



FINAL DETERMINATION

IN THE MATTER OF

**JOHN VIZZARRI,
Requester**

v.

**UPPER DARBY TOWNSHIP,
Respondent**

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Docket No: AP 2024-0695

FACTUAL BACKGROUND

On February 8, 2024, John Vizzarri (“Requester”) filed a request (“Request”) with Upper Darby Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “[c]opies of all emails sent from and received by the email address: htunisjrcouncil@upperdarby.org between February 1, 2024 up to an[d] including February 7, 2024.” On March 8, 2024, after invoking a thirty-day extension to respond, *see* 65 P.S. § 67.902(b), the Township partially denied the Request, providing records redacted of personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), exempt employee information, 65 P.S. § 67.708(b)(7)(iv), and information, the disclosure of which would be reasonably likely to threaten computer security, 65 P.S. § 67.708(b)(4). The Township withheld records reflecting its internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), relating to noncriminal investigations, 65 P.S. § 67.708(b)(17), and protected by the attorney-client privilege.

On March 12, 2024, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ 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 April 1, 2024, the Township submitted a position statement, reiterating its grounds for denial and also arguing that certain material is protected by the attorney-work product doctrine. In support, the Township submitted an inspection index, verified under the penalties of unsworn falsification to authorities by Scott Alberts, the Township’s Open Records Officer (“Alberts Attestation”).

On April 2, 2024, the Requester submitted a position statement, arguing that the Township has not proven that records reflect internal, predecisional deliberations, certain redactions were made to hide the fact that the Township violated the Sunshine Act, 65 Pa.C.S. §§ 701-716, and the Township must produce the draft resolution attached to Bates no. 26. On April 4, 2024, in response to the OOR’s inquiry, the Requester clarified that he is not interested in personal identification information or employee information. *See* 65 P.S. § 67.708(b)(6)(i)(A), 65 P.S. § 67.708(b)(7)(iv). As a result, the Requester has waived any objections to the redactions made on these bases. *See Pa. Dep’t of Corr. v. Off. of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

On April 10, 2024, in response to the OOR’s request for clarification, the Township submitted a supplemental position statement with additional detail about certain records, clarifying that many records withheld on the basis that they are protected by the attorney-client privilege and/or the attorney-work product doctrine are also internal, predecisional and deliberative and *vice versa*. Finally, the Township also argues that a draft resolution constitutes an exempt draft under

¹ The OOR notified the Requester that the appeal was deficient because it did not include copies of the Request or the Township’s response. *See* 65 P.S. § 67.1303(b). On March 13, 2024, the Requester cured the deficiency.

the RTKL, 65 P.S. § 67.708(b)(9). In support, the Township submitted a supplemental Alberts attestation (“Supplemental Alberts Attestation”).

LEGAL ANALYSIS

The Township is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Township is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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 appeal is moot in part

On appeal, the Township has produced redacted copies of emails that it originally withheld in their entirety on the basis that they are protected by the attorney-client privilege or are internal, predecisional and deliberative, 65 P.S. § 67.708(b)(10)(i)(A). Accordingly, to the extent the requested information has been provided, the appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. Sept. 13, 2019) (unreported opinion) (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Township has proven that records relate to a noncriminal investigation

The Township argues that certain emails are related to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[c]omplaints submitted to an agency[.]” “[i]nvestigative materials,

notes, correspondence and reports” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation.” 65 P.S. §§ 67.708(b)(17)(i)-(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Off. of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *See Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

The Commonwealth Court has held that complaints leading to an investigation are exempt from disclosure. *See Black v. Pa. State Police*, 2016 Pa. Commw. Unpub. LEXIS 809 (Pa. Commw. Ct. 2016) (finding that complaints related to a noncriminal investigation “are exempt from disclosure whether they caused the investigation to commence in whole or in part or not at all”) (quoting *Stein v. Plymouth Twp.*, 994 A.2d 1179, 1182 n.8 (Pa. Commw. Ct. 2010)); *Brown v. Pa. Off. of Insp. Gen.*, 730 C.D. 2016, 2017 Pa. Commw. Unpub. LEXIS 868, *13 (Pa. Commw. Ct. 2017) (noting that for the exemption to apply, there must actually be an investigation).

Subsection (vi)(A) contains an exception to the exemption, providing that the exemption does not apply to “the imposition of a fine or civil penalty ... or an executed settlement agreement....” 65 P.S. § 67.708(b)(17)(vi)(A); *Heavens v. Pa. Dep’t of Env’tl Prot.*, 65 A.3d 1069, 1075 (Pa. Commw. Ct. 2013) (“it [is] incumbent upon [an agency] to determine whether

records exist[] that [do] not fall within the exception or whether an exception to the noncriminal investigation [exemption] require[s] that certain documents be disclosed”).

Here, the Alberts Attestation provides that Bates Nos. 1-5 contain material related to non-criminal investigations or complaints. Alberts Attestation at ¶ 6. The verified exemption log provides that these records related to a complaint about and the investigation of an abandoned vehicle. Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Township has acted in bad faith, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’t Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Although the Township does not offer detailed evidence explaining the process of investigating complaints, the OOR has consistently held that municipalities are statutorily authorized to investigate violations of their ordinances. *See, e.g., Colella v. Pocopson Twp.*, OOR Dkt. AP 2018-1472, 2018 PA O.O.R.D. LEXIS 1152 (finding that a township has the authority to conduct investigations pursuant to the Municipalities Planning Code); *Westrich v. Malvern Borough*, OOR Dkt. AP 2022-0605, 2022 PA O.O.R.D. LEXIS 1327; *Kipe v. Liberty Twp.*, OOR Dkt. AP 2023-0421, 2023 PA O.O.R.D. LEXIS 700. Townships of the first class are authorized to enact ordinances, *see* 53 P.S. 58301-A, and the Township’s zoning ordinance specifically addresses abandoned vehicles. *See* CODE OF ORDINANCES OF THE TOWNSHIP OF UPPER DARBY, § 527-6, available: <https://ecode360.com/UP3641>.

Further, the redacted records facially consist of a complaint about an abandoned vehicle made by a private citizen, along with related emails; responses by a police officer and other Township employees, including an email noting that the matter had been processed for code enforcement; and internal correspondence related to the complaint and/or the investigation. *See Off. of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (*en banc*) (an affidavit may be unnecessary when an exemption is clear from the face of the record); *Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions). Accordingly, evidence establishes that the Township has met its burden of proving that the emails at Bates nos. 1-5 are related to a noncriminal investigation, and there is no evidence that the exception to the exemption applies. *See* 65 P.S. § 67.708(a)(1).

3. The Township has produced all responsive records

The Requester complains that several council members use personal email addresses to conduct Township business. However, the Request expressly sought emails to and from htunisjrcouncil@upperdarby.org, and the Supplemental Alberts Attestation provides that “[n]o responsive documents have been withheld at this point. Council President Hafiz Tunis’s emails have been obtained during this time period and provided.” Supplemental Alberts Attestation at ¶ 3.

“The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). An attestation by the individual who searched for responsive records is sufficient to meet an agency’s burden of proving the nonexistence of a record. *Id.*; *see also Pa. Dep’t of Labor and Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015) (finding that, once the agency

contacted the individuals identified in the request, it was not necessary to contact all other employees to determine whether requested records existed); *Pa. Dep't of Health v. Mahon*, 283 A.3d 929, 936 (holding that, when there is evidence that a record does not exist, “[i]t is questionable to what degree additional detail and explanation are necessary....”); *Campbell v. Pa. Interscholastic Athletic Ass’n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry); *but see Mack v. Pa. Dep't of Corr.*, No. 699 C.D. 2022, 2023 Pa. Commw. Unpub. LEXIS 393, *5 (finding that the agency failed to prove that no other records exist where the open records officer’s affidavit provided only that she contacted an individual who “would likely have possess[ed] such records if they existed” and that individual reported that no records existed).

In the absence of any evidence that the Township has acted in bad faith, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Accordingly, while nothing in this Final Determination prevents the Requester from filing another RTKL request, and if necessary, filing an appeal pursuant to the requirements of 65 P.S. § 67.1101(a)(1), the Township has met its burden of proving that no other records responsive to this Request exist in its possession, custody, or control. *See Hodges*, 29 A.3d at 1192.

4. The Township has proven that portions of certain records are protected by the attorney-work product doctrine and/or the attorney-client privilege

The Township argues that portions of certain records protected by the attorney-work product doctrine and/or the attorney-client privilege. The RTKL’s definition of privilege includes the attorney-work product doctrine and the attorney-client privilege, and the presumption that

records in the possession of local agencies are public records does not apply to records that are privileged. *See* 65 P.S. §§ 67.102 and 305(a)(2). 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 Bousamra v. Excela Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citation omitted). When waiver is at issue, the burden of proof shifts to the requester. *See Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014). 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, e.g., Mezzacappa v. Northampton Cnty.*, OOR Dkt. AP 2022-2617, 2023 PA O.O.R.D. LEXIS 240.

Meanwhile, the attorney work-product doctrine prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. “The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation.” *Bousamra*, 210 A.3d at 976 (*see also Heavens v. Pa. Dep't of Env't Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”)). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product

doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted). Work-product immunity is only waived by disclosure to an adversarial party or by disclosure “to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.” *Id.* at 978 (internal quotation omitted).

The doctrine applies to non-attorney representatives as well, as long as that individual was hired in anticipation of litigation. *Rittenhouse v. Bd. of Supervisors*, 2012 Pa. Commw. Unpub. LEXIS 248, *4 (Pa. Commw. Ct. 2012) (citing *LaValle v. Off. of Gen. Counsel*, 769 A.2d 449 (2001)). For the doctrine to apply, the material must contain opinions relating to the merit of a claim or defense or relating to strategy or tactics. *See id.*

The Alberts Attestation provides:

8. ... Kailie Melchior, Esq. evaluated Bates Nos. 6-8, 10, 12-15, 17, 22-25, 45 and 46 to redact all attorney-client privileged material. [I]n each email ... [the] Township is the holder of the privilege and asserts that privilege. Additionally, the person to whom the communication was made is a member of the bar of a court or his subordinate. In each communication, a solicitor from the Kilkenny Law firm, the firm that serves as solicitor for [the] Township, is either sending or receiving the communication. Sean Kilkenny, Esq., Jim Gallagher, Esq., Patrick Hitchens, Esq., Colleen Marsini, Esq. and Dave Sander, Esq. are attorneys at the Kilkenny Law Firm. Briana Bryant is a law clerk with the Kilkenny Law firm. Jenny Dobbins and Elisa Suarez are paralegals with the Kilkenny Law firm. Furthermore, each communication relates to a fact[] of which the attorney was informed by his client, without the presence of strangers for the purpose of securing an opinion of law, legal services or assistance in a legal matter and not for the purpose of committing a crime or tort. Each individual in the privileged e-mail communications is either a member of the Kilkenny Law firm or employed by the Township. Finally, the privilege is being claim[ed] and has not been waived by the Township.

The Supplemental Alberts Attestation provides additional specificity:

4. Bates No. 6 ... includes strategy regarding answering technical legal questions. ... These messages are only between members of the Solicitor’s office and employees or elected officials for [the] Township.²

² Each paragraph of the Supplemental Alberts Attestation provides that the emails are internal.

5. Bates No. 7 reflects communications and exchanges of information concerning the drafting of three ordinances which were later placed before the board for approval. These [] contain privileged information and attorney work product as the documents and analysis contained in the email were drafted by attorneys with the solicitor's office. []
6. Bates No. 8 reflects communications between attorneys with the solicitor's office and employees and elected officials of [the] Township exchanging information concerning the strategy for public comment. []
- ...
8. Bates No. 10 reflects communications and exchanges of information concerning revised plans and proposed resolution/land development plans regarding Delaware County Community College land development project and was created by or distributed internally [] The redacted portions [] contain attorney-client privileged information including legal advice and recommendations.
- ...
10. Bates No. 12 reflects communications and exchanges of information concerning draft script for upcoming meeting and deliberations regarding three ordinances including legal advice and guidance for those ordinances following questions directed to the solicitor's office The redacted portions [] contain ... legal advice and recommendations.
11. Bates No. 13 reflects communications and exchanges of information concerning draft script for upcoming meeting and deliberations regarding three ordinances including legal advice and guidance for those ordinances following questions directed to the solicitor's office
- ...
13. Bates No. 15 reflects communications and exchanges of information concerning legal research regarding conducting a special meeting and information regarding proposed ordinances for the special meeting
- ...
15. Bates No. 17 reflects communications and exchanges of information concerning legal research and recommendations for ordinance draft for proposed ordinance
- ...
20. Bates No. 22 reflects communications and exchanges of information concerning legal research and recommendations regarding the millage rate related to draft ordinance
21. Bates No. 23 reflects communications and exchanges of information concerning legal research and recommendations regarding draft tax ordinance

- 22. Bates No. 24 reflects communications and exchanges of information concerning legal research and recommendations regarding draft ordinance
- 23. Bates No. 25 reflects communications and exchanges of information concerning legal research and recommendations regarding draft ordinance
- ...
- 27. Bates No. 29 reflects communications and exchanges of information concerning legal research and legal recommendations and guidance regarding conducting public comment

The Attestations provide that the redacted content consists of material exchanged between the Township and a member(s) of the firm that serves as the solicitor for the Township related to legal questions, services or opinions or contain an attorney's opinions or work product. Furthermore, the Township has claimed the privilege and there is no evidence that it has been waived. Accordingly, evidence establishes that the bulk of the redacted material is protected by the attorney-work product doctrine and/or the attorney-client privilege. *See* 65 P.S. § 67.305(a)(2).³

In its request for supplemental evidence, the OOR asked the Township to address the existence of severable factual information, but the Supplemental Alberts Attestation does not specifically address Bates nos. 45 and 46. The verified exemption log reflects that the subject of the email at Bates no. 45 is "Treasurer Powers," and the email was sent by Attorney Kilkenny to Township employees. Further, the Township's redactions were limited to privileged material. Meanwhile, Bates no. 46, the subject of which is "Appointment of Council Clerk," was also sent by Attorney Kilkenny to Township employees, but the Township redacted the entire body of the email, including the names of the documents attached to the email. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981) (noting that the privilege extends only to communications and not to

³ The Township also argues that a number of these records are internal, predecisional and deliberative, 65 P.S. § 67.708(b)(10)(i)(A). However, because the Township has proven that they are privileged, the OOR need not assess whether they are also exempt under these provisions of the RTKL.

underlying facts); *Phila. v. Westinghouse Electric Corp.*, 2015 F. Supp. 830, 831 (E.D. Pa. 1962) (same); compare *Janesch v. Pa. House of Representatives*, 299 A.3d 1030, 1041 (Pa. Commw. Ct. 2023) (rejecting the argument that redactions to engagement letters and invoices was unreasonable in part due to the limited nature of the redactions), with *Couloumbis v. Senate of Pa.*, 300 A.3d 1093, 1104-05 (Pa. Commw. Ct. 2023) (finding that the Senate had not met its burden of proof where review of the redacted records indicated that the Senate had made broad, categorical redactions).

Additionally, the Township has redacted the names of attachments to various emails but has not provided evidence of how the names themselves are privileged. Because the Township has not submitted evidence justifying the redaction of these names, nor is there evidence that there is no severable factual information in Bates no. 46, it has not met its burden of proof in these respects. See 65 P.S. § 67.305(a)(2).⁴

5. Certain material reflects the Township's internal, predecisional deliberations

The Township argues that portions of certain records reflect its internal, predecisional deliberations. Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure a record that reflects:

The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

⁴ Though the Township does not expressly embrace the argument, to the extent that it withheld the names of the attachments because they are draft records, Section 708(b)(9) does not apply to the names of draft records. 65 P.S. § 67.708(b)(9).

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).

For purposes of this exemption, records that are exchanged with another agency are considered “internal” to the agency. *See Off. of the Governor v. Davis*, 122 A.3d 1185 (Pa. Commw. Ct. 2015). To be deliberative in nature, a record must make recommendations or express opinions on legal or policy matters and cannot be purely factual in nature. *Kaplin*, 19 A.3d at 1214. The term “deliberation” is generally defined as “[t]he act of carefully considering issues and options before making a decision or taking some action....” BLACK’S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep’t of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, *aff’d*, No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014). In addition, to prove that a record is exempt under this section, an agency must explain how the information withheld reflects or shows the deliberative process in which an agency engages during its decision-making. *See Twp. of Worcester v. Off. of Open Records*, 129 A.3d 44, 61 (Pa. Commw. Ct. 2016).

Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep’t of Env’t Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014). However, factual material can still qualify as deliberative information if its “disclosure would so expose the deliberative process within an agency that it must be deemed excepted”; or in other words, when disclosure of the factual material “would be tantamount to the

publication of the [agency's] evaluation and analysis.” *Id.* at 387-88 (citing *Trentadue v. Integrity Commc’n*, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

The Alberts Attestation provides:

9. ... Bates Nos. 9, 11, 16, 18, 19, 20, 21 and 26-28 all contained predecisional deliberations and redacted the relevant portion of the documents. []

The Supplemental Alberts Attestation provides:

7. Bates No. 9 reflects communications and exchanges of information concerning the hiring of a new municipal clerk and was created by or distributed internally among Upper Darby Township personnel The deliberations reflected in the records are predecisional because [the] Township was actively engaging in discussions about the new hire. []

...

9. Bates No. 11 reflects communications and exchanges of information concerning draft script for upcoming meeting and deliberations regarding three ordinances ... created by or distributed internally The ... Township was actively engaging in discussions about the ordinances and proper procedure for putting them forward at a public meeting. []

...

14. Bates No. 16 reflects communications and exchanges of information concerning draft agenda for the upcoming meeting and outlining information contained in draft versions of three ordinances and was created by or distributed internally The ... Township was actively engaging in discussions about the ordinances and proper procedure for putting them forward at a public meeting. []

...

16. Bates No. 18 reflects communications and exchanges of information concerning draft minutes from prior meeting and was created by or distributed internally The ... Township was actively engaging in discussions about the minutes that would ultimately be voted on at a public meeting.

17. Bates No. 19 reflects communications and exchanges of information regarding a proposed pilot project for recycled glass and was created by or distributed internally among [] Township elected officials and members of citizen boards. The ... Township was actively engaging in discussions regarding the proposed project.

18. Bates No. 20 reflects communications and exchanges of information concerning draft agenda items[,] includes the draft meeting agenda as an attachment and was created by or distributed internally among [] Township personnel The ... Township was actively engaging in discussions about the agenda prior to finalizing it for the upcoming meeting.

19. Bates No. 21 reflects communications and exchanges of information concerning deliberations about the junior councilmember program as well research regarding the same and was created by or distributed internally The ... Township was actively engaging in discussions about the merits of the program and whether to participate.

...

24. Bates No. 26 reflects communications and exchanges of information concerning a request for feedback regarding a resolution to the former Mayor of [the] Township who has been involved with the resolution prior to leaving office. The ... Township was actively engaging in discussions about [] this resolution for putting them forward at a public meeting.

25. Bates No. 27 reflects communications and exchanges of information concerning [a] draft script [] to be used for the upcoming public meeting [that] was created by or distributed internally

26. Bates No. 28 reflects communications and exchanges of information concerning conducting a special meeting and contains draft ordinances and a proposed draft agenda and was created by or distributed internally The ... Township was actively engaging in discussions about the ordinances and proper procedure for putting them forward at a public meeting. []

The Supplemental Alberts Attestation explains in detail how the redacted material is internal and reflects specified deliberations engaged in by the Township prior to a final decision on the relevant matter. As evidence establishes that the bulk of the redacted material is internal, predecisional and deliberative, the Township has met its burden of proving that it is exempt from disclosure. *See* 65 P.S. § 67.708(a).

The Requester argues that the Township has violated the Sunshine Act; however, alleged violations of the Sunshine Act, 65 Pa.C.S. §§ 701-716, do not fall within the OOR's jurisdiction. *See* 65 Pa.C.S. § 715 (providing for the jurisdiction and venue of judicial proceedings). The OOR is only responsible for providing training courses about the Sunshine Act and does not have the authority to adjudicate or prosecute claims that the Sunshine Act has been violated. 65 P.S. § 67.1310(a)(3) (requiring the OOR to provide annual trainings on the RTKL and Sunshine Act).

The Requester also argues that the email at Bates no. 26 was sent to Barbara Keffer, the former mayor of the Township, who was a private citizen on the date of the email, February 1, 2024. The Supplemental Alberts Attestation provides:

3. I reviewed Requester's correspondence and additional argument submitted on April 2, 2024. [] The chain that Requester has mentioned that was discussed in a meeting is contained already in the documents provided. The message chain discusses predecisional, internal deliberations, which is why it has been redacted.

However, the Township's website reflects that a new mayor was sworn in on January 2, 2024, *see* <https://www.upperdarby.org/events/27045/>, and the Township's position statement acknowledges that Ms. Keffer is the *former* mayor. Records are not "internal" for the purposes of Section 708(b)(10) if they are sent to or from a party that is not an employee or official of an agency. *See Shannon v. Pa. Dep't of Admin. Svcs.*, OOR Dkt. AP 2021-1375, 2021 PA O.O.R.D. LEXIS 1765. Communication with a third party renders the exemption inapplicable. *See Chester Water Auth. v. Pa. Dep't of Cmty. and Econ. Dev.*, 249 A.3d 1106, 1113 (Pa. 2021). As there is no evidence that Ms. Keffer was an employee of the Township or any other agency on February 1, 2024, the Township has not proven that the email qualifies under the exemption.

Additionally, as noted *supra*, the Township has redacted the names of attachments; as there is no evidence that the names of these attachments are themselves internal, predecisional and deliberative, the Township has not met its burden with regard to the names of the attachments or the body of the email at Bates no. 26. *See* 65 P.S. § 67.708(a).⁵

⁵ As noted *supra*, the Township also argues that a number of these records are also protected by the attorney-work product doctrine and/or the attorney-client privilege. However, because the Township has proven that they are internal, predecisional and deliberative, the OOR need not assess whether they are also privileged.

6. The draft resolution attached to Bates no. 26 is exempt

Although the email at Bates no. 26 is not internal for the purposes of Section 708(b)(10)(i)(A) of the RTKL, the Township also argues that it constitutes an exempt draft. Section 708(b)(9) of the RTKL exempts “[t]he draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.” *See* 65 P.S. § 67.708(b)(9). The Supplemental Alberts Attestation provides that the attachment to the email is a draft resolution that was sent to the former mayor for her feedback. Supplemental Alberts Attestation at ¶ 24. As draft resolutions are expressly exempt under the RTKL, the Township has met its burden of proof. *See* 65 P.S. § 67.708(a).

7. The Township has not proven that the disclosure of certain information is reasonably likely to threaten computer security

The Township argues that the disclosure of certain information is reasonably likely to threaten computer security. Section 708(b)(4) exempts from disclosure “[a] record regarding computer hardware, software and networks ... which, if disclosed, would be reasonably likely to jeopardize computer security.” 65 P.S. § 67.708(b)(4). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375 (Pa. Commw. Ct. 2013); *see also California Borough v. Rothey*, 185 A.3d 456 (Pa. Commw. Ct. 2018) (holding that an agency must “offer more than speculation or conjecture to establish the security-related exceptions under the [RTKL]”).

The Supplemental Alberts Attestation provides:

11. I determined that Bates No. 37, 39, 43, and 50 contained information regarding computer networks, including administrative or technical records, which if disclosed, would be reasonably likely to jeopardize computer security. The relevant documents contain zoom meeting identification and password information that if released could compromise confidential meetings and allow outside parties to join Township meetings without being invited to them.

Notably, confidential, attorney-client privileged and other deliberative communications occur on the Township zoom. []

However, the fact that information enabling access to Zoom meetings could enable unauthorized individuals to gain access to meeting at which privileged and deliberative information is shared in no way proves that the disclosure of this information is reasonably likely to threaten computer security. Moreover, the OOR notes that the organizer of a zoom meeting can choose whether or not to admit an individual who is attempting to join the meeting. *See* https://support.zoom.com/hc/en/article?id=zm_kb&sysparm_article=KB0065164. Further, review of the redacted copy of Bates no. 39 indicates that the redacted material is actually a link to a file on Google Drive. The email relates to a proposal to be presented to the Township's Zoning Committee by Delaware County Community College and enumerates the documents that appear to be contained at the link, including a development plan, application and several related letters. It is not evident how disclosure of this information could threaten computer security, and the Township provides no supporting evidence. As the Township has not proven that disclosure of the Zoom information or the Google Drive link is reasonably likely to threaten computer security, it has not met its burden of proving that it properly redacted this information. *See* 65 P.S. § 67.708(a).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part, and dismissed as moot in part**, and the Board is required to produce responsive records, as set forth 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 Delaware 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, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁶ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 18, 2024

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Delivered via E-File Portal to: John Vizzarri, Kailie Melchior, Esq. and Scott Alberts

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).