



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**SCOT WITHERS,
Requester**

v.

**DELAWARE COUNTY,
Respondent**

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Docket No.: AP 2021-1187

INTRODUCTION

Scot Withers, Esq. (“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 records regarding the sale of the Delaware County Regional Water Quality Control Authority (“DELCORA”). The County denied the Request, arguing that the responsive records are subject to an unspecified privilege. 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 County is not required to take any further action.

FACTUAL BACKGROUND

On April 19, 2021, the Request was filed, stating:

[F]or the time period beginning December 1, 2020, to the present, I hereby request all documents, communications and/or records, from the [County] for the following transactions or activities of the County:

1. All documents, communications and/or records documenting the County's considering establishing, and/or establishment of, the County's own waste water system to replace the system maintained and operated by [DELCORA].
2. All documents, communications and/or records documenting the County's considering, or attempting, to obtain approval from the Pennsylvania Public Utility Commission to establish the County's own waste water system to replace the system maintained and operated by DELCORA.
3. All documents, communications and/or records documenting the County's considering, or attempting, the hiring of employees by the County to establish and/or operate the County's own waste water system to replace the system maintained and operated by DELCORA.
4. All documents, communications and/or records documenting the County's plans to pay for capital improvements, repairs and maintenance, in order for the County to operate the County's own waste water system to replace the system maintained and operated by DELCORA.
5. All documents, communications and/or records documenting the County's considering to operate or takeover, and/or the County's operation or takeover, of the waste water system maintained and operated by DELCORA.
6. All documents, communications and/or records documenting the County's considering, or attempting, to obtain approval from the Pennsylvania Public Utility Commission for the County to operate or takeover the waste water system maintained and operated by DELCORA.
7. All documents, communications and/or records documenting the County's considering, or attempting, the hiring of employees by the County to establish and/or operate or takeover the waste water system maintained and operated by DELCORA.
8. All documents, communications and/or records documenting the County's plans to pay for capital improvements, repairs and maintenance in order for the County to operate or takeover the waste water system maintained and operated by DELCORA.

On May 26, 2021, following a thirty-day extension, 65 P.S. § 67.902, the County denied the Request, arguing that any responsive records were protected by an unspecified privilege. 65 P.S. § 67.305(a)(2)

On June 15, 2021, the Requester appealed to the OOR, arguing that the County had not demonstrated any privilege. The OOR invited the parties to supplement the record and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On June 18, 2021, the Requester submitted a statement asking the OOR to issue an *in camera* order and require specific disclosures.

On June 26, 2021, the County submitted a position statement acknowledging that several responsive emails exist, but arguing that each of them was exempt under the attorney-client privilege or attorney-work product doctrine. In support of this argument, the County submitted the affidavit of Anne Coogan, the County's Open Records Officer, who attests that there are three responsive emails, each of which is privileged.

On June 29, 2021, in response to an inquiry from the OOR, the County submitted the affidavit of County Solicitor William Martin, Esq., who attested as to the content of the three emails in question.

On July 7, 2021, the Requester reiterated his request for an *in camera* review of the responsive records, arguing that a review was required to determine whether the emails at question actually provided or solicited legal advice or contained purely factual information.

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, the Requester sought an *in camera* review of the responsive records, but that request is denied because the OOR possesses sufficient evidence to decide the appeal.¹

The County 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

¹ Specifically, the Requester argues on appeal that the County’s descriptions of its records are insufficient to demonstrate the privilege because they do not rule out the possibility that the emails contain purely factual information. In this case, however, the detailed description submitted by the County’s Solicitor is sufficient to determine the privileged nature of the records.

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 County identifies three emails as responsive to the Request and argues that it is entitled to withhold the responsive emails because they consist 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).

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 at 976 (internal citations omitted); *see also Heavens v. Pa. Dep't of Env'tl. 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 support of this argument, the County submitted the affidavit of Ms. Coogan, who attests that:

3. I presented the Records Request to the County Solicitor's Office. The County Solicitor's Office informed me that:

(a) The County is a party to the following litigation in which DELCORA is an adverse party: (i) *Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Section 507, 1102, and 1329 of the Public Utility Code for, inter alia, approval of the acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority, and DELCORA Rate Stabilization Fund Trust Agreement b/t the Delaware County Regional Water Quality Control Authority as Settlor and Univest Bank and Trust Co. as Trustee, Appellees v. Darby Creek Joint*

Authority, Southern Delaware County Authority, and Aqua Pennsylvania Wastewater, Inc., Intervenors; Commonwealth Court Docket No. 148 C.D. 2021; and

(b) Requester is counsel to Aqua Pennsylvania Wastewater, Inc., a party adverse to the County in the foregoing litigation matters.

4. Accordingly, the County Solicitor's Office assumed responsibility for responding to the [Request] due to the active litigation in which Requester is counsel to an adverse party.

5. The County Solicitor's Office directed the County IT Department to undertake a search of emails that may be responsive to the [Request].

6. The County Solicitor's Office informed me that such search resulted in certain emails which may be responsive to the Records Request, but that such emails were privileged.

7. The emails at issue consist of the following:

(a) email dated December 20[, 2020] from member of County Council Christine Reuther to County Solicitor William Martin regarding "current operations of Delcora."

(b) email dated March 22, 2021 from County Solicitor William Martin to Carol Steinour Young, Adeolu Bakare, and David Unkovic, all being lawyers with the law firm McNees Wallace which is counsel to the County in the above-named litigation regarding "current DELCORA operations."

(c) email dated April 8, 2021 from County Solicitor William Martin to Carol Steinour Young, Adeolu Bakare, David Unkovic and Kandice Hull, all being lawyers with the firm McNees, Wallace which is counsel to the County in the above-named litigation regarding "running DELCORA long-term."

The County further submitted the affidavit of Solicitor Martin, who attests that:

3. December 20, 2020 Email: This email exchange consisted of an initial inquiry submitted to me in my capacity as County Solicitor from member of County Council Christine Reuther, requesting my legal advice about a report regarding Delcora operations and the appropriateness of sharing information about certain other members of County Council and County staff, and my response to her.

4. March 22, 2021 Email: In this email I provided information about certain Delcora operations matters (capital costs for a failed pump station and cash flow issues) to the lawyers whom I am working with on behalf of the County for their consideration in developing a litigation strategy.

5. April 8, 2021 Email: This email exchange consisted of my reporting on the status of settlement discussion with attorney Michael Puppio to the lawyers whom I am working with on behalf of the County and answering questions relating thereto posed by such lawyers. Mr. Puppio is Requester's co-counsel in representing Aqua Pennsylvania Wastewater, Inc. in the litigation in which the County is an adverse party.

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 County 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 County has demonstrated that it maintains an attorney-client relationship with Solicitor Martin and with the firm of McNees Wallace. The County's affidavits demonstrate that the December 20, 2020 email consists of a request for legal advice from a County councilmember to the County Solicitor, and the Solicitor's response to her inquiry; the March 22, 2021 email consists of emails between lawyers on the same legal team discussing capital costs for the benefit of a litigation strategy; and the April 8, 2021 email consists of an update on a settlement conference to other members of the legal team. *See, e.g., Yoder v. Lancaster Cnty. Solid Waste Auth.*, OOR Dkt. AP 2017-0796, 2017 PA O.O.R.D. LEXIS 636 (emails providing legal advice in response to a client inquiry are exempt); *Newcomer v. Mount Joy Boro.*, OOR Dkt. AP 2017-0117, 2017 PA O.O.R.D. LEXIS 1384 (accord); *DiMarco v. Chester Cnty.*, OOR Dkt. AP 2017-1957, 2017 PA O.O.R.D. LEXIS 1689; *Campbell v. Bellefonte Area Sch. Dist.*, OOR Dkt. AP 2019-0483, 2019 PA O.O.R.D. LEXIS 474 (an exception log may not be required if sufficient detail regarding the

records exists in an affidavit). Here, the County has submitted facts sufficient to show that the councilmember's request and receipt of legal advice from the Solicitor is protected under the attorney-client privilege. Similarly, the County has demonstrated that the remaining two emails constitute attorney-work product, having been prepared in connection with ongoing litigation and for the purpose of permitting the County's team of attorneys to develop legal strategies and continue settlement efforts. Therefore, the County properly invoked the privileges as to these three records.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, 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 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 21, 2021

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Scot Withers, Esq. (via email only);
Anne Coogan (via email only);
Robert Scott, Esq. (via email only)

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).