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CIVIL DIVISION
NORTHAMPTON COUNTY, PA

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Attorney for Petitioner

BOROUGH OF BATH,	:	IN THE COURT OF COMMON PLEAS
Petitioner,	:	NORTHAMPTON COUNTY,
	:	PENNSYLVANIA
v.	:	CIVIL DIVISION
MICHAEL LONG,	:	
Respondent.	:	NO. C-48-CV-2023-10559

APPEAL OF AND PETITION FOR REVIEW OF FINAL ORDER DATED DECEMBER 1, 2023 PARTIALLY GRANTING AND PARTIALLY DENYING RECONSIDERATION, ISSUED BY PENNSYLVANIA OFFICE OF OPEN RECORDS AT OOR DKT. AP 2023-1598

AND NOW COMES Petitioner Borough of Bath ("Petitioner" or "Borough"), who, by and through its undersigned legal counsel, files this Appeal of and Petition for Review of Final Order Dated December 1, 2023 Partially Granting and Partially Denying Reconsideration, issued by the Pennsylvania Office of Open Records at OOR Dkt. AP 2023-1598, averring as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this statutory appeal pursuant to 42 Pa.C.S. § 933(a)(3) and 65 P.S. § 67.1302(a).

2. Venue is proper in this Court pursuant to 65 P.S. § 67.1302(a).

Pennsylvania Tpk. Comm'n v. Elec. Transaction Consultants Corp., 230 A.3d 548, 560 (Pa. Commw. 2020).

BACKGROUND

9. On November 3, 2023, the OOR issued a final determination (the "November 3, 2023 Final Determination") in the matter of *Michael Long v. Bath Borough*, OOR Dkt. AP 2023-1598, a copy of which is attached hereto at Exhibit B.

10. On November 17, 2023, the Borough filed a Petition for Reconsideration with the OOR arguing that the OOR's November 3, 2023 Final Determination erred because of the following inseparable reasons: (1) impermissibly refashioning the Request to seek records between less than the entire group of listed persons; (2) potentially granting access to potential records other than emails; and (3) potentially granting access to potential records that would reveal the subject matter of attorney-client privileged communications. A true and correct copy of the Borough's Petition for Reconsideration is attached hereto at Exhibit C.

11. On December 1, 2023, the Borough filed an appeal with this Honorable Court of the OOR's November 3, 2023 Final Determination (the "December 1, 2023 NCCCP Appeal") pursuant to 42 Pa.C.S. § 933(a)(3) and 65 P.S. § 67.1302(a), which appeal is pending before this Court at *Borough of Bath v. Michael Long*, C-48-CV-2023-9734.

12. On December 1, 2023, the OOR issued its December 1, 2023 Final Order purporting to partially grant and partially deny the Borough's Petition for Reconsideration purportedly via 1 Pa. Code § 35.241. *See* Exhibit A.

17. On December 11, 2023, the Borough submitted correspondence to the OOR that noted that the OOR lacked legal authority to continue reconsideration and issue a new final determination because, among other reasons, per the express language of 1 Pa. Code § 35.241(f)(1), this Court has jurisdiction over the Borough's December 1, 2023 NCCCP Appeal of the November 3, 2023 Final Determination. A true and correct copy of this submission to the OOR is attached hereto at Exhibit E.

18. Via said correspondence from the Borough to OOR, the Borough informed the OOR that its December 1, 2023 Final Order partially granting reconsideration should be vacated because 1 Pa. Code § 35.241(f) only permits a full grant or a full denial of a reconsideration request. See Exhibit E.

19. On December 13, 2023, the OOR, however, advised the Borough and Respondent that it will continue to reconsider the November 3, 2023 Final Determination but for only two of the three inseparable reasons raised by the Borough and OOR will adjudicate by issuing a new final determination despite the Borough's December 1, 2023 NCCCP Appeal and the express language of 1 Pa. Code § 35.241(f)(1) that provides this Court with jurisdiction over the Borough's December 1, 2023 NCCCP Appeal of the November 3, 2023 Final Determination. *See* December 13, 2023 correspondence from Senior Appeals Officer Kelly Isenberg, attached hereto at Exhibit F.

20. As the OOR erred as a matter of law in issuing its December 1, 2023 Final Order that partially granted and partially denied the Borough's Petition for Reconsideration, this appeal follows.

28. 1 Pa. Code § 35.241(f)(1), in relevant part, states:

> "If … reconsideration is denied, the original adjudication or other order will be subject to judicial review upon the previously filed petition for review."

29. Because the Borough's Petition for Reconsideration was denied, per 1 Pa. Code § 35.241(f)(1), this Court has jurisdiction over the Borough's December 1, 2023 NCCCP Appeal of the November 3, 2023 Final Determination and the OOR does not have jurisdiction to reconsider the November 3, 2023 Final Determination and render a new final determination.

30. Also, under 65 P.S. § 67.1302(b), the release of records is stayed until this Court decides, in accordance with 65 P.S. § 67.1302(a), the Borough's December 1, 2023 NCCCP Appeal.

31. Because the Borough filed a timely appeal to this Court via the Borough's December 1, 2023 NCCCP Appeal, the release of all records ordered released in the November 3, 2023 Final Determination is automatically stayed by operation of 65 P.S. § 67.1302(b).

32. As the Borough's December 1, 2023 NCCCP Appeal is pending, the OOR lacks jurisdiction to order the release of any records on reconsideration by virtue of the automatic stay provisions of 65 P.S. § 67.1302(b).

33. Because the OOR lacks jurisdiction to order the release of any records as a result of the automatic stay under 65 P.S. § 67.1302(b), the OOR lacks jurisdiction to continue to adjudicate the "partial" grant of reconsideration.

34. The OOR committed an error of law and abused its discretion by issuing its December 1, 2023 Final Order purporting to partially grant and partially deny the Borough's Petition for Reconsideration.

VERIFICATION

I, Bradford T. Flynn, the Manager for the Borough of Bath, hereby verify that the facts contained in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: 12/27/2023

Bradford T. Flynn

pennsylvania
OFFICE OF OPEN RECORDS

OOR RESPONSE TO PETITION FOR RECONSIDERATION

DATE ISSUED AND MAILED: December 1, 2023

IN RE: *Michael Long v. Bath Borough,* OOR Dkt. AP 2023-1598

Upon review of the petition for reconsideration ("Petition") filed by Bath Borough ("Borough") with the Office of Open Records ("OOR") to the above-referenced docket number, it is determined that the Petition is **PARTIALLY GRANTED** as follows.

The Petition sets forth three (3) numbered reasons for reconsideration. Upon review of the record before me, the Petition is **GRANTED** with respect to Items 1 and 2 of the Petition. However, the Petition is **DENIED** with respect to Item 3 ("The OOR impermissibly granted access to records that would reveal the subject matter of privileged communications").

In the absence of applicable OOR regulations regarding petitions for reconsideration, this office will follow the procedures set forth in Pennsylvania General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.241. The parties may file a response in the nature of an answer within 15 days of the issuance of this response, or by December 18, 2023. The Appeals Officer will issue a new Final Determination upon Reconsideration within 30 days of that date.

Issued by:

/s/ Kyle Applegate

CHIEF COUNSEL
Kyle Applegate

Sent to: J. Chadwick Schnee, Esq.; Michael Long

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MICHAEL LONG,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2023-1598**
	:	
BATH BOROUGH,	:	
Respondent	:	
	:	

FACTUAL BACKGROUND

On May 17, 2023, Michael Long ("Requester") submitted a request ("Request") to Bath Borough ("Borough") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking:

> [1.] All communications, including but not limited to emails, memos, notes, and text messages, between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022, regarding:
>
> [a.] The resignation of Mark Saginario
>
> [b.] The vacated council seat following Mark Saginario's resignation
>
> [c.] The appointment of Emmanuel Mirabito to the council seat
>
> [d.] Borough policy on a vacated council seat

regarding the resignation of Mark Saginario, the vacated Council seat following the Saginario resignation, the appointment of Emmanuel Mirabito to the Council seat and the process to appoint a person to a vacated Council seat are protected by the attorney-client privilege. In addition, the Borough claims that no emails between Bradford Flynn and Attorney Kratz exist regarding employment, position benefits, or compensation for Fiorella Mirabito; advertisement of any new position within the Borough; the resignation of Marena Rasmus; regarding clerk positions within the Borough; the hiring of any individual for a clerk position with the Borough; Borough policy on hiring for new positions; or any public announcements regarding the categories of records. The Borough partially denied Item 2, of the Request, arguing that a list containing the requested information does not exist. The Borough provided the Employee Earnings Reports for any personnel hired by the Borough for the relevant timeframe, with the home addresses, dates of birth, and social security numbers redacted pursuant to Section 708(b)(6)(i)(A) of the RTKL, 65 P.S. § 67.708(b)(6)(i)(A). The Borough's final response was attested to by the Borough Open Records Officer, Bradford Flynn, subject to the penalty of perjury pursuant to 18 Pa.C.S. § 4904.

On July 13, 2023, the Requester appealed to the Office of Open Records ("OOR"), challenging the partial denial and stating grounds for disclosure.[1] The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On July 24, 2023, the Borough submitted a position statement reiterating its grounds for partial denial. The Borough also claims that the Requester is improperly attempting to modify Request Item 1, on appeal. In support of its position, the Borough submitted the affidavit of James

[1] 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).").

questions the adequacy of the Borough's record keeping practices and, also requests that the Borough conduct a second search for records that "may have been overlooked in digital locations such as[,] emails, text messages, or group chats." The Requester also seeks an *in camera* review of the all relevant records, including those for which the Borough claims the attorney-client privilege.[2,3]

On July 27, 2023, the Requester submitted a third statement, alleging misconduct on the part of the Borough in the form of "scrubbing emails." The Requester included copies of April 3, 2023, Council meeting minutes and the June 5, 2023, Council meeting agenda, which he claims demonstrate discussions of email "scrubbing" and an agenda item of discussion regarding the possible filing of legal action seeking an injunction against the Requester related to RTKL requests. The Requester states, the following:

> Learning that the possibility of deleting or removing emails was raised post-request raises alarms bells and exacerbates my fears about the integrity of the Borough's records management practices and response efforts. Intentionally destroying requested records to avoid disclosure is unambiguously illegal under the RTKL. Even discussing "scrubbing" emails after receiving my access request implies a willful disregard for transparency obligations.
>
> Respectfully, this new revelation warrants serious investigation by the Office of Open Records as part of this appeal. Efforts by any agency to conceal public information from citizens through destruction of records betray the core principles of open government. I await your judicious examination of these deeply troubling allegations.

---

[2] The Requester's July 26, 2023 submission and the Borough's July 25, 2023, submission were provided after the records closing date; however, to develop the record, the submission was considered. *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").

[3] The Requester also states, "I have been informed about the existence of an ongoing group chat involving council members. This group chat could potentially constitute a continuous state of quorum, raising issues related to open meetings laws. Importantly, communications about borough business that occur on private devices, such as in this group chat, can still be considered public records under the [RTKL]." Allegations of possible Sunshine Act violations are beyond the purview of the OOR's jurisdiction. *See* 65 Pa.C.S. § 715 (providing for the jurisdiction and venue of judicial proceedings).

involvement in the handling of RTKL requests and whether access was provided to privileged or sensitive records.

LEGAL ANALYSIS

The Borough 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 Borough 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)).

In this matter, the Requester sought *in camera* review of relevant records. However, based upon the submissions, including the Borough's exemption log, the OOR has the necessary evidence before it to adjudicate the matter and, therefore, the request for an *in camera* review is denied.

1. The Request may not be modified or expanded on appeal

In the appeal form, the Requester states the following as "Records At Issue In This Appeal," "1. Emails between any combo of B. Flynn, F. Mirabito, M. Ehrgott, P. Andrews, B. Fenstermaker, J. Kratz from 9/20/21 to 5/15/22 regarding council membership changes, hiring, and policy. 2. List of employees hired outside of Public Works Department since 1/1/22, with details including name, position, date of hire, department, status, salary, and additional benefits. -

Off., OOR Dkt. AP 2022-2584, 2023 PA O.O.R.D. LEXIS 80. The OOR determines the reasonableness of the agency's interpretation from the text and context of the request alone, as neither the OOR nor the Requester are permitted to alter the request on appeal. *See McKelvey v. Office of Attorney General*, 172 A.3d 122 (Pa. Commw. Ct. 2017) ("Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal."). Further, 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 (Pa. Commw. Ct. 2012). Further, agencies should rely on the common meaning of words and phrases. *Gingrich*, 2012 Pa. Commw. Unpub. LEXIS 38 at *16.

Regarding the Borough's interpretation of Item 1, research shows that the word "between" is defined in the Merriam-Webster dictionary as "by the common action of: jointly engaging" (shared the work between the of them; talks between the three) and "in common to: shared by" (divided between his four grandchildren).[4] While OOR and court precedent makes clear that the Requester may not modify the Request on appeal, the Requester's assertion that the language of Item 1 encompasses "any combo" of emails comports with the use of the word "between" prior to the listing of relevant Borough employees and officials. A reasonable interpretation of the Request is that Item 1 seeks emails between or among any permutation of individuals that may be included on an email, whether it is 2 of them, all seven of them, or some other number of individuals. Therefore, we find that the Borough's interpretation of Item 1 was unreasonably narrow.

In addition, the Borough argues that, while the Requester included a letter with the appeal, which is referenced above as the attachment to the appeal, the appeal should be limited to the records the Requester stated are "Records At Issue In This Appeal" on the appeal form. However,

[4] *See* https://www.merriam-webster.com/dictionary/between (last accessed October 30, 2023).

> 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 record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (*Uniontown Newspapers I*), *aff'd,* 243 A.3d 19 (Pa. 2020) (*Uniontown Newspapers II).* Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open records officers have:

> a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also 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 support of the Borough's argument that a good faith search was conducted and all non-exempt records were provided, the Flynn Attestation states, the following:

> 4). After receipt of [the Requester's] [RTKL] [R]equest, I reviewed the Borough's hard copy storage files to determine whether the Borough had a hard copy storage file for the following specific topics and found as follows:
>
> a. The resignation of Mark Saginario;
>
> > i. Based on my review, I found the Councilmember file that the Borough has for Mark Saginario for when he was a Councilperson. I further found that it did not contain any emails, memos, notes, or text messages between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022.

i. Based on my review, I found that the Borough did not maintain a hard copy storage file specific to the general category of clerk positions within the Borough.

i. The hiring of any individual for a clerk position within the Borough.

i. Fiorella Mirabito was the only clerk (part-time office clerk) hired at a certain point during the period from September 20, 2021, to May 15, 2022. And, since I already found the hard copy personnel file for Fiorella Mirabito and found that it did not contain any emails, memos, notes, or text messages between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022, I ended my search on this topic there.

j. Borough policy on hiring for new positions.

i. Based on my review, I found the Borough's hard file containing the Borough's policy on hiring new positions. I also found that it did not contain any emails, memos, notes, or text messages between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022.

5) Via my review described in #4 above, I denied [the Requester's] [R]equest for the alleged memos, I denied [the] [R]equest for the ... memos and notes as they do not exist.

6) After receipt of [the Requester's] ... [R]equest, I checked my cell phone for any text messages between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022, regardless of subject matter to determine potentially responsive text messages. I didn't locate any because none exist. Hence, I denied [the Requester's] request for the alleged text messages because they do not exist.

7) After receipt of [the Requester's] ... [R]equest, I worked with the Borough's IT vendor to conduct a thorough examination of emails in the possession, custody and control of the Borough for records responsive to the request underlying this appeal by performing a search on the Borough's server for emails between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz from September 20, 2021, to May 15, 2022, regardless of subject matter to determine potentially responsive emails.

8) From my search described in #7 above, I then reviewed the potentially responsive emails for whether they were responsive to the subject matters identified

resignation. I downloaded Mr. Mirabito's letter of interest and marked it Attachment 'B' – 2.

c. 'March Meeting Minutes' email dated 04/04/2022 from me to Mayor Fiorella Mirabito and all Council members at that time (including, but not limited to, Michele Ehrgott, Phyllis Andrews, and Barry Fenstermaker) with copy to Solicitor Kratz and Borough Engineer Madison. This email is responsive because it is my reporting that former Borough employee Marena Rasmus resigned from her position effective Sunday, April 3, 2022. I downloaded this email and marked it Attachment 'C'.

10) Via my review described in #7 above, I located the following attorney-client privileged email:

a. 'RE: 12/6/21 Meeting of Council' email dated December 3, 2021, from Solicitor Kratz to former Borough employee Rasmus with copy to me, Borough Engineer Madison, Mayor Fiorella Mirabito and all Council members at that time (including, but not limited to, Michele Ehrgott, Phyllis Andrews, and Barry Fenstermaker). This email contains Solicitor Kratz's legal advice regarding proposed Resolution #2021-012 (Articles of Decorum and Rules of Order for Public Meetings) including, but not limited to, legal advice regarding Article 2.7(f) of proposed Resolution #2021-012.

i. When I discussed Solicitor Kratz's above email with him on or around June 23, 2023, Solicitor Kratz informed me that, as a precautionary measure, I should note in the Borough's denial letter to Mr. Long that emails from Solicitor Kratz to me, the Mayor and/or members of Council regarding Solicitor Kratz's legal advice regarding the resignation of Mark Saginario from Council, the vacated Council seat following Mark Saginario's resignation, the appointment of Emmanuel Mirabito to the Council seat and the process to appoint a person to a vacated Council seat are privileged per attorney-client and not subject to access per RTKL Section 102 (definitions of "privilege" and "public record"). I believe Solicitor Kratz stated that because of the email referenced in #7)a. above and certain other attorney-client privileged emails that he possesses.

11) Via my review described in #7 above, I determined that the potentially responsive emails did not contain any privileged or non-privileged emails from

impermissibly narrow interpretation of Item 1. Accordingly, the Borough has failed to demonstrate that the search described in ¶¶ 4, 6-7, was a sufficient search to prove that no additional responsive records may exist within its possession, custody or control. *See Segelbaum and The York Daily Record v. York Cnty.*, OOR Dkt. AP 2021-1180, 2021 PA O.O.R.D. LEXIS 2098 (finding that County's search for emails using only suggested keywords was an unreasonably narrow interpretation of the request); *Vodzak v. South Park Twp.*, OOR Dkt. AP 2021-1784, 2021 PA O.O.R.D. LEXIS 1815 (concluding that, based on the request language seeking financial date, searching for only invoices an impermissibly narrow interpretation and the search was not conducted in good faith); *Kneller v. Luzerne Cnty.*, OOR Dkt. AP 2020-0864, 2020 PA O.O.R.D. LEXIS 1226 (concluding that the County's search for a only list of employee appointments and resignations was based on an unreasonably narrow interpretation of the request and did not amount to a good faith search). As a result, the Borough has not proven that no additional emails, memos, notes, or text messages related to the subjects outlined in 1(a) – 1(k), exchanged between or among any of the individuals identified in Item 1, exist within its possession, custody or control. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

However, regarding the Saginario resignation letter, Manager Flynn attests that Councilperson Saginario only resigned his position as Council President during the July 14, 2021 meeting, not from his position as a Councilmember. Manager Flynn further attests that Saginario "later resigned as a Councilmember via his letter dated December 31, 2021, which resignation was accepted by ... Council at its meeting on January 3, 2022" and that the December 31, 2021, resignation letter was provided to the Requester, with the Borough's final response. A review of the appeal shows that the December 31, 2021 resignation letter was attached to the Borough's June 23, 2023 final response letter as Attachment B-1. Therefore, the Borough has proven that the

967, 982-83 (Pa. 2019) (citing *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007), *aff'd* 992 A.2d 65 (2010)). "[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). An agency may not, however, 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"). In support of the Borough's claim of privilege, the Borough presents the Supplemental Kratz Affidavit.[5] In addition, the Borough relies on *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011) and *Davis, supra.*, as well as RTKL Sections 102 (definitions of "privilege" and "public record"), 305(a)(2) and 506(c)(2), in further support of its argument. 65 P.S. §§ 67.102; 67.305(a)(2); 67.506(c)(2).

The Kratz Affidavits state that Attorney Kratz is an attorney licensed in Pennsylvania and employed by the law firm of Stevens & Lee. Supplemental Kratz Affidavit, ¶¶ 1-3. Attorney Kratz states that he served as the Assistant Borough Solicitor from January 2005 – August 2021, and, subsequently, he commenced serving as the Borough Solicitor. Supplemental Kratz Affidavit, ¶¶ 4-6. The Supplemental Kratz Affidavit also provides, the following:[6]

> 14. Here, the holder of the privilege is the Borough ... and the Borough has not waived the privilege.
>
> 15. Bradford T. Flynn ("Flynn") is an Open Records Officer for the Borough.
>
> 16. Flynn is also the Manager for the Borough.

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[5] The Supplemental Kratz Affidavit incorporates that initial Kratz Affidavit that was provided by the Borough with its July 24, 2023, submission, expands on the initial Affidavit and corrects any errors found in the initial Affidavit, based on a subsequent review related to the production of an exemption log.

[6] Certain portions of the original Supplemental Kratz Affidavit have been bolded, in order to signal the OOR as to what material had been amended from the initial Kratz Affidavit. However, we have not included the emphasis in the text quoted in this Final Determination.

the presence of strangers, for an opinion of law regarding any part of proposed Resolution #2021-012 and not for the purpose of committing a crime or tort.

22. The JFK Email of 12-3-21 is protected by the attorney-client privilege....

23. In response to Office of Open Records Appeal Officer Kelly Isenberg's request of September 26, 2023, for the Borough to provide an Exemption Log, attached hereto as Exhibit "A" is the Borough's Exemption Log.

24. I prepared the Borough's Exemption Log and I have actual knowledge of the records identified in the Borough's Exemption Log.

25. The JFK Email of 12-3-21 is identified as Record Number 1 on the Borough's Exemption Log. *See* Exhibit "A".

26. On or around June 23, 2023, I also stated to Flynn that, as a precautionary measure, he should note in the Borough's letter of June 23, 2023, to Mr. [the Requester] that emails from me to Flynn, Mayor Fiorella Mirabito and/or members of Council regarding my legal advice regarding the resignation of Mark Saginario from Council, the vacated Council seat following Mark Saginario's resignation, the appointment of Emmanuel Mirabito to the Council seat[7] and the process to appoint a person to Council seat are attorney-client privileged and not subject to access per RTKL Section 102 (definitions of "privilege" and "public record").

27. I stated "and/or" to Flynn (as referenced in paragraph 26 above) because (a) the JFK Email of 12-3-21 which falls within the "between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz" but also (b) I had/have the following email exchange for legal advice that does not fall within "between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz":

> (a) Email exchange in October 2021 (the "Email Exchange in October 2021") with Flynn and Council President Ehrgott regarding their request for legal advice regarding the resignation of then Councilmember Mark Saginario, the vacated Council seat following Mark Saginario's resignation and the general process to appoint a Council person. The prospective appointment of Emmanuel Mirabito to the Council seat was not a part of this email exchange and it was not part of the JFK Email of 12-3-21 either. As stated in paragraph 19 above, I was not asked to provide a legal opinion regarding the prospective appointment of Emmanuel Mirabito to said Council seat.

[7] In a footnote to paragraph 26 of the Supplemental Affidavit, Attorney Kratz explained that "[o]n or around June 23, 2023, [he] mistakenly included the topic of the appointment of Emmanuel Mirabito to Council as I was not asked to provide a legal opinion regarding the appointment of Emmanuel Mirabito to Council and re-reviewing the content of the attorney-client privileged emails identified on the Borough Exemption Log made me realize that."

34. The JFK 4-21-22 Email Exchange #1 was made by and to a representative of my client, the Borough, for purposes of the Borough seeking and my providing legal advice to the Borough, outside the presence of strangers, in response to a communication from Flynn, outside the presence of strangers, for opinion of laws regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and form of compensation, and not for the purpose of committing a crime or tort.

35. In my Affidavit of July 24, 2023, I inadvertently forgot to mention that the JFK 4-21-22 Email Exchange #1 was not made for the purpose of committing a crime or tort.

36. The JFK 4-21-22 Email Exchange #1 is protected by the attorney-client privilege....

37. The JFK 4-21-22 Email Exchange #1 is identified as Record Numbers 13 thru 15 on the Borough's Exemption Log attached hereto as. Exhibit "A".

38. The "JFK 4-21-22 Email Exchange #2" was made by and to a representative of my client, the Borough, for purposes of the Borough seeking and my providing legal advice to the Borough, outside the presence of strangers, in response to a communication from Council President Ehrgott, outside the presence of strangers, for an opinion of law regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough, and not for the purpose of committing a crime or tort.

39. In my Affidavit of July 24, 2023, I inadvertently forgot to mention that the JFK 4-21-22 Email Exchange #2 was not made for the purpose of committing a crime or tort.

40. The JFK 4-21-22 Email Exchange #2 is identified as Record Numbers 16 thru 18 on the Borough's Exemption Log attached hereto as Exhibit "A".

41. The JFK 4-21-22 Email Exchange #2 is protected by the attorney-client privilege....

42. While the JFK 4-21-22 Email Exchange #1 and JFK 4-21-22 Email Exchange #2 each fall outside of Mr. [the Requester]'s "between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and [Solicitor Kratz]" designation via his RTKL Request and are attorney-client privileged, I informed Mr. [the Requester] of the existence of the JFK 4-21-22 Email Exchange #1 and JFK 4-21-22 Email Exchange #2 via my Affidavit of July 24, 2023, so Mr. [the Requester] is aware that Flynn and Council President Ehrgott were aware of the legal advice that I provided so Mr. [the Requester] may possibly find that he does not need to make another right-to-know law request on those topics/time period.

that Attorney Kratz personally reviewed all of the withheld emails, the Borough's evidence is sufficient to demonstrate that the withheld emails described in the Kratz Affidavits are protected by the attorney-client privilege.

The Requester also states that communications between an agency and counsel regarding the appointment of an individual to an elected position is "procedural in nature and laid out by the law [and] should not be shielded from public scrutiny." However, the Requester did not expand on this argument or provide a citation to a "law" or legal precedent for such an exception to the attorney-client privilege.

However, as the Requester asserts that factual material in an otherwise privileged document is not protected and, as neither the log nor attestations address whether the withheld emails contain purely factual or routine information, to the extent that any of the emails contain information that does not discuss the contents of the legal advice sought or provided, the portions of such emails are not protected by the privilege. Similarly, the attachments to the withheld emails, if any, are not protected if they are purely factual information. *See Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Commw. Ct. 2015) (citing *Commw. v. Vartan*, 733 A.2d 1258 (Pa. 1999)); *see also Upjohn Co. v. United States*, 449 U.S. 383 (1981) (privilege extends only to communications and not to fact).

3. The Borough has proven that a list responsive to Item 2 does not exist

Item 2 of the Request sought a "list of all employees hired by the Borough outside of the Public Works Department since January 1, 2022" that includes the name, position title, date of hire, department, full-time or part-time status, salary or hourly wage and any additional compensation benefits for each person hired. The Borough denied Item 2, claiming that a responsive list does not exist. However, the Borough did provide the Requester with copies of

employees, and that Manager Flynn, "did not create the format of the Employee Earnings report and [he doesn't] know how that field was created or populated. The report form is generated from the Borough's designated payroll servicing company, NCR payroll." *See* ¶ 20. As a result of Manager Flynn providing additional points of information not available on the Employee Earnings Report, during the course of the appeal, the appeal is moot as to the three employees' start date, hourly pay rate, full or part-time employment status, pay increases, and employment position.

Regarding the Borough's denial of a list, the RTKL provides, "[w]hen responding to a request for access, 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."). *See* 65 P.S. § 67.705. "An agency need only provide the information in the manner in which it currently exists." *Commonwealth v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012). An agency is not required to create a list or spreadsheet containing the requested information; however, "the information … must simply be provided to requestors in the same format that it would be available to agency personnel." *Id.* at 549, n.12. Further, the OOR has consistently held that "where an agency does not maintain a list specified by a requester, the agency is not required to create such a list." *See Purcell and the Philadelphia Inquirer v. City of Phila., Dep't of Lic. & Insp.*, OOR Dkt. AP 2023-1818, 2023 PA O.O.R.D. LEXIS 2299 (agency is not required to search contractor violation files and extract certain requested datapoints to compile a list in response to a request); *Bush v. Carrol Twp.*, OOR Dkt. AP 2019-1721, 2019 PA O.O.R.D. LEXIS 1783 (denying a request for a list of specific information where no such list exists).

In this matter, the Flynn Attestation demonstrates that a list containing the information sought in Item 2, does not exist within its possession, custody or control and would require the

Manager Flynn stated in the July 25, 2023, sworn statement that, "the Borough can accommodate that request at a cost of $5.00 per record (in accordance with the Borough's Schedule of Fees, Resolution No. 2022-016)" if the Requester notifies the Borough that he wishes to have the responsive records certified and pay the applicable charges. Section 1307(c) of the RTKL permits agencies to "impose reasonable fees for official certification of copies if the certification is at the behest of the requester and for the purpose of legally verifying the public record." 65 P.S. § 67.1307(c); *see also* Official Fee Structure (recommending no more than $5.00 per record for certification fees).[9] Therefore, the Borough is required to provide certified copies, upon payment of applicable fees.

5. The OOR declines to make a finding of bad faith

The Requester presents several claims concerning the Borough's actions in regard to the instant Request and appeal, as well as general concerns about transparency and records maintenance. The Requester alleges that the Borough's search for responsive records "seems lacking in thoroughness and timeliness." The Requester also asserts that the record keeping practices raises concerns because "[t]here is a recurring pattern where they provide only some records while stating that others do not exist or cannot be produced. Yet, when the existence of these records is later established, they produce manually created versions instead of official reports. These substitute records often raise more questions than they answer." In addition, the Requester raises concerns regarding the Borough's transparency and alleged violations of the Pennsylvania Sunshine Act. Finally, the Requester relies on the April 3, 2023, Council meeting minutes to allege that the Borough is engaging in "email scrubbing."

[9] *See* https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm (last accessed October 17, 2023).

because the Barracuda Defense System was going live on May 19, 2023, and emails would no longer be accessible other than by logging into Barracuda.

A finding of bad faith is typically reserved only for an egregious or blatant violation of the RTKL. The OOR has made a finding of bad faith where an agency failed to provide evidence that it conducted a good faith search and repeatedly ignored deadlines set by the OOR and the RTKL and declined to address the OOR's requests for clarification. *See Towne v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2021-0292, 2021 PA O.O.R.D. LEXIS 307. The OOR has also found that an agency acted in bad faith where it demonstrated a pattern of invoking extensions but failing to respond to requests or participate in the appeals. *See Hayden v. City of Reading*, OOR Dkt. AP 2018-0244, 2018 PA O.O.R.D. LEXIS 402. Based on a review of the record in consideration of the Requester's bad faith claims, we find that the record does not support a finding that the Borough has acted in an egregious fashion or that there is a pattern of shirking RTKL obligations. Therefore, we decline to make a finding of bad faith.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part**, **denied in part** and **dismissed as moot in part**, and the Borough is directed to conduct a supplemental search for records responsive to Item 1, except for the records determined to be privileged, as set forth in this Final Determination. If no additional records are located as a result of its search, the Borough shall provide an attestation or sworn affidavit to the Requester confirming same. Such action must take place within thirty days of the mailing date of this Final Determination. In addition, the Borough is directed to certify all responsive records, upon the payment of fees in accordance with the OOR's fee schedule. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Delaware

EXHIBIT C

The Appeals Officer, however, held that it was *also* reasonable for the Request to seek records encompassing "any combo" of members of the group. In doing so, the Appeals Officer impermissibly refashioned the Request despite recognizing the case law preventing the OOR from doing so. Just because the Requester's interpretation of his Request was arguably also reasonable does not make the Borough's interpretation of the Request as written unreasonable, especially where an agency has a certain amount of discretion in interpreting RTKL requests. For these reasons, the OOR impermissibly expanded the scope of the Request to seek records beyond what was sought, and reconsideration should be granted.[1]

2. The OOR impermissibly granted access to records other than emails.

The OOR has previously held that requesters may choose to limit the scope of appeals. *See, e.g., Youngblood v. Philadelphia Redevelopment Authority*, OOR Dkt. AP 2015-2902 (limiting an appeal solely to one exemption); *Sopko v. Central Bucks School District*, OOR Dkt. AP 2023-0820 (limiting an appeal solely to names); *Walz v. Washington County*, OOR Dkt. AP 2023-0375 (limiting an appeal to certain records); *Suttles v. Beaver Borough*, OOR Dkt. AP 2023-0487 (same).

While the Request sought records beyond emails, the Requester, on appeal, limited his request to seeking only "emails." Specifically, in his appeal form, the Requester wrote under "Records at Issue in this Appeal" that he was seeking "emails." Additionally, in his July 13, 2023 correspondence accompanying his appeal, the Requester wrote that he was "appealing the denial of [his] request for: Email communications…"

In the Final Determination, however, the Appeals Officer found that the Borough had not "proven that no additional … memos, notes, or text messages … exist…" *See* Final Determination at 17. As the appeal facially was limited to emails, the Appeals Officer erred in granting access to "memos, notes, or text messages."

3. The OOR impermissibly granted access to records that would reveal the subject matter of privileged communications.

The Appeals Officer also erred in ordering the release of "purely factual" information within privileged emails. While "purely factual" information is potentially discoverable, it is only accessible where such information can be divulged without revealing privileged communications. *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 632-33 (M.D. Pa. 1997). If, for example, the Borough Solicitor were to send a communication to the Borough Manager concerning a labor issue and attached a copy of the applicable collective bargaining agreement, providing the collective bargaining agreement (an otherwise public document) in response to a request for the Solicitor's communications would reveal that the Solicitor provided advice on a labor issue. For

[1] Notably, the Appeals Officer's finding greatly expands the scope of the Request by requiring the Borough to search for and produce records it has not yet reviewed to determine whether any privileges or statutory exemptions apply, changing the request to one set of records for each of eleven topics to fifteen sets of records (e.g., Flynn to Mirabito; Flynn to Ehrgott, etc.) for each of the eleven topics. As a matter of due process, the Borough should be afforded an opportunity to review such records prior to any order requiring their release, and, to the extent that the OOR grants reconsideration, the Borough asks that it be afforded such additional time in accordance with *Pa. State Sys. of Higher Educ. v. Ass'n of State Coll. & Univ. Faculties*, 142 A.3d 1023 (Pa. Commw. 2016).

EXHIBIT A

[e.] Any potential employment, position benefits, compensation for Fiorella Mirabito

[f.] Advertisement of any new position within the Borough

[g.] The resignation of Marena Rasmus

[h.] Clerk positions within the Borough

[i.] The hiring of any individual for a clerk position within the Borough

[j.] Borough policy on hiring for new positions

[k.] Any public announcement regarding the above topics [. . .]"

Please note that this request includes any relevant communications that are not covered by attorney-client privilege. Under the RTKL, attorney-client privilege does not apply to factual information or data, the application of law to fact, or legal strategy, among other things."

[2.] A list of all employees hired by the Borough of Bath outside of the Public Works Department since January 1, 2022. For each employee, please provide the following information:

- Full name
- Position title
- Date of hire
- Department
- Full-time or part-time status
- Salary or hourly wage
- Any additional compensation or benefits

Please note that personal identifying information such as home address, personal phone numbers, and social security numbers can be redacted for privacy reasons. Please provide these records in electronic format. If any of these requests are denied, please cite each specific exemption you believe justifies the refusal to release the information and notify me of appeal procedures available under the law.

On June 23, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Borough partially denied Item 1 of the Request by providing emails and arguing that no responsive memos, notes or text messages exist. Regarding Item 1, the Borough also claimed that solicitor James Kratz, Esq., did not provide any emails containing legal advice

Kratz, Esq., the Borough solicitor ("Kratz Affidavit") and the Attestation Regarding Borough Possession of Records, made under penalty of perjury pursuant to 18 Pa.C.S. § 4904, from Bradford Flynn, the Borough Manager ("Flynn Attestation").

On July 24, 2023, the Requester submitted a statement in support of the appeal, arguing that additional responsive records exist and that the Borough failed to conduct a good faith search for records, disputing the Borough's claim of attorney-client privilege, and asserting that the Borough failed to certify the records provided as indicated in the Request form.

On July 25, 2023, Borough Manager Flynn submitted a supplemental statement in reply to the Requester's appeal statement, that was made subject to the penalties of perjury. Manager Flynn addresses the points raised by the Requester, arguing that emails related to the resignation of Office Administrator Marena Rasmus fall outside the timeframe stated in the Request and that the letter of resignation of Council President Mark Saginario, in which he resigned as Borough President, also falls outside the timeframe of the Request. Manager Flynn further states that the December 31, 2021, resignation letter of Mark Saginario, in which he resigned as a Councilmember, was included in the Borough's final response to the Request. Finally, Manager Flynn argues that the Requester failed to raise the issue of certification in the appeal, but, however, if the Requester wishes to have certified copies of the records attached to the Borough's final response, they would be provided at a cost of $5.00 per record, in accordance with the Borough's Fee Schedule (Resolution No. 2022-016), if the Requester notifies the Borough that any or all of the records should be certified.

On July 26, 2023, the Requester submitted a second supplemental appeal statement, asserting that the Borough did not conduct a thorough search for records and that discussions contained in Council meeting minutes suggest that additional records may exist. The Requester

The Requester has already repeatedly raised the issue of the completeness and good faith nature of the Borough's search in all of his prior filings, thereby placing the issues before the OOR on appeal. Regarding any wrongdoing, illegal activity or allegations of inadequate management on the part of the Borough, the RTKL does not authorize the OOR to conduct an investigation of an agency, as part of the appeals process.

On August 2, 2023, the Borough submitted a supplemental sworn Flynn statement disputing the Requester's assertions of "email scrubbing" on the part of the Borough to evade transparency and evade compliance with the RTKL. In addition, the Borough again argues that the issue of record certification should be dismissed, as it was not raised in the initial appeal and the Requester first raised the issue in his July 24, 2023 submission.

On October 4, 2023, in response to the OOR's directive, the Borough submitted an exemption log, detailing the attorney-client privileged emails identified in response to the Request. The submission included a supplemental Kratz Affidavit, that expanded upon the July 24, 2023, initial Kratz Affidavit.

On October 13, 2023, the Requester submitted a statement in response to the Borough's exemption log. The Requester disputes the accuracy of facts stated in the Second Kratz Affidavit and asserts that the Affidavit "omits text messages and implies privilege covered all communications between the named parties" when it does not. The Requester also asserts that the Borough incorrectly applies the attorney-client privilege to factual matters and that log is missing details such as, dates, authors or recipients of the communications. The Requester further reiterates the argument that the Borough is not being adequately transparent and failing to properly maintain its records. Finally, the Requester seeks an explanation for the IT consultant DriveLocker's

more detailed version attached[.]" In the referenced attachment to the appeal, the Requester states that he is appealing the denial of ...:

> • Email communications between specific individuals regarding the resignation of a council member, the vacated council seat, appointment of a new member, policies on vacated seats, and hiring, among other matters. The Borough claimed no such emails exist without proof.
>
> • A list of employees hired since January 2022 with name, position, salary, etc. The Borough claimed no such list exists but provided employee earnings reports.

The Borough argues that, with regard to Item 1 of the Request, the use of "any combo" is an impermissible modification of the Request. To the extent that the Requester intended to modify or expand the scope of emails sought in Item 1, the OOR's review is on appeal is confined to the Request as written, and any modification or explanation of the Request on appeal will not be considered. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010*); Michak v. Pa. Dep't of Pub. Welfare*, 56 A.3d 925 (Pa. Commw. Ct. 2012) (holding that "where a requester requests a specific type of record ... the requester may not, on appeal argue that an agency must instead disclose a different record in response to the request"). *McKelvey v. Office of Attorney General*, 172 A.3d 122 (Pa. Commw. Ct. 2017) ("Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal.") Nevertheless, the Borough states that Manager Flynn interpreted Item 1 as seeking emails between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, **and** James Kratz from the timeframe specified between September 20, 2021, to May 15, 2022," thereby implying that emails must have all named individuals on an email for it to qualify as responsive. (Emphasis in original). The OOR has consistently held that an agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Mezzacappa v. Northampton Cnty. Dist. Atty's*

the information included on the appeal form also stated, "more detailed version attached[.]" Therefore, the OOR's review will be of the partial denial issued by the Borough in response to the original Request language.

2. The Borough has not proven that all non-exempt records have been provided to the Requester

In response to Item 1, the Borough identified and provided emails from December 12, 2021, December 29, 2021 and April 4, 2022, and attachments consisting of Resolution #2021-012, Councilman Mark Saginario's resignation letter, and a letter of interest to fill the Council position from Borough citizen, Emmanuel Mirabito. The Borough claims that no responsive memos, notes, and text messages exist and that no emails from Attorney Kratz "regarding any potential employment, position benefits, compensation for Fiorella Mirabito, advertisement of any new position within the Borough, resignation of Marena Rasmus, clerk positions within the Borough, hiring of any individual for a clerk position with the Borough, Borough policy on hiring for new positions or any public announcements regarding the foregoing" exist. In addition, the Borough withheld emails sent by Attorney Kratz to Manager Flynn, the Borough Mayor and/or members of Borough Council containing legal advice, "regarding the resignation of Mark Saginario from Council, the vacated Council seat following Mark Saginario's resignation, the appointment of Emmanuel Mirabito to the Council seat and the process to appoint a person to a vacated Council [seat]," arguing that the emails are protected by the attorney-client privilege and attorney work-product doctrine.

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 concluded that:

b. The vacated council seat following Mark Saginario's resignation;

i. Based on my review, I found that the Borough did not have a hard copy storage file for this topic.

c. The appointment of Emmanuel Mirabito to the council seat;

i. Based on my review, I found the Councilmember file that the Borough has for Emmanuel Mirabito since he was appointed a Councilperson in early January 2022. I further found that it did not contain any emails, memos, notes, or text messages between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022.

d. Borough Policy on a vacated council seat;

i. Based on my review, I found that the Borough did not have a hard copy storage file for this topic.

e. Any potential employment, position benefits, compensation of Fiorella Mirabito;

i. Based on my review, I found the hard copy personnel file for Fiorella Mirabito. However, the personnel file did not contain any emails, memos, notes, or text messages between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022.

f. Advertisement of any new position within the Borough;

i. Based on my review, I found that the Borough did not maintain a hard copy storage file specific to advertisements of any new position with the Borough.

g. The resignation of Marena Rasmus

i. Based on my review, I found the personnel file for Marena Rasmus. I also found that it did not contain any emails, memos, notes, or text messages between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022.

h. Clerk positions within the Borough

by [the Requester] in #3 above and to exclude any attorney-client privileged emails (if any existed) from the potentially responsive emails that I located.

9) Via my review described in #7 above, I located the following non-attorney-client privileged responsive emails:

a. '12_6_21 Meeting of Council' email dated 12/02/2021 from Marena Rasmus to Mayor Fiorella Mirabito and all Council members at that time (including, but not limited to, Michele Ehrgott, Phyllis Andrews, and Barry Fenstermaker) with copy to me, Solicitor Kratz, Borough Engineer Madison and Borough office secretary Lamparter. This email is responsive because it references proposed Resolution #2021-012 (Articles of Decorum and Rules of Order for Public Meetings) which, at Article 2.7 (Filling Council Vacancies), is responsive to [the Requester's] request for Borough policy on a vacated council seat. I downloaded a copy of this email and marked it Attachment 'A'.

i. The above email (Attachment 'A') included an attachment (Council packet) that included Resolution #2021-012. I downloaded proposed Resolution #2021-012 and marked it Attachment 'A' - 1.

b. 'January 2022 Regular & Reorganization Meeting' email dated 12/29/2021 from me to Mayor Fiorella Mirabito and all Council members at that time (including, but not limited to, Michele Ehrgott, Phyllis Andrews, and Barry Fenstermaker) with copy to Solicitor Kratz, former employee Rasmus and Borough office secretary Lamparter. This email is responsive because it references Mark Saginario's resignation from Council and a letter of interest from a borough resident (Emmanuel Mirabito) requesting to be appointed to the vacant Council seat because of Mr. Saginario's resignation. I downloaded a copy of this email and marked it Attachment 'B'.

i. The above email (Attachment 'B') included an attachment (Council packet) that included Mr. Saginario's resignation letter from Council. I downloaded Mr. Saginario's resignation letter from Council and marked it Attachment 'B' – 1.

ii. The above email (Attachment 'B') included an attachment (Council packet) that included a letter of interest from a borough resident (Emmanuel Mirabito) requesting to be appointed to the vacant Council seat because of Mark Saginario's

> Solicitor Kratz regarding any potential employment, position benefits, compensation of Fiorella Mirabito, advertisement of any new position within the Borough, resignation of Marena Rasmus, clerk positions within the Borough, hiring of any individual for a clerk position with the Borough, Borough policy on hiring for new positions or any public announcements regarding the foregoing.
>
> 12) Via my review described in #7 above, I also determined that the potentially responsive emails did not contain any privileged or non-privileged emails from any of the other persons identified by [the Requester's] request regarding any potential employment, position benefits, compensation of Fiorella Mirabito, advertisement of any new position within the Borough, clerk positions within the Borough, hiring of any individual for a clerk position with the Borough, Borough policy on hiring for new positions or any public announcements regarding same but I forgot to state that in my letter of June 23, 2023 to Mr. Long.
>
> 13) Via the Borough's final response to [the Requester's] ... Request, I granted him access to (and provided to him) the non-attorney-client privileged responsive records that I located and have identified in #9 above (Attachments 'A', 'A' – 1, 'B', 'B' – 1, 'B' – 2, and 'C' and identified in the Borough's final response of June 23, 2023, to Mr. Long.

Under the RTKL, an affidavit may serve as sufficient evidentiary support to withhold requested records. *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).

The Requester argues that more responsive records should exist. The Requester notes that Borough Council meeting minutes for July 14, 2021, and April 4, 2022 reference the resignation letters of Ms. Rasmus and Councilperson Saginario and such records fall within the scope of the Request. Regarding Ms. Rasmus' resignation, Manager Flynn stated in the July 25, 2023, sworn statement that "[o]n April 3, 2022, emailed her resignation of [B]orough employment, effective immediately" and "[t]he email served as the resignation letter." Manager Flynn states that the email was not captured in the Borough's search because the email recipients included himself, Ms. Ehrgott, Frank Hesch, and the message was copied to Mayor Mirabito and Tanya Lamparter, and "the email recipients fall outside the scope of [the Request]." Manager Flynn's statement demonstrates that the Borough's search was based on what we have determined was an

Saginario resignation letter has been provided in response to Item 1(a). Nevertheless, as we have determined that the Borough did not conduct a sufficient search, we find that the Borough has not demonstrated that no responsive emails or other requested records exist. *Hodges*, 29 A.3d at 1192. In addition, the OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records sought in the Request. *See, e.g., Segelbaum and The York Daily Record v. York Cnty, supra.*; *Campbell v. Galeton Area Sch. Dist.,* OOR Dkt. AP 2018-2175, 2019 PA O.O.R.D. LEXIS 45; *Kowalchick v. Norwegian Twp.,* OOR Dkt. AP 2018-2217, 2019 PA O.O.R.D. LEXIS 48.

2. The Borough has demonstrated that certain emails responsive to Item 1 are privileged

The Borough withheld certain emails responsive to Item 1, arguing that the information is protected by the attorney-client privilege. More specifically, in the June 23, 2023 final response, the Borough stated, in pertinent part, "as to emails from Solicitor Kratz to me [Manager Flynn], the Mayor and/or members of Council regarding Solicitor Kratz's advice regarding the resignation of Mark Saginario from Council, the vacated Council seat following Mark Saginario's resignation, the appointment of Emmanuel Mirabito to the Council seat and the process to appoint a person to a vacated Council [seat]" are protected by the attorney-client privilege.

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. *Bousamra v. Excela Health,* 210 A.3d

17. On or around June 23, 2023, Flynn, in his capacity as a Borough Open Records Officer, asked me to review several potentially responsive emails that he located via his search on the Borough's server for emails between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and me from September 20, 2021, to May 15, 2022, regarding the subject matters identified in the RTKL Request.

18. Based on my review of the potentially responsive emails that Flynn located via his search on the Borough's server, I identified only my email of December 3, 2021, from me to former Borough employee Marena Rasmus with copy to Flynn, Borough Engineer Madison, Borough employee Lamparter, Mayor Fiorella Mirabito and all Council members at that time (including, but not limited to, Michele Ehrgott, Phyllis Andrews, and Barry Fenstermaker) (the "JFK Email of 12-3-21") as containing my legal advice regarding several parts of proposed Resolution #2021-012 including, but not limited to, Article 2.7(f) of proposed Resolution #2021-012.

19. Article 2.7 of proposed Resolution #2021-012 relates to the process to appoint a person to a vacated Council seat. Thus, Article 2.7(f) of proposed Resolution #2021-012 relates to the process to appoint a person to a vacated Council seat. Thus, my legal advice in the JFK Email of 12-3-21 related to the process to appoint a person to a vacated Council seat. Also, while my Affidavit of July 24, 2023, states that "[b]ecause of that, my legal advice in the JFK Email of 12-3-21 regarding Article 2.7(f) of proposed Resolution #2021-012 ..., ..., ... related to the prospective appointment of Emmanuel Mirabito to the Council seat that was imminently being vacated by former Councilmember Mark Saginario[]", after further review, that statement is not correct because it was not until the January 2022 Regular & Reorganization Meeting email dated 12/29/2021 (Attachment 'B' to Bath's final response letter dated June 23, 2023, addressed to Mr. [the Requester] which response letter is attached hereto as Exhibit "C" which response letter included (a) then Councilmember Mark Saginario's resignation letter dated December 31, 2021 (Attachment 'B-1' to Exhibit "C" attached hereto) and (b) the Emmanuel Mirabito letter of interest dated December 13, 2021 (Attachment 'B-2' to Exhibit "C" attached hereto)) that I became aware of the possibility of Council possibly appointing Emmanuel Mirabito to the Council seat that was imminently being vacated by former Councilmember Mark Saginario and I was not asked to provide a legal opinion regarding the prospective appointment of Emmanuel Mirabito to said Council seat.

20. The JFK Email of 12-3-21 falls within the "between Bradford Flynn , Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022" stated in [the] RTKL Request....

21. The JFK Email of 12-3-21 was made to representatives of my client, the Borough, for purposes of providing legal advice, outside the presence of strangers, in response to a communication from Borough employee Marena Rasmus, outside

28. The Email Exchange in October 2021 is comprised of the emails identified as Record Numbers 2 thru 12 on the Borough's Exemption Log attached hereto as Exhibit "A".

29. The Email Exchange in October 2021 was made by and to representatives of my client, the Borough, for purposes of the Borough seeking and my providing legal advice to the Borough, outside the presence of strangers , in response to emails from Flynn and Council President Ehrgott, outside the presence of strangers, for an opinion of law and legal assistance regarding the resignation of then Councilmember Mark Saginario, the vacated Council seat following Mark Saginario's resignation and the general process to appoint a Council person and not for the purpose of committing a crime or tort.

30. The Email Exchange in October 2021 is protected by the attorney-client privilege....

31. I stated "and/or" to Flynn as stated in paragraph 26 above because I desired that Flynn inform Mr. [the Requester] that I did provide legal advice on the topics covered by the Email Exchange in October 2021 so [the Requester] is aware that Flynn and Council President Ehrgott were aware of my legal advice so [the Requester] may possibly find that he does not need to make another [RTKL] request on that topic/time period.

32. On or around June 23, 2023, I also searched my email records for the Borough and did not find any other email exchanges regarding Mr. [the Requester]'s other subject matters during the relevant time frame so I informed Flynn that I didn't have other attorney-client privileged emails to note for Mr. [the Requester].

33. In preparing my Affidavit of July 24, 2023, I performed another search to ensure my initial search was correct and I located the following email exchanges:

> (a) Email exchange on April 21, 2022 (the "JFK 4-21-22 Email Exchange #1"), between Flynn and me wherein Flynn sought legal opinions regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and form of compensation and where I provided legal advice in response to same.
>
> (b) Email exchange on April 21, 2022 (the "JFK 4-21-22 Email Exchange #2"), between Council President Ehrgott and me wherein Council President Ehrgott sought legal opinion regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and where I provided legal advice in response to same.

43. In preparing this Affidavit, I gathered the emails identified as Record Numbers 1 thru 18 and, in doing so, I located the following attorney-client privileged email exchange that relates to the JFK Email of 12-3-21:

> (a) Email exchange on December 6, 2021 (the "12-6-21 Email Exchange") between Flynn and me wherein Flynn sought follow up legal advice to the legal advice that I provided via the JFK Email of 12-3-21 regarding Article 2.7(f) of proposed Resolution #2021-012.

44. The 12-6-21 Email Exchange was made by and to a representative of my client, the Borough, for purposes of the Borough seeking and my providing legal advice to the Borough, outside the presence of strangers, in response to [the Requester's] email of 12-6-21 ... for follow up legal advice regarding the JFK Email of 12-3-21 regarding Article 2. 7(f) of proposed Resolution #2021-012 and not for the purpose of committing a crime or tort.

45. The 12-6-21 Email Exchange is comprised of the emails identified as Record Numbers 19 and 20 on the Borough's Exemption Log attached hereto as Exhibit "A".

46. The 12-6-21 Email Exchange is protected by the attorney-client privilege....

A review of the exemption log shows that the emails the Borough claims are protected by the attorney-client privilege were exchanged between Attorney Kratz, Manager Flynn, Borough Council members and Borough employees, during the relevant timeframe noted in the Request. The subject matters of the emails is described as legal advice regarding a proposed Resolution related to the appointment process for a vacated Council seat, legal advice in response to a verbal inquiry regarding Councilman Saginario's resignation and the appointment process to fill the vacancy, and legal advice related to the prospective employment of Ms. Mirabito as a part-time office clerk for the Borough. The Requester argues that the Borough's claim of attorney-client privilege "may be an overreach or abuse of the ... privilege, in this case" and that the Borough has not supported the claim of privilege with sufficient evidence. However, when the log is reviewed in conjunction with Attorney Kratz's affidavit, especially considering the fact that Attorney Kratz was a party to the emails and would have personal knowledge of the content, as well as the fact

"Employee Earnings Reports" for any personnel hired from January 1, 2022, to April 30, 2023, with the individuals' home addresses, social security numbers, and dates of birth, pursuant to Section 708(b)(6)(i)(A) of the RTKL, 65 P.S. § 67.708(b)(6)(i)(A). The Borough provided the Employee Earnings Reports for Michael Kovach, Fiorella Mirabito, and David Smith[8] to the Requester and the copies were included with the appeal. The Employee Earnings Reports include the employee start date, number of hours worked per weekly pay period, and gross pay for the respective period. *See* Flynn Attestation, ¶ 19.

Regarding Item 2 of the Request, the Flynn Attestation states that Manager Flynn is familiar with the names and positions of Borough employees by virtue of his employment obligations as Borough Manager and also, that he "conduct[s] the hiring process for any prospective Borough employee." Manager Flynn attests that the Borough does not maintain a list containing the information requested in Item 2. *See* ¶¶ 15-17. The Flynn Attestation also states that Manager Flynn participated in the hiring of Michael Kovach, Fiorella Mirabito and David Smith, during the relevant timeframe. The Flynn Attestation states that Michael Kovach and David Smith were hired as a part-time parking and code enforcement officer, and Fiorella Mirabito was hired as a part-time office clerk. *See* ¶¶ 18(a) – (c). The Flynn Attestation further provides the start date, hourly pay rate, full or part-time employment status and any pay increases that took place during the relevant timeframe for Kovach, Mirabito and Smith. *See*, *id.* Finally, the Flynn Attestation explains that, while the Employee Earnings Reports shows that the employees have a standard work week of 40 hours, each of the three employees are, in fact, part-time at-will

[8] We note that the copy of the Employee Earnings Report indicates that the employee's name is *Cavic* Smith. In addition, in all other words with the letter "d", the letter has been replaced with a "c", such as the word "date." In the Supplemental Katz Affidavit and the Borough's submission in support of the Exemption Log, it was explained that the misspelling of David Smith's name may have stemmed from an error related to the software the Requester used to upload the appeal and attachments. The Borough provided the correct and true copy of the Reports with the October 4, 2023, submission. *See* Supplemental Katz Affidavit, ¶¶ 49-50; Attachment D of Exhibit C.

creation of a record. *See Hodges*, 29 A.3d at 1192; *Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294. Furthermore, none of the Requester's multiple submissions contain competent evidence to prove that such a list exists. In addition, Item 2 expressly states, "[p]lease note that personal identifying information such as home address, personal phone numbers, and social security numbers can be redacted for privacy reasons" and the Borough's sworn final response indicates that only personal information was reacted under Section 708(b)(6)(i)(A). While the Borough also redacted dates of birth, information not expressly exempt under Section 708(b)(6)(i)(A), on October 18, 2023, the Requester responded to the OOR's request for clarification by stating that he intended to include date of birth within the "personal identifying information" category of information that he expressly could be redacted. Accordingly, the Borough has proven that the employee information sought in Item 2, does not exist and that the Borough is not required to create a record. 65 P.S. § 67.708(a); 65 P.S. § 67.705.

4. The Borough failed to certify the records pursuant to Section 904 of the RTKL

The Requester argues that he requested certified copies of the responsive records and that the Borough failed to certify the records provided. Under the RTKL, "[i]f an agency's response grants a request for access, the agency shall, upon request, provide the requester with a certified copy of the record if the requester pays the applicable fees...." 65 P.S. § 67.904. The Requester indicated on the Request form that certified copies were being sought. While the Borough argues that the Requester has waived the issue of certification on appeal, the Request clearly indicated certification was sought on the face of the form. In addition, the Requester used the OOR standard appeal form and therefore, Section 1101 of the RTKL. *See Auerbach v City of Phila. Law Dept.*, OOR AP Dkt. 2023-0404, 2023 PA O.O.R.D. LEXIS 763 (noting that the statement in the OOR's standard appeal form is sufficient to meet the requirements of Section 1101(a)). Furthermore,

While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a). Under the RTKL, a finding of bad faith is appropriate where an agency refuses to comply with its statutory duties under the RTKL. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 28-29 (Pa. 2020); *California Univ. of Pa. v. Bradshaw*, 210 A.3d 1134 (Pa. Commw. Unpub. 2021) *appeal denied* 2019 PA LEXIS (Pa. 2019); *Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Commw. Ct. 2017).

In the instant matter, while we have determined that the Borough's search was not sufficient due to the narrow interpretation of the Request, the appeal record demonstrates that the Borough engaged in a timely search in response to the Request and provided a lengthy and detailed final response and fully participated on appeal. Regarding the adequacy of the Borough's record keeping or maintenance, such a claim is beyond the purview of the RTKL and the OOR's review. Regarding the claim of "email scrubbing," the Borough submitted a supplemental sworn statement from Manager Flynn, addressing the allegations. Manager Flynn asserts that, not only were the April 3, 2023, discussions not relevant to the timeframe of the Request and this appeal, but, also, the claims are erroneous. Manager Flynn attests that "the 'email scrubbing' refers to the Borough's newly installed Barracuda Network Email Gateway Defense Quarantine program (the "Barracuda Defense Program"). This is a security measure used by the Borough effective May 19, 2023, to control outside emails being sent to our government's email exchange server" as the Borough has been the subject of email phishing scams and the new system was installed as an added layer of cybersecurity. Manager Flynn further explained that a reference to emails to Borough employees and officials noted in the June 5, 2023, Borough Council meeting agenda, were reminders sent

County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.[10] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: November 3, 2023

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent via email to: Michael Long; James Kratz, Esq.; Bradford Flynn

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

From: Isenberg, Kelly
To: J. Chadwick Schnee; michael.long479@gmail.com
Subject: RE: [External] Question
Date: Wednesday, December 6, 2023 10:09:00 AM
Attachments: image001.png

Good morning, Attorney Schnee.

Please provide a response by the close of business on Mon., Dec. 11th.

Regards,
Kelly Isenberg

Kelly C. Isenberg |Attorney
Senior Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
https://www.openrecords.pa.gov
@OpenRecordsPA

From: J. Chadwick Schnee <chadwick@schneelegal.com>
Sent: Tuesday, December 5, 2023 4:20 PM
To: Isenberg, Kelly <kisenberg@pa.gov>; michael.long479@gmail.com
Subject: RE: [External] Question

Dear Senior Appeals Officer Isenberg,

Thank you for your email.

Would you please kindly clarify as to whether you request a response from the Borough as to the possible application of 1 Pa. Code 35.241(f) on or before December 18, 2023 or a different date?

Thank you.

Mr. Long: Regarding Question No. 2, it is not clear what is being asked or what "this matter" is referring to, so I am unable to provide a response. Regarding Question No. 3, the OOR never "collaborates" with parties to prior appeals for any reason.

Thank you for your attention to these matters. If you have any questions, please advise.

Kelly Isenberg

Kelly C. Isenberg |Attorney
Senior Appeals Officer
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333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
https://www.openrecords.pa.gov
@OpenRecordsPA

From: Michael Long <michael.long479@gmail.com>
Sent: Tuesday, December 5, 2023 2:53 PM
To: Isenberg, Kelly <kisenberg@pa.gov>
Subject: [External] Question

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the Report Phishing button in Outlook.*

Regarding the reconsideration the borough filed in response to 2023-1598, apparently in a panic they apparently filed a an appeal through the local courts. They hand served me at council meeting last night. So now my question is 3 fold.

1. Does this put an end to the reconsideration

2. As neither I nor do I suspect the oor received any notification regarding this matter, does the 30 day limit apply to notifying all parties as that timeline expired Sunday or just the fact they filed prior

EXHIBIT E

The Borough is also in receipt of various communications from Mr. Michael Long in this matter that appear to argue that the OOR should grant reconsideration for a variety of reasons. First, as set forth above, per 1 Pa. Code § 35.241(f)(1), the judicial review of the Borough's appeal filed with the Court of Common Pleas of Northampton County on December 1, 2023, divests the OOR of jurisdiction to further address this matter. Second, to the extent that Mr. Long attempts to seek reconsideration of his issues, such a request is untimely. *See* 1 Pa. Code § 35.241(a). Third, while Mr. Long is permitted to file a response to the Borough's Petition for Reconsideration, it must be in the nature of an answer, rather than on entirely different bases irrelevant to the Borough's Petition for Reconsideration.

Thank you.

Regards,



J. Chadwick Schnee, Esq.

pennsylvania
OFFICE OF OPEN RECORDS

December 13, 2023

Via E-File Portal Only:

Michael Long
220 Creek Road
Bath, PA 18014
michael.long479@gmail.com

J. Chadwick Schnee
Schnee Legal Services, LLC
74 E. Main Street, #648
Lititz, PA 17543
chadwick@schneelegal.com

Via E-File Portal Only:

James F. Kratz
840 W. Hamilton Street
Suite 521
Allentown, PA 18101
james.kratz@stevenslee.com

Bradford T. Flynn
Agency Open Records Officer
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121 South Walnut Street
Bath, PA 18014
manager@boroughofbath.org
bradford.flynn@boroughofbath.org

James Kratz
Stevens & Lee
840 W. Hamilton Street, Suite 521
Allentown, PA 18101
james.kratz@stevenslee.com

RE: Long v. Bath Borough OOR Dkt. AP 2023-1598

Dear Attorney Schnee:

We have reviewed your response to the OOR's request for clarification regarding the application 1 Pa. Code § 35.214(f) to the reconsideration of the Final Determination in this matter and, based on our review of the issue, we have determined that the matter will be proceeding to a Final Determination on Reconsideration.

As a reminder to both parties, a response in the nature of an answer is due on before December 18, 2023.

Regards,

/s/ Kelly Isenberg

Kelly Isenberg
Senior Appeals Officer

Supreme Court of Pennsylvania

Court of Common Pleas
Civil Cover Sheet

NORTHAMPTON County

For Prothonotary Use Only:	
Docket No: C-48-CV-2023-	10559

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:
☐ Complaint ☒ Writ of Summons ☐ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:	Lead Defendant's Name:
BOROUGH OF BATH	MICHAEL LONG
Are money damages requested? ☐ Yes ☒ No	Dollar Amount Requested: (check one) ☐ within arbitration limits ☐ outside arbitration limits
Is this a *Class Action Suit?* ☐ Yes ☒ No	**Is this an *MDJ Appeal?*** ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney: J. CHADWICK SCHNEE, ESQ.

☐ Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

SECTION B

Nature of the Case: Place an "X" to the left of the **ONE** case category that most accurately describes your ***PRIMARY CASE.*** If you are making more than one type of claim, check the one that you consider most important.

TORT *(do not include Mass Tort)*
- ☐ Intentional
- ☐ Malicious Prosecution
- ☐ Motor Vehicle
- ☐ Nuisance
- ☐ Premises Liability
- ☐ Product Liability *(does not include mass tort)*
- ☐ Slander/Libel/ Defamation
- ☐ Other:

MASS TORT
- ☐ Asbestos
- ☐ Tobacco
- ☐ Toxic Tort - DES
- ☐ Toxic Tort - Implant
- ☐ Toxic Waste
- ☐ Other:

PROFESSIONAL LIABILITY
- ☐ Dental
- ☐ Legal
- ☐ Medical
- ☐ Other Professional:

CONTRACT *(do not include Judgments)*
- ☐ Buyer Plaintiff
- ☐ Debt Collection: Credit Card
- ☐ Debt Collection: Other
- ☐ Employment Dispute: Discrimination
- ☐ Employment Dispute: Other
- ☐ Other:

REAL PROPERTY
- ☐ Ejectment
- ☐ Eminent Domain/Condemnation
- ☐ Ground Rent
- ☐ Landlord/Tenant Dispute
- ☐ Mortgage Foreclosure: Residential
- ☐ Mortgage Foreclosure: Commercial
- ☐ Partition
- ☐ Quiet Title
- ☐ Other:

CIVIL APPEALS
Administrative Agencies
- ☐ Board of Assessment
- ☐ Board of Elections
- ☐ Dept. of Transportation
- ☒ Statutory Appeal: Other 65 P.S. Section 67.1302(a)
- ☐ Zoning Board
- ☐ Other:

MISCELLANEOUS
- ☐ Common Law/Statutory Arbitration
- ☐ Declaratory Judgment
- ☐ Mandamus
- ☐ Non-Domestic Relations Restraining Order
- ☐ Quo Warranto
- ☐ Replevin
- ☐ Other:

FILED
DEC 20 2023
NORTHAMPTON COUNTY PROTHONOTARY

Updated 1/1/2011

BOROUGH OF BATH,	:	IN THE COURT OF COMMON PLEAS
Petitioner,	:	NORTHAMPTON COUNTY,
	:	PENNSYLVANIA
v.	:	CIVIL DIVISION
MICHAEL LONG,	:	C-48-CV-2023- 10559
Respondent.	:	NO. _____

ORDER

AND NOW, this _____ day of _____, 20___, upon review of the Appeal Of And Petition For Review Of Final Order Dated December 1, 2023 Partially Granting And Partially Denying Reconsideration Issued By Pennsylvania Office Of Open Records At OOR DKT. AP 2023-1598, and any responses thereto, it is hereby ORDERED and DECREED as follows:

(a) reverses the OOR's December 1, 2023 Final Order purporting to partially grant reconsideration;

(b) decrees that OOR does not have jurisdiction to continue reconsideration of the November 3, 2023 Final Determination or render a new final determination pursuant to 1 Pa. Code § 35.241(f)(2);

(c) decrees this Honorable Court has jurisdiction over the Borough's December 1, 2023 NCCCP Appeal of the November 3, 2023 Final Determination pursuant to 1 Pa. Code § 35.241(f)(1) and 65 P.S. § 67.1302(a) and (b); and

BOROUGH OF BATH, Petitioner, v. MICHAEL LONG, Respondent.	: : : : : :	IN THE COURT OF COMMON PLEAS NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL DIVISION NO. C-48-CV-2023-10559

CERTIFICATE OF SERVICE

I, J. CHADWICK SCHNEE, ESQ., certify that I have served a true and correct copy of the Appeal of and Petition for Review of Final Order Dated December 1, 2023 Partially Granting and Partially Denying Reconsideration, Issued by Pennsylvania Office of Open Records at OOR Dkt. AP 2023-1598 to the following:

Via email on 12/28/23 and First Class Mail on 12/29/23:

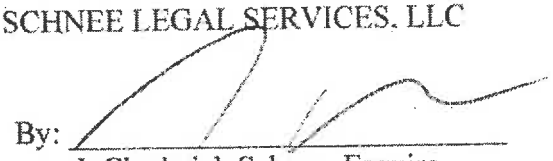
Michael Long
220 Creek Road
Bath, PA 18014
michael.long479@gmail.com
Respondent, *pro se*

Pennsylvania Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
oor-postfd@pa.gov

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

SCHNEE LEGAL SERVICES, LLC

By: 

J. Chadwick Schnee, Esquire
PA Attorney ID 306907
Schnee Legal Services, LLC
74 E. Main Street, #648
Lititz, PA 17543
Phone: 717-400-5955
Fax: 717-882-5271
chadwick@schneelegal.com

Dated: December 29, 2023


Schnee
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DEC 29, 2023
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Harrisburg, PA 17101-2234