pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
GERARD GREGA,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2021-0204**
	:	
WEATHERLY AREA SCHOOL DISTRICT,	:	
Respondent	:	

INTRODUCTION

Gerard Grega ("Requester") submitted a request ("Request") to Weatherly Area School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking text messages and emails between the District and Slusser Law firm. The District partially denied the Request, arguing the emails are subject to attorney-client privilege and text messages do not exist. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted**, and the District is required to take additional action as directed.

FACTUAL BACKGROUND

On December 17, 2020, the Request was filed, seeking:

> Text messages and/or E-mails sent to/from/between Mrs. Young, WASD Supt (text using her personal cell [telephone number omitted] Slusser Law Firm- Slusser or Rockman (Cells), and/or with any combination of current Board members' Cell numbers or WASD E-mail addresses whether I (Grega) was included on the text string/s, E-mails or not, pertaining to or discussing any type of WASD-

> Board/Administrative subject matter, school business, or school-related topics. I am requesting all texts and/or E-mails exchanged (as described above) beginning Thursday-December 1, 2020 (start of business) through Friday, December 18, 2020 (end of business).

On January 21, 2021, after invoking a thirty-day extension during which to respond. 65 P.S. § 67.902(b), the District denied the Request, arguing that the request for text messages do not exist and providing an attestation made under the penalty of perjury from Teresa Barna, Secretary and records custodian for the District, attesting that text messages do not exist. The District also asserted that the District emails between the superintendent and solicitor are protected by attorney-client privilege. The District further asserts that emails between the superintendent and other board members do not exist in electronic format because the emails contain exempt information that would require redaction in hard copy form.

On February 1, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester also stated that the emails exist in electronic format and the District is capable of electronic redaction. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 10, 2021, the District submitted its position statement, reiterating its reasons for denial, verified under the penalty of perjury from Jeffrey Rockman, Esq, District Solicitor. As well, the District argues that the Requester did not challenge the District's assertion that records are privileged in his appeal.[1]

[1] The District raises an issue with the Requester submitting the RTKL request as a school board member. The District provides a copy of its Board Policy No. 011.1 that establishes procedures for school board members to obtain information. Regardless of the District's position, this is not a consideration under the OOR's jurisdiction in determining the public nature of an agency record.

On February 10, 2021, the Requester submitted a statement arguing that any emails where he is the subject, they should be provided without redaction.[2] He further asserts that the District's search for responsive records should not have resulted in hundreds of records.

On February 24, 2021, the Requester submitted his position statement and argument supported by his statement under the penalty of perjury. The Requester argues, among other things, that records exist and are not privileged. He further asserts that the District is capable of electronic redaction and that, as a school board member, he is asking the District not to redact his name from the responsive records.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id*. Here, neither party requested a hearing.

[2] The Requester appears to assert that he is waiving privilege. On February 11, 2021, the District supplemented the record stating that he does not have the authority to unilaterally waive the privilege on behalf of the District.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011).] Preponderance of the evidence has been defined as "such proof as leads the fact-finder … to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, "[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Requester sufficiently challenges the District's denial

The District argues that the Requesters appeal does not challenge the District's denial based on the attorney-client privilege and attorney-work product doctrine. Pursuant to Section 1101 of the RTKL, a requester "must state the grounds upon which the requester asserts that the record is

a public record … and … address any grounds stated by the agency for delaying or denying the request." 65 P.S. § 67.1101(a)(1); *see also Pa. Dep't of Corr. v. Office of Open Records,* 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) ("[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency's stated reasons for denying a RTKL request"); *Saunders v. Pa. Dep't of Corr*., 48 A.3d 540, 543 (Pa. Commw. Ct. 2012) (holding that a requester must "state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access").

When filing the appeal, the Requester used the OOR's electronic Appeal Form, which states that "[b]y submitting this form, I am 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..." Even though the Requester does not specifically address each reason for denial raised by the District, the Commonwealth Court has held that a general statement that records are public and not subject to an exemption is sufficient to meet the requirements of 1101(a)(1). *See Barnett v. Pa. Dep't of Pub. Welf*., 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Therefore, the Requester sufficiently challenged the District's grounds for denying access to records, and the OOR may reach the merits of the appeal.

2. The District must conduct a good faith search for the requested text messages

Here, the District asserts that text messages do not exist. Ms. Barna attests that:

> in good faith searched the agency's files to the best of my ability and that the records requested as set forth above do not exist. It is understood that this does not mean that the records do not exist under another spelling, another name, or under another classification.

Although the District asserts that it searched the agency's files, it is unclear if it asked the individuals identified in the Request whether each had any responsive text messages in their possession. 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. The RTKL does not define the term "good faith effort" as used in Section 901 of the RTKL. In *Rowles v. Rice Township*, however, the OOR stated:

> [I]n order for an agency to meet its burden that a good faith search was conducted in response to a FOIA request an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents as established by relatively detailed and non-conclusory affidavits submitted in good faith by responsible officials.

OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec*., 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted). 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 Requestor.

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).

Here, the District did not provide sufficient evidence of a good faith search for text messages of the individuals identified in the Request. Accordingly, the District is required to

conduct a search reasonably executed to locate the requested text messages and provide them to the Requester.

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 listed in the Request. Absent an agency's provision of a sufficient evidentiary basis as to whether any responsive records exist in the first place, however, the OOR will order the disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 651.

3. The District failed to provide sufficient evidence to support its denial under any exemption under the RTKL or pursuant to attorney-client privilege and attorney-work product

Here, the District asserts that emails sought between Mrs. Young and Slusser Law firm are protected by the attorney-client privilege and attorney-work product doctrine. The RTKL defines "privilege" as "[t]he attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102. In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the 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 Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). "[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.*). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must prove all four elements. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 ("Simply invoking the phrase 'attorney-client privilege' or 'legal advice' does not excuse the agency from the burden it must meet to withhold records"). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client's goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001).

The 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 v. Excela Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep't of Env't 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).

In order to meet its burden of proof to withhold information, the agency must provide sufficient evidence. *But see Pa. Game Comm'n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements when construing exemptions). Under the RTKL, "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the Dist. Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL") (citations omitted); *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) ("Affidavits that are conclusory or merely parrot the exemption do not suffice") (citing *Scolforo*); *West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) ("The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions") (citing *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)). Based on the evidence submitted by the District, merely stating that the records are subject to the attorney-client privilege and attorney-work product doctrine is insufficient to meet the burden of proof.

Further, the District asserts that the portion of the Request seeking emails between Mrs. Young and board members do not exist in electronic format. The District further asserts that they may be exempt under the RTKL. However, as stated above, conclusory affidavits are insufficient evidence to withhold the responsive records. *Scolforo, supra.* Accordingly, the District has not met

its burden to withhold the records. The District must provide the responsive emails in electronic format, if they exist in that format.[3]

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the District is required to provide all responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Carbon County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.[4] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: February 26, 2021

/s/ Jill S. Wolfe

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APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Gerard Grega (via email only);
Jeffrey Rockman, Esq. (via email only);
Teresa Barna (via email only)

[3] The Requester asserts that he should be provided the records in electronic format like he did in a prior request of October 2020. The District indicated that records provided in response to the October request were printed and manually redacted. The District then scanned the records and emailed them to the Requester. The District did not seek payment for the duplication of those costs. Here, however, because the District has not provided sufficient evidence to support any redactions of the responsive records, there is no need to print the records to perform redactions.
[4] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).