



FINAL DETERMINATION

IN THE MATTER OF

MATTHEW MYER,
Requester

v.

SILVER SPRING TOWNSHIP,
Respondent

:
:
:
:
:
:
:
:
:
:
:
:
:

Docket No: AP 2021-0372

INTRODUCTION

Matthew Myer, Esq. ("Requester") submitted a request ("Request") to Silver Spring Township ("Township") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking records related to two developments. The Township partially denied the Request, withholding some emails that it argues are protected by the attorney-client privilege and one that is related to a noncriminal investigation. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Township is required to take further action as indicated.

FACTUAL BACKGROUND

On December 23, 2020, the Request was filed, seeking:

1. All communications, letters and emails, including all attachments, relating to the Developments that were drafted, sent, or received by any of the persons listed in [Item] No. 2 through a Township or personal account, address or device between January 1, 2018 and the present.

2. All text messages, iMessages or electronic chat messages relating to the Developments that were drafted, sent, or received by any of the persons listed below¹ through a Township or personal account, address or device between January 1, 2018 and the present.
3. All photos and videos related to the Developments taken or recorded between January 1, 2018 and the present.
4. All contracts and agreements between the Township and any record or beneficial owners of the Developments from 2010 to the present, including but not limited to developer's agreements and financial security and irrevocable letter of credit agreements.
5. All letters of credit, bonds and financial security related to the Developments from 2010 to the present.
6. All records related to the creation, establishment, increase, decrease, release or reduction of any letters of credit, bonds or financial security related to the Developments from 2010 to the present, including but not limited to notices of completion of improvements, determinations whether improvements were constructed and installed in accordance with the plans and ordinances and regulations, written notifications of approval or rejection of improvements and written notifications of amounts authorized to be released.
7. All emails, including all attachments, related to curbs or curbing at the Developments that were drafted, sent, or received by any representative of the Township Engineer from January 1, 2018 to the present.
8. All documents, including but not limited to reports, related to curbs or curbing at the Developments that were drafted, sent, or received by any representative of the Township Engineer from January 1, 2018 to the present.
9. All photos and videos related to curbs or curbing at the Developments taken or recorded by any representative of the Township Engineer from January 1, 2018 to the present.

On December 28, 2020, the Township invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902(b). On February 2, 2021, the Township provided the Requester with a DropBox link where responsive observation reports, letters of credit, engineer comments, and various other documents

¹ The Request included a list of persons: Chairman Carl Machamer, Vice Chairman Nancy, Konhaus Griffie, Supervisor Harry Kotzmoyer, Supervisor David Lenker, Supervisor Laura Brown, Township Manager Theresa Eberly, Zoning Officer Jodi Heffner, Tyler Erb, Christopher Guarino, Jodi Heffner, Kathy Kramer, Scott Maldonado, Cheryl Neidig, Deb Pekala, Mark Bruening.

were located. The Township noted that emails and text messages would be forthcoming, and the next day, the Township provided printouts of responsive text messages and a link to responsive emails. In total, the Township produced 648 records. On February 4 and 8, 2021, the Requester asked the Township for confirmation that he had received all records that were responsive to the Request. On February 9, 2021, the Township notified the Requester that it withheld seven emails because they were protected by the attorney-client privilege and one email due to its relation to a noncriminal investigation, *see* 65 P.S. § 67.708(b)(17).²

On February 24, 2021, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.³ The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On March 5, 2021, the Township submitted a position statement, the affidavit of Theresa Eberly, the Township's Open Records Officer, a log of withheld records, and the records themselves for the OOR's *in camera* review. On March 8, 2021, the OOR agreed to review the records *in camera*.

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

² On February 12, 2021, the Township declined to provide the Requester with a privilege/exemption log.

³ The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

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, the OOR has conducted *in camera* review of the records that were withheld.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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). 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 is timely

The Township argues that the appeal should be dismissed as untimely, because it considers the Request to have been deemed denied in part on February 3, 2021, and the Request was not filed within 15 *calendar* days. However, Section 901 of the RTKL allows an agency five business days from the date a request is received by the agency's open records officer to respond, and Section 902 permits agencies to invoke an additional thirty calendar-day extension. *See* 65 P.S. §§ 67.901, 902(b). Here, the Township received the Request on December 23, 2020, but, as the Township's administrative offices were closed on Christmas Eve, the Township had until January 4, 2021 to respond. *See* 65 P.S. § 67.901; [Silver Spring Township, PA - Official Website \(sstownship.org\)](http://sstownship.org). Therefore, as the Township timely invoked a 30-day extension to respond, it had until February 3, 2021 to issue its final response. *See* 65 P.S. § 67.902(b). The Township provided responsive records on February 2 and 3 but failed to notify the Requester that the Request was denied in part until February 9, 2021.

Section 1101(a)(1) of the RTKL provides that a requester has 15 *business* days from a denial or deemed denial to file an appeal. Fifteen business days from February 3, 2021 is February 25, 2021. Therefore, the appeal, which was submitted on February 24, 2021, is timely. *See* 65 P.S. § 67.1101(a)(1).

2. Most of the emails the Township withheld are privileged

The Township argues that seven responsive records 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. *See Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citation omitted). When waiver is at issue, the burden of proof shifts to the requester. *See Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must establish the first three prongs of the privilege for it to apply. *See id.*

Here, Ms. Eberly attests:

7. At all times relevant to the Request Sean M. Shultz, Esquire has been and continues to be the attorney for the Agency as its appointed solicitor.
8. Solicitor Shultz is a member of the Bar of the Supreme Court of the Commonwealth of Pennsylvania.
9. Emails 1 through 7 listed in the Exemption Log were communicated between the solicitor and the Agency for the purpose of securing legal assistance in regard to matters associated with the Developments, and the Agency claims that attorney-client privilege exempts these records from the response to the Request as all of the emails were in an effort to communicate with the solicitor for the purpose of seeking legal assistance.
10. The Agency, in claiming attorney-client privilege as to Emails 1 through 7, has not provided the emails to a third party and has not otherwise waived attorney-client privilege as to those records.
11. Solicitor Shultz is bound by the Pennsylvania Rules of Professional Conduct, specifically Pa. R.P.C. 1.6(a), which states, “[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation....”
12. Email 1 has Solicitor Shultz copied on all communications in the email thread for the purpose of informing of a potential matter for litigation in order to secure legal assistance in a matter regarding the Developments, noting the need for

legal consultation on the matter at the beginning of the thread and concluding with a request for advice.

13. Email 2 is a thread of two emails, one to Solicitor Shultz and a reply, in regard to one of the Developments. The initial email provides information and a request for an opinion letter from Solicitor Shultz, and Solicitor Shultz references a previous memorandum on the matter in reply.
14. Email 3 has Solicitor Shultz copied on all emails in the thread because counsel for the developer was already involved in the matter, and Agency representatives were communicating with Solicitor Shultz to keep him apprised of potential legal matters for eventual legal assistance in the matter.
15. Email 4, although a small portion of the thread deals with scheduling a meeting with Solicitor Shultz on a legal matter, is primarily a communication from Solicitor Shultz to Agency representatives regarding legal advice and strategy in the subject matter.
16. Email 5 contains an email thread in which Agency staff communicated a request for legal assistance.
17. Email 6 contains an email thread in which Agency staff is communicating with Solicitor Shultz regarding a legal issue involving one of the Developments with responses from Solicitor Shultz.
18. Email 7 contains an email thread in which Agency staff communicated a request for legal assistance on a matter involving one of the Developments along with Solicitor Shultz's replies.

Ms. Eberly's attestation establishes that the emails were sent between employees and contractors of the Township and Attorney Shultz, its solicitor, for the purpose of seeking legal assistance or providing legal services, and the privilege has been claimed and not waived. Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Township acted in bad faith, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Accordingly, the Township has met its burden of proving that the emails are privileged, except as noted below.

The Requester argues that the Township waived the privilege with regard to emails on which the Township's third-party engineer was copied. However, the Township asserts that the engineers copied on the emails are statutorily appointed agents of the Township pursuant to the Second Class Township Code, *see* 53 P.S. § 66202, and privilege can apply to agents of a governmental entity. *See Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Commw. Ct. 2000) (internal citations omitted). Because he has not proven that the engineers are not agents of the Township, the Requester has not met his burden of proving waiver. *See Bagwell*, 103 A.3d at 420.

However, *in camera* review establishes that, while emails 1, 2, 3, 5, and 7 are privileged in their entirety, certain portions of emails 4 and 6 are not privileged. Specifically, the first two and last two sentences of the fourth email from Attorney Shultz and the email from Aaron Moyer are not privileged, as they are merely scheduling discussions. In other words, the third and fourth sentences of the email from Attorney Shultz are privileged; the remainder of the email must be disclosed. Regarding the sixth email, the email from Willetta Huth is not privileged.

3. The Township has proven that one email is related to a noncriminal investigation

The Township argues that one email is related to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "[i]nvestigative materials, notes, correspondence and reports" and "[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *See Pa. Dep't*

of Health v. Office of Open Records, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

Here, Ms. Eberly attests that “[e]mail 8 is a complaint communicated to the Agency in regard to alleged violations pertaining to one of the Developments.” In its unsworn position statement, the Township explains:

On its face, Email 8 is a complaint about an alleged violation at one of the Developments. The Email 8 thread begins with a complaint by a township resident (“Township Resident 1”) about an alleged violation regarding use of open space in one of the Developments. The thread then has Township Resident 1 following up regarding the progress of the complaint. The response in the thread from the Township provides evidence that there was an investigation, an official probe, into the complaint and that there was an official follow-up on it by Township Manager Eberly.

In camera review confirms that Ms. Eberly did investigate the matter, call the subject of the complaint, and advise the complainant of the results of the call. *See Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. 2015) (*en banc*) (finding that the review of records *in camera* can satisfy an agency’s burden of proof). Pursuant to the Second Class Township Code, the Township has promulgated an ordinance containing certain requirements regarding open space in developments. *See* 53 P.S. §§ 66601; Code of the Township of Silver Spring, PA § 360-38. The Township has the authority to investigate violations of its ordinances. *See* 53 P.S. § 66601; *see, e.g., Smith v. Robeson Twp.*, OOR Dkt. AP 2019-1435, 2019 PA O.O.R.D. LEXIS 1396; *Mycek v. Upper Merion Twp.*, OOR Dkt. AP 2016-1300, 2016 PA O.O.R.D. LEXIS 1650.

Accordingly, the Township has met its burden of proving that the email is related to a legislatively authorized noncriminal investigation. *See Black v. Pa. State Police, Office of Inspector Gen.*, 2016 Pa. Commw. Unpub. LEXIS 809 (Pa. Commw. Ct. 2016) (finding that complaints related to a noncriminal investigation “are exempt from disclosure whether they caused the investigation to commence in whole or in part or not at all”) (quoting *Stein v. Plymouth Twp.*, 994 A.2d 1179, 1182 n.8 (Pa. Commw. Ct. 2010)).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Township is required to produce emails 4 and 6, redacted as described above, 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 Cumberland 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 This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 23, 2021

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to: Matthew Myer, Esq. (via email);
Sean Shultz, Esq. (via email);
Theresa Eberly, AORO (via email)

⁴ *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).