Michael Long, Pro Se
220 Creek Road
Bath, Pa 18014
(610)507-3721
Michael.Long479@gmail.com

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

RESPONSE TO BOROUGH'S ANSWER OPPOSING MOTION TO QUASH APPEAL AS MOOT

AND NOW COMES Respondent Michael Long ("Respondent"), proceeding pro se, files this Response to Petitioner Borough of Bath's ("Borough" or "Petitioner") Response to Borough's Answer Opposing Motion to Quash Appeal as Moot and in support thereof, avers as follows:

Introduction: Core Issues of Justiciability and Finality

1. Respondent respectfully submits this response challenging the mootness of the Borough's appeals from determinations superseded by the Office of Open Records' ("OOR") subsequent final decision. Central to this dispute are core legal principles of justiciability and administrative finality carefully codified in the Right-to-Know Law's ("RTKL") statutory framework. While the Borough disputes mootness, its stance rests on a flawed interpretation of these foundational concepts that, if accepted, would undermine the RTKL's efficacy in resolving public record disputes efficiently and consistently with governing procedure.

Argument for Mootness

2. The RTKL requires exhaustion of administrative remedies prior to judicial intervention, permitting appeals to courts solely "from a final decision of the appeals officer." 65 P.S. § 67.1301(a). As the Commonwealth Court recognized in Bowling v. Office of Open Records, 990 A.2d 813, 820 (Pa. Commw. Ct. 2010), this exhaustion doctrine serves the critical policy aim of providing agencies the "opportunity for internal review and a chance to remedy any inconsistency" before burdening courts. This integrated process respects

administrative autonomy while ensuring consistent, efficient resolutions of public record controversies.

3. Here, the Borough filed premature appeals on December 1, 2023 (Exhibit A) and December 27, 2023, challenging the OOR's November 3, 2023 determination (Exhibit C) before the agency concluded its internal process. Crucially, the OOR subsequently granted reconsideration and issued a superseding Final Determination upon Reconsideration on January 12, 2024 (Exhibit B) - the operative, appealable final order under the RTKL's framework.
4. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161, 1165 (Pa. Commw. Ct. 2018) (holding an agency's reconsideration grant renders the original determination a "legal nullity") establishes that the Borough's appeals are now moot. They present no live case or controversy capable of resulting in a "concrete prospective remedy." *Pap's A.M. v. City of Erie*, 719 A.2d 273, 276 (Pa. 1998) (explaining mootness applies when a change deprives the litigant of a stake in the outcome).
5. Adjudicating appeals from this nullified determination would violate justiciability principles by producing mere advisory opinions on an abstract, moot dispute. Such an exercise would flout the RTKL's purposes of transparency and accountability by disregarding governing finality mandates so crucial to the law's efficacy.

Service Compliance

6. The Borough's opposition rests primarily on challenging service under Pa.R.C.P. 205.4(g)(1). However, that rule explicitly permits service "by electronic transmission, including...electronic mail..." where "the party...agrees thereto or an electronic mail address is included on an... other paper previously filed with the court in the case."
7. Here, the exhibits conclusively demonstrate Respondent's proper email service on January 9, 2024 (Exhibit D), to which the Borough's counsel consented by listing an email address on the Borough's initial appeal filing in this case without amendment (Exhibit A). See Pa.R.C.P. 205.4(g)(1)(ii). With the Borough's procedural objections conclusively refuted by the record, its pursuit of the severe sanction remedy is rendered even more meritless.

Opposition to Sanctions

8. The Borough's strident sanctions request under 42 Pa.C.S. § 2503(9) is meritless. Pennsylvania law makes clear that sanctions represent an "extreme" punitive remedy, reserved for clear misconduct like obdurate delay, willful defiance of court orders, or harassment. *Roverio v. John Crane, Inc.*, 226 A.3d 526, 553 (Pa. 2020). No such egregious conduct occurred here.

9. Rather, as a pro se litigant, Respondent aimed to uphold the RTKL's procedures and purposes through this advocacy. The Pennsylvania Supreme Court has instructed that while some deference to pro se status is appropriate, it cannot deprive a party of "meaningful merits review." *Commonwealth v. Williams*, 832 A.2d 962, 965 n.4 (Pa. 2003). This requires courts to balance leniency toward procedural imperfections against ensuring full and fair consideration of the substantive claims and evidence.

10. Here, Respondent's filings - though imperfect - focused this Court's attention on significant justiciability issues meriting review on the merits, untainted by vexatious intent. Imposing the severe sanction of penalties would disregard the principle of meaningful merits review by punishing Respondent's good-faith efforts to advance this matter of public import concerning transparent governance.

11. The Borough has suffered no tangible prejudice from Respondent's substantive advocacy seeking to uphold the RTKL's vital objectives. Imposing sanctions in these circumstances would contravene Pennsylvania's public policy promoting pro se access to justice and robust judicial scrutiny of government conduct.

Conclusion

12. In light of the OOR's superseding Final Determination upon Reconsideration, the Borough's prematurely filed appeals challenging prior nullified rulings are indisputably moot under bedrock justiciability doctrines. Proceeding with these appeals would subvert the RTKL's carefully designed administrative scheme privileging agency autonomy and internal correction before court involvement.
13. This Court's paramount role is safeguarding the rule of law, preventing the waste of judicial resources on non-justiciable disputes, and upholding the RTKL's vital objectives of accountable, transparent governance through established procedural channels. Granting this motion to quash while denying baseless sanctions fulfills these solemn duties, respects pro se litigants' rights, and applies justice equitably to all parties. Such a ruling would reinforce Pennsylvania's abiding commitment to resolving public record controversies consistently, efficiently, and in adherence with due process.

WHEREFORE, in service of preserving the integrity of administrative finality, conserving judicial resources for live controversies, and effectuating the RTKL's transparency goals through adherence to governing justiciability tenets and solicitude to pro se representation, Respondent respectfully requests this Court:

A. Grant Respondent's Motion to Quash the Borough's appeals at C-48-CV-2023-09734 and C-48-CV-2023-10559 as moot following the OOR's January 12, 2024, Final Determination upon Reconsideration (Exhibit B).

B. Deny the Borough's baseless request for sanctions under 42 Pa.C.S. § 2503(9), as Respondent's conduct - though imperfect - was untainted by the sanctionable misconduct contemplated by that punitive remedy; and

C. Award any other just and proper relief upholding justiciability, finality, and the right of pro se access while ensuring the RTKL's objectives of transparent, accountable governance are given full effect through adherence to governing procedural prerequisites.

Respectfully submitted,



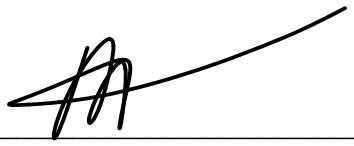
Michael Long

Pro Se Respondent

Dated: April 4, 2024

VERIFICATION

I, Michael Long, hereby verify that the statements made in the foregoing RESPONSE TO BOROUGH'S ANSWER OPPOSING MOTION TO QUASH APPEAL AS MOOT are true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.



Michael Long

Pro Se Respondent

Date: April 4, 2024

CERTIFICATE OF SERVICE

I certify that on April 4, 2024, I served the foregoing Opposition upon counsel for Petitioner by way of email:

J. Chadwick Schnee, Esq.

Schnee Legal Services, LLC

74 E. Main St. #648

Lititz, PA 17543

Via email: chadwick@schneelegal.com



_____

Michael Long

Pro Se Respondent

Date: April 4, 2024

EXHIBIT

A

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

Attorney for Petitioner

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

MOTION TO STRIKE MOTION TO QUASH APPEAL

AND NOW COMES Petitioner Borough of Bath ("Petitioner" or "Borough"), who, by and through its undersigned legal counsel, files this Motion to Stike Motion to Quash Appeal, averring as follows:

1. On or about January 10, 2024, Respondent Michael Long ("Respondent") filed a Motion to Quash Appeal with this Court.

2. In his Motion, Respondent cites *In re S.S.*, 651 A.2d 174 (Pa. Super. 1994) for the proposition that it "pronounced based on underlying 1 Pa. Code § 35.241 provisions, the original decision becomes inoperative for appeal purposes once reconsideration commences…:

3. However, *In re S.S.* does not in any way reference 1 Pa. Code § 35.241, nor does it opine in any way about whether "the original decision becomes inoperative for appeal purposes once reconsideration commences." Instead, it is an appeal from a child dependency matter.

4. Additionally, Respondent cites *Jacobs v. Halloran*, 710 A.2d 1098 (Pa. 1998) for the proposition that "parallel court Appeals of non-final decisions risk confusion and erosion of orderly dispute resolution."

5. However, *Jacobs* has nothing to do with "parallel court Appeals …," as it, instead, involves an appeal from a judgment of non pros and various equitable considerations.

6. "Section 2503(9) of the Judicial Code allows imposition of fees and costs for conduct that is 'otherwise ... in bad faith.'" *Cnty. of Fulton v. Sec'y of Commonwealth*, 292 A.3d 974, 1062 (Pa.), *cert. denied sub nom. Fulton Cnty., Pennsylvania v. Sec'y of the Commonwealth of Pennsylvania*, 144 S. Ct. 283 (2023).

7. The term "bad faith" means fraud, dishonestly or corruption. *Id.*

8. Here, the Respondent cites cases (*In re S.S.* and *Jacobs*) and offers alleged summarizes of such cases that are wholly inaccurate and dishonest.

9. As Respondent cites no other caselaw in support of his Motion to Quash Appeal and the caselaw cited in no way stands for the various propositions asserted, a sanction of Petitioner's reasonable counsel fees and costs should be imposed against Respondent.

10. Additionally, Respondent has not complied with N.C.R. Civ.P. No. N208.3(a), §§ 1-3 by providing notice to the Borough and including the required materials.

11. Further, although counsel for the Borough has entered his appearance on behalf of the Borough, Respondent's Certificate of Service states that it was, at some unidentified date, served on the Borough Manager, rather than counsel. *See* Pa. R.Civ. P. 440(a)(1)(i) (requiring service to be made "at the address of the party's attorney of record).

12. As Respondent's Motion to Quash fails to conform to law and contains wholly inaccurate, dishonest misstatements of the law, the Borough respectfully asks this Honorable Court to strike Respondent's Motion to Quash Appeal and impose a sanction against Respondent of Petitioner Borough's reasonable counsel fees and costs.

WHEREFORE, Petitioner Borough of Bath respectfully asks this Honorable Court to enter an order striking Respondent's January 10, 2024 Motion to Quash Appeal and sanctioning Respondent, per Section 2503(9) of the Judicial Code, by awarding Petitioner Borough its reasonable counsel fees and costs for Petitioner Borough's instant motion and prosecution of same.

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: March 15, 2024

EXHIBIT

B

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION UPON RECONSIDERATION

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

[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

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).").

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

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).

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

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

On November 3, 2023, the OOR issued a Final Determination, finding that the Borough's interpretation of Request Item 1, was impermissibly narrow and that, based on the unreasonable interpretation, the Borough did not conduct a sufficient search that would support the Borough's conclusion that no additional emails, memos, notes or text messages related to the subjects outline in 1(a) – 1(k), exist within its possession, custody or control. The OOR also concluded the Borough proved that some records are protected by the attorney-client privilege, but the Borough did not demonstrate that the privileged records did not also contain purely factual, non-privileged information. Finally, the OOR found that the Borough proved no list that is responsive to Item 2 of the Request exists, that the Borough failed to certify the responsive records, as indicated in the Request form and that the record did not support a finding of bad faith on the part of the Borough.

On November 17, 2023, the Borough filed a Petition for Reconsideration with the OOR. The Borough argued that the OOR impermissibly refashioned Item 1 of the Request by determining that the Borough unreasonably interpreted the Request as seeking records among the entire group of individuals listed and, also, records between less than the entire group. The Borough also argued that the OOR impermissibly granted access to records other than emails, as the Requester, on appeal, limited his challenge of the denial of Item 1 to emails. Finally, the Borough argued that the OOR impermissibly granted access to records that would reveal the subject matter of privileged communications.

On December 1, 2023, the OOR granted reconsideration as to Items 1 and 2 of the Petition and denied reconsideration as to Item 3. The OOR provided the parties with the opportunity to file a response in the nature of an answer by December 18, 2023.

On December 5, 2023, the Requester submitted a copy of an "Appeal of and Petition for Review of Final Determination Dated November 3, 2023, Issued by Pennsylvania Office of Open Records at OOR Dkt. AP 2023-2598," that was filed by the Borough with the Northampton County Court of Common Pleas on December 1, 2023.

On December 5, 2023, the OOR directed the Borough to address the application of 1 Pa. Code § 35.241(f) to the issue of whether filing of the Petition for Review on the same day the OOR granted partial reconsideration divests the OOR of jurisdiction over the instant matter.

On December 8, 2023, the Requester submitted a statement addressing each of the Borough's points in the Petition for Reconsideration. The Requester argues that the OOR's finding with respect to the Borough's interpretation of Item 1 is proper, as the language would include communications involving "any combination of the listed parties." Regarding Petition Item 2, the Requester also argues that the OOR's finding was proper because the Request language implicates communications beyond just emails such as, for example, memos, notes, letters, or text messages.[4] In addition, the Requester seeks reconsideration of the OOR's conclusion that the record does not support a finding of bad faith and challenges the sufficiency of the Borough's search. However, regarding the challenges the Requester raises related to the Final Determination, 1 Pa. Code § 35.241(f) provides that "[a]n application for rehearing or reconsideration may be filed by a party to a proceeding with 15 days, or another period as may be expressly provided by statute applicable to the proceeding, after the issuance of an adjudication or other final order by the agency...." Because the Requester did not file a Petition for Reconsideration raising his objections to the

[4] The Requester also outlines his argument regarding the Borough's Petition Item 3; however, as the OOR has denied reconsideration as to Item 3, this portion of the Requester's arguments will not be addressed. In addition, the Requester claims that the Borough's counsel has violated Pennsylvania Rule of Professional Conduct 3.3 "Candor Toward the Tribunal." This issue is beyond the purview of the RTKL and the authority of the OOR, as the Pennsylvania Supreme Court has the sole supervisory authority over attorney conduct. PA. CONST. 10(c); PA.R.D.E. § 103.

OOR's finding on the claim of bad faith within 15 days of November 3, 2023, or by November 20, 2023, his request for reconsideration is untimely filed. The OOR will only consider the Requester's responses in the nature of an answer related to the Borough's Petition for Reconsideration.

On December 11, 2023, the Borough responded to the OOR's request for clarification. The Borough asserts that under the language of 1 Pa. Code § 35.241(f), an agency may only grant or deny reconsideration, not partially grant reconsideration. The Borough argues that the effect of the OOR's partial grant of reconsideration for "one of the three inseparable reasons for reconsideration" amounts to a complete denial. The Borough further argues that the effective "denial" of reconsideration renders the Final Determination subject to judicial review with the Northampton County Court of Common Pleas, which appeal was filed on December 1, 2023. Finally, the Borough asserts that, because a timely appeal has been filed, "the release of all records ordered released in the final determination under review is automatically stayed by operation of 65 P.S. § 67.1302(b)."[5] (Emphasis in original).

Also, on December 11, 2023, the Requester submitted a rebuttal to the Borough's reconsideration request, asserting that the Final Determination should not be modified. Regarding the Borough's argument addressing the OOR's findings related to Item 1, the Requester asserts that the Borough's interpretation of the word "between" is "overly literal" and "does not align with the spirit of maximum transparency...." The Requester also asserts that the original Request language included the phrase "including but not limited to" and the phrase "denotes a comprehensive, non-exhaustive enumeration," implying all types of records. The Requester further states, "[a]lthough my appeal letter cited emails as the contentious issue, I never meant to

[5] The Borough also points out that the Requester has submitted correspondence asserting reasons why the OOR should grant reconsideration and such a request is alternatively untimely and procedurally inappropriate.

explicitly affirm, concede, or confine my dispute solely to the email component of the [R]equest." In addition, the Requester submits supplemental argument regarding the claim of bad faith, regarding the Borough's Petition Item 3, and a claim that the Borough's legal counsel has violated Pennsylvania Rule of Professional Conduct 3.3. However, these issues have been addressed and disposed above and will not be discussed in this Final Determination on Reconsideration.

On December 13, 2023, the OOR issued a statement in response to the Borough's submission of clarification related to the Borough's Petition for Review, explaining that the submission had been reviewed and a determination was made that the matter would proceed to a Final Determination on Reconsideration.[6]

On December 18, 2023, the Borough submitted a statement in support of the Petition. The Borough reiterated its argument that the OOR lacks jurisdiction to decide the instant matter or grant access to records because of the Borough's appeal to the Court of Common Pleas and the automatic stay provision of 65 P.S. § 67.1302(b). The Borough also relies on the assertions made in its Petition for Reconsideration and the December 11, 2023 correspondence regarding the OOR's adjudication on reconsideration. Regarding the Requester's December 18, 2023, statement, the Borough argues that the Borough's interpretation of Item 1 was reasonable "in light of the words 'between' and 'and'." The Borough also asserts that it appears from the Requester's submissions that he is not contesting that he limited the scope of the Request to emails and "[a]s [the Requester] limited the scope of his [R]equest on appeal, the OOR erred in granting access to records other than emails."

On December 18, 2023, the Requester filed a supplemental response, stating that, "in accordance with the procedural requirements outlined in 1 Pa. Code § 35.241, I present the

[6] The OOR also reminded the parties of the December 18, 2023, deadline to submit a response in the nature of an answer.

following inquiries and analysis." The Requester then poses a series of question under each of the following topic headings, "Inquiries Regarding Points 1 and 2: Interpretation of 'Between' and Scope of Request"; "Enhanced Precedent Analysis"; and, "Counterargument Response Section." The supplemental response also includes a section title "Public Interest Emphasis," arguing that this matter is "about the fundamental principles of public access and government accountability." Finally, the Requester states the "Concise Conclusion," as follows:

> In summary, the arguments and legal precedents presented demonstrate that the Borough's narrow interpretation and response to my request do not align with the RTKL's spirit. This case is pivotal for upholding transparency and accountability in government. I urge the Office of Open Records to consider these points and render a decision that reflects the RTKL's principles.

The Requester submitted a third supplemental response on December 18, 2023. The response restates the points made by the list of questions and adds legal court case citations that the Requester asserts are supportive of his inquiries. The Requester also includes a topic heading, "Precedent Necessitates Ongoing Scrutiny," wherein the Requester references *Dental Benefit Providers .v Eiseman*, 87 A.3d 932 (Pa. Comm. Ct. 2014) as standing for the proposition that the OOR retains jurisdiction over a matter unless judicially overturned. On December 19, 2023, the Borough objected to the admission of the third supplemental statement, asserting that it was uploaded to the docket after 11:59:59 p.m. on December 18th. On December 20, 2023, the Requester responded by stating that "an administrative oversight occurred during the upload process, resulting in two copies of the "Letter about update.docx" being uploaded, rather than one copy of that letter and one copy of the "Revised recon response.docx." The Requester included a copy of a screenshot of what appears to be the two documents contained on the Microsoft Word application on a cellular phone and an email confirmation of a document upload to the OOR E-file Portal, in an attempt to demonstrate that "both documents were finalized on the deadline" as they

were both completed before midnight. While the screenshots, if accurate, show that both documents were created prior to midnight on the 18th, a review of the OOR E-file Portal electronic log shows that "Revised recon response.docx" was date stamped on December 19, 2023, and time stamped at 18:19:52 or 6:19:52 p.m. Furthermore, the "Revised recon response.docx" is cumulative and repetitive of the arguments that the Requester has made in all of the submissions provided in response to the Petition. Therefore, the Borough's objection is sustained as to the statement filed on December 19, 2023. *See* 65 P.S. §§ 67.1102(a)(2); 67.1102(b)(3).

On December 28, 2023, the Borough submitted a copy of an "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," that was filed with the Northampton County Court of Common Pleas. The Borough reiterates its position that the OOR does not have jurisdiction to further consider the Petition for Reconsideration. The Borough claims that, under 1 Pa. Code § 35.241(f), the OOR was only permitted to *fully* grant or *fully* deny the Petition for Reconsideration and, because the OOR only granted reconsideration as to two of three claims of error, the effect was to deny the Petition in full. The Borough states that 1 Pa. Code § 35.241(f) recognizes that "Pa.R.A.P. 1701(b) contemplates that a party may elect to concurrently petition for review and apply for ... reconsideration of an adjudication...." In such an event, "[i]f ... reconsideration is denied, the original adjudication ... will be subject to judicial review upon the previously filed petition for review" or "[i]f ... reconsideration is granted within the time contemplated by subsection (e) ... [t]he timely order granting ... reconsideration automatically renders inoperative a petition for review theretofore or thereafter filed with respect to the prior adjudication...." 1 Pa. Code §§ 35.241(f)(1) – (2)(i).

However, nothing in the regulatory language indicates that the agency action on a petition for reconsideration must be an all or nothing decision. Indeed, the Borough has not submitted any legal precedent wherein a court has determined that 1 Pa. Code § 35.241 only permits an agency to grant or deny reconsideration in full. If an agency was required to accept each and every reason set forth for reconsideration, this would mean that they would be constrained to accept any frivolous reason set forth by a petitioner. 1 Pa. Code §35.241(c), governing responses to petitions for reconsideration, anticipates that an agency has discretion as to which grounds for reconsideration will be granted. ("The response shall be confined to the issues upon which rehearing or reconsideration has been granted."). Here, the Borough filed a petition for reconsideration, and the OOR partially granted that relief in a timely manner. As the party that sought the relief to which it now objects, the Borough's petition for review is inoperative, and it has an obligation to ensure the petition is stricken. 1 Pa. Code §35.241(f). Accordingly, based upon its obligations under 1 Pa. Code § 35.241, the OOR hereby issues this Final Determination Upon Reconsideration.

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. - more detailed version attached[.]"

The Borough argues that, with regard to Item 1 of the Request, the Requester's use of "any combo" in the appeal 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 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).[7] While OOR and court precedent make clear that the

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

Requester may not modify the Request on appeal, the Requester's assertion that the language of Item 1 encompasses "any combo" of emails could comport with the use of the word "between" prior to the listing of relevant Borough employees and officials. However, this portion of the Request also states that records are being sought "between" the list of Borough staff and officials "and" James Kratz, the Borough solicitor. Therefore, Item 1 could reasonably be interpreted as either seeking communications between or among any permutation of individuals that may be included on the communication, whether it is two of them, all seven of them, or some other number of individuals and, also, communications between the group of listed individuals *and* Attorney Kratz. When a request is subject to multiple reasonable interpretations, the OOR's task on appeal is to analyze whether the agency's interpretation is reasonable based on the text and the context of the Request. *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."). While the Requester asserts that the "including but not limited to" language prior to the list of categories of records sought implies that Item 1 is broader, as to the individuals who created and/or exchange the records and more consistent with the RTKL's spirit of transparency, because Item 1 is subject to two different, but reasonable interpretations, we find that the Borough's interpretation that was used to respond to Item 1 was reasonable in this instance. Nothing precludes the Requester from submitting a new RTKL request with language that seeks a larger universe of records, if he chooses to do so.

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. The

information included on the appeal form also stated, "more detailed version attached[.]" The appeal attachment states, in relevant part, the following:

> ... I am appealing the denial of my [R]equest for:
>
> - 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*... (emphasis added).

In this matter, the Requester used the OOR's standard appeal form, which provides that the Requester was "appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific." The Requester also identified "Records At Issue In This Appeal" and attached an appeal statement that contained the language the Borough relies on to assert that the Requester limited the appeal of the response to Item 1, to only emails. However, with respect to the other records sought in Item 1, such as "communications ... memos, notes, and text messages," the Borough denied the Request, arguing that no records exist, and the Requester expressly challenged the Borough search in the attachment to the appeal form. More specifically, the Requester stated, "[t]he Borough denied my request claiming the records do not exist, without providing any proof of their search methodology or locations. I argue they did not perform an adequate search in good faith, and that the requested records do likely exist for the reasons outlined in this appeal." Therefore, based on the use of the standard appeal form and the objections outlined in the attached appeal statement, we determine that the appeal of Item 1 is not limited only to the

denial of email records; rather, the appeal of Item 1, includes the challenge to the alleged non-existence of memos, notes, text messages and any other form of "communications."

2. The Borough has 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:

> 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.

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

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

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

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

> 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]." As set forth above, we have determined that the Borough's interpretation of Item 1 was reasonable as encompassing records

created or exchanged by the list of Borough officials and staff *and* Attorney Katz. Accordingly, based on the Flynn attestation the Borough has demonstrated that the search described in ¶¶ 4, 6-7, was a sufficient search to prove that no additional responsive records exist within its possession, custody or control. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

In addition, 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 Saginario resignation letter has been provided in response to Item 1(a).

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 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.[8] 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,

[8] 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.

and, subsequently, he commenced serving as the Borough Solicitor. Supplemental Kratz Affidavit, ¶¶ 4-6. The Supplemental Kratz Affidavit also provides, the following:[9]

> 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.
> 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"

[9] 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.

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 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[10] 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

[10] 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."

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.

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.

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.

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 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 "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[11] 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

[11] 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.

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 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 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, 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).[12] 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

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

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."

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, we have determined that the Borough's search was sufficient based on a reasonable interpretation of the Request. In addition, 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 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**. The Borough is directed to review the records and email attachments claimed to be protected by the attorney-client privilege to determine whether they contain non-exempt factual

information and provide records redacted as set forth in this Final Determination. The Borough is also directed to certify all responsive records, upon the payment of fees in accordance with the OOR's fee schedule. This Final Determination Upon Reconsideration is binding on all parties. Within thirty days of the mailing date of this Final Determination Upon Reconsideration, any party may appeal or petition for review to the Northampton 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.[13] All documents or communications following the issuance of this Final Determination Upon Reconsideration shall be sent to oor-postfd@pa.gov. This Final Determination Upon Reconsideration shall be placed on the website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: January 12, 2024

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

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

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

EXHIBIT

C

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

[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

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).").

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

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).

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

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. -

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*

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).

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:

> 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.

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

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

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

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

> 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

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

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

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.

[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.

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

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."

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.

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.

> 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

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

"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.

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

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,

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).

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

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

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).

EXHIBIT

D

3 day notice

Michael Long <michael.long479@gmail.com> Tue, Jan 9 at 12:10 PM
To: Bradford Flynn <bradford.flynn@boroughofbath.org>, Isenberg, Kelly <kisenberg@pa.gov>, J. Chadwick Schnee <chadwick@schneelegal.com>, Kratz, James F. <james.kratz@stevenslee.com>

Please attached
[Quoted text hidden]
Praecipe to Strike.docx, Quashfinal.docx