



FINAL DETERMINATION

IN THE MATTER OF

**JOHN YAKIM,
Requester**

v.

**GREGG TOWNSHIP,
Respondent**

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Docket No: AP 2018-1880

INTRODUCTION

John Yakim (“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 regarding RTKL requests. The Township denied the Request, arguing, among other things, that it is insufficiently specific. 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 September 11, 2018, the Request was filed, seeking “all emails to or from KeriMiller.greggtownship@gmail.com regarding Right to Know requests, time frame January 1 2018 to August 31, 2018.” On September 18, 2018, the Township invoked a thirty-day extension to respond to the Request. *See* 65 P.S. § 67.902. On October 16, 2018, the Township denied the Request, arguing that it is insufficiently specific, *see* 65 P.S. § 67.703. In the alternative, the

Township argued that responsive records contain internal, predecisional deliberations, *see* 65 P.S. § 67.708(b)(10)(i)(A), and are protected by the attorney-client privilege, *see* 65 P.S. § 67.305(a)(2).

On October 16, 2018, the Requester appealed to the OOR, challenging the denial of the Requests 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 October 26, 2018, the Township submitted a position statement reiterating its arguments. Accompanying the position statement was an affidavit executed by Jennifer Snyder, the Township's Open Records Officer, who explains that Keri Miller is the Chair of the Township's Board of Supervisors and that the responsive emails number nearly 500 pages.

On November 19, 2018, the Requester agreed to an extension to facilitate *in camera* review of the records, and on the same day, the OOR issued an order directing the production of the records for said review. On January 3, 2019, the Township submitted the 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 LLC 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. 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 Requester asked for *in camera* review, and upon the determination that such review was warranted, the OOR has reviewed the records *in camera*.

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. 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. 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly 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). 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 Request is sufficiently specific

The Township argues that the Request is not sufficiently specific to enable it to identify responsive records. *See* 65 P.S. § 67.703. In determining whether a particular request under the RTKL is sufficiently specific, the OOR applies a three-part balancing test set forth by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). The OOR examines to what extent the request identifies: (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep’t of Educ.*, 119 A.3d at 1125.

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep’t of Educ.*, 119 A.3d at 1125. The subject matter should provide a context to narrow the search. *Id.* (citing *Montgomery County v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) (*en banc*)). Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *Id.* Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. “The timeframe prong is ... the most fluid of the three prongs, and whether or not the request’s timeframe is narrow enough is generally dependent upon the specificity of the request’s subject matter and scope.” *Id.* Failure to identify a finite timeframe will not render an otherwise sufficiently specific request overbroad. *See Pa. Hous. Fin. Agency v. Ali*, 43 A.3d 532, 536 (Pa. Commw. 2012) (concluding request for proposals and sales agreements relating to two specific projects that did not specify

timeframe was sufficiently specific). Similarly, an extremely short timeframe will not rescue an otherwise overbroad request. *Cf. Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. 2011) (finding request for all emails sent or received by any school board member in thirty-day period to be sufficiently specific because of short timeframe), *appeal denied*, 54 A.3d 350 (Pa. 2012).

While the Request does not specify a subset of RTKL requests, it does provide a context to narrow the search, especially in light of the narrowly defined scope – emails sent to and from a single email address. While the OOR has held that a request for all emails received or sent from a single address over the span of nine months was insufficiently specific, the Request does not seek all emails, but rather, only those pertaining to a specific subject matter – RTKL requests. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-2279, 2015 PA O.O.R.D. LEXIS 1808 (citing *Pa. Dep’t of Educ.*, 119 A.3d at 1126-27 (holding that a request for all emails from a specific account over a one-year period was insufficiently specific in the absence of a defined subject matter)). Finally, while it does span eight months, the fact remains that the Request provides a finite timeframe. Taken together, the Request is sufficiently specific to enable the Township to locate responsive records. *See Iverson*, 50 A.3d at 284 (holding that “the specificity of a request must be construed in the request’s context, rather than envisioning everything the request might conceivably encompass.”); *Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 264-265 (holding that, because a request delineated “a clearly-defined universe of documents[,]” there was no need to make a judgment call as to whether any records were related to the request); *St. Hilaire v. Camp Hill Borough*, OOR Dkt. AP 2017-0416, 2017 PA O.O.R.D. LEXIS 465 (finding that a request for all emails and text messages to and from police officers, employees and council members regarding RTKL requests in 2016 was sufficiently specific)

2. Some responsive records are privileged or exempt from disclosure

The Township argues that responsive records are protected by the attorney-client privilege, *see* 65 P.S. § 67.305(a)(2). The RTKL includes the attorney-client privilege in the definition of “privilege.” 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 establish the first three prongs of the privilege for it to apply. *See Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014); *see also Davis*, 122 A.3d 1185. The privilege does not extend to general or factual content where no legal advice is sought. *See Scarcella v. City of Sunbury*, OOR Dkt. AP 2015-2895, 2017 PA O.O.R.D. LEXIS 450; *see also Upjohn Co. v. United States*, 449 U.S. 383 (1981) (stating that the privilege extends only to communications and not to underlying facts).

The Township also argues that some of the requested records reflect internal, predecisional deliberations. *See* 65 P.S. § 67.708(b)(10)(i)(A). Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure a record that reflects:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, ... including predecisional deliberations relating to a budget recommendation, ... or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). In order for this exemption to apply, three elements must be satisfied: 1) “[t]he records must ... be ‘internal’ to a governmental agency”; 2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and 3) the contents must be deliberative in character, *i.e.*, pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

Initially, Ms. Snyder attests that Attorney Gaines is the Township’s solicitor; however, while some of the emails are between only Attorney Gaines and other Township employees, *in camera* review establishes that a number of the emails consist of communications from various requesters and OOR Appeals Officers that were forwarded to Attorney Gaines and/or Township employees either entirely without comment or with a perfunctory introductory statement such “FYI” or “please see attached.” Therefore, these communications cannot be privileged, nor do they qualify as internal for the purpose of establishing that they constitute internal, predecisional deliberations.

Other emails originally had draft affidavits¹ or response letters attached to them, but the bodies of the emails contain only text with minimal or no substance. Still others comprise straightforward recitations of facts that are not provided for the purpose of seeking legal advice or that reflect simple steps taken in scheduling or arranging routine operations or responding to

¹ Page 438 contains a draft affidavit in the body of the email. The draft was sent by Ms. Snyder to Attorney Gaines and Ms. Miller. Drafts of documents prepared by an attorney or sent to an attorney for comments on legal issues are considered privileged if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version. *See Andritz Sprout-Bauer v. Beazer East*, 174 F.R.D. 609, 634 (M.D. Pa. 1997). Here, however, there is no evidence of legal advice, nor is there evidence that this draft differed substantially, if at all, from the final version of the affidavit.

requests and appeals. These emails are not deliberative in nature, nor can they be withheld on the basis that they are privileged. *See Yoder v. Lancaster County Solid Waste Management Auth.*, OOR Dkt. AP 2016-0796, 2017 PA O.O.R.D. LEXIS 636 (finding that records relating to routine responsibilities associated with providing legal services to the agency, such as circulating documentation among employees or scheduling meetings, were not privileged).

While *in camera* review has established that many of the emails are not privileged or exempt from disclosure for the reasons explained above, some emails are privileged in their entirety, in that they are to or from Attorney Gaines, contain or seek legal advice or assistance with a legal matter and were not sent to external parties. Some emails, although Attorney Gaines was copied on them, were not sent to or from him, and, thus do not meet the definition of privilege. However, some of these emails do contain deliberations among Township employees regarding RTKL matters, were before a final decision was made regarding how to respond to a request, requester, appeal, etc., and were not sent to outside parties. Thus, they are exempt from disclosure as reflecting the Township's internal, predecisional deliberations. Accordingly, the following emails can be withheld in their entirety:

- The entirety of pages 2, 4, 5, 8-10, 12-15, 18-24, 30-31, 103, 112-113, 117-118, 153, 162, 189, 191, 202,² 208-209, 249-250, 259, 281-282, 307, 310, 312, 317, 322, 324-325, 331, 336, 369, 386-388, 400, 407, 409, 414, 417, 419-420, 429, 439, 441-442, 444-445, 457-458, 460-462, 464-465, and 467

A number of emails contain exempt or privileged content, but also contain portions that cannot be withheld from disclosure; accordingly, the following portions may be redacted, pursuant to 65 P.S. § 67.706:

² Although factual material is present in this email, it is integral to the solicitation and provision of legal advice, as well as an internal deliberation regarding how to respond to a request. *Cf. McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 385-386 (Pa. Commw. Ct. 2014) (requiring the disclosure of purely factual material contained in otherwise deliberative documents if it is severable from its context).

- Page 1: The second and third paragraphs of Attorney Gaines' email and the entirety of Ms. Miller's email
- Page 6: All of Ms. Snyder's email, except the first three lines
- Pages 42, 77, 79, 114, 116, 128, 151, 161, 188, 190, 211, 266, 288, 295-296, 304, 306, 308-309, 311, 313, 327, 335, 355, 358, 363-364, 368, 372, 385, 393 and 402: The emails from Ms. Snyder
- Pages 70, 152, 230, 253, 255, 265, 322, 326, 330, 353, 389 and 446: The emails from Attorney Gaines
- Pages 73, 110, 149 and 437: The emails from Ms. Miller
- Page 102: The emails from Attorney Gaines and the second sentence of the body of the email from Ms. Miller
- Page 104: The picture and the email from Attorney Gaines
- Page 106: The email from Ms. Snyder and the emails from Attorney Gaines
- Page 111: The email from Penns Valley Code Enforcement Agency³
- Page 171: The first and last sentences of the email from Ms. Snyder dated June 11, 2018
- Page 199: The third through fifth sentences of Ms. Snyder's email
- Page 200: The email from Attorney Gaines and the second and third sentences of the email from Ms. Snyder
- Page 207: The clause of the penultimate sentence of Ms. Snyder's email following "but,"
- Page 226: The email from Ms. Snyder and the reply from Attorney Gaines
- Page 245: The last sentence of the email from Ms. Snyder
- Page 262: The second sentence of Ms. Snyder's email
- Page 270: The third, fourth and sixth sentences of Ms. Snyder's email dated April 20, 2018
- Pages 275-276: The question from Ms. Miller and the reply from Attorney Gaines
- Page 291: All except the first sentence of Ms. Snyder's email
- Page 301: The emails from Ms. Snyder and Attorney Gaines
- Pages 342-343: The emails from Ms. Snyder and Attorney Gaines
- Pages 349-351: The emails from Ms. Snyder, Ms. Miller and Attorney Gaines
- Pages 359-361: All except the forwarded emails sent by Michelle Grove

³ This email, as well as a number of others, were sent to or from employees at Penns Valley Code Enforcement Agency. From the context of these emails, it is clear that Penns Valley conducts inspections for the Township and these emails relate to RTKL requests that implicate records in the possession, custody or control of Penns Valley. However, records that originate from or are sent to an agency's contractor may be internal to that agency under Section 708(b)(10)(i)(A) of the RTKL. See, e.g., *Miller v. Cumberland Valley Sch. Dist.*, OOR Dkt. AP 2018-1820, 2019 PA O.O.R.D. LEXIS 25; *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013); *Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015) ("The origination of records from outside an agency does not preclude the application of RTKL exceptions"); see also *Ritenour and Five-R Excavating, Inc. v. Montour Sch. Dist.*, OOR Dkt. AP 2017-2347, 2018 PA O.O.R.D. LEXIS 179 (finding an email between agency contractors to be "internal" to the agency).

- Pages 372-374: The entirety of the emails sent by Attorney Gaines and the following emails sent by Ms. Snyder:
 - The entirety of the email sent at 11:54 a.m. on March 9, 2018
 - The first line of the email sent at 12:07
 - The second, fourth and fifth sentences of the email sent on March 12, 2018
 - The entirety of the email sent on March 14, 2018
- Pages 383-384: The email sent by Attorney Gaines at 8:13 p.m. on March 12, 2018
- Page 396: Ms. Snyder's email, except for the text enclosed in parentheses
- Page 401: The third, fourth, fifth and sixth sentences of Attorney Gaines' email
- Page 406: The email sent by Ms. Miller at 10:49 a.m. on May 23, 2018
- Page 408: The last sentence of the email sent by Ms. Snyder
- Page 415: All but the last line of the email sent by Ms. Snyder
- Pages 427-428: The first two emails from Ms. Snyder and the response from Attorney Gaines
- Page 451: The third sentence of the email from Ms. Snyder
- Page 452: The email Ms. Snyder sent on May 30, 2018
- Page 454: The second and third sentences of the email from Ms. Snyder and the email from Attorney Gaines
- Page 455: The first three lines of the email

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the Township is required to provide the responsive records as set forth above to the Requester within 30 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: <http://openrecords.pa.gov>.

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

FINAL DETERMINATION ISSUED AND MAILED: January 31, 2019

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

Sent to: John Yakim (via email only);
Keri Miller (via email only);
David Gaines, Esq. (via email only)