



3. Correspondence between (to or from) the ... District and the U.S. Equal Opportunity Commission [“EEOC”] and/or the Pennsylvania Human Relations Commission [“PHRC”] relative to Maurice Wigley
4. Nonprivileged correspondence regarding litigation brought or threatened by Maurice Wigley

On September 22, 2016, after extending the response period under 65 P.S. § 67.902, the District partially granted the Request by providing records responsive to Item 2 of the Request. The District denied the remainder of the Request, claiming that Item 1 sought personnel records, 65 P.S. § 67.708(b)(7), and records subject to withholding under the Inspection of Employment Records Law (“IERL”), 46 P.S. § 1321. The District denied Item 3 of the Request, claiming that the records are not subject to public access in accordance with EEOC and PHRC regulations and are also subject to withholding under the attorney-client privilege and the attorney-work product doctrine. Finally, the District claimed that it does not possess records responsive to Item 4 of the Request.

On October 6, 2016, the Requester appealed to the OOR, challenging the District’s response to Items 1, 3 and 4 of the Request and stating grounds for disclosure.<sup>1</sup> The Requester requested that the OOR conduct an *in camera* review of the withheld records. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On February 8, 2016, the District submitted a position statement reiterating the grounds for denial. The District stated that it is willing to submit settlement agreements responsive to Item 1 of the Request for *in camera* inspection. The District also provided seven pages of

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<sup>1</sup> On appeal, the Requester does not challenge the sufficiency of the District’s response to Item 2 of the Request. As a result, the Requester has waived any objections regarding the sufficiency of the responsive records provided for that Item. *See Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

records responsive to Item 3 of the Request.<sup>2</sup> The District reiterated its claim that the remaining records are subject to the attorney-client privilege and the attorney-work product doctrine. In support of its position, the District submitted the affidavits of Patrick Berdine, the District's Open Records Officer, and Patricia Andrews, Esq., an attorney with the firm serving as the District's solicitor.

On October 18, 2016, the Requester responded, reiterating his argument that the withheld records are subject to public access.<sup>3</sup> The Requester argued that the withheld settlement agreements may be financial records, and, as a result of the limited exemptions applicable to financial records, are not subject to withholding under the personnel records exemptions. The Requester also argued that the District waived the attorney-client privilege and the attorney-work product doctrine as a basis for withholding a position statement that was filed with the EEOC during its administrative proceedings.

On November 3, 2016, the OOR requested that the Requester grant the OOR an extension to conduct an *in camera* review of the records at issue in this appeal. However, the Requester did not grant a sufficient extension to accommodate the *in camera* review process.

### **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,

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<sup>2</sup> On appeal, the District does not claim that the withheld records are exempt from public access under EEOC and PHRC regulations. Therefore the OOR will not consider those grounds for denial.

<sup>3</sup> The District also withheld records described as “letters between the ... District Solicitor's office and the ... District or its insurer.” However, on appeal, the Requester does not contest the application of the privilege to those records and explains that these records were not sought in the Request. As the Requester does not challenge the withholding of these records, the OOR will not address whether these records are privileged.

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. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Requester requested that the OOR conduct an *in camera* review of the withheld records; however, the request is denied because the Requester did not agree to extend the final determination deadline for a sufficient amount of time to accommodate the *in camera* process.

The District 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). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “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).

#### **1. The District does not possess records responsive to Item 4 of the Request**

The District claims that it does not possess non-privileged records responsive to Item 4 of the Request. Section 705 of the RTKL states that “an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705. Mr. Berdine attests that “[t]o the best of my knowledge, information and belief, the ... District does not have in its possession, custody or control of the records that are responsive to this request.” Mr. Berdine further attests that “I have caused to be searched the ... District files to the best on my ability and that the records requested in Item #4 do not exist.”

Under the RTKL, an affidavit 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the District has acted in bad faith or that the requested records do, in fact, exist, “the averments in [the affidavit] 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 evidence provided, the District has met its burden to show that it does not possess records responsive to Item 4 of the Request.

**2. The District cannot withhold the requested settlement agreements under the IERL**

The Item 1 of the Request seeks settlement agreements. The District argues that these records are exempt from disclosure under the IERL, which states:

An employer shall, at reasonable times, upon request of an employee, permit that employee or an agent designated by the employee to inspect his or her own personnel files used to determine his or her own qualifications for employment, promotion, additional compensation, termination or disciplinary action. The employer shall make these records available during the regular business hours of the office where these records are usually and ordinarily maintained, when sufficient time is available during the course of a regular business day, to inspect the personnel files in question. The employer may require the requesting employee or the agent designated by the employee to inspect such records on the free time of the employee or agent. At the employer's discretion, the employee may be required to file a written form to request access to the personnel file or files or to indicate a designation of agency for the purpose of file access and inspection. This form is solely for the purpose of identifying the requesting individual or the designated agent of the requesting individual to avoid disclosure to ineligible individuals. To assist the employer in providing the correct records to meet the employee's need, the employee shall indicate in his written request, either the purpose for which the inspection is requested, or the particular parts of his personnel record which he wishes to inspect or have inspected by the employee's agent.

43 P.S. § 1322. The OOR has held that “[t]he IERL allows employees and their designated agents to inspect their own personnel files; however, the IERL does not restrict access to the contents of these personnel files that are made public under the RTKL.” *Barcaro and WGAL, News 8 v. Cumberland County*, OOR Dkt. AP 2014-1570, 2014 PA O.O.R.D. LEXIS 1212. As a result, the IERL does not prohibit the release of settlement agreements. *See Maulsby v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1480, 2014 PA O.O.R.D. LEXIS 1268.

### **3. The settlement agreements responsive to Item 1 of the Request are not personnel records**

The District claims in an unsworn statement that the settlement agreements are exempt from disclosure under Section 708(b)(7)(vii) and Section 708(b)(7)(viii) of the RTKL. Under Section 708(b)(7), certain “records relating to an agency employee,” such as a “[g]rievance material, including documents related to discrimination or sexual harassment,” 65 P.S. § 67.708(b)(7)(vii); and “[i]nformation regarding discipline, demotion or discharge contained in a personnel file,” 65 P.S. § 67.708(b)(7)(viii). Based on the underlying purpose of the RTKL, however, “exemptions from disclosure must be narrowly construed.” *Bowling v. Office of Open Records*, 990 A.2d at 824. As the OOR has previously acknowledged, subsections within 65 P.S. § 67.708(b)(7) only apply to records specifically mentioned and do not protect a broad class of generic “personnel records.” *McGill and The Morning Call v. Bangor Borough*, OOR Dkt. AP 2010-1216, 2011 PA O.O.R.D. LEXIS 38; *Konias v. Dravosburg Borough*, OOR Dkt. AP 2009-1062, 2009 PA O.O.R.D. LEXIS 711.

Here, the District describes the withheld settlement agreements as follows:

7. The first agreement is a settlement of a grievance and EEOC filing by Mr. Wigley and is contained in his personnel file and was not a final action of the ... District resulting in demotion or discharge.
8. The second agreement is a settlement of an EEOC filing made by Mr. Wigley. The agreement contains information regarding discipline, demotion or discharge of a District employee that is maintained in the personnel file.

While a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof under the RTKL, *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), conclusory statements are not sufficient to meet an agency’s burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A]

generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Here, the District has not offered any evidence other than the conclusory statements that the withheld settlement agreements contain exempt grievance material and “information regarding discipline, demotion or discharge of a District employee.” As a result, the District has not demonstrated that the settlement agreements are personnel records, specifically grievance material relating to an agency employee, as required under Section 708(b)(7)(vii). Therefore, the District has failed to meet its burden of proving that the settlement agreements are exempt from disclosure under Section 708(b)(7)(vii) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

In addition, courts have consistently held that settlement agreements involving public agencies are public records subject to disclosure. *Tribune-Review Publishing Co. v. Westmoreland County Housing Authority*, 833 A.2d 112 (Pa. 2003); *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644 (Pa. Commw. Ct. 2006) (holding settlement agreements are public records under the RTKL’s predecessor legislation); *see also Lord v. Allegheny County*, OOR Dkt. AP 2013-0849, 2013 PA O.O.R.D. LEXIS 427; *Bowling v. Allegheny County*, OOR Dkt AP. 2013-0583, 2013 PA O.O.R.D. LEXIS 425. Accordingly, in the absence of any evidence demonstrating that the settlement agreement is exempt from disclosure, it is subject to public access.

**4. The District waived the attorney-client privilege and attorney-work product doctrine for the Position Statement responsive to Item 3 of the Request**

The District argues that it withheld records responsive to Item 3 of the Request because they are protected by the attorney-client privilege or the 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). “[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. 2015) (citing *id.*).

An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must prove all required 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 recently 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*, 65 A.3d at 1077 (“[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-work product doctrine and attorney-client privilege are related, the attorney-work product doctrine is broader in scope “because it protects any material, regardless of whether it is confidential” revealing an attorney’s mental impressions. *Gillard*, 15 A.3d 59 n.16. (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001)).

The District describes the sole record withheld in response to Item 3 of the Request as “a position statement filed by the ... District Solicitor with the EEOC.” Ms. Andrews attests that the withheld EEOC Position Statement “contain[s] the firms’ legal analysis, conclusions, legal opinions, mental impressions, [and] legal theories. This ... Position Statement also contains information relative to strategy and tactics.” Based upon Ms. Andrew’s affidavit, the District has established that the first and second elements of the attorney-client privilege have been satisfied—the District is a client of its Solicitor and its Solicitor’s office consists of licensed attorneys in the Commonwealth. However, as the withheld Position Statement was filed in a proceeding before the EEOC, a third party administrative agency, the District has waived the

attorney-client privilege. *But see Bd. of Supervisors of Milford Twp. v. McGogney*, 13 A.3d 569, 572 (Pa. Commw. Ct. 2011) (relating to the inadvertent disclosure of a record subject to the attorney-client privilege). Like the attorney-client privilege, the attorney work product doctrine can be waived. As a result, the withheld Position Statement is subject to public access.

Finally, during the course of the appeal, the District provided the Requester with seven pages of correspondence exchanged with the EEOC and PHRC. Because the District provided additional responsive records during the course of the appeal, the appeal is dismissed as moot as those records.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part, dismissed as moot in part**, and **denied in part**, and the District is required to provide the foregoing records 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 Allegheny 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 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>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

**FINAL DETERMINATION ISSUED AND MAILED: November 7, 2016**

/s/Benjamin Lorah, Esq.

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