



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**TODD BARTLEY,  
Requester**

:

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:

:

**v.**

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**Docket No: AP 2021-0825**

:

**WILLIAMSPORT AREA SCHOOL  
DISTRICT,  
Respondent**

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### INTRODUCTION

Todd Bartley (“Requester”) submitted a request (“Request”) to the Williamsport Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records related to emails sent by District officials between January 1, 2018 through March 5, 2021, as well as a report of the taxpayer cases referred for criminal arrest or to the Magistrate Judge for fiscal years 2017 through 2021. The District partially denied the Request, arguing some responsive records do not exist and other records were either withheld or redacted because they contain privileged attorney-client communications or attorney-work product. 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 District is required to take additional action as directed.

## FACTUAL BACKGROUND

On March 5, 2021, the Request was filed, seeking:

- 1) Emails sent/received by Wanda Erb with [District] school board president Lori Baer regarding [Requester] and/or Colonial Radio Group of Williamsport, LLC, Fox Sports Williamsport, Talk Williamsport between January 1, 2018 - March 5, 2021.
- 2) Emails sent/received by Wanda Erb with [District] Solicitor Fred Holland regarding [Requester] and/or Colonial Radio Group of Williamsport, LLC, Fox Sports Williamsport, Talk Williamsport between January 1, 2018 - March 5, 2021.
- 3) Emails sent/received by Wanda Erb with [District] Superintendent Dr. Timothy Bowers regarding [Requester] and/or Colonial Radio Group of Williamsport, LLC, Fox Sports Williamsport, Talk Williamsport between January 1, 2018 - March 5, 2021.
- 4) Emails sent/received by Wanda Erb with [District] tax office staff regarding [Requester] and/or Colonial Radio Group of Williamsport, LLC, Fox Sports Williamsport, Talk Williamsport between January 1, 2018 - March 5, 2021.
- 5) [District] Tax Office or [District] report of the taxpayer cases referred to the Magistrate Judge Level for the fiscal years, 2017-2018, 2018-2019, 2019-2020 and 2020-2021.
- 6) A [District] Tax Office or [District] report of the taxpayer cases referred for criminal arrest in the fiscal years, 2017-2018, 2018-2019, 2019-2020 and 2020-2021.

On March 12, 2021, the District invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On April 9, 2021, the District partially denied the Request, providing some responsive records, arguing some records do not exist, and either redacting or withholding records that are privileged attorney client communications or attorney-work product.

On April 12, 2021, the Requester emailed the District seeking an explanation regarding attachments not being provided. The District responded that it did not interpret the Request seeking emails to also include attachments, and the Requester would need to submit a new RTKL request for any attachments he is seeking.

On April 22, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. Specifically, the Requester challenges the denial of records regarding the Requester, the District and the District Tax Office. 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 May 3, 2021, the District submitted a position statement reiterating its grounds for denial. The District first argues that some records were properly withheld or redacted due to attorney-client privilege or attorney-work product, some records were provided, and that some records do not exist within the possession, custody or control of the District. The District then makes the argument that Items 5 and 6 would constitute confidential tax information and are protected from disclosure by the Local Tax Enabling Act (“Act”), 53 P.S. §§ 6924.101-6924.517. The District also argues that the District properly interpreted the Request to only seek emails and not attachments. In support of its position, the District submitted the affidavit of Wanda Erb, the District’s Open Records Officer.

### **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.

The District 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). 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 District’s interpretation of the Request is too narrow**

The District explains that, because the Request is limited to “emails,” the District excluded attachments to the emails because it did not consider these records responsive to the Request and instead asked the Requester to submit a new request for those additional records. An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Garland v. Pa. Dep’t of Environ. Prot.*, OOR Dkt. AP 2017-1490, 2017 PA O.O.R.D. LEXIS 1310; *Ramaswamy v. Lwr. Merion Sch. Dist.*, OOR Dkt. AP 2019-1089, 2020 PA O.O.R.D. LEXIS 2095. When a request is subject to multiple reasonable interpretations, the OOR’s task on appeal is to determine if the agency’s interpretation was reasonable. *Ramaswamy*, 2020 PA O.O.R.D. LEXIS 2095. The OOR determines this from the text and context of the request alone, as neither the OOR nor the Requester is permitted to alter a request on appeal. *See McKelvey v. Office of the Attorney Gen.*, 172 A.2d 122, 127 (Pa. Commw. Ct. 2016); *Smith Butz, LLC v. Dep’t of Environ. Protection*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016).

The District does not claim that the attachments included with the responsive emails do not exist or are otherwise subject to withholding under the RTKL; in fact, the District merely indicates that some of the correspondence includes prior RTKL requests or other similar correspondence that would be in the possession of the Requester. Therefore, the District’s interpretation of the Request for emails to not include the attachments within those emails is unreasonable. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, \*16 (Pa. Commw. Ct. 2012) (“The RTKL must be construed to maximize access to government records”). As email attachments are included within the responsive emails and the District has not

provided evidence that all of the attachments have been provided to the Requester during the course of this appeal, the District must provide those attachments to the Requester. *Allegheny County Dep't of Admin. Servs. v. A Second Chance*, 13 A.3d 1025 at 1034 (Pa. Commw. Ct. 2011) (“We must also interpret the RTKL liberally to effect its purpose”); *Peiffer v. Penn Ridge Sch. Dist.*, OOR Dkt. AP 2016-0031, 2016 PA O.O.R.D. LEXIS 1225 (rejecting the argument that a request for correspondence did not encompass attachments).

**2. The District properly withheld records protected by the attorney-client privilege and the attorney-work product doctrine**

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.*

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). “[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, 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”). 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 District also argues that a portion of the records redacted are exempt from public disclosure under the attorney work-product doctrine. The attorney work-product doctrine 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 at 976 (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).

Furthermore, the attorney work-product doctrine protects information prepared by agents of an attorney. In *Bagwell v. Pa. Dep’t of Educ.*, the requester sought, in relevant part, emails containing information discussing the investigation conducted by at least one law firm engaged by Penn State University to investigate allegations that subsequently became the subject of lawsuits.

103 A.3d 409 (Pa. Commw. Ct. 2014). In concluding that the information was permissibly redacted from the records, the Commonwealth Court held that the attorney-work product doctrine “protects materials prepared by agents for the attorney[,]” including “an attorney’s ‘[investigator’s or other agent’s] opinions, theories, or conclusions’ as part of preparing his client’s case.” *Bagwell*, 103 A.3d at 415-16; *see also Rittenhouse v. Bd. of Supervisors*, 41 A.3d 975, 2012 Pa. Commw. Unpub. LEXIS 248 (Pa. Commw. Ct. 2012) (work product extends to an investigator’s report); *Shanley v. Upper Merion Area Sch. Dist.*, OOR Dkt. AP 2018-1932, 2018 PA O.O.R.D. LEXIS 1514 (holding that an engineering report prepared for a law firm retained to represent a local agency was protected by the attorney work-product doctrine).

In support of the District’s argument that it properly redacted or withheld records protected by attorney-client privilege and the attorney-work product doctrine, Ms. Erb attests as follows:

In receiving this Request, I performed a good faith search of District records that would fit within the scope of the requests referenced in [Items 1 through 6].

With regard to email requests referenced in [Items 1 through 6], I contacted the District’s Technology Department to do a search of the District servers for any responsive emails. I also searched the emails folder on my own District-issued computer for responsive emails. The District’s Technology Department’s search of the District email system any my own search uncovered emails sought in the requests referenced in [Items 1 through 4].

...

Fred Holland is an attorney with the law firm Murphy Butterfield & Holland P.C., which serves as the District’s solicitor on all legal matters. Attorney Holland and/or current associate, Jeffrey Rowe, from this law firm have provided the District with confidential legal guidance on a wide variety of legal matters including, but not limited to, responses on RTKL matters and delinquent tax collection matters.

Jeffrey D. Litts and Howard L. Kelin are both attorneys with the law firm Kegel Kelin Litts & Lord, LLP, which serves as special legal counsel for the District to assist with labor negotiations, personnel matters and RTKL matters.

To the best of my knowledge, Attorneys Holland, Rowe, Litts and Kelin are all licensed to practice law in the Commonwealth of Pennsylvania. The District’s

Board of School Directors (“School Board”) has taken official action to appoint Attorney Holland as the District’s solicitor and Kegel Kelin Litts & Lord LLP as special legal counsel.

Employees from District and/or District Tax Office conferred with Attorney Holland via email to receive confidential legal advice on specific delinquent tax collection matters that were pending before a local magistrate judge. Some of the emails contained or shared Attorney Holland’s opinions on how best to handle matters related to that litigation.

Employees from District conferred with Attorney Rowe via email to receive confidential legal advice on specific RTKL requests that were received by the District. Some of the emails contained Attorney Rowe’s mental impressions and/or opinions how best to respond to RTKL requests, including the assertion of exceptions under Section 708(b) of the RTKL, and included a proposed draft response to one RTKL request for the District’s consideration.

Employees from District conferred with Attorneys Litts and/or Kelin via email to receive confidential legal advice on specific RTKL requests that were received by the District. Some of these emails contained Attorney Litts’ and/or Attorney Kelin’s mental impressions and/or opinions how best to respond to RTKL requests, including the appropriateness of asserting exceptions under Section 708(b) of the RTKL, and included proposed draft responses to RTKL requests for the District’s consideration.

The District is governed by a School Board comprised of nine (9) members, and operated under the auspices of Pennsylvania’s Public School Code of 1949, as amended. The District’s School Board has not approved a waiver of any of the District’s legal privileges associated with any email containing confidential legal communications from either the District’s solicitor and/or its special counsel.

Emails that were withheld contained the mental impressions, conclusions, opinions, and written work product created by the District’s solicitor and/or special legal counsel regarding the issues for which legal advice was sought and provided on matters related to responses to RTKL requests and appeals or litigation concerning the collection of delinquent taxes owed to the District.

Some email records containing attorney-work product were provided to Requester in response to the requests referenced in [Items 1 through 6], but were redacted to remove the privileged portions of those email communications.

At no time were the confidential email communications of District’s solicitor and/or special legal counsel shared with anyone outside of District’s attorneys, board of school directors or employees or made in the presence of anyone other than a District school director or employee.

None of the email records to which the District has denied access pursuant to the attorney-client privilege or the attorney-work product privilege contain purely factual information. Any attorney emails containing only factual information, which were responsive to the requests referenced in [Items 1 through 6], were provided to the Requester.

Under the RTKL, a sworn affidavit or statement made under the 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the District has 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)).

Here, the District has proved that it has provided some responsive records and either withheld or redacted records between the District and its attorneys regarding legal advice, opinions of law, legal services or advice in a legal matter, and the privilege has not been waived by either party. Additionally, the District has demonstrated that the records are exempt as attorney work-product and properly redacted portions of responsive records that contain mental impressions, theories and/or strategies of an attorney that were sent in the course of professional duties. Accordingly, the District has provided sufficient evidence to prove that the redacted or withheld records are protected by the attorney-client privilege and attorney work-product doctrine.

### **3. The District proved that it is not in possession, custody or control of some records**

The District argues that it is not in the possession, custody or control of responsive records regarding Items 5 and 6. In support of this argument, Ms. Erb attests as follows:

With regard to taxpayer case reports sought in the requests referenced in [Items 5 and 6], I contacted the Municipal and School Earned Income Tax Office (which is commonly referred to, and referred to hereafter, as the “District Tax Office”) whose offices are located in the same building as the District’s administrative offices. The

District Tax Office employees are considered District employees, and the District Tax Office manager reports directly to me. The District Tax Office collects the earned income taxes imposed by all school districts and municipalities in the Lycoming County Tax Collection Committee, and residents of those participating school districts and municipalities are required to pay and businesses located within those districts and municipalities are required to remit on behalf of their resident employees. I asked the District Tax Office if they maintained a cumulative report of all delinquent tax collection cases filed with local magistrate judge courts for collection and/or referred for criminal prosecution. I am aware that from time-to-time, delinquent tax collection cases are filed in order to recover local taxes from businesses or individuals that are owed, the District does not maintain or possess a cumulative list of all delinquent tax collection cases for particular fiscal years as requested in [Items 5 and 6].

The District Tax Office likewise advised me that it did not have any cumulative list of all delinquent tax collection cases for particular fiscal years as requested in [Items 5 and 6]. Specifically, on March 9, 2021, I emailed the District Tax Office Manager, Dorothy Hillard, to [ask] if any list of all delinquent tax collection cases existed and Ms. Hillard replied on same day, “No the Tax Office does not have a report of all Criminal and Civil Cases Filed ....” This March 9 email exchange was provided to Requester as part of the District’s response to the requests referenced in [Items 5 and 6], and is included among the documents filed in this appeal.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support for the nonexistence of a record. *See Sherry* at 520-521.

Additionally, the District argues that even if the records did exist, the requested records constitute confidential tax information and are protected from disclosure by the Local Tax Enabling Act, 53 P.S. §§ 6924.101-6924.517. Section 6924.514 of the Act provides that “[a]ny information gained by a tax officer or any employee or agent of a tax officer or of the tax collection committee as a result of any declarations, returns, investigations, hearings or verifications shall be confidential tax information.” 53 P.S. § 6924.514. The Act also provides criminal penalties for unauthorized disclosure of confidential tax information. *Id.*

The OOR has previously held that taxpayer information obtained by a tax officer or an agent of the tax office is confidential and not publicly accessible under the RTKL. *See Henning v. Jim Thorpe Borough*, OOR Dkt. AP 2018-0881, 2018 PA O.O.R.D. LEXIS 703; *PFUR v. Butler*

*Area Sch. Dist.*, OOR Dkt. AP 2014-0777, 2014 PA O.O.R.D. LEXIS 636; *Delilah's Den of Phila. v. City of Phila.*, OOR Dkt. AP 2014-0596, 2014 PA O.O.R.D. LEXIS 548.

The present Request is seeking a list of taxpayer cases that have been referred to a local Magistrate or District Attorney's office for collection or prosecution. The affidavit provided by the District states that this information would contain "individual taxpayer information," and would have been obtained through a declaration, return, investigation, hearing, or verification. Additionally, the Act specifically states that if there is any regulatory conflict, the Act shall prevail. 53 P.S. § 6924.516. Based on the evidence provided the District has proven that records responsive to Items 5 and 6 are not in the District's possession, custody or control, and regardless, if the records were to exist, those records would constitute confidential tax information, which are protected from public access under the Act. *See Hodges*, 29 A.3d at 1192.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the District is required to provide all responsive attachments 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 Lycoming 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.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>1</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: May 21, 2021**

*/s/ Ryan W. Liggitt*

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RYAN W. LIGGITT, ESQ.  
APPEALS OFFICER

Sent to: Todd Bartley (via email only);  
Wanda Erb, AORO (via email only);  
Jeffrey D. Litts, Esq. (via email only);  
Paula Mishler (via email only)