



Hearing Board, all employees of the Fayette County Office of Planning, Zoning and Community Development with respect to a Zoning Hearing Board Decision Resolution No. 12-32 of the Fayette county Zoning Hearing Board and the enforcement of violations by the property owner, Joseph Cellurale, Jr., and the operation of the On-Par business as it relates to the property now or formerly of Joseph Cellurale, Jr. and the operation of a business known as On-Par on said property which bears Tax Map No's: 9-31-36 and 9-31-36-2. This Request is for the time period from November 25, 2015 through August 11, 2016.

The County did not respond within five business days of receiving the Request, and on August 22, 2016, the Request was deemed denied. *See* 65 P.S. § 67.901.

On August 26, 2016, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On September 2, 2016, the County provided the records responsive to the Request, with a single e-mail redacted pursuant to the attorney-client privilege. On September 6, 2016, the Requester submitted a position statement. On the same day, the OOR asked the Requester if he was satisfied with the County's submission, and he requested that the OOR undertake an *in camera* review to determine if the redacted information was actually privileged. On September 7, 2016, the County concurred with the Requester's motion. On September 8, 2016, the Requester granted the OOR a two week extension of time to issue its Final Determination and the County sent the OOR the redacted record for *in camera* review.<sup>1</sup>

On September 28, 2016, the OOR sought clarification from the County regarding its claim of attorney-client privilege. In response, the County submitted the affidavit of Amy Revak, its Chief Clerk, on October 3, 2016. The same day, the OOR requested clarification of the affidavit, and the County likewise responded the same day with the amended affidavit from

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<sup>1</sup> The County provided this record *sua sponte*, outside of an order to provide the OOR with the record.

Ms. Revak. Again on October 3, 2016, the Requester submitted another position statement, arguing that the amended affidavit did not meet the test for attorney-client privilege.

### 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 County 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 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). 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 appeal is dismissed as moot with respect to the records provided on appeal**

On appeal, the County provided all responsive records to the Requester, subject to the redaction of one e-mail.<sup>2</sup> Therefore, the appeal is dismissed as moot as to those records not redacted.

**2. Part of the redacted record is exempt under the attorney-client privilege**

On appeal, the County provided a chain of e-mails between County officials and the County solicitor, but redacted one e-mail, asserting that this information is exempt under the

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<sup>2</sup> Ms. Revak attests that all responsive records were provided to the Requester.

attorney-client privilege. 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). 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).

In support of its claim, the County submitted the affidavit of Amy Revak, the County’s Chief Clerk. In her affidavit, Ms. Revak attests that she identified all responsive records and found that one of the e-mails in the responsive chain contained information that is protected by attorney-client privilege. Ms. Revak further attests that the e-mail in question is between John Cupp Esq., at the time the County Solicitor, and Sara Rosiek, a County employee. This affidavit establishes the first two elements of the attorney-client privilege.

Based on an *in camera* review of the records at issue in this appeal, part of the e-mail is protected by the attorney-client privilege. The sentence beginning with “Although” through the

sentence ending with “ZHB” is privileged, as that segment constitutes a recommendation by the County’s attorney as to legal action which the County should take in response to an inquiry by a County employee. It is also evident from the document that only the County employee and the County’s then-solicitor were privy to the discussion. Therefore, the *in camera* review satisfies the third element of the attorney-client privilege, and the identified sentences are exempt. *See Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (holding that an *in camera* review may serve to establish elements of the privilege); *Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014) (holding that once the first three elements of attorney-client privilege are established, the burden of showing waiver falls to the other party).

The other redacted sentences in the e-mail are not protected by the attorney-client privilege; the remainder of the e-mail consists of a generic description of a letter received by the County, with no advice or characterization. These sentences are entirely factual and do not reveal any legal advice sought by the County or provided by its solicitor. Therefore, these sentences are not protected by the attorney-client privilege.

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part, denied in part, and dismissed as moot in part**, and the County is required to provide the Requester with a copy of the subject e-mail, redacted as set forth above, 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 Fayette 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at:  
<http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 11, 2016**

*/s/ Jordan Davis*

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APPEALS OFFICER  
JORDAN C. DAVIS

Sent to: Leslie Mlakar, Esq. (via e-mail only);  
Jack Purcell, Esq. (via e-mail only);  
Amy Revak (via e-mail only);

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