



FINAL DETERMINATION

IN THE MATTER OF
DYLAN SEGELBAUM,
Requester
v.
CITY OF YORK,
Respondent

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Docket No.: AP 2021-2174

INTRODUCTION

Dylan Segelbaum (“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 certain messages sent or received by the Mayor and Police Commissioner related to a specific police officer. The City denied the Request, arguing that no responsive records exist. 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 City is required to take further action as directed.

FACTUAL BACKGROUND

On August 10, 2021, the Request was filed, seeking:

Copies of all text messages that York Mayor Michael Helfrich sent and received on any government issued or personal cellphones, including (717) 779-7915 and (717) 817-7975. The timeframe of this request is May 30, 2020-present.

Copies of all messages that York Mayor Michael Helfrich sent and received on any government or personal Facebook pages. The timeframe of this request is May 30, 2020-present.

Copies of all emails that York Mayor Michael Helfrich sent and received on any government issued or personal accounts. The timeframe of this request is May 30, 2020-present.

Copies of all emails that York City Police Commissioner Michael Muldrow sent and received on any government issued or personal accounts. The timeframe of this request is Nov. 5, 2020-present.

Copies of all text messages that York City Police Commissioner Michael Muldrow sent and received on any government issued or personal cellphones. The timeframe of this request is Nov. 5, 2020-present.

Copies of all messages that York City Police Commissioner Michael Muldrow sent and received on any government or personal Facebook pages. The timeframe of this request is Nov. 5, 2020-present.

For all requests I am asking for messages that relate to York City Police Officer Clayton Swartz. If this request is too broad, or difficult for the [C]ity to compile, please limit to any of the following keywords in the timelines outlined above: "Clayton;" "Clayl" "Swartz;" "trial board;" "mocked;" "reenacted;" "re-enacted;" "arbitrator;" and "arbitration."

On September 30, 2021, following a thirty-day extension, 65 P.S. § 67.902, the City denied the Request, arguing that no responsive Facebook records or text messages, except for certain exempt texts in the possession of the Mayor, exist in the possession, custody, or control of the City. The City also provided some responsive emails but denied others as subject to the attorney-client privilege, as constituting internal, predecisional deliberations, 65 P.S. § 67.708(b)(10), as relating to noncriminal investigations, 65 P.S. § 67.708(b)(17), and as constituting exempt personnel information, 65 P.S. § 67.708(b)(7).

On October 15, 2021, the Requester appealed to the OOR, arguing that responsive records do exist, because public posts responsive to the Request exist on the Mayor's public Facebook page, that text messages should exist, and that the City's denial of emails should be reviewed *in*

camera.¹ 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 October 29, 2021, the City submitted a verified position statement arguing that there are no private Facebook posts on the Mayor's page, and therefore, the Requester has access to all postings, and that two responsive text messages from the Commissioner's phone had been located, but that both are exempt as internal, predecisional, and deliberative and relating to employee discipline. The City also reiterated its arguments that the emails are exempt from disclosure. In support of these arguments, the City submitted the affidavits of Mayor Michael Helfrich and Police Commissioner Michael Muldrow, who each attest that their Facebook pages are open to the public. The City also submitted the supplemental affidavit of Commissioner Muldrow, who attests that he only had two responsive text messages, the affidavit of Patricia Siebert, the City's Open Records Officer, who attests that she conducted a search for records, and the affidavit of Jason Sabol, Esq., the City's Assistant Solicitor, who attests that he reviewed the responsive emails and found that they were protected by attorney-client privilege and other exemptions.

The same day, the Requester submitted a position statement arguing that the City had failed to turn over responsive Facebook posts.

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

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

actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, the Requester sought *in camera* review, but that request is denied, as the OOR has sufficient information to adjudicate this case.

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)). 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 City has not demonstrated that no responsive Facebook messages exist

The Request seeks, in part, all Facebook messages sent or received by Mayor Helfrich and Police Commissioner Muldrow. The City denied the Request, in part, because it asserts that no responsive Facebook messages exist. On appeal, the City clarifies that while responsive posts exist, they are public posts, which the Requester may access on the City’s Facebook page at will.

In support of this position, the City submitted the affidavit of Mayor Helfrich, who attests that:

2. On August 10, 2021, I was contacted by Patricia Siebert, the Open Records Officer for the City of York, regarding copies of all messages that I sent and received “...on any government or personal Facebook pages...” from May 30, 2020 to August 10, 2021 concerning York City Police Officer Clayton Swartz.

3. My Facebook page is open to the public and is readily accessible. [The Requester] has the ability to locate the posts pertaining to Officer Clayton Swartz on my Facebook page.

Likewise, the City submitted the affidavit of Police Commissioner Muldrow, who attests that:

2. On August 10, 2021, I was contacted by Patricia Siebert, the Open Records Officer for the City of York, regarding copies of all messages that I sent and received “...on any government or personal Facebook pages...” from November 5, 2020 to August 10, 2021 concerning York City Police Officer Clayton Swartz.

3. My Facebook page is open to the public and is readily accessible. [The Requester] has the ability to locate the posts pertaining to Officer Clayton Swartz on my Facebook page.

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 verifications] 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)). Therefore, the City has proven that all the responsive posts made by Mayor Helfrich and Police Commissioner Muldrow are publicly accessible.

Contrary to the Requester’s position, an agency can meet its obligations under the RTKL by directing a requester to a publicly available internet site. 65 P.S. § 67.704(a). However, the two affidavits submitted address only the posts created by Mayor Helfrich and Police Commissioner Muldrow; they do not submit evidence to show that neither received private messages regarding Officer Swartz over Facebook. Therefore, to the extent that the Mayor or Police Commissioner received any private messages over Facebook relating to Officer Swartz, those messages must be provided. *Hodges*, 29 A.3d at 1192.

2. The City has demonstrated that some responsive texts are exempt

The Request seeks, in part, text messages sent or received by Police Commissioner Muldrow related to Officer Swartz. On appeal, the City states that two responsive text messages exist, but that both messages constitute exempt internal, predecisional, deliberative communications. Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure records reflecting:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative

proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

In support of this position, the City submitted the affidavit of Attorney Sabol, who attests that:

5. On October 25, 2021, after receipt of [this appeal], Commissioner Muldrow conducted a second search of his government and personal cell phone and located two text messages responsive to the [R]equest.

6. As Solicitor of the City of York, I reviewed the responsive text messages and determined that the information contained in the text messages was predecisional, as it was not part of a final decision, but instead a continued discussion regarding the employment and settlement options available to the City of York regarding York City Police Officer Clayton Swartz.

7. Officer Swartz remains an employee of the City of York/York City Police Department and a final decision has not been reached regarding his employment. I advised the City of York's Open Record Officer to deny [the Request], as the information is predecisional.

The City also submitted a position statement, verified by Ms. Siebert, who attests that:

11. Upon legal review, Assistant Solicitor Jason Sabol determined that the two text messages provided by Commissioner Muldrow were exempt as they concern potential disciplinary and settlement options and are predecisional.

14. The text messages were internal, and discussed possible disciplinary and settlement options related to York City Police Officer Clayton Swartz.

15. The content of this correspondence was not part of a final decision, but instead a continued discussion regarding the disciplinary and settlement options available to the City of York regarding Officer Clayton Swartz.

16. The content of the records is deliberative in character in that it relates to internal deliberations, considerations, and discussions pertaining to proposed actions or inactions with regard to the ongoing disciplinary action and litigation related to York City Police Officer and City employee, Clayton Swartz.

As noted above, an affidavit may suffice to prove an exemption under the RTKL. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Here, the City has submitted evidence demonstrating that the text messages were exchanged within the City and relate to deliberations regarding what, if any, consequences should be imposed on Officer Swartz for his misconduct, and that no such decision had been finalized when the text messages were sent. *See, e.g., Maciejewski v. Southern Columbia Area Sch. Dist.*, OOR Dkt. AP 2019-1095, 2019 PA O.O.R.D. LEXIS 1062 (finding that discussion of reasons for employee discipline could not qualify for Section 708(b)(10) if that discipline had already been imposed). Therefore, because the text messages constitute internal deliberations about employee discipline prior to any discipline being enacted, they are exempt from disclosure under Section 708(b)(10)(i)(A) of the RTKL.

3. Email correspondence with Clark Hill, PLC is privileged

The City argues that it is entitled to withhold the responsive emails because they contain 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:

5. As Solicitor of the City of York, I reviewed the responsive emails and determined that the subject matter in the remaining emails is related to an employee matter and subsequent litigation and consists of legal advice, opinions, strategy, and other confidential information between the Clark Hill, PLC and its client, [the City].

6. 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.

8. 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.

9. Information protected by the attorney-work product doctrine was denied as it is specifically related to the aforesaid litigation in York City v. Clayton Swartz. The denied information consists of conclusions, opinions, memoranda, notes or summaries, legal research, or legal theories.

10. 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.

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

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; *Henry v. City of York*, OOR Dkt. AP 2021-0651, 2021 PA O.O.R.D. LEXIS 978. Therefore, the City has demonstrated that the responsive emails with Clark Hill PLC are subject to the attorney-client privilege.^{2,3}

4. The City has not demonstrated that any other records are exempt

The Request seeks, in part, text messages to and from Mayor Helfrich regarding Officer Swartz. The City denied the Request, arguing that all of the responsive text messages are exempt employee records. Section 708(b)(7) exempts from disclosure:

(7) The following records relating to an agency employee:

(i) A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual, unless it was prepared in relation to the appointment of an individual to fill a vacancy in an elected office or an appointed office requiring Senate confirmation.

(ii) A performance rating or review.

² Because the responsive emails are exempt under the attorney-client privilege, the OOR need not analyze the City's argument under Sections 708(b)(7), 708(b)(10) or 708(b)(17) of the RTKL.

³ It appears from the City's statements and evidence that the emails between the City and Clark Hill PLC are the only emails responsive to the Request. To the extent that other responsive emails exist, the City has not demonstrated that they are exempt for the same reasons set forth in the section below, and they must be provided.

(iii) The result of a civil service or similar test administered by a Commonwealth agency, legislative agency or judicial agency. The result of a civil service or similar test administered by a local agency shall not be disclosed if restricted by a collective bargaining agreement. Only test scores of individuals who obtained a passing score on a test administered by a local agency may be disclosed.

(iv) The employment application of an individual who is not hired by the agency.

(v) Workplace support services program information.

(vi) Written criticisms of an employee.

(vii) Grievance material, including documents related to discrimination or sexual harassment.

(viii) Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.

(ix) An academic transcript.

65 P.S. § 67.708(b)(7).

Here, the City did not describe the content of the Mayor's text messages or submit any evidence pertaining to the text messages. While an affidavit may suffice to show that records are exempt under Section 708(b) of the RTKL, the burden of proof is on the City to make a submission. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Because the City did not submit any evidence regarding the text messages at issue, the OOR cannot determine that any exemption applies to them.

Likewise, the City argues generally that "all information" responsive to the Request is necessarily exempt as relating to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "[i]nvestigative materials, notes, correspondence and reports" and "[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi)(A). In order for this exemption to apply, an agency

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

Contrary to the City’s position, it is not necessarily the case that all records responsive to the Request must relate to a noncriminal investigation. While it is undoubtedly true that the City has conducted a noncriminal investigation into Officer Swartz’ conduct, Section 708(b)(17) applies to records which are generated as part of the ongoing investigation, not simply administrative records or communications which happen to be about a person being investigated. *See Silver v. City of Pittsburgh*, OOR Dkt. AP 2013-1395, 2013 PA O.O.R.D. LEXIS 886 (“The withheld records are related to a criminal investigation only in the sense that they have been obtained by the FBI as evidence during their investigation. The fact that a record becomes evidence in a criminal investigation -- especially a nominally public record dealing with the expenditure of public funds -- does not transform that record into one exempt from disclosure pursuant to Section 708(b)(16)"); *Hope v. Muhlenberg Twp. Police Dep’t*, OOR Dkt. AP 2016-2077, 2017 PA O.O.R.D. LEXIS 115. Therefore, the OOR will not assume that all potentially responsive records are exempt under Section 708(b)(17), and the City has not demonstrated that the Mayor’s text messages are exempt from disclosure.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the City is required to provide any responsive Facebook messages and texts to or from the Mayor, as well as any responsive emails that were not withheld pursuant to the attorney-client privilege. 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 19, 2021

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Dylan Segelbaum (via email only);
Patricia Siebert (via email only);
Jason Sabol, Esq. (via email only)

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