pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
THOMAS HELBIG, JR.,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2022-2315**
	:	
RECEIVER FOR THE CITY OF	:	
CHESTER,	:	
Respondent	:	

FACTUAL BACKGROUND

On August 16, 2022, Thomas Helbig, Jr., Esq. ("Requester") submitted a request ("Request") to the Receiver for the City of Chester ("Receiver") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

1. All emails and correspondence with Mr. Rocco Imperatrice from June 22, 2020 to present.

2. All emails and correspondence with Kathryn Herchede from June 22, 2020 to present.

3. All emails and correspondence with any representative of Widener University from June 22, 2020 to present.

4. All emails and correspondence with Eric Hagget from June 22, 2020 to present.

5. Any contracts, agreements, or invoices entered into, or received from, Eric Hagget and/or Walker Consultants from June 22, 2020 to present.

6. All emails and correspondence with Econsult Solutions, Inc. regarding its September 10, 2020 memorandum titled "Chester Parking Contract Issues and Recommendation" from August 28, 2020 to present.

7. Any contracts, agreements, or invoices entered into, or received from, any public relations firm from June 22, 2020 to present.

8. All memorandums or analyses received from Econsult Solutions, Inc. regarding the Amended and Restated Master Asset Management Agreement ("Management Agreement") between the City of Chester and PFS from August 18, 2020 to present.

9. All memorandums drafted, performed, or received regarding the Management Agreement from June 22, 2020 to present.

10. All agendas and meeting minutes from the Municipal Financial Recovery Advisory Committee ("MFRAC") meetings from June 22, 2020 to present.

11. All notes from meetings or conversations with representatives of Widener University from June 22, 2020 to present.

12. All emails and correspondence with Kenny Cooper from January 1, 2021, to present.

13. All documents provided or disclosed to Kenny Cooper [from] January 1, 2021, to present.

14. All emails and correspondence with Kathleen Carey from January 1, 2021, to present.

15. All documents provided or disclosed to Kathleen Carey from January 1, 2021, to present.

On September 20, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Receiver denied the Request, arguing that part of the Request is insufficiently specific, 65 P.S. § 67.703, records to not exist for parts of the Request, the records are pre-decisional deliberations of the Receiver, 65 P.S. § 67.708(b)(20)(i)(A), records are protected by the attorney-client privilege and the attorney work product doctrine, portions of the Request are

exempt notes and working papers, 65 P.S. § 67.708(b)(12), and exempt meeting minutes, 65 P.S. § 67.708(b)(21)(i)(ii).[1]

On October 4, 2022, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.[2] Specifically, the Requester argues that "[t]he Receiver failed to support its asserted exemptions with an affidavit or exemption log regarding [Items] 1-6, 8, and 9, and failed to supply an affidavit that no records exist with respect to [Items] 5, 7, and 11[,]" and that "[t]he Receiver's claim that Requests are not sufficient specific is error."[3] The OOR invited both parties to supplement the record and directed the Receiver to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

The record in this matter closed on October 17, 2022; however, because no submissions were received, on October 19, 2022, the OOR contacted the parties and extended the submission deadline to October 21, 2022. That same day, the Receiver requested a two-week extension to file a submission. In order to grant the Receiver's request, the OOR asked the Requester to permit the OOR to extend the final determination deadline to November 18, 2022. The Requester opposed a two-week extension but did permit the OOR a one-week extension to issue a final determination. Accordingly, the OOR extended the submission deadline for both parties until October 24, 2022.

On October 28, 2022,[4] the Receiver submitted a position statement arguing that that the Requests lack specificity, the records are protected by the attorney-client privilege and the attorney work product doctrine, and that the responsive records contain predecisional deliberations exempt

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[1] In its final response, the Receiver addressed each item of the Request.

[2] The Requester granted the OOR additional time to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).").

[3] The OOR notes that the Requester is not challenging the Receiver's response to Item 10 as weblinks were provided to access the records responsive to Item 10.

[4] The OOR notes that the submission was filed late; however, the OOR will accept the late submission in order to resolve the dispute. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

from disclosure, 65 P.S. § 67.708(b)(10). The Receiver did not submit an affidavit in support of its arguments nor did it submit a privilege/exemption log.

On October 28, 2022, the Requester responded asking that the "Receiver's response be stricken as untimely." That same day, the Receiver responded asking that the OOR accept its response and give it the appropriate weight and consideration. On November 1, 2022, the Receiver submitted the attestation of Michael Doweary, appointed Receiver for the City of Chester, attesting that records responsive to Item 7 do not exist. The OOR will accept the Receiver's late submission and afford it its due weight and consideration. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

On November 1, 2022, the OOR contacted the parties seeking clarification regarding what issues remain outstanding for the OOR to adjudicate.[5] That same day, the Requester responded with the understanding that "the Requester has not produced all responsive records, but rather has withheld records pursuant to asserted privilege as well as the predecisional deliberation exemption." The Requester further noted that "[t[he Receiver has not provided a log of withheld documents…." Likewise, the Receiver responded that it has "produced documents that [the Receiver] understood to be responsive and not subject to an exemption or privilege, despite the lack of specificity. However, several requests were denied for reasons such as lack of specificity and privilege, among others."

On November 2, 2022, the OOR asked the Requester for a one-week extension to provide the Receiver additional time to submit a privilege/exemption log identifying the withheld documents and proper exemptions. The Requester agreed to such extension. On November 7,

[5] The Receiver, on the one hand, provided evidence that all responsive documents have been provided but, on the other hand, also argued that the Request lacked specificity.

2022, the Receiver submitted a privilege log. On November 14, 2022, the Requester filed a response to the Receiver's November 14, 2022 privilege log.

On November 14, 2022, the Receiver contacted the OOR indicating that Chester City filed for Chapter 9 bankruptcy and asked the OOR to stay the instant matter. The Receiver noted that the Commonwealth Court in *Alfred Brown v. Receiver for the City of Chester*, No. 1139 CD 2021 (OOR Dkt. AP 2021-1218) continued the matter generally and asked the parties to file a status report on or before December 29, 2022.[6] In *Chester Community Charter School v. Hardy*, the Commonwealth Court addressed whether a RTKL request was barred based on a court order staying discovery in related litigation holding:

> It may be that Requester is using the Right-to-Know Law to conduct discovery in the defamation action, which has been stayed. This result may seem unfair because Charter School is barred by the bankruptcy proceedings from doing similar discovery against the Defamation Defendants. Unfortunately for Charter School, it matters not. A requester's motive under the Right-to-Know Law has been made irrelevant by the legislature…. Charter School is an "agency." As such, it is bound by the directives of the legislature for all agencies, and whether those directives are fair or wise is beyond the court's proper field of inquiry.

38 A.3d 1079, 1089 (Pa. Commw. Ct. 2012); *see also City of Allentown v. Brenan*, 52 A.3d 451 (Pa. Commw. Ct. 2012) (holding that a judicial order denying a motion to compel discovery did not prohibit a RTKL request). Additionally, the Third Circuit in *Maritime Electric Co., Inc. v. United Jersey Bank*, 959 F.2d 1194 (3d Cir. 1991) found that "[a]lthough the scope of the automatic stay is broad, the clear language of section 362(a) [of Title 11 of the Bankruptcy Code] indicates that it stays only proceedings *against* a 'debtor' – the term used by the statute itself." (emphasis in the original).

[6] The OOR notes that the Commonwealth Court did not specifically "stay" all proceedings involving the Receiver for the City of Chester, nor did the Court address RTKL requests or matters pending before the OOR.

Because the Commonwealth Court did not specifically "stay" all proceedings with the Receiver, and the Request seeks records under the RTKL and the Request is against the Receiver for the City of Chester and not Chester City itself, the OOR is constrained to deny the Receiver's request for a stay and will address the merits of the instant appeal.

LEGAL ANALYSIS

The Receiver 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 Receiver 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 Receiver proved that no additional records responsive to Item 7 exist but failed to meet its burden that no records responsive to Item 11 exist.

The Receiver argues that it does not possess records responsive to Item 7. Item 7 seeks "[a]ny contracts, agreements, or invoices entered into, or received from, any public relations firm from June 22, 2020 to present."

In response to a request for records, "an agency shall make a good faith effort to determine if … the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort," in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court stated:

> As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession… When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under … the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

On November 1, 2022, the Receiver submitted a sworn attestation made under the penalty of perjury from Michael Doweary, Receiver for the City of Chester, who attests that a search was conducted and that no responsive records exist to Item 7 in the Receiver's possession, custody, or control.[7] The Doweary Attestation further states:

> 6. Upon receipt of the [R]equest, [the Receiver] directed [his] Chief of Staff, Vijay Kapoor, to conduct a thorough examination of files in [the Receiver's] possession, custody and control, including a search of his email account for all responsive documentation.
>
> 7. After conducting a good faith search of [the Receiver's office] files and email account, including [the Receiver's] deleted emails folder, and [the Receiver has] not identified any records within the [Receiver's] possession, custody and control, including a search of [the Receiver's] email account for all responsive documentation.

[7] Under the RTKL, a sworn affidavit or statement made under the 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith or that the requested responsive records exist, "the averments in [the declaration] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)).

8. After conducting a good faith search of [the Receiver's office] files and email account, including [the Receiver's] deleted emails folder, and Mr. Kapoor and [the Receiver] produced all responsive documents to the remaining requests.

See Doweary Attestation, ¶¶ 6-8. Therefore, based on the evidence provided, the Receiver has met its burden of proof that it does not possess the records to Item 7 of the Request. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). *See also 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), *appeal granted on other grounds*, 280 A.3d 870 (Pa.2022).

Item 11 seeks "[a]ll notes from meetings or conversations with representatives of Widener University from June 22, 2020 to present." In the Receiver's final response, the Receiver denied the Request as "no records exist that are responsive to this [R]equest."[8] Additionally, in its submission, the Receiver argues that "there are no responsive documents or information for [Items] 7 and 11." However, the Doweary Attestation fails to address Item 11. As the Receiver failed to present any evidence that it does not possess records responsive to Item 11, the Receiver failed to meet its burden that records responsive to Item 11 do not exist within its possession, custody or control. Accordingly, the Receiver must conduct a search for records responsive to Item 11 of the Request and provide the Requester with any records responsive to that search or an attestation describing the search in detail.

2. Items 1-4, and 12-15 are insufficiently specific, while Item 5 is sufficiently specific.

The Receiver argues that Items 1-4 and 12-15 are insufficiently specific because the Items seek "all communications between the agency and several individuals and named entities."

[8] The Requester also denied Item 11 as records protected by the attorney client privilege and the attorney work-product doctrine.

Section 703 of the RTKL states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." 65 P.S. § 67.703. When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citations omitted). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep't of Corr*., 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). First, "[t]he subject matter of the request must identify the 'transaction or activity' of the agency for which the record is sought." *Pa. Dep't of Educ*., 119 A.3d at 1125. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See id*. at 1125. Third, "[t]he timeframe of the request should identify a finite period of time for which the records are sought." *Id*. at 1126. This factor is the most fluid and is dependent upon the request's subject matter and scope. *Id*. Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id*. None of these factors are dispositive, instead, the Commonwealth Court has emphasized the importance of a "flexible, case by case, contextual application of the test." *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1145 (Pa. Commw. Ct. 2017).

Here, Items 1-4, and 12-15 do not contain a subject matter. However, a broad subject matter is not grounds for an automatic finding that a request is insufficiently specific, and "[a] requester's failure to identify a subject matter may be accorded more or less weight depending

upon other factors." *Methacton Sch. Dist. v. Office of Open Records*, 250 C.D. 2021, 2021 Pa. Commw. Unpub. LEXIS 670 (Pa. Commw. Ct. 2021).

The Request has an even broader scope. Items 1-4, 12, and 14 seek all emails and correspondence while Items 13, and 15 seek all documents provided or disclosed. The Request also does not include a discrete timeframe to allow the Receiver the opportunity to narrow its search for responsive records but instead seeks records from June 22, 2020 to present (Items 1-5), or January 1, 2021 to present (Items 13-15). Both the scope and timeframe, in combination with the broad subject matter, do little to help the Receiver narrow its search for responsive records. *See Commonwealth v. Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016) (finding that a request with a broad subject matter requires a narrow scope and timeframe that render the request specific). The OOR has previously held that requests are insufficiently specific because they provide no context to guide a search for responsive records when the scope is very broad and the timeframe is lengthy. *See Vedilago v. N. Lebanon Sch. Dist.*, OOR Dkt. AP 2021-2496, 2022 PA O.O.R.D. LEXIS 170 (finding that requests seeking all electronic communication between the Governor, the Pennsylvania Departments of Health and Education, the County Department of Health and certain agency officials and communication among agency officials for a period of almost 21 months was insufficiently specific); *see also Winklosky v. Pa. Office of Admin.*, OOR Dkt. AP 2018-1438, 2018 PA O.O.R.D. LEXIS 1391 ("[s]eeking all records related to a topic or topics does not necessarily make a request insufficiently specific; however, a request must provide enough specificity in its scope and timeframe to help guide the agency in its search for records"). Because the Request is overly broad, the test enunciated in *Pa. Department of Education* supports a finding that the Request is insufficiently specific with respect to Items 1-4, and 12-15 under

Section 703 of the RTKL.[9] *See Coston v. Southern Lehigh Sch. Dist.*, OOR Dkt. AP 2022-0824, 2022 PA O.O.R.D. LEXIS 1472. However, nothing in this Final Determination prevents the Requester from filing a more specific RTKL request for the same information, and if necessary, filing an appeal pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

Item 5, however, seeks "[a]ny contracts, agreements, or invoices entered into, or received from, Eric Hagget and/or Walker Consultants from June 22, 2020 to [the date of the Request]." Item 5 identifies a discrete group of documents and a well-defined scope (i.e. contracts, agreements, or invoices). Item 5 is further limited to contracts, agreements, or invoices entered into, or received from Eric Hagget and/or Walker Consultants for a time period of under two years. Similarly, the Receiver was able to search for similar responsive records in Item 7. Therefore, because Item 5 of the Request has a specific subject matter, narrow scope and moderate timeframe, it is sufficiently specific under Section 703 of the RTKL.

3. The Receiver has demonstrated that Items 6, 8 and 9 are privileged.

The Receiver argues that records responsive to Items 6, 8 and 9 are exempt under both the attorney-client privilege and attorney-work product doctrine. 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

[9] Because the Request is insufficiently specific, the OOR need not reach the Receiver's alternative grounds for denying access to Items 1-6 and 13-15. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

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 citations omitted).

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 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 Commonwealth Court has confirmed that, after an agency establishes the privilege was properly invoked under the first three prongs outlined above, the party challenging invocation of the privilege must prove waiver under the fourth prong. *Bagwell v. Pa. Dep't of Educ*., 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

The attorney-work product doctrine, in turn, 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 Envtl. 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").

Here, the Receiver explains that "[t]he Receiver, Widener University, and their respective counsel, including Roccoe Imperatrice, are parties to a Joint Defense Agreement [(joint privilege agreement)]." The Receiver further explains that "the parties enter[ed] into a joint defense agreement to preserve the attorney client privilege between counsel for different clients. The decision as to whether to enter into a joint defense agreement entails legal strategy for each client and requiring disclosure of the existence of a joint defense agreement and the identities of the parties involved in a joint defense agreement would result in disclosure of strategy involving ongoing litigation, in violation of the attorney client privilege and attorney-work product doctrine."

The joint privilege agreement is a contract to share legal interests, executed between the Receiver and a third party. This agreement begins with a statement of mutual interests, explains the legal actions the parties intend to take in a lawsuit, and sets forth the restrictions on the other party's use of privileged materials. Here, however, the Receiver is asserting continued privilege through the common interest doctrine. To demonstrate that the common interest doctrine applies, four elements must be shown:

> (1) the parties' agreement to same; (2) a common-interest in the litigation or a jointly shared litigation strategy; (3) the communications were made pursuant to such agreement, and (4) the continued confidentiality of the communications, i.e., the communications were not disclosed to other third parties such that the privileges were waived.

Rosser Int'l, Inc. v. Walter P. Moore & Assocs., Inc., No. 2:11-CV-1028, 2013 U.S. Dist. LEXIS 108561, 2013 WL 3989437, at *19 (W.D. Pa. Aug. 2, 2013). However, a prerequisite requirement exists; the communications at issue must be subject to the attorney-client privilege outside of waiver. *Pa. Public. Utility C'mmn. v. Sunrise Energy*, LLC., 177 A.3d 438 (Pa. Commw. Ct. 2018) (remanding to the OOR to determine which emails were privileged prior to application of the common interest doctrine).

Additionally, the Receiver submitted a privilege log noting the 1) date of the responsive records, 2) the author, and 3) the recipients along with the subject and the reason for the privilege. A review of the privilege log and the Receiver's position statement demonstrate that the Receiver has entered into a Joint Defense Agreement for a proposed joint strategy to handle litigation matters. Because the Receiver has invoked the attorney-work product privilege and the privilege log reflects the opinions and strategies of attorneys in preparation for litigation, the agreement is privileged unless it was waived. Unlike the attorney-client privilege, waiver of the attorney-work product privilege occurs only when the material is either shared with an adversary or disclosed in a manner likely to cause an adversary to acquire it. *Bousamra*, 210 A.3d at 978. Here, the privilege log reflects that the documents were shared between the Receiver, Rocco Imperatrice and those parties involved in the Joint Defense Agreement. With respect to Item 6, the privilege log identifies those records protected by the attorney-client privilege relating to the "Chester Parking Contract Issues and Recommendation." *See* Privilege Log, lines 1,4, 19-22, and 43. As such, the Joint Defense Agreement is exempt from disclosure under the RTKL pursuant to the attorney-work product privilege and those email correspondences relating to the "Chester Parking Contract Issues and Recommendation" are protected by the attorney-client privilege. *See, e.g., United States v. Bicoastal Corp.*, 1992 U.S. Dist. LEXIS 21445, 92-C R-261, 1992 WL 0693384 at *6

(N.D.N.Y. Sept. 28, 1992) ("This Court does find that the disclosure of the existence of such an [joint defense] agreement would be an improper intrusion into the preparation of the defendants' case. Thus, this court will deny any motion by the Government to be provided with any joint defense agreement should one exist."); *see also Brown v. Receiver for the City of Chester*, OOR Dkt. AP 2021-1218, 2021 PA O.O.R.D. LEXIS 1709 (finding that "the joint privilege agreement is exempt from disclosure under the RTKL pursuant to the attorney-work product privilege).[10]

CONCLUSION

For the foregoing reasons, the appeal is **granted in part and denied in part**, and the Receiver is required to provide all responsive records to Items 5 and 11 of the Request or, if no records are located, a detailed attestation explaining its search. 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 Commonwealth Court 65 P.S. § 67.1301(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.[11] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: December 7, 2022

/s/ Lyle Hartranft

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APPEALS OFFICER
LYLE HARTRANFT, ESQ.

Sent via email to: Thomas Helbig, Jr., Esq; Tiffany Allen, Esq.

[10] Appeal pending before the Commonwealth Court, 1139 CD 2021.
[11] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).