 29, 2018 at 10:10 a.m.;
11. Page 64, the email from Attorney Gaines to the Township Secretary, dated June 1, 2018 at 3:32 p.m., and the email from the Township Secretary to Attorney Gaines, dated June 4, 2018 at 7:59 a.m.;
12. Page 74, the attachments and the email from Attorney Gaines to the Township Secretary, dated April 11, 2018 at 11:12 a.m.;
13. Page 75, all attachments, the email from the Township Secretary to Attorney Gaines, dated April 11, 2018 at 11:24 a.m., and the email from the Township Secretary to Attorney Gaines, dated April 18, 2018 at 8:07 a.m.;
14. Page 76, the email from Attorney Gaines to the Township Secretary and Keri Miller, dated May 22, 2018 at 9:00 p.m.;
15. Page 93, the email from Attorney Gaines to the Township Secretary, dated March 12, 2018 at 7:36 p.m.;
16. Page 94, the attachments and the email from Keri Miller to Attorney Gaines, dated March 13, 2018 at 9:47 a.m.;
17. Page 95, the email from Attorney Gaines to the Township Secretary, dated February 28, 2018 at 3:47 p.m.;
18. Page 96, the email from the Township Secretary to Attorney Gaines and Keri Miller, dated March 26, 2018 at 9:38 a.m.; and
19. Page 103, the attachments only.

With respect to the four withheld records, the attachments are also subject to the attorney-client privilege.

The above withheld and redacted emails and attachments were transmitted between Attorney Gaines, in his capacity as the Township's Solicitor, and Township officials and employees. The Township has likewise shown that the above redacted and withheld emails either

relate to communications regarding how to respond to RTKL requests and appeals, or the drafting of legal filings on behalf of the Township. *See Bagwell*, 103 A.3d at 420. Moreover, the Requester has not proven that the Township waived the privilege. *Id.* Accordingly, the Township has demonstrated that the above withheld and redacted emails are protected by the attorney-client privilege. *See* 65 P.S. § 67.102.

However, the remaining portions of the emails submitted for *in camera* review are not protected by the attorney-client privilege. Specifically, the remaining portions do not seek or give legal advice. Rather, these portions relate to ancillary matters, such as scheduling information and instructions regarding signing papers, and do not reveal any confidential communications between attorney and client. Accordingly, they are not confidential under the attorney-client privilege.

2. The OOR declines to make a finding of bad faith

The Requester argues that the Township has failed to comply with previous Final Determinations issued by the OOR and that “[a] bad faith ruling is long overdue.” While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith....”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith”). Here, the OOR finds no evidence that the Township acted in bad faith and, accordingly, declines to make a finding of bad faith.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Township is required to provide portions of the responsive records, as outlined above,

within thirty days. 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 RTKL. 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.⁴ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 18, 2019

/s/ Magdalene C. Zeppos

MAGDALENE C. ZEPPOS, ESQ.
APPEALS OFFICER

Sent to: Michelle Grove (via email only); and
David Gaines, Esq. (via email only)

⁴ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).