



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

RICHARD STEWART,  
Requester

v.

MUNICIPALITY OF KINGSTON,  
Respondent

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Docket No.: AP 2016-1336

### INTRODUCTION

Richard Stewart (“Requester”), submitted a request (“Request”) to the Municipality of Kingston (“Municipality”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of communications regarding the Requester. The Municipality did not respond within five business days of receiving the Request, and 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 Municipality is required to take further action as directed.

### FACTUAL BACKGROUND

On July 15, 2016, the Request was filed, seeking “[a]ll emails & written correspondence relating to Richard C. Stewart from any Kingston employees, officers, agents and Solicitor Mattern (in-house interoffice mail).” On July 28, 2016, the Municipality responded, advising the

Requester that all e-mails regarding the Requester had previously been provided, and that any e-mails to and from Solicitor Mattern are protected by the attorney-client privilege.<sup>1</sup>

On August 12, 2016, the Requester appealed to the OOR, stating grounds for disclosure.<sup>2</sup> The OOR invited both parties to supplement the record and directed the Municipality to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On August 23, 2016, the Municipality submitted a position statement with the supporting attestation of Julie Norton, the Municipality's Open Records Officer. In her attestation, Ms. Norton states that other than communications between the Municipality and its solicitor, all of the requested records were previously provided to the Requester. On September 14, 2016, the Municipality submitted the attestation of Harry Mattern, Esq., the Municipality's solicitor. In his attestation, Attorney Mattern states that the only withheld records are requests for legal advice or his legal advice in responding to the Requester's various requests for 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).

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<sup>1</sup> While the Municipality's Open Records Officer responded to the Request, there is no evidence that she responded within five business days of receiving the Request. Therefore, the Request was deemed denied by operation of law on July 22, 2016. 65 P.S. § 67.901.

<sup>2</sup> In his appeal, the Requester granted the OOR an additional thirty days to issue a final determination. *See* 65 P.S. § 67.1101(b)(1). Thereafter, the Requester granted the OOR until October 12, 2016 to issue a final determination. *Id.*

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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Municipality 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. 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). Similarly, the burden of proof in claiming a privilege from disclosure 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. Communications between the Municipality and its Solicitor are protected by the attorney-client privilege**

The Request seeks communications between Municipality officials, including communications with the Municipality’s solicitor. On appeal, the Municipality provided the attestation of Harry Mattern, Esq., who attests that only withheld records are communications from the Municipality seeking legal advice in responding to the Requester’s requests for records, as well as communications from him to the Municipality in which he provides legal advice to the Municipality. Attorney Mattern argues these records are protected by the attorney-client privilege and attorney-work product doctrine.

The RTKL excludes records subject to a privilege from the definition of “public record.” *See* 65 P.S. § 67.102. 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.” *Id.* 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).

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 Pennsylvania Supreme Court has explained that the attorney-work product doctrine “manifests a particular concern with matters arising in anticipation of litigation.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that “[t]he ‘work product rule’ is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation”)); *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”).

In his attestation, Attorney Mattern states that the only withheld records are communications from the Municipality seeking legal advice, or communications from Attorney Mattern providing legal advice to his client. 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 v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Municipality 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 Municipality's attestation, the Municipality has met its burden of proof that it properly withheld communications information protected by the attorney-client privilege.

**2. The Municipality is required to disclose all records previously provided to the Requester**

In her attestation, Ms. Norton states that in response to the Request, she did not locate any documents other than those documents previously provided to the Requester. Ms. Norton further states that she has "not provided them a second time." While not cited by the Municipality, an agency may deny a request where: 1) the requester has made a request for the same records, and 2) the repeated requests have put an unreasonable burden on the agency. 65 P.S. § 67.506(a); *Borough of W. Easton v. Mezzacappa*, 74 A.3d 417 (Pa. Commw. Ct. 2013).

Here, while the Request may seek the same records as previously provided to the Requester, the Municipality offers no evidence of how providing these same records again would place an unreasonable burden on the Municipality. Merely seeking the same records again does not place an unreasonable burden on an agency. *Mezzacappa, supra*. As the Municipality raises no other grounds for denying access to the requested records, the Municipality is required to disclose the requested records.

## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Municipality is required to disclose all responsive records not protected by the attorney-client privilege within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Luzerne 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 according to court rules 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: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 12, 2016**

/s/ Charles Rees Brown  
CHARLES REES BROWN  
CHIEF COUNSEL

Sent via e-mail to:

Richard Stewart  
Harry Mattern, Esq.

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