



FINAL DETERMINATION

IN THE MATTER OF

**TOM MURSE AND LNP MEDIA GROUP,
INC.,
Requester**

v.

**LANCASTER COUNTY,
Respondent**

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Docket No: AP 2022-0923

FACTUAL BACKGROUND

On March 17, 2022, Tom Murse and LNP Media Group, Inc. (collectively “Requester”) submitted a request (“Request”) to Lancaster County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, in relevant part:¹

Any communication (emails, printed material, text messages or other electronic messages including from social media or productivity apps, regardless of whether they’re from a personal or county-issued device) between any of the Lancaster County commissioners, or between any of the commissioners and the chief clerk or county solicitor, between Jan. 1, 2022, through March 17, 2022, regarding how county employees respond to the news media or regarding any directive or policy pertaining to how county employees respond to the news media. Throughout this [R]equest, “news media” includes newspaper reporters, television reporters, radio reporters or other persons engaged in the process of news gathering for dissemination to the public. In the event the [C]ounty believes these records do not exist, please provide a signed affidavit attesting to fact that the agency does not possess responsive records.

¹ The Request included three items; however, the Requester limits his appeal to the County’s response to the first item of the Request.

On March 30, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the County partially denied the Request, arguing that certain records are related to an agency employee, 65 P.S. § 67.708(b)(7); are draft statements of policy, 65 P.S. § 67.708(b)(9); and reflect the internal, predecisional deliberations of the County, 65 P.S. § 67.708(b)(10). Additionally, the County withheld certain records that it argues are confidential pursuant to the attorney-client privilege. *See* 65 P.S. § 67.305(a)(2).

On April 19, 2022, the Requester appealed to the Office of Open Records (“OOR”).² With his appeal filing, the Requester sought *in camera* review of the withheld records. On April 29, 2022, the County submitted a position statement, reiterating its reasons for denial. In support of its position, the County submitted the affidavit of Lawrence George, Chief Clerk for the County. The County also submitted a privilege log, accompanied by a statement made under the penalty of perjury from Jacquelyn E. Pfusich, Esq., the County’s solicitor, who identifies the records withheld pursuant to the attorney-client privilege. On June 8, 2022, the OOR ordered the County to produce unredacted copies of all withheld records for the OOR’s *in camera* inspection. On June 22, 2022, the County submitted copies of the withheld records for *in camera* review.³ The Requester did not submit any additional argument or evidence during the course of the appeal.

² The Requester does not challenge redactions made to personal cellular telephone numbers, which are expressly exempt from public access under the RTKL. *See* 65 P.S. § 67.708(b)(6)(i)(A). Additionally, the Requester does not challenge the County’s withholding of records that it claims are records of a judicial agency; regardless, on appeal, the County has not argued or identified responsive records that were withheld because they are not records of the County.

³ The County provided several duplicate copies of emails, as the emails came from different individual’s email accounts.

LEGAL ANALYSIS

1. The County has demonstrated that certain records are protected by the attorney-client privilege

The County argues that it properly withheld responsive records that are protected by the attorney-client privilege. The RTKL defines “privilege” as “[t]he 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.” 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 Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citations omitted). “[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. *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 County's Inspection Index identifies redactions that were made pursuant to the attorney-client privilege. Attorney Pfursich affirms that she is the County's solicitor and is a member of the bar, and that the communications that were withheld were between her and County employees, specifically the Chief Clerk and Deputy Chief Clerk, for the purposes of seeking and providing legal advice, and that the communications were outside of the presence of strangers. *See* Pfursich Statement.

Under the RTKL, an affidavit or a statement made under the penalty of perjury 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 evidence that the County has acted in bad faith, "the averments in [the statement] 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 submitted, including a review of the County's privilege log and its Inspection Index, as well as the OOR's *in camera* review, the County has proven that the withheld communications are protected by the attorney-client privilege, as they are communications seeking and providing legal advice. Specifically, the records, as identified on the Inspection Index, that are protected by the attorney client privilege are as follows:

- CO-000001
- CO-000002
- CO-000005, email from 4:40 p.m.
- CO-000012, email from 4:40 p.m.
- CO-000018, email from 4:40 p.m.
- CO-000021, including attachment
- CO-000029, email from 4:40 p.m.
- CO-000035, email from 4:40 p.m.
- CO-000038, including attachment
- CO-000045
- CO-000053
- CO-000055

- CO-000075, email from 4:40 p.m.
- CO-000078
- CO-000080
- CO-000081

2. The County has demonstrated that certain records reflect the internal, predecisional deliberations of the County

The County also argues that certain records are exempt from public access as the internal, predecisional deliberations of the County. Section 708(b)(10)(i)(A) 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, employees or officials of another agency, 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). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

To establish that records are deliberative, an agency must show that the information relates to the deliberation of a particular decision. *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 378-88 (Pa. Commw. Ct. 2014). 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). 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. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan*, 103 A.3d at 382-83. 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 Communication*, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

In support of the County’s position, Mr. George affirms the following:

8. In my capacity as Chief Clerk, I instructed my Deputy Chief Clerk to prepare a draft employee policy regarding media inquiries and to provide that draft policy to the County Solicitor and to each member of the Board of Commissioners.

9. I further instructed my Deputy Chief Clerk to gather input for the purpose of revisions to the draft policy.

10. To the best of my knowledge, my Deputy Chief Clerk provided the draft policy to each member of the Board of Commissioners as well as the County Solicitor.

11. Revisions and input continue to be provided by the members of the Board of Commissioners as well as the County Solicitor.

12. No finalized draft of a media policy has been presented to the Board of Commissioners for their approval.

13. No finalized media policy has been published or incorporated into the County’s employee handbook.

14. No finalized media policy has been distributed to County department heads or [C]ounty employees in any format.

As previously set forth, a sworn affidavit is competent evidence to sustain an agency’s burden of proof under the RTKL. *Sherry*, 20 A.3d at 520-21. The OOR’s review of the withheld records indicates that certain emails are internal to the County and were between County employees, and in some instances, between County employees and one County Commissioner.

Additionally, Mr. George's affidavit, as well as the OOR's review of the emails, establishes that the communications are pertaining to a draft policy, and contain deliberations regarding how employees should handle media inquiries. Specifically, the following records reflect the internal, predecisional deliberations of the County:

- CO-000019
- CO-000036
- CO-000057
- CO-000065
- CO-000066
- CO-000082

However, while the County has demonstrated that the records set forth above reflect the internal, predecisional deliberations of the County, it has not established that all records withheld meet the requirements of this exemption and do not fall within the exception to Section 708(b)(10).

Section 708(b)(10)(ii) of the RTKL provides as follows:

Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record.

65 P.S. § 67.708(b)(10)(ii). The OOR has held that if records are presented to a quorum of a board, the OOR must consider whether they fall under the exception to Section 708(b)(10). *Esposito v. Pennridge Sch. Dist.*, OOR Dkt. AP 2019-1521, 2019 PA O.O.R.D. LEXIS 1532. Two requirements must be met for a record to be subject to public disclosure pursuant to the exception: 1) it must be presented to a quorum; and 2) it must be presented for deliberation. *Hale v. Borough of Gettysburg*, OOR Dkt. AP 2016-0642, 2016 PA O.O.R.D. LEXIS 1128. Section 708(b)(10)(ii) may apply to a record submitted to the full quorum even if the record is not presented at a public meeting. *Esposito, supra*. Instead, the OOR has found that any record presented to a quorum for

the purpose of making a decision is subject to production. *Longo v. Phoenixville Area Sch. Dist.*, OOR Dkt. AP 2020-0504, 2020 PA O.O.R.D. LEXIS 1361.

In the instant matter, the Requester argues that the County's Board of Commissioners is comprised of three members, and that because many of the withheld records were between at least two of the three Commissioners, and in some cases between all three Commissioners, that the records were presented to a quorum, and, are therefore, subject to public access.⁴ As set forth above, Mr. George affirms that the draft policy was provided to the County Commissioners for their input. *See* George Affidavit, ¶ 10. In its unsworn position statement, the County argues that the policy is an internal administrative policy and not a public policy that is required to be voted on at a public meeting.⁵

A review of the withheld records indicates that several of the emails that the County claims reflect internal, predecisional deliberations are between either all of the County Commissioners, or two of the three County Commissioners. Specifically, the records are deliberative, as acknowledged by the County in citing to the internal, predecisional deliberation exemption, and are between and shared with a quorum of the County Commissioners. *See Schmitt v. Pine-Richland Sch. Dist.*, OOR Dkt. AP 2016-1635, 2017 PA O.O.R.D. LEXIS 1280 (predecisional and deliberative records that were circulated among members of the school board were public). Additionally, the County has not set forth evidence that the records were shared with the County Commissioners during or in advance of an executive session. *See* 65 Pa.C.S. § 708 (under the Sunshine Act, an agency may hold an executive session in certain instances). As a result, the

⁴ The County's website indicates that its Board of Commissioners is comprised of: John Trescot, Ray D'Agostino, and Joshua Parsons. *See* <https://www.co.lancaster.pa.us/131/Commissioners-Office> (last accessed August 2, 2022).

⁵ Unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) ("Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all").

exception to the exemption applies to this group of withheld records, and therefore, the County has not met its burden of proving that the remaining records identified as the internal, predecisional deliberations of the County are exempt pursuant to Section 708(b)(10)(i)(A). *See* 65 P.S. § 67.708(b)(10)(ii).

3. The County has demonstrated that certain records are exempt from public access pursuant to Section 708(b)(9) of the RTKL

The County also argues that the withheld records are exempt from public access pursuant to Section 708(b)(9) of the RTKL. Section 708(b)(9) exempts from disclosure “[t]he draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.” 65 P.S. § 67.708(b)(9). This exemption covers only drafts that fall into the specific categories set forth in Section 708(b)(9) of the RTKL. *See, e.g., Public Interest Legal Foundation v. City of Phila. Office of City Comm’rs.*, OOR Dkt. AP 2018-0256, 2018 PA O.O.R.D. LEXIS 562 (drafts of transcripts do not meet the categories identified by the exemption); *but see Watt v. State College Borough*, OOR Dkt. AP 2020-0113, 2020 PA O.O.R.D. LEXIS 1777 (finding that a draft zoning ordinance was exempt).

In support of the County’s position, Mr. George affirms that a draft employee policy regarding media inquiries was provided to each member of the Board of Commissioners for their input and revisions, and that no finalized media policy has been presented to the County’s Board of Commissioners, nor has the policy been published or finalized. *See* George Affidavit, ¶¶ 8-14. The OOR’s *in camera* review of the withheld records indicates that the following emails contain a draft policy regarding media inquiries:

- CO-000014
- CO-000025, email from 12:54 p.m.
- CO-000026
- CO-000031
- CO-000042, email from 12:54 p.m.

- CO-000043
- CO-000046
- CO-000061, email from 12:54 p.m.
- CO-000062
- CO-000063
- CO-000064
- CO-000070

However, the remaining records, while related to the County's handling of media inquiries, are not, on their face, related to the draft policy referenced by the County, or any other policy, bill, resolution, regulation, management directive, ordinance or amendment as set forth in Section 708(b)(9). Therefore, while the County has demonstrated that some of the withheld records contain a draft policy, it has not established that the remaining records are exempt from access as a draft policy. *See* 65 P.S. § 67.708(a)(1).

4. The County may redact written criticism of an employee

The County redacted responsive text messages, arguing that the redacted information consists of written criticisms of an employee. Section 708(b)(7)(vi) of the RTKL expressly exempts from disclosure, "[w]ritten criticisms of an employee." 65 P.S. § 67.708(b)(7)(vi). While the County cited this exemption in its final response, as well as on its Inspection Index, the County did not submit argument or evidence on appeal in support of redactions made to written criticisms of an employee. However, the OOR's review of the redactions indicates that one County Commissioner and the County Chief Clerk criticized a County employee's handling of a media matter. Redacted from the texts, which have been identified on the Inspection Index as CO-000087, CO-000088, CO-000089 and CO-000090, was the County employee's name and a specific criticism made regarding the employee. Because written criticisms of an employee are expressly exempt from public access, the County's redactions under Section 708(b)(7)(vi) are

permissible. *See Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 4. (Pa. Commw. Ct. 2012) (Section 708(b)(7) applies to criticism of individuals who are employees of the agency).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the County is required to provide the Requester with unredacted copies of the following records within thirty days: CO-000004, CO-000005 (emails from 5:05 p.m. and 5:10 p.m.), CO-000008, CO-000010, CO-000011, CO-000015, CO-000017, CO-000022, CO-000023, CO-000025 (email from 1:49 p.m.), CO-000027, CO-000028, CO-000032, CO-000034, CO-000039, CO-000040, CO-000042 (email from 1:49 p.m.), CO-000052, CO-000054, CO-000056, CO-000059, CO-000060, CO-000061 (email from 1:49 p.m.), CO-000074, CO-000075 (emails from 5:05 p.m. and 5:10 p.m.), CO-000077, CO-000079, CO-000084, and CO-000085. 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 Lancaster 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. 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 19, 2022

/s/ Kathleen A. Higgins

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DEPUTY CHIEF COUNSEL

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

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