



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**DANIEL HENRY,
Requester**

v.

**CITY OF YORK,
Respondent**

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Docket No.: AP 2021-0651

INTRODUCTION

Daniel Henry (“Requester”) submitted a request (“Request”) to the City of York (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to the appeal of a disciplinary matter. The City denied the Request, arguing that the responsive records are subject to the attorney-client privilege and contain internal, predecisional, and deliberative communications. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the City is not required to take any further action.

FACTUAL BACKGROUND

On February 12, 2021, the Request was filed, stating:

On 09/22/2020, according to invoices sent from Clark Hill Law Firm to the City of York regarding the investigation of Officer Clayton Swartz, York City was billed for “emails and telephone calls regarding issues related to appeal”. Please disclose all emails sent and received on this date regarding the issues related to the appeal.

On March 26, 2021, following a thirty-day extension, 65 P.S. § 67.902, the City denied the Request, arguing that emails responsive to the Request are subject to the attorney-client privilege and contain internal, predecisional, and deliberative communications. *See* 65 P.S. § 67.708(b)(10)(i)(A).

On March 29, 2021, the Requester appealed to the OOR, arguing that the responsive records are not privileged or exempt from disclosure. The OOR invited the parties to supplement the record and directed the City to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On April 8, 2021, the City submitted a position statement reiterating that the responsive emails contain material exempt under the attorney-client privilege, and internal, predecisional, and deliberative communications. In support of this argument, the City submitted the affidavit of Jason Sabol, Esq., Assistant Solicitor, who attests that the City possesses one responsive email, but that the email is a communication between the City and a law firm for the purpose of providing legal advice, consists of legal theories and opinions, and had not been disclosed to any third parties. The City also submitted the affidavit of Patricia Siebert, the City’s Open Records Officer, who attests to the timeline of the appeal.¹

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

¹ The City also submitted a statement noting that the Requester has filed five RTKL appeals regarding litigation between the City and Clayton Swartz, and states that it believes the filing of these additional RTKL requests is frivolous, since the materials sought are uniformly privileged. Although this issue is not before the OOR on appeal, the RTKL’s prohibition on repeated requests in Section 506 require both that the repeated requests be for the same record(s) and that this places an unreasonable burden on the agency. *See* 67.506(a); *Pa. Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011).

“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 City 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 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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)).

The City argues that it is entitled to withhold the responsive email because it consists of privileged material. 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.” 65 P.S. § 67.102.

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). An agency may not 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 Commonwealth Court has confirmed that, after an agency establishes the privilege was properly invoked under the first three prongs outlined above, the party

challenging invocation of the privilege must prove waiver under the fourth prong. *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

In support of this argument, the City submitted the affidavit of Assistant Solicitor Sabol, who attests that:

4. I reviewed the emails and determined that the subject matter is related to litigation in City of York vs. Clayton Swartz and consists of legal advice, opinions, strategy, and other confidential information between the Clark Hill, PLC and its client, [the City].

5. Clark Hill PLC law firm serves as outside counsel for the [City] in the matter of York City vs. Clayton Swartz, docket 2020-SU-001897 in York County Court of Common Pleas, which is pending.

7. The [City] is a client of Clark Hill PLC. The denied information was provided by the law firm Clark Hill PLC and its subordinate. The communication is between the law firm Clark Hill PLC and its client, the [City], in the Clayton Swartz investigation, a legal matter. The attorney-client privilege has not been waived.

8. Correspondence between Clark Hill PLC and the [City] discussed pending litigation, attorney opinion, and strategy related to the matter of City of York vs. Clayton Swartz.

9. The email communication has not been disclosed to any third parties.

Under the RTKL, a verification 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 City has acted in bad faith, “the averments in [the verification] 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 City has demonstrated that it maintains an attorney-client relationship with Clark Hill PLC, that the email consists of legal advice and opinion being provided to the City by its law

firm, and that the information has not been disclosed to any third parties. The OOR has previously found that the City has a valid attorney-client relationship with Clark Hill PLC, and that records showing Clark Hill PLC's advice to the City regarding Clayton Swartz are privileged records. *See Henry v. City of York*, OOR Dkt. AP 2021-0187, 2021 PA O.O.R.D. LEXIS 451. Finally, the subject of the responsive email concerns the City's position relating to a letter published by the Fraternal Order of Police regarding the City's decision to file a lawsuit to terminate an employee, which is facially a legal matter. Therefore, the City has demonstrated that the responsive email is subject to the attorney-client privilege.²

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the City 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 York 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. 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 10, 2021

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Daniel Henry (via email only);

² Because the responsive email is exempt under the attorney-client privilege, the OOR need not analyze the City's argument under Section 708(b)(10) of the RTKL.

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

Patricia Siebert (via email only);
Jason Sabol, Esq. (via email only)