pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SCOTT THOMAS,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2026-3097**
	:	
DELAWARE COUNTY,	:	
Respondent	:	

FACTUAL BACKGROUND

On June 10, 2026, Scott Thomas ("Requester") submitted a request ("Request") to Delaware County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking:

> [A] copy of all emails during the year of 2024 that contain any of the following key words: "Hand count", "Hand counting", "counting by hand", "Election law", "Judge of elections" from the following [County] employee email addresses: James Allen, Director of Elections[;] Ashley Lukenhemer, Board of Elections[;] Scott Alberts, Board of Elections[;] John C. McMeekin II, Board of Elections[; and] Christine Ruether, County [C]ouncil[.] Requesting [] emails that are outbound, inbound and inter [C]ounty[.]

On June 17, 2026, the County invoked a thirty-day extension to respond to the Request, 65 P.S. § 67.902(b). As the Requester did not receive a response from the County by the expiration of the thirty-day extension, or by July 17, 2026, the Request was deemed denied on that date. *See* 65 P.S. § 67.902(b)(2).

On July 29, 2026, the Requester filed an appeal with the Office of Open Records ("OOR"), claiming the Request was deemed denied.[1] The OOR invited both parties to supplement the record and directed the County to notify the OOR if any third parties have a direct interest in this appeal. 65 P.S. § 67.1101(c).

On September 1, 2026, the County submitted correspondence, indicating responsive records would be provided to the Requester on that same date. Additionally, the County noted the Requester would be provided with an privilege log by September 2, 2026, at which time the Requester would review all of the records and the privilege log. Thereafter, the Requester would provide an outline of all the remaining issues to be determined by the OOR.

On September 15, 2026, the Requester submitted correspondence, challenging the County's withholding of the following records: County Production 1, pages 6806 through 6810, pages 6818 through 6819, pages 6823 through 6839, pages 6848 through 6850, pages 6854 through 6856, pages 6159 through 6165; County Production 3, pages 399 through 400; and County Production 4, page 57. The Requester additionally seeks a privilege log for the outlined records.

On September 28, 2026, the County submitted an attestation made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities, authored by Leah Lewis ("Lewis Attestation"), the County's Agency Open Records Officer ("AORO") and an Exemption Log ("Log"),[2] outlining the withheld responsive records. The County claims records were withheld pursuant to the attorney-client privilege and attorney work product doctrine, 65 P.S. §§ 67.102 (definition of privilege), 67.305(a)(2), 67.506(c)(2), the Pennsylvania Election Code

[1] At the time of the appeal, the Requester granted the OOR a thirty-day extension to issue a Final Determination. On August 28, 2026, the Requester granted the OOR an additional thirty-day extension to issue a Final Determination in order to accommodate the extension requests of the County. *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).").

[2] The Log is affirmed in accordance with 18 Pa.C.S. § 4904. *See* Lewis Attestation ¶ 8.

("Election Code"), 25 P.S. §§ 2600 *et seq*., and *Honey v. Lycoming County Offices of Voter Services*, 355 A.3d 801 (Pa. 2026).[3]

LEGAL ANALYSIS

The County 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 County is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as "such proof as leads the fact-finder … to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The appeal as it relates to the records provided during the appeal is moot

During the pendency of the appeal, the County provided responsive records to the Requester, including page 57 of County Production 4. *See* Lewis Attestation ¶¶ 5, 7. As such, the appeal as to the records provided to the Requester during the pendency of the appeal is dismissed as moot. *See Chester Water Auth. v. Pa. Dep't of Cmty. & Econ. Dev.*, 249 A.3d 1106, 1114 (Pa. 2021) (finding that a matter was settled by provision of records, and thus, "the controversy has been mooted").

2. The Election Code, not the RTKL, governs disclosure of a portion of the responsive records

[3] The evidentiary record in this appeal originally closed on August 10, 2026; however, based on the submissions and agreement of the parties, the OOR ultimately extended the evidentiary submission record until September 29, 2026. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

On April 28, 2026, the Pennsylvania Supreme Court issued its opinion in *Honey*. In *Honey*, the Supreme Court found that "requesters **must follow the procedure for review as laid out in the Election Code** – they simply cannot obtain review via the RTKL, as the Election Code governs the disclosure of these records." *Honey*, 355 A.3d at 823 (emphasis in original); *see also* 65 P.S. § 67.3101.1. While *Honey* specifically concerned CVR records, the opinion appears to treat all Election Code records as being subject to the Election Code's general rule of disclosure found at 25 P.S. § 2648. *Honey*, 355 A.3d at 822 (noting "neither Section 308 nor any other Election Code provision defines 'reports,' 'documents,' and 'records'"); *Id*. ("Here, there is a conflict between the RTKL and the Election Code with respect to the process by which an individual may access public records").

The Log indicates that the Return Sheets for 2024 were withheld from production pursuant to the Election Code. *See* Log pp. 8-9. Section 2648 of the Election Code provides:

> The records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents and records in its custody, except the contents of ballot boxes and voting machines and records of assisted voters, shall be open to public inspection, except as herein provided and may be inspected and copied by any qualified elector of the county...

25 P.S. § 2648. The above section of the Election Code outlines what is expressly public, which would include the records withheld by the County, as Section 2648 clearly includes "general and duplicate returns."

We agree that the Return Sheets for 2024 are a category of records covered by 25 P.S. § 2648. Thus, as the release of the records found at County Production 4, pages 399-400, are governed by the Election Code, and a requester may not use the RTKL to obtain copies of the records, this portion of the appeal must be **dismissed**. The dismissal of this portion of the appeal

shall not prejudice the ability of the Requester to obtain the requested records under the Election Code. *See Thomas v. Delaware County*, OOR Dkt. AP 2026-1805, 2026 PA O.O.R.D. LEXIS 2029 (finding release of mail-in ballots and the information related thereto is governed by the Election Code).

3. The County demonstrated that the remaining withheld responsive records at issue herein are privileged

The RTKL excludes records subject to a privilege from the definition of "public record." *See* 65 P.S. § 67.102. The RTKL defines "privilege" as "[t]he attorney-work-product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." *Id*. The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client's goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001). In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Bousamra v. Excela Health*, 210 A.3d 967, 976 (Pa. 2019). "[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong." *Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014) (citing *id*.).

The attorney-work product doctrine, on the other hand, prohibits disclosure "of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa.R.C.P. 4003.3. "The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *Bousamra*, 210 A.3d 976 (internal citations omitted); *see also Heavens v. Pa. Dep't of Envtl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) ("[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked"). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id*. at 979 (internal citations and quotation omitted).

The County asserts that the remaining withheld records encompass communications between legal counsel and County staff and either seek legal advice, provide legal opinions or contain the thoughts and mental impressions of counsel and, therefore, the responsive records are protected by the attorney-client privilege and/or the attorney work product doctrine. *See generally* Log; *see also generally* Lewis Attestation. Specifically, the Log details that the communications are between the County's attorneys, County officials and County Employees. *See* Log pp. 1-8. The Log further details the communications seek legal guidance regarding a potential response to the Judge of Elections, review of Poll Watcher Rules, a draft of a petition for redistricting, legality of hand counting and hearing preparation. *Id*.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist*., 20 A.3d 515, 520-21 (Pa.

Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the County has acted in bad faith, "the averments in the [attestation and Log] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot*., 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Based upon the review of the attestation and the descriptions contained within the Log, the County has demonstrated that the withheld records are protected by the attorney-client privilege and/or attorney work product doctrine. The records consist of communications between the County and its counsel, containing or seeking legal advice related to election issues. The withheld records either seek or provide legal advice or contain the thoughts and mental impressions of an attorney. Furthermore, the County affirms that the withheld records have not been shared beyond the County, no privileges have been waived and the Requester has not proven waiver of attorney-client privilege. As such, the responsive records were properly withheld under the attorney-client privilege and/or attorney work product doctrine and the records are not subject to public access. *See Pa. Health and Wellness, Inc. v. Pa. Dep't of Human Resources*, OOR Dkt. AP 2020-1398, 2021 PA O.O.R.D. LEXIS 644; *see also Shannon v. Pa. Dep't of General Services*, OOR Dkt. AP 2021-1375, 2021 PA O.O.R.D. LEXIS 1765.

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed in part**, and the County is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the 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 as

per Section 1303 of the RTKL; however, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.[4] 65 P.S. § 67.1303. 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 OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: October 22, 2026

/s/ Bandy L. Jarosz

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BANDY L. JAROSZ, ESQ.
APPEALS OFFICER

Sent to: Scott Thomas (via portal only)
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[4] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).