

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ALFRED BROWN,

Petitioner

v.

No. _____ C.D. 2021

**RECEIVER FOR THE CITY OF
CHESTER,**

Respondent.

PETITION FOR REVIEW
(APPELLATE JURISDICTION)

I. JURISDICTIONAL STATEMENT

1. This is an appeal from a Final Determination of the Commonwealth of Pennsylvania Office of Open Records (the “OOR”), on which the Commonwealth Court exercises appellate jurisdiction pursuant to Section 1301(a) of the Right-to-Know Law, 65 P.S. § 67.1301(a) (“RTKL”) and Sections 763(a)(1) and (a)(2) of the Judicial Code, 42 Pa.C.S. §§ 763(a)(1) and (a)(2).

2. The Final Determination for which review is sought is *Alfred Brown v. Receiver for the City of Chester*, OOR Docket No. AP 2021-1218, issued and mailed September 17, 2021. A true copy of this Final Determination is attached hereto as Exhibit A.

3. This Court's standard of review of a final determination of the Office of Open Records ("OOR") is *de novo* and the scope of review is plenary. *Hunsicker v. Pennsylvania State Police*, 93 A.3d 911, 913 n. 7 (Pa.Commw. 2014).

II. THE PARTIES

4. Petitioner Alfred Brown ("Mr. Brown") is an adult individual and attorney in the law firm Dailey LLP, with a business address of 1650 Market Street, 36th Floor, Philadelphia, Pennsylvania 19103.

5. Petitioner is a Requester for purposes of the RTKL.

6. Respondent, Receiver for the City of Chester, Michael Doweary (the "Receiver"), was appointed by Order of this Court dated June 22, 2020 in *Davin v. City of Chester*, Pa.Commw. No. 336 M.D. 2020 (Crompton, J.) (herein, the "Receivership Proceeding") following a petition therein by Dennis M. Davin, Secretary of the Department of Community and Economic Development (the "DCED"). Secretary Davin filed the petition seeking appointment of a Receiver for the City of Chester at the direction of Governor Tom Wolf. The Receiver's

business address is Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225.

7. The Receiver is an Agency and a Commonwealth Agency for purposes of the RTKL.

8. The Receiver is a separate Agency from the City of Chester, and has been and is adverse to the City of Chester in the Receivership Proceeding and in the duties to which he was appointed with respect to the City of Chester.

III. THE OFFICE OF OPEN RECORDS

9. The OOR is an office within the DCED, established pursuant to § 1310(a) of the RTKL (65 P.S. § 67.1310(a)), with an office located at 333 Market Street, 16th Floor, Harrisburg, Pennsylvania 17101-2234. Pursuant to *Padgett v. Pennsylvania State Police*, 73 A.3d 644 n.5 (Pa.Commw. 2013), the OOR is not a proper party to the instant appeal and, accordingly, is not named as a party. However, the OOR is being served with this Petition to provide it with notice of the appeal and an opportunity to respond per § 1303 of the RTKL (65 P.S. § 67.1303).

IV. SCOPE AND STANDARD OF REVIEW

10. Appeals from decisions of the OOR are reviewed *de novo* by the appropriate Court. *Bowling v. Office of Open Records*, 621 Pa. 133, 173, 75 A.3d 453, 476-477 (2013).

11. The reviewing Court's scope of review in this matter is broad and/or plenary, and the Court may consider evidence in addition to the administrative record as it deems necessary. *Id.*; see also *Pennsylvania Department of Transportation v. Office of Open Records*, 7 A.3d 329, 332 n.2 (Pa.Comm.w. 2010).

V. STATEMENT OF FACTS AND BACKGROUND

12. On April 23, 2021, Mr. Brown sent an RTKL request (the "Request") via electronic mail to the Receiver, who received it instantaneously. The Request contained twelve numbered items, a list of which is replicated on page 2 of the OOR's September 17, 2021 Final Determination. A true copy of the OOR's Final Determination is attached hereto as Exhibit A.

13. In response to Mr. Brown's Request, the Receiver:

a. produced very few documents, and far fewer than the Receiver must have within his possession, custody, or control;

b. failed to produce any documents responsive to most of the items in the Request;

c. asserted a spectrum of “denial reasons” and exemptions to all but two items in the Request;

d. sent an untimely updated response that attempted to claim an additional exemption beyond the statutorily-permitted time for doing so; and

e. failed to produce an affidavit the Receiver’s counsel promised to produce.

14. Mr. Brown appealed the Receiver’s response regarding eleven of the twelve items in his Request (all except item no. 2) to the OOR on June 21, 2021.

15. The parties subsequently submitted position statements to the OOR. Concurrently with his position statement, the Receiver submitted an affidavit to the OOR concerning his investigation and response to Mr. Brown’s RTKL request.

16. Notably, the Receiver’s position statement failed to provide legal authority or even argument to support the spectrum of “denial reasons” and exemption he asserted in his responses to Mr. Brown’s RTKL request. Instead, the Receiver’s position statement focused only on: (a) his exemption claim under 65 P.S. § 67.708(b)(26) (which was untimely made) with respect to items 5 and 6 of the Request and an Asset Purchase Agreement involving the City of Chester that Mr. Brown had argued was properly subject to his Request; and (b) privilege

claims with respect to a joint defense agreement and written waiver of conflict. Moreover, the Receiver's accompanying affidavit fails to establish he complied with his obligations under the RTKL.

17. Following agreed-upon extensions, the OOR issued and mailed its Final Determination regarding Mr. Brown's appeal on September 17, 2021. *See* Exhibit A.

VI. DETERMINATION TO BE REVIEWED

18. Mr. Brown seeks this Court's review of the OOR's September 17, 2021 Final Determination, wherein his appeal was denied in part and dismissed as moot in part. *See* OOR Final Determination (Exhibit A hereto) at 19 ("Conclusion" section) and the accompanying legal analysis (*id.* at 4-19).

VII. STATEMENT OF OBJECTIONS TO THE DETERMINATION

19. The OOR erred in presuming and concluding that the Receiver acted in good faith in his response to the RTKL request, and in concluding there was no evidence showing that more records must exist, while not even addressing several arguments and exhibits Mr. Brown proffered to establish that: (a) it is inconceivable and not credible that the Receiver had no further responsive documents to produce; (b) the Receiver had not met his burden to prove there are

no further records responsive to Mr. Brown's Request; and (c) that the Receiver failed to make a good faith search for responsive items and to make required inquiries of other agency personnel and third parties for responsive items.

20. The OOR erred in failing to order the Receiver to make inquiries of other agency personnel and third parties for items responsive to Mr. Brown's request, despite citing legal authority that imposes that requirement and despite the fact that neither the Receiver's position statement nor affidavit indicated that any such required inquiries were made.

21. Mr. Brown believes and avers that the OOR erred in concluding, after an *in camera* review, that certain joint defense agreements, conflict-of-interest waivers, and other documents withheld from production by the Receiver were subject to the attorney/client privilege and/or the work product doctrine. Mr. Brown does not have access to those documents, and therefore respectfully requests that the Commonwealth Court conduct its own *in camera* review of said documents.

22. The OOR erred in failing to resolve the Receiver's claimed exemption for pre-decisional deliberations under 65 P.S. § 67.708(b)(10)(i)(A), and in failing to order the production of any documents the Receiver was withholding pursuant to that claimed exemption, despite: (a) the OOR's acknowledgment that the Receiver had claimed the exemption (*see* Final Determination at 3);

(b) Mr. Brown's argument in his position statement and reply position statement that the Receiver failed to meet his burden to establish entitlement to the exemption; and (c) the Receiver's failure to support his claim to the exemption with any evidence, legal authority, or argument in his position statement.

23. The OOR erred in upholding the Receiver's claim to an exemption under 65 P.S. § 67.708(b)(26) (which relates to agency procurement or disposal of supplies, services, or construction) with respect to items 5 and 6 of Mr. Brown's Request and a certain "Asset Purchase" Agreement or Management Contract. In so doing, the OOR: (a) erroneously accepted the Receiver's exemption claim under this statute despite the fact that the Receiver's claim was untimely made; (b) erroneously concluded that the Receiver was entitled to claim the exemption despite the fact that the Receiver was neither procuring nor disposing of supplies, services, or construction pursuant to that Agreement; (c) erroneously determined that it "cannot conclude that the Receiver constitutes an agency separated from the affairs of the City [of Chester] for the purposes of Section 708(b)(26)" (Final Determination at 15) (thus, among other things, erroneously applying a standard and threshold requirement that does not exist in that statute); and (d) erroneously determined that the subject Asset Purchase Agreement or Management Contract between the City of Chester and an external entity was a contract for procurement

of services, despite the fact that it relates to the potential acquisition of the assets of an entire municipal authority (the Chester Water Authority).

24. The OOR erred in concluding that item no. 3 of Mr. Brown's Request "does not seek records" and was "insufficiently specific under Section 703 of the RTKL" (Final Determination at 6-9).

VIII. RELIEF SOUGHT

WHEREFORE, Petitioner Alfred Brown respectfully requests that this Court review these incorrect determinations of the Office of Open Records and:

(a) grant this Petition for Review of the OOR's September 17, 2021 Final Determination;

(b) reverse the portions of the OOR's Final Determination that denied Mr. Brown's appeal;

(c) grant those portions of Mr. Brown's appeal to the OOR that the OOR failed to address or resolve;

(d) order the Receiver to fulfill all his obligations under the RTKL, including making a good faith search for materials responsive to items 1 and 3 through 12 of Mr. Brown's RTKL request, making required inquiries for responsive items with other agency personnel and relevant third parties, and

producing all responsive, non-exempt documents in his possession, custody, or control;

(e) order the Receiver to comply with those portions of the OOR's Final Determination that were granted in Mr. Brown's favor, which included orders that the Receiver: (i) conduct a search of his email to server to determine whether other responsive records exist therein, and (ii) produce a certain March 1, 2021 email; and

(f) grant all other relief the Court deems just and proper.

Respectfully submitted,

BY: /s/ Alfred Anthony Brown

Jeffery A. Dailey (No. 85993)

Alfred Anthony Brown (No. 59403)

DAILEY LLP

1650 Market Street

36th Floor

Philadelphia, PA 19103

(215) 367-1640

Attorneys for Petitioner

Alfred Brown

Dated: October 18, 2021

VERIFICATION

I verify that the facts set forth in the foregoing Petition for Review are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

/s/ Alfred Anthony Brown

Alfred Anthony Brown

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently from non-confidential information and documents.

/s/ Alfred Anthony Brown

Alfred Anthony Brown

Dated: October 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2021, a true copy of the foregoing Petition for Review was served upon the following via PACFile and/or in the manner(s) indicated:

Via certified mail and electronic mail

John P. McLaughlin, Esquire
Benjamin R. Patchen, Esquire
Campbell Durrant, P.C.
One Belmont Avenue
Suite 300
Bala Cynwyd, PA 19004
jmclaughlin@cdblawn.com
bpachen@cdblawn.com

Jordan C. Davis, Esquire
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
jordddavis@pa.gov

Via certified mail

Commonwealth of Pennsylvania
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120

/s/ Alfred Anthony Brown

Alfred Anthony Brown

Dated: October 18, 2021

EXHIBIT A

EXHIBIT A



FINAL DETERMINATION

IN THE MATTER OF

**ALFRED BROWN,
Requester**

v.

**RECEIVER FOR THE
CITY OF CHESTER,
Respondent**

:
:
:
:
:
:
:
:
:
:
:

Docket No.: AP 2021-1218

INTRODUCTION

Alfred Brown, Esq. ("Requester") submitted a request ("Request") to the Receiver for the City of Chester ("Receiver") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking records related to COVID-19 loans, communications, assessments and comments related to the proposed sale of the Chester Water Authority ("Authority") and letters related to representation. The Receiver denied the Request in part, and 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, denied in part** and **dismissed as moot in part**, and the Receiver is required to take further action as directed.

FACTUAL BACKGROUND

On April 23, 2021, the Request was filed, seeking:

1. Requests, applications, or inquiries made to federal, state, county or other governmental bodies, for funds, grants, or loans related to the impact COVID-19 has had on the City of Chester [“City”].
2. Comments from members of the public regarding any proposal to sell the [Authority], including but not limited to any such comments received at, or referenced during, the Municipal Financial Recovery Advisory Committee Meetings from September 29, 2020 to the Present[.]
3. Records and documents relating to recommendations in the November 3, 2020 presentation (hereafter, the “Presentation”) that is attached to the Status Update and is entitled “Receiver’s Assessment of the City of Chester’s Financial and Operational Condition” that the [Authority] be “monetized” as part of a “grand bargain” (see, e.g., Presentation pages 2, 8, and 21-23)[.]
4. The “independent assessment of a potential sale or other monetization of the CWA using experts from Public Financial Management” conducted or being conducted by the Receiver’s team, as referenced on page 22 of the Presentation.
5. Any communications from January 1, 2020 to the present to or from Aqua America, Inc.
6. Any communications from January 1, 2020 to the present to or from Essential Utilities, Inc.
7. Any communications from January 1, 2020 to the present to or from Aqua Pennsylvania.
8. Any communications from January 1, 2020 to the present to or from Aqua Wastewater Management Inc.
9. Any written waiver of conflict received from any lawyer, law firm, or other entity that you have relied upon for legal representation since your appointment as Receiver.
10. Engagement letters with every law firm providing you, or your staff, legal advice in connection with your appointment as Receiver and fulfillment of your duties as Receiver.
11. Any joint representation, joint prosecution, joint defense, or common interest letters or agreements you have with any party, lawyer or law firm.
12. Any documents where you have exercised your power to compromise claims, whether against the City of Chester or asserted by the City of Chester.

On June 18, 2021, following a thirty-day extension, 65 P.S. § 67.901, the Receiver granted the Request in part, but denied other parts as insufficiently specific, 65 P.S. § 67.703, as seeking information which is not a “record” under the RTKL, as seeking records which do not exist, as seeking records of internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), as seeking information which is exempt under the attorney-client privilege and attorney-work product doctrine, and as seeking exempt proposals under 65 P.S. § 67.708(b)(26). Specifically, the Receiver granted the records responsive to Item 2; granted and denied in part records responsive to Items 1, 3, 4, 5, 6, and 10; and denied Items 7, 8, 9, 11, and 12 in full.¹

On June 21, 2021, the Requester appealed to the OOR, arguing that the denials are invalid in general, and specifically that additional records should exist. The OOR invited the parties to supplement the record and directed the Receiver to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 23, 2021, the Requester submitted a position statement arguing that evidence exists to show that additional responsive records must exist, that the Receiver had not conducted a good faith search, that the records withheld as privileged were not categorically privileged as the Receiver had claimed, that the two cited exemptions are not applicable to the case, and that no part of the Request was insufficiently specific. Finally, the Requester sought an *in camera* review to the extent that the OOR found that any records might be exempt.

The same day, the Receiver submitted a position statement arguing that all records responsive to several items of the Request had been produced, that the bid submitted by Aqua Pennsylvania in response to the City’s RFP is exempt, that written waivers of conflict from the

¹ The Receiver also denied being categorized as “the Commonwealth” or “a Commonwealth official.” To the extent that this statement, which was not explored on appeal, is a challenge to the determination of the Receiver’s status as a Commonwealth agency, the RTKL defines “Commonwealth agency” as including “[a]n organization established by [...] a statute [...] which performs or is intended to perform an essential government function.” 65 P.S. § 67.102.

Receiver's solicitor are privileged, and that the Joint Defense Agreement is privileged. The Receiver also submitted the verification of Michael Doweary, the Receiver of the City of Chester, who attests that bids for sale of the Chester Water Authority had been submitted to the City and forwarded to his attention, that he had conducted an examination of all files in his possession, and that the attached privilege log is accurate. Finally, the Receiver provided a short privilege log listing the records which had been withheld, consisting of the Joint Privilege Agreement, two potential conflict of interest waivers, email correspondence involving the waivers, and the asset purchase proposal submitted by Aqua Pennsylvania, Inc.²

On July 30, 2021, the Requester submitted a supplemental statement, arguing that the Receiver had not substantiated several of the bases for denial, that additional records must exist, that no good faith search had been conducted and that none of the cited exemptions or privileges could apply.

On August 16, 2021, the OOR issued an Order directing the Receiver to produce the privileged records for a review *in camera*. On August 20, 2021, the OOR received the records, and subsequently conducted an *in camera* review.

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 The Receiver also produced four additional documents.

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 Requester sought an *in camera* review of any records which the OOR determines to be privileged or exempt, and the OOR conducted such a review of the records withheld as privileged.

The Receiver is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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). 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 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). 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 Receiver provided certain records on appeal

On appeal, the Receiver provided four additional documents to the Requester. Because those records are responsive to the Request, the appeal is dismissed as moot as to the specific records or parts of records provided. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. Item 1 of the Request is sufficiently specific, but Item 3 does not seek records

The Receiver denied the Request in part because it was insufficiently specific. In the final response, the Receiver argued that “many of [the items in the Request] have not identified a transaction or activity, a discrete group of documents, or a finite period of time for which the records are sought[.]” The Receiver specifically identified Items 1 and 3 of the Request as insufficiently specific, though some records responsive to both items were provided.³

In determining whether a particular request under the RTKL is sufficiently specific, the OOR applies a three-part balancing test set forth by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). The OOR examines to what extent the request

³ Because the Receiver identifies only those two items of the Request as insufficiently specific, the OOR will not analyze the other items under Section 703 of the RTKL.

identifies (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep't of Educ.*, 119 A.3d at 1125.

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep't of Educ.*, 119 A.3d at 1125. The subject matter should provide a context to narrow the search. *Id.* (citing *Montgomery County. v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) (en banc)). Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *Id.*

Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. “The timeframe prong is ... the most fluid of the three prongs, and whether or not the request's timeframe is narrow enough is generally dependent upon the specificity of the request's subject matter and scope.” *Id.* Failure to identify a finite timeframe will not render an otherwise sufficiently specific request overbroad. *See Pa. Hous. Fin. Agency v. Ali*, 43 A.3d 532, 536 (Pa. Commw. 2012) (concluding request for proposals and sales agreements relating to two specific projects that did not specify timeframe was sufficiently specific). Similarly, an extremely short timeframe will not rescue an otherwise overbroad request. *Cf. Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1265 (Pa. Commw. 2011) (finding request for all emails sent or received by any school board member in thirty-day period to be sufficiently specific because of short timeframe), *appeal denied*, 54 A.3d 350 (Pa. 2012).

Item 1 of the Request seeks “[r]equests, applications, or inquiries made to federal, state, county or other governmental bodies, for funds, grants, or loans related to the impact COVID-19 has had on the [City].” Here, the Request is seeking records related to applications and fund inquiries intended to mitigate the impact of COVID-19, giving Item 1 of the Request a straightforward and easily understood subject matter. This item of the Request also has a well-

defined scope, as it is seeking only requests for specific types of funds and inquiries related to such requests for grants and loans. Finally, while the Requester argues that the Request specified that it sought records from 2016 onward, COVID-19 was not identified as a matter of concern until the end of 2019;⁴ as a practical matter, Item 1 of the Request has an implicit timeframe of just over a year. *Mitchell v. Phila. Police Dep't*, OOR Dkt. AP 2015-2335, 2015 PA O.O.R.D. LEXIS 1944 (finding a request interpreted to seek current agency policies to have an implied timeframe); *Barry v. Bensalem Twp. Police Dep't*, OOR Dkt. AP 2013-1151, 2013 PA O.O.R.D. LEXIS 690 (timeframe may be implied from the context of the records requested). Therefore, because Item 1 of the Request has a specific subject matter, narrow scope and moderate timeframe, it is sufficiently specific under Section 703 of the RTKL.

Item 3 of the Request seeks “[r]ecords and documents relating to recommendations in the [Presentation] [...] that the [Authority] be [monetized].” This item has an even smaller timeframe than Item 1, as the presentation in question was submitted on November 3, 2020, and the Receiver was appointed only a few months prior to that. Unlike Item 1, however, Item 3 has no scope, seeking any records which relate to the recommendations in question. The lack of a scope is not a fatal flaw in an RTKL request if there is enough specificity in the timeframe and subject matter to guide a search for records. *See, e.g., Moriarty v. Plum Borough Sch. Dist.*, OOR Dkt. AP 2020-0118, 2020 O.O.R.D. LEXIS 2128.

Beyond the lack of a scope, however, the subject matter of Item 3 does not narrow the universe of records for the Receiver to provide, but instead asks the agency to determine which

⁴ Specifically, COVID-19 was identified in China in December of 2019, but the World Health Organization did not declare a pandemic event until March 11, 2020. “CDC’s Global Resources Pivot to Address COVID-19”, Centers for Disease Control and Prevention Center For Global Health, <https://www.cdc.gov/globalhealth/resources/reports/annual/2021/global-resources-pivot.html> (last accessed September 8, 2021).

records support a specific conclusion and provide those. The OOR has repeatedly held that requests which require an agency to make judgments as to whether each potential record is properly “related to” a request is insufficiently specific, and this additionally requires the Receiver to identify records which support the specific recommendations in the Presentation. *See, e.g., Brown v. Office of the Governor*, OOR Dkt. AP 2017-1118, 2017 PA O.O.R.D. LEXIS 996. Therefore, although Item 3 of the Request has a finite timeframe, the lack of a useful subject matter or limiting scope render it insufficiently specific under Section 703 of the RCTL.⁵

3. The Receiver has demonstrated that certain records are privileged

The Receiver withheld four records as exempt under both the attorney-client privilege and attorney-work product doctrines. The RCTL 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) (internal

⁵ The Requester notes that the Receiver did provide one record, the “Water System Bid Analysis” presentation prepared by the Receiver’s financial advisor, which analyzes the benefits of sale of the water system to various offerors and argues that this belies the Receiver’s specificity argument. However, it is not clear that this record is responsive to Item 3 of the Request at all; the document was prepared on December 1, 2020, almost a month after the Receiver submitted the presentation in question.

citations omitted). 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, in turn, 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 Pennsylvania Supreme Court has explained that the attorney-work product doctrine “manifests a particular concern with matters arising in anticipation of litigation.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that “[t]he ‘work product rule’ is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation”); *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”).

Here, the Receiver withheld one “Joint Privilege Agreement”, two conflict waivers from the Receiver’s solicitor, and email correspondence with the Receiver’s solicitor regarding the conflict waivers. In order to determine the validity of this claim, the OOR reviewed each of these records *in camera*.

As described in the exemption log, two of the documents are letters from the Receiver’s solicitor confirming the lack of a conflict of interest for the purposes of representation. These letters discuss the law firm’s representation of the Receiver, their relationship with other clients, and constitute legal advice regarding the practical and legal considerations of representation; they are manifestly privileged documents. Furthermore, the letters cannot be usefully redacted of non-factual information, as they consist entirely of analysis.

Next, the email correspondence consists of a three-email chain relating to the attached letters, confirming their receipt and the client’s response. One email consists of an attorney’s provision of legal advice on the ethics and practical effect of continued representation, while another constitutes the client’s directive for representation. The final email is purely archival, committing the chain to a file. The first two emails are privileged documents, and unable to be usefully redacted; however, the third email contains no privileged material outside of the subject line. Therefore, the single email sent on March 1, 2021, at 8:06 A.M. should be provided with the subject line redacted.

Finally, the joint privilege agreement is a contract to share legal interests, executed between the Receiver and a third party. This agreement begins with a statement of mutual interests, explains the legal actions the parties intend to take in a lawsuit, and sets forth the restrictions on the other party’s use of privileged materials.

The joint privilege agreement was communicated between two different parties to one litigation; therefore, ordinarily, the attorney-client privilege would be waived. Here, however, the Receiver is asserting continued privilege through the common interest doctrine. To demonstrate that the common interest doctrine applies, four elements must be shown:

(1) the parties' agreement to same; (2) a common-interest in the litigation or a jointly shared litigation strategy; (3) the communications were made pursuant to such agreement, and (4) the continued confidentiality of the communications, i.e., the communications were not disclosed to other third parties such that the privileges were waived.

Rosser Int'l, Inc. v. Walter P. Moore & Assocs., Inc., No. 2:11-CV-1028, 2013 U.S. Dist. LEXIS 108561, 2013 WL 3989437, at *19 (W.D. Pa. Aug. 2, 2013). However, a prerequisite requirement exists; the communications at issue must be subject to the attorney-client privilege outside of waiver. *Pa. Public. Utility C'mmn. v. Sunrise Energy, LLC.*, 177 A.3d 438 (Pa. Commw. Ct. 2018) (remanding to the OOR to determine which emails were privileged prior to application of the common interest doctrine).

In this case, the joint defense agreement does not actually contain any legal advice, memorandums, or legal strategy communicated between the parties. The purpose of the document, as set forth by the agreement itself, is to memorialize the agreement for the purpose of facilitating future litigation efforts, not to actually transmit legal advice to either party. The Receiver argues, however, that the very fact that an agreement as to legal strategy was executed between two parties suffices to demonstrate privilege. Although the Receiver does not cite any authority under Pennsylvania law, it does note that courts throughout the United States have upheld this argument. *See, e.g., United States v. Bicoastal Corp.*, 1992 U.S. Dist. LEXIS 21445, 92-C R-261, 1992 WL 693384 at *6 (N.D.N.Y. Sept. 28, 1992) ("This court does find that the disclosure of the existence of such an [joint defense] agreement would be an improper intrusion into the preparation of the

defendants' case. Thus, this court will deny any motion by the Government to be provided with any joint defense agreement should one exist.”).

However, the document is plainly one which was prepared by the attorneys who signed the joint privilege agreement in anticipation of litigation, and contains the mental impressions, opinions, and proposed joint strategy of the attorneys involved. Because the Receiver has invoked the attorney-work product privilege and the document reflects the mental impressions, opinions and strategies of attorneys in preparation for litigation, the agreement is privileged unless it was waived. Unlike the attorney-client privilege, waiver of the attorney-work product privilege occurs only when the material is either shared with an adversary or disclosed in a manner likely to cause an adversary to acquire it. *Bousamra*, 210 A.3d at 978. Here, where the document was shared only with two parties intending to act as co-parties in litigation, the OOR cannot find that the disclosure was shared with an adversary or in a way which would increase an adversary's likelihood of receipt. Therefore, the joint privilege agreement is exempt from disclosure under the RTKL pursuant to the attorney-work product privilege.

4. The responsive bid is exempt under Section 708(b)(26)

The Receiver withheld a copy of the “Asset Purchase Management Contract,” a proposal by Aqua Pennsylvania, Inc. for the purchase of the Authority, as relating to a procurement proposal. Section 708(b)(26) of the RTKL exempts “[a] proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids....” *See* 65 P.S. § 67.708(b)(26). In support of this argument, the Receiver submitted the verification of Receiver Doweary, who attests that:

1. I was appointed to be the [Receiver] for the City of Chester on June 22, 2020.
2. The City of Chester is a distressed municipality under Act 47.

3. As Receiver for the City of Chester, I am responsible for developing a recovery plan to continue the provision of vital and necessary services, provide for the payment of lawful obligations of the City and its authorities and provide for timely deposits of required payments to the pension funds.

4. Based on my duties as Receiver, I am aware that the City of Chester has issued a Request for Proposals for the Acquisition of Assets of the Chester Water Authority.

5. One of the bids in response to the RFP was submitted by Aqua Pennsylvania, Inc.

6. Aqua Pennsylvania, Inc.'s bid was forwarded to me in a July 23, 2020 email correspondence by their counsel.

7. To date, no contract has been executed, and the City of Chester is still considering its options with respect to the potential acquisition of the Chester Water Authority.

Under the RTKL, a sworn affidavit 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 competent evidence that the District 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)).

The Requester argues that two issues preclude application of this exemption - first, that Section 708(b)(26) applies only to the agency selling or procuring supplies and services; second, that the Authority does not constitute “supplies, services or construction”, and the exemption cannot be read to cover the sale of a subsidiary legal entity.

Section 708(b)(26) of the RTKL provides that the proposal in question must “pertain[] to agency procurement or disposal[,]” and the use of the word “agency” in the RTKL indicates the agency from which records are sought. 65 P.S. § 67.708(b)(26); *see, e.g., Belko v. City of Pittsburgh*, OOR Dkt. AP 2018-0022, 2018 PA O.O.R.D. LEXIS 281 (bids filed by a municipality

with a third party are not protected under Section 708(b)(26)). The bid at issue in this case was presented to the City of Chester, not the Receiver, and therefore, the Requester argues that, as a separate agency which incidentally is privy to the City's finances, the Receiver has no basis to withhold the bids.

This argument ignores the fact that the Receiver is an office established to monitor, plan, and restructure the assets of the City. Under the Municipalities Financial Recovery Act, the Receiver has the power:

- (1) To require the distressed municipality or authority to take actions necessary to implement the recovery plan under section 703.
- (5) To require the distressed municipality or authority to cause the sale, lease, conveyance, assignment or other use or disposition of the distressed municipality's or authority's assets in accordance with section 707.
- (6) To approve, disapprove, modify, reject, terminate or renegotiate contracts and agreements with the distressed municipality or authority, except to the extent prohibited by the Constitutions of the United States and Pennsylvania.
- (7) To direct the distressed municipality or authority to take any other action to implement the recovery plan.

Act of 1987, P.L. 246, No 47; 53 P.S. § 706. As such, the Receiver has the authority to accept, reject or modify the City's potential acceptance of the submitted bid. Because the Receiver is operating in a managerial capacity in overseeing the City's acceptance of bids regarding potential purchase of the Authority, it appears that the bids in question have been submitted to both the City and the Receiver. Therefore, the OOR cannot conclude that the Receiver constitutes an agency separated from the affairs of the City for the purposes of Section 708(b)(26).

The Requester's second argument is that this bid does not constitute a bid for the procurement or disposal of "supplies, services, or construction." There is no doubt that the Requester is correct that this bid is not for supplies or construction, so the only question is whether

the sale of the Authority would constitute the disposal of “services”. The RTKL does not define the term “services”, and the common definition of the word “service” is self-referential. *See Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/services> (last accessed September 7, 2021) (“the work performed by one that serves”).⁶ The Requester argues that what is being disposed of in this case is a separate legal entity, and not a service.

The Authority, however, is a legal, property-holding entity which provides utility service to the City. The sale being contemplated is the transfer of the service territory of the Authority, and presumably related assets and obligations, to a private utility provider who will then be required to provide water utility services to the City and its population. As such, the bid submitted by Aqua is not only a bid to purchase a service which the City currently provides through the Authority, but also to provide similar service to the City. Therefore, the Receiver has demonstrated that the bid is a proposal pertaining to both agency procurement and disposal of a service, and Item 7 of the Request must be denied under Section 708(b)(26) of the RTKL.

5. The Receiver has not demonstrated that no additional records exist

The Receiver argues that no additional records responsive to the Request exist. In support of this argument, the Receiver submitted the verification of Receiver Doweary, who attests that:

8. I have reviewed the Right to Know request filed by Dailey LLP.

9. In my capacity as Receiver for the City of Chester, I am familiar with the records contained in my office.

10. Upon receipt of the [R]equest, I conducted a thorough examination of files in the possession, custody and control of my office, and searched my email account for all responsive documentation.

11. After conducting a good faith search of [] my office’s files and email account, I have identified all of the records within the Agency’s possession, custody and control that are responsive to the [R]equest and not subject to any exemptions and

⁶ Similarly, the definition of “serve” is self-referential.

provided those documents to the [R]equester through my attorney via electronic mail on May 28, 2021, June 18, 2021 and July 21, 2021.

12. Other than documents that were withheld subject to exemption under the Right to Know Law and identified in the attached privilege log, I have produced all responsive documents in my possession.

A verification may serve as sufficient evidence to demonstrate that responsive records do not exist under the RTKL. *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. In this instance, the Requester argues both that the small number of records identified as responsive is unbelievable and that the Receiver has not demonstrated that a good faith search for responsive records was conducted.

The OOR must presume that public officials act in good faith when responding to RTKL requests unless there is evidence otherwise. *Commonwealth v. Donahue*, 59 A.3d 1165 (Pa. Commw. Ct. 2013). However, the OOR has occasionally found that an affidavit's conclusions are mistaken because they contradict other facts in evidence. *See, e.g., Rittenhouse v. Hempfield Sch. Dist.*, OOR Dkt. AP 2014-0809, 2014 PA O.O.R.D. LEXIS 661 (rejecting an agency affidavit that it does not possess line-item budget information when it regularly submits reports with such information in them); *Luning v. Scranton Sewer Auth.*, OOR Dkt. AP 2016-0184, 2016 PA O.O.R.D. LEXIS 588 (rejecting the argument that the authority must have records of discussions of its potential sale outside of public meeting minutes). Here, the OOR takes note of the fact that the Receiver is an agency consisting of a single person, his support staff, and any contractors he may have retained. Because the Requester has submitted no evidence showing that more records must exist, and the Receiver is a single-person agency, Requester has not demonstrated that the Receiver's verification must be false.

The Requester also argues that the Receiver has not demonstrated that he conducted a good faith search for responsive records. 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. While the RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *appeal granted in part by* 218 A.3d 375, 2019 Pa. LEXIS 5410 (Pa. 2019); *see also* *Rowles v. Rice Twp.*, 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). Furthermore, a good faith search may require an Agency Open Records Officer to consult with other agency officials to determine if they possess responsive records. *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). Finally, an agency must also demonstrate that records of deleted emails no longer exist on the agency’s servers. *Pa. Dep’t of Labor and Indus. v. Earley*, 126 A.3d 355, 358 (Pa. Commw. 2015).

In this matter, the Receiver has submitted a verification showing that he searched the files in his office and email account for responsive records. However, the Receiver did not provide any evidence demonstrating that it conducted a search of the Receiver’s email server, to determine if any responsive, deleted emails remain on the server, as required by *Earley*. *Id.* Therefore, the

Receiver is directed to undertake a search of the Receiver's email server to determine whether any other responsive records exist on the server, even if they were deleted from the Receiver's own account. In the event that no other responsive records exist, the Receiver should provide the Requester with an attestation demonstrating that the search was completed and no additional responsive records were located.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the Receiver is required to provide the Requester with the single March 1, 2021 email, with subject line redacted, and any additional responsive emails discovered on the Receiver's email server, 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 Commonwealth Court. 65 P.S. § 67.1301(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.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 17, 2021

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Alfred Brown, Esq. (via email);
Benjamin Patchen, Esq. (via email)

⁷ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).