



FINAL DETERMINATION

IN THE MATTER OF

**MICHELLE GROVE,
Requester**

v.

**GREGG TOWNSHIP,
Respondent**

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Docket No: AP 2018-1517

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 emails to and from an identified email account. The Township partially denied the Request, arguing that certain records were protected by 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 August 15, 2018, the Request was filed seeking “January-February 2018 ALL EMAILS to/from kerimiller.greggtownship@gmail.com.” On August 23, 2018, the Township partially denied the Request, providing responsive records except for records protected by the attorney-client privilege.

On August 24, 2018, the Requester appealed to the OOR, arguing that the Township withheld certain emails and that other records state “quoted text hidden.” 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 September 6, 2018, the Township submitted a position statement indicating that it provided 173 pages of responsive records, withholding two records that are subject to the attorney-client privilege. Further, the Township explains that the “quoted text hidden” is provided as part of the chain emails. In support of its position, the Township submitted the affidavits, made under the penalty of perjury, from Keri Miller, chair of the board of supervisors for the Township and subject of the Request, and Jennifer Snyder, Open Records Officer for the Township.

On September 7, 2018, the Requester submitted a position statement arguing that there is no need to reduce the number of pages by removing repeated chain emails. Also, the Requester sought the OOR to conduct *in camera* review of records.

On September 20, 2018, the OOR received the responsive records for *in camera* review.

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. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* 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). 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).

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. The Township properly withheld two records pursuant to the attorney-client privilege

The Township asserts it provided 173 pages of emails to the Requester and that two chain emails were withheld. Ms. Miller attests that she provided all emails to Ms. Snyder following the Request. Ms. Snyder attests that the emails, except for two chain emails protected by the attorney-client privilege, have been provided to the Requester.

The RTKL defines “privilege” as “[t]he 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). “[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014) (citing *Id.*). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must prove all four elements. *See Clement*

v. Berks County, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client’s goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001).

Ms. Snyder attests that the withheld emails involved attorney-client communications where supervisors were seeking and receiving advice from the solicitor regarding procedures at public meetings. The OOR conducted *in camera* review of the withheld records. Based upon its review and the evidence submitted, the Township has properly withheld an email chain and another email pursuant to the attorney-client privilege. In the email thread of January 29, 2018, a Township official sent an email seeking legal advice regarding Township meetings. In the second withheld email of February 6, 2018, the solicitor for the Township provided advice on how to handle certain issues arising from citizens. Accordingly, the Township has properly withheld the records identified in the privilege log as GREGG00176 (full thread) and GREGG00178.

2. The Township is required to provide the entirety of the responsive emails

Ms. Snyder also explains that “quoted text hidden” emails are “simply the emails to which a response is being provided.” The OOR has previously held that “there [is no] exemption under the RTKL which permits an agency to redact content in a responsive record that is presumptively public because the content is non-responsive.... The fact that the [record] may contain other information is of no consequence.” *Hemler v. Borough of Gettysburg*, OOR Dkt. AP 2017-0022, 2017 PA O.O.R.D. LEXIS 797; *Kerr v. North Huntingdon Twp.*, OOR Dkt. AP 2014-1080, 2014 PA O.O.R.D. LEXIS 1031. Here, there is no assertion that the redacted information is non-

responsive, rather the Township explains that the “‘quoted text hidden’ is simply the emails that solicited a response to the relevant mail.” However, because the Township has not submitted evidence demonstrating that emails with “quoted text hidden” are exempt from disclosure, the Township must provide the emails in their entirety.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part**, and the Township is required to provide the entirety of all responsive emails, except for GREGG00176 and GREGG00178, to the Requester 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 6, 2018

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

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

¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).