pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PAULA KNUDSEN BURKE,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2022-2836**
	:	
PHILADELPHIA DISTRICT	:	
ATTORNEY'S OFFICE,	:	
Respondent		

FACTUAL BACKGROUND

On November 2, 2022, Paula Knudsen Burke, Esq. ("Requester") submitted a request ("Request") to the Philadelphia District Attorney's Office ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

> 1. The "entire media distribution list" utilized by the [Office] through MailChimp. Records sought are the distribution lists for Jan. 1, 2022 through Nov. 1, 2022. This request anticipates that reporters are added or dropped over the months and that the list would be changed/updated during this time period.
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> 2. Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner. Records sought are from July 1, 2022 through Nov. 1, 2022.
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> 3. Records referencing barring members of the news media from [Office] press conferences, either in person or virtually. Key words include "eject," "invite," "press conference," "Ralph Cipriano." Records sought for Jan 1, 2022 through Nov. 1, 2022.

On December 9, 2022, following a thirty-day extension, 65 P.S. § 67.902(b), the Office granted the Request in part, providing a copy of the current media distribution list, but with email addresses, IP addresses and geographical identification redacted pursuant to Section 708(b)(6) of the RTKL, 65 P.S. § 67.708(b)(6), and the state constitutional right to privacy. The Office also provided two emails and a single Zoom invitation receipt but argued that any additional responsive records are subject to the attorney-work product doctrine or relate to a noncriminal investigation. 65 P.S. § 67.708(b)(17).

On December 21, 2022, the Requester appealed to the Office of Open Records ("OOR"), providing reasons for disclosure. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 19, 2023, the Requester submitted a position statement arguing that the Office had not demonstrated that other responsive records—particularly prior instances of the media distribution list—did not exist, that "geographical distribution" should not have been redacted, and that the Office had not demonstrated that any responsive records are privileged or subject to the noncriminal investigative exemption. The Requester also submitted copies of letters written by the Requester to the Office in relation to a prior RTKL request.

On January 27, 2023, the Office submitted a position statement arguing that it had no ability to retrieve any earlier version of the media distribution list via MailChimp, and that the geographic data was properly redacted under the right to privacy, that the Office had properly withheld two security memoranda, and that it had properly withheld an email exchange as privileged because it involved legal concerns regarding Office press access policies. In support of these arguments, the Office submitted the attestation of its Open Records Officer, Josh Niemtzow, Esq., who avers that

he asked the Office's Communications Director to demonstrate the MailChimp program and was satisfied that it could not be made to produce past records, that there was only one record of a Zoom call between the District Attorney and a media entity in the identified period, that he had reviewed the responsive emails produced by the Office's IT department and that he had spoken to various other identified members of the Office and determined that their memos regarding interaction with Mr. Cipriano constituted part of a noncriminal investigation. The Office additionally submitted the attestation of Jane Roh, the Office's Communications Director, who explains that she attempted to discern whether past distribution lists could be accessed and could not find any way to do so.

On April 14, 2023, in response to an inquiry from the OOR, the Office submitted a brief letter clarifying that one of the memos regarding interaction with Mr. Cipriano spanned several months.

LEGAL ANALYSIS

The Office 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 Office 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)). Likewise, "[t]he 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 appeal is dismissed as moot in part

On appeal, the Requester notified the Office that it had not produced two communications she herself had sent the Office. The Office explained that it did not believe that the emails were responsive because they were associated with letter attachments that contained responsive discussion, but the body of the email did not itself contain responsive text. Nevertheless, the Office provided the records on appeal. On review, the OOR agrees with the Requester that the communications are responsive and that the emails should have been provided. Because the Office has provided these responsive records during the appeal, the appeal is dismissed as moot as to those records. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Office has not demonstrated that geolocation data is exempt

The Office provided the Requester with a copy of the current media distribution list, a document the Office uses to distribute press invitations and other news. The list includes email addresses, first names, last names, the email type, a variable showing an aggregate engagement metric, the dates of mailing opt-in and confirmation, geolocation data, notes on whether communications are bouncing, internal IDs and tags, and IP addresses. The Office redacted part of most email addresses, the IP addresses, and the "geolocation data" under a combination of Section 708(b)(6) of the RTKL and the right to privacy. On appeal, the Requester challenges only the failure to provide the geolocation data.

It appears that Section 708(b)(6) of the RTKL was invoked only to redact the personal email addresses, as neither IP addresses nor geolocation data appear within the exemption. 65 P.S.

§ 67.708(b)(6)(i)(A) (exempting "all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal information number."). To the extent that the Requester is alleging that the geolocation data is exempt under Section 708(b)(6)(i)(A), it is not among the items listed as exempt in the statute and therefore may not be withheld under Section 708(b)(6). Though the withheld IP addresses are not before the OOR, they and the geolocation data were both redacted pursuant to the state constitutional right to privacy.

When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Pa. State Education Ass'n v. Commonwealth* ("PSEA"), 148 A.3d 142 (Pa. 2016) (holding that an individual possesses a right to privacy in certain types of personal information); *see also Pa. State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

Although the Pennsylvania Supreme Court did not expressly define the types of "personal information" subject to the balancing test, the Court recognized that certain types of information, by their very nature, implicate privacy concerns and require balancing. *Id.* at 156-57; *see also Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home

addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test).

To determine whether the constitutional right to privacy precludes disclosure of an individual's personal information, the OOR must apply the balancing test articulated in *Denoncourt v. Pa. State Ethics Comm'n*, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), "weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure."

Here, the Office explains that "geographical information" includes the latitude and longitude of the contact, along with country code, region, and time zone information. This information is generated by the MailChimp service, which presumably populates it based on the IP address of the individuals interacting with the mailing list.[1] The Office states that this record provides "the exact latitude and longitudinal coordinates" of the contacts, but it is impossible to know whether the IP address from which individuals on the marketing distribution list connected were home network addresses, business addresses, or even mobile network connections.[2]

The Pennsylvania Supreme Court reaffirmed the status of home addresses as potentially subject to redaction or withholding under the right to privacy in *PSEA*. However, individuals do not have the same expectation of privacy in a business address, and business entities have no such expectation at all. *See Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173

[1] Intuit provides a short article about MailChimp's geolocation service which states that the collection uses a standard process to reference an IP address with a geographic database. *See* "About Geolocation", mailchimp.com, https://mailchimp.com/help/about-geolocation/

[2] The precision of the addresses provided by such a service also tends to vary; often an IP address may only be used to determine the city or neighborhood of the user. Here, however, there is no evidence in the record showing how accurate MailChimp's service is and the OOR will refrain from speculation.

* 20 (Pa. Commw. Ct. 2017) ("The constitutional right to informational privacy only inures to individuals").

Therefore, the Office has not demonstrated whether the geolocation data contained on the list encompasses home addresses, nor did it explain whether the latitude and longitude data is precise enough for the Requester to accurately determine a street address from it. Because the Office did not demonstrate that any home addresses would be identified by this release, the geographic location information may not be withheld under the auspices of the state constitutional right to privacy.

3. The Office has demonstrated that it does not possess the prior versions of the distribution list

The Request sought copies of the media distribution list as it existed throughout the period from January 1, 2022 through November 1, 2022. The Office provided a copy of the current distribution list but argues on appeal that it does not possess the ability to provide prior versions of the list. In support of this argument, the Niemtzow Attestation provides, in part, as follows:

> 6. Upon receipt of the request, I reached out to [the Office's] Communications Director, Jane Roh, for help locating responsive records for items one and two. Ms. Roh explained that due to the dynamic nature of the [Office's] media distribution list and the technical capacity of the MailChimp program, the [Office] would be unable to generate the distribution lists for designated periods in the past. As further verification, I received a demonstration on the program from a member of the communications team, and I did not ascertain any readily available method to isolate prior mailing lists. I requested a current media distribution list from Ms. Roh, which was appended to our final response, as I believed this current list was partially responsive to the request, because the current list includes hundreds of names, a large number of which would have been included in past iterations of the list from the requested time period.

Meanwhile, the Roh Attestation provides, in part, that:

> 3. The [Office's] Communications Team generally circulates mass electronic press releases and media advisories by utilizing Mailchimp, an online email marketing product. My team has developed familiarity with Mailchimp throughout our time serving on the Communications Team at the [Office].

> 4. The [Office] maintains a primary media distribution list on Mailchimp. Media advisories, such as those announcing [Office] press conferences, are generally sent out via Mailchimp to this media distribution list. Participants are added to or removed from the list, and they may also choose to opt out of receiving [Office] press notices. In other words, the [Office's] distribution list is dynamic.
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> 7. After revisiting the mechanics of our Mailchimp software, I was able to confirm and conclude that, to the best of my knowledge, Mailchimp does not provide any means of generating past distribution lists. Our team is only able to access the current media distribution list.
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> 8. I informed the Open Records Officer that, for this reason, I could not provide him with past media distribution lists, but that the current list had significant overlap with recipients who would have been on prior versions of the list. I shared with him an excel file for the media distribution list that was current as of December 7, 2022, which Mr. Niemtzow disclosed to [the Requester].
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> 9. I generated the current distribution list by logging on to Mailchimp, selecting the contacts on the main media distribution list and selecting "Export Audience as a CSV file." To the extent [R]equester is claiming that there may be prior lists that were previously exported and saved, the Communications Team did not locate any such lists from the requested time period, nor do I have any reason to believe that any such records were generated during the requested period, as Mailchimp is a tool exclusively utilized by the DAO's Communications Team for purposes of circulating press invitations.

Under the RTKL, a statement made under 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 Office acted in bad faith or that the responsive records exist, "the averments in [the attestation] 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)).

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); *In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is "the open records officer's duty and responsibility" to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

In *Pennsylvania Department of Health v. Mahon*, the Commonwealth Court discussed the evidence required to establish the absence of records, quoting its previous decision in *Hodges v. Pennsylvania Department of Health*, which held that an agency "may satisfy its burden of proof...with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." 283 A.3d 929, 936 (Pa. Commw. Ct. 2022) (quoting *Hodges*, 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).

Here, the Office has submitted the attestation of the custodian of the records, who attests that she and the Open Records Officer both attempted to manipulate the MailChimp program to access prior lists and were unable to discern a way to produce them. The Requester argues that the Office might either have printed out past copies of lists, or that it might be possible that the software saves past versions of the list that are accessible, but the Roh Attestation establishes that the Office's Communications Team are the only users of the list and its software and have no other saved copies of the list. Roh Attestation ¶ 9. Therefore, the Office has met its burden of showing that it does not possess the versions of the list sought by the Requester.[3] *See Mahon*, 283 A.3d at 936; *Hodges*, 29 A.3d at 1192.

4. The Office has demonstrated that no other responsive Zoom emails exist

The Request seeks "Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner" for a five-month period. The Office provided a single record, an Outlook calendar entry showing acceptance of a meeting between the District Attorney and the Philadelphia Inquirer. On appeal, the Requester argues that the Office must demonstrate that no additional meeting records exist and that it has conducted a sufficient search of, for example, deleted email items.

In support of its position, the Office submitted the attestations of Attorney Niemtzow, who attests that:

> 8. For item number two, Ms. Roh provided me with a Zoom invitation notification for a press call between District Attorney Krasner and the Philadelphia Inquirer Editorial Board. She confirmed that, to the best of her knowledge, this was the only Zoom invitation record between the District Attorney and members of the media during the specified period.

[3] Notably, this is not the same question as whether it is possible to view archived contacts which may have been removed from the list; such information would not permit either party to reconstruct the list as it existed during the period identified in the Request.

Likewise, Ms. Roh attests that:

> 6. As the [Office's] Communications Director, I coordinate press calls with DA Krasner, and would be looped in on any such calls. Therefore, in seeking out responsive records, I ran an email search in my Outlook for Zoom invitations with the press, and I also searched my Outlook calendar. I was able to locate one responsive record, which I shared with the Open Records Officer.

As noted above, an attestation may serve as sufficient evidence to show that records do not exist. *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. The Requester argues correctly that a search for records on an email server may not suffice where there is reason to believe that records may have been deleted but remain retrievable by the agency's IT department. *Pa. Dep't of Labor & Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015); *but see Klaves v. Pa. Dep't of Health*, OOR Dkt. AP 2021-2228, 2021 PA O.O.R.D. LEXIS 2711 (explaining the factors distinguishing *Earley* from other RTKL requests). However, when the officer of the agency responsible for maintaining such records states on appeal that additional records do not exist because they were never created, that may suffice to meet the agency's burden. *Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (Dr. Lombadi's attestation that he had only ever created responsive correspondence in communication with the PIAA's legal team sufficed to meet the minimal burden of proof.). Therefore, because the Office has demonstrated that it conducted a search for responsive records and that additional responsive records were never created, it has met its burden of proof that no additional responsive records exist. *See Mahon*, 283 A.3d at 936; *Hodges*, 29 A.3d at 1192.

5. The Office has demonstrated that one inquiry is privileged

The Office withheld an email exchange between Ms. Roh and Attorney Niemtzow responsive to Item 3 of the Request, arguing that it is subject to the attorney-client or attorney-work product privileges. 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. Excela Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citation 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 id*. When waiver is at issue, the burden of proof shifts to the requester. *See Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

The attorney work-product doctrine, on the other hand, 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 purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *Bousamra*, 210 A.3d at 976; *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").

In support of this argument, Attorney Niemtzow attests that:

> 10. In the course of corresponding with [Requester] regarding this appeal, she informed me that she had expected the [Office] to produce records of her email correspondence with the [Office] involving press access. During my review of email communication, I had come across three emails from [the Requester]: one sent to me, and two directed to Ms. Roh, which included a letter attachment discussing [Office] press access; however, the body of the emails included no such

> discussion. I therefore made the determination that these were not responsive records, particularly given that Ms. Burke was the sender of these emails, and already in possession of these records.
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> 11. Moreover, I determined that as one of these emails included a follow-up message from Ms. Roh, to myself and the Law Division Supervisor, requesting legal advice, that email communication is protected under attorney-client privilege. I have since turned over the two other emails sent by [Requester].

In its position statement, the Office also notes that "[t]his communication was made in response to [Requester's] letter which raised legal concerns regarding DAO press access. The DAO has not waived the privilege, as there are no other recipients to the email and the communication was not forwarded to any outside party[.]"[4] A review of the included communications from the Requester confirm that they contain an allegation that the Office's removal of Mr. Cipriano violated federal law and that further illegal restriction of access was occurring. Given the context provided in the record, the Office's attestation suffices to establish that the Office's press officer sent the Office's civil litigation staff an inquiry regarding the validity of the legal claims being made by the Requester's letter. That inquiry, and any legal advice subsequently provided, plainly constitute a request for legal advice from the client of an attorney, and there is no evidence on appeal that the advice was later disseminated. *Bousamra*, 210 A.3d at 983. Therefore, the Office has demonstrated that one email was properly withheld as subject to the attorney-client privilege.

6. The Office has not demonstrated that the security detail memos may be withheld

Finally, the Office withheld two records responsive to Item 3 of the Request; memos written by the two members of the Philadelphia Police Department assigned as the District

[4] The Office notes several times that it did not view this record or the ones it later provided to the Requester as responsive because although the communications related to a letter attachment regarding Mr. Cipriano's removal. For the reasons set forth in this appeal, the OOR does not need to address this argument that the records are non-responsive; however, this interpretation of Item 3 of the Request is unreasonably narrow.

Attorney's security detail regarding the incident in which they removed Mr. Cipriano from a press conference. The Office argues that these memos are exempt under Section 708(b)(17) of the RTKL because they chronicle a noncriminal investigation undertaken into Mr. Cipriano's conduct and the incident itself.

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "[c]omplaints submitted to an agency, [i]nvestigative materials, notes, correspondence and reports" and "[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17)(i)-(ii); 65 P.S. § 67.708(b)(17)(vi)(A). For this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *See Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties." *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). Only a noncriminal investigation conducted by agencies acting within their legislatively granted factfinding and investigative powers constitutes an official probe. *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would "craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure." *Id.* at 259. In addition, the agency must demonstrate that while the investigation was within the agency's official duties, it surpassed the agency's routine performance of its duties. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Commw. Ct. 2011).

In support of this argument, Attorney Niemtzow attests that:

> 12. To further our diligence, I spoke with members of District Attorney Krasner's security detail, Sergeant Tom Kolenkiewicz and Officer Agnes Torres, two

> Philadelphia Police officers specially assigned this responsibility, to ascertain whether they had any responsive records concerning the [Office] barring members of the media from press conferences. They each provided me with a respective memo, documenting instances where [Requester's] client, Ralph Cipriano, was asked to leave Office press conferences, or otherwise recording their interactions with him.
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> 13. Sgt. Kolenkiewicz explained to me that his practice of memorializing his interactions with Mr. Cipriano is in furtherance of his security responsibilities. He described these memos as a "police working file" that those working on the DA's security detail team typically and routinely use to document unusual or suspicious behavior. As part of his responsibilities as a member of DA Krasner's security detail, Sgt. Kolenkiewicz has kept working files on other individuals as well.
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> 14. Sgt. Kolenkiewicz also explained that his memorialization of these interactions further assists in recalling specific incidents in the event that he or the office is subjected to litigation or complaints relating to his duties. From his experience, it is not atypical for people who are dissatisfied in their interaction with law enforcement to provide an incomplete narrative of a particular incident when reporting complaints to police internal affairs or in litigation. Accordingly, Sgt. Kolenkiewicz created these memos in order to record a comprehensive and accurate set of facts in preparation for litigation or for a police internal affairs investigation.
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> 15. Officer Torres' memo similarly documents her interaction with Ralph Cipriano in response to the first [Office] press conference attended by Mr. Cipriano. This instance was particularly noteworthy because Officer Torres had been providing security for DA Krasner since the start of his first term as District Attorney in 2018, and as part of her duties, she attended most [Office] press conferences and was familiar with many of the participants in attendance. As a first-time participant at the [Office] press conference, Mr. Cipriano did not appear to be associated with the press, which prompted her to notate any unusual conduct or interactions. The officer described her memo as serving a similar purpose as that which Sgt. Kolenkiewicz described: documentation required pursuant to her security responsibilities, and recorded in the event of potential litigation or internal affairs complaints. Officer Torres' memo is addressed to Sgt. Kolenkiewicz, who is her supervisor.
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> 16. Accordingly, I determined that these memos were written as part of an ongoing noncriminal investigation and constitute factual work product.

The Office does not argue that the memos at issue on appeal were created pursuant to any specific statutory delegation of authority, but the Philadelphia Police Department are granted authority to safeguard and investigate affairs within the city by Section 5-201 of the City Charter.

Philadelphia Home Rule Charter section § 5-201. Notably, the two officers responsible for the memos at issue are members of the Philadelphia Police Department on assignation to the Office, and not employees of the Office itself. Here, Officer Torres' memo describes her observations and conduct at a press conference, while Sgt. Kolenkiewicz' memo includes observations of interactions with Mr. Cipriano over the course of several months.

Officer Torres' memo describes an incident wherein Mr. Cipriano was removed from a press conference, and Attorney Niemtzow attests that it serves as a "police working file," where Officer Torres recorded both her actions in removing Mr. Cipriano from the conference and in notating strange or suspicious actions Mr. Cipriano took prior to the removal. Niemtzow attestation ¶ 13, 15. As noted above, an incident report detailing an incident that does not result in an investigation may not be withheld under Section 708(b)(17) of the RTKL. See *Corpora v. City of Bethlehem*, OOR Dkt. AP 2015-2862, 2016 PA O.O.R.D. LEXIS 140 (finding that an incident report relating to a medical call was not exempt under Section 708(b)(17)); *see also Jewish Home of Eastern Pa. v. Pa. Dep't of Health*, OOR Dkt. AP 2014-0892, 2015 PA O.O.R.D. LEXIS 1813 (finding that records are not exempt under Section 708(b)(17) where they do not contain any investigatory material and are not investigative in nature). On appeal, the Office confirms that Sgt. Kolenkiewicz' memo describes a larger pattern of observations including Officer Torres' memo and actions at the press conference; however, the Office does not establish that these observations are in service of an "official probe" undertaken pursuant to any specific obligations. *Pa. Dep't of Health*, 4 A.3d at 810-11. Instead, the only specific official purpose the Office notes for the observations is that they may be relevant to later complaints or lawsuits. Niemtzow attestation ¶ 14, 15. This may be good practice for a security detail, but it is not part of any

investigation now. Therefore, the OOR is constrained to hold that the Office has not demonstrated that the memos are exempt under Section 708(b)(17) of the RTKL.

The Office argues further that the memos, which were created at least part in anticipation of potential future litigation, are subject to the "factual work product" privilege. As noted above, the attorney-work product privilege 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 Office argues that this privilege also encompasses the factual studies of experts retained by attorneys in the course of that work, citing to *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*. 91 A.3d 680 (Pa. 2014). In that case, a divided Pennsylvania Supreme Court determined that correspondence between an attorney and an engaged expert witness was generally not discoverable. *Id.* The Office reasons that because the memos were prepared in part to establish a factual record in expectation of potential litigation, they may be considered privileged.

The memos on appeal, however, are quite distinct from the communications between the engaged expert and attorney in *Barrick*; they are observations written down by the security detail and kept in a file. Nothing in the record indicates that they were prepared at the direction of the Office's civil litigation unit, or contain expert testimony requested by any attorney thereof. Regardless of the Supreme Court's expansive interpretation of Pa.R.C.P. 4003.3, it ruled only on the actual communications between attorney and expert, and not the expert's own records, prepared without prior direction. *See also Carrier Corp. v. Workers' Comp. Appeal Bd. (Haugh)*, 241 A.3d 692 (Pa. Commw. Ct. 2020) (unpublished). As the privilege is a statutory one, the OOR cannot find that the Pa.R.C.P. 4003.3, which exclusively addresses communications and work prepared by or for a party's attorney, can apply to memos which the Office does not establish were

prepared by or for an attorney at all. *Maleski by Chronister v. Corp. Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1, 5 (Pa. Cmwlth. 1994).[5] Finally, the Office explains that there may be other reasons for exemption and defers to the OOR's analysis. As with all tribunals in Pennsylvania, the OOR is not empowered to raise an issue *sua sponte*, save for questions of jurisdiction or constitutional obligations. *See, e.g., Quigley v. Unemployment Comp. Bd. of Review*, 263 A.3d 574 (Pa. 2021) (explaining how a tribunal raising and resolving an issue on its own motion can deprive one or more parties of due process).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part,** and **dismissed as moot in part**, and the Office is required to provide the media contact list without redaction of geolocation data and the withheld memos from Sgt. Kolenkiewicz and Officer Torres 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 Philadelphia 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: https://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: April 20, 2023

/s/ Jordan C. Davis
JORDAN DAVIS, ESQ.
SENIOR APPEALS OFFICER

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

Sent via email to: Paula Knudsen Burke, Esq.; Josh Niemtzow, Esq., AORO